Case 9

You Can't Take It with You, or Have It Shipped Either—Direct Shipment: The Supreme Court Weighs In

Granholm v. Heald, 544 U.S. 460 (2005)

As the wine industry, particularly in California, has expanded in the last 25 years, the tasting rooms of Napa and Sonoma County wineries have become popular tourist venues. These are attractions in themselves, not just places to taste wine but often art galleries, historical sites, and, of course, gift shops where a wide variety of wine-themed souvenirs can be purchased.

Any visitor to the San Francisco Bay area making a pilgrimage to the Napa Valley can acquire a set of wine glasses, perhaps some olive oil soaps or bottles of olive oil, and have them shipped back to her home in, say, Austin or Baltimore without any question. So she should be able to have a case of the winery's Cabernet Sauvignon shipped directly to her home also, right? Maybe not. It would depend on where she lives. The winery could ship the wine to Austin as long as it kept within certain vol ume limits. But if this unfortunate tourist lives in Baltimore, then she is probably out of luck. In the state of Maryland, direct shipments of wine to an individual are prohibited.

So if you fall in love with a luscious Pinot Noir or fruity Chardonnay during a visit to the Napa Valley, you risk a felony charge if you live in Baltimore and try to have it shipped to your home. You have to jump through a number of hoops, including designating a Maryland-licensed wholesaler to receive the wine shipment and purchasing it (with an appropriate markup, of course) through a licensed distributor in the state. Even the well-known wine critic, Robert Parker, who lives and works out of his home in Monkton, Maryland, was for a long while not able to have wine sent directly to him to evaluate in *The Wine Advocate* newsletter that he publishes until he obtained a permit from the state liquor board.[1]

This type of law, which is not unique to Maryland, has effectively created a monopoly for domestic wine sellers and limited choices for consumers in those states that restrict direct shipment. Thus, wine bloggers generated enormous enthusiasm in early 2005 in anticipation of the Supreme Court decision in *Granholm v. Heald.* The case was a consolidation of three challenges to direct-shipment prohibitions in Michigan and New York state. The appellate courts in two different circuits had reached opposite conclusions regarding the enforceability of these laws. In the two Michigan cases, the Sixth Circuit Court of Appeals had struck down that state's prohibition,[2] while the Second Circuit had upheld the New York state requirements.[3] Wine enthusiasts optimistically predicted that the Supreme Court would take this opportunity to throw out the "crazy quilt" of state restrictions on direct shipment and "open the cellar door" to wineries to ship their product freely throughout the country.

Alas, they were too hopeful and not good judges of how courts—and particularly the Supreme Court—function. It was wildly optimistic to imagine that the Court would throw out an entire body of prior law and completely disregard the judgment of numerous state legislatures, simply to allow some wine buffs to shop more freely and taste more widely. For these enthusiasts, then, the Court's decision in the *Granholm* case was a disappointment. In a 5-4 opinion delivered by Justice Anthony Kennedy, the Court struck down the requirements of both states, but the relief the Court afforded was not what the direct shipment advocates had wished. Ultimately, however, although the final decision was less than momentous, it nevertheless threw a number of state restrictions—some of which had been in place since the repeal of Prohibition, and not just in Michigan and New York, but in more than half the states in the continental United States—into question.

Today many Americans regard alcoholic beverages, and especially beer and wine, as ordinary consumer items, no different from olive oil or soap. But, as Justice Stevens pointed out in his dissenting opinion in *Granholm*, this was not the case in 1919, when the Eighteenth Amendment prohibiting the sale of alcoholic beverages nationally was ratified, or in 1933, when Prohibition was repealed by the Twenty-first Amendment. Once the federal government backed away from prohibiting the sale and use of alcoholic beverages, states stepped in to fill the void, putting in place laws that reflected the then majority viewpoint in the United States: that alcoholic beverages, including wine, were inherently dangerous, requiring extensive regulation and control to protect the states' residents from their deleterious effects. And before the rise in popularity of wine and wine tourism in the United States, the restrictions set out in most states' alcoholic beverage regulations, although annoying to a few, did not appear to be particularly onerous. No groundswell occurred to change them until the last two decades of the twentieth century, during which time annual wine consumption in the United States doubled, with an increased interest in fine wine and a rapid expansion in the number of small boutique wineries in states as disparate as New York and Virginia. Many of these smaller wineries—so-called "*garagistes*" (after boutique winemakers in the Bordeaux wine region of France who literally used the garages attached to their homes as wine cellars)—produced only a few thousand cases per year, and their wines could not be found in local wine shops, because they were too small to access the large distribution networks in any given state. But they could be found online.

