NOTES ON WINE DISTRIBUTION

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With Legislative Updates by ShipCompliant.com

What This Is (and Isn't):

These notes, now in their sixteenth year, are intended to serve discussion and development of wine distribution options in a changing legal environment, with emphasis on multi-state operations and alternatives to three-tier systems. They do not pretend to be a complete summary of the relevant law or a compliance handbook. For practical sales guidance, please see "Other Resources," below.

Here's the fine print: Nothing in this document constitutes legal advice or creates an attorney-client relationship. Regulators and government lawyers may disagree with observations in this document, as may courts resolving litigated issues. Neither completeness nor accuracy of the information in the notes is guaranteed. Laws may change without notice, and statements qualified as based on reports of others (*e.g.*, "reportedly") are generally unverified.

Regarding terminology, the notes use "direct shipment" for sale and delivery directly to consumers and "direct distribution" for sale and delivery to retailers (also known as "winery self-distribution"), whether intrastate or interstate, and whether delivered by third party carrier or by the seller itself. "Distribution" applies to both, unless the context clearly limits it to one or the other. Unless otherwise specified, notes apply to direct shipment by U.S. wineries or assisted shipment at U.S. wineries by their customers who have purchased at the premises. An "on-site" sale is one in which the customer makes the purchase from existing inventory while physically present at the point of sale (normally the selling winery). References to "leveling up" and "leveling down" refer, respectively, to the state option to eliminate discrimination against interstate commerce by increasing shipment privileges of out-of-state wineries or by reducing privileges of in-state wineries. Unless the context requires otherwise, "wine" is under-21% table wine, but note that state laws vary on maximum alcohol percentage for sales under direct shipment laws and on whether addition of spirits puts the product in a category with different distribution requirements.

I revise this document when material changes or additions come to my attention, but new releases may not reflect developments in all states since the preceding version. In particular, notes on pending legislation are usually limited to significant bills or amendments that have been reported in news media.

The **Release Number** appears in file name, shown in the lower right corner of each page. Please discard earlier releases. Headings of sections with substantial changes since the preceding release are highlighted.

Why It's Pertinent:

Wine distribution law is changing more rapidly and profoundly than at any time since Repeal. Published lists, carrier policies, and regulatory personnel (sometimes from the same agency) disagree on legality of various means of reaching customers, and regulators change their minds in response to numerous factors of varying transparency. Meanwhile, both the economic significance of alternative distribution methods and market access grow. In July 2007 the Wine Institute estimated that wineries could lawfully ship directly to 80% of the adult U.S. population, but conceded that shippers still face "a labyrinth of state laws."

The May 2005 *Granholm* decision[1] of the U.S. Supreme Court casts doubt on the validity of many state laws, including all reciprocity statutes and those putting limits on wine distribution that disproportionately burden interstate commerce relative to local commerce, such as on-site requirements. The November 2005 and April 2006 district court *Costco Wholesale Corp. v. Hoen* rulings applied *Granholm* to interstate sales by wineries to retailers.

Other aspects of the *Costco* case remain controversial. The April 2006 decision introduced a rigorous and in some respects novel application of federal antitrust law to state restraints on trade, including the frequently encountered requirement that chain stores exclude wine from their internal distribution systems. That judgment, stayed on appeal, was mostly rejected by the Ninth Circuit Court of Appeals in its January 29, 2008 decision.

Thus far, *Costco* is significant for inducing the Washington state legislature to adopt a direct distribution option for out-of-state wineries and for making it clear that state laws requiring suppliers to post their prices and hold them unchanged for a period are invalid on antitrust grounds, even if the system does not directly facilitate collusion. At this point it is unknown whether either side will appeal from the Ninth Circuit decision, following denial of Costco's petition for rehearing on April 1, 2008. An appeal or petition for certiorari to the Supreme Court could be filed any time before July 2008. The statistical probability of the Court's accepting a case for review is not high, but the difference in approach to price posting schemes between *Costco* and a Fourth Circuit case, *TFWS, Inc. v. Schaefer,* improves chances.

A 2008 federal district court decision in Texas extends *Granholm* to direct shipment by non-producing retailers, the opposite conclusion from a 2007 federal district court deci-

[1] Granholm v. Heald, 544 U.S. 460 (2005), does not "open the states" to direct shipment, but (1) requires states to apply substantial location neutrality when they regulate winery shipments to consumers and (2) significantly clarifies the nature and limits of states' rights under the 21st Amendment, with important implications beyond winery direct shipment. For an early analysis of its broader effects, see www.winebusiness.com/ReferenceLibrary/webarticle.cfm?dataId=38950. For recent commentary on application to retailer shipments, see http://shipcompliantblog.com/blog/2007/10/05/wrong-but-not-surprising-a-loss-in-extending-granholm-to-shipments-by-retailers.

sion in New York. Potential conflict between the 5th Circuit (including Texas) and the 2nd Circuit (including New York) on the meaning of *Granholm* increases the likelihood of another Supreme Court decision on the subject within a few years.

In a time of uncertain rules, fiercely competing interests, and increasing reliance on vendors to perform legal compliance functions, the industry needs exchange of ideas and information. In these notes I try to look beyond the "go/no-go" lists, to stimulate awareness of what may be possible. That produces differences between the notes and widely published counts. These notes identify only six states to which no shipment seems possible. A list circulated by general media in late 2007 counted 15 states prohibiting shipments from out-of-state sources, citing as examples Montana (where a convoluted law with criminal sanctions causes major carriers to forego the state), Utah (where direct shipment really is prohibited) and South Dakota (where a very limited amount purchased on site can be shipped home), without noting the differences.

Other Sources:

For practical compliance guidance, www.shipcompliant.com provides a free look at frequently updated instructions on shipping lawfully, with real-time automated transaction compliance available long-term for a fee. Direct shipment information and commentary from various sources are at a related free public site, www.shipcompliantblog.com/blog, which offers a list server and RSS feeds for updates. Also handy are the publicly available compilations at www.wineinstitute.org/programs/shipwine, including a state law summary and a "Who Ships Where" tab, listing states served by FedEx and UPS. Shipping policies can change without notice; check directly with carriers for recent developments. FedEx's site for pairing states of origin and states of destination is www.dmz.fedex.com/cgi-bin/wineShipping.cgi. For some reason, the carrier has not maintained a currently valid security certificate on the pairing page, which can set off alarm bells on some browsers. General information on the FedEx program and a link to specific conditions of transport are at www.fedex.com/us/wine; the analogous UPS site is ups.com/wine. Trade association members may be entitled to shipping discounts. WineAmerica (formerly the American Vintners Association) provides members with a summary of direct shipment procedures with step-by-step instructions; the home site is www.wineamerica.org. Note that carrier-published lists may be authoritative as to policies of the carrier, but are not necessarily reliable as to current law. In the *Cherry Hill* opinion on shipments to Kentucky, the judge said, "The defendants . . . assert that thirty-nine states require in-person purchases, citing a chart from the UPS wine shipment program. From the court's review of this document, it appears that thirty-two states allow direct shipment with no such requirement."

As the direct sales segment matures, more resources appear. The trade magazine *Wines & Vines* has published on-line polls on winery experiences with alternative distribution, and articles on the topic appear in *Wine Business Monthly*. There is also a continuing stream of seminars devoted to direct shipment, with varying levels of sophistication.

Notes Applicable to Multiple States

Three-tier Distribution:

Traditional distribution through wholesalers may be the only practical alternative for some markets and can be desirable on its own merits. However, imposition of a particular structure by law is frequently inefficient and unfair.

Many states have enacted statutory restraints on freedom of contract in supplier-wholesalers transactions, ranging from minor departures to imposition of detailed and onerous contractual obligations that can arise unintentionally from conduct that would ordinarily be regarded as preliminary to an agreement. Description of the counter-measures I recommend for selling to wholesalers in those states is beyond the scope of these notes. Wineries should not send samples or sell wine to any wholesaler without a written agreement, which in the states indicated as restrictive must be designed specifically to minimize adverse effects of state law. Further information is available on request by email to the address shown on the heading of these notes.

Constitutionality of mandated three-tier systems is a fertile area of litigation, even though the right of states to require all wine to go through three tiers without discrimination based on location is thus far unquestioned. Litigation has focused on discriminatory exemption of local sellers from forced use of a middle tier or from statutory prescription of contract terms. The restrictive law in Washington State was invalidated on the grounds that it discriminatorily applied only to out-of-state wineries and has not been replaced.

There has been renewed interest in "drop shipment" of wine to retailers –*i.e.*, shipment directly from the winery to the retail customer of a wholesaler. Many states, often at the behest of wholesalers, have rules or policies prohibiting the practice, and federal authorities formerly questioned it; the usual objection was that it constitutes exercise of the wholesaler's license privilege without involving its licensed premises. A sometimes-acceptable workaround is the "dock-bump" delivery, which involves a token trip to the wholesale warehouse, eliminating the cost of unloading, placement in the warehouse, and reloading, but not the economic penalty of roundabout routing. An interesting late-2006 development is approval of drop shipment in New York, a change negotiated by proponents of retailer Internet ordering of special items on winery web sites, combined with automated generation of paperwork documenting a sale by the winery to an authorized wholesaler and by the wholesaler to the ordering retailer. Reportedly, similar negotiations have taken place in Arizona, California, Florida, Texas and Washington (which has since adopted a statutory amendment allowing direct distribution for U.S.-produced wines without a workaround).

Age & Identity Verification:

Although the image of teenagers ordering table wine shipped direct for youthful drinking bouts may seem almost humorously unrealistic, there is nothing unreal about the publicity campaigns in favor of restricting direct shipment.

A wholesaler-funded report released in August 2006 by Teenage Research Unlimited showed 2% of teens self-reporting purchase of an alcoholic beverage from some source over the Internet, with an additional 12% reporting they had heard of another teenager's having done so. Most headlines characterized the report as reassuring, but its sponsors have ballyhooed it as proof of an imminent flood of wine in underage hands.

Some direct shipment laws require use of approved verification systems, and it makes sense to use them everywhere, as suggested in the "Wine Industry Code for Direct Shipping Practices," www.freethegrapes.org/wineries.html#code, because they tend to quell irrational fears and because the entire industry has an interest in averting even an aberrant sale or delivery to an underage recipient. For more information, see www.idology.com, www.choicepoint.com and www.veratad.com, all of which are approved for use in Michigan. Integrity Identity Verification Services, a well-known company in the on-site age verification business, is reportedly applying for Michigan approval of an on-line wine sales system; see http://integrity.aristotle.com.

On-site Sales under Federal Law:

The Transportation Security Administration carry-on ban of over-3-oz. containers of most liquids[2] accentuates the importance of the federal direct shipment statute, enacted as § 11022 of the Department of Justice Appropriations Act of 2002. It creates a federal-state hybrid alternative to whatever method, if any, a state provides for "personal importation" (*i.e.*, bringing the wine with you into the state), by allowing the winery to ship wine that would otherwise go as luggage. Most states have a personal importation exception to their prohibitions of unlicensed importation, usually for quantities that would fit in a glove box or handbag, but in some cases for enough to make shipment feasible. Volume limitations applicable to shipping on-site purchases appear in the state notes below, but in practice they raise questions of interpretation and enforcement, none of which has been definitively answered. Prudence suggests a "no" answer to issues such as whether separately invoiced "importations" can be aggregated in one box and whether on-site purchase of futures or club subscription wines not yet released constitute an on-site sale, but without a judicial determination for each ambiguous phrase it is impossible to be sure.

Although the federal direct shipment statute is not interpreted in the same way by all state agencies, is ambiguous regarding whether it supplements formal methods of direct shipment, is in effect only so long as the FAA security restrictions on air travel remain in place, and imposes requirements on the selling winery regarding proof of age, *etc.*, in addition to those that may apply under state law or be implemented by carriers, it appears to open some markets for sales to winery visitors who want their in-person purchases shipped home and is so interpreted by the major delivery carriers. The notes below may omit reference to the federal direct shipment statute for a state if that option does not add substantially to direct shipment rights under other laws.

See below in this introduction for federal penalties on illegal interstate shipment and federal constitutional issues arising from the disproportionate burden on out-of-state wineries from uniform on-site-only shipment laws.

Tax and Liability Traps:

Unintended consequences may follow application for a license or permit to ship to consumers in another state. In addition to the administrative burdens of filing shipping re-

[2] www.tsa.gov/travelers/airtravel/prohibited/permitted-prohibited-items.shtm#10. Slightly different rules apply to duty-free purchases. See http://www.tsa.gov/travelers/airtravel/assistant/duty_free.shtm.

ports and/or excise tax returns, direct shipment may subject a winery to jurisdiction of the recipient state on the same basis as businesses located there, including imposition of business taxes on gross receipts and susceptibility to tax liens and service of process. States with income taxes may require returns for revenues derived from sales by out-of-state wineries that have sufficient contacts with the state to satisfy jurisdictional prerequisites or have consented to jurisdiction as part of a shipping permit process. Wineries should consult counsel about secondary effects before signing license applications.

Some state statutes can be read to impose liability on a winery for shipping wine to a consumer that causes the customer to go over an aggregate annual limit set for purchases from all direct shippers. Winery ordering procedures should require all purchasers to represent and warrant that filling the order will not violate state law, with special attention to aggregate limit states, but the effect of relying on consumer representations is uncertain. Indiana has clarified its position on enforcement in a manner that makes representations effective so long as the winery's own shipments for the year are not over the limit. Questions may exist in other aggregate limit states, which at last count included Ohio, Nevada, North Dakota, and Wisconsin.

Most direct shipment sales are now subject to state and local sales and use taxes, which may vary by county or other political subdivision. Formerly, the most prudent practical way to deal with it was to pay the highest rate in the state for all destinations, as the difference is tiny compared to the annoyance of calculating tax by address within a state. Paying an average or median rate does not constitute compliance, because tax authorities do not credit taxpayers with overpayments on other sales. However, modern compliance software, such as the Web-based ShipCompliant program, can now deal with the plethora of tax rates to avert both underpayment and overpayment. Note also that state excises often have a higher tax rate for "dessert" or "fortified" wine, a category that usually includes unfortified table wine containing more than 14.0% alcohol.

