NOTES ON WINE DISTRIBUTION

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***What This Is (and Isn't)*:**

These notes, now in their eighteenth year, are intended to serve discussion and development of wine distribution options in a changing legal environment, with emphasis on multi-state operations and alternatives to three-tier systems. They do not pretend to be a complete summary of the relevant law or a compliance handbook. For practical guidance, please see "Other Sources," on page 3 below.

The fine print: Nothing in this document constitutes legal advice or creates an attorney-client relationship. Regulators and government lawyers may disagree with observations in this document, as may courts resolving litigated issues. Neither completeness nor accuracy of the information in the notes is guaranteed. Laws may change without notice, and statements qualified as based on reports of others (*e.g.*, "reportedly") have not been independently verified.

***Terminology*:**

Unless otherwise specified, the notes apply to shipments entirely within the U.S. Unless the context requires otherwise, "wine" is under-21% table wine, but state laws vary on maximum alcohol percentage for sales under direct shipment laws and on whether addition of spirits puts the product in a category with different distribution requirements.

The term "direct shipment" means winery sale and delivery directly to consumers, whether intrastate or interstate, and whether delivered by third party carrier or by the seller itself. "On-site" direct shipment means a purchase made from existing inventory at the winery premises by a consumer who is physically present, followed by shipment to the consumer's address; "off-site" direct shipment includes all other arrangements culminating in delivery to the consumer's address, such as Internet sales and wine club subscription orders not consummated during a visit to the winery (even if club membership was purchased in person at the premises). "Direct distribution" (also known as "winery self-distribution") means winery sale and delivery to retailers. "Retailer to consumer" or "R2C" refers to shipment to a consumer by a non-producer seller holding a retailer license that authorizes sale to consumers of products of multiple third-party producers. Direct shipment and R2C may overlap somewhat, as direct shipment laws in some states appear to permit wineries to sell and ship wine produced by others. A combined term for direct-to-consumer sale and shipment from whatever source is “D2C.”

“Distribution” applies to all methods of connecting winery and consumer, including direct distribution, D2C and multi-tier systems such as wholesalers selling to retailers, unless the context clearly limits it. “Drop shipment” refers to physical movement of wine that does not go through the premises of an intermediate reseller, *e.g.*, sale by a winery of a special order to a wholesaler, who sells it to a retailer, who sells it to the consumer who ordered it, with goods shipped directly from the winery to the consumer.

References to “leveling up” and “leveling down” refer, respectively, to the state option to eliminate discrimination against interstate commerce by increasing shipment privileges of out-of-state sellers or by reducing privileges of in-state sellers. Significant issues remain in defining “level.”[1]

***Revision*:**

I revise this document when material changes or additions accumulate significantly, but new releases may not reflect developments in all states since the preceding version.

The **Release Number** of each revision appears in the lower right corner of each page. Please be sure you are reading the latest release (available at CorbinCounsel.com and ShipCompliant.com), and discard earlier releases. Headings of sections with substantial changes since the preceding release are highlighted.

Why It’s Pertinent:

Wine distribution law is changing more rapidly and profoundly than at any time since Repeal. Published lists, carrier policies, and regulatory personnel (sometimes from the same agency) disagree on legality of various means of reaching customers, and regulators change their minds in response to factors of varying transparency. Meanwhile, both the economic significance of alternative distribution methods and market access grow. In 2009, news media reported that 90% of U.S. wine drinkers had access to wine by direct shipment, although the Wine Institute has not changed its 2007 observation that shippers face “a labyrinth of state laws.”

Legal mazes aside, the underlying constitutional support of interstate wine commerce became radically more robust with the May 2005 *Granholm* decision[2] of the U.S.

[1] A point of controversy is whether the Commerce Clause is indifferent to whether a court cures discrimination by leveling up or down. Pro-commerce advocates argue that it makes no sense to level down in enforcing a constitutional provision intended to encourage interstate trade, at least in the absence of manifest legislative intent, and criticize as simplistic judicial approaches like counting the number of lines of statutory text that would have to be rewritten and picking the smaller revision. A more fundamental question is whether limiting all wineries to on-site sales is leveling at all. If carrier delivery is the only way an out-of-state winery can compete in a market defined as direct wine sales to local customers, then the playing field is not leveled by placing the same ban on local wineries, whose less distant tasting rooms can reach the local market without direct shipment.

[2] Granholm v. Heald, 544 U.S. 460 (2005), does not “open the states” to direct shipment, but (1) requires states to apply substantial location neutrality between in-state and out-of-state wineries

Supreme Court. The November 2005 and April 2006 district court *Costco Wholesale Corp. v. Hoen* rulings applied *Granholm* to interstate sales by wineries to retailers in the state of Washington.

Litigation in other states addresses *Granholm*'s potential application to sales by non-producing retailers, with a developing split among the federal judicial circuits whose resolution may require a second Supreme Court decision. However, it is unlikely that clarifying *Granholm* is a current priority for the Court; it turned down a 2009 opportunity to consider the constitutionality of requiring in-person ordering for direct shipment, a restriction with obvious disadvantages for distant wineries relative to local producers. (See the discussion under "Facial Neutrality," below.)

Head Counts:

In a time of uncertain rules, fiercely competing interests, and increasing reliance on vendors to perform legal compliance functions, the industry needs exchange of ideas and information. In these notes I try to look beyond the "go/no-go" lists, with the aim of stimulating thought about what may be possible. That produces differences between the notes and other published counts.

These notes identify only six states to which no shipment seems possible. Media reports following recent changes in Kansas, Maine and Tennessee report 37 offsite direct-to-consumer states (including DC), which does not jibe with a recent advocacy group count of 10 no-go states[3]. The list circulated by general media in late 2007, before the Kansas, Maine, and Tennessee legislation, counted 15 states prohibiting consumer shipments from out-of-state sources. Classification of state restrictions is subject to judgment calls; the 2007 media list cited as examples of prohibited states Montana (where a convoluted law with criminal sanctions causes major carriers to forego the state), Utah (where direct shipment really is prohibited) and South Dakota (where a very limited amount purchased on site can be shipped home), without noting the differences. Although classification of a state as permitting or prohibiting direct shipment does not depend on the penalty for wrongful shipment, some industry members view shipment as "more prohibited" in the three states (Kentucky, Maryland and Utah) where violation of importation laws is a felony.

Other Sources:

My colleagues in producing these notes, ShipCompliant.com, provide a free look at frequently updated instructions on shipping lawfully, with real-time automated transaction compliance available for a fee. Direct shipment information and commentary from various sources are at a related free public site, www.shipcompliantblog.com/blog, which offers a list server and RSS feeds for updates. An Internet search will produce a

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when they regulate winery shipments to consumers and (2) significantly, but far from definitively, clarifies the nature and limits of states' rights under the 21st Amendment, with important implications beyond winery direct shipment.

[3] According to a 30 September 2009 release by Free the Grapes!, a coalition of wine producers, retailers and consumers, only Alabama, Arkansas, Delaware, Maryland, Montana, New Jersey, Oklahoma, Pennsylvania, South Dakota and Utah prohibit wineries from shipping directly to consumers.

substantial number of wine shipment compliance contractors, offering services of varying comprehensiveness that industry members can compare to ShipCompliant's products.

WineAmerica (formerly the American Vintners Association) provides members with a summary of direct shipment procedures with step-by-step instructions; the home site is www.wineamerica.org. Also handy are the publicly available compilations at www.wineinstitute.org/programs/shipwine, including a state law summary and a "Who Ships Where" table, http://wineinstitute.shipcompliant.com/WhoShipsWhere.aspx, listing states served by FedEx and UPS. The major carriers' pairings of states of origin and states of destination are at www.dmz.fedex.com/cgi-bin/wineShipping.cgi and at the UPS wine-shipping page, where one must click on "View Wine Contract Addendum A." (Oddly, FedEx has not maintained a currently valid security certificate on its pairing page, which can set off alarm bells on some browsers.) General information on the FedEx wine program and links to wine-specific information are at www.fedex.com/us/wine; the analogous UPS site is ups.com/wine. Trade association members may be entitled to shipping discounts. Shipping policies can change without notice; check directly with carriers for recent developments.

Note that carrier-published lists may be authoritative as to policies of the carrier, but are not necessarily reliable as to current law. In the *Cherry Hill* opinion on shipments to Kentucky, the judge noted the discrepancy: "The defendants . . . assert that thirty-nine states require in-person purchases, citing a chart from the UPS wine shipment program. From the court's review of this document, it appears that thirty-two states allow direct shipment with no such requirement."

As the direct sales segment matures, more resources appear. The trade publications *Wine Business Monthly* and *Wines & Vines* have published polls on winery experiences with alternative distribution. There is also a continuing stream of seminars devoted to direct shipment, with varying levels of sophistication.

Notes Applicable to Multiple States

Three-tier Distribution, Old & New:

Traditional distribution through wholesalers may be the only practical alternative for some markets and can be desirable on its own merits. However, imposition of a particular distribution structure by law is frequently inefficient and unfair.

Many states have enacted statutory restraints on freedom of contract in supplier-wholesalers transactions, ranging from minor departures to imposition of detailed and onerous contractual obligations that can arise unintentionally from conduct that would ordinarily be regarded as preliminary to an agreement. The statutes are often called franchise laws, but "pseudo-franchise" would be more descriptive, as they impose franchise-like restrictions upon business relationships that lack the defining features of true franchises.

Description of the counter-measures I recommend for selling to wholesalers in so-called franchise states is beyond the scope of these notes. Prudent wineries and importers do not send samples or sell wine to any wholesaler without a written agreement, which in about half the states must be designed specifically to avert, or at least minimize, adverse effects of special interest legislation. Further information is available on request by email to my address shown on the heading of these notes at page 1.

Constitutionality of mandated three-tier systems is a fertile area of litigation, even though the right of states to require all wine to go through three tiers without discrimination based on location is thus far unquestioned. Litigation has focused on discriminatory exemption of local sellers from forced use of a middle tier or from statutory prescription of contract terms. In Washington the state supreme court invalidated a mandatory middle tier law on the grounds it applied only to out-of-state wineries; the statute has been reenacted in nondiscriminatory form for beer only.

An important development is renewed interest in drop shipment of wine sold through three tiers –*i.e.*, sale by a winery to a wholesaler, from a wholesaler to a retailer, and a retailer to a consumer, but shipment directly from the winery to the ultimate purchaser (or to the retailer for local delivery to the consumer), sometimes called "virtual three-tier distribution." Many states, often at the behest of wholesalers, have rules or policies prohibiting the practice, and federal authorities formerly questioned it; the usual reasons were the technical objection that license privileges are exercisable only at the named licensed premises and the practical consideration that physical presence of the goods at a wholesale warehouse facilitated excise tax auditing. As a sometimes-acceptable workaround, some regulators have tolerated "dock-bump" delivery, which involves a token trip to the wholesale warehouse, eliminating the cost of unloading, placement in the warehouse, and reloading, but not the economic penalty of roundabout routing.

Lately, some regulators have reexamined drop shipment issues and concluded that sales documentation provides an adequate paper trail for tax audit purposes and that the need for license-premises connection is merely theoretical. In 2006 New York approved a drop shipment program to allow *retailers* to receive special items ordered on winery web sites (logistically, but not economically, equivalent to direct distribution), with automated generation of paperwork documenting a sale by the winery to an authorized wholesaler and by the wholesaler to the ordering retailer. Reportedly, negotiations for similar rulings have taken place nationally, with seven states nixing direct delivery to retailers and, thus far, ten following New York's lead (plus Washington, which alone expressly permits actual direct distribution by statute, a move made in response to the *Costco* litigation).

Age & Identity Verification:

Direct shippers cannot safely delegate compliance with minimum age requirements to carriers, even if the carrier collects an extra fee for verification. The Massachusetts Supreme Court decision affirming suspension of Wine.com's shipper license because of FedEx's delivery to a 19-year-old consignee underscores responsibility of the seller to verify age at the time of purchase.

Although the image of teenagers ordering table wine shipped direct for youthful drinking bouts may seem almost humorously unrealistic, there is nothing unreal about the publicity campaigns in favor of restricting direct shipment. A wholesaler-funded report released in August 2006 by Teenage Research Unlimited showed 2% of teens self-reporting purchase of an alcoholic beverage from some source over the Internet, with an additional 12% reporting they had heard of another teenager's having done so. Most observers characterized the report as reassuring, but its sponsors ballyhooed it as proof of an imminent flood of wine in underage hands.

Some direct shipment laws (at last count, Kansas, Michigan, Ohio, and Georgia) require use of approved verification systems, and verification is part of the voluntary "Wine Industry Code for Direct Shipping" proposed by Free the Grapes and endorsed by major winery trade associations. It makes sense to use robust systems everywhere, because they tend to quell irrational fears and because the entire industry has an interest in averting even an aberrant sale or delivery to an underage recipient. For more information, see www.idology.com, http://integrity.aristotle.com/content/view/47/80/ and www.veratad.com. Another system approved by one or more state agencies was at choicepoint.com, but at last report the link pointed at a Lexis-Nexis page that did not refer to age identification for on-line purchases.

On-site Sales under Federal Law:

The Transportation Security Administration carry-on ban of over-3-oz. containers of most liquids[4] accentuates the importance of the federal direct shipment statute[5], enacted to facilitate security by reducing the volume of airline passenger baggage. It creates a federal-state hybrid alternative to whatever method, if any, a state provides for "personal importation" (*i.e.*, bringing the wine with you into the state), by allowing the winery to ship wine purchased "while the purchaser was physically present at the winery" that would otherwise go as luggage. Most states have a personal importation exception to their prohibitions of unlicensed importation, usually for quantities that would fit in a glove box or handbag, but in some cases for enough to make shipment feasible. Volume limitations applicable to shipping on-site purchases appear in the state notes below, but in practice they raise issues of interpretation and enforcement, none of which has been definitively resolved. Prudence suggests a "no" answer to questions such as whether separately invoiced "importations" can be aggregated in one box and whether on-site purchase of futures or club subscription wines not yet released constitute an on-site sale, but without a judicial determination for each ambiguous phrase it is impossible to be sure. See "Federal Regulation," below, for federal penalties on illegal interstate shipment.

Although the federal direct shipment statute is not interpreted in the same way by all state agencies, is ambiguous regarding whether it supplements formal methods of direct shipment, is in effect only so long as the FAA security restrictions on air travel remain in place, and imposes requirements on the selling winery regarding proof of age, *etc.*, in addition to those that may apply under state law or be implemented by carriers, it appears to open some markets for sales to winery visitors who want their in-person purchases shipped home and is so interpreted by the major delivery carriers. The state notes below may omit reference to the federal direct shipment statute if that option does not add substantially to direct shipment rights under other state laws.

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[4] See http://www.tsa.gov/311/index.shtm. Slightly different rules apply to duty-free purchases, www.tsa.gov/travelers/airtravel/assistant/duty_free.shtm.

[5] 27 U.S.C. § 124, originally § 11022 of the Department of Justice Appropriations Act of 2002.

Tax and Liability Traps:

Unintended consequences may follow application for a license or permit to ship to consumers in another state. In addition to the administrative burdens of filing shipping reports and/or excise tax returns, direct shipment may subject a winery to jurisdiction of the recipient state on the same basis as businesses located there, including imposition of business taxes on gross receipts and susceptibility to tax liens and service of process. States with income taxes may require returns for revenues derived from sales by out-of-state wineries that have sufficient contacts with the state to satisfy jurisdictional prerequisites or have consented to jurisdiction as part of a shipping permit process. Wineries should consult counsel about secondary effects before signing license applications.

Some state statutes can be read to impose liability on a winery for shipping wine to a consumer that causes the customer to go over an aggregate annual limit set for purchases from all direct shippers. Winery ordering procedures should require all purchasers to represent and warrant that filling the order will not violate state law, with special attention to aggregate limit states, but the effect of relying on consumer representations is uncertain. Indiana has clarified its position on enforcement in a manner that makes consumer representations effective so long as the winery's own shipments for the year are not over the limit. Questions may exist in other aggregate limit states, which at last count included Ohio, Massachusetts, Nevada, North Dakota, and Wisconsin.

Most direct shipment sales are now subject to state and local sales and use taxes, which may vary by county or other political subdivision. Formerly, the most prudent practical way to deal with it was to pay the highest rate in the state for all destinations, as the difference is tiny compared to the annoyance of calculating tax by address within a state. Paying an average or median rate does not constitute compliance, because tax authorities do not credit taxpayers with overpayments on other sales. However, modern compliance software can now deal with the plethora of tax rates to avert both underpayment and overpayment. Note also that state excise taxes often have a higher rate for "dessert" or "fortified" wine, a category that usually includes unfortified table wine containing more than 14.0% alcohol.