At the same time, consumers (who by then were not only accustomed to having purchases made in stores and by catalogue sent to them by mail but also had become avid Internet shoppers) were eager to taste these lesser-known wines and to have them shipped directly to their homes. The fact that information about so many wines was prevalent on winery Web sites and also through wine newsletters and Internet blogs added to the frustration of these consumers, who were tantalized by descriptions of luscious wines only to learn that they had no practical way to obtain them because of what they viewed as arcane regulations preventing direct shipping that seemed to be from a far different era. And it seemed that the more restrictive laws were in states such as New York, Florida, Maryland, and Virginia—states that, after California, had the country's largest number of wine consumers, sophisticated enthusiasts eager to try new offerings from small out-of-state wineries.

At the time the Supreme Court agreed to consider the issue of direct wine shipment, state wine distribution regulation generally followed one of two patterns. Either every drop of wine had to pass through the three-tier system, from producer to distributor to retailer, or the state allowed in-state wineries to sell directly to consumers, but prohibited such sales to out-of-state wineries. This was the case in both Michigan and New York. The motive of the states in this latter example was to promote the growth of the nascent wine industry within the state. Wine distributors, for their part, largely opposed allowing direct shipment by anyone, seeing even this small-scale practice as a threat to their industry, and claiming that they formed a bulwark against criminal influences in the liquor industry and illegal sales of liquor to minors over the Internet. On the other hand, wine consumers and the out-of-state wineries that were prohibited from shipping directly to them argued that these prohibitions in favor of in-state wineries were discriminatory and a violation of the Commerce Clause.[4]

In *Granholm,* the Court assessed the regulatory scheme in the two states. The plaintiff in the Michigan case, Domaine Alfred, was a small winery located in San Luis Obispo, California. It produced 3,000 cases of wine per year. It had received requests for its wine from Michigan consumers but could not fill orders because of the state's direct-shipment ban. Most alcoholic beverages in Michigan were distributed through the state's three-tier system. Wineries, whether located in-state or out-of-state, generally sold only to licensed in-state retailers. Licensed retailers sold to consumers, through stores and, in limited circumstances, through home delivery. However, an exception was made for Michigan's approximately 40 in-state wineries that could obtain a "winemaker" license, allowing them to ship directly to in-state consumers. Out-of-state wineries could apply for an "outside seller of wine" license, but this only allowed them to sell to in-state wholesalers. According to briefs filed with the Court, even if the Domaine Alfred winery could have found a Michigan distributor to sell its wine, the wholesaler's markup would have made the sale economically infeasible. The only cost-effective way for it to sell its wine other than locally was over the Internet, and it was prevented from doing so by Michigan's laws. On the other hand, Michigan wineries could legally sell wine directly to Michigan residents through online sales.

In the New York case, Juanita Swedenburg and David Lucas were the plaintiffs. Swedenburg owned a small winery in Virginia (the Swedenburg Estate Vineyard) and Lucas a small California winery (The Lucas Winery). Some of their customers were tourists from other states who purchased their wine during tastings at the wineries. But customers residing in New York state could not order Swedenburg or Lucas wines to be shipped directly to their homes. To ship directly to New York consumers, the wineries would have been required to open a branch office, a storeroom, or a warehouse within the state of New York, something that would have been prohibitively expensive for a small winery. In fact, it was so prohibitive that, according to Justice Kennedy in the majority opinion in *Granholm*, not a single out-of-state winery had availed itself of New York's direct-shipping privilege.

