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Opinion No. 09-37

Validity of Pending House Bill 1549

QUESTIONS

Would House Bill 1549/Senate Bill 944, if enacted, amend Tenn. Code Ann. § 57-3-207 in such a manner as to make it defensible against attack for the constitutional infirmities that the court identified in *Jelovsek v. Bredesen,* 545 F.3d 431 (6th Cir. 2008)?

OPINIONS

Yes. House Bill 1549/Senate Bill 944, if enacted, would amend the statute in a manner as to make it defensible against attack for the constitutional infirmities in Tenn. Code Ann. § 57-3-207 that the United States Court of Appeals for the Sixth Circuit identified in *Jelovsek v. Bredesen,* 545 F.3d 431 (6th Cir. 2008).

ANALYSIS

If enacted into law, House Bill 1549/Senate Bill 944 would amend the Grape and Wine Law, Tenn. Code Ann. § 57-3-207, in an attempt to cure the constitutional infirmities in the statute that the court identified in *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008). In that case, the plaintiffs challenged Tenn. Code Ann. § 57-3-207 on grounds that the prohibition against direct shipments of wine by out-of-state wineries, residency requirements to obtain a winery license and the domestic content requirements of the statute violated the Commerce Clause of the United States Constitution.[1]

The court upheld the State's ban against direct shipments of wine into Tennessee by in-state and out-of-state wineries. The court concluded that since the prohibition applied equally to both domestic and out-of-state wineries, it did not violate the Commerce Clause.

[1] Under Tenn. Code Ann. § 57-3-207(d), as presently written, a person must be a Tennessee resident for at least two years before he or she may obtain a winery license. Tenn. Code Ann. § 57-3-207(f)(1), as presently written, requires a Tennessee winery to use agricultural products from Tennessee which total at least seventy five percent of the ingredients that are used in the production of its wine.

The court, however, did find that the residency requirements for obtaining a winery license and the domestic content provisions of the statute were facially discriminatory against out-of-state wineries and remanded the case to the district court for further proceedings.[2]

House Bill 1549/Senate Bill 944 addresses the court's concerns by striking the residency requirements, thus allowing out-of-state wineries to obtain a Tennessee winery license. It further addresses those concerns by removing the domestic content requirements for wine produced and sold in Tennessee, and by allowing consumers to purchase limited quantities of wine from an out-of-state licensed winery and personally transport such amount into Tennessee for personal consumption.

The court in *Jelovsek* applied the principles that were set forth in two Supreme Court decisions, *Granholm v. Heald,* 125 S.Ct. 1885 (2005) and *Bacchus Imports, Ltd v. Dias,* 468 U.S. 263 (1984).[3] As both cases show, states have broad authority, under the Twenty-First Amendment, to regulate the trafficking in alcoholic beverages within their borders. But these cases also hold that such powers may not be used solely to protect in-state producers and sellers at the expense of interstate commerce. To be upheld, the laws must be even-handed and must afford even-handed treatment to both in-state and out-of-state sellers and producers.

In finding that the licensing and domestic content requirements set forth in Tenn. Code Ann. § 57-3-207 were facially discriminatory and therefore violated the Commerce Clause, the court in *Jelovsek* said:

> Other provisions of the Grape and Wine Law are discriminatory on their face, and in their purpose. For example, the Grape and Wine Law requires a two-year Tennessee residency before a winery license may be obtained and, if the applicant is a corporation, all of the capital stock must be owned by two-year Tennessee residents. Only if 75% of the agricultural products used in producing its wine are grown in Tennessee may a Tennessee winery serve samples of the wine without charge at its facility, and sell wine at retail directly to consumers. In addition, 'any nonprofit association organized to encourage and support grape growing and winemaking in [Tennessee] with ten (10) or more Tennessee licensed wineries as members' is permitted to hold festivals and 'transport, serve and offer complimentary samples' of Tennessee wine, and wineries using at least 75% agricultural products from Tennessee may 'donate wine without charge to nonprofit religious, educational or charitable institutions or associations.' Each of these provisions impermissibly favors Tennessee interests at the expense of interstate commerce.

[2] In remanding the case, the court instructed the district court to afford the State an opportunity to produce evidence to show that the discriminatory provisions serve a legitimate regulatory purpose which cannot be achieved by less discriminatory means. The court instructed the district court to consider the appropriate remedy if it should find that one or both of the discriminatory provisions are unconstitutional.

[3] In *Granholm*, the Court struck down a Michigan statute that permitted Michigan wineries to ship directly to Michigan residents but prohibited out-of-state wineries to make the same shipments into Michigan. In *Bacchus,* the Court struck down a Hawaii tax statute that provided for a lower rate of taxation for alcoholic beverages produced in the state and a higher rate for alcoholic beverages produced by out-of-state producers.

Jelovsek, 545 F.3d at 438.

In addition to the provisions mentioned above, the court also found that the law governing on-site sales of wine was facially discriminatory. It noted that, under current law, consumers could legally purchase and then transport limited quantities of wine that had been purchased from a Tennessee winery but could not legally transport into Tennessee any wine that had been purchased from an out-of-state winery.

The language of House Bill 1549/Senate Bill 944 indicates that it was intended to address all three points of concern that were raised by the court. By removing the residency and domestic content requirements and by permitting Tennessee residents to transport wine from out-of-state wineries that hold a Tennessee license, the bill would effectively remove all of the barriers to interstate commerce that the court in *Jelovsek* found to be potentially objectionable. The bill, if enacted could therefore be defended against the types of challenges that were raised in *Jelovsek.*[4]

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[4] It is possible that House Bill 1549/Senate Bill 944 will be challenged on grounds that it violates the Commerce Clause because it does not allow out-of-state wineries to avail themselves of the Tennessee wine market via direct shipment, and thus affords no meaningful opportunity to participate. A strong argument can nonetheless be made that the bill as presently written ought to be upheld. The bill is similar to a statutory scheme in Maine that was upheld by the First Circuit in *Cherry Hill Vineyards, LLC v. Baldacci*, 505 F. 3d. 28 (1st Cir. 2007). In *Baldacci*, out-of-state wineries could obtain Maine local farm winery licenses and participate in the Maine wine market on the same terms as wineries located in Maine. Under the statute, Maine residents are permitted to transport into the state limited quantities of wine that are purchased onsite at licensed out-of-state wineries. However, Maine also prohibits both in-state and out-of-state wineries from making direct shipments of wine to consumers. In upholding Maine's statutory scheme, the court stated that the statutory scheme did not explicitly discriminate against interstate commerce because Maine farm winery licenses were available on equal terms to in-state and out-of-state vineyards alike and the ban on the direct shipping of wine applied evenhandedly across the board.

It is anticipated that any such challenge would be based on *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008). In *Cherry Hill*, the court held that Kentucky's statutory scheme discriminated in practical effect against interstate commerce because the in-person purchase requirement in order to receive direct shipment made it both economically and logistically infeasible for consumers to purchase and have shipped directly to them wine from out-of-state small farm wineries, and therefore favored in-state wineries. However, we think *Lilly* can be distinguished by the fact that the statute authorized direct shipping by domestic wineries. Under current law, Tennessee allows no such shipments.

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