Reciprocity Rethought:

Reciprocity has been turned on its head since *Granholm*. Under the pre-*Granholm* regime, laws allowing direct shipment among states that offered one another's wineries equivalent privileges were considered a pro-commerce development and the basis for a stable, if geographically limited, trade in wines outside the three-tier system. Although reciprocal shipment was not directly before the court in *Granholm*, the Supreme Court made it clear that trading areas within the United States, excluding sellers in states that do not join the trade group, are incompatible with the Commerce Clause. That message, however, has taken a while to work its way through the organs of state government that regulate trade in wine.

New York, one of the two states before the Court in *Granholm*, found its discriminatory non-reciprocal law invalidated, but ironically adopted in its place a quasi-reciprocal law that might not pass constitutional muster. California sensibly repealed its reciprocity requirement for winery shipments, but retained it for the added category of non-producer retailers; however, in 2006 the state asserted a no-enforcement policy in responding to a suit by a retailer trade association, effectively extending the privilege to retailers in non-reciprocal states, at least while litigation was pending. The litigation has since been dismissed, but the policy apparently remains in force.

Five years after *Granholm*, the substantial period of transition from reciprocity laws appears to be winding down. Illinois switched to a permit system in June 2008, and Wisconsin converted in October 2008. At last count, no replacement had been enacted in Iowa (where permit legislation was recommended by regulatory agency, but not acted on by the legislature) or New Mexico (where a permit bill died in the legislature). A recently filed lawsuit challenging the Iowa reciprocity law may prompt the legislature to replace it with a law that preserves local wineries' direct shipment privileges and extends out-of-state winery direct shipment to all states, though one cannot foresee consequences at this stage. The New York "substantially equivalent" requirement looks close enough to reciprocity for Commerce Clause purposes; it doesn't matter whether a law uses the term "reciprocal" or not, as the aspect condemned in *Granholm* is treating sister states differently with respect to trade, depending on the conformity of their laws with one's own. Reportedly, New York was not enforcing a reciprocity requirement, but did block Maryland wineries because Maryland offers no direct shipment.

Federal Regulation: The Tobacco, Tax & Trade Bureau (TTB), successor agency to ATF, has a web site, www.ttb.gov/publications/direct_shipping.shtml, with information on efforts to lend federal weight to state laws restricting wine distribution. It points out that the 1913 federal Webb-Kenyon Act is still on the books, forbidding shipment of alcoholic beverages "intended, by any person interested therein, to be received, possessed, sold, or in any manner used in violation of any law" of the recipient state, and that winery basic permits are held under the condition that the permittee obey federal liquor laws, including Webb-Kenyon. Suppliers, the site concludes, "should remember that their Federal basic permits could be at risk if they fail to comply with State rules." In a January 2007 interview, TTB administrator John Manfreda said no state had requested action by his agency, in part because wholesaler-sponsored federal legislation from 2000 (fatuously entitled the "21st Amendment Enforcement Act") authorizes state attorneys general to seek federal court injunctions themselves against liquor sales that contravene state law.

Further Constitutional Questions:

Commercial Speech.

Several states restrict advertising for sales by direct shipment. Restraints on truthful and non-misleading commercial speech are questionable under the First Amendment. Some liquor laws restricting speech have already been invalidated, and more challenges are likely. Meanwhile, methods of promoting sales by means other than traditional media are proliferating, generating varied responses from regulators. The application of constitutional commercial speech rights to unconventional practices, such as unlicensed consumer "Tupperwine parties" at which sales reps promote on-line orders, is yet to be determined.

Recently, California announced a policy that amounts to limiting the Internet activities of unlicensed "marketplace sites" to informational speech directing consumers to licensee sites, prohibiting the business model of soliciting an order from the visitor and passing it along to the licensee. Most First Amendment protection of commercial speech has involved informational material, and it remains uncertain whether the more active communication involved in order-taking or transaction-facilitating will be constitutionally protected.

Facial Neutrality.

Current Legal Climate

Under a widely accepted reading of *Granholm*, the Commerce Clause requires states either to give local and out-of-state wineries access to consumers and retail accounts on economically equivalent terms or to deny it altogether. In response, some legislatures[6] have attempted to accommodate wholesaler interests by allowing direct shipment or direct distribution only for wineries with annual production or capacity under a gallonage cap, typically set just above the output of the largest local winery and well below major out-of-state producers that account for most wine sales volume, and/or by imposing an "equal" requirement that consumer purchases be made in person at the winery, irrespective of location.

Challenges to laws that are facially neutral as to winery location impose a substantial evidentiary burden on the plaintiffs, who must show how discrimination against interstate commerce results in practice. Because proof may require fact-based economic analysis, the cases can be expensive to litigate. Plaintiffs expecting to shoot fish in the *Granholm* barrel will often be disappointed by the cost and complexities of litigation when the state has not enacted forthright protectionism.

There have been recent successes, notwithstanding the issues of proof.[7] In December 2008, the federal Court of Appeals for the Sixth Circuit affirmed the 2006 Kentucky *Cherry Hill* case (formerly known as *Huber Winery v. Hudgins*), which held that impermissible discriminatory effects resulted from a facially nondiscriminatory on-site requirement, but not from a volume cap or small per-order limit. In January 2010, the First Circuit affirmed the 2008 decision in *Family Winemakers of California v. Jenkins*, holding that a Massachusetts direct shipment intentionally crafted so as not to exclude any local winery but leave out nearly all interstate wine sales constituted discrimination both in purpose and effect, and that state could not apply it to exclude the larger (*i.e.*,

[6] At last report, Arizona, Arkansas, Indiana, Kentucky, Ohio and Massachusetts granted different distribution options, depending on the winery's production volume. The Massachusetts cap has been ruled invalid in ongoing litigation.

[7] An interesting alternative to judicial challenge of volume caps is what might be called the "Jess Jackson workaround," in which an enterprise linked by common equity ownership sells through two or more separately licensed entities. Sales into Kentucky by the under-cap Atalon and La Jota operations, both owned by Jackson Family Farms, LLC, outraged state wholesalers, who seemed only belatedly to understand that laws restricting rights based on size of operation need consolidation rules to be effective. Other issues in administering caps may arise from statutory text. For example, the Arkansas direct distribution statute refers to sales as reported on the winery's TTB Report of Wine Premises Operations, which does not report sales. Thus, it is unclear whether the relevant number is tax-paid withdrawals during the year or consummated sales in the same period. Sales could include transfers in bond that would not show as withdrawals and/or wine removed from bond in a previous or subsequent year.

exclusively out-of-state) wineries. (The *Family Winemakers* case is discussed under "Volume Caps," below.)

Nevertheless, failed challenges in a string of federal suits –*Black Star Farms LLC v. Oliver* in Arizona, *Baude v.Heath* in Indiana, *Cherry Hill Vineyard v. Baldacci* in Maine and *Jelovsek v. Bredesen* in Tennessee– provide a telling lesson in the difference between overt discrimination cases like *Granholm* and claims of discriminatory burdens in practice. An important factor in determining the outcome is the court's choice of test in gauging the constitutionality of state legislation under the dormant Commerce Clause, a subject addressed in the discussion of *Family Winemakers*, below.

<u>On-Site Requirements</u>

The February 2008 decision by an Arizona federal district court in *Black Star Farms* upheld in-person purchase at the winery premises as a precondition to direct shipment.[8]

"On site" purchase requirements respond to a fundamental political problem for the wholesalers. Although *Granholm* allows states to forbid all shipments to consumers, pursuing that "level down" strategy in a state legislature could require extravagant expenditure of political capital, because it would constitute a death sentence for a significant portion of local wineries dependent upon shipping to in-state customer lists. However, the wholesaler trade associations contend that *Granholm* also permits a state to allow local wineries to engage in on-site direct shipment, making them viable competitors in the local wine market, so long as out-of-state wineries have the same privilege –even if they cannot practically use it.

Decisions like *Black Star Farms* have voiced the "accident of geography" theory, which contends that the impracticality of, *e.g.*, an Arizona consumer's visiting a Yakima Valley winery to place an order for a wine advertised on the Internet, compared to the convenience of visiting an Arizona winery for the same purpose, does not discriminate against interstate commerce. The federal Court of Appeals for the Second Circuit in *Arnold's Wines v. Boyle* (appealed as *Buy Right, Inc. v. Boyle*), the Fifth Circuit in the R2C case *Siesta Village Market, LLC v. Perry*, the Seventh Circuit in *Baude v. Heath*, and a Tennessee federal district court in *Jelovsek v. Bredesen* appear also to have bought the theory; the Sixth Circuit in the Kentucky case *Cherry Hill Vineyards, LLC v. Hudgins* (affirmed as *Cherry Hill Vineyards v. Lilly*) rejected it. Appeals are reportedly under way in the second, fourth, and ninth federal circuits.

The geographic accident argument articulated in *Black Star Farms* does not seem logical. With respect to governmental restrictions, the Commerce Clause is supposed to provide equal access to markets for interstate commerce originating in any location. True, it does not require states to neutralize natural effects of geography, such as the greater cost of shipping from a distant point, but the trade restriction in question arises from the legislative pen, not from geography itself. For legislation, the Commerce Clause supports location parity by voiding state enactments with substantial discriminatory effects,

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[8] Although Arizona law changed to accommodate off-site sales, the case remains an important statement of the "weak Granholm" position. At last report, states forbidding off-site direct shipment to their residents, but permitting at least small on-site quantities under the federal direct shipment statute, included Delaware, New Jersey, Oklahoma, Rhode Island and South Dakota.

including the effect of leveraging location advantages of local businesses against distant competitors by forbidding the out-of-state business to compete in the only practical way it can. If one supposes as a thought experiment that a New York law involved in *Granholm*, which permitted local wineries to ship directly within the state if their wines were made from New York-grown grapes, were made "neutral" by authorizing any winery anywhere to ship directly to New York consumers with the same grape source restriction, then supporters of the geographic accident theory presumably must argue that the *Granholm* court would have upheld the law, even if it practically excluded the California and Virginia winery plaintiffs.

Ironically, *Black Star Farms* cites a 1994 Supreme Court case, *C & A Carbone, Inc. v. Clarkstown*, which invalidated a facially neutral city ordinance requiring all nonhazardous solid waste received and processed in the town to be deposited at the defendant township's transfer station. The fatal flaw of the *Clarkstown* ordinance was that in practice it favored local waste management business to the exclusion of all non-local competition, which sounds pretty similar to a three-tier requirement for out-of-state businesses, but the *Black Star Farms* court decided not to follow that precedent for reasons that are difficult to divine in its opinion.

There is, however, a basis for the anti-trade result in *Black Star Farms* other than the purported geographic accident defense to *Granholm*-based suits: the proposition that for non-facial discrimination the plaintiff must prove, with economic expert testimony based upon factual research, the existence of a market from which it was excluded or to which its access was burdened to the point of inability to compete. As the *Black Star Farms* judge put it in refusing to reach the same result as *Hudgins*: "However, Plaintiffs proffer no evidence to suggest that such a limited exception, applicable to both in-state and out-of-state wineries, erects a barrier to Arizona's wine market that in effect creates a burden that alters the proportional share of the wine market in favor of in-state wineries, such that out-of-state wineries are unable to effectively compete in the Arizona market."

A test based on inability to compete effectively sets a higher bar than might appear justified under current Commerce Clause jurisprudence. Support for a somewhat more trade-friendly test can be found in the important First Circuit case, *Family Winemakers of California v. Jenkins*, discussed in the following section.

<u>Volume Caps</u>

"Volume cap" is shorthand for granting direct shipment privileges or other forms of market access only to sellers below a certain size, typically wineries that produce no more than a specified number of gallons annually. Because a volume cap statute does not differentiate according to location, it constitutes a "facially neutral" measure for Commerce Clause purposes, unlike the statutes considered in *Granholm*.

By far the most important statement about volume caps, with implications for all facially neutral state regulation of interstate commerce, is the 14 January 2010 decision of the United States Court of Appeals for the First Circuit in *Family Winemakers of California v. Jenkins*. In *Family Winemakers* the First Circuit has articulated an analysis that may provide a persuasive alternative to the *Black Star Farms* "inability to effectively compete" standard for finding discriminatory effects from superficially even-handed enactments.

As in all dormant Commerce Clause[9] cases, a central issue in *Family Winemakers* was choice of the proper test for determining the constitutionality of a state law that burdens interstate commerce to the benefit of local commerce. However, litigation over volume caps that do not overtly discriminate according to location falls outside the exact fact pattern of *Granholm*, which dealt with laws whose "object and design" to discriminate against out-of-state wineries was "evident" from their text and which in fact did discriminate.

In Granholm the Supreme Court considered how the presence of those factors —intent to discriminate and effect of discriminating— affected the answers to two distinct questions. The first question concerned the 21st Amendment and certain federal legislation, which, taken together, affirmed the right of states to regulate wine from outside the state as fully as wine produced in the state and declared it illegal to ship wine into a state in contravention of "any" its laws. Does that broad language, the Court asked, permit the states intentionally to discriminate against interstate commerce (as a literal reading might suggest)? After an extensive and somewhat controversial historical analysis of the federal statutes and the constitutional amendment, the Court answered "no," concluding that the dormant Commerce Clause subjects alcoholic beverage regulation to the same tests of constitutionality as apply to laws governing other goods. The opinion does not, however, expressly state that there is no 21st Amendment immunity for state statutes *not* intended to favor local industry over interstate commerce.

If there is no immunity, the statute must be tested for constitutionality, leading to the second question: Which of the two accepted tests applies? In *Granholm*'s analysis, the choice was obvious. As stated in a leading case:

> [W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected . . . . But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach . . . .

With a case of flagrant economic protectionism before it, the *Granholm* Court had no trouble applying the strict test, which invalidates a law unless the state clearly demonstrates with "concrete" evidence that it is necessary for an essential state purpose and there is no workable less-discriminatory means of achieving the purpose. Neither defendant state even came close to meeting that standard. On the evidentiary records of

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[9] In subject areas where Congress has not enacted legislation that serves as a comprehensive regulatory scheme, states have some room for regulation, even if it affects interstate trade to a degree. However, the fact that interstate commerce is within Congress's power to regulate means that in subject matter where it has *not* acted (i.e., where its regulatory power is "dormant") certain unwritten principles inherent in the Commerce Clause nevertheless limit state regulatory power. State laws that exceed those limits are said to offend the "dormant Commerce Clause." As a leading case puts it, "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism --that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."

most lawsuits, selection of the strict test is a death-knell for a statute challenged under the dormant Commerce Clause.

In contrast, Family Winemakers dealt with a law all parties agreed was neutral on its face. The pivotal question was whether it would therefore receive the "more flexible approach."

Defenders of volume caps and on-site requirements contend that facial neutrality has two profound effects: (1) For alcoholic beverages, it invokes 21st Amendment immunity from dormant Commerce Clause challenge, which, they argue, was repudiated in *Granholm* only for facially discriminatory laws. (2) If there is no 21st Amendment immunity, it invokes the "more flexible" test of constitutionality, under which a statute will be upheld unless the burden imposed on interstate commerce is "clearly excessive" in relation to the claimed local benefits, rather than the strict necessity test *Granholm* applied to facially discriminatory laws. Neither contention survived the First Circuit's decision in *Family Winemakers*.

In repudiating a 21st Amendment immunity defense for all facially neutral laws, the Court of Appeals formulated a useful test: Even if a statute is "neutral on its face," when its effect is to "change the competitive balance" between in-state and out-of-state wineries in a way that benefits local wineries and "significantly burdens" their out-of-state competitors, the result is the same as for facially discriminatory statutes in *Granholm* --no 21st Amendment immunity.

After conceding that *Granholm* dealt only with facially discriminatory statutes, the *Family Winemakers* court set forth on its own to decide whether the 21st Amendment provided Massachusetts with immunity from dormant Commerce Clause challenge. Like the *Granholm* majority, it viewed the question as resolvable by historical context and accordingly read the 21st Amendment as preserving only the pre-Prohibition regulatory power Congress allows states under the Wilson Act and the Webb-Kenyon Act –*i.e.*, the right to regulate out-of-state wine on the same basis as in-state wine, but not to discriminate against the former in favor of the latter. By engaging in extended history-grounded analysis, the First Circuit has provided additional support for the proposition that *Granholm*'s no-immunity ruling applies to all discriminatory measures, whether overtly protectionist or facially neutral.

With immunity out of the picture, the primary issue before the First Circuit was how to test a facially neutral statute under the dormant Commerce Clause –*i.e.*, what questions a court should ask to determine whether the state law would be upheld or struck down. *Family Winemakers* follows prevailing Commerce Clause jurisprudence in recognizing the two possibilities noted above, a strict "per se" test requiring proven necessity or a more flexible balancing test.

States and wholesalers argue that facial neutrality, at least in the absence of proven intentional protectionism, automatically requires the more flexible approach, originally formulated by the Supreme Court in the *Pike v. Bruce Church, Inc*. However, the *Pike* test as developed in case law is not invoked by superficial characteristics.