After considering the history of wine regulation both pre-and post-Prohibition, and the briefs submitted by the parties and all the interested trade groups, the *Granholm* majority concluded that both the Michigan and New York schemes granted in-state wineries access to the state's consumers on preferential terms. As the Court noted, in the absence of federal legislation, the "negative" or so-called "dormant" Commerce Clause prohibits a state from passing laws affecting interstate commerce, particularly laws favoring an in-state business over out-of-state businesses. Therefore, all things being equal, the New York and Michigan regulatory schemes violated the Commerce Clause.

But the analysis did not end there, because what was at stake was not olive oil or soap, but wine. Thus, the issue was complicated by Section 2 of the Twenty-first Amendment to the Constitution. This provision was enacted at the time of repeal of Prohibition to allow states broad authority to regulate the sale of alcoholic beverages within their borders. It reads:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.

Those arguing in favor of Michigan's and New York's regulations maintained that this clause broadly allows states to treat those importing alcohol into the state in any manner they see fit, if such regulation has a legitimate purpose of protecting the state's residents. This could, if necessary, result in permissible discrimination against out-of-state wineries. The states further argued that prior to Prohibition, the wine industry was made up of small local wineries in almost every community, and that large so-called "corporate" wineries, which took root particularly in California, only developed as a result of Prohibition. California wineries did not suffer so much from Prohibition, they continued, and therefore were able to recover more quickly and to take advantage of the failures of the local wine industries. It was therefore rational for a state to put in place a system more protective of small, nascent local wineries, because the California wine industry had a 50-year advantage over these local producers.

The Court in *Granholm* rejected these arguments, concluding that none of them justified treating out-of-state producers differently from in-state vintners. According to the Court, this was a privilege that states did not have pre-Prohibition, and they did not receive authority to pass discriminatory laws in the Twenty-first Amendment. Such discrimination was therefore unconstitutional. The Court concluded that states were free to regulate the direct shipment of wine as they saw fit, as long as they treated in-state and out-of-state wineries equally and uniformly. In other words, the Court did not question the constitutionality of an absolute three-tier system of regulation. And it did not mandate any particular direction for states to take. A state may ban or allow direct shipments of wine as long as the decision applies equally to all wineries.

So, what is the practical impact of *Granholm* on our wine buff from Baltimore? Practically none. She is still not able to have wine shipped directly to her home. The actual ruling did not automatically change any laws or legalize direct shipping. Legislation that would open up direct shipment in Maryland was introduced in the state legislature in March 2008, but unless and until it passes, Maryland law will remain as it existed before the *Granholm* decision. And in other states, the result has been mixed. In May 2005, at the time *Granholm* was decided, 26 states allowed direct shipping of wine to consumers. By 2007, 34 states allowed some form of direct shipping, but frequently with some hurdles.

And for at least one of the plaintiffs in *Granholm*, the Swedenburg Estate Vineyard, the "victory" was pyrrhic at best. Although New York state was not permitted to discriminate against Juanita Swedenburg, she ultimately lost in her home state of Virginia. Before *Granholm*, Virginia wineries were free to ship directly to shops and restaurants. After *Granholm*, a 2005 Virginia court decision prohibited such sales, with the result that small wineries, such as Swedenburg Estate, that used to get their wines directly into restaurants faced the prospect of seeing their sales revenues decrease due to wholesaler markups.[5]

And the battle is far from over. The Court in *Granholm* put the burden on the states to show a legitimate purpose that would justify apparent discrimination. A number of states have made a few changes to their direct shipment laws in an effort to comply with *Granholm*, such as allowing direct shipping for both in-state and out-of-state wineries up to a relatively low volume limit, or permitting direct shipment only to consumers who purchase the wine in person at the winery. The state of Massachusetts modified its regulations to allow direct shipping only by wineries that produce less than 30,000 gallons of wine each year. Coincidentally, none of the wineries in Massachusetts produced over 30,000 gallons at the time the legislation was enacted, so effectively all Massachusetts wineries were allowed to direct-ship to consumers, although many larger but still small out-of-state wineries continued to be prohibited from doing so. These various efforts have, of course, brought further legal challenges. For example, a group of smaller California wineries has sued the state of Massachusetts under *Granholm*, arguing that the degree of discrimination is irrelevant in analyzing whether a state law violates the Commerce Clause.[6] And consumers are as confused as ever, if not more so, because they believe that an important Supreme Court decision that grabbed headlines in 2005 must have changed something.