Rethinking Reciprocity:

Reciprocity has been turned on its head since *Granholm*. Under the pre-*Granholm* regime, laws allowing direct shipment among states that offered one another's wineries equivalent privileges were considered a pro-commerce development and the basis for a stable, if geographically limited, trade in wines outside the three-tier system. Although reciprocal shipment was not directly before the court in *Granholm*, the Supreme Court made it clear that trading areas within the United States, excluding sellers in states that do not join the trade group, are incompatible with the Commerce Clause. That message, however, has not fully worked its way through the organs of state government that regulate trade in wine.

New York, one of the two states before the Court in *Granholm*, found its discriminatory non-reciprocal law invalidated, but ironically adopted a reciprocal law that appears unlikely to pass constitutional muster. California sensibly repealed its reciprocity requirement for winery shipments, but retained it for the added category of non-producer retailers; however, in 2006 the state entered into a possibly temporary agreement with a retailer trade association that effectively extends the privilege to retailers in non-reciprocal states, at least while litigation is pending. Wisconsin recognized its obligation to abandon reciprocity agreements with other states, but missed the Supreme Court's message that it could not revert to the kind of direct discrimination that was invalidated for New York and Michigan in the *Granholm* decision.

We can expect further anomalies for a substantial period of transition from reciprocity laws. Illinois is switching to a permit system in June 2008, but at last count no replacement had been enacted in Iowa (where permit legislation was recommended by regulatory agency, but not acted on by the legislature), New Mexico (where a permit bill died in the session just concluded), New York (where a "substantially equivalent" requirement seems close enough to reciprocity for Commerce Clause purposes) and Wisconsin (where a highly restrictive permit proposal was vetoed by the governor, but several new proposals are pending). A proposed New York beer shipment law was also limited to shippers in states that provided lawful means for direct shipment to its residents by New York brewers, without explicit reference to reciprocity. However, it doesn't matter for *Granholm* analysis whether a law is termed reciprocal or not; the aspect condemned in that opinion is treating sister states differently with respect to trade, depending on the conformity of their laws with one's own.

Predicting the behavior of administrative agencies and courts is made more difficult by ambiguities in wording. For example, Iowa's statute refers to states providing an "equal reciprocal privilege." Under ordinary rules of statutory construction, that means the privilege must be both equal and reciprocal. Access involving a license fee or paperwork that differs from the recipient state may or may not be "equal." Moreover, the Iowa text may or may not require that the other state apply *restrictive* reciprocity, *i.e.*, prohibit shipments from wineries in non-reciprocal states, rather than allow wineries in all states, including Iowa, to ship in.

Federal Regulation: The Tobacco, Tax & Trade Bureau (TTB), successor agency to ATF, has a web site, www.ttb.gov/publications/direct_shipping.shtml, with information on efforts to lend federal weight to state laws restricting wine distribution. It points out that the 1913 federal Webb-Kenyon Act is still on the books, forbidding shipment of alcoholic beverages "intended, by any person interested therein, to be received, possessed, sold, or in any manner used in violation of any law" of the recipient state, and that winery basic permits are held under the condition that the permittee obey federal liquor laws, including Webb-Kenyon. Suppliers, the site concludes, "should remember that their Federal basic permits could be at risk if they fail to comply with State rules." In a January 2007 interview, TTB administrator John Manfreda said no state had requested action by his agency, in part because wholesaler-sponsored federal legislation from 2000 (fatuously entitled the "21st Amendment Enforcement Act") authorizes state attorneys general to seek federal court injunctions themselves against liquor sales that contravene state law.

Further Constitutional Questions:

Commercial Speech. Several states restrict advertising for sales by direct shipment. Restraints on truthful and non-misleading commercial speech are questionable under the First Amendment. Some liquor laws restricting speech have already been invalidated, and more challenges are likely. Meanwhile, methods of promoting sales by means other than traditional media are proliferating, generating varied responses from regulators. The application of constitutional commercial speech rights to novel practices, such as consumer "Tupperwine parties" keyed to Internet sales, is yet to be determined.

Volume Caps and On-site Requirements.

Under *Granholm*, the Commerce Clause requires states either to give local and out-of-state wineries access to consumers and retail accounts on economically equivalent terms or to deny it altogether. In response, some legislatures have attempted to accommodate wholesaler interests by allowing direct shipment or direct distribution only for wineries with annual production or capacity under a gallonage cap, typically set just above the output of the largest local winery and well below many producers in the major winegrowing states, and/or by imposing an "equal" requirement that consumer purchases be made in person at the winery, irrespective of location.

Challenge to production caps and on-site requirements as *de facto* discrimination arising from disproportionate effect on interstate commerce is under way. *De facto* cases impose a substantial evidentiary burden on the plaintiffs and, because of the need for fact-based economic analysis, are expensive to litigate. Plaintiffs expecting to shoot fish in the *Granholm* barrel will be disappointed at the cost and complexities of litigation in which the state has not enacted forthright protectionism.

The pro-commerce cause achieved a mixed result in the Kentucky *Cherry Hill* case (formerly known as *Huber Winery v. Hudgins*), which in December 2006 found *de facto* discrimination from a facially nondiscriminatory on-site requirement, but not from a volume cap or small per-order limit. The Family Winemakers of California lawsuit in Massachusetts asserts that, in purpose and effect, the limits imposed by the capacity caps fall solely upon out-of-state wineries, while in-state wineries continue to enjoy unfettered access to the Massachusetts market. When courts rule that volume cap or on-site-only suits must rely on constitutional limitation of burdening interstate commerce (or possible antitrust theories), rather than overt discrimination against interstate trade relative to local commerce, they will prove evidentially more difficult for the plaintiffs than did *Granholm*.

Failed challenges to state law in the Arizona, Maine and Tennessee federal suits, *Black Star Farms LLC v. Oliver*, *Cherry Hill Vineyard v. Baldacci* and *Jelovsek v. Bresden*, provide a telling lesson in the difference between overt discrimination cases like *Granholm* and claims of de facto discrimination arising from disproportionate burdens. With statutes that are facially non-discriminatory and serve legitimate regulatory objectives, invalidity depends on showing the state adopted measures that harm interstate commerce more than necessary to accomplish its purpose. The burden of proving adverse effects rests on the winery and consumer plaintiffs, who are unlikely to prevail if they approach the litigation as though they had the benefit of the *Granholm* presumptions. A legislative history showing intent to assist local commerce by setting caps to allow all in-state wineries to sell direct would provide an argument for assessing the caps under strict anti-discrimination principles, but there are no known smoking gun committee reports or floor debate transcripts. Legislative records to date, to the extent they prove anything about intent, suggest that states wish to retain a mandated middle distribution tier for products of large producers, a goal that is neither condemned nor definitively authorized by *Granholm*.

Apart from constitutionality, questions may arise about the meaning of legislated caps. For example, the Arkansas direct distribution statute refers to sales as reported on the winery's TTB Report of Wine Premises Operations, which does not report sales. Thus, it is unclear whether the relevant number is tax-paid withdrawals during the year or consummated sales in the same period, possibly including transfers in bond that would not show as withdrawals and/or wine removed from bond in a previous year.

An interesting alternative to judicial challenge of volume caps is what might be called the "Jess Jackson workaround," in which an enterprise linked by common equity ownership sells through two or more separately licensed entities. Sales into Kentucky by the under-cap Atalon and La Jota operations, both owned by Jackson Family Farms, LLC, have evoked howls of outrage from state wholesalers, who seem belatedly to understand that laws restricting rights based on size of operation need consolidation rules to be effective.

On-site restrictions have elicited different responses from different courts. Most recently, the February 26, 2008 decision by an Arizona federal district court in *Black Star Farms* upheld in-person purchase as a precondition to direct shipment. On-site laws solve a fundamental political problem for the middle tier. Although *Granholm* allows states to eliminate discrimination against interstate direct shipment by forbidding in-state shipment, pursuing that "level down" strategy requires extravagant expenditure of political capital, because it constitutes a death sentence for a significant fraction of local wineries. Thus, wholesaler trade associations are faced with reconciling survival of direct shipment for local wineries with the core objective of forcing wineries in other states to go through three tiers, a conceptual problem after *Granholm*.

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Decisions like *Black Star Farms* have voiced the "accident of geography" theory, which contends that the impracticality of, *e.g.*, an Arizona consumer's visiting a Yakima Valley winery to place an order for a wine advertised on the Internet, compared to the convenience of visiting an Arizona winery for the same purpose, does not discriminate against interstate commerce. A New York federal district court in *Buy Right, Inc. v. Boyle* and a Tennessee federal district court in *Jelovsek v. Bresden*, appear also to have bought the theory; federal district courts in the Kentucky case, *Cherry Hill Vineyards, LLC v. Hudgins*, and the Indiana case, *Baud v. Heath*, rejected it. Appeals are reportedly under way in the fourth, sixth, seventh and ninth federal circuits.

At first impression, the geographic accident argument does not seem logical. With respect to governmental restrictions, the Commerce Clause is supposed to provide equal access to markets for interstate commerce originating in any location. True, it does not require states to neutralize natural effects of geography, such as the greater cost of shipping from a distant point, but the trade restriction in question arises from the legislative pen, not from geography itself. For legislation, the Commerce Clause supports location parity by voiding state enactments with substantial discriminatory effects, including the effect of leveraging location advantages of local businesses against distant competitors.

Ironically, *Black Star Farms* cites a 1994 Supreme Court case on the subject, *C & A Carbone, Inc. v. Clarkstown*, which invalidated a facially neutral city ordinance requiring all nonhazardous solid waste received and processed in the town to be deposited at the defendant township's transfer station. The fatal flaw of the *Clarkstown* ordinance was that in practice it favored local waste management business to the exclusion of all non-local competition, which sounds pretty similar to a three-tier requirement for out-of-state businesses, but the *Black Star Farms* court decided not to follow that precedent for reasons that are difficult to divine in its opinion.

There is, nevertheless, a solid basis for the anti-trade result in *Black Star Farms* and other recent cases, which is widely (and perhaps erroneously) understood as endorsement of a geographic accident defense to *Granholm*-based suits --the enormous evidentiary difference between a facial discrimination case like *Granholm* itself and a *de facto* discrimination case like *Black StarFarms*. The latter category, which includes challenges to volume caps as well as to on-site limitations, requires much more extensive preparation, with economic expert testimony, to satisfy the plaintiffs' substantial burden of proof. The *Black Star Farms* judge underlines that point in refusing to reach the same result as *Hudgins* and *Baude*: "However, Plaintiffs proffer no evidence to suggest that such a limited exception, applicable to both in-state and out-of-state wineries, erects a barrier to Arizona's wine market that in effect creates a burden that alters the proportional share of the wine market in favor of in-state wineries, such that out-of-state wineries are unable to effectively compete in the Arizona market."

Other Disproportionate Burdens. Legal scrutiny is less developed for restrictions other than volume caps and on-site limitations. The Louisiana "Wine Producers Act," in partial compensation for taking direct distribution away from in-state wineries to forestall a *Costco* challenge by out-of-state suppliers, expands the rights of wineries to market their products through local fairs, festivals and non-profit special events, a feature that raises its own *Granholm* issues because of disproportionate availability to local producers. Local grape content requirements for winery license privileges (as distinct from appellation requirements), such as are found in Iowa and to some extent in Pennsylvania, may have an adverse effect on interstate trade in bulk wine, juice or grapes and therefore raise *Granholm* issues.

Application of Federal Antitrust Law under the Supremacy Clause.

Some nondiscriminatory state restraints on streamlined distribution raise issues under the Sherman Act and possibly under other federal trade regulation laws. Because federal statutes preempt inconsistent state laws under the Supremacy Clause of the federal constitution, the Supreme Court has invalidated conflicting state liquor laws such as those requiring unsupervised price-fixing by wholesalers. Although the Commerce Clause is, in a sense, at the bottom of antitrust challenges because it grants Congress the power to maintain the competitiveness of interstate trade, antitrust cases do not enjoy the strong presumption of illegality that applies to state laws directly discriminating against interstate commerce, as in *Granholm*.

The trial court decision in *Costco* was the vanguard for applying federal antitrust law to state liquor regulation, recognizing a right of suppliers to ship to retailers' central warehouses, omit price posting, offer quantity discounts, *etc.* If it had been sustained in its entirety on appeal, numerous laws that protect middle-tier turnstiles at the expense of producer and consumer interests would have been subject to challenge, but only the invalidation of "post and hold" pricing was affirmed. Substantial questions remain as to how the regulatory agency can enforce the now-validated rules requiring uniform delivered pricing and forbidding quantity discounts, without the discarded posting system. The Ninth Circuit opinion is unclear on whether posting without the "hold" requirement would be permissible, but administering an instantly changeable posting system would be challenging and of dubious benefit to anyone. Costco raised the irrationality of teasing the system apart in its petition for rehearing, but the Ninth Circuit did not alter or clarify its opinion when it denied the petition on April 1, 2008.

Administrative Burdens. Indirect forms of discrimination against interstate commerce, such as onerous fees and reporting requirements not required of local wineries, persist. *Granholm*'s economic equivalence standard logically should take into account all substantial costs, but the Supreme Court opinion does not provide exact guidelines for gauging whether particular differences are permissible.

Direct Shipment by Retailers

Retailers as a category now embrace some brand owners who wish to appear in the market as "virtual wineries" (although other licensure strategies may be preferable for that business objective), as well as the well-known Internet bottle shops. The latter group and their trade association, Specialty Wine Retailers, www.specialtywineretailers.org/, have been highly active in the important area of extending *Granholm* to interstate sales by sellers not licensed as wineries.