As enunciated in *Granholm*, the *Pike* test requires a two-stage inquiry. In the first stage, a court begins with the threshold question: Does the challenged state law regulate "evenhandedly" as between interstate commerce and local commerce? If not, the inquiry switches to the strict test, and *Pike* is irrelevant. If the law is even-handed[10], the first stage concludes with a second question: Is whatever burden it places on interstate commerce an "indirect" consequence of its pursuit of a legitimate local interest? Again, if the answer is negative, analysis proceeds under the strict test. Only if the answer is "yes" to both stage one questions does a court proceed to stage two, which is application of a balancing test. The stage two question is whether the burden on interstate commerce is "clearly excessive" in relation to the legitimate state purpose. If the answer to that highly subjective third question is "no," the state law stands. For none of the three questions is the answer determined by facial appearance.

The district court in *Family Winemakers* had essentially followed that algorithm in an alternative holding, finding the statute invalid even if the *Pike* test applied because its effects failed to serve a legitimate state purpose. Probably the most significant aspect of the First Circuit opinion is the means by which it bypasses the *Pike* test by classifying the Massachusetts law as protectionist in both intent and effect.

Though the district court decision in *Family Winemakers* was clearly cause for celebration in the pro-commerce contingent, there was some concern that the record was *so* strong on protectionist purpose that the case might not serve as a highly useful precedent in other cases, whose records will mostly be at best ambiguous on legislative intent. The district judge had placed great stress on a sensationally revealing legislative history. As proclaimed by Senator Morrissey, who sponsored the legislation and is quoted at length in the district court opinion: "[W]ith the limitations that we are suggesting in the legislation, we are really still giving an inherent advantage indirectly to the local wineries."

In the Court of Appeals, proof of protectionist purpose rests on a more broadly applicable base. The finding of discriminatory intent explicitly relies not on the "smoking gun" statements of legislators or lobbyists, but on the appellate court's reading of the statute itself with reference to external uncontested facts. Close attention to the text revealed a volume cap at odds with prevailing industry classification of wineries as large or small, or as able or unable to secure wholesaler distribution, as well as with the state's own size demarcation for license fees. The court was particularly impressed by the facts that ultimately there was no winery size standard at all, given that non-grape wine volume would not be counted and that the fruit wine exemption allowed an over-30,000-gallon Massachusetts winery to enjoy "small" winery benefits. Revealing intent by a combination of textual analysis and reference to objective data should be applicable to other "facially neutral" restraints before other courts, without need for thrilling exposés.

Objective data also underlie the First Circuit's finding of burdensome effects, to complete classifying the statute as discriminatory in intent and effect and thereby bring application of strict dormant Commerce Clause test squarely under *Granholm*. The court follows the approach of its petroleum product distribution decision, *Exxon Corp. v. Governor of Maryland*, saying a statute is "plainly" discriminatory if its effect is to cause local goods

[10] Even-handedness is the absence of "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," with only "incidental" effects on interstate commerce.

to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market –a demonstrable effect of the statute under consideration. As an alternative to the *Black Star Farms* “inability effectively to compete” formulation, the *Family Winemakers* shift-of-market-share test sets a markedly more commerce-friendly standard for judging state laws.

Once the statute was classified as discriminatory in purpose and effect, it became subject to the strict necessity test, with its “concrete record evidence” requirement, which the state did not attempt to meet. As the appellate court pointed out, the record revealed the opposite of necessity, *i.e.*, the existence of a non-discriminatory means of helping wineries unable to secure wholesaler distribution –passing a direct shipment law based on the National Conference of State Legislatures model bill, as the governor had urged– and no reason why that would have been unworkable.

The First Circuit opinion in *Family Winemakers* also sheds light on its earlier opinion in a failed suit challenging Maine’s on-site-only direct consumer sale law, *Cherry Hill Vineyard v. Baldacci*. The *Baldacci* decision can be read in various ways and has been advanced by direct shipment opponents as recognizing a “no direct shipping market” defense to Commerce Clause challenge. In brief, the theory is that if no purchases in the state can be fulfilled by direct shipment, there is no market from which out-of-state wineries could be excluded or in which they could be disadvantaged, and therefore no discrimination. The *Family Winemakers* defendants claimed it supported the proposition that without “explicit” discrimination, a law would not violate the dormant Commerce Clause, or at worst would be judged under the *Pike* test.

The “no direct shipping market” theory is, I believe, fallacious, because the Commerce Clause protects commerce, not means of delivery. A *Granholm* issue arises if a state favors any local market in a line of goods, even one limited to on-site sales, by directly burdening interstate sellers who are compelled by economics to use a different distribution method. Whether leveling down to all face-to-face sales constitutes discrimination subject to the strict necessity test is a hotly contested question in current *Granholm* litigation.

In my view, the no-local market defense issue in *Family Winemakers* arose from *Baldacci*’s misapplying *Exxon*, where there indeed was no local market, to a local market in which in-state wineries made on-site sales, protected from out-of-state competition. The First Circuit clarifies *Exxon* in *Family Winemakers*:

> Exxon held that a law that restricts *a market consisting entirely of out-of-state interests* is not discriminatory because there is no local market to benefit. Exxon is not apposite where, as here, there is an in-state market and the law operates to its competitive benefit. Massachusetts cannot apply Exxon only to "large" wineries as distinct from "small" wineries; the wine market is a single although differentiated market, and § 19F's two provisions [the statute in question] operate on that market together.

The First Circuit went on to distinguish its decision in *Baldacci* (which was submitted for decision on an agreed written fact statement) as dealing with an unsupported challenge:

> That case involved a challenge to a Maine law that allowed wineries to sell to consumers only in face-to-face transactions. That challenge failed because plaintiffs did not introduce any evidence that the law benefitted Maine vineyards or harmed out-of-state wineries.
>
> . . . .
>
> *Baldacci* only addressed the kind of showing required when a statute is challenged as discriminatory in effect but is concededly non-discriminatory in purpose. We did not address whether a lesser showing might suffice when a law is allegedly discriminatory in both effect and purpose. We do not reach this question because even under the standard in *Baldacci*, plaintiffs have shown § 19F is discriminatory in effect.

The First Circuit decision encourages examination of what has been regarded as a central tenet of *Granholm* jurisprudence, the "level field" model. It is a commonplace that protectionist discrimination can be cured by leveling up or down; in other words, that a state can comply with the Commerce Clause by permitting direct shipment for both in-state and out-of-state wineries or by denying it to both. Such a mechanistic approach, however, leads to uncritical acceptance of formalistically even-handed schemes like on-site-only laws, notwithstanding their disparate impact on nearby and distant wineries. Putting facial neutrality in perspective, as occurs in *Family Winemakers*, should support critical examination of other playing fields that are only superficially level.

Significant as it is, the First Circuit opinion in *Family Winemakers* does not answer all the questions the case raises. Following sound judicial practice, the court prudently made the most easily defensible ruling on the record before it. The opinion's principal limitation is that on both 21st Amendment immunity and choice of test under the dormant Commerce Clause it deals with a statute convincingly shown to be effectively *and* intentionally discriminatory against interstate commerce.

Thus, *Family Winemakers* leaves important unsettled post-*Granholm* issues: What test applies if a state statute is discriminatory in effect but not intent?[11] What if it was intended to discriminate, but fails to do so, assuming anyone would have an interest in arguing about it in that instance? If a law is evenhanded, but would flunk the *Pike* balancing test on furthering the claimed local interest, could it be saved by giving special weight to "core 21st Amendment interests" like temperance and tax collection? Indeed, is there anything special at all about liquor control interests versus other state objectives in dormant Commerce Clause jurisprudence after *Granholm*?

Other Local Favoritism

Legal scrutiny is less developed for restrictions other than volume caps and on-site limitations. The Louisiana "Wine Producers Act," in partial compensation for taking direct distribution away from in-state wineries to forestall a *Costco* challenge by out-of-state suppliers, expands the rights of wineries to market their products through local fairs,

[11] The First Circuit leaves the question open, although dicta in its *Baldacci* opinion support a greater burden on plaintiffs in such cases. The Supreme Court opinion in *Bacchus*, a precursor case to *Granholm*, says either intent or effect will serve to show protectionism, but that statement also is dicta.)

festivals and non-profit special events, a feature that raises its own *Granholm* issues because of disproportionate availability to local producers. Similar issues arise under the Texas winery festival permit, which in theory could be issued to an out-of-state applicant, but requires wineries in counties that have not had local election approval of retail sales to use Texas raw materials, and under similar local grape content requirements for other winery license privileges, such as are found in Iowa and to some extent in Pennsylvania. Raw materials restrictions may have a direct adverse effect on interstate trade in bulk wine, juice or grapes, in addition to practically favoring local producers with respect to finished goods, and therefore raise substantial *Granholm* issues.

Application of Federal Antitrust Law under the Supremacy Clause.

Some nondiscriminatory state restraints on streamlined distribution raise issues under the Sherman Act and possibly under other federal trade regulation laws. Because federal statutes preempt inconsistent state laws under the Supremacy Clause of the federal constitution, the Supreme Court has invalidated conflicting state liquor laws such as those requiring unsupervised price-fixing by wholesalers. Although the Commerce Clause is, in a sense, the foundation of antitrust challenges because it grants Congress the power to maintain the competitiveness of interstate trade, antitrust cases do not enjoy the strong presumption of illegality that applies to state laws directly discriminating against interstate commerce, as in *Granholm*.

The trial court decision in *Costco* was the vanguard for applying federal antitrust law to state liquor regulation, recognizing a right of suppliers to ship to retailers' central warehouses, omit price posting, offer quantity discounts, *etc.* If it had been sustained in its entirety on appeal, numerous laws that protect middle-tier turnstiles at the expense of producer and consumer interests would have been subject to challenge, but only the invalidation of "post and hold" pricing was affirmed.

Administrative Burdens. Indirect forms of discrimination against interstate commerce, such as onerous fees and reporting requirements not required of local wineries, persist. *Granholm*'s economic equivalence standard logically should take into account all substantial costs, but the Supreme Court opinion does not provide practical guidance for gauging whether particular differences are permissible.

Direct Shipment by Retailers

Internet bottle shops and their trade association, Specialty Wine Retailers, have been highly active in the important area of applying *Granholm* to interstate sales by sellers not licensed as wineries.[12]

Two cases brought by the same interstate retailer have resulted in different rulings. In September 2008, a Michigan federal district court in *Siesta Village Market, LLC. v. Granholm* simply extended the *Granholm v. Heald* holding to the bottom tier, requiring the same direct shipment privileges for out-of-state retailers as the state had granted its

[12] Retailers as a licensee category now embrace some brand owners who wish to appear in the market as "virtual wineries," although other licensure strategies may be preferable for that business objective.

own retail licensees. (For later history of the case, see "Litigation" under the Michigan state notes, below.)

In January 2010, the Court of Appeals for the Fifth Circuit overruled a conceptually pro-trade 2008 Texas federal district court decision in *Siesta Village Market, LLC v. Perry* (with which *Wine Country Gift Baskets.Com v. Steen* is consolidated). The lower court had ruled that out-of-state retailers had a Commerce Clause right to hold Texas retail licenses, giving them the same right to deliver to consumers as retailers located within the state, but that the state could require them to acquire the goods from a Texas-licensed wholesaler.

The district and appellate courts' analyses in *Siesta Village* merit attention, as they illustrate the extent and importance of Commerce Clause -21st Amendment issues *Granholm* neither resolved nor clarified. First, there is the question of licensing out-of-state retailers. The district judge analyzed the challenged statute as a *location* requirement and reasoned that it would be unconstitutional on the same Commerce Clause grounds that had already invalidated the Texas "citizenship" requirement of a year's residence in the state for most licenses, if it prevented issuance of the requisite retailing licenses to out-of-state retailers. In that view, location neutrality could be squared with states' 21st Amendment licensing power by requiring issuance of Texas retail licenses to out-of-state applicants. The appellate court, which recognized no right of out-of-state retailers to sell to Texans, did not have to deal with the licensure issue.

Both the reversed district court judge and the appellate panel had some important things to say about the most significant internal tension of the *Granholm* majority opinion, *viz*., the difficulty of squaring the underlying principle of the decision, that states cannot require out-of-state businesses to become residents as a condition to reaching local markets, with a dictum-within-a-dictum quoted from a 1990 Supreme Court case, *North Dakota v. United States*, to the effect that the 21st Amendment empowers states "to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." (For an explanation of the difference between holdings and dicta, see the ShipCompliant blog on post-*Granholm* R2C.)

The district judge in *Siesta Village* took *Granholm* as a location parity case, and his opinion is explicit that physical presence requirements "plainly discriminate against interstate commerce." However, like every analyst of *Granholm*, he had to deal with the *North Dakota* dicta.

One way of resolving the issue is to require the state to accept methods of consummating the purchase requirement that do not substantially burden interstate commerce relative to local, such as running the sale to an out-of-state retailer through the local middle tier without requiring the wine to take an economically disadvantageous logistical path. Another is to declare that the "in-state" part of the troublesome quotation is dicta and therefore not binding in applying the *Granholm* holding to a different chain of distribution where its effect on commerce is more problematic. That may be rather too bold a departure to expect in a lower court opinion, but it would have supported a straightforward solution to the three-tier problem –issue Texas licenses to wholesalers in other states. In the event, the judge simply let the contradiction lie, holding that the retailers have to comply with Texas laws requiring a state retail license *and* purchase from a Texas-licensed wholesaler, a confusing picture that unsurprisingly failed to survive appellate review.

The appellate court in *Siesta Village* adopted a third approach: treat the *North Dakota* dictum as if it were a holding. The Fifth Circuit, like the Second Circuit, declared that *Granholm* extended Commerce Clause protection to wineries, but not to wholesalers or retailers, because national markets in the lower tiers would make it impossible for a state to protect the "traditional three-tier system." As the Court of Appeals judge said about setting aside fundamental economic policy embodied in the dormant Commerce Clause to follow a judicial aside that was not part of the *Granholm* holding, "That language may be *dicta*. If so, it is compelling *dicta*."

It is not news that judges, who are not bound to follow dicta, will elevate it to persuasive precedent when it coincides with their value systems. The values question in *Siesta Village* is whether states' asserted 21st Amendment right to maintain a privileged middle tier trumps the Commerce Clause policy against differential treatment of in-state and out-of-state economic interests. Presently the cases do not point toward a universally acceptable answer.

The parties in *Knightsbridge Wine Shoppe, LTD v. Jolly* had agreed to extend *Granholm* to non-producing retailers selling to California consumers through the end of 2008. A change of defendant directors did not change state policy, and on 5 January 2009 both sides agreed to dismiss the action in view of their previous stipulation that the California Department of Alcoholic Beverage had never enforced state licensing, importation, and retailer direct shipment reciprocity statutes against carriers or out-of-state retailers shipping wine to adult Californians for personal non-resale use, a point the state had earlier unsuccessfully advanced as rendering the suit premature.

In a 2007 New York case, *Arnold's Wines, Inc. v. Boyle* (also known as *Buy Rite, Inc. v. Boyle*), the New York federal district court dismissed a retailer suit without an evidentiary hearing, on the grounds that the state had a 21st Amendment right to require all sales to go through an in-state wholesaler, following Scalia's vexing *North Dakota* dictum quoted in the *Granholm* opinion. In 2009 the Second Circuit Court of Appeals affirmed on the same grounds. Both *Arnold's Wines* courts rejected the "strong *Granholm*" reading –*viz*., although a state may have the right to require all wine to go through three tiers, it does not have the right to apply that requirement with location discrimination unless it provides evidence that its discrimination against interstate sellers is required by a legitimate state objective that cannot be achieved through nondiscriminatory means.

The reversed *Siesta Village* district judge in Texas expressly declined to follow *Arnold's Wines*, which he plausibly characterized as putting the 21st Amendment above the Commerce Clause, precisely what *Granholm* forbids. The judge in the Michigan *Siesta Village* case was even clearer on R2C rights of out-of-state retailers, omitting any requirement that they purchase from Michigan wholesalers –in effect, endorsing a frontal challenge to states' rights to maintain three-tier systems by means of location discrimination.

Interstate Wholesaling.

Although it would not be surprising to see a wholesaler break ranks and invoke the *Granholm* principle to cross state lines, suits with that objective seem to have remained in the realm of rumor. The *Southern Wine* case in Texas found a one-year residence requirement for wholesalers unconstitutional, but did not reach the key point on location discrimination because the plaintiffs formed a Texas corporation and indicated their intent to operate facilities physically located in the state.

Federal Preemption of State Delivery Laws.

Some observers have suggested that a federal decision invalidating Maine's requirements for averting delivery of cigarettes to minors makes it impossible for states to enact statutes requiring carriers to verify age of wine recipients. I think the case does nothing of the kind, but the wholesalers have presented it to regulators as a serious problem. A ShipCompliant blog post and comments offer differing viewpoints on the controversy.

Shipment of Alcoholic Beverages other than Wine.

A 2006 ruling in Ohio applied *Granholm* to keg beer sold by retailers, but the relevance of *Granholm* to beverage categories other than wine remains largely unexplored. Meanwhile, states can, of course, permit direct shipment for other beverages by statute, as has occurred for beer in some instances, and existing personal importation laws may allow on-site purchase and transportation of small quantities of beer or spirits.

