



2008

Huber Winery v. Wilcher: The Commerce Clause, State Regulations and the Free Trade of Wine

William H. Brammell Jr.
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/kjeanrl>

 Part of the [Agriculture Law Commons](#), and the [Constitutional Law Commons](#)

Click here to let us know how access to this document benefits you.

Recommended Citation

Brammell, William H. Jr. (2008) "Huber Winery v. Wilcher: The Commerce Clause, State Regulations and the Free Trade of Wine," *Kentucky Journal of Equine, Agriculture, & Natural Resources Law*: Vol. 1 : Iss. 1 , Article 6.
Available at: <https://uknowledge.uky.edu/kjeanrl/vol1/iss1/6>

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Journal of Equine, Agriculture, & Natural Resources Law by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

HUBER WINERY V. WILCHER: THE COMMERCE CLAUSE, STATE REGULATIONS AND THE FREE TRADE OF WINE

WILLIAM H. BRAMMELL, JR.*

I. INTRODUCTION

Before prohibition, the nation recognized Kentucky as the third largest grape and wine producing state.¹ Prohibition ended Kentucky's wine reign and tobacco gained increasing popularity with Kentucky farmers. In recent years, however, tobacco's dwindling popularity (and profit) has forced Kentucky's small farmers to consider crop diversification. Small wineries provide a profitable alternative for the Kentucky farmer and once again, grape and wine production occupies a significant role in the state's agricultural economy.² In *Huber Winery v. Wilcher*, the District Court for the Western District of Kentucky evaluates the constitutional validity of four Kentucky statutes that were designed to foster in-state wine sales by imposing burdens on out of state