On January 14, 2008, a district court in Texas rendered a mostly pro-trade decision in *Siesta Village Market, LLC v. Perry* (with which *Wine Country Gift Baskets.Com v. Steen* is consolidated). The case upholds the basic Specialty Wine Retailers contention that a state allowing its retailers to deliver to consumers must permit direct shipment by out-of-state retailers. It also has some important things to say about the meaning of *Granholm*'s less pellucid passages. In particular, it attempts to deal with the most significant internal tension of the *Granholm* majority opinion, *viz*., the difficulty of squaring the holding of the opinion, that states cannot require out-of-state wineries to become residents as a condition to reaching local markets, with a dictum-within-a-dictum quoted from a 1990 Supreme Court case, *North Dakota v. United States*, to the effect that the 21st Amendment empowers states "to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." (For an explanation of the difference between holdings and dicta, see www.shipcompliantblog.com/blog/2007/09/18/discrimination-against-out-of-state-retailers-after-granholm/.)

The *Siesta Village* decision and its implications merit further discussion, in particular on the following points:

1. Texas had a "citizenship" requirement of at least a year's residence in the state for most licenses. It had already been declared unconstitutional when applied to newly arriving wholesalers with physical premises within the state. *Siesta Village* goes farther by analyzing the statute as a *location* requirement and holding it unconstitutional on Commerce Clause grounds, to the extent it prevented issuance of the requisite retailing licenses to out-of-state retailers. That suggests location neutrality can be squared with the 21st Amendment by preserving the state's power to license and requiring it to issue licenses to out-of-state applicants.

2. The *Siesta Village* judge takes *Granholm* as a location parity case, and his opinion is explicit that physical presence requirements "plainly discriminate against interstate commerce." However, like every analyst of *Granholm*, he had to deal with a key question posed by the quotation from *North Dakota*, noted above: If a state has the right to require all wine to "be purchased from a licensed in-state wholesaler," how does one give effect to the Commerce Clause policy against location discrimination? One way of resolving the issue is to require the state to accept methods of consummating the purchase requirement that do not substantially burden interstate commerce relative to local, such as running the sale through the local middle tier without requiring the wine to take an economically disadvantageous logistical path when sold by an out-of-state retailer. Another is to declare that the "in-state" part of the quotation is dicta and therefore not binding in applying the *Granholm* holding to a different chain of distribution where its effect on commerce is more problematic. That may be rather too bold a departure to expect in a district court opinion, but it would support the most straightforward solution to the three-tier problem –issue Texas licenses to wholesalers in other states. In the event, the judge simply let the contradiction lie, holding that the retailers have to comply with Texas laws requiring a state retail license and purchase from a Texas-licensed wholesaler, a deferral that has been described as a ticket to the next round of litigation. Meanwhile, the Texas Alcoholic Beverage Control Commission has informally commented that it is not their problem.

3. Experts disagree on the extent to which *Granholm* was a "weak record case" that could have gone the other way had the states made a better showing of regulatory problems, for example in tax collection and averting deliveries to underage recipients. *Siesta Village* took the opposite view and granted summary judgment, which means the court decided Texas failed to show substantial likelihood that, if it were afforded a full hearing, it would present evidence on which a judgment in its favor could be based. To win in a direct discrimination case like *Granholm* or *Siesta Village*, a state would have to show there is no reasonable alternative to discrimination for achieving legitimate regulatory objectives. The court reads *Granholm* to say that the availability of licensing and modern communications makes such an argument inherently implausible, and comes close to saying a state can never prevail on the proposition that interstate delivery is more likely to cause underage drinking than intrastate delivery.

4. Another point of controversy among lawyers is whether the Commerce Clause is indifferent to whether a court cures discrimination by leveling up or down. *Siesta Village* takes the side of those who argue that it makes no sense to level down in enforcing a constitutional provision intended to encourage interstate trade, at least in the absence of manifest legislative intent to terminate in-state privileges in case of invalidity of interstate prohibition. In constitutional law terms, the *Siesta Village* judge may have discovered a penumbra to the Commerce Clause, preventing courts from taking such simplistic approaches as counting the number of lines of statutory text that would have to be rewritten and picking the smaller revision.

5. Although *Siesta Village* rejected the wholesalers' strange argument that the statutory discrimination arose not from Texas's intent, but from the happenstance of the plaintiffs' locations, the court indulged in dicta indicating states can adopt on-site-only laws, in which case the "accident of geography," and not state discrimination, would be responsible for excluding remote sellers. It appeared to accept the reasoning that because there is no "direct shipment market" in those states, the remote sellers are not excluded from anything by the prohibition. That argument appears flawed in construing the Commerce Clause, whose policy extends to disproportionate burden as well as to overt discrimination. If carrier delivery is the only way and out-of-state winery can compete in a market defined as direct wine sales to local customers, then the playing field is not leveled by placing the same ban on local wineries, who can reach the market without it.

Appeals seem likely. Meanwhile, the parties in *Knightsbridge Wine Shoppe, LTD v. Jolly* have agreed, at least through the end of 2008, to extend *Granholm* to non-producing retailers selling to California consumers, at which time they may up their cudgels on application of the *Siesta Village* analysis versus that of the New York case, *Arnold's Wines, Inc. v. Boyle*. In *Arnold's Wines* (also known as *Buy Rite, Inc. v. Boyle)*, the New York federal district court dismissed a retailer suit without an evidentiary hearing, on the grounds that the state had a 21st Amendment right to require all sales to go through an in-state wholesaler, a proposition suggested by the vexing dictum in the *Granholm* opinion.

The *Arnold's Wines* decision seems to miss *Granholm's* point that a state may have the right to require all wine to go through three tiers, but does not have the right to apply its rule with location discrimination unless it provides evidence that its discrimination against interstate sellers is required by a legitimate state objective that cannot be achieved through nondiscriminatory means. The *Siesta Village* judge expressly declined to follow *Arnold's Wines*, which it plausibly characterized as putting the 21st Amendment above the Commerce Clause, precisely what *Granholm* forbids.

Interstate Wholesaling. Although it would not be surprising to see a wholesaler break ranks and invoke the *Granholm* principle to cross state lines, suits with that objective seem to have remained in the realm of rumor. The *Southern Wine* case in Texas found a one-year residence requirement for wholesalers unconstitutional, but did not reach the key point on location discrimination because the plaintiffs formed a Texas corporation indicated their intent to operate facilities physically located in the state.

Federal Preemption of State Delivery Laws. Some observers have suggested that a federal suit invalidating Maine's requirements for averting delivery of cigarettes to minors makes it impossible for states to enact statutes requiring carriers to verify age of wine recipients. I think the case does nothing of the kind, but the wholesalers have been presenting it to regulators as a serious problem. For differing viewpoints on the controversy, see http://shipcompliantblog.com/blog/2008/02/25/another-rowe-to-hoe/.

Shipment of Alcoholic Beverages other than Wine. A 2006 ruling in Ohio applied *Granholm* to keg beer sold by retailers, but the relevance of *Granholm* to beverage categories other than wine remains largely unexplored. Meanwhile, states can, of course, permit direct shipment for other beverages by statute, as has occurred for beer in some instances, and personal importation laws may allow on-site purchase and shipment of small quantities of beer or spirits.

Direct Distribution by Out-of-state Suppliers.

The federal district court in *Costco* found it relatively easy to rule in the plaintiff's favor on the direct distribution issue, relative to some of the antitrust counts, and that part of the judgment is not affected by the adverse appellate ruling, because the legislature has already complied with it. Washington had granted direct distribution privileges only to its own wineries, a discrimination the judge found directly contrary to *Granholm*. Although the result was not immediately pro-commerce –judicially leveling down, with a stay to permit the legislature to rescue local wineries by leveling up– the case seems persuasive precedent against discriminatory direct distribution laws, which remain common among winery licensing statutes and administrative practices.

While there is little logical basis for distinguishing between producers and wholesalers who want to reach retailers in other states, it seems likely that post-*Granholm* law will preserve states' rights to require "every drop" to go through a middle-tier business. In that case, a state legislature willing to kill off home state wineries that depend on direct distribution could allow only wholesalers to sell to retailers, but might be constitutionally prohibited from specifying where the wholesalers may be located. Oregon faced that issue with respect to wholesaling licenses in the *Morchella Wine Cellars* appeal, but the case appears to have been mooted by legislation that became effective at the beginning of 2008.

Direct Shipment by Overseas Sellers. An unanswered question is whether *Granholm* and GATT create rights in overseas wineries to distribute in the U.S. market on the same basis as domestic competitors. A state court suit in Illinois, *Raimondi v. Koppel,* raises the discrimination issue on behalf of an Italian winery, but the plaintiff's motivations are unclear, as the case relies only on state law and seeks only to prevent Illinois wineries from exercising statutory direct distribution privileges.

State Notes

Alabama

Direct Shipment Basics: Wineries can ship in care of a state liquor store, freight prepaid, if the customer has obtained Beverage Control Board approval and paid for the wine. Assessment ($0.38 per liter) and excise taxes are payable on delivery to customer.

Direct Distribution: Recent adaptation of an agricultural cooperative law to allow in-state direct distribution by cooperating local wineries, following defeat of legislation to allow individual direct distribution, raises issues of access to retailers by out-of-state wineries under *Costco*.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Legislation: Senate Bill 142 and its companion HB 520 would allow in-state and out-of-state wineries and retailers that obtain a $100 direct shipper permit to ship to Alabama residents in wet areas, limited to 24 cases to an individual in a calendar year from any one shipper.

Alaska

Direct Shipment Basics: Out-of-state sellers and in-state wineries may ship to residents who are not in the liquor business and do not live in an interdicted community (list available from state, 907-269-0350). Carriers, however, reportedly do not serve all non-interdicted destinations; reportedly, FedEx added Ketchikan, Sitka, Valdez and Kodiak only in 2008. Out-of-state sellers are limited to "reasonable quantities" for personal use and consumption. Under the 2007 shipment statute, Alaska wineries have a 5-gallon limit per shipment. The new law does not appear to provide greater privileges for in-state wineries than for out-of-state wineries and therefore should not engender *Granholm* challenge, even if the license is unavailable to out-of-state wineries, unless the state interprets "reasonable quantities" to mean substantially less than 5 gallons. Allowing out-of-state sellers more volume than local wineries would not raise Commerce Clause issues. According to statute, all liquor shipped into the state is taxable, even if the recipient is entitled to purchase liquor tax-free, but authorities reportedly have not attempted to tax direct shipments.

Arizona

Direct Shipment Basics: Any winery in the U.S. or in its possessions or territories may hold a "domestic farm winery" license (Series 13) if it produces no more than 40,000 and no fewer than 200 gallons per year, but the direct shipment privilege applies only to wineries producing up to 20,000 gallons annually. (The so-called "direct shipment license" is for three-tier distribution only.) Section 42-3356 of the revised statutes requires the Department of Liquor Licenses & Control to determine the amount of a tax bond, not less than $500, based upon twice the projected annual liability, but domestic farm wineries are exempt after they have made twelve consecutive timely monthly payments. At last report, the agency was looking to the Department of Revenue to administer the tax bonds, but wineries were not on that department's list of businesses required to post bonds. The form at www.azliquor.gov/forms/pdf/outofstatedomesticfarmwinerybrewery.pdf is for out-of-state wineries. At last report, the Department of Liquor Licenses & Control was accepting license applications with "applied for" entered on the form in place of a Department of Revenue registration number for payment of the transaction privilege tax.

On-site Sales: The statute apparently permits shipment to a residential address of wine purchased at the winery by a person who "could have lawfully carried the wine into the state," up to two cases per year for personal use. Existing law appears to contemplate shipments to the purchaser, but not necessarily at the purchaser's own address. Seemingly, the purchaser is not required to be an Arizona resident. Under current regulations and statutes, the only persons who can lawfully carry wine into the state are common carriers transporting the wine to licensed wholesalers and travelers returning from abroad with duty-free beverages, but the Department of Liquor License & Control reportedly interprets the "lawful carrier" requirement as satisfied by private means whenever the purchaser is at least 21 years of age.

Litigation: The complaint in a post-*Granholm* suit, *Black Star Farms, LLC v. Morrison*, originally challenging outright discrimination under the previous statute in favor of in-state wineries, was amended to charge discriminatory effects from the volume cap for farm wineries. (The Series 01 winery license for larger wineries is expressly referred to as an "in-state producer" license on the state domestic winery information page, www.azll.com/lic01.htm.) On February 26, 2008 the court ruled in favor of the state and the intervening wholesalers, leaving the volume cap in place. Different plaintiffs voluntarily dismissed a previous discrimination case, *Parker v. Morrison*, after the Department leveled down without benefit of legislation. The effect of the new ruling is to legitimize the state's restoring in-state privileges for the local industry while allowing only wineries that are no larger than its own to ship from outside the state. Plaintiffs in *Black Star Farms* have filed notice of appeal.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Arkansas

Direct Shipment Basics: There are no direct shipment provisions. Act 666 of the 2007 legislative session allows consumers who receive wine from outside the state to pay excise taxes directly to the Department of Finance and Administration, but does not create any new shipment or importation rights. Although carriers reportedly still accept shipments from instate wineries, which arguably had direct shipment privileges for wine made from Arkansas produce as "native wineries" under a somewhat ambiguous 2005 amendment to state law intended to apply only to on-site sales, the legal basis is questionable. Act 668 of the same session repeals the native winery transportation privilege in an effort to end litigation by leveling down (see "Litigation," below) and also ends the previous right of native wineries to ship to out-of-state purchasers by "common carrier or appropriate parcel delivery service."

Direct Distribution: Act 668 of the 2007 session authorizes the state to license in-state and out-of-state "small farm wineries" as wholesalers for direct distribution, with a 250,000-gallon annual sales cap.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract for over-250,000-gallon wineries.

Litigation: On November 1, 2007, a federal judge dismissed *Beau v. Moore*, which had originally challenged discrimination in favor of native wineries that seemed clearly forbidden by *Granholm*. The federal judge temporarily stayed the case pending resolution of a state suit brought by the wholesalers to level down, *Moon Dist., Inc. v. Arkansas Dept. of Finance & Admin.* The *Moon* plaintiffs sought to level down, but the case was dismissed as moot after enactment of Act 668, which apparently was intended to accomplish the same objective. However, the *Beau* plaintiffs amended their complaint to allege discrimination based on the right of up-to-250,000-gallon wineries to sell directly to Arkansans at the winery premises, which practically favors local over distant sellers. The suit did not challenge the volume cap, which did not affect the plaintiff winery. The opinion follows the increasingly popular "no interstate market" theory in upholding on-site limits against challenges based on disproportionate impact on interstate commerce.