Direct Distribution by Out-of-state Suppliers.

The federal district court in *Costco* found it relatively easy to rule in the plaintiff's favor on the direct distribution issue, relative to some of the antitrust counts, and that part of the judgment was not affected by the adverse appellate ruling, because the legislature had already settled the leveling issue. Before *Costco*, Washington had granted direct distribution privileges only to its own wineries, a discrimination the judge found directly contrary to *Granholm*. Although the result was not immediately pro-commerce (judicially leveling down, with a stay to permit the legislature to rescue local wineries by leveling up), the case seems persuasive precedent against discriminatory direct distribution laws, which remain common among winery licensing statutes and administrative practices.

While there is little logical basis for distinguishing between producers and wholesalers who want to reach retailers in other states, it seems likely that post-*Granholm* law will preserve states' rights to require "every drop" to go through a middle-tier business. In that case, a state legislature willing to kill off home state wineries that depend on direct distribution could allow only wholesalers to sell to retailers, but might be constitutionally prohibited from specifying where the wholesalers may be located. Oregon faced that issue with respect to wholesaling licenses in the *Morchella Wine Cellars* appeal, but the case appears to have been mooted by legislation that became effective at the beginning of 2008.

Direct Shipment by Overseas Sellers.

An unanswered question is whether *Granholm* and GATT create rights in overseas wineries to distribute in the U.S. market on the same basis as domestic competitors. A 2006 state court suit in Illinois, *Raimondi v. Koppel*, raised the discrimination issue on behalf of an Italian winery, but the plaintiff's motivations were unclear, as the complaint relied only on state law and sought to level down –*i.e.*, to prevent Illinois wineries from exercising statutory direct distribution privileges. Nothing has been reported about it since it was filed.

Logistical Support Services.

Fulfillment houses are common in Internet and "mail order" sales of consumer goods generally and have found a niche in the wine industry, particularly for products of wineries that by choice or from limitation of resources do not manage their own direct shipment programs, where they are often styled "marketing agents." Third-party packing and shipping makes sufficient business sense to have supported significant capital investment (notwithstanding one prominent instance of disinvestment), but has recently engendered resistance from some regulators. The problem is collision between dispersal of operations –production and bottling at the winery, shipping at another location– and the basic beverage law concept that a regulated activity may go on only by a licensed entity at a licensed location. Sales of wine are, of course, a regulated activity, and in most states the definition of "sale" is broad enough to cover almost any act facilitating a sales transaction.

Three states have given the problem public utterance. In June 2009, California issued an "industry advisory" to the effect that a marketing agent must be licensed to receive orders or ship wine and must take title to the wine. The state also adverted to tied house issues arising if a marketing agent receives income from wineries and also provides services to retailers. The following month Virginia followed suit, with a circular letter forbidding use of unlicensed marketing agents; the state has since indicated its willingness to issue the winery a license at the separate shipping location. Washington has adopted regulations, effective in February 2010, that prohibit use of contract site operators by local non-producing retailers and put various restrictions on delivery, including a ban on drop shipment from suppliers. The delivery restrictions apparently apply to exports by Washington on-sale wine licensees to states permitting direct shipment by retailers licensed in the shipper state, a feature that may raise extraterritoriality issues under the Commerce Clause.

A Limitation of Litigation:

Court decisions that invalidate state restrictions on wine distribution can be exhilarating, but for usually do not set things right overnight. Federal district judges have the power to "stay" their own injunctions pending resolution of an appeal by the state (usually joined by the wholesaler trade association). A stay on appeal is an order postponing the effective date of the injunction until the appellate process has been completed, often around two years. Although trial judges have broad discretion regarding stays, widely accepted standards call for taking four factors into account: (1) whether the party applying for the stay has made a "strong showing" that it is likely to prevail on the merits; (2) whether that party will be irreparably injured by denial of a stay; (3) whether issuance of the stay will substantially injure other interested parties; (4) the effect of granting or denying the stay on the public interest.

Stays denied by a district court can be granted by a judge of the appellate court. In either instance, a stay provides sufficient time for interests that support the challenged restriction to respond in the state legislature. If, for example, a district judge finds a statute unconstitutional under *Granholm*, but the ruling is stayed pending resolution of the appeal, a legislative fix by leveling down may end the matter; even a legislative attempt to achieve the same result with less overt discrimination against interstate commerce may moot the case on appeal and start the game over from the first with a new statute, in effect putting the finding of unconstitutionality aside forever.[13]

Nevertheless, litigation can be effective if the factual proof is there. A successful outcome will force opponents to seek new legislation to restore restriction, and it is always easier to stop a bill than to pass one. Thus, pro-commerce interests without the political muscle to modify state law in a frontal legislative attack may, after invalidating a restrictive statute in court, be able to stop or substantially moderate a legislative replacement.

State Notes

Alabama

Winery Direct Shipment Basics: Wineries can ship in care of a state liquor store, freight prepaid, if the customer has obtained Beverage Control Board approval and paid for the wine. Assessment ($0.38 per liter) and excise taxes are payable on delivery to customer.

Direct Distribution: Recent adaptation of an agricultural cooperative law to allow in-state direct distribution by cooperating local wineries, following defeat of legislation to allow individual direct distribution, raises issues of access to retailers by out-of-state wineries under *Costco*.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Legislation: Senate Bill 127, which would have allowed direct shipments of wine to Alabama consumers, died in the Commerce, Transportation & Utilities Committee with *sine die* adjournment on May 15, 2009.

Alaska

Winery Direct Shipment Basics: Out-of-state sellers and in-state wineries may ship to residents who are not in the liquor business and do not live in an interdicted community (list available from state, 907-269-0350). Carriers, however, reportedly do not serve all non-interdicted destinations; reportedly, FedEx added Ketchikan, Sitka, Valdez and Kodiak only in 2008. Out-of-state sellers are limited to “reasonable quantities” for personal use and consumption. Under the 2007 shipment statute, Alaska wineries have a 5-gallon limit per shipment. The new law does not appear to provide greater privileges for in-state wineries than for out-of-state wineries and therefore should not engender *Granholm* challenge, even if the license is unavailable to out-of-state wineries, unless the state interprets “reasonable quantities” to mean substantially less than 5 gallons.

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[13] Those interested in the legal details of stays may wish to examine FRCP 62(c) and Cooper v. United States Postal Service, 246 FRD 415, 417 (D. Conn. 2007), citing Hilton v. Braunskill, 481 U.S. 770 (1987), for trial court stays, and FRAP 8(a) and 45 Baylor L.Rev. 809 (1993) for appellate stays.

Allowing out-of-state sellers more volume than local wineries would not raise Commerce Clause issues. According to statute, all liquor shipped into the state is taxable, even if the recipient is entitled to purchase liquor tax-free, but authorities reportedly have not attempted to tax direct shipments.

Arizona

Winery Direct Shipment Basics: Any winery in the U.S. or in its possessions or territories may hold a "domestic farm winery" license (Series 13) if it produces no more than 40,000 and no fewer than 200 gallons per year, but the direct shipment privilege applies only to wineries producing up to 20,000 gallons annually. (The so-called "direct shipment license" is for three-tier distribution only.) Section 42-3356 of the revised statutes requires the Department of Liquor Licenses & Control to determine the amount of a tax bond, not less than $500, based upon twice the projected annual liability, but domestic farm wineries are exempt after they have made twelve consecutive timely monthly payments. At last report, the agency was looking to the Department of Revenue to administer the tax bonds. See www.azliquor.gov/forms/pdf/outofstatedomesticfarmwinerybrewery.pdf for out-of-state winery forms. Reportedly, the Department of Liquor Licenses & Control has accepted license applications with "applied for" entered on the form in place of a Department of Revenue registration number for payment of the transaction privilege tax. In addition to the required state privilege taxes, shippers must pay sales tax, which is complicated by the status of "program cities" taxes (*i.e.*, cities whose local taxes are collected by the state Department of Revenue) and thirteen "non-program" cities (reportedly Apache Junction, Avondale, Chandler, Flagstaff, Glendale, Mesa, Nogales, Peoria, Phoenix, Prescott, Scottsdale, Tempe, and Tucson), whose taxes must be paid by direct shippers directly to each locality, thus requiring shippers to register separately with each destination non-program city, in addition to state registration.

On-site Sales: The statute apparently permits shipment without licensure, tax bonds, *etc.*, to a residential address of wine purchased at the winery by a person who "could have lawfully carried the wine into the state," up to two cases per year for personal use. Reportedly, the regulatory agency considers shipments subsequent to, and in the same calendar year as, a winery visit to be purchases at the winery. Existing law appears to contemplate shipments to the purchaser, but not necessarily at the purchaser's own address. Seemingly, the purchaser is not required to be an Arizona resident. Under current regulations and statutes, the only persons who can lawfully carry wine into the state are common carriers transporting the wine to licensed wholesalers and travelers returning from abroad with duty-free beverages, but the Department of Liquor License & Control reportedly interprets the "lawful carrier" requirement as satisfied by private means whenever the purchaser is at least 21 years of age.

Litigation: The complaint in a post-*Granholm* suit, *Black Star Farms, LLC v. Morrison*, originally challenging outright discrimination under the previous statute in favor of in-state wineries, was amended to charge discriminatory effects from the volume cap for farm wineries. (The Series 01 winery license for larger wineries is expressly referred to as an "in-state producer" license on the state domestic winery information page, www.azll.com/lic01.htm.) On February 26, 2008 the court ruled in favor of the state and the intervening wholesalers, leaving the volume cap in place. The case is now in the

Ninth Circuit Court of Appeals as *Black Star Farms, LLC v. Oliver*, where oral argument was heard on 15 September 2009. Different plaintiffs voluntarily dismissed a previous discrimination case, *Parker v. Morrison*, after the Department leveled down without benefit of legislation. The effect of the *Black Star* ruling is to legitimize the state's restoring in-state privileges for the local industry while allowing only wineries that are no larger than its own to ship from outside the state, a system with similarities to the Massachusetts volume cap law invalidated in *Family Winemakers of California v. Jenkins*.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Arkansas

Winery Direct Shipment Basics: There are no direct shipment provisions. Act 666 of the 2007 legislative session allows consumers who receive wine from outside the state to pay excise taxes directly to the Department of Finance and Administration, but does not create any new shipment or importation rights. Although carriers reportedly still accept shipments from instate wineries, which arguably had direct shipment privileges for wine made from Arkansas produce as "native wineries" under a somewhat ambiguous 2005 amendment to state law intended to apply only to on-site sales, the legal basis is questionable. Act 668 of the same session repeals the native winery transportation privilege in an effort to end litigation by leveling down (see Litigation, below) and also ends the previous right of native wineries to ship to out-of-state purchasers by "common carrier or appropriate parcel delivery service."

Direct Distribution: Act 668 of the 2007 session authorizes the state to license in-state and out-of-state "small farm wineries" as wholesalers for direct distribution, with a 250,000-gallon annual sales cap.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract for over-250,000-gallon wineries.

Litigation: On November 1, 2007, a federal judge dismissed *Beau v. Moore*, which had originally challenged discrimination in favor of native wineries that seemed clearly forbidden by *Granholm*. The court had temporarily stayed the case pending resolution of a state suit brought by the wholesalers, *Moon Dist., Inc. v. Arkansas Dept. of Finance & Admin.* The *Moon* plaintiffs sought to level down, but the case was dismissed as moot after enactment of Act 668, which apparently was intended to accomplish the same objective. However, the *Beau* plaintiffs amended their complaint to allege discrimination based on the right of up-to-250,000-gallon wineries to sell directly to Arkansans at the winery premises, which practically favors local over distant sellers. The suit did not challenge the volume cap, which did not affect the plaintiff winery. The opinion follows the "no direct shipment market" theory in upholding on-site limits against challenges based on disproportionate impact on interstate commerce; the theory holds that a plaintiff must prove there was trade in wine by direct shipment as to which the out-of-state seller suffered exclusion or burdening. (It would seem to follow that if local wineries do not develop a direct shipment market and *de facto* discrimination against out-of-state wineries successfully deters them from developing a market in that state, no constitutional challenge could occur.)

California

Winery Direct Shipment Basics: A winery registered as out-of-state shipper ($10 annual registration fee for applicants with no state license other than the required Type 82 out-of-state shipper's permit) and as payer of state business taxes (annual reporting required) may ship to consumers without volume limits, subject to $0.20/gal. excise and 7.25% use tax and posting a $500 interim tax bond. A less useful alternative allows transportation from any U.S. location of up to one quart per year, either accompanying an adult passenger on board a chartered airplane on a flight entirely within the U.S. or shipped directly if the purchaser bought the wine at the winery. Winery shipper privileges are not limited to reciprocal states, but there is a reciprocal provision in the new law for shipments by retailers (see Litigation, below) and by individuals, and an older reciprocal provision for donations of wine to nonprofit tastings.

Litigation: A *Granholm*-based retailer suit, *Knightsbridge Wine Shoppe, LTD v. Jolly*, filed 26 April 2006 in the Northern District federal court, produced an agreement with the state through 2008 similar to the interim result in Texas, permitting out-of-state retailers delivery privileges equivalent to California retailers, without respect to reciprocity. On 5 January 2009, the parties agreed to dismissal, essentially on the grounds that the state as a matter of policy was not enforcing location-discriminatory laws. An earlier case, *Coulombe v. Jolly*, had been dismissed on the grounds the plaintiffs lacked standing to sue because they had not adopted a concrete wine sales plan that would violate the challenged statutes; the follow-on case, *Longstreet Delicatessen, Fine Wines & Specialty Coffees, L.L.C. v. Jolly*, was dismissed on similar grounds in September 2007.

Colorado

Winery Direct Shipment Basics: A winery holding a $50 out-of-state shipper permit may ship to a "personal consumer located in Colorado," subject to $0.80/gal. excise. Monthly tax reporting and submission to jurisdiction required. The permit application is available (though a little difficult to navigate to) on-line at the Department of Revenue site.

Connecticut

Winery Direct Shipment Basics: The current winery shipper's permit replaces the old small winery shipper's permit, continuing the $250 fee for up-to-100,000-gallon annual producers. Licensees consent to state jurisdiction and tax audits. Form "REG-1 Business Taxes Registration" is on-line at www.ct.gov/drs/lib/drs/forms/2006forms/applications/reg-1.pdf. Descriptions of other required forms are at www.ct.gov/drs/cwp/view.asp?a=1454&q=306678&drsPNavCtr=|41930|. The code also contemplates qualifying to do business in the state ($275 initial registration fee and $300/yr. maintenance fee), but the Liquor Control Division is not requiring shippers to hold wholesale distributor or retail seller licenses or file monthly tax returns as a wholesaler or retailer, as might be suggested by ambiguous provisions in the current statute. Case content markings and adult signature are required, with criminal penalties for noncompliance. The licensee must conspicuously display its shipper's permit number or numbers in its on-line advertising. Shipment is limited to wine produced on the premises described in the shipper's permit, in quantities of up to five gallons (25 x 750-

ml bottles, plus a couple of miniatures, a volumetric holdover from the old law) of a registered brand, via holder of a $1000 in-state transporter's permit (which is not limited to common carriers, see www.ct.gov/dcp/lib/dcp/pdf/forms/cpltr-01.pdf), within any two-month period to consumer at an address not within a dry township, subject to sales and excise taxes. Brand registration costs $100, and each varietal or proprietary product is a separate brand; see www.ct.gov/dcp/lib/dcp/pdf/liquor/cplbd.pdf. The $1000 general "out-of-state shipper's permit" and $250 former "out-of-state small winery shipper's permit," originally required to ship to wholesalers and already held by some wineries, apparently now authorize shipment to consumers.

On-site sales: At last report, carriers were shipping wine purchased in person by the consignee, up to two cases per month. The legal basis for wineries that do not hold a state shipper's license is murky, as the federal direct shipment statute applies only to wine the purchaser could have imported personally under the laws of the state, and Connecticut law appears to limit such importations to five gallons per 365-day period.

Direct Distribution: Out-of-state wineries producing up to 100,000 gallons annually from at least 25% their own fruit now have the privilege, formerly limited to Connecticut "farm" wineries, to sell and ship directly to retailers in sizes not to exceed 56 liters per container.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract. Connecticut's general franchise law (the real franchise statute, with substantial requirements like those applicable to McDonald's, not the pseudo-franchise wholesaler protection legislation often called "franchise" in the wine industry) is of unusually broad application and may apply to ordinary sales through wholesalers.

Legislation: On May 20, 2009, Governor M. Jodi Rell signed SB 312, which allows holders of a manufacturer's permit for cider to ship to in-state and out-of-state consumers. The new law also amends certain wine festival provisions and the hours of sales and sampling for manufacturers of wine. Other shipment bills died with *sine die* adjournment on June 3, 2009: SB 322 would have changed brand registration to make direct shipping easier for out-of-state wineries; SB 516 would have allowed in-state wineries to deliver the same amount as out-of-state wineries.