The result of this confusion is a continuation of technically illegal wine shipments. Just as in Prohibition, when the law was frequently ignored, consumers who are determined to get a certain wine will persist in finding the means, no matter where they live. It is well known, for example, that residents of the state of Arkansas, which has some of the more restrictive rules in the nation, including several "dry" counties where no alcohol can be sold, procure wine simply by driving over the state borders and bringing it back in the trunks of their cars. Other resolute consumers travel to California and carry the wine back in their luggage, risking disappointing breakage and spoiled clothing. In February 2008, the Wines and Spirits Wholesalers of America (WSWA), the trade association of wine wholesalers, voiced "grave concern" about the widespread practice of shipping wine across state lines to consumers in a letter sent to liquor control boards and attorneys general in all 50 states. According to the WSWA, "illegal alcohol trafficking" is rampant in the wine industry and attention must be paid.[7] It most likely will. The goal of the direct-shipment lobby is to open up all 50 states to direct shipping; the goal of the distributors' lobbies is to retain the three-tier system that has been the basis of their industry for more than 70 years. The battle is definitely not over.

Vignette

The Three-Tier Distribution System

State Regulation of Wine and Wineries

Throughout its history as a colony and a nation, the United States and the individual states have tried through various means to regulate the sale and use of alcoholic beverages. In fact, nothing else used in American society, not even weapons, has faced such varied, complicated, and persistent regulation as alcohol: its production, its containers, its labeling, and its pricing, who can sell it, how and where it is to be sold and drunk, and whether it can be sold at all, and who is allowed to purchase and drink it. National Prohibition through the Eighteenth Amendment represented the most extreme form of alcoholic beverage regulation. But if anything, its impact on drinking patterns in the United States was no stronger than during the period after Repeal in 1933, as a new web of regulations was woven by the various states. A few states retained Prohibition. In fact, the last of these, Mississippi, did not repeal its "dry" laws until 1966, and in some states, such as Arkansas, dry counties remain to this day.[1]

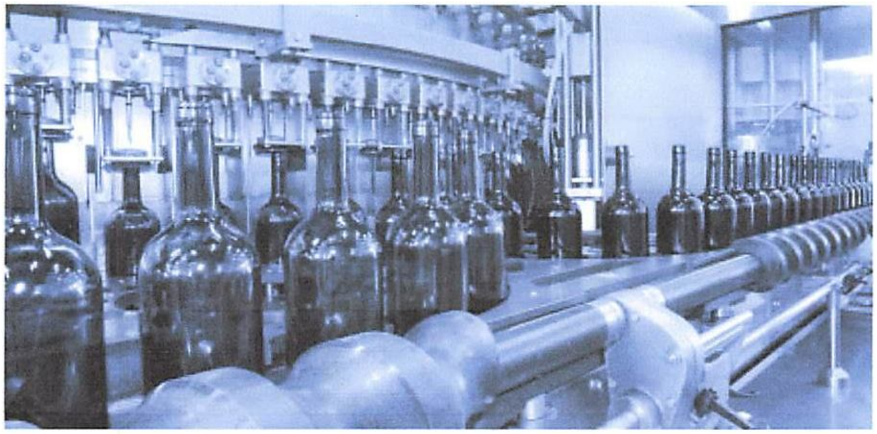
Most states, however, either created state monopolies to handle all liquor sales, including wine and beer, or formed state agencies to issue licenses for the production, distribution, and sale of alcoholic beverages. This latter system is known as the "three-tier" system. These state liquor control boards have exercised a broad range of control over the ways and means by which alcohol is made, advertised, sold, and consumed.

