

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LEBAMOFF ENTERPRISES, INC. d/b/a CAP)
N' CORK, RANDY LEWANDOWSKI, and)
LUTHER STRODER,)

Plaintiffs,)

vs.)

1:09-cv-744- LJM-TAB)

P. THOMAS SNOW, IN HIS OFFICIAL)
CAPACITY AS CHAIRMAN OF THE)
INDIANA ALCOHOL & TOBACCO)
COMMISSION,)

Defendant.)

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. Introduction

Cap N Cork is a Fort Wayne wine retailer that operates approximately 15 stores in the greater Fort Wayne area. It has developed a substantial off-site delivery business, much of which is referred to it by wine fulfillment companies. A wine fulfillment company is an entity that receives orders from consumers responding to advertisements, internet, magazine reviews, or other media sources in order to have wine delivered directly to the consumer's business or personal residence. Examples of wine fulfillment companies include Lionstone International, Wall Street Journal Wine Club, Zagat's Wine Club and the American Express Wine Cellar.

Current Indiana law provides that an Indiana wine retailer may deliver wine to an Indiana consumer using his own vehicle. This law, as it currently stands, specifically prohibits the use of a common carrier to deliver the wine. I.C. 7.1-3-15-3(d) provides:

"... a wine dealer who is licensed under IC 7.1-3-10-4 may deliver wine only in

permissible containers to a customer's residence, office, or designated location. This delivery may only be performed by the permit holder or an employee who holds an employee permit."

There are other instances in which wine may be delivered using a common carrier to the Indiana consumer. These examples include an Indiana winery which holds a direct shipper's permit and also an out-of-state winery which holds a direct shipper's permit. 7.1-3-26-9 provides that "A direct wine seller's permit entitles a seller to sell and ship wine to a consumer by receiving and filling orders that the consumer transmits by electronic or other means if all of the following conditions are satisfied before the sale or by the times set forth as follows...[the direct wine seller]...(c) causes the wine to be delivered by the holder of a valid carrier's alcoholic beverage permit under IC 7.1-3-18."

Cap N Cork has brought this lawsuit to contest the constitutionality of the prohibition contained within Indiana Statutes that prevents Cap N Cork and other Indiana wine retailers from making deliveries of wine to consumers using common carriers. The wine in question passes in the stream of interstate commerce and is delivered to the Indiana consumers in its original container utilizing a common carrier.

Cap N Cork has received three citations for violating the statute against using common carriers from the Indiana ATC. These citations were not originated by the ATC itself but strangely enough were initiated by complaints made by the Indiana Wine Wholesalers Association.

II. The Facts:

Cap N Cork operates approximately fifteen (15) wine retail stores in the greater Fort Wayne area in Northern Indiana. (See Designated Evidence #1). Cap N Cork has developed a brisk home delivery business, much of it working with fulfillment companies such as Lionstone International and Winding Road Beverages. (See Doust affidavit as Designated Evidence #2).

A fulfillment company is a company that does its marketing by using a variety of different techniques such as mass media, air industry ads, internet or agreements with wineries themselves to help “fulfill” wine orders that come in from Indiana wine consumers as well as consumers from other states. The wine which enters the stream of interstate commerce does so in different ways.

One example is that the consumer hears or reads about a winery which has good reviews. The consumer may contact the winery directly and order a number of bottles of wine. The winery at this point has the choice of attempting to qualify for an Indiana direct shipper’s permit or to “fulfill” the order by using the provisions of the Indiana three-tier system. For purposes of this case, we are only concerned about the latter method of using the three-tier system.

In the three-tier system scenario, the winery will make contact with any number of fulfillment companies with which it has an affiliation. One such company is Lionstone International of Illinois. The wine is prepared to be shipped by Lionstone pre-packaged and pre-addressed. (See affidavit of Nick Lucca as Designated Evidence #3). Lionstone thereafter arranges with an Indiana wholesaler to continue the stream of commerce by having the wine delivered first to the Indiana wholesaler, which in turn arranges for

delivery to an Indiana wine retailer such as Cap N Cork. (See Designated Evidence #3). In the present case, the wine is transferred to Cap N Cork by common carrier for eventual fulfillment by delivery to the Indiana consumer. At all times, the order of wine remains in the interstate stream of commerce and remains in the original package. (See affidavit of Lee Richardson affidavit as Designated Evidence #4).

Another example is where the fulfillment company itself receives the order from the Indiana consumer. In this scenario, the fulfillment company will contact the winery with which it has a business arrangement. The winery then ships the wine order(s) pre-packaged and pre-addressed to the fulfillment company, which in turn delivers the wine to the Indiana wholesaler, which in turn delivers the wine to Cap N Cork, which delivers the wine to consumers. Again the wine never leaves the original package.