Delaware

On-site Sales: Under the federal direct shipment statute and Delaware personal importation law, a winery may ship up to 1 liter per day (4 liters if from American Samoa, Guam, or American Virgin Islands) from anywhere in the state where it is located, to any person in Delaware at least 21 years old, not mentally ill or deficient, who does not habitually drink alcohol to excess and is not interdicted by the state, adult signature required, if the wine was purchased while the purchaser was physically present at the selling winery, for any purpose other than resale, or any amount for consumption solely by the importing person or that person's family or guests. Personal importations are subject to excise tax; the state directs importing individuals to notify the Department of Revenue by email to William.Kirby@state.de.us.

Litigation: In the federal suit, *Hurley v. Minner*, a challenge to restrictions on direct shipment was dismissed upon the court's 2006 finding that because the state required consumers to pick up Delaware wine at the winery, the special order provisions requiring them to pick up out-of-state wine at a local retail licensee (see “Three-tier Distribution,” below) was permissible under *Granholm*. A direct distribution count in the complaint was dismissed by agreement on August 25, 2006 because level-down legislation rendered it moot. On April 12, 2007, the court granted the plaintiffs’ motion for reconsideration of its previous dismissal order, but the suit was finally dismissed by stipulation on January 8, 2008.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract between wineries and wholesalers. A special order provision appears to allow a consumer to initiate a shipment of wine from an out-of-state winery that holds a “Direct Shipper License” (not to be confused with the proposed “Wine Direct Shipper License”) for successive delivery to a wholesaler and a retailer and pickup by the purchaser.

Legislation: The Delaware Legislature adjourned *sine die* on June 30, 2009 without action on HB 180, which would have made any business licensed in any U.S. state as a wine producer eligible to hold a “Wine Direct Shipper License,” permitting shipment via a permit-holding carrier of up to 24 cases of wine annually directly to any resident of Delaware at least 21 years old for personal use and not for resale.

District of Columbia

Winery Direct Shipment Basics: Wineries may ship directly to any consumer of age to purchase, by public or common carriers, up to one case per month per recipient.

On-site Sales: Under federal direct shipment statute, a winery may also ship from anywhere in the state where it is located, to a consumer (adult signature required) in the District, up to one gallon purchased while the purchaser was physically present at the selling winery.

Direct Distribution: Wineries may ship directly to retailers who hold importation permits for the brand, which the D.C. Alcoholic Beverage Control Board issues only if it is satisfied that the brand is not obtainable by the licensee from a wholesaler in the District in sufficient quantity to reasonably satisfy the immediate needs of the licensee. The retailer must pay excise tax.

Florida

Winery Direct Shipment Basics: An example of law-making by litigation, Florida has been operating under policy directives of the Department of Business & Professional Regulation, necessitated by the August 5, 2005 federal district court order in *Bainbridge v. Turner*. The court ruled, with the state’s consent, that prohibition of direct shipment was unconstitutional under *Granholm* for discriminating in favor of in-state wineries and refused the wholesalers’ request to cure discrimination by invalidating the in-state direct shipment statute. The case was dismissed by stipulation on October 18, 2005, apparently having achieved its purpose. The policy announced February 16, 2006 allows shipment directly to consumers via common carrier, with monthly payment of tax. The court did not specify procedures for payment of the $2.25/gal. excise, the 6% sales tax, or other potential regulatory issues or enjoin the state from enforcing penalties for non-payment of tax. In an informal discussion in September 2005, the Department’s attorney said that express companies such as FedEx and UPS are considered exempt as common carriers from vehicle permit requirements and may deliver for manufacturers (notwithstanding an earlier attorney general opinion to the contrary). Shortly thereafter, the Department began issuing periodic reports that new administrative rules were in process, but they never appeared. Subsequently, it concluded that legislation is required. In mid-2007 the Department removed its web site description of acceptable direct shipment procedure under *Bainbridge*, an accommodation it described as "not legally binding." That action caused concern that the Department would bow to wholesaler pressure to discontinue the current arrangement (for example, by leveling down in administrative rule-making), following the legislature's failure to act. The Department of Business & Professional Regulation Audit Bureau originally appeared to support a restrictive policy by declaring in an April 2007 press release that it lacks statutory authority to track, audit and collect taxes on direct wine shipments from outside the state (a debatable proposition), but the governor reportedly directed maintenance of the status quo. Efforts in each session to formalize shipping rules have failed to pass a bill, leaving the informal direct shipment privilege in place.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Florida, up to one gallon per shipment.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Legislation: Two direct-to-consumer measures for the 2009 legislative session died in committees upon final adjournment on May 2. Senate Bill 764/HB 245 would have required an annual $250 fee, a $1,000 to $5000 surety bond, a 250,000-gallon annual production cap and a 12-case/yr per consumer shipping limit. Senate Bill 272/HB 251 had no production or shipment limits, and lower license and bond fees at $100 and $500-$1000, respectively.

Georgia

Winery Direct Shipment Basics: A winery holding a special order shipping license may ship up to 12 cases of brand-registered wine to a state resident, subject to $1.51 state excise and 4% sales tax and to an age verification requirement that in effect mandates an on-line system (see "Age & Identity Verification Systems" under ***Notes Applicable to Multiple States***, above), without bond or territorial designation; additional sales through local distributors are optional.

On-site Sales: State law permits shipment directly to consumer who has placed order in person at winery premises, free of excise tax, not to exceed five cases per order.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Hawaii

Winery Direct Shipment Basics: The islands are separate counties with their own regulatory agencies, which have historically differed somewhat in procedures. A winery holding a county Direct Wine Shipper Permit may ship up to six cases per household per year to consumers in that county (although there have been inconsistent interpretations regarding a possible state maximum), subject to excise taxes. Tax payment requires a General Excise Tax License, which is issued by the Department of Taxation after the winery files a Basic Business Application. The current permit procedures, which became mandatory on January 1, 2007, have not thus far produced complete consistency. Maui County requires a copy of the federal basic permit; Kauai and Hawaii Counties require a copy of the state winery license. Permits for Maui and Hawaii Counties cost $48; Honolulu County's permit costs $120. All counties require excise tax registration on form BB-1. A preexisting provision independently authorizes shipment directly to a consumer holding an importation permit from a county liquor commission, not to exceed one 5-gallon shipment per household per calendar year (plus unsolicited gifts not exceeding 3.2 gallons each), for use of the permittee or permittee's family. Importation permit applicants must demonstrate to the issuing liquor commission that the product is otherwise unavailable in the state or pay an additional fee equivalent to the excise tax.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Hawaii, up to one gallon per shipment.

Idaho

Winery Direct Shipment Basics: A winery holding a $50 shipping permit ($1000 tax bond required) may ship up to 24 cases annually to a resident consumer, subject to sales and excise taxes and a somewhat burdensome annual shipment report specifying invoice number, order type and sale type, purchase date and ship date, buyer's name and address, shipped-to name and address, date of birth for buyer and for recipient, brand and product description, alcohol percentage, number of bottles, volume per bottle, total price of wine and tax charged, and invoice total. Separate sales tax form is required for sales made to Nez Perce County residents. A permit is available to retailers in reciprocal states, but because the restriction is probably invalid under *Granholm*, that arrangement does not appear reliable for the long run.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Illinois

Winery Direct Shipment Basics: Wineries may obtain a permit, with sliding scale fees from $150 to $1000, based on capacity, authorizing direct shipment of up to 12 cases per year to a single customer. See ShipCompliant's Illinois posting and Illinois checklist for details.

On-site Sales: A question exists whether Illinois has any a general prohibition on importation by consumers, as the statutory prohibition appears to apply only to shipment or transportation initiated from outside the state. To the extent residents may themselves lawfully import wine for personal use (an unsettled matter), wineries could in theory ship in-person purchases to them under the federal direct shipment law, independently of the direct shipment statute. According to a 1974 Attorney General Opinion, the Commission lacks jurisdiction over importations by residents for their personal use, although by unpublished policy, personal importation of over 1 gallon per year of wine not authorized by the direct shipment statutes without written permission of Liquor Control Commission would be deemed not for personal use.

Direct Distribution: The direct shipment permit also allows direct distribution of up to 5,000 gallons per year by under-25,000-gallon annual production wineries.

Three-tier Distribution: The state follows the Uniform Commercial Code, but requires registration of distributors.

Litigation: Out-of-state retailers have threatened suit under *Granholm* because of their ineligibility for a permit to ship to consumers under the new direct shipment law. A 2006 state court suit *Raimondi v. Koppel*, in which an Italian winery apparently seeks to level down by enjoining in-state wineries from direct distribution, is based on the Illinois Constitution's equal protection clause and prohibition of special interest legislation, rather than *Granholm*. No substantive rulings are reported.

Legislation: House Bill 2462, which would license retailers for direct shipment, was referred for the second time to the Rules Committee on 13 March 2009. The legislature adjourned on 31 May 2009 and reportedly reconvened in January 2010. Reportedly, the bill will have to be reintroduced for consideration in the reconvened session.

Indiana

Winery Direct Shipment Basics: Out-of-state wineries that have not distributed through an Indiana wholesaler in the past 120 days or produced annually more than 100,000 gallons can apply for a direct wine seller's permit. Wineries that are subsidiaries, parents, or affiliates of other wineries (or of brewers or distillers) are ineligible. Permit holders may ship a total of up to 3,000 cases per year per winery to consumers in the state *who have previously purchased on-site*, not to exceed 24 cases in a calendar year to any single customer *from all wineries*, but appear to become ineligible to maintain the permit if they sell to an Indiana wholesaler after issuance. According to the statute, wineries that hold a "license to wholesale" issued by any jurisdiction, *i.e.*, most wineries, assuming a winery license allowing direct distribution is a license to wholesale, are ineligible for the permit, but that provision was held invalid in the *Baude* case (see Litigation, below). On October 15, 2007, the Commission announced it would not take action against a winery whose shipment puts a consumer over the aggregate limit if (1) the holder of the direct wine seller's permit has not directly shipped in excess of 216 liters within the calendar year to the particular Indiana consumer; (2) the direct wine seller has no actual knowledge that the particular consumer has received in excess of 216 liters within the calendar year; and (3) at the time of the sale transaction, the consumer represented to the direct wine seller that the sale would not result in the consumer's receiving in excess of 216 liters in the calendar year.

On-site Sales: Under the federal direct shipment statute, a winery may ship from anywhere in the state where it is located to a consumer (adult signature required) in Indiana up to one quart of wine purchased while the purchaser was physically present at the selling winery. On-site sale of a larger quantity would require a shipper permit; at least one on-site sale must precede any direct shipment of an order not placed in person. (The law is unclear on whether the sale must be of wine, but the in-person age verification requirement applies, so wineries should record particulars of ID-checking, regardless of what was purchased.)

Retailer Direct Shipment: Reportedly, Department of Revenue authorities have said informally that out-of-state wine stores can ship on the same terms as out-of-state wineries if they follow the same rules, but the statute appears to require that a shipping retailer also manufacture wine, and there is no reported instance of the state Alcohol & Tobacco Commission’s issuing a permit to a non-producing retailer.

Direct Distribution: A “micro-wholesaler” (up to 12,000 gallons annual sales) permit ($100/yr.) has no express location requirement. In an informal opinion, the state regulatory agency indicated it would issue the license to an out-of-state winery that either has never previously held a wine wholesaler's permit and anticipates selling less than 12,000 gallons of wine and brandy in a year or, if it previously held a wine wholesaler's permit, certifies that it sold less than that amount in the previous year. By statute, the wholesale operation can be on farm winery premises and can use goods and services provided by the farm winery, suggesting that wineries licensed as micro-wholesalers will be subject to the 500,000-gallon cap on the total of direct shipment and direct distribution sales in the state.

Litigation: On 18 May 2009, the Supreme Court declined to review the 7 August 2008 Seventh Circuit Court of Appeals decision in the federal suit, *Baude v. Heath*, which declared unconstitutional one aspect of the Indiana statute, but upheld the on-site initial purchase requirement. The invalid portion of the statute rendered most out-of-state wineries ineligible for the “direct wine seller’s permit,” which the statute would have limited to in-state wineries and to out-of-state wineries in the few states that do not grant them local wholesaling privileges. The case does not address the recent statutory change disqualifying wineries with Indiana wholesaler relationships from direct shipment; a similar Massachusetts provision that fell disproportionately on out-of-state wineries was condemned in *Family Winemakers of California v. Jenkins*. In an earlier Indiana suit, *Bridenbaugh v. Freeman-Wilson*, brought on grounds similar to *Baude v. Heath*, the same appellate judge sustained then-current state law on the theory it requires “every drop” of wine, without discrimination between in-state and out-of-state shippers, to go through the three-tier system, although it is questionable whether that was ever the case. The lower court in *Baude v. Heath* specifically found that Indiana law allows in-state wineries to sell directly to consumers and retailers, thereby discriminating against interstate commerce. On May 20, 2005, the Commission warned Indiana wineries by letter that in its view instate shipment to consumers is prohibited, but on November 15, 2005, nine Indiana wineries filed *Thomas Family Winery v. Heath*, a state suit challenging that interpretation, and on November 23, 2005, the state court enjoined enforcement of the putative prohibition, pending resolution of the issue by legislative action. The preliminary injunction supported local direct shipment only until April 6, 2006, and appears to have been supplanted by the current statute, which was only partly invalidated in *Baude v. Heath* (see “Winery Direct Shipment Basics,” above). *Thomas Family Winery* was dismissed as part of the compromise with the wholesalers that made that legislation possible, although it is difficult to ascertain what the wineries gained thereby. Indiana has a history of resisting Commerce Clause claims. In 2003, the Alcoholic Beverage Commission, which was reportedly considering whether to permit “farm wineries” (producing under 500,000 gallons and using Indiana fruit) to exercise their on-site sales privilege by shipping to consumers who purchase by electronic means or mail, put the project on hold to await the decision in *Granholm.* The Commission's public statements at the time implied it would not allow direct shipment for any winery unless *Granholm* permitted extending the privilege only to in-state wineries, which of course did not occur.

Iowa

Winery Direct Shipment Basics: A winery licensed in a state that affords Iowa wineries an "equal reciprocal shipping privilege" may ship eighteen liters per month to an individual for personal use by common carrier. The right of wineries in non-reciprocal states to ship to Iowa consumers is unclear, and carrier policies at last report were inconsistent, permitting shipments to fulfill all orders from some non-reciprocal states and limiting others to on-site only. Reports of state policy on reconciling the conflicting requirements of the state statute and the Commerce Clause have been inconclusive.

Litigation: On 12 January 2010, winery and consumer plaintiffs filed suit against the regulatory administrator, alleging that the reciprocal shipment law discriminates against wineries in non-reciprocal states relative to wineries in reciprocal states, including the local wineries in Iowa. (See "Reciprocity Rethought" in the introductory materials, above.) The suit seeks an injunction against withholding from the plaintiff winery the same privileges as are afforded wineries in reciprocal states; if granted, the injunction conceivably could produce a workable *modus vivendi* without legislation, as occurred in Florida. Reportedly, a hearing took place on 1 February 2010, to review options; the defendant administrator is already on record as favoring a license law and wants "to be sure it's constitutional."

Kansas

Winery Direct Shipment Basics: Any wine "producer or maker" holding a federal basic permit for "manufacturing" wine may obtain a "special order shipping license" ($50 registration, $10 annual renewal) that authorizes direct shipment of 12 cases of wine per year to a Kansas consumer for "personal or household use" within the state. The statute bristles with unusual qualifications and specifications on matters such as delivery charges and state tax calculation. Age verification requirements practically mandate use of an electronic service (see "Age & Identify Verification" under ***Notes Applicable to Multiple States***, above). Volume-based excise tax returns are annual, but other state taxes may impose different requirements by regulation. It is unclear whether employees who communicate with direct shipment customers must hold the permit required of those who deal with Kansas wholesalers (see Three-tier Distribution, below).

On-site Sales: All wineries may ship wine directly to consumers at least 21 years old who made the purchase at the winery for personal consumption, subject to excise tax, annual reporting of shipment, and consent to tax audits.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract. However, wine shipped under the pre-July 2009 indirect consumer shipment statute is not sold to the wholesaler or retailer and therefore may not subject the shipping winery to special supplier-wholesaler legislation. Wineries should obtain legal advice before shipping to a retailer under the pre-July 2009 system and before shipping to a wholesaler under any circumstances. The state has reportedly begun requiring all winery employees who communicate in any way with a purchasing Kansas wholesaler to hold a $10/yr. permit specified by statute for anyone "act[ing] as a salesperson … or … taking or soliciting … orders for the sale of, alcoholic liquor."

Litigation: Note that a previous version of this release erroneously listed here the recent Iowa litigation reported in the notes for that state, above.