The result has been chaotic, to say the least. Taxes vary widely, leading to a wide range of prices for the same bottle of wine depending on in which state it is sold. In some states, one can purchase wine in a private store, even if "distilled" liquor (including, by state definition, non-distilled beverages such as sweet or fortified wines with a high alcohol content) can only be purchased in a state-controlled store. Sometimes wine can be purchased in drug stores, but not in grocery stores. This confusion created by a balkanized regulatory scheme illustrates two obvious facts: first, in the United States, attitudes about wine and its sale still carry the legacy of Prohibition almost a century after its enactment, and second, wine cannot be viewed or treated as a simple commodity like cheese or chocolate.

A three-tier system consists of the following levels: manufacturer, distributor, and retailer. Manufacturers sell product to the distributors who, in turn, sell the product to the retailer. Each carries a separate license from the state, and a licensee in one tier, such as a winemaker, cannot also be licensed in the state in another of the tiers. Thus a winery cannot also establish retail wine shops separate from the winery, and a distributor cannot obtain a license to make wine. The reason behind this restriction was the perceived social ill of brewers operating their own bars or saloons (which had been one of the primary justifications for Prohibition in the first place). The fear of a proliferation of saloons after Repeal caused states to look for ways to keep alcohol producers away from alcohol sellers.

Over time, modifications to the three-tier system have been adopted in a number of states. For example, many states allow wineries to self-distribute to retailers and restaurants, although often these privileges have been extended only to small, start-up wineries making a limited number of cases of wine per year (for example, 1,000 cases or less). Some allow direct shipment to restaurants and retail shops in the state but not to consumers' homes. Others allow direct shipment to consumers, but not to restaurants or retail establishments.

With the loosening of regulation, ironically, have come the legal challenges to aspects of the three-tier system, such as discrimination in favor of in-state wineries over out-of-state producers (*Granholm*) and challenges to pricing regulations (*Costco*).[2] The three-tier system over time has allotted significant power to the wine distribution industry. States depend on distributors to collect the lucrative excise taxes paid on wine sales each year. Distributors also play an unofficial enforcement role—refusing to supply retailers who have had legal problems or who have a history of selling to minors. They also notify states of violations of direct-shipping restrictions and other regulations. Wine distributors argue that they play a critical role in protecting the state and its residents by ensuring the collection of taxes, by preventing the sale of alcohol to minors, and by limiting the consumption of alcoholic beverages in general.[3]



Whether a winery can get into the right distribution networks within a particular state or not can determine its success or failure. As the distribution industry has consolidated over the past two decades, locating a distributor and getting a favorable contract has become almost impossible in some states for small start-up wineries. This has led to criticism of the three-tier system and of the role played by wholesalers: that it limits diversity in wine selection and increases costs for all. A typical wholesaler markup can be 25 percent, which adds a lot to the price ultimately paid by the consumer.

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1. David J. Hanson, "Dry Counties," *Alcohol: Problems and Solutions*, http://www2.potsdam.edu/hansondj/controversies/1140551076.html.

2. Costco Wholesale Corporation v. Hoen, No. 06-35543, Jan. 29, 2008, ___ F. 3d __ (9th Cir. 2008); *See* Case 10.

3. *See*, Costco Wholesale Corporation v. Hoen, Nos. 06-35538, 06-35542, and 06-35543, Brief of the National Beer Wholesalers Association and Wine and Spirits Wholesalers of America, Inc., as *Amicus Curiae* in support of Defendants-Appellants, filed Nov. 10, 2006.

