Legislative Analysis

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BAN DIRECT SHIPMENT OF WINE TO CONSUMERS

House Bill 4959 as introduced
Sponsor: Rep. Chris Ward
Committee: Regulatory Reform

First Analysis (8-29-05)

BRIEF SUMMARY: The bill would ban the direct shipment of wine by a winemaker to a consumer.

FISCAL IMPACT: This bill appears to maintain the current practice of prohibiting direct shipments from wineries to individual consumers but also adds in-state wine makers to the group prohibited from direct shipments to consumers. A preliminary analysis suggests that this should increase administrative costs for the Michigan Liquor Control Commission and local liquor law enforcement efforts to regulate their shipments. However, the amount of the increase is indeterminate.

THE APPARENT PROBLEM:

Michigan regulates the manufacture, importation, transportation, warehousing, and retail sales of alcohol through a three-tier system in which licensed manufacturers sell their products to licensed warehousers, licensed warehousers sell the product lines they carry to licensed retailers, and licensed retailers sell directly to consumers. The tiers are kept separate, meaning that a person or company can only operate at one of the tiers; for example, a manufacturer is prohibited from also being licensed as a warehouser or retailer. However, there are a few narrow exceptions. For example, brewpubs and micro breweries are allowed to sell the beer they brew at their licensed premises to consumers for consumption either on or off the premises.

Another exception allows licensed wineries located within the state to sell their own products at wholesale (i.e., to restaurants and retailers) or retail (i.e., to consumers at the winery and at sites where tastings are conducted). And, for almost 30 years, the Michigan Liquor Control Commission has allowed instate wineries to ship their wine directly to consumers who reside in Michigan. Wineries located in other states, however, are required to strictly adhere to the three-tier regulatory system and so must contract with a licensed warehouser located within Michigan who then markets the winery's wines to retailers in the state.

It is precisely the disparity in the treatment of wineries located in the state and wineries located outside of Michigan that has become the subject of several years of litigation.

In 2001, a lawsuit challenging the constitutionality of the provisions allowing in-state wineries to ship directly to consumers but prohibiting out-of-state wineries from doing the same was filed in the federal District Court, Eastern Division by several wine enthusiasts, wine writers, and a small California winery. The court upheld the state's regulatory structure and the case was appealed to the 6th U.S. Circuit Court of Appeals. In August of 2003, the federal appeals court ruled in favor of the plaintiffs saying that the Michigan law discriminated against out-of-state wineries, was not justified by the 21st amendment repealing Prohibition, and therefore violated the dormant Commerce Clause. In May of this year the U.S. Supreme Court upheld the federal appeals court's decision and remanded the case to the original trial court for further proceedings consistent with the Supreme Court's ruling.

The impact of the Supreme Court's ruling is that Michigan wineries can no longer directly ship to consumers. Many see the legislature as having three options: 1) ban all direct shipments from wineries, both in-state and out-of-state, to consumers; 2) carefully craft a law allowing restricted direct shipments of wine from both in-state and out-of-state wineries, or 3) do nothing and see what remedies the federal District Court grants to the plaintiffs now that the case has been remanded.

THE CONTENT OF THE BILL:

The bill would, among other things, amend the Liquor Control Code to ban a wine maker or small wine maker from directly shipping wine to any person in the state for personal consumption or for any noncommercial purpose.

In addition, a brewer who manufactured less than 200,000 barrels a year would no longer be eligible for licensure as a specially designated merchant (SDM). An SDM license allows a licensee to sell beer and wine for off-premises consumption.

Further, under the bill, neither a specially designated distributor (SDD) – which allows for the sale of spirits for off-premises consumption – nor an SDM would be allowed to also hold a wine maker or small wine maker license. This is in addition to the current prohibition on an SDD or SDM holding a mixed spirit drink manufacturer, wholesale, warehouse, outstate seller of beer, outstate seller of mixed spirit drink, or outstate seller of wine license.

Lastly, the bill would revise two definitions in the code. Currently, a "wine maker" is defined as a person licensed by the commission to manufacture wine, and sell, at wholesale or retail, wine manufactured by that person. Instead, the bill would define "wine maker" as a person licensed by the commission to manufacture wine, to sell that wine to a wholesaler, at retail on the licensed winery premises, and as provided for in Sections 537 and 603 of the code. (Section 537 allows a wine maker to sell his or her wine and Section 603 allows a brandy manufacturer to sell his or her brandy in a restaurant owned by the wine maker or brandy manufacturer, respectively, or operated by another person under an agreement approved by the commission and located on the winery premises or the brandy manufacturer's premises. Section 537 also allows wine makers, under certain conditions, to sell wine at the location of a wine tasting.)

"Warehouser" is defined as a licensee authorized by the Liquor Control Commission to store alcoholic beverages (the bill would strike "beverages" and insert "liquor"), but prohibited from making sales or deliveries to retailers unless the licensee is also the holder of a wholesaler or manufacturer license issued by the commission. The bill would eliminate the reference to a manufacturer license.

MCL 436.1113, 436.1203, and 436.1607

ARGUMENTS:

For:

In the relief section of their complaint, the plaintiffs asked that Section 203 of the Michigan Liquor Control Code be declared unconstitutional. However, Section 203 is the backbone of the entire regulatory system. Its provisions imbue the Michigan Liquor Control Commission with the authority to regulate the sale of all types of alcohol in the state, including regulating shipments from other states. To strike this provision could open up unrestricted wine shipments from out-of-state wineries and potentially allow all alcohol (including spirits) to be shipped directly from manufacturers to consumers. It is necessary therefore that the legislature act preemptively by enacting legislation that addresses the issue of direct shipments of wine from wineries to consumers.