Additionally, in some circumstances the order of wine may be placed first with Cap N Cork, which then contacts the fulfillment company or a winery to begin the process. In all of these examples, the wine enters the stream of interstate commerce from outside Indiana and in all cases the wine remains in the original package.

In every one of the above examples, many of the eventual customers of Cap N Cork are at some distance from Fort Wayne. The two consumer plaintiffs in the present case live in the Indianapolis area. It is not economically feasible for Cap N Cork to use its own delivery trucks to make small consumer deliveries beyond a fifteen (15) mile radius of its stores, nor is it feasible for the consumers to travel to Fort Wayne to pick it up.

Cap N Cork has received three citations from the Indiana ATC for making "illegal" deliveries of wine to Indiana consumers using UPS to complete the fulfillment

processes that are all within the stream of interstate commerce. (See Designated Evidence #5). It appears from the evidence produced by the ATC to the plaintiffs that the investigation of Cap N Cork was instigated by the Indiana Wine and Spirit Wholesalers. (See Designated Evidence #6). There is evidence that James Purucker of the Indiana Wine and Spirit Wholesalers received updates from the ATC as to the progress in the investigation of Cap N Cork. Mr. Purucker has also made public statements about his involvement (See Designated Evidence #7 and #8). This seems strange in that Cap N Cork is one of the larger customers of the Indiana wholesalers.

Based on this set of facts, Cap N Cork filed a lawsuit in state court challenging the constitutionality of the Indiana statute which forbids the use of an Indiana wine retailer from using a common carrier such as UPS in the scenario presented. The Indiana Attorney General removed the case to Federal Court.

III. Argument

1. INDIANA'S PROHIBITION AGAINST WINE RETAILERS DELIVERING WINE VIA COMMON CARRIERS IS UNCONSTITUTIONAL

i. Introduction

Indiana laws that regulate Indiana wine retailers prohibit the use of common carriers by retailers who wish to make delivery of wine to their customers within the State of Indiana. I.C. 7.1-3-15-3(d). This is not a part of a general prohibition against retail home deliveries because retailers may use their own vehicles. Additionally, this is not part of a general prohibition on common carriers making home deliveries because holders of a direct wine shipper's permit may use common carriers to deliver wines.

ii. Facial Discrimination

The Plaintiffs maintain that an analysis under strict scrutiny applies here. The first example of discrimination is the Indiana small winery which has obtained an Indiana direct wine shipper's permit issued by the Indiana ATC. The winery acts as a wine retailer in this instance as it is permitted to deliver wine to Indiana consumers and to restaurants using common carriers as the delivery mode. (See I.C. 7.1-3-26-9(1)(C)). The second example is the out-of-state winery which also has received a direct wine shipper's permit issued by the Indiana ATC. It is permitted to make deliveries to the Indiana consumer through its own private vehicle as well as through a common carrier. (See I.C. 7.1-3-26-9(1)(C) and I.C. 7.1-3-26-7(a)(1)). What results from these examples is the situation where Indiana wineries and out-of-state wineries are able to use common carriers to deliver wine, but Indiana wine retailers are forbidden from doing so. This different treatment of similar entities is facial discrimination and violates the non-discrimination principles set out in *Granholm v. Heald*, 544 U.S. 460 (2005).

At issue in *Granholm* were two state statutes, respectively, from Michigan and New York. In Michigan, in-state wineries by statute were able to deliver directly to Michigan consumers while out-of-state wineries were not. In New York, there was a statutory requirement that any out-of-state or in-state winery had to have a bricks and mortar establishment within New York state before it was able to sell, ship and deliver wine to consumers within New York state.

In the instance of Michigan, the U.S. Supreme Court struck down the statute in question as facially discriminatory against interstate commerce. As for New York, the

U.S. Supreme Court struck down the statute as applied since it placed an unreasonable burden on the out-of-state winery to build a facility in New York just to ship a few cases of wine. *Granholm*, U.S. at 467 (“The differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce.”)

2. CAP N CORK IS ENGAGED IN INTERSTATE COMMERCE.

The evidence that Cap N Cork has presented through affidavits of Lionstone International (see Designated Evidence #3), the affidavit of Joe Doust who is the general manager of Cap N Cork (see Designated Evidence #2), and the affidavit of Lee Richardson of Winding Road (see Designated Evidence #4), a Indiana wine wholesaler, clearly establish that the wine eventually delivered to the Indiana consumer remains in the original package from the out-of-state winery to the Illinois fulfillment company Lionstone International, to the Indiana wholesaler Winding Road, to Cap N Cork the retailer and finally to the consumer. There is a continuous stream of interstate commerce.