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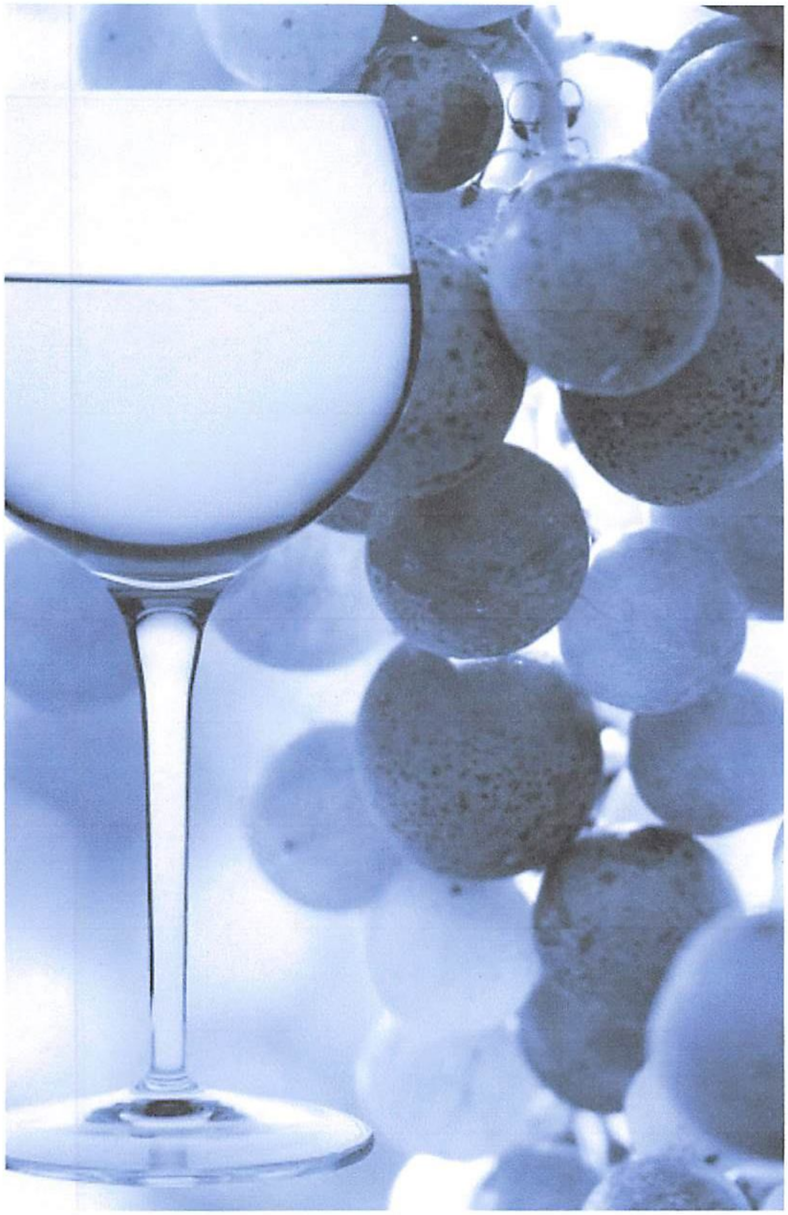
1. Echikson, Noble Rot 104.
2. Heald v. Engler, 342 F. 3d 517 (6th Cir. 2003).
3. Swedenburg v. Kelly, 358 F. 3d 223 (2d Cir. 2004).
4. U.S. Const., Art. I, Section 8.

5. Juanita Swedenburg died in the summer of 2007; she was 82 years old. It is now up to her children to carry on the battle to open up Virginia's direct-shipping laws.

6. Family Winemakers of California v. Jenkins, No. 1:06-CV-11682 (D. Mass.) Sept. 18, 2007.

7. News Release, Wines and Spirits Wholesalers of America, Feb. 26, 2008, *available at* http://www.wswa.org/public/media/20080226.html.



Case 10

We Can't Get It for You Wholesale—Costco Takes On the Three-Tier System

Costco Wholesale Corp. v. Hoen, No. 06-35543, Jan. 29, 2008, ___ F.3d ___ (9th Cir. 2008)

Saturday afternoon at any Costco Wholesale store in the United States: entire families pushing giant-sized shopping carts through a crowded warehouse facility stacked almost to the ceiling with pallets and racks of very large packages of every type of consumer item anyone would want to buy. Aisles are filled with jars of pickles, boxes of plastic bags, clothing, furniture, audio equipment, wide-screen televisions, computers, pharmaceuticals, makeup, flowers, meat, fresh vegetables, frozen foods, auto care products, jewelry, and beverages, including wine (in those states where wine is permitted to be sold in grocery stores). All of these products are offered at a significant reduction over customary retail prices. How does Costco do it?