California

Direct Shipment Basics: A winery registered as out-of-state shipper ($10 annual registration fee for applicants with no state license other than the required Type 82 out-of-state shipper's permit) and as payer of state business taxes (annual reporting required) may ship to consumers without volume limits, subject to $0.20/gal. excise and 7.25% use tax and posting a $500 interim tax bond. A less useful alternative allows transportation from any U.S. location of up to one quart per year, either accompanying an adult passenger on board a chartered airplane on a flight entirely within the U.S. or shipped directly if the purchaser bought the wine at the winery. Winery shipper privileges are not limited to reciprocal states, but there are a limited reciprocal provision in the new law for shipments by retailers (see Litigation, below) and by individuals, and an older reciprocal provision for donations of wine to nonprofit tastings.

Litigation: A *Granholm*-based retailer suit, *Knightsbridge Wine Shoppe, LTD v. Jolly*, pending in the Northern District federal court has produced an agreement with the state similar to the interim result in Texas, permitting out-of-state retailers delivery privileges equivalent to California retailers, without respect to reciprocity, but the case has not been dismissed. The case management conference originally scheduled for December 22, 2006, to establish issues to be resolved and a time line for completion of proceedings, has been postponed to January 9, 2009, and the agreement has been extended to December 31, 2008. An earlier case, *Coulombe v. Jolly*, had been dismissed on the grounds the plaintiffs lacked standing to sue because they had not adopted a concrete wine sales plan that would violate the challenged statutes.

Colorado

Direct Shipment Basics: A winery holding a $50 out-of-state shipper permit may ship to a "personal consumer located in Colorado," subject to $0.80/gal. excise. Monthly tax reporting and submission to jurisdiction required. Permit applications can be downloaded from www.revenue.state.co.us/liquor_dir/pdfs/8475.pdf, but a state bulletin of June 7, 2006 says no new application is required for a winery holding a current Wine Shipment Permit that was applied for before July 1, 2006.

Connecticut

Direct Shipment Basics: The current winery shipper's permit replaces the old small winery shipper's permit, continuing the $250 fee for up-to-100,000-gallon annual producers. Licensees consent to state jurisdiction and tax audits. Forms "REG-1 Business Taxes Registration," www.ct.gov/drs/lib/drs/forms/2006forms/applications/reg-1.pdf, and "Out of State Shipper's Permit," www.ct.gov/dcp/lib/dcp/pdf/forms/cplos-01.pdf, are available online. The code also contemplates qualifying to do business in the state ($275 initial registration fee and $300/yr. maintenance fee), but the Liquor Control Division is not requiring shippers to hold wholesale distributor or retail seller licenses or file monthly tax returns as a wholesaler or retailer, as might be suggested by ambiguous provisions in the current statute. Case content markings and adult signature are required, with criminal penalties for noncompliance. The licensee must conspicuously display its shipper's permit number or numbers in its on-line advertising. Shipment is limited to wine produced on the premises described in the shipper's permit, in quantities of up to five gallons (25 x 750-*ml* bottles, plus a couple of miniatures, a volumetric holdover from the old law) of a registered brand, via holder of a $1000 in-state transporter's permit (which is not limited to common carriers, see www.ct.gov/dcp/lib/dcp/pdf/forms/cpltr-01.pdf), within any two-month period (changed on October 1, 2007 from 60-day periods to make calculation easier) to consumer at an address not within a dry township, subject to sales and excise taxes. Brand registration costs $100, and each varietal or proprietary product is a separate brand; see www.ct.gov/dcp/lib/dcp/pdf/liquor/cplbd.pdf. The $1000 general "out-of-state shipper's permit" and $250 former "out-of-state small winery shipper's permit," heretofore required to ship to wholesalers and already held by some wineries, apparently now authorize shipment to consumers.

On-site sales: At last report, carriers were shipping wine purchased in person by the consignee, up to two cases per month. The legal basis for wineries that do not hold a state shipper's license is murky, as the federal direct shipment statute applies only to wine the purchaser could have imported personally under the laws of the state, and Connecticut law appears to limit such importations to five gallons per 365-day period.

Direct Distribution: Out-of-state wineries producing up to 100,000 gallons annually from at least 25% their own fruit now have the privilege, formerly limited to Connecticut "farm" wineries, to sell and ship directly to retailers in sizes not to exceed 56 liters per container.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract. Connecticut's general franchise law (the real franchise statute, with substantial requirements like those applicable to McDonald's, not the pseudo-franchise wholesaler protection legislation often called "franchise" in the wine industry) is of unusually broad application and may apply to ordinary sales through wholesalers.

Delaware

On-site Sales: Under the federal direct shipment statute, a winery may ship up to 1 liter per day (4 liters if from American Samoa, Guam, or American Virgin Islands) from anywhere in the state where it is located, to any person in Delaware at least 21 years old, not mentally ill or deficient, who does not habitually drink alcohol to excess and is not interdicted by the state, adult signature required, if the wine was purchased while the purchaser was physically present at the selling winery, for consumption solely by the importing person or that person's family or guests.

Litigation: On April 12, 2007, the court granted the plaintiffs' motion for reconsideration of its previous order to dismiss a federal suit, *Hurley v. Minner*, which challenges restrictions on direct shipment. The ruling abandoned the court's 2006 finding that because the state required consumers to pick up Delaware wine at the winery, the special order provisions requiring them to pick up out-of-state wine at a local retail licensee (see "Three-tier Distribution," below) was permissible under *Granholm*. A direct distribution count in the complaint was dismissed by agreement on August 25, 2006 because level-down legislation rendered it moot. The remainder of the suit was dismissed by stipulation on January 8, 2008.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract between wineries and wholesalers. A special order provision appears to allow a consumer to initiate a shipment of wine from an out-of-state winery for successive delivery to a wholesaler and a retailer, for pickup by the purchaser.

District of Columbia

Direct Shipment Basics: Wineries may ship directly to any consumer of age to purchase, by public or common carriers, up one quart per month per recipient.

On-site Sales: Under federal direct shipment statute, a winery may also ship from anywhere in the state where it is located, to a consumer (adult signature required) in the District, up to one gallon purchased while the purchaser was physically present at the selling winery.

Direct Distribution: Wineries may ship directly to retailers who hold importation permits for the brand, which are issued if the D.C. Alcoholic Beverage Control Board is satisfied that the brand is not obtainable by the licensee from a wholesaler in the District in sufficient quantity to reasonably satisfy the immediate needs of the licensee. The retailer must pay excise tax.

Florida

Direct Shipment Basics: An example of law-making by litigation, Florida has been operating under policy directives of the Department of Business & Professional Regulation, necessitated by the August 5, 2005 federal district court order in *Bainbridge v. Turner*. The court ruled, with the state's consent, that prohibition of direct shipment was unconstitutional under *Granholm* for discriminating in favor of in-state wineries and refused the wholesalers' request to cure discrimination by invalidating the in-state direct shipment statute. The case was dismissed by stipulation on October 18, 2005, apparently having achieved its purpose. The policy announced February 16, 2006 allows shipment directly to consumers via common carrier, with monthly payment of tax. The court did not specify procedures for payment of the $2.25/gal. excise, the 6% sales tax, or other potential regulatory issues or enjoin the state from enforcing penalties for non-payment of tax. In an informal discussion in September 2005, the Department's attorney said that express companies such as FedEx and UPS are considered exempt as common carriers from vehicle permit requirements and may deliver for manufacturers (notwithstanding an earlier attorney general opinion to the contrary). Shortly thereafter, the Department began issuing periodic reports that new administrative rules were in process, but they never appeared. Subsequently, it concluded that legislation is required. In mid-2007 the Department removed its web site description of acceptable direct shipment procedure under *Bainbridge*, an accommodation it described as "not legally binding." That action caused concern that the Department would bow to wholesaler pressure to discontinue the current arrangement (for example, by leveling down in administrative rule-making), following the legislature's failure to act. The Department of Business & Professional Regulation Audit Bureau originally appeared to support a restrictive policy by declaring in an April 2007 press release that it lacks statutory authority to track, audit and collect taxes on direct wine shipments from outside the state (a debatable proposition), but the governor reportedly directed maintenance of the status quo. Efforts in each session to formalize shipping rules have failed to produce a bill, and the 2008 legislature is considering bills that would shut the current accommodation down.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Florida, up to one gallon per shipment.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Legislation: House Bill 693 and Senate Bill 1096 offer a $250 direct shipment permit to wineries less than 250,000 gallons of wine annually. Both would impose annual household quantity limitations and require posting a tax bond, making reports, paying excise taxes, and verifying purchaser age. Senate Bill 1096 appears to combine a confusing array of distributor-supported restrictions. A similar measure, Senate Bill 1736, withdrawn on March 12th, 2008, would have provided felony penalties for knowingly and intentionally shipping to a person under 21.

Georgia

Direct Shipment Basics: For wine with a Georgia-approved label that is not sold through Georgia distributors, a winery holding a special order shipping license and having no commercial relationship with a Georgia distributor may ship up to five cases in a year to a single consumer, subject to $1.51 state excise, 4% sales tax, and a 50-case annual limit for all customers in the state.

On-site Sales: State law permits shipment directly to consumer who has placed order in person at winery premises, free of excise tax, not to exceed five cases per order.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Legislation: House Bill 1061 was approved by the Senate and sent to the Governor for signature on March 31st, 2008. The bill would allow wineries to ship offsite sales of wine even if a distributor in the state sells their products. The bill would also increase the customer volume limitation from 5 cases per year to 12 cases per year, remove the wholesaler designation requirement, and require sales tax to be paid on all shipments into the state.

Hawaii

Direct Shipment Basics: The islands are separate counties with their own regulatory agencies, which have historically differed somewhat in procedures. A winery holding a county Direct Wine Shipper Permit may ship up to six cases per household per year to consumers in that county (although there have been inconsistent interpretations regarding a possible state maximum), subject to excise taxes. Tax payment requires a General Excise Tax License, which is issued by the Department of Taxation after the winery files a Basic Business Application. See forms under "Relevant Documents" at http://wi.shipcompliant.com (by clicking on the "State Shipping Laws" header and then on

Hawaii). The current permit procedures, which became mandatory on January 1, 2007, have not thus far produced complete consistency. Maui County requires a copy of the federal basic permit; Kauai and Hawaii Counties require a copy of the state winery license. Permits for Maui and Hawaii Counties cost $48; Honolulu County's permit costs $120. All counties require excise tax registration on form BB-1. A preexisting provision independently authorizes shipment directly to a consumer holding an importation permit from a county liquor commission, not to exceed one 5-gallon shipment per household per calendar year (plus unsolicited gifts not exceeding 3.2 gallons each), for use of the permittee or permittee's family. Importation permit applicants must demonstrate to the issuing liquor commission that the product is otherwise unavailable in the state or pay an additional fee equivalent to the excise tax.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Hawaii, up to one gallon per shipment.

Idaho

Direct Shipment Basics: A winery holding a $50 shipping permit ($1000 tax bond required) may ship up to 24 cases annually to a resident consumer, subject to sales and excise taxes and a somewhat burdensome annual shipment report specifying invoice number, order type and sale type, purchase date and ship date, buyer's name and address, shipped-to name and address, date of birth for buyer and for recipient, brand and product description, alcohol percentage, number of bottles, volume per bottle, total price of wine and tax charged, and invoice total. Separate sales tax form is required for sales made to Nez Perce County residents. A permit is available to retailers in reciprocal states, but because the restriction is probably invalid under *Granholm*, that arrangement does not appear reliable for the long run.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Illinois

Direct Shipment Basics: Beginning June 1, 2008, wineries may obtain a permit, with sliding scale fees from $150 to $1000, based on capacity, authorizing direct shipment of up to 12 cases per year to a single customer. Meanwhile, presumably shipment will continue under a system the Liquor Control Commission has conceded is illegal under *Granholm*, permitting wineries in a reciprocal state to ship directly to consumers, not to exceed two cases annually for a single customer. Carriers are reportedly following their existing policies, but it is an open question whether any administrative action would or could be taken against such shipments from a non-reciprocal state.

On-site Sales: A question exists whether Illinois has any a general prohibition on importation by consumers, as the statutory prohibition appears to apply only to shipment or transportation initiated from outside the state. To the extent residents may themselves lawfully import wine for personal use (an unsettled matter), wineries could in theory ship in-person purchases to them under the federal direct shipment law, independently of the direct shipment statute. According to a 1974 Attorney General Opinion, the Commission lacks jurisdiction over importations by residents for their personal use, although by unpublished policy, personal importation of over 1 gallon per year of wine not authorized by the direct shipment statutes without written permission of Liquor Control Commission would be deemed not for personal use.

Direct Distribution: The direct shipment permit also allows direct distribution of up to 5,000 gallons per year by under-25,000-gallon annual production wineries.

Three-tier Distribution: The state follows the Uniform Commercial Code, but requires registration of distributors.

Litigation: Out-of-state retailers have threatened suit under *Granholm* because of their ineligibility for a permit to ship to consumers under the new direct shipment law. A state court suit *Raimondi v. Koppel*, in which an Italian winery apparently seeks to level down by enjoining in-state wineries from direct distribution, is based on the Illinois Constitution's equal protection clause and prohibition of special interest legislation, rather than *Granholm*. No substantive rulings are reported.

Legislation: Senate Bill 107 would allow direct distribution of up to 25,000 gallons by an Illinois winery producing less than 100,000 gallons annually. Excluding out-of-state wineries raises obvious *Granholm* issues.