This principle refers back to the long-held “Original Package Doctrine” first announced by the U.S. Supreme Court in *Leisy v. Hardin*, 135 U.S. 100 (1890). In *Leisy*, a quantity of beer in its “original package” from another state was seized at a train depot by Iowa alcohol authorities under a search warrant. The U.S. Supreme Court stated that the shipment was made lawfully under the Commerce Clause as an act of interstate commerce and that the beer was not subject to seizure under the laws of Iowa. Other cases upholding the Original Package Doctrine include *Bowman et al. v. Chicago & N.W. Ry Co.*, 125 U.S. 465 (1888) (issuance of a certificate by transporting state found as an attempt to regulate interstate commerce); *Rhodes v. State of Iowa*, 170 U.S. 412 (1898) where the court held that the Iowa regulation which provided that alcohol transported

into Iowa becomes subject to inspection when it arrived at the final destination within Iowa is an attempt to regulate interstate commerce; and finally *Vance et al. v. W.A. Vandercook Co.*, 170 U.S. 468 (1898) which held that a certificate of purity of alcoholic beverages which came from outside the state of South Carolina but were finally delivered to a South Carolina company also violated the Original Package Doctrine.

3. PIKE ANALYSIS

If the court determines that strict scrutiny does not apply, then we must look at second-tier analysis under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under the Pike balancing test, there are three steps involved:

First, we are to evaluate the nature of the putative local benefits advanced by the statute. Second, we must examine the burden the statute places on interstate commerce. Finally, we are to consider whether the burden is “clearly excessive” as compared to the putative local benefits.

Here, the Indiana statute bans the use of a common carrier to complete an interstate transaction for the fulfillment of a wine order placed by an Indiana consumer. As previously stated, the stream of the commerce begins with the placement by the consumer of an order to a fulfillment company, whether it is an out-of-state winery or a marketing/wholesaler; the wine is then prepackaged and preaddressed by the out-of-state source, which then delivers the wine to the Indiana wholesaler, Winding Road, which in turns delivers the wine to the Indiana retailer, Cap N Cork, which then completes the stream of commerce by using a common carrier to complete the last link in the chain of events by delivering the wine to the consumer.

Just what is the state’s interest? Keeping the wine out of the hands of minors? The U.S. Supreme Court has already rejected this argument in *Granholm v. Heald*,

544U.S. 460 (2005). It is matter of record that UPS drivers have been instructed in the proper method of checking for age verification. They will only leave the wine with an adult. This is true of FedEx and other common carriers which have been given training in permit states. Moreover, there are far fewer instances reported of wine getting into the hands of minors from delivery by common carriers than there is from minors getting alcoholic beverages from retail establishments themselves.

Is the state trying to insure that the appropriate taxes are collected? In fact, the Indiana wine retailer does collect tax on the transaction and remits it to the state. (See Designated Evidence #2). The tax argument was also rejected by the court in *Granholm*.

Is the state trying to discourage home deliveries? The state already allows retailers to make home deliveries in their own personal vehicles. Is the state worried that UPS cannot be trusted? The state already allows UPS and other common carriers to deliver wine from wineries.

In short, there are no valid state interests in this case except to insure that all wine sold to our Indiana consumers pass through the hands of our larger wine wholesalers. Why else would the wholesaler trade association have initiated the sting in the first place?

The burden placed on Interstate commerce is extreme. Many small out-of-state wineries cannot afford to pay the annual direct wine shipper's permit fee in Indiana to ship one or two cases of their wine each year. The alternative is to seek a fulfillment route which will allow them to sell, ship, and deliver their wine lawfully through the Indiana three-tier system. To enforce the ban would foreclose these wineries as well as the out-of-state fulfillment companies from engaging in interstate commerce as protected by the Commerce Clause of the U.S. Constitution.

4. CONCLUSION

There are no material issues of fact. The court should find as a matter of law that Indiana's prohibition against a wine retailer using a common carrier to make deliveries violates the Commerce Clause of the U.S. Constitution.

Respectfully submitted,

Attorneys for Plaintiffs

/s/ Robert D. Epstein

Robert D. Epstein (Attorney No. 6726-49)
Jason A. Flora (Attorney No. 28565-49)
EPSTEIN COHEN DONAHOE & MENDES
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 317-639-1326
Fax: 317-638-9891
Rdepstein@aol.com

/s/ James A. Tanford

James A. Tanford (Attorney No. 16982-53)
Indiana University School of Law
211 South Indiana Avenue
Bloomington, IN 47405
Tel: 812-855-4846
Fax: 812-855-0555
tanford@indiana.edu

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 11th day of December, 2009 to:

Attorney for Defendant

Chad C. Duran
Office of the Attorney General
Indiana Government Center South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
cduran@atg.state.in.us

/s/ Robert D. Epstein

Robert D. Epstein
EPSTEIN COHEN DONAHOE & MENDES
50 S. Meridian Street, Suite 505
Indianapolis, IN 46204