Costco Wholesale Corporation is a Washington state–based national chain of membership discount buying clubs with millions of members in the United States and Canada. Costco's success is based on the concept of offering its members low prices on a limited selection of products within a very wide range of merchandise categories. Rapid inventory turnover in its stores and high sales numbers result from operating efficiencies and volume purchasing, efficient distribution, and self-service product selection in the stores. It buys in bulk directly from the producers most of the products it sells, eliminating the middleman and an entire distribution chain. This results in significant cost savings that Costco is able to pass on to its members. In most cases, this business model works. But for wine, it has been a different story in three-tier states—one that independent distributors have not wanted to change.

For decades after the institution of the three-tier system, in most states, distributors enjoyed a virtual monopoly in the sale and distribution of alcoholic beverages. But amendments to the laws, for example, to allow wineries to sell directly to consumers, have eroded the distributors' hold on the market. Therefore, the distribution industry evidenced strong concern when, in 2004, Costco sued the state of Washington in an effort to overthrow its three-tier system, viewing this challenge as a significant threat to its bottom line. With the growth of the big-box retail industry, the large chains and warehouse stores, such as Costco, represent a lucrative market for distributors. Costco claims to be one of the largest wine retailers in the United States. A distributor's profit margin is greater when it can deliver, say, 2,000 cases of wine in one shipment to a big-box store like Costco than to make many deliveries of only a few cases to a number of small retail shops.

But Costco's business model does not, as a general rule, rely on distributors. By receiving shipments of wine directly from wineries in California, for example, Costco is able to offer a variety of good wines at low cost. But in Costco's home state, Washington, it was unable to take full advantage of this business model when it came to buying wine for sale in its stores there, because Washington's Liquor Control Board (LCB) imposed certain requirements on distributors and retailers that resulted in higher uniform prices on wines sold in that state. At the time of its lawsuit in 2004, Costco claimed that it was paying 4 percent more on average for Washington-state-made wine in Washington than it was for the same wine when shipped to its stores in California.[1]

The Washington state law imposed a number of restrictive requirements: it required both distributors and retailers to mark up prices at least 10 percent; it outlawed volume discounts; it prohibited retailers from buying beer or wine on credit and prevented them from storing wine or beer at their central warehouse; and it required wholesalers to post wine and beer prices with the state LCB and to hold them in place for 30 days (post-and-hold requirement).[2] Costco argued in its suit that these restrictions violated the Sherman Antitrust Act because they were anticompetitive, and the district court ruled in Costco's favor.[3] The court ruled that Washington's posting, holding, minimum markup, delivered pricing, uniform pricing, ban on volume discounts, and ban on credit sale requirements conflicted with federal antitrust laws. The Ninth Circuit Court of Appeals overturned the district court's ruling on most counts, upholding most of the provisions of the Washington law, other than the "post-and-hold" requirements.

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[4] If a group of wholesalers had met and agreed among themselves to follow the practices they were required to implement under the Washington state law, Costco would likely have had no problem proving that such actions are a violation of federal antitrust law. Should the effect be different because the state imposes the same actions on private parties legislatively, without evidence of collusion? The state argued successfully before the Ninth Circuit that anticompetitive actions, which would otherwise be prohibited under federal antitrust law, are permissible when legitimized by states under the powers granted to them by Section 2 of the Twenty-first Amendment to the Constitution. This clause, as discussed in Case 9, prohibits the transportation or importation of intoxicating liquors into any state in violation of that state's laws. The state claimed that the Sherman Act was intended to prohibit private restraints on trade, not state action. Because a state is empowered by the Twenty-first Amendment to regulate all alcohol coming into it, it can unilaterally impose pricing and related restrictions without being subjected to Sherman Act claims. The district court had agreed with the state that it, when acting as a sovereign, can impose restraints on competition because it is immune from antitrust liability.

However, Costco argued—and the district court had agreed—that the restraints in question were "hybrid": the wholesalers played an important role in implementing and enforcing the state system, and in particular the post-and-hold requirement. In this respect, the state LCB allowed the producers to dictate market conditions to others, and therefore the restrictions were illegal per se under the Sherman Act. Because active state supervision was lacking, there could be no immunity. (The lower court did not agree with Costco's more aggressive argument that the wholesaler industry had effectively taken over the LCB and had written the state's legislation to perpetuate their monopoly.)