Indiana

Direct Shipment Basics: Out-of-state wineries can apply for the direct wine seller's permit available to Indiana "farm wineries," with restrictions including (through June 30, 2008) a 500,000-gallon annual cap on production of wine *sold in Indiana*. See "Legislation," below, for changes effective July 1, 2008. Instructions for the current application are at www.in.gov/atc/pdf/DirectShipperSupplement.pdf. An applicant that has not operated as an Indiana farm winery (with both a 500,000-gallon total volume cap and a local fruit or honey requirement), which presumably would include all out-of-state wineries, may not have distributed through an Indiana wholesaler for 120 days preceding the application. Wineries that are subsidiaries, parents, or affiliates of other wineries (or of brewers or distillers) are ineligible. Permit holders may ship at total of up to 3,000 cases per year per winery to consumers in the state, not to exceed 24 cases in a calendar year to any single customer *from all wineries*. The substantial record-keeping burden has reportedly induced one well-known Indiana winery to close its doors. On October 15, 2007, the Commission announced it would not take action against a winery whose shipment puts a consumer over the aggregate limit if (1) the holder of the direct wine seller's permit has not directly shipped in excess of 216 liters within the calendar year to the particular Indiana consumer; (2) the direct wine seller has no actual knowledge that the particular consumer has received in excess of 216 liters within the calendar year; and (3) at the time of the sale transaction, the consumer represented to the direct wine seller that the sale would not result in the consumer's receiving in excess of 216 liters in the calendar year. According to the statute, wineries with wholesaling rights in their own states –*i.e.*, most wineries– are ineligible for the permit. (Although virtually all state winery licenses include intrastate direct distribution, its status is questionable in the numerous states that deny it to out-of-state wineries.) Wholesaling-privilege ineligibility and a requirement that direct shipment recipients have previously presented personal identification and signed a prescribed statement at the winery site were invalidated in the *Baud* case (see "Litigation," below). Reportedly, Department of Revenue authorities have said informally that out-of-state wine stores can ship on the same terms as out-of-state wineries if they follow the same rules, but there is no known instance of the Alcohol & Tobacco Commission's issuing a permit to a non-producing retailer.

On-site Sales: Under the federal direct shipment statute, a winery may ship from anywhere in the state where it is located to a consumer (adult signature required) in Indiana up to one quart of wine purchased while the purchaser was physically present at the selling winery.

Direct Distribution: There is a "micro-wholesaler" (up to 12,000 gallons annual sales) permit ($100/yr.), with no express location requirement. In an informal opinion, the state regulatory agency indicated it would issue the license to an out-of-state winery that either has never previously held a wine wholesaler's permit and anticipates selling less than 12,000 gallons of wine and brandy in a year or, if it previously held a wine wholesaler's permit, certifies that it sold less than that amount in the previous year. By statute, the wholesale operation can be on farm winery premises and can use goods and services provided by the farm winery, suggesting that wineries licensed as micro-wholesalers will be subject to the 500,000-gallon cap on the total of direct shipment and direct distribution sales in the state.

Litigation: On August 29, 2007 the federal suit, *Baude v. Heath*, produced a judgment that declares unconstitutional two aspects of the Indiana statute, *viz.*, ineligibility of most out-of-state wineries for the "direct wine seller's permit" available to in-state wineries and wineries in the few states that do not grant them local wholesaling privileges, and the on-site purchase requirement. The case is on appeal to the 7th Circuit, which heard oral argument on February 22, 2008. As no stay has been entered, the Commission remains enjoined from denying permits on the statutory basis and from preventing direct shipment based on off-site orders, but at last report the injunction had not been implemented, and the application form still contains the no-wholesale-permit requirement. Indiana has a history of resisting Commerce Clause claims. In 2003, the Alcoholic Beverage Commission, which was reportedly considering whether to permit "farm wineries" (producing under 500,000 gallons and using Indiana fruit) to exercise their on-site sales privilege by shipping to consumers who purchase by electronic means or mail, put the project on hold to await the decision in *Granholm.* The Commission's public statements implied it would not allow direct shipment unless *Granholm* permitted extending the privilege only to in-state wineries, which of course did not occur. An earlier suit similar to *Baude v. Heath* ended in sustaining the state law on the theory it requires "every drop" of wine, without discrimination between in-state and out-of-state shippers, to go through the three-tier system, although it is questionable whether that was ever the case. In any event, *Baude v. Heath* specifically finds that Indiana law allows in-state wineries to sell directly to consumers and retailers, thereby discriminating against interstate commerce. On May 20, 2005, the Commission warned Indiana wineries by letter that in its view instate shipment to consumers is prohibited, but on November 15, 2005, nine Indiana wineries filed *Thomas Family Winery v. Heath*, a state suit challenging that interpretation, and on November 23, 2005, the state court enjoined enforcement of the putative prohibition, pending resolution of the issue by legislative action. The preliminary injunction supported local direct shipment only until April 6, 2006, and appears to have been supplanted by the current statute. *Thomas Family Winery* was dismissed as part of the compromise with the wholesalers that made that legislation possible, although it is difficult to ascertain what the wineries gained thereby. The *Baude v. Heath* plaintiffs were not parties to that agreement.

Legislation: Senate Bill 107, effective July 1, 2008, raises the production volume cap for eligible wine shippers and in-state "farm wineries" from 500,000 to 1,000,000 gallons and makes it clear that out-of-state wineries can apply for the permit. The bill does not remove the country-wide wholesaler exclusion (noted under "Litigation," above), but adds specific disqualification of applicants with wholesale representation in Indiana.

Iowa

Direct Shipment Basics: A winery licensed in a state that affords Iowa wineries an "equal reciprocal shipping privilege" may ship eighteen liters per month to an individual for personal use by common carrier. The right of wineries in non-reciprocal states to ship to Iowa consumers is unclear, and carrier policies at last report were inconsistent, permitting shipments to fulfill all orders from some non-reciprocal states and limiting others to on-site only. Reports of state policy on reconciling the conflicting requirements of the state statute and the Commerce Clause have been inconclusive.

Kansas

Direct Shipment Basics: Wineries producing no more than 100,000 gallons annually and holding a $50 permit may ship wine to a Kansas retailer for delivery to consumers who are not purchasing face-to-face (including, presumably, those ordering via Internet or phone), with $5 pickup fee. Larger wineries may ship to a Kansas wholesaler for transshipment to a Kansas retailer, who then delivers to the off-site purchasing consumer, who must pay all shipping costs. The wine is subject to excise tax, and the shipping winery must file annual shipment reports and consent to tax audits.

On-site Sales: All wineries may ship wine directly to consumers at least 21 years old who made the purchase at the winery for personal consumption, subject to excise tax, annual reporting of shipment, and consent to tax audits.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract. However, wine shipped under the direct shipment statute is not sold to the wholesaler or retailer and therefore may not subject the shipping winery to special supplier-wholesaler legislation.

Kentucky

Direct Shipment Basics: Wineries holding "small farm winery" licenses ($100/yr.), which are limited to producers of up to 50,000 gallons in any calendar year, may ship by licensed common carrier. Under a federal district court ruling of December 26, 2006, orders need not be placed in person. A two-case limit "per visit" applies, but whether it will be applied per order or per shipment remains to be determined, given that the visitation requirement has been invalidated. At last visit, the Wine Institute "Who Ships Where" table indicated carriers were accepting only intrastate shipments, and reports indicate even those are only for on-site sales.

Direct Distribution: The state has revoked self-distribution by small farm wineries, presumably to avert a *Costco* challenge to prohibition on direct distribution from outside the state. The current law creates a "small farm winery wholesaler" license, but it cannot be held by a small farm winery. In August 2006, the federal court ruled against an attempt to open the state to direct distribution, finding the plaintiffs had not demonstrated direct and harmful discrimination.

Three-tier Distribution: The state will subsidize no-markup distribution of small farm winery products, provided the winery can find a Kentucky wholesaler willing to participate in the program.

Litigation: On December 26, 2006, in the *Granholm*-based suit *Cherry Hill Vineyards, LLC v. Hudgins* (also known as *Huber Winery v. Wilcher*), a federal district court enjoined the state from enforcing the on-site-only requirement of its direct shipment law, which purportedly applied to all wineries and gives out-of-state wineries the right to hold Kentucky "small farm winery" licenses. The decision reaffirms the court's analysis of last August, which struck down portions of the preceding statute on the grounds of practical effects (as distinct from overt discrimination) that unduly burden interstate commerce relative to in-state direct shipments. The ruling has direct effect only in Kentucky, but is of broader significance because it challenges illusory equality that conceals *de facto* discrimination and recognizes that, because wines from different regions are distinct, availability of local wines does not cure practical difficulty in exercise of consumers' right of access to distant producers under *Granholm*. The court, however, upheld other aspects of the new law. The winery and consumer plaintiffs had also challenged two restrictions on small farm winery licensees, (1) that the license is available only to wineries producing no more than 50,000 gallons annually, and (2) that wineries may ship no more than two cases "per visit." The court decided both restrictions were constitutionally permissible because the inequities arose from "mere geographic happenstance," but did not describe how to find the line between happenstance and an impermissibly protectionist system in a *de facto* discrimination case. The state's and wholesalers' appeal from the August ruling had been parked in the Court of Appeals pending the December judgment. The state dropped out of the appeal in April 2007, but remains involved as *amicus curiae* in further proceedings. The wholesalers' appeal from the December 2006 ruling, filed in January 2007, became active as *Huber Winery v. Wilcher* in November 2007, with initial briefing by both sides completed on February 29, 2008.

Louisiana

Direct Shipment Basics: A producing winery holding a shipping permit ($150 "annual tax") and having no relationship with any Louisiana wholesaler may ship up to 60 bottles (any size) per year to a consumer, routing a copy of a detailed invoice to the state, subject to a volume limitation of forty-eight 750-*ml* bottles per year to any single "household address." The shipping winery must report monthly the number of cases shipped into the state and pay the excise and sales taxes for all wine shipped.

On-site Sales: If the shipping winery is a direct or indirect party to an agreement that granted a Louisiana wholesaler the right to purchase and sell any of its wines, its sale of any wine to be shipped to the consumer in the state must have been "perfected" (which may or may not mean an in-person purchase) on the "domicile" (usually, but not necessarily, the production premises) of the winery.

Direct Distribution: The "Wine Producers Act" eliminated direct distribution by in-state wineries, to protect the prohibition on sales to retailers by out-of-state wineries against challenge under *Granholm.* In December 2006, the Louisiana Office of Alcohol & Tobacco Control obtained a consent decree, enjoining a New Jersey tobacco wholesale operation distributing tobacco products directly to retail outlets in Louisiana. The same agency has enforcement responsibility for the current wine law.

Maine

Direct Shipment Basics: Selling or purchasing by "mail order" is expressly forbidden. Whether other means are permitted is academic, because there is currently no authorized method of shipping off-site purchases.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Maine. The statutory limit of one gallon per transportation into the state can be waived by the Bureau of Revenue services upon special application by the resident.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: In an opinion more notable for use (and misuse) of uncommon terms like "perscrutation" and "limn" than for rigor of analysis, on October 11, 2007 the First Circuit Court of Appeals upheld the March 5, 2007 federal district court judgment in favor of the state in *Cherry Hill Vineyard v. Baldacci*. The decision is based on the grounds that the face-to-face restriction applies equally to in-state and out-of-state small wineries, both of which can be licensed in Maine, and that the plaintiffs failed to present evidence of any off-site order local market that is available to in-state wineries but denied to out-of-state wineries. The plaintiffs' strategy (probably dictated by economic factors) of submitting the appeal on a relatively sparse agreed record prevented consideration of economic burdens resulting from facially neutral legislation. Among issues left unsettled is the question whether the plaintiffs must prove such discrimination or only that the state could as well have achieved its purpose with a *lesser impact* on interstate commerce.

Maryland

Three-tier Distribution: An out-of-state winery that has not held, and in which no one holding any financial interest has held, any other Maryland alcoholic beverage license or permit within the past 2 years may hold a $10 "direct wine seller" permit, to sell wine of which it is the brand owner, U.S. importer, or designated agent of the brand owner, and which is not being distributed by a Maryland wholesaler and was not distributed in the state during the two years preceding the winery's permit application, to residents for personal consumption, subject to an annual sales limit of 900 liters for all Maryland residents and 108 liters for any single Maryland resident. An annual excise tax return is required. Direct shipment is prohibited, as the wine must be delivered, freight prepaid, to a Maryland wholesaler, for redelivery to a Maryland retailer, before reaching the purchaser, who must pay, if asked by the delivering licensees, a fee up to $14 per shipment. For conventional sales through wholesalers, the state has not enacted systematic restraints on freedom of contract, but some state statutes are ambiguous regarding possible effect on supplier-wholesaler relations.

Direct Distribution: Holder of Nonresident Winery Permit ($50, available only to licensed wineries producing no more than 27,500 gallons annually) may ship directly to restaurants, off-sale retailers, and certain other permit holders.

Legislation: House Bill 1260 and the companion Senate Bill 616 died in the House Economic Matters Committee after hearings on February 18, 2008. The bills would have established a $100 permit for wineries, retailers, importers and brand owners to ship up to 24 cases per year to a consumer in a wet area.

Massachusetts

Direct Shipment Basics: According to statute, wineries producing not more than 30,000 gallons annually may ship to consumers under a $100 shipment license. Wineries producing over 30,000 gallons annually may ship only if they have been free of contractual relationships with Massachusetts wholesalers during the preceding six months. Problems have arisen with implementation, and at last report major carriers were making only intrastate deliveries.

Direct Distribution: An up-to-30,000 gallon winery holding the shipment license may sell to Massachusetts retailers, with certain limitations (*e.g.*, no more than 250 cases per year to any off-sale account).

