Mississippi Supreme Court Rejects ‘Passage of Title’ DTC Theory

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Last week, the Supreme Court of Mississippi handed down an opinion in *Fitch v. Wine Express Inc.*, No. 2018-SA-01259-SCT. A state court decision on the rather dry subject of personal jurisdiction often merits little comment, but the *Fitch* opinion features an emphatic rejection of the legal theory relied upon by many direct-to-consumer retail alcohol sellers today.

As a “control” state for wine sales, Mississippi law generally prohibits the importation, transportation and sale of alcoholic beverages (a term that includes wine) outside of the state’s monopoly control system. And, as in virtually every state, the retail sale of wine to consumers is reserved to state licensees and, in the case of control jurisdictions, the state itself.

In 2017, the state investigated online wine retailers. While most did not accept orders for shipment to a location in Mississippi, the state found three online retailers that accepted such orders. After further investigation, the Department of Revenue and Office of the Attorney General filed civil actions against all three retailers, seeking a variety of injunctive and monetary remedies. None of the retailers had a place of business in Mississippi and, instead, shipped wine to Mississippi consumers from locations in California or New York. None held a Mississippi license.
At the trial court, the Defendants moved to dismiss the State’s case for lack of personal jurisdiction. The Defendants argued that because their terms of sale specify that all sales are F.O.B. their places of business (located in California and New York) and place the responsibility for legal compliance on the buyer, Mississippi courts lack jurisdiction over the Defendants. In other words, the Defendants sought to rely on the “passage of title” theory prevalent in the direct-to-consumer retail business: Because title passed to the consumer in the state where the retail seller holds a license to sell the wine (and presumably pays applicable excise and sales taxes to that state), it has done nothing to violate the law of the consumer’s state and is not subject to civil or criminal jurisdiction in the consumer’s state. While the passage of title theory has fared poorly when tested in court, see State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828 (Mo. App., 2000); State v. Amoroso, 975 P.2d 505 (Utah App., 1999), it continues to be relied upon by many direct-to-consumer retailers.

Surprisingly, in 2018, a Mississippi trial court agreed with the Defendants and dismissed the case for lack of personal jurisdiction. Last week’s Mississippi Supreme Court decision reverses that dismissal and remands the case for further proceedings on the merits.

The Fitch opinion’s analysis follows the familiar personal jurisdiction analysis in civil matters. First, the court held that Defendants’ operation of websites actively soliciting and selling to Mississippi residents constituted “doing business” in the state within the meaning of Mississippi’s long-arm statute. Turning to Due Process, the court then applied the analysis from well-known Supreme Court opinions (Burger King v. Rudzewicz, International Shoe v. Washington) in examining whether: (1) Defendants’ activities established minimum contacts with the state; (2) the causes of action arise out of or relate to Defendants’ activities within the state; and (3) exercising jurisdiction would comport with fair play and substantial justice. Evaluating these factors in light of Defendants’ sale and shipment of over $200,000 worth of wine to Mississippi consumers during the period investigated, the Mississippi Supreme Court had little trouble concluding that the State had personal jurisdiction over the Defendants.

Significantly, the Fitch opinion contains an emphatic rejection of the passage of title theory:

The Defendants attempt an end run around Mississippi law and the purposeful-availment due-process requirement by employing F.O.B. terms that customarily govern the shipper’s costs and loss from destruction or breakage during delivery. Were it that simple to defeat jurisdiction, almost no entity that engages in interstate sale of goods and products would be amenable to suit outside of that entity’s principle state of business—regardless of their purposeful contact(s) with the other state.

Fitch at ¶ 38.

Regardless of your views toward the policy merits direct-to-consumer shipping of wine or other alcohol beverages, the Fitch court’s reasoning makes sense. Were it otherwise, interstate shipment would quickly undermine states’ ability to enforce its own laws. California, for example, should have the ability to sue a Mississippi-based
gun shop for systematically selling and shipping firearms to California citizens in violation of California’s gun laws.

What *Fitch* does not resolve—or even address—is the constitutionality of state laws that permit in-state retailers to sell and deliver wine (or other alcohol) directly to consumers’ homes, but deny those same privileges to out-of-state retailers. In the wake of last year’s *Tennessee Wine & Spirits Retailers Association* decision by the US Supreme Court, that issue is currently the subject of litigation in multiple federal courts across the country. *Fitch* underscores the significance of those cases, as it adds to the judicial precedent rejecting the theory upon which many online retailers of alcohol today rely to conduct their businesses.

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