Costco also argued that keeping the current system in place harms consumers by keeping prices high and limiting consumer options. The state countered that keeping the current pricing regulation system in place helped prevent alcoholism by keeping prices higher. It actually claimed that if prices for wine in Washington fell, the state would encounter rates of alcoholism among its residents similar to those in Russia, where alcohol was historically cheap. The Washington Beer and Wine Wholesalers Association (WBWA), which had intervened in the case as a co-defendant with the LCB, made another argument: removal of the mandatory markup would drive smaller retailers out of business because of the increased competition. If the lower court's decision were upheld, they argued, large-volume retailers such as Costco would be able to negotiate for price discounts and other concessions that, as a practical matter, would not be equally available to small-store owners. If the Ninth Circuit were to uphold the district court's ruling, the wholesalers maintained, the result would be fewer choices for consumers, fewer independent retailers in the marketplace, and fewer options for small wineries to get their product into retail shops.[5]

After considering all the parties' arguments, the Ninth Circuit ruled against Costco in upholding seven of the nine challenged liquor control laws. The district court had considered the full impact of the restrictions when taken as a whole in determining their antitrust impact. The Ninth Circuit considered each on a stand-alone basis and determined that, although the post-and-hold requirement was in violation of antitrust laws, the others were a reasonable application of the state's powers under Section 2 of the Twenty-first Amendment.

This decision has initially been viewed as a victory for the alcohol distribution industry and small retailers. A decision in Costco's favor would have affected regulations in other states within the Ninth Circuit's jurisdiction and could easily have had a ripple effect on state alcoholic beverage control laws elsewhere. Costco immediately announced its intention to pursue this case, and in February 2008 it filed a petition for a rehearing by the same panel of judges. The petition also asked for an *en banc* review of the case, i.e., that the entire appeals court hear the case if the original panel did not grant Costco's request. In its brief filed in connection with the request for the rehearing, Costco stated that "Washington eliminates major aspects of ordinary competition among wine and beer producers and distributors, encouraging those private sellers to inflate prices ultimately paid by consumers."[6] On April 1, 2008, in a sort of April Fool's joke on Costco, the Ninth Circuit denied Costco's request for a rehearing and its petition for *en banc* review. The Court mandated that the Washington state LCB replace the existing post-and-hold system within seven days of the ruling. On April 8, 2008, the state LCB announced that the uniform pricing would remain in place and that all price changes had to remain in effect until changed. Pro ducers are no longer required to hold prices in effect for a specified period of time but are still required to file all price changes on the LCB's site before they can sell, and they are required to reasonably notify all their customers when prices change. And the 10 percent markup requirement also remains in effect. On June 10, 2008, Costco announced that it would not appeal this decision to the U.S. Supreme Court.[7]

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1. Plaintiff's Expert Report of Keith Leffler, Associate Professor of Economics, University of Washington, June 3, 2005.

2. RCW 66.28.185, RCW 66.28.070, and implementing regulations, Washington Administrative Code (WAC) 314-20-100(2), (5); WAC 314-24-190 (2), (5).

3. Costco also argued that the state laws violated the Commerce Clause of the U.S. Constitution because they discriminated against out-of-state wineries. The court ruled in favor of Costco on this argument on the basis of the *Granholm* case discussed in Case 9, and the State did not appeal. Subsequent to the district court's Com-

merce Clause ruling, the Washington State Legislature enacted laws extending its direct sales privilege to out-of-state wineries. The appeal to the Ninth Circuit was solely on the antitrust claims.

4. 15 U.S.C. § 1.

5. The wholesalers did not see the irony in their making these arguments—the consolidation in the distribution industry had already had the foretold impact on consumers, small retailers, and small wineries.

6. Costco Wholesale Corporation's Petition for Rehearing or Rehearing en Banc, filed Feb. 18, 2008.

7. Washington State Liquor Control Board official website, http://www.liq.wa.gov/3++f-site/Costco-documents/asp.