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: On October 17, 2005, the federal district court entered judgment for plaintiffs in a post-*Granholm* federal suit, *Stonington Vineyards, Inc. v. Jenkins,* overturning prohibition of direct shipment to Massachusetts consumers and retailers on grounds of discrimination against interstate commerce. The court enjoined the state from enforcing state statutes "so as to prohibit out-of-state wineries from selling and shipping wine directly to consumers and licensed retail wine sellers in the Commonwealth of Massachusetts." The current direct shipment law, passed on February 15, 2006 by legislative override of the governor's veto, may have mooted the injunction, but administrative issues and the question of the validity of the volume cap remained unresolved. A federal suit, *Family Winemakers of California v. Jenkins*, filed September 18, 2006, alleges that subjecting out-of-state wineries to a volume cap and to ineligibility if they also sell through wholesalers, while affording in-state wineries "unfettered access" to Massachusetts consumers violates the Commerce Clause, both by unduly burdening commerce and by discrimination in favor of local wineries as condemned in *Granholm*. Curiously, the complaint most prominently attacks Ch. 138, § 19F, of the code, which is the new law allowing direct shipment, leaving open the remedy of invalidating that provision without changing any of the other code sections that prohibit importation except to distributors or under § 19F, which are not challenged in the complaint. If the court took that route, it would have to invalidate the § 19B in-state "farmer-winery" privilege as well, to level down under *Granholm*. The state wholesaler trade association's motion to intervene in the suit was denied on December 18, 2006. The commonwealth's motion to dismiss is scheduled for hearing on

April 22, 2008. The motion is based on alleged lack of standing to sue, arguing that the plaintiff trade association is not representative of wineries because of the conflict of interest between large and small producers and that the plaintiff consumers' interest in greater personal choice of wines is not commerce within the meaning of the Commerce Clause.

Michigan

Direct Shipment Basics: After several postponements, Michigan, a losing party in *Granholm*, produced what might be termed a grudging acceptance statute in purported compliance with the Supreme Court decision. A winery holding a Direct Shipper license and registered with the state Department of Treasury may ship to consumers in the state. Restrictions include a 1500-case annual limit per winery or group of commonly managed wineries, a $100 annual license for out-of-state wineries, quarterly excise tax returns with shipment history details, both an underage delivery warning and a special label on the carton with the license number, a requirement to use an age-verification specialist approved by the Commission or receive a faxed copy of the purchaser's driver's license, a requirement to retain transaction records, and consent to state jurisdiction and tax audits. Senders of email that offers wine or contains a link to a site offering wine must comply with 2005 Public Act 241, which provides penalties for email sent to an underage recipient whose address is on a state registry. The state fee for checking winery email lists against the registry is $0.007 per address.

On-site Sales: Under federal direct shipment statute, wineries may ship from anywhere in the state where selling winery is located to a consumer (adult signature required) in Michigan, under-21% wine purchased for personal use while the purchaser was physically present at the selling winery, up to 312 oz. (about a case plus a split) per importation. An oddity of state law also allows on-site purchasers at U.S. wineries who, before flying to Michigan, go abroad for more than 48 hours to ship, at intervals of more than 30 days between trips, any amount federally permitted as personal importation (not, apparently, limited to the duty-free two liters). Federal law imposes no specific volume limit on duty-paid personal importations if the quantity is consistent with not "engaging in the business" of importing. Perhaps some enterprising high-margin winery will offer a two-day side trip to Puerto Vallarta or Victoria as part of its VIP case buyer program.

Direct Distribution: The current law leaves direct sales to retailers in place only for in-state wineries, unless a court finds the discrimination unconstitutional, in which case it repeals the in-state privilege.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Minnesota

Direct Shipment Basics: Out-of-state wineries may ship up to two cases per year to a consumer. By statute, the sales are not deemed to occur in Minnesota; winery sales terms locating the sale in the seller's state should therefore be effective. A gross receipts tax of 2.5% on sales by "liquor retailers" became effective January 1, 2006, but is of uncertain application to out-of-state sellers and, even if applicable, allows credit for home state gross receipts taxes.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: On April 3, 2006 the court in *Crockett v. Campion* entered a consent decree that wineries have the a 1st and 14th Amendment right "to engage in truthful, non-misleading advertising and solicitation of direct sales and shipments of wine to Minnesotan consumers" and to "initiate and/or accept online orders for sales and shipments of wine placed by Minnesotan consumers via the Internet." For the text of the decree, see www.dps.state.mn.us/alcgamb/alcgamb_files/show_case_doc.pdf.

Mississippi

Direct Shipment Basics: Prohibited. The state has expressly restricted in-state winery consumer sales to the winery location, to avert *Granholm* arguments based on a reading of state law that would permit in-state direct shipment.

Three-tier Distribution: Importation and distribution is a state monopoly.

Legislation: House Bill 815 in Mississippi passed both House and Senate and has been returned to the House for concurrence. The bill would allow Mississippi consumers to order "unlisted" items, but would require delivery to a package store for all direct shipments, up to one case per month to a consumer from any combination of licensees, not limited to direct shippers. A 27% ad valorem tax, 7% retail sales tax, and 3% mark-up (for the package store) apply to all orders. Unlisted wines could also be shipped to on-sale premise retailers in Mississippi, subject to the 27% tax.

Missouri

Direct Shipment Basics: Wineries may obtain a permit to ship 2 cases per month to a consumer, subject to excise tax. A permit with similar privileges is available to retailers in states that have entered into reciprocal agreements with the Missouri regulatory agency; as such agreements are condemned by *Granholm*, it seems unlikely the arrangement will remain in force long term. The carrier must hold a separate permit to deliver to a consumer.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: A *Granholm*-based federal suit, *Burack v. Lobdell* (formerly titled *A. Rafanelli Winery & Vineyards, LP v. Lobdell*), challenging the pre-August 8, 2007 reciprocal law, was voluntarily dismissed on October 2, 2007.

Montana

Direct Shipment Basics: A winery registered with Montana as a "foreign winery" may ship directly to a consumer holding a "connoisseur's" permit, using a shipping label provided by customer, not to exceed 12 cases per year to a single customer and 60 cases per year for all recipients in the state. The state requires listing distributors, if any, and consumer customers if there are no distributors, on the registration form, but reportedly does not regulate allocation of sales between direct shipment and three-tier, except for imposing the 60-case annual limit on the former. Complicated limits and criminal penalties for non-willful violations by wineries or brewers may make the permit impractical; FedEx does not show the state as a permissible destination for off-site sales.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Montana, not to exceed 3 gallons per importation.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Direct Distribution: Senate Bill 524, which affirms the right of wineries to sell to Montana retailers, was signed by the governor on May 16, 2007.

Legislation: The original Senate Bill 524 deleted carrier criminal liability for violations of the direct shipment law not done "purposely, knowingly or negligently," but that change was removed by wholesaler lobbying.

Nebraska

Direct Shipment Basics: Wineries holding S-1 shipper's licenses ($500 annual fee) may ship directly to consumers for personal use of recipient or recipient's family or guests, not to exceed 9 liters per month to any one recipient (or possibly family), subject to excise tax.

Three-tier Distribution: State statutory restraints on freedom of contract may be vulnerable to constitutional challenge.

Nevada

Direct Shipment Basics: With some peculiar qualifications, a winery may ship wine "for household or personal use" directly to a consumer who receives no more than 12 cases per year from all winery sources combined. It is unclear whether wineries may safely rely on customer representations of their total annual received shipments. The shipping winery must hold a shipping license ($50/yr.) and pay an importer license fee if it ships 200 or more cases per year. Wineries shipping 25 cases or more in any fiscal year must designate a Nevada importer. Although the statute does not require shipping wineries to sell any wine to the importer, supplier-importer relationships raise significant legal issues; consultation with counsel is recommended before exceeding the 25-case level.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Nevada, not to exceed 1 gallon per month or any federally duty-free amount, tax-free, limited to household or personal use.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

New Hampshire

Direct Shipment Basics: A winery holding a "direct shipper" permit may ship to consumers via licensed carriers, limited to 60 bottles (one liter or less each) to any one customer in a calendar year. Direct shipper licensees must file monthly reports and are required to offer to the commission any direct sale items that have been listed with the commission within the preceding 2 months or of which more than 100 cases have been shipped into the state.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in New Hampshire, up to three quarts per importation (3 gallons with permit from State Liquor Commission).

Three-tier Distribution: Importation is a state monopoly.

New Jersey

Direct Shipment Basics: New Jersey exhibits both an odd collection of wine importation statutes and a remarkable gap between text and practice. Theoretically, wineries may ship to consumers via a licensed beverage transporter with payment of tax, under a permit issued by Division of Alcoholic Beverage Control, but the Division refuses to issue the permits.

On-site Sales: Two provisions of state law may be relevant to application of the federal direct shipment statute. One allows personal importation in a vehicle under control of the consumer, up to 1 gallon within a 24-hour period, but only from a state allowing similar importation of alcoholic beverages purchased in New Jersey, a limitation that is questionable under *Granholm*. The other allows a consumer reentering the state to bring wine into the state under a $25 permit issued by Division of Alcoholic Beverage Control, for personal consumption, with no stated volume limit (but possibly a practical requirement that it be consistent with personal use). Each presents some uncertainty. At least one carrier accepts shipments of up to one gallon purchased in an on-site sale, but the requirement in the one-gallon statute that importation without a permit be in a vehicle under control of the consumer does not fit the federal direct shipment model, which is based on allowing shipment of wine that could otherwise be transported lawfully as airline luggage. Importation with a permit would increase the allowed volume, but does not seem commercially practical, and whether the state would issue a permit for shipment under the federal statute is presently unknown.

Direct Distribution: In response to wholesaler fears that the discrimination might result in court-mandated direct shipment, the state repealed in-state direct shipment provisions on July 14, 2004, but gave in-state wineries rights to additional sales sites that are not available to other producers.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: Cross-motions for summary judgment are pending in a federal case, *Freeman v. McGreevey*, challenging discrimination against out-of-state wineries. As of March 2008, the parties were arguing about the significance of the *Black Star Farms* case, noted under Arizona litigation, above, and discussed in the prefatory section on volume caps.

New Mexico

Direct Shipment Basics: Wineries in reciprocal states may ship directly to consumers, not to exceed two cases per month for a single customer. Prohibition of shipments from other states is of questionable validity under *Granholm*. Remarkably, another state law appears to allow a consumer who is not a minor to import reasonable amounts exclusively for private use or consumption, independently of the reciprocal shipment statute, without a requirement of personal transportation.

On-site Sales: Even if the consumer importation provision noted above is limited to personal transportation, it should provide a basis for shipment under the federal direct shipment statute without the two-case limit, but carriers reportedly limit shipments to two cases for the aggregate of on-site and off-site sales.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

New York

Direct Shipment Basics: Ironically, although New York was the defendant in *Swedenburg v. Kelly*, the companion case decided by the Supreme Court in *Granholm*, it "fixed" the unconstitutionality of its direct shipment ban by enacting a quasi-reciprocal law that is itself probably unconstitutional under *Granholm*. Reportedly, the legislative sponsors were aware of the flaw, but accepted it because anti-commerce legislators would not vote for the bill without it. In any event, it is the statute currently in force and allows a winery licensed and located in a state that, in the State Liquor Authority's opinion, affords New York wineries substantially equivalent privileges to obtain a New York out-of-state direct shipper's license ($125/yr.), authorizing shipment of up to 36 cases per year to a consumer for personal use, via licensed carrier, subject to state and local excise and sales taxes. (The list of qualifying states is subject to change without notice; at last report, the SLA was processing license applications from wineries in California, North Carolina, Oregon, Texas, Virginia and Washington, a group that does not correspond to the reciprocal shipment state list because "substantial equivalence" is apparently different from reciprocity. A Washington application by a multi-facility winery reportedly resulted in separate licenses for different locations, leading to some confusion on the part of state tax authorities regarding separate versus consolidated tax reporting.) Licensees must file annual and semi-annual reports, retain records for three years, submit to state jurisdiction and taxpayer registration with permission for audits, use special case markings, verify purchaser age, and deliver only upon adult signature with photo ID. Reporting documents include Wine Manufacturer's Report (filed semi-annually with the New York State Liquor Authority), Sales and Use Tax Return (sent quarterly to the attention of the New York State Sales Tax Processing Division), and Excise Tax Payment Form (sent monthly to the attention of the New York State Alcoholic Beverages Tax Processing Unit). Carriers must maintain state licenses and undertake substantial responsibility for averting delivery to underage recipients. Administrators in some remaining reciprocal states reportedly refused shipper licenses to New York wineries on the logically reversed grounds the New York law is not truly reciprocal. (To comply with *Granholm*'s message on reciprocal shipment, they should drop their own reciprocity requirements and not worry about New York's.) They may have been influenced by the color-coded Wine Institute map at http://wi.shipcompliant.com/Home.aspx?SaleTypeID=1, which does not identify New York as reciprocal.

Advertising: With respect to advertising in New York by out-of-state direct shipment licensees, the new law does not expressly repeal the ad ban under § 109(1), but the *Swedenburg* trial court found it invalid under the First Amendment and was not reversed on that point, so the ban appears to be effectively dead, whether or not enforcement is prohibited under a current injunction.

Three-tier Distribution: The state has approved "drop shipment" from wineries to retail accounts pursuant to special Internet orders from retailers without taking the goods into the selling wholesaler's warehouse. The approved system reportedly requires automated routing of the order to an authorized wholesaler under the standard system, which includes invoicing from winery to wholesaler and from wholesaler to retailer, price posting, and label approval.

Litigation: On September 9, 2007, a federal district court upheld discrimination between in-state and out-of-state retailers in *Arnold's Wines v. Boyle*, dismissing a complaint based on *Granholm*. The court relied on a 1990 Supreme Court case, quoted in *Granholm*, to the effect that states have a right to require three-tier systems, but seems to have missed *Granholm*'s message that upholding location discrimination requires evidence that it serves a legitimate state objective not achievable by non-discriminatory means. The case has been appealed to the 2nd Circuit as *Buy Rite, Inc. v. Boyle* and is at an early stage.

