LAWYERS

continued from page 18

regulations that will cause permanent shifts, or just temporary during the shutdown?

We have not seen any objections coming from the ABC relating to virtual tastings. They have acknowledged wineries' rights to host outdoor wine tastings without the service of food, which has been a necessity during the COVID-19 crisis as otherwise the limited reopening of wineries would not have been possible.

I would expect this to be a permanent change, as I do not think it likely that any regulatory agency will be mandating indoor tastings in the near future, nor requiring food service.

This pandemic and resulting shutdown is hardly something any client could have adequately prepared for legally. What are one or two smart things you saw some clients have in place which softened the blow from this event?

The wineries that have done the best during this time had robust communications with their customers and well developed mailing lists. These wineries with one-on-one customer relationships were able to continue to sell wine.

Although internet marketing has continued to be important, the personal touch of direct communications by phone has been a lifesaver for many wineries.

Similarly, virtual tastings have provided another form of personal connection with customers that has been invaluable to many wineries. Just as people have Zoom cocktail hour with their friends, they can also have a Zoom tasting with a winery, and generally wineries have found these to be very successful.

And on the flip side, for the next time, what are key measures or actions you'd advise clients to take?

I think all wineries should have well developed safety protocols to protect consumers and employees.

Although there has been a focus on having customers sign liability waivers in order to participate in tastings, those waivers will only be valid if the wineries are carefully following their protocols. The most important thing wineries can do to insulate themselves from liability is to create (and document) a clear set of safety measures and then ensure that employees are adhering to them. A good dose of common sense can be more important than a legal document.

The other important thing that wineries can do is to keep their customer lists up to date, and put time and energy into those relationships and communications. Having loyal customers is the best protection against economic uncertainty.

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In the June 2019 Supreme Court ruling - Tennessee Wine and Spirits Retailers Association v. Russell F. Thomas - striking down Tennessee's durational residency requirement for alcohol retailers, has changed the landscape of shipping wines across stateliness, describe how. If not, what barriers remain (and in how many states) regarding shipping California wine across state lines?

In light of recent events, the direct to consumer ("DTC") aspect of the beer, wine, and spirits business, from a manufacturers' perspective, has transformed from a growth tool to a potential survival tool. In this context the legal matter of Tennessee Wine and Spirits Retailers Association v. Russell F. Thomas recently adjudicated by the Supreme Court of the United State ("SCOTUS") has become a topic of discussion, leaving many in the industry to wonder if the decision in this case will open up states to DTC sales of California products.

First some background. In 2016, the Ketchum family decided to move from Utah to Memphis, Tennessee and purchase a wine store. When the Ketchums applied for a retail liquor license, the Tennessee Wine & Spirits Retailers Association (the "Association") intervened by making sure the Tennessee Alcoholic Beverage Commission (the "TennABC") had not forgotten about Tennessee's two-year residency requirement, which precludes a liquor license from being issued unless the applicant has resided in Tennessee for at least two years.

According to the association's website, it was founded "to protect the interests of the independent package store owners of Tennessee."

> "The question remains, will the SCOTUS decision really change anything for California manufacturers of beer, wine, or spirits wishing to enter into other states via DTC or otherwise."

Leadership at the TennABC had concerns as to the constitutionality of the two-year requirement and was considering approving the Ketchums' application. The association, unwavering in its resolve to protect the interest of its members, was not impressed and decided the best course of action, to prevent this clear miscarriage of justice (tongue fully in cheek), was to sue the TennABC.

A federal district judge ruled that the two-year requirement was unconstitutional and the decision was upheld by the Sixth Circuit Court of Appeals. The association was not done, and appealed the decision to the SCOTUS.

I am sure that the Ketchums had no idea what they had started, but this case attracted the attention of a cornucopia of interested parties, including the Cato Institute, the Center for Alcohol Policy, the National Beer Wholesaler Association, and many others (including other states).

All of this over a wine shop in Memphis? Not really.

This case was about a conflict between the 21st Amendment to the Constitution and the Constitution's Commerce Clause. The 21st Amendment repealed Prohibition, a good thing, but gave the states broad authority to regulate alcohol within their borders. The commerce clause refers to provisions of the Constitution that vests Congress with the exclusive power to regulate commerce among states.

This exclusive federal power carries an implicit consequence for states' powers. Primarily, the commerce clause prevents states from erecting business barriers with other states, unless such barriers serve or advance legitimate local purposes.

The vexing issue here was, had Tennessee's two-year residency requirement usurped Congress' exclusive power, under the Commerce Clause, to regulate commerce among states, and if so, was it nevertheless permissible under the broad authority states have, under the 21st Amendment, to regulate alcohol within their borders.

Cut to the chase, in 2019 the SCOTUS ruled, with a clear majority, that the broad authority granted to the states under the 21 Amendment remains subject to the commerce clause, and Tennessee's two-year residency requirement, implemented to protect the interests of the independent package store owners of Tennessee, was not serving or advancing a legitimate local purpose, but was simply protectionism.

The SCOTUS concluded the "predominant effect of the 2-year residency requirement is simply to protect the Association's members from out-of-state competition." As a result, it "violates the Commerce Clause and is not saved by the 21st Amendment." Ouch!

Had this decision been over a non-alcohol commodity, it would not have the potential implications that it has. Under the broad authority afforded to states under the 21st Amendment, legislation favoring wholesalers, regulating alcohol, the sales, marketing, and distribution of alcohol, and even contractual relationships between manufacturers and distributors (i.e. franchise laws) has enjoyed somewhat untouchable status; however, the 7 to 2 decision in this case signals that this is no longer the case, and that any states' protectionist legislation, including that enjoyed by wholesalers, is at risk.

The question remains, will the SCOTUS decision really change anything for California manufacturers of beer, wine, or spirits wishing to enter into other states via DTC or otherwise.

The short answer is no, at least not in the immediate future.

The 21st Amendment remains intact and each state can continue to regulate how California, and other states', products enter such state.

However, this decision does represent a clear chink in the 21st Amendment armor that numerous wholesaler trade associations have taken advantage of since the repeal of Prohibition. Accordingly, if a state regulation provides for resident manufacturers DTC privileges, but does not allow or places unreasonable restrictions on non-resident manufacturers' DTC privileges, the time may be right to challenge such regulation, and the starting point is with Tennessee Wine and Spirits Retailers Association v. Russell F. Thomas.