

The Uncertain Legal Future of Wine Direct Shipping by the Retail Tier

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The Supreme Court of the United States' 2005 decision in *Granholm v. Heald*, which required states allowing their own wineries to direct-ship to consumers to also grant such privileges to out-of-state wineries, marked the beginning of a new era of wine direct-shipping. With the relaxation of wine shipping laws around the country following *Granholm*—nearly every state now allows wineries to ship wine directly to in-state consumers—the wine direct-shipping landscape has changed greatly over the past decade. Indeed, wine shipments in 2016 saw double-digit growth in both volume and sales.

At the same time, growth in recent years in the online shopping industry has led to new innovations in the wine retail space: the existence of a multitude of internet wine retailers, wine-of-the-month clubs and mobile wine delivery apps offers consumers greater access to wine. Many states—and courts—though, are now grappling with the legalities surrounding direct shipping of wine by retailers, as well as the role of unlicensed third parties in such transactions. Some states prohibit retailers from directly shipping wine to consumers altogether, while many others give *in-state* retailers the right to ship wine directly to consumers while withholding the privilege from *out-of-state* retailers.

Most recently, in January 2017 Michigan enacted legislation allowing in-state retailers to ship wine to in-state consumers, but prohibiting out-of-state retailers from making such shipments. The new legislation, which amends Michigan's existing statute addressing wine shipments, authorizes a retailer located in Michigan to obtain a "specially designated merchant license" in order to ship wine to in-state consumers. The specially designated merchant license is only available to in-state retailers, so retailers located outside Michigan remain prohibited from directly shipping wine to consumers in the state.

Unsurprisingly, given the requirements of *Granholm* (which, incidentally, concerned in part a Michigan law), the new legislation retains the right of both in-state and out-of-state wineries to ship wine directly to Michigan consumers upon obtaining a direct shipper license. In fact, the new statute even reduces the burden on wineries shipping to consumers; under the new law wineries will no longer be required to include their direct shipper license number and the order number on each shipping container, or the brand registration approval number for each shipped wine on the accompanying invoice (although label registration requirements will still apply).

The legislation does not go into effect until March 29, 2017, but already litigation involving the new law has commenced. In late January 2017, an Indiana retailer and several Michigan consumers sued Michigan's governor and attorney general and the head of the Michigan Liquor Control Commission in federal court, alleging the statute violates the US Constitution's Commerce Clause and Privileges and Immunities Clause. Similar lawsuits are pending in Illinois and Missouri.

Some courts have already interpreted the constitutionality of similar laws that treat in-state and out-of-state wine retailers differently. While the US Courts of Appeals for the Second and Eighth Circuits have interpreted *Granholm* to apply only to differential treatment of producers and products (and not to wholesalers and retailers), the Fifth Circuit Court of Appeals recently struck down as unconstitutional Texas residency requirements burdening out-of-state wholesalers and retailers. The Texas Package Stores Association appealed to the Supreme Court based on the apparent "circuit split" created by the Fifth Circuit's decision. Although the

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Supreme Court denied *certiorari* in November 2016, differing outcomes in the currently pending suits could ultimately bring the issue of wine direct-shipping back to the Supreme Court, providing an opportunity for much-needed clarification of *Granholm's* scope.

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