North Carolina

Direct Shipment Basics: A winery holding the no-fee shipper permit may ship wine its has formally listed with the state to consumers via a common carrier approved by the ABC Commission, up to two cases per month to any one customer, after notification to any wholesalers that purchase the same brand. Wineries shipping over 1,000 cases to all North Carolina consumers in a calendar year (not counting cases shipped home for winery visitors) must contract for wholesale distribution with at least one North Carolina wholesaler if any of them initiates a proposal.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in North Carolina, not to exceed 50 liters (4 liters if fortified) per importation without a permit. Theoretically, a consumer with a Purchase Transportation Permit could receive a shipment of up to 100 liters (40 liters if fortified).

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

North Dakota

Direct Shipment Basics: A winery or retailer that holds a $50 direct shipping permit, pays excise taxes, and files reports may ship directly to a consumer who receives no more than 27 liters of wine and spirits per month from all out-of-state sources combined, limited to personal use. Although the statute, which became effective in August 2007, is not clear on the point, it appears North Dakota may apply an annual 25,000-gallon limit on all direct sales and shipment by in-state wineries, rather than the 3-cases-per-month customer limit applicable to out-of-state wineries, raising a *Granholm* issue.

Ohio

Direct Shipment Basics: Wineries that produce no more than 150,000 gallons annually and qualify for the federal small domestic producer tax credit may hold a $25 type S permit to ship wine of its own production to resident consumers, who have a household limit of 24 cases annually from all wineries, subject to state and local sale tax, excise tax, and annual reporting to the Division of Liquor Control. The state previously operated under a 2005 injunction, using interim forms and omitting volume limitations. Out-of-state retailers may ship up to 15 gallons per 3-month period per household of wine that is not registered for sale in Ohio. No special permit is required, but the recipient must complete and file an Ohio excise and use tax return. Before the current shipping permit law became effective, when direct shipment was pursuant to an injunction, the state allowed the out-of-state shipper to handle the tax paperwork for the customer. The new procedure requires the shipper to file excise tax forms. Information about procedures is at www.liquorcontrol.ohio.gov/DirectShipping.htm.

Direct Distribution: Wineries that produce no more than 150,000 gallons annually and qualify for the federal small domestic producer tax credit may hold a $25 type B-2a permit to ship wine of its own production to Ohio retailers.

Litigation: In a 2006 case arising from enforcement of a statutory ban on private importation of alcoholic beverages purchased from an out-of-state retailer, a state judge ruled that *Granholm* prevents prosecution of individuals for bringing beer purchased from an out-of-state retailer into Ohio, because of the discrimination relative to Ohio retail licensees.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Oklahoma

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Oklahoma for personal use of “the possessor, his family and guests,” after payment of excise tax (except for sacramental wine), limited by administrative interpretation of “personal use” to 1 liter per importation. The state has no formal method of collecting tax except through wholesale distribution, but carriers accept on-site purchases. According to a July 2005 state attorney general’s opinion, now reinforced by a federal court judgment (see “Litigation,” below), an on-site purchaser may ship wine from in-state wineries to the purchaser’s residence, but in-state wineries may not ship to any unlicensed person anywhere.

Direct Distribution: Legislative Referendum 317 was adopted by voters in 2000, amending the state constitution to allow direct distribution by in-state wineries only, but is currently challenged in court by wholesalers under *Granholm*.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Litigation: On November 15, 2006, the federal district court granted summary judgment in *Action Wholesale Liquors v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n* for the wholesaler plaintiffs, who sued to level down the discrimination favoring in-state wineries. State wineries had argued for sustaining the law, which appears to require leveling up or down to comply with *Granholm*. The court indicated its preference for leveling down, but stayed its ruling until June 15, 2007, to afford an opportunity for legislative repair of the law, which originated in a referendum. Because the legislature failed to act, upon expiration of the stay the court entered an injunction eliminating the in-state direct shipment privilege.

Legislation: Senate Joint Resolution No. 29 would authorize a voter referendum on allowing in-state and out-of-state wineries to ship to distributors, retailers and consumers. Senate Bill 995 would allow direct distribution in Oklahoma by any U.S. winery of wine *manufactured in the state of Oklahoma,* a restriction with substantial *Granholm-Costco* problems. Senate Bill 995 was approved by the Senate and has been in the House since March 8, 2007. On March 4, 2008, the House Rules Committee reported SB 995 and SJR 29 with "do pass" recommendations.

Oregon

Direct Shipment Basics: Effective January 1, 2008, Wineries holding a $50 "direct shipper permit" may ship up to two cases per month per individual purchaser. A $1000 bond will be required to secure payment of privilege taxes. Meanwhile, "out-of-state wine shipper" licenses, which have been issued only to wineries in states the OLCC recognizes as reciprocal, continue to authorize direct shipment to an Oregon consumer, not to exceed two cases per month or in any single delivery. According to a letter from the then OLCC director, Oregon deems New York reciprocal, notwithstanding differences between the two statutes, but the status of other states is uncertain. The right of the state to refuse out-of-state wine shipper licenses to otherwise qualified wineries in non-reciprocal states, or to take enforcement action against a shipping winery after refusing to issue the license solely because of location, is problematic.

Direct Distribution: Oregon law allows wineries to hold wholesaling licenses. By administrative interpretation, the OLCC has contended it has authority to issue such licenses under current law only to in-state applicants. Effective January 1, 2008, a new "wine self-distribution" permit created by HB 2677 will allow out-of-state wineries to sell directly to the Commission and to licensees with license endorsements that permit receipt of directly distributed wine. See www.oregon.gov/OLCC/wine_shipping_2008.shtml.

Litigation: Oregon appears to have side-stepped the first test of the *Costco* principle for wholesalers. An appeal is pending in *Morchella Wine Cellars, LLC* from the OLCC's refusal to issue a wholesaling license to a Washington winery. The case is now in the state Court of Appeals, but may face dismissal as moot because the direct distribution option opened by HB 2677 provides privileges substantially identical to the wholesaling licenses available to Oregon wineries.

Pennsylvania

Direct Shipment Basics: Although the major carriers ship only intrastate, since December 12, 2006, the state law appears to have offered out-of-state wineries two methods for delivering wine to consumers, one by direct shipment and one via a state liquor store. The former requires a "limited winery license" created for Pennsylvania wineries, see www.lcb.state.pa.us/plcb/cwp/view.asp?a=1327&q=548215&plcbNav=|32370|, which requires using "fruits generally grown in Pennsylvania." In a non-binding informal opinion, counsel for the Liquor Control Board described the license as available to out-of-state wineries as a response to an injunction against prohibiting direct shipment (see the *Cutner* case in "Litigation," below), pending expected legislative change, but at last report major carriers were delivering only intra-state shipments. The Board has published no regulations or procedures for direct shipment, leaving it unclear whether the special permission form would be required to use fruit grown in the shipping winery's home state, which a Pennsylvania winery importing the fruit would have to file. Preexisting indirect shipment procedure, www.lcb.state.pa.us/plcb/cwp/view.asp?a=1328&q=554550&plcbNav=|32369|, requires a winery to hold a direct shipment license and ship consumer orders to state liquor stores for pickup by purchasers, limited to 9 liters per month for a single consumer of wine not on sale in state stores and subject to a $4.50 handling fee, 18% excise tax, 6% sales tax (7% for Philadelphia and Allegheny counties), and an annual report requirement. Municipalities may prohibit shipments to liquor stores within their jurisdictions, by local option referendum. Carriers' reported refusal to accept direct shipments to Pennsylvania consumers from out-of-state wineries would presumably not apply to shipments to a government agency.

Direct Distribution: The court decision allowing direct shipment to consumers also permits shipment to hotel and restaurant accounts**.**

Litigation: In Advisory Notice No. 21 (09/30/05), the Liquor Control Board ordered in-state wineries, which had enjoyed direct shipment privileges within the state, to follow the roundabout state store delivery procedure described above, beginning November 1, 2005. On November 3, 2005, local wineries responded by filing *Pennsylvania Wine Association v. Commonwealth* in state court, and on November 7, 2005 obtained a temporary restraining order against enforcement of Notice No. 21. On November 9, 2005, the federal district court in *Cutner v. Newman*, a *Granholm*-based suit challenging the discrimination that Notice No. 21 attempted to end by leveling down, granted plaintiffs judgment on the pleadings, enjoining the state from "prohibit[ing] out-of-state wineries from selling and shipping wine directly to consumers, hotels and restaurants" (but not necessarily from requiring licenses, collecting taxes, *etc.*), as long as in-state wineries "are not subject to equivalent restrictions." On November 10, 2005 the state court in *Pennsylvania Wine Association v. Commonwealth* entered a preliminary injunction against enforcement of Notice No. 21, effectively declaring local wineries free of restrictions equivalent to those on out-of-state wineries. Thus, the state court system brought state law back into conflict with *Granholm* and effectively prevented the state from leveling down administratively.

Legislation: House Bill 255 for the 2007-2008 session, which would create a $100 direct shipment permit for 2 cases per month per customer, subject to tax, was referred to the Liquor Control Committee on February 6, 2007. Its companion, SB 293, was referred to the Senate Law & Justice Committee on March 9, 2007. No hearing schedule has been reported for either bill. On January 17, 2008, HB 2165 was referred to the same committee; it would empower the Liquor Control Board to deliver wine to licensees and consumers and remove the local winery privilege to ship wine directly to Pennsylvania consumers, an attempt at leveling down that raises legal questions about application of the Commerce Clause to state agencies that enter a market in competition with private businesses.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Rhode Island

On-site Sales: After payment of tax, a winery may ship directly to fill an order "for non-business purpose" personally placed by the purchaser at the producing winery's place of business. The Division of Tax will fax authority to ship after payment of tax ($0.60/gal. excise plus 7% sales) and submittal of the wine sales invoice, which can be faxed to the Division at 401-222-6314. The state continues to enforce an informal maximum of 5 shipments per year, not to exceed 3 gallons per shipment, to any one consumer, but will sometimes allow a single first shipment of a greater quantity. Shipments to the Liquor Control Administration to fill special orders are still permitted.

Litigation: A suit challenging direct shipment prohibition was dismissed, but state law remains vulnerable to challenge under *Granholm* for discrimination in favor of Rhode Island wineries.

Legislation: Senate Bill 2125 would allow in-state and out-of-state wineries and retailers holding a $100 direct shipper permit to ship to Rhode Island residents in wet areas (at present and probably permanently the entire state), limited to 24 cases to an individual by the same winery in a calendar year.

South Carolina

Direct Shipment Basics: Winery holding an out-of-state shipper licensee ($600 per two-year license term, application at www.sctax.org/nr/rdonlyres/28a1ee91-3802-4a8b-b261-8d958efb96db/0/abl571.pdf) and has registered with the Department of Revenue ($50 fee), www.sctax.org/nr/rdonlyres/57289904-9cf6-470b-b0e5-e6c3a71654dd/0/sctc11122206.pdf, may sell and ship to consumer via state-authorized common carrier, up to 24 bottles per month for a single legal resident of state for personal use. Annual returns are required for both excise and sales taxes. The statutes seem to require a separate retailing license, but reportedly the state is not requiring it. Direct shipment does not require a wine producer certificate.

On-site Sales: The direct shipment statute probably voids a 1944 Attorney General Opinion allowing state residents to carry up to one gallon into the state for personal use, which would have opened an alternative method for in-person purchases.

Two-tier Distribution: Out-of-state wineries may ship products that are not distributed in the state to a wholesaler for resale directly to ordering consumer, with payment of taxes.

Three-tier Distribution: Although the state has not enacted statutory restraints, it may qualify freedom of contract by administrative rulings.

South Dakota

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in South Dakota for personal use, not to exceed 1 gallon per importation.

Tennessee

On-site Sales: State law prohibits possession of non-sacramental wine on which excise tax has not been paid, but does not provide a means for payment of tax except through wholesale distribution. However, transportation of wine not tax-paid is expressly prohibited for quantities over 1 gallon originating outside the state and over 3 gallons intrastate, implying that possession (at least for the purpose of transportation) is permitted for lesser quantities. Although state law does not distinguish between personal transportation and shipment by a carrier, carriers reportedly accept shipments home of up to 1 gallon of wine purchased in person by state residents.

Litigation: On March 30, 2007 the court in *Jelovsek v. Bresden* granted judgment on the pleadings in favor of the state and wholesalers, leaving the on-site requirement in place. Because the court found the statutes and regulations treated all wineries facially the same, it treated the suit as a *de facto* discrimination case, not overt discrimination as in *Granholm*. The judge found that the plaintiffs hadn't produced the evidence required to show the existence of a direct shipment market and exclusion of out-of-state wineries from it. The decision also disposes of the 2006 *S.L. Thomas Family Winery* suit, which was consolidated with *Jelovsek*. The plaintiff has appealed to the Sixth Circuit Court of Appeals, where oral argument is scheduled for April 29, 2008.

Legislation: House Bill 1850 and Senate Bill 1977 would create a $100 direct shipping permit for 2 cases annually, subject to excise and sales tax. The Local Government subcommittee of the House Committee on State & Local Government has deferred action on HB 1850 to March 5, 2008. On March 19th, 2008, SB 1977 was referred to the Senate Committee on State & Local Government. House Bill 2824 (in Local Government subcommittee of State & Local Government Committee, with action also deferred until March 5, 2008) and companion SB 2686 (referred on January 16, 2008 to State & Local Government Committee, with no action scheduled) are similar, but charge $500 for the permit; similar committee referrals occurred in January 2008 for the substantially identical HB 2730/SB 2814. The same committees have received HB 3516/SB 2959 (also similar to HB 1850/SB 1977, but with a $300 permit) and HB 2730 ($250 permit).