Supporters of a ban on all direct shipments of alcohol feel that this measure best protects the integrity of the three-tier system, allows for good record keeping and collection of all taxes, and is effective in preventing sales to minors.

Response:

It is true that the U.S. Supreme Court remanded the case to the trial court for a determination of relief; however, any further proceedings by the trial court <u>must</u> be within the boundaries established by the Supreme Court's decision. Since the Supreme Court kept the focus of the case only to wine shipments, it is unlikely the trial court would or could grant relief to the plaintiff broader than the Supreme Court's narrow parameters. Regarding sales to minors, sales to minors of any alcohol by any means, including spirits, by in- or out-of-state manufacturers is illegal under current law and the state has successfully prosecuted violators both criminally and civilly. Neither enactment of the bill nor defeat of the bill will impact the state's measures to prevent and punish illegal sales of alcohol to minors.

For:

Under the few exceptions in the liquor code under which alcohol can be delivered directly to the consumer, Section 203 requires the box to be clearly marked that it contains alcohol, and requires the delivery person to ensure that the individual accepting delivery is of legal age to do so and that the individual is either the one who placed the order or is the designated recipient residing at the same address. If these conditions are not satisfied, the delivery person must return the alcohol to the retailer. However, this provision is in danger of being voided by a recent motor carrier case in Maine. Though the case involved the delivery of tobacco products, the court ruled that it was unreasonable for states to interfere with operations of a business – in this case, for UPS delivery persons to be required to check IDs because it interferes with their quick delivery system. Under federal law, motor carrier laws take precedence over state laws. If the LCC could no longer enforce the requirement for IDs to be checked, minors may find it easier to access alcohol using the Internet to place orders. Therefore, banning all direct shipments of wine to consumers as the bill would do affords the greatest ability to restrict access to alcohol by minors.

Response:

Representatives from several wineries testified that obtaining a signature (and in the case of alcohol, checking IDs) is offered as an additional service by many, if not all, delivery companies for an additional charge. This charge is often passed along to the consumer. Since it can cost an additional $10 or $15 to add this service to each shipment, it is unlikely that a minor would be tempted to obtain alcohol by ordering wine directly from a winery. In addition, many Michigan wineries produce high end wines marketed to the connoisseur; these are simply too expensive for most juveniles and not the type of alcohol typically sought for underage parties. Lastly, for almost three decades, the LCC reports no known problems with Michigan wineries shipping their products to minors.

Against:

Michigan's wineries are an important part of the state's economy by generating tax revenue and drawing tourists to the state, as well as providing jobs in rural areas. In 2002, the economic impact of the state's wine industry was estimated to be over $75 million annually. If the bill were to be enacted, small wineries would be negatively impacted. Some vintners say their businesses would be devastated. Where direct shipments to consumers range from 8-10 percent of sales for large wineries, they account for up to 40 percent of the sales by the smaller wineries. This is because distributors are not always interested in investing time and resources in a brand that has limited production. Therefore, consumers can not buy these wines in a store, but must either travel to the winery or order through the mail or over the Internet. If these small wineries could not ship directly to in-state consumers, many would be forced out of business. If the legislature instead adopted limited shipping to consumers by in- or out-of-state wineries, Michigan wineries – many of which have won national and international awards – could contribute even more to the state's economy by increasing their presence among wines sought by the nation's wine connoisseurs.

POSITIONS:

The COSHAR Foundation, an organization representing faith and community based organizations, supports the bill. (6-28-05)

The Michigan Teamsters supports the bill. (6-28-05)

The Law Enforcement Alliance of America supports the bill. (6-28-05)

The Alliance of Minority Medical Associations supports the bill. (6-28-05)

The Coalition for a Safe and Responsible Michigan supports the bill. (6-28-05)

A representative of the Associated Food Dealers of Michigan testified in support of the bill. (6-28-05)

A representative of the Michigan Beer and Wine Wholesalers Association testified in support of the bill. (6-28-05)

A representative of the Miller Brewing Company indicated support for the bill. (6-28-05)

The Michigan Liquor Control Commission does not have a formal position on the bill. (6-28-05)

The Michigan Restaurant Association opposes the bill. (6-28-05)

The Filipo Marc Winery opposes the bill. (6-28-06)

The Jomagrha Vineyards and Winery opposes the bill. (6-28-05)

Wine Michigan opposes the bill. (6-28-05)

The Greater Lansing Vintners Club opposes the bill. (6-28-05)

A representative of Wine Consumers Across Michigan (WineCAM) testified in opposition to the bill. (6-28-05)

A representative of Uncle John's testified in opposition to the bill. (6-28-05)

A representative of the Pioneer Wine Trail and Pentamere Winery testified in opposition of the bill. (6-28-05)

A representative of the Leelanau Peninsula Vintners testified in opposition to the bill. (6-28-05)

A representative of the Michigan Farm Bureau indicated opposition to the bill. (6-28-05)

A representative of Stoney Acres Winery indicated opposition to the bill. (6-28-05)

A representative of Leelanau Wine Cellars indicated opposition to the bill. (6-28-05)

A representative of Sandhill Crane Vineyards indicated opposition to the bill. (6-28-05)

A representative of the Wine Institute indicated opposition to the bill. (6-28-05)

A representative of Tartan Hill Winery indicated opposition to the bill. (6-28-05)

A representative of Black Star Farms indicated opposition to the bill. (6-28-05)

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