Kentucky

Winery Direct Shipment Basics: Out-of-state and in-state wineries holding "small farm winery" licenses ($100/yr.), which are limited to producers of up to 50,000 gallons in any calendar year, may ship to consumers by licensed common carrier. Under a federal district court ruling of December 26, 2006, the state cannot enforce its on-site requirement, although the two-case "per visit" limit was not invalidated. At last report, carriers were providing only intrastate shipments of on-site sales.

Direct Distribution: The state has revoked self-distribution by small farm wineries, presumably to avert a *Costco* challenge to prohibition on direct distribution from outside the state. The current law creates a "small farm winery wholesaler" license, but it cannot be held by a small farm winery.

Three-tier Distribution: The state will subsidize no-markup distribution of small farm winery products, provided the winery can find a Kentucky wholesaler willing to participate in the program.

Litigation: On December 24, 2008 the Sixth Circuit Court of Appeals in *Cherry Hill Vineyards, LLC v. Lilly* (formerly *Cherry Hill Vineyards, LLC v. Hudgins* and sometimes styled *Huber Winery v. Hudgins*) affirmed the federal district court's judgment entered two years earlier, enjoining the state from enforcing the on-site-only requirement of its direct shipment law, which permits all wineries meeting a 50,000-gallon production cap to hold Kentucky "small farm winery" licenses. The ruling has broad significance because it challenges illusory equality that conceals *de facto* discrimination and recognizes that, because wines from different regions are distinct, availability of local wines does not cure practical difficulty in exercise of consumers' right of access to distant producers under *Granholm*. The court, however, upheld other aspects of the new law. The winery and consumer plaintiffs had also challenged two restrictions on small farm winery licensees, (1) that the license is available only to wineries producing no more than 50,000 gallons annually, and (2) that wineries may ship no more than two cases "per visit." The court decided both restrictions were constitutionally permissible because the inequities arose from "mere geographic happenstance," but did not describe how to find the line between happenstance and an impermissibly protectionist system in a *de facto* discrimination case.

Louisiana

Winery Direct Shipment Basics: A producing winery holding a shipping permit ($150 "annual tax") and having no relationship with any Louisiana wholesaler may ship up to 60 bottles (any size) per year to a consumer, routing a copy of a detailed invoice to the state, subject to a volume limitation of forty-eight 750-*ml* bottles per year to any single "household address." The shipping winery must report monthly the number of cases shipped into the state and pay the excise and sales taxes for all wine shipped.

On-site Sales: If the shipping winery is a direct or indirect party to an agreement that granted a Louisiana wholesaler the right to purchase and sell any of its wines, its sale of any wine to be shipped to the consumer in the state must have been "perfected" (which may or may not mean an in-person purchase) on the "domicile" (usually, but not necessarily, the production premises) of the winery.

Direct Distribution: The "Wine Producers Act" eliminated direct distribution by in-state wineries, to protect the prohibition on sales to retailers by out-of-state wineries against challenge under *Granholm.* In December 2006, the Louisiana Office of Alcohol & Tobacco Control obtained a consent decree, enjoining a New Jersey tobacco wholesale operation from distributing tobacco products directly to retail outlets in Louisiana. The same agency has enforcement responsibility for the current wine law.

Maine

Winery Direct Shipment Basics: A winery holding the Maine "wine direct shipper license" may ship wine of its own production other than coolers by common carrier directly to consumers, subject to a volume limit of 12 cases (each up to 9 liters) in a calendar year to the same address, state excise and "premium" taxes, and quarterly reporting of shipments. Minimum bottle size is 750 *ml*. The Liquor Licensing & Tax Division has set the application fee for the license at the statutory maximum of $200; to use the license, an additional $100 registration fee is required. Annual renewal is $50. Registration involves submission to state jurisdiction for taxation and other enforcement, and the license requires providing copies of any records the state requests with 10 days of request. Quarterly excise tax and monthly sales tax returns are required.

On-site Sales: Under the federal direct shipment statute, a winery may, without holding a Maine license, ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Maine, up to one gallon per shipment.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: The failed attempt to force direct shipment by litigation in *Cherry Hill Vineyard v. Baldacci* has been rendered moot by 2009 legislation. The October 11, 2007 First Circuit Court of Appeals opinion affirming the March 5, 2007 federal district court judgment in favor of the state may be more notable for use (and misuse) of uncommon terms like "perscrutation" and "limn" than for rigor of analysis. The decision is based on the grounds that the face-to-face restriction applies equally to in-state and out-of-state small wineries, both of which can be licensed in Maine, and that the plaintiffs failed to present evidence of any off-site order local market that is available to in-state wineries but denied to out-of-state wineries. The plaintiffs' strategy (probably dictated by economic factors) of submitting the appeal on a relatively sparse agreed record prevented consideration of economic burdens resulting from facially neutral legislation.

Maryland

Three-tier Distribution: An out-of-state winery that has not held, and in which no one holding any financial interest has held, any other Maryland alcoholic beverage license or permit within the past 2 years may hold a $10 "direct wine seller" permit, to sell wine of which it is the brand owner, U.S. importer, or designated agent of the brand owner, and which is not being distributed by a Maryland wholesaler and was not distributed in the state during the two years preceding the winery's permit application, to residents for personal consumption, subject to an annual sales limit of 900 liters for all Maryland residents and 108 liters for any single Maryland resident. An annual excise tax return is required. Direct shipment is prohibited, as the wine must be delivered, freight prepaid, to a Maryland wholesaler, for redelivery to a Maryland retailer, before reaching the purchaser, who must pay, if asked by the delivering licensees, a fee up to $14 per shipment. For conventional sales through wholesalers, the state has not enacted systematic restraints on freedom of contract, but some state statutes are ambiguous regarding possible effect on supplier-wholesaler relations.

Direct Distribution: Holder of Nonresident Winery Permit ($50, available only to licensed wineries producing no more than 27,500 gallons annually) may ship directly to restaurants, off-sale retailers, and certain other permit holders.

Legislation: Direct shipment advocates are repeating their perennial attempt to extend direct shipment privileges to Maryland wineries and to out-of-state wineries under shipper permits, with growing editorial support in the regional press. Although in a 1 December 2009 public forum, the senate president and house speaker suggested the measure lacked momentum, at a February 2010 press conference the most recent bill was presented as sponsored by a majority of legislators in both houses (which is not necessarily a majority in the key committees where previous bills have died).

Massachusetts

Winery Direct Shipment Basics: According to statute, in-state and out-of-state wineries may ship to consumers under a $100 shipment license that is available to applicants producing 30,000 gallons or more annually only if they have been free of contractual relationships with Massachusetts wholesalers during the preceding six months. However, the state has been enjoined from applying the volume cap, leaving wineries of all sizes eligible for the license whether or not they also sell through Massachusetts wholesalers (see Litigation, below.) At last report, major carriers continued to make only intra-state deliveries.

Direct Distribution: An up-to-30,000 gallon winery holding the shipment license may sell to Massachusetts retailers, with certain limitations (*e.g.*, no more than 250 cases per year to any off-sale account).

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: On October 17, 2005, the federal district court entered judgment for plaintiffs in a post-*Granholm* federal suit, *Stonington Vineyards, Inc. v. Jenkins,* overturning prohibition of direct shipment to Massachusetts consumers and retailers on grounds of discrimination against interstate commerce. The court enjoined the state from enforcing state statutes "so as to prohibit out-of-state wineries from selling and shipping wine directly to consumers and licensed retail wine sellers in the Commonwealth of Massachusetts." The state's adoption of a successor direct shipment law, replacing location discrimination with a volume cap, passed on February 15, 2006 by legislative override of the governor's veto, may have mooted the injunction, but administrative issues and validity of the volume cap remained unresolved. Filed on September 18, 2006, the *Granholm*-based federal suit, *Family Winemakers of California v. Jenkins*, challenged subjecting larger wineries, which were exclusively out-of-state, to a volume cap and to ineligibility if they also sell through wholesalers, while affording smaller wineries, a category for which all in-state wineries qualified, "unfettered access" to Massachusetts consumers. On December 18, 2006 the court denied the state wholesaler trade association's motion to intervene, and on May 16, 2008 it denied the state's long-pending motion to dismiss for lack of standing. On November 19, 2008 the court granted plaintiffs' motion for summary judgment and ordered the state to discontinue applying the volume cap to force larger wineries to choose between engaging wholesalers and using direct shipment. On December 18, 2008 the court entered final judgment, with an injunction in accordance with its November order. The state appealed to the First Circuit Court of Appeals, and trade associations of wholesalers and wineries filed amicus briefs, but no stay of the lower court judgment was sought. The Court of Appeals affirmed the district court decision on 14 January 2010, leaving in place the injunction against withholding direct shipment privileges from over-cap producers or requiring them to choose between direct shipment and sales to wholesalers. The case is discussed in more detail under "Volume Caps" in the introductory material, above.

Legislation: Senate Bill 176, filed on 10 January 2009, would enact a conventional direct shipment licensing law without a volume cap. House Bill 317, filed three days later, has similar provisions and is in the Joint Committee on Consumer Protection & Professional Licensure. The legislature is concluding the first year of its two year session, which began in January 2009.

Michigan

Winery Direct Shipment Basics: After several postponements, Michigan, a losing party in *Granholm*, produced what might be termed a grudging acceptance statute in purported compliance with the Supreme Court decision. A winery holding a Direct Shipper license and registered with the state Department of Treasury may ship to consumers in the state. Restrictions include a 1500-case annual limit per winery or group of commonly managed wineries, a $100 annual license for out-of-state wineries, quarterly excise tax returns with shipment history details, both an underage delivery warning and a special label on the carton with the license number, a requirement to use an age-verification specialist approved by the Commission or receive a faxed copy of the purchaser's driver's license, a requirement to retain transaction records, and consent to state jurisdiction and tax audits. Senders of email that offers wine or contains a link to a site offering wine must comply with 2005 Public Act 241, which provides penalties for email sent to an underage recipient whose address is on a state registry. The state fee for checking winery email lists against the registry is $0.007 per address.

Retailer Direct Shipment: In a spectacular display of fast-tracked special interest legislation, HB 6644 was introduced on 12 November 2008 in response to the *Siesta*

Village decision (see Litigation, below) and signed by the governor on 9 January 2009. The statute appears to preserve delivery privileges of local retailers by allowing retailer direct shipment only if delivery is by the retailer's own employee (except for recipients on islands inaccessible by motor vehicles). Because exclusion of contract carriers clearly burdens out-of-state retailers more than local retailers, the feature invites *Granholm*-based litigation.

On-site Winery Sales: Under federal direct shipment statute, wineries may ship from anywhere in the state where selling winery is located to a consumer (adult signature required) in Michigan, under-21% wine purchased for personal use while the purchaser was physically present at the selling winery, up to 312 oz. (about a case plus a split) per importation. An oddity of state law also allows on-site purchasers at U.S. wineries who, before flying to Michigan, go abroad for more than 48 hours to ship, at intervals of more than 30 days between trips, any amount federally permitted as personal importation (not, apparently, limited to the duty-free two liters). Federal law imposes no specific volume limit on duty-paid personal importations if the quantity is consistent with not "engaging in the business" of importing. Perhaps some enterprising high-margin winery will offer a two-day side trip to Puerto Vallarta or Victoria as part of its VIP case buyer program.

Direct Distribution: The current law leaves direct sales to retailers in place only for in-state wineries, unless a court finds the discrimination unconstitutional, in which case it repeals the in-state privilege.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: On September 30, 2008, the federal district court in *Siesta Village Market, LLC v. Granholm* ordered Michigan to give out-of-state retailers access to Michigan consumers to whom local retailers could deliver wine, but the parties agreed to a stay of the ruling pending appeal to the Sixth Circuit. The trial court's reasoning closely parallels that of *Granholm v. Heald*, extending the "level playing field" concept from wineries to non-producing retailers. However, opponents managed to obtain a legislative change (see "Retail Direct Shipment," above) while the appeal was pending, to render the decision moot by leveling down if *Granholm* applies. By agreement filed 18 May 2009, the parties consented to returning the case to the district court for relief from the judgment, in effect setting aside the original injunction (which had never taken effect) and ending the case.

Minnesota

Winery Direct Shipment Basics: Out-of-state wineries may ship up to two cases per year to a consumer. By statute, the sales are not deemed to occur in Minnesota; winery sales terms locating the sale in the seller's state should therefore be effective. A gross receipts tax of 2.5% on sales by "liquor retailers" became effective January 1, 2006, but is of uncertain application to out-of-state sellers and, even if applicable, allows credit for home state gross receipts taxes. In May 2009, the state sent letters to directly shipping wineries, referring to a monthly shipment reporting requirement that appears to apply only to wineries shipping to Minnesota wholesalers, but at last report the matter had not been clarified.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: On April 3, 2006 the court in *Crockett v. Campion* entered a consent decree that wineries have the a 1st and 14th Amendment right "to engage in truthful, non-misleading advertising and solicitation of direct sales and shipments of wine to Minnesotan consumers" and to "initiate and/or accept online orders for sales and shipments of wine placed by Minnesotan consumers via the Internet." For the text of the decree, see www.dps.state.mn.us/alcgamb/alcgamb_files/show_case_doc.pdf.

Mississippi

Winery Direct Shipment Basics: Prohibited. The state has expressly restricted in-state winery consumer sales to the winery location, to avert *Granholm* arguments based on a reading of state law that would permit in-state direct shipment.

Three-tier Distribution: Importation and distribution is a state monopoly.

Missouri

Winery Direct Shipment Basics: Wineries may obtain a permit to ship 2 cases per month to a consumer, subject to excise tax. A permit with similar privileges is available to retailers in states that have entered into reciprocal agreements with the Missouri regulatory agency; as such agreements are condemned by *Granholm*, it seems unlikely the arrangement will remain in force long term. The carrier must hold a separate permit to deliver to a consumer.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: A *Granholm*-based federal suit, *Burack v. Lobdell* (formerly titled *A. Rafanelli Winery & Vineyards, LP v. Lobdell*), challenging the pre-August 8, 2007 reciprocal law, was voluntarily dismissed on October 2, 2007.

Montana

Winery Direct Shipment Basics: A winery registered with Montana as a "foreign winery" may ship directly to a consumer holding a "connoisseur's" permit, using a shipping label provided by customer, not to exceed 12 cases per year to a single customer and 60 cases per year for all recipients in the state. The state requires listing distributors, if any, and consumer customers if there are no distributors, on the registration form, but reportedly does not regulate allocation of sales between direct shipment and three-tier, except for imposing the 60-case annual limit on the former. Complicated limits and criminal penalties for non-willful violations by wineries or brewers may make the permit impractical; FedEx does not show the state as a permissible destination for off-site sales.

On-site Sales: The federal direct shipment statute authorizes wineries to ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required), to the extent the consumer could lawfully have personally imported the wine. Montana does not prohibit *possession* of up to 3 gallons of wine personally imported without going through the above direct shipment procedure. However, there is no statutory provision for *importing* the wine, and in October 2009 the regulatory agency ruled that personal importation is illegal, rendering the federal statute inapplicable.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Direct Distribution: Winery licenses are not location-restricted and include the right to self-distribute. Licensed out-of-state wineries that have reached their 60-case aggregate annual limit under connoisseur permits may route wine to their Montana connoisseurs through Montana retailers.

Nebraska

Winery Direct Shipment Basics: Wineries holding S-1 shipper's licenses ($500 annual fee) may ship directly to consumers for personal use of recipient or recipient's family or guests, not to exceed 9 liters per month to any one recipient (or possibly family), subject to excise tax.

Three-tier Distribution: State statutory restraints on freedom of contract may be vulnerable to constitutional challenge.

Nevada

Winery Direct Shipment Basics: With some peculiar qualifications, a winery may ship wine "for household or personal use" directly to a consumer who receives no more than 12 cases per year from all winery sources combined. It is unclear whether wineries may safely rely on customer representations of their total annual received shipments. The shipping winery must hold a shipping license ($50/yr.) and pay an importer license fee if it ships 200 or more cases per year. Wineries shipping 25 cases or more in any fiscal year must designate a Nevada importer. Although the statute does not require shipping wineries to sell any wine to the importer, supplier-importer relationships raise significant legal issues; consultation with counsel is recommended before exceeding the 25-case level.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Nevada, not to exceed 1 gallon per month or any federally duty-free amount, tax-free, limited to household or personal use.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

New Hampshire

Winery Direct Shipment Basics: A winery holding a "direct shipper" permit may ship to consumers via licensed carriers, limited to 60 bottles (one liter or less each) to any one customer in a calendar year. Direct shipper licensees must file monthly reports and are required to offer to the commission any direct sale items that have been listed with the commission within the preceding 2 months or of which more than 100 cases have been shipped into the state.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in New Hampshire, up to three quarts per importation (3 gallons with permit from State Liquor Commission).

Three-tier Distribution: Importation is a state monopoly.