Texas

Direct Shipment Basics: A winery holding both a sales tax permit and an out-of-state winery direct shipper's permit ($75 annual fee) may ship up to three gallons in a rolling 30-day period to an "ultimate consumer" with proof of age anywhere in the state, subject to state excise tax and a 35,000 gallon annual limit (apparently on all sales to consumers, not only to those in Texas), via a carrier holding a Texas carrier permit. Permit holders submit to personal jurisdiction in Texas state and federal courts and, for any proceedings by or against the Commission, to venue in Travis County. Shipper's permits are not issued to applicants that have any financial or control interests in a Texas wholesaler or retailer prohibited by state tied house law. Direct shipment by retailers is the subject of litigation, in which an interim agreed injunction allowing shipment on the same basis as wineries was in force from May 2006 until January 14, 2008, the date on which the court issued its opinion and replaced the agreement with a permanent injunction. The decision retains the right of out-of-state retailers holding Texas retailer licenses to sell and ship directly to Texas consumers in locations where Texas retailers can sell and ship, but is unclear whether the statutory requirement that the wine have been purchased from a Texas-licensed wholesaler would require physical movement of the wine through the licensed wholesale premises. Moreover, while the decision implies that Texas cannot refuse the requisite licenses on location grounds, and the judgment specifically declares the residence statute unconstitutional as applied to directly shipping retailers, the court did not order Texas to license the out-of-state wholesalers with which it would be practical for the shipping retailers to deal. The Texas Alcoholic Beverage Commission has commented informally that the loose ends are not its problem. Information on winery and retailer direct shipment issues as of June 14, 2007 and links to download application forms are at www.tabc.state.tx.us/leginfo/Wine/Default.htm, which at last visit had not been revised to reflect the decision in the retailer suit. A statutory amendment, Senate Bill 1229, became effective September 1, 2007, reducing the delivery area of Texas package store licensees with local cartage permits to "the county." The apparent purpose was to foil the out-of-state retailer plaintiffs' *Granholm* argument by restricting local retailer delivery, but the in-county dispensation prevented its having that effect. (See "Litigation," below.)

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Texas, not to exceed 3 gallons per 30-day period (1 gallon if nonresident), subject to payment of tax.

Litigation: In an important decision on January 14, 2008, the federal district court resolved eight pending motions, including motions for summary judgment by both sides, in *Siesta Village Market, LLC v. Perry* and *Wine Country Gift Baskets.Com v. Steen*, which it had consolidated with *Siesta Village* in June 2006, leaving no doubt that *Granholm* applies to non-producing retailers in the same manners as to wineries, but ample doubt about the logistics of direct shipments by retailers. At this point, it appears that *Siesta Village* renders the statutes that would require importation by a wholesaler invalid as applied to retailers shipping directly to consumers, and that it would be possible to use a "drop shipment" transaction to comply with the three-tier requirement, in which, for example, a California winery or importer invoices a Texas guerilla wholesaler, who invoices the California retailer, with the wine going directly from the retailer to the consumer. Alternatively, invalidity of the statutes that would prevent the nonresident winery or importer from holding a Texas wholesaling license at its California location could render existing arrangements compliant with the valid portions of Texas law –assuming the regulatory agency would issue the licenses without a specific court order. The case was appealed to the 5th Circuit on March 12, 2008.

Utah

Direct Shipment Basics: There are no provisions for shipment (whether sold on-site or off-site), and email solicitations in the state present risks. Senders of email that offers wine or contains a link to a site offering wine must comply with Title 13, Chapter 9, of the Utah Code, which provides penalties for email sent to an underage recipient whose address is on a state registry.

Vermont

Direct Shipment Basics: A U.S. winery holding a direct shippers license may ship up to 12 cases to a consumer, totaling not more than 29 gallons (about 150 *ml* more than 12 cases) to any one Vermont resident in a calendar year.

Direct Distribution: The shipment statute also allows shipper license holders to sell up to 2,000 gallons of wine a year directly to first- or second-class licensees (restaurants and grocery stores).

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Vermont, up to 6 gallons of table wine and 8 quarts of fortified wine or brandy per importation, not subject to excise tax.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Virginia

Direct Shipment Basics: A licensed wine shipper ($65 annual license, plus one-time $65 application fee, not restricted to producers and also applicable to beer) may ship up to two cases per month to a Virginia consumer via an approved carrier. Authorization by the owner of the brand is required if the brand is not registered to the shipping license-holder. A useful checklist for preparing an application and links to resources are at http://shipcompliantblog.com/blog/2007/09/06/virginia-out-of-state-winery-shipper%e2%80%99s-application-checklist . Official state license information is at www.abc.state.va.us/enforce/shipperslicense.html. Additionally, any person who owns "an establishment with adequate inventory, shelving, and storage facilities" *other than* a retail store open to the public may hold a $150 Virginia "Internet wine retailer license," to take orders by Internet or telephone and ship the wine directly to Virginia consumers.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Virginia, not to exceed four liters per importation.

Direct Distribution: To avert direct distribution by out-of-state wineries, wholesaler-supported legislation took away direct distribution by Virginia wineries. Since July 1, 2006, local wineries have been forbidden to sell to restaurants, wine shops and grocery stores, although the September 11, 2006 ruling of the Fourth Circuit Court of Appeals restores their direct distribution to state-run retail stores. Since July 1, 2007, any winery is eligible under the $185 "restricted wholesale license" to become the "client" of a Department of Agriculture & Consumer Services-managed nonprofit wholesaler, which could then sell up to 3,000 cases of the client's products annually to private retailers in areas where the winery has not appointed a Virginia wholesaler. Reportedly, the roundabout device is intended to preserve the three-tier structure within the state while impeding out-of-state sales to Virginia retailers, by invoking the form, but not the substance, of a "state distribution monopoly." Procedures were to have been explained in the Commission's Circular Letter 07-06, which at last report no one had seen.

Litigation: On September 11, 2006, the Fourth Circuit Court of Appeals, in *Brooks v. Vassar*, upheld Virginia's 4-liter limit on personal importation and its statute permitting only in-state "farm" wineries access to the state-run retail store system. The Supreme Court declined to review the decision, leaving numerous questions unanswered regarding the ability of states to impede interstate commerce. Under its original name, *Bolick v. Robertson*, the suit had challenged discrimination in direct shipment before *Granholm*. The trial court enjoined enforcement of a number of state statutes, leading to a legislative change while an appeal was pending. That case was remanded by the Court of Appeals to the district court as *Bolick v. Danielson*, for consideration of the constitutionality of the revised statute in light of *Beskind v. Easley*, a Fourth Circuit level-down opinion also rendered before the *Granholm* decision. On remand, the complaint was amended again, and the case proceeded under its current name, challenging persistent discrimination against out-of-state sellers. The district court leveled down on all discrimination issues, creating a crisis for Virginia wineries, and both sides appealed. While that appeal was pending, the state again amended its statutes, essentially adopting the district court view. In its September 2006 ruling, the Court of Appeals dismissed the direct shipment part of the case as having been mooted by the remedial legislation, leaving the current license system in place.

Three-tier Distribution: The state has enacted substantial statutory restraints on freedom of contract.

Washington

Direct Shipment Basics: The operator of a U.S. winery that has registered with the Washington Department of Revenue, collects and returns applicable sales taxes, pays excise taxes on monthly returns in substantially the same manner as state wholesalers, and *either* holds a state wine shipper's permit *or* holds a certificate of approval and has notified the Board of its intent to ship to consumers may ship directly to a Washington resident. Forms can be found at http://liq.wa.gov/publications/WineryToConsumer.asp. Permit holders insure that carriers have verified recipients' age and sobriety and obtain recipient signatures. Shippers must "clearly and conspicuously" display license or permit numbers in their advertising. Wineries may also ship to the Liquor Control Board to fulfill consumer special orders, subject to tax and markup, in reasonable amounts as approved by the Board.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Washington, free of tax and markup, for personal or household use, up to 2 liters of spirits or wine or 288 fluid ounces of beer, in no more than one importation per month.

Direct Distribution: Out-of-state wineries holding certificates of approval can obtain endorsements to ship up to 100 cases per month directly to retailers under a law passed in response to the commerce clause ruling in the *Costco* case, which is not involved in the current appeal. The Board released an "interpretive statement" of some of the law's ambiguous provisions before passage; a copy is available on request to the email address shown on the header to these notes. The direct distribution statute, as interpreted in the statement, modifies the 16 November 2004 Bulletin No. 05-04, which at last report was still posted at www.liq.wa.gov/publications/Bulletin%2005-04.pdf . Ambiguity about who can contract with a common carrier for delivery was clarified by enactment of SB 5898 in 2007, but questions remain as to the ability of retailers to arrange carrier shipment of wines from out-of-state consignors in quantities greater than 100 cases per month and in mixed shipments of wines produced by different wineries.

Litigation: On January 29, 2008 the Ninth Circuit Court of Appeals in *Costco* affirmed the district court injunction against enforcement of laws requiring price posting and maintaining prices for thirty days. Other restrictions challenged in the case were upheld, but the Liquor Control Board (LCB) has not yet adopted regulations regarding how various price restrictions will be maintained in the absence of the invalidated post-and-hold scheme. On April 1, 2008 the Ninth Circuit denied the petition for rehearing filed by Costco on February 19, 2008, but at last report had not changed its order keeping the stay of judgment in force. Apparently, until the injunction entered by the district court becomes effective, the LCB intends to continue using a post-and-hold system all parties agree is illegal and has even issued a memorandum suggesting that it will respond to the injunction by retaining posting and enforcing a definition of uniform pricing that in effect would merely reduce the hold feature from 30 days to 14 with respect to price reductions.

West Virginia

Direct Shipment Basics: Wineries may hold a $150 or $250 permit for shipping up to 18 liters per month per resident purchaser by "licensed and bonded" carrier, subject to excise and to state and local sales taxes, a monthly shipment reporting requirement, and submittal of a brand list with the license application. (The lower license fee is for shippers who ship only dry unfortified wine. Apparently, the higher fee applies for licensees who may also ship "dessert wines," whether or not fortified, and to shippers of Port, Sherry or Madeira.) Limited liability companies are subject to additional filing fees and registration requirements. Many details of the law, which became effective June 8, 2007, are ambiguous or contradictory. Direct shipment does not seem to require brand registration ($100 per brand for three years), which applies only to a winery or other wine supplier "who sells or offers to sell or solicits or negotiates the sale of wine to any licensed West Virginia distributor." The license appears to be available only to shippers who do not have West Virginia distributors, as holders of direct shipper licenses may not sell to state distributors or retailers, although it might be possible to read in an implied qualification, "under the shipper license," thereby allowing a winery to hold also a supplier license for sales to wholesalers. With that proviso, any winery, wholesaler or retailer licensed in its home state appears eligible for the license. Direct shippers of non-U.S. wine must acquire it from a domestic licensed suppler. Carrier licensing and bonding, prohibition of shipment to dry counties or municipalities, age verification requirements for delivery personnel, and penalties for improper delivery (including felony charges and civil liability for knowingly transporting an unauthorized shipment) may deter carrier acceptance of shipments. Useful information about procedures and links to resources are at http://shipcompliantblog.com/blog/2007/07/16/more-information-about-the-west-virginia-direct-shipping-application-process. Wineries may also ship to the Alcoholic Beverage Control Commission to fulfill consumer special orders, subject to markup.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in West Virginia, not to exceed 10 gallons per importation.

Three-tier Distribution: State statutes are ambiguous regarding certain restraints on freedom of contract.

Legislation: House Bill 4168 and Senate Bill 473 would limit direct shipment privileges to wineries producing no more than 20,000 gallons annually and make a grab-bag of other changes, such as allowing wine specialty shop tastings and removing restrictions on gifts to politicians by wholesalers. House Bill 4168 was referred to the House Judiciary Committee on January 24, 2008. Senate Bill 473 received unanimous approval in the Senate on February 25, 2008 and on February 28, 2008 went to the House Judiciary Committee. If reported out, the bills are expected to go to their respective finance committees.

Wisconsin

Direct Shipment Basics: Through September 30, 2008, a winery in a reciprocal state that holds a $10 shipping permit and has entered into a reciprocity agreement with Wisconsin may ship directly to consumers, not to exceed 27 liters per year to any one purchaser, subject to requirements of data collection and annual winery reporting of buyers and their purchases. In a June 2006 letter to Washington wineries, the state recognized the invalidity of reciprocal agreements under *Granholm*, but canceled its reciprocity agreement with Washington and Oregon on the (factually correct) grounds that they are no longer reciprocal, rather than on the more appropriate grounds that Wisconsin no longer has the right to require the agreements. At last report, the state had discontinued making reciprocity determinations. For changes occurring on October 1, 2008, see "Legislation," below.

Direct Distribution: Currently, licensing statutes appear to authorize issuance of wholesale licenses to out-of-state businesses in some circumstances. However, the effect of the newly revised direct shipment law (see "Legislation," below) on out-of-state wholesaling is unknown because the new law severely restricts direct distribution by Wisconsin wineries, presumably to permit the state to prohibit it to out-of-state wineries.

Three-tier Distribution: The state has enacted statutory restraints on freedom of contract.

Legislation: Senate Bill 485 was signed into law and takes effect on October 1, 2008. It provides that licensed wineries located anywhere in the US and holding a $100 Wisconsin permit may ship wine directly to an of-age and non-intoxicated individual in Wisconsin. The individual may receive no more than 108 liters of wine annually from any combination of out-of-state shippers; the individual is responsible for compliance with the annual limit. Sales tax, excise tax and reporting are required quarterly. Also provided by Senate Bill 485 is direct distribution for wineries that produce less than 25,000 gallons of wine in a year. Eligible wineries have until the end of the year to form a "co-op" wholesale establishment, which can distribute to Wisconsin retailers as a regularly licensed wholesaler. The co-op must have a single physical location within the state of Wisconsin, the same feature that resulted in invalidity of the New York law in *Granholm*. The maximum number of cooperatives is limited to six (presumably the first six to qualify), and in any event to whatever number have been formed by December 31st, 2008.

Wyoming

Direct Shipment Basics: A winery holding a $50 out-of-state shipper license may ship to consumers, not to exceed 2 cases to the same household in any 12-month period, subject to tax and substantial record-keeping and reporting requirements.

On-site Sales: Under the federal direct shipment statute, a winery may ship wine purchased while the purchaser was physically present at the selling winery from anywhere in the state where the winery is located to a consumer (adult signature required) in Wyoming, not to exceed 3 liters per importation, tax-free.

Direct Distribution: The license also allows shipment of items not listed by the state to Wyoming retailers.

Three-tier Distribution: In-state distribution is a state monopoly.

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