Legislation: Senate Bill 181 would allow manufacturers, importers, wholesalers, and retailers to ship directly to consumers, subject to a 10% sales fee payable to the State Liquor Commission. Other provisions of the bill include those that address advertisements and corkage fees. The bill was re-referred to the Ways & Means committee on 8 April 2009 and reportedly will carry over to the 2010 session. House Bill 636, which would have created a direct shipping license for wineries, was effectively removed from consideration on 4 March 2009. The legislature reportedly reconvened on 6 January 2010.

New Jersey

Winery Direct Shipment Basics: New Jersey exhibits both an odd collection of wine importation statutes and a remarkable gap between text and practice. Theoretically, wineries may ship to consumers via a licensed beverage transporter with payment of tax, under a permit issued by Division of Alcoholic Beverage Control, but the Division refuses to issue the permits.

On-site Sales: Two provisions of state law may be relevant to application of the federal direct shipment statute. One allows personal importation in a vehicle under control of the consumer, up to 1 gallon within a 24-hour period, but only from a state allowing similar importation of alcoholic beverages purchased in New Jersey, a limitation that is questionable under *Granholm*. The other allows a consumer reentering the state to bring wine into the state under a $25 permit issued by Division of Alcoholic Beverage Control, for personal consumption, with no stated volume limit (but possibly a practical requirement that it be consistent with personal use). Each presents some uncertainty. At least one carrier accepts shipments of up to one gallon purchased in an on-site sale, but the requirement in the one-gallon statute that importation without a permit be in a vehicle under control of the consumer does not fit the federal direct shipment model, which is based on allowing shipment of wine that could otherwise be transported lawfully as airline luggage. Importation with a permit would increase the allowed volume, but does not seem commercially practical, and whether the state would issue a permit for shipment under the federal statute is presently unknown.

Direct Distribution: In response to wholesaler fears that the discrimination might result in court-mandated direct shipment, the state repealed in-state direct shipment provisions on July 14, 2004, but gave in-state wineries rights to additional sales sites that are not available to other producers.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: A June 30, 2008 leveling-down decision in the federal case, *Freeman v. McGreevey*, terminated in-state direct shipment for New Jersey wineries because it was unavailable to out-of-state wineries, upheld as non-discriminatory a requirement that both in-state and out-of-state wineries sell to consumers only from physical locations within New Jersey, and required the state to charge in-state and out-of-state wineries the same license fee for the privilege. The ruling is stayed pending the plaintiffs' appeal to the Third Circuit, where the case is entitled *Freeman v. Governor of New Jersey* and is defended by the wholesalers without participation by the state. The matter has been briefed and had been scheduled for argument on 9 September 2009, but was taken off calendar on 16 July 2009. The court has not yet set a new date for argument.

Legislation: Companion direct shipment bills SB 1810 and AB 2656 have not moved since being referred respectively to Senate Law & Public Safety & Veterans' Affairs Committee on 15 May 2008 and to Assembly Law & Public Safety Committee on 12 May 2008. The legislative session was scheduled to adjourn on 12 January 2010. The bills impose no quantity or frequency limits, require annual excise and sales tax return with payment by relatively inconvenient certified check, rather than bank draft or cashier's check, and shipment by parcel delivery service approved by the director of the Division of Taxation, subject to penalty of up to six months' incarceration for underage delivery; license fees are $50 for in-state and $100 for out-of-state wineries.

New Mexico

Winery Direct Shipment Basics: Wineries in reciprocal states may ship directly to consumers, not to exceed two cases per month for a single customer. Prohibition of shipments from other states is of questionable validity under *Granholm*. Remarkably, another state law appears to allow a consumer who is not a minor to import reasonable amounts exclusively for private use or consumption, independently of the reciprocal shipment statute, without a requirement of personal transportation.

On-site Sales: Even if the consumer importation provision noted above is limited to personal transportation, it should provide a basis for shipment under the federal direct shipment statute without the two-case limit, but carriers reportedly limit shipments to two cases for the aggregate of on-site and off-site sales.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

New York

Winery Direct Shipment Basics: Ironically, although New York was the defendant in *Swedenburg v. Kelly*, the companion case decided by the Supreme Court in *Granholm*, it "fixed" the unconstitutionality of its direct shipment ban by enacting a quasi-reciprocal law that is itself probably unconstitutional under *Granholm*. Reportedly, the legislative sponsors were aware of the flaw, but accepted it because anti-commerce legislators would not vote for the bill without it. In any event, it is the statute currently in force and allows a winery licensed and located in a state that, in the State Liquor Authority's opinion, affords New York wineries substantially equivalent privileges to obtain a New York out-of-state direct shipper's license ($125/yr.), authorizing shipment of up to 36 cases per year to a consumer for personal use, via licensed carrier, subject to state and local excise and sales taxes. (The list of qualifying states is subject to change without notice; at last report, the SLA was processing license applications from wineries in

California, North Carolina, Oregon, Texas, Virginia and Washington, a group that does not correspond to the reciprocal shipment state list because "substantial equivalence" is apparently different from reciprocity. A Washington application by a multi-facility winery reportedly resulted in separate licenses for different locations, leading to some confusion on the part of state tax authorities regarding separate versus consolidated tax reporting.) Licensees must file annual and semi-annual reports, retain records for three years, submit to state jurisdiction and taxpayer registration with permission for audits, use special case markings, verify purchaser age, and deliver only upon adult signature with photo ID. Reporting documents include Wine Manufacturer's Report (filed semi-annually with the New York State Liquor Authority), Sales and Use Tax Return (sent quarterly to the attention of the New York State Sales Tax Processing Division), and Excise Tax Payment Form (sent monthly to the attention of the New York State Alcoholic Beverages Tax Processing Unit). Carriers must maintain state licenses and undertake substantial responsibility for averting delivery to underage recipients. Administrators in some remaining reciprocal states reportedly refused shipper licenses to New York wineries on the logically reversed grounds the New York law is not truly reciprocal. (To comply with *Granholm*'s message on reciprocal shipment, they should drop their own reciprocity requirements and not worry about New York's.) They may have been influenced by the color-coded Wine Institute map at http://wi.shipcompliant.com/Home.aspx?SaleTypeID=1, which does not identify New York as reciprocal.

Advertising: With respect to advertising in New York by out-of-state direct shipment licensees, the new law does not expressly repeal the ad ban under § 109(1), but the *Swedenburg* trial court found it invalid under the First Amendment and was not reversed on that point, so the ban appears to be effectively dead, whether or not enforcement is prohibited under a current injunction.

Three-tier Distribution: The state has approved "drop shipment" from wineries to retail accounts pursuant to special Internet orders from retailers without taking the goods into the selling wholesaler's warehouse. The approved system reportedly requires automated routing of the order to an authorized wholesaler under the standard system, which includes invoicing from winery to wholesaler and from wholesaler to retailer, price posting, and label approval.

Litigation: On September 9, 2007, a federal district court upheld discrimination between in-state and out-of-state retailers in *Arnold's Wines v. Boyle*, dismissing a complaint based on *Granholm*. The Second Circuit Court of Appeals affirmed the district court decision under the name *Buy Rite, Inc. v. Boyle* on July 1, 2009. Both courts relied on *North Dakota v. U.S.*, a 1990 Supreme Court case quoted in *Granholm* to the effect that states have a right to require three-tier systems, but did not read *Granholm* to say that three-tier systems incorporating location discrimination are valid only if they serve a legitimate state objective not achievable by non-discriminatory means. The appellate decision seems to recognize that its conclusions were not compelled by precedent and constituted a choice to regard the *North Dakota* dicta as persuasive.

North Carolina

Winery Direct Shipment Basics: A winery holding the no-fee shipper permit may ship wine its has formally listed with the state to consumers via a common carrier approved by the ABC Commission, up to two cases per month to any one customer, after notification to any wholesalers that purchase the same brand. Wineries shipping over 1,000 cases to all North Carolina consumers in a calendar year (not counting cases shipped home for winery visitors) must contract for wholesale distribution with at least one North Carolina wholesaler if any of them initiates a proposal.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in North Carolina, not to exceed 50 liters (4 liters if fortified) per importation without a permit. Theoretically, a consumer with a Purchase Transportation Permit could receive a shipment of up to 100 liters (40 liters if fortified).

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

North Dakota

Winery Direct Shipment Basics: A winery or retailer that holds a $50 direct shipping permit, pays excise taxes, and files reports may ship directly to a consumer who receives no more than 27 liters of wine and spirits per month from all out-of-state sources combined, limited to personal use. Although the statute, which became effective in August 2007, is not clear on the point, it appears North Dakota may apply an annual 25,000-gallon limit on all direct sales and shipment by in-state wineries, rather than the 3-cases-per-month customer limit applicable to out-of-state wineries, raising a *Granholm* issue.

Ohio

Winery Direct Shipment Basics: Wineries that produce no more than 250,000 gallons annually and qualify for the federal small domestic producer tax credit may hold a $25 type S permit to ship wine of its own production to resident consumers, who have a household limit of 24 cases annually from all wineries, subject to tax, annual reporting to the Division of Liquor Control, and a label approval requirement costing $50 for each label. Wineries not previously qualified to ship to wholesalers must complete an S-5 registration, fee $100.

Direct Distribution: Wineries that produce no more than 250,000 gallons annually and qualify for the federal small domestic producer tax credit may hold a $25 type B-2a permit to ship wine of its own production to Ohio retailers.

Litigation: In a 2006 case arising from enforcement of a statutory ban on private importation of alcoholic beverages purchased from an out-of-state retailer, a state judge ruled that *Granholm* prevents prosecution of individuals for bringing beer purchased from an out-of-state retailer into Ohio, because of the discrimination relative to Ohio retail licensees.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Oklahoma

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Oklahoma for personal use of "the possessor, his family and guests," after payment of excise tax (except for sacramental wine), limited by administrative interpretation of "personal use" to 1 liter per importation. The state has no formal method of collecting tax except through wholesale distribution, but carriers accept on-site purchases. According to a July 2005 state attorney general's opinion, now reinforced by a federal court judgment (see Litigation, below), an on-site purchaser may ship wine from in-state wineries to the purchaser's residence, but in-state wineries may not ship to any unlicensed person anywhere.

Direct Distribution: In November 2008 voters approved State Question 743, allowing in-state and out-of-state producers of up to 10,000 gallons of wine a year to sell wine directly to retail stores and restaurants, so long as they do not sell to Oklahoma wholesalers and make the wines available equally to all state retailers.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: On November 15, 2006, the federal district court granted summary judgment in *Action Wholesale Liquors v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n* for the wholesaler plaintiffs, who sued to level down the discrimination favoring in-state wineries. State wineries had argued for sustaining the law, which appears to require leveling up or down to comply with *Granholm*. The court indicated its preference for leveling down, but stayed its ruling until June 15, 2007, to afford an opportunity for legislative repair of the law, which originated in a referendum. Because the legislature failed to act, upon expiration of the stay the court entered an injunction eliminating the in-state direct shipment privilege. The ruling invalidated Legislative Referendum 317, adopted by voters in 2000, amending the state constitution to allow direct distribution by in-state wineries only.

Oregon

Winery Direct Shipment Basics: Wineries holding a $50 "direct shipper permit" may ship up to two cases per month per individual purchaser. A $1000 bond is required to secure payment of privilege taxes.

Direct Distribution: A "wine self-distribution" permit allows out-of-state wineries to sell directly to the Commission and to licensees with license endorsements that permit receipt of directly distributed wine. See www.oregon.gov/OLCC/wine_shipping_2008.shtml.

Litigation: Oregon may have side-stepped the first court test of the *Costco* principle for wholesalers. The appeal in *Morchella Wine Cellars, LLC* from the OLCC's refusal to issue a wholesaling license to a Washington winery appears mooted, as the direct distribution option that became effective at the beginning of 2008 ostensibly provides privileges substantially identical to the wholesaling licenses available to Oregon wineries.

Pennsylvania

Winery Direct Shipment Basics: Although the major carriers have shipped only intrastate since December 12, 2006, state law appears to offer out-of-state wineries two methods for delivering wine: shipment by a "direct wine shipper" via a state liquor store of wine not otherwise available in state stores and direct shipment to the consumer by a "limited winery" (under-200,000-gallon producer). Carriers' refusal of direct shipments to Pennsylvania consumers from out-of-state wineries would presumably not apply to shipments to a government agency, but uncertainties about proper handling of wines have deterred use of the liquor store alternative. The "limited winery license," described at www.lcb.state.pa.us/plcb/cwp/view.asp?a=1327&q=548215&plcbNav=|32370|, was originally created for small Pennsylvania wines using local fruit; in a non-binding informal opinion, counsel for the Liquor Control Board said the license became available to out-of-state wineries as a response to an injunction against prohibiting direct shipment (see the *Cutner* case in Litigation, below), pending expected legislative change. The license requires a $700 application fee and a $385 annual license fee. Limited wineries pay an annual assessment to fund marketing Pennsylvania wines, $0.15 per gallon of wine sold during the calendar year; regulations are ambiguous as to whether an out-of-state licensee would pay only on wine sold in Pennsylvania, and litigation over non-beverage agricultural marketing assessments has raised doubts about constitutionality of assessing out-of-state sellers to fund state marketing programs. Limited winery bottle sizes must be at least 187.5 *ml* and (for still wine) no larger than 5 liters, and direct mail advertising is subject to regulatory approval and recipient opt-in requirements. The alternative state liquor store shipment procedure for wineries with direct shipment licenses is described at www.lcb.state.pa.us/plcb/cwp/view.asp?a=1328&q=554550&plcbNav=|32369|. It requires pickup by the purchaser, limited to wine not on sale in state stores and 9 liters per month maximum for a single consumer, subject to a $4.50 handling fee, 18% excise tax, 6% sales tax (7% for Philadelphia and Allegheny counties), and an annual report requirement. Municipalities may prohibit shipments to liquor stores within their jurisdictions by local option referendum.

Direct Distribution: The court decision allowing direct shipment to consumers also permits shipment to hotel and restaurant accounts**.**

Litigation: In Advisory Notice No. 21 (09/30/05), the Liquor Control Board ordered in-state wineries, which had enjoyed direct shipment privileges within the state, to follow the roundabout state store delivery procedure described above, beginning November 1, 2005. On November 3, 2005, local wineries responded by filing *Pennsylvania Wine Association v. Commonwealth* in state court, and on November 7, 2005 obtained a temporary restraining order against enforcement of Notice No. 21. On November 9, 2005, the federal district court in *Cutner v. Newman*, a *Granholm*-based suit challenging the discrimination that Notice No. 21 attempted to end by leveling down, granted plaintiffs judgment on the pleadings, enjoining the state from "prohibit[ing] out-of-state wineries from selling and shipping wine directly to consumers, hotels and restaurants" (but not necessarily from requiring licenses, collecting taxes, *etc.*), as long as in-state wineries "are not subject to equivalent restrictions." On November 10, 2005 the state court in *Pennsylvania Wine Association v. Commonwealth* entered a preliminary injunction against enforcement of Notice No. 21, effectively declaring local wineries free of restrictions equivalent to those on out-of-state wineries. Thus, the state court system brought state law back into conflict with *Granholm* and effectively prevented the state from leveling down administratively.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Legislation: Senate Bill 787 was referred to the Law & Justice Committee on 23 April 2009; the measure would license producers, wholesalers and retailers to ship two cases per month directly to consumers, subject to tax. House Bill 960, referred to the Liquor Control Committee on 17 March 2009, would allow direct shipment for wineries with a maximum production of 200,000 gallons. House Bill 186, which creates a direct shipping permit for wineries, retailers, and wholesalers, is in the same committee. Senate Bill 454, which creates a direct shipping permit with specific tax requirements, remains in the Law and Justice Committee. Senate Bill 487, which allows for importation of up to 256 oz. of wine for personal consumption, was re-referred to the Appropriations Committee on 16 March 2009. The legislature reportedly reconvened on 5 January 2010.

Rhode Island

On-site Sales: After payment of tax, a winery may ship directly to fill an order “for non-business purpose” personally placed by the purchaser at the producing winery’s place of business. The Division of Tax will fax authority to ship after payment of tax ($0.60/gal. excise plus 7% sales) and submittal of the wine sales invoice, which can be faxed to the Division at 401-222-6314. The state continues to enforce an informal maximum of 5 shipments per year, not to exceed 3 gallons per shipment, to any one consumer, but will sometimes allow a single first shipment of a greater quantity. Shipments to the Liquor Control Administration to fill special orders are still permitted.

Litigation: A suit challenging direct shipment prohibition was dismissed, but state law remains vulnerable to challenge under *Granholm* for discrimination in favor of Rhode Island wineries.

Legislation: House Bill 6011, to allow in-state and out-of-state wineries and retailers holding a $100 direct shipper permit to ship to Rhode Island residents in wet areas, limited to 24 cases to per individual per calendar year from each winery, was referred to the Corporations Committee. A hearing was scheduled for March 31, 2009, but the committee voted to retain it “for further study.” The legislature reportedly reconvened on 5 January 2010.

South Carolina

Winery Direct Shipment Basics: A winery holding an out-of-state shipper license ($600 per two-year license term, application at www.sctax.org/nr/rdonlyres/28a1ee91-3802-4a8b-b261-8d958efb96db/0/abl571.pdf) and has registered with the Department of Revenue ($50 fee), www.sctax.org/nr/rdonlyres/57289904-9cf6-470b-b0e5-e6c3a71654dd/0/sctc11122206.pdf, may sell and ship to consumer via state-authorized common carrier, up to 24 bottles per month for a single legal resident of state for personal use. Annual returns are required for both excise and sales taxes. The statutes seem to require a separate retailing license, but reportedly the state is not requiring it. Direct shipment does not require a wine producer certificate.

On-site Sales: The direct shipment statute probably voids a 1944 Attorney General Opinion allowing state residents to carry up to one gallon into the state for personal use, which would have opened an alternative method for in-person purchases.

Two-tier Distribution: Out-of-state wineries may ship products that are not distributed in the state to a wholesaler for resale directly to ordering consumer, with payment of taxes.

Three-tier Distribution: Although the state has not enacted statutory restraints, it may qualify freedom of contract by administrative rulings.

South Dakota

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in South Dakota for personal use, not to exceed 1 gallon per importation.

Tennessee

Direct Shipment Basics: A business engaged in making, bottling or rectifying wine and holding a federal basic permit and a Tennessee wine direct shipper license may sell and deliver by common carrier to over-21 direct purchasers in wet areas of Tennessee, subject to volume limitations of 9 liters to the same recipient in any calendar month and 27 liters in any calendar year. Licensure requires a $300 non-refundable application fee, a $150 annual license fee, and submission to state jurisdiction. Out-of-state licensees file sales and excise tax returns; as of the date of this release, there was no known exemption from monthly filing of sales tax returns, but the Commissioner of Revenue can set excise tax reporting intervals and is reported by the Wine Institute as having made them annual. The Alcoholic Beverage Commission has been authorized since 4 June 2009 to adopt regulations, and the licensing law has been in force since 1 July 2009, but as of the closing date of this release no new regulations related to direct shipment had been adopted, and provisions in old regulations inconsistent with current law had not been modified. The Wine Institute site reports that licenses are being issued and that carriers are making deliveries under the new law. Another 2009 enactment makes out-of-state wineries eligible to hold Tennessee winery licenses, which is unnecessary for importation and delivery, but which would bring the out-of-state winery under existing transportation regulations. Because previously enacted statutory restrictions on transportation apply only to quantities larger than 5 gallons, it is not clear whether regulations adopted under them, but lacking the small-shipment exemption, would apply to a two-case shipment by a Tennessee-licensed out-of-state winery.

On-site Sales: State law prohibits possession of non-sacramental wine on which excise tax has not been paid, but does not provide a means for payment of tax except through wholesale distribution. The state reportedly had not enforced existing statutes requiring all wine entering to the state to be consigned to a licensed wholesaler, allowing shipment home of on-site purchases not exceeding one gallon in reliance on another statute that forbids personal importation only in quantities exceeding that amount. However, an informal opinion of August 2009 indicated that the policy was discontinued in view of the law change on 1 July 2009. At last report, carriers were still accepting shipments home of up to 1 gallon of wine purchased in person on-site by state residents from wineries not licensed as direct shippers.

Litigation: On October 24, 2008 the Sixth Circuit Court of Appeals in *Jelovsek v. Bredesen* affirmed part of the federal district court's March 2007 judgment on the pleadings in favor of the state and wholesalers, leaving the on-site requirement in place, and remanded the case to the trial court for better development of the evidentiary record. The appellate court agreed with the trial judge that the statutes and regulations treated all wineries facially the same and did not constitute overt discrimination as was found in *Granholm* and that plaintiffs had failed to produce the evidence required to show the existence of a direct shipment market and exclusion of out-of-state wineries from it. The decision also applies to the 2006 *S.L. Thomas Family Winery* suit, which was consolidated with *Jelovsek*. On remand, the trial court stayed proceedings on 23 March 2009, to allow time for action by the legislature. After passage of a direct shipment law without an on-site requirement (see "Direct Shipment Basics," above), the intervenor Tennessee winery trade association moved on 29 May 2009 for dismissal, which the plaintiff opposes and the wholesaler intervenors support. Meanwhile, on 5 October 2009 the Supreme Court declined to grant a writ of certiorari to review the Sixth Circuit opinion. If the motions to dismiss are denied, the plaintiff presumably will be allowed to amend the complaint to take the legislative change into account.

Texas

Winery Direct Shipment Basics: A winery holding both a sales tax permit and an out-of-state winery direct shipper's permit may ship to Texas consumers anywhere in the state, via a carrier holding a Texas carrier permit, subject to (a) volume limits of 9 gallons in any calendar month and 36 gallons in any 12-month period to the same consumer, (b) proof of age, (c) state excise tax (with a quarterly return) and (d) a 35,000 gallon annual limit on sales "to ultimate consumers" (apparently on all D2C sales, not only those to consumers in Texas). The permit fee for a two-year period, including a $160 annual "surcharge," totals $470. Permit holders submit to personal jurisdiction in Texas state and federal courts and, for any proceedings by or against the Commission, to venue in Travis County. Shipper's permits are not issued to applicants that have any financial or control interests in a Texas wholesaler or retailer prohibited by state tied house law. The Alcoholic Beverage Commission provides direct shipment information at www.tabc.state.tx.us/laws/direct_shipping_of_wine_to_texas_consumers.asp, reportedly current through September 1, 2009, but for retailer D2C guidance the site simply refers the reader to the district court decision in a current lawsuit. (See Litigation, below.)

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Texas, not to exceed 3 gallons per 30-day period (1 gallon if nonresident), subject to payment of tax.

Retailer Direct Shipment:

Litigation: On January 14, 2008, the federal district court resolved eight pending motions, including motions for summary judgment by both sides, in *Siesta Village Market, LLC v. Perry* and *Wine Country Gift Baskets.Com v. Steen*, which it had consolidated with *Siesta Village* in June 2006, holding that retailers were required to hold Texas licenses and purchase their supplies from Texas-licensed wholesalers. A statutory amendment, Senate Bill 1229, had become effective September 1, 2007, reducing the delivery area of Texas package store licensees with local cartage permits to “the county.” The apparent purpose was to foil the out-of-state retailer plaintiffs’ *Granholm* argument by restricting local retailer delivery, but the in-county dispensation prevented its having that effect. The district court ruled under *Granholm* that the state was obliged to issue retail licenses to out-of-state retailers, but was silent on licensing out-of-state wholesalers, providing no guidance on the logistics of purchasing from a Texas wholesaler. On 26 January 2010, the Court of Appeals for the Fifth Circuit followed the Second Circuit *Arnold’s Wines* decision, which limits *Granholm* to the manufacturing tier, and reversed the lower court decision, holding that the Commerce Clause affords out-of-state retailers no direct shipment rights, regardless of rights held by in-state retailers.

Utah

Winery Direct Shipment Basics: There are no provisions for shipment (whether sold on-site or off-site) to an individual, and email solicitations in the state present risks. Senders of email that offers wine or contains a link to a site offering wine must comply with Title 13, Chapter 9, of the Utah Code, which provides penalties for email sent to an underage recipient whose address is on a state registry. Consumers can request the Department of Alcoholic Beverage Control to special-order wines that are not available in the state stores from registered vendors, to be picked up by the consumer at a state store; there is no charge to the winery for registering or to the consumer for ordering, but the process takes approximately two months.

Vermont

Winery Direct Shipment Basics: A U.S. winery holding a direct shippers license may ship up to 12 cases to a consumer, totaling not more than 29 gallons (about 150 *ml* more than 12 cases) to any one Vermont resident in a calendar year.

Direct Distribution: The shipment statute also allows shipper license holders to sell up to 2,000 gallons of wine a year directly to first- or second-class licensees (restaurants and grocery stores).

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Vermont, up to 6 gallons of table wine and 8 quarts of fortified wine or brandy per importation, not subject to excise tax.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Virginia

Winery Direct Shipment Basics: A licensed wine shipper ($65 annual license, plus one-time $65 application fee, not restricted to producers and also applicable to beer) may ship up to two cases per month to a Virginia consumer via an approved carrier. (Winery using third party packer-shipper contractor must hold a licensed wine shipper license at that location (and any other location from which shipments originate. Presumably, that would not raise the volume limit.) Authorization by the owner of the brand is required if the brand is not registered to the shipping license-holder. A useful checklist for preparing an application and links to resources are at http://shipcompliantblog.com/blog/2007/09/06/virginia-out-of-state-winery-shipper%e2%80%99s-application-checklist . Official state license information is at www.abc.state.va.us/enforce/shipperslicense.html. Additionally, any person who owns "an establishment with adequate inventory, shelving, and storage facilities" *other than* a retail store open to the public may hold a $150 Virginia "Internet wine retailer license," to take orders by Internet or telephone and ship the wine directly to Virginia consumers.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Virginia, not to exceed four liters per importation.

Direct Distribution: To avert direct distribution by out-of-state wineries, wholesaler-supported legislation took away direct distribution by Virginia wineries. Since July 1, 2006, local wineries have been forbidden to sell to restaurants, wine shops and grocery stores, although the September 11, 2006 ruling of the Fourth Circuit Court of Appeals restores their direct distribution to state-run retail stores. Since July 1, 2007, any winery is eligible under the $185 "restricted wholesale license" to become the "client" of a Department of Agriculture & Consumer Services-managed nonprofit wholesaler, which could then sell up to 3,000 cases of the client's products annually to private retailers in areas where the winery has not appointed a Virginia wholesaler. Reportedly, the roundabout device is intended to preserve the three-tier structure within the state while impeding out-of-state sales to Virginia retailers, by invoking the form, but not the substance, of a "state distribution monopoly." Procedures were to have been explained in a circular letter that seemingly never appeared; at last visits, the ABC Commission website still said, "More information will be provided as it becomes available," and the DA&CS website was silent on the point.

Litigation: On September 11, 2006, the Fourth Circuit Court of Appeals, in *Brooks v. Vassar*, upheld Virginia's 4-liter limit on personal importation and its statute permitting only in-state "farm" wineries access to the state-run retail store system. The Supreme Court declined to review the decision, leaving numerous questions unanswered regarding the ability of states to impede interstate commerce. Under its original name, *Bolick v. Robertson*, the suit had challenged discrimination in direct shipment before *Granholm*. The trial court enjoined enforcement of a number of state statutes, leading to a legislative change while an appeal was pending. That case was remanded by the Court of Appeals to the district court as *Bolick v. Danielson*, for consideration of the constitutionality of the revised statute in light of *Beskind v. Easley*, a Fourth Circuit level-down opinion also rendered before the *Granholm* decision. On remand, the complaint was amended again, and the case proceeded under its current name, challenging persistent discrimination against out-of-state sellers. The district court leveled down on all discrimination issues, creating a crisis for Virginia wineries, and both sides appealed. While that appeal was pending, the state again amended its statutes, essentially adopting the district court view. In its September 2006 ruling, the Court of Appeals dismissed the direct shipment part of the case as having been mooted by the remedial legislation, leaving the current license system in place.

Three-tier Distribution: The state has enacted substantial statutory restraints on freedom of contract.

Washington

Winery Direct Shipment Basics: The operator of a U.S. winery that has registered with the Washington Department of Revenue, collects and returns applicable sales taxes, pays excise taxes on monthly returns in substantially the same manner as state wholesalers, and *either* holds a state wine shipper's permit *or* holds a certificate of approval and has notified the Board of its intent to ship to consumers may ship directly to a Washington resident. Forms can be found at http://liq.wa.gov/publications/WineryToConsumer.asp. Permit holders insure that carriers have verified recipients' age and sobriety and obtain recipient signatures. Shippers must "clearly and conspicuously" display license or permit numbers in their advertising. Wineries may also ship to the Liquor Control Board to fulfill consumer special orders, subject to tax and markup, in reasonable amounts as approved by the Board.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Washington, free of tax and markup, for personal or household use, up to 2 liters of spirits or wine or 288 fluid ounces of beer, in no more than one importation per month.

Direct Distribution: Out-of-state wineries holding certificates of approval can obtain endorsements to ship up to 100 cases per month directly to retailers under a law passed in response to the commerce clause ruling in the *Costco* case, which is not involved in the current appeal. The Board released an "interpretive statement" of some of the law's ambiguous provisions before passage; a copy is available on request to the email address shown on the header to these notes. The direct distribution statute, as interpreted in the statement, modifies the 16 November 2004 Bulletin No. 05-04, which at last report was still posted at www.liq.wa.gov/publications/Bulletin%2005-04.pdf . Ambiguity about who can contract with a common carrier for delivery was clarified by enactment of SB 5898 in 2007, but questions remain as to the ability of retailers to arrange carrier shipment of wines from out-of-state consignors in quantities greater than 100 cases per month and in mixed shipments of wines produced by different wineries.

Three-tier Distribution: The Liquor Control Board has proposed regulations applying 2009 legislation that became effective 26 July 2009, with formal rule-making to follow. The comment period ended 9 December 2009. The new laws, dealing with numerous matters, modify tied house restrictions on inter-tier interests and eliminate price posting, but retain uniform pricing, which implies holding for some period. Post-and-hold with a 30-day period was invalidated in *Costco*. The Board has announced it is devising an audit system to enforce the uniform pricing rule and other restraints the Court of Appeals upheld in *Costco*.

West Virginia

Winery Direct Shipment Basics: Wineries may hold a $150 or $250 permit for shipping up to 18 liters per month per resident purchaser by "licensed and bonded" carrier, subject to excise and to state and local sales taxes, a monthly shipment reporting requirement, and submittal of a brand list with the license application. (The lower license fee is for shippers who ship only dry unfortified wine. Apparently, the higher fee applies for licensees who may also ship "dessert wines," whether or not fortified, and to shippers of Port, Sherry or Madeira.) Limited liability companies are subject to additional filing fees and registration requirements. Many details of the law, which became effective June 8, 2007, are ambiguous or contradictory. Direct shipment does not seem to require brand registration ($100 per brand for three years), which applies only to a winery or other wine supplier "who sells or offers to sell or solicits or negotiates the sale of wine to any licensed West Virginia distributor." The license appears to be available only to shippers who do not have West Virginia distributors, as holders of direct shipper licenses may not sell to state distributors or retailers, although it might be possible to read in an implied qualification, "under the shipper license," thereby allowing a winery to hold also a supplier license for sales to wholesalers. With that proviso, any winery, wholesaler or retailer licensed in its home state appears eligible for the license. Direct shippers of non-U.S. wine must acquire it from a domestic licensed suppler. Carrier licensing and bonding, prohibition of shipment to dry counties or municipalities, age verification requirements for delivery personnel, and penalties for improper delivery (including felony charges and civil liability for knowingly transporting an unauthorized shipment) may deter carrier acceptance of shipments. Useful information about procedures and links to resources are at http://shipcompliantblog.com/blog/2007/07/16/more-information-about-the-west-virginia-direct-shipping-application-process. Wineries may also ship to the Alcoholic Beverage Control Commission to fulfill consumer special orders, subject to markup.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in West Virginia, not to exceed 10 gallons per importation.

Three-tier Distribution: State statutes are ambiguous regarding certain restraints on freedom of contract.

Wisconsin

Winery Direct Shipment Basics: Licensed wineries located anywhere in the U.S. and holding a Wisconsin permit ($200 for two years) may ship wine directly to an of-age and non-intoxicated individual in Wisconsin. The individual may receive no more than 108 liters of wine annually from any combination of out-of-state shippers and is responsible for compliance with the annual limit. For sales, excise and stadium tax reporting requirements, see the November 2009 blog report at the ShipCompliant site, http://shipcompliantblog.com/blog/2009/11/02/wisconsin-county-and-stadium-local-taxes/.

Direct Distribution: Licensing statutes appear to authorize issuance of wholesale licenses to out-of-state businesses in some circumstances. However, the current direct shipment law, which became effective 1 October 2008, severely restricts direct distribution by Wisconsin wineries, presumably to permit the state to prohibit it to out-of-state wineries. Direct distribution is limited to wineries that produce less than 25,000 gallons of wine in a year. Eligible wineries have until the end of the year to form a “co-op” wholesale establishment, which can distribute to Wisconsin retailers as a regularly licensed wholesaler. The co-op must have a single physical location within the state of Wisconsin, the same feature that resulted in invalidity of the New York law in *Granholm* with respect to winery locations, but which was upheld in a post-*Granholm* New York case for other tiers. The maximum number of cooperatives is limited to six (presumably the first six to qualify), and in any event to whatever number have been formed by December 31, 2008.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Wyoming

Winery Direct Shipment Basics: A winery holding a $50 out-of-state shipper license may ship to consumers, not to exceed 2 cases to the same household in any 12-month period, subject to tax and substantial record-keeping and reporting requirements.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Wyoming, not to exceed 3 liters per importation, tax-free.

Direct Distribution: The license also allows shipment of items not listed by the state to Wyoming retailers.

Three-tier Distribution: In-state distribution is a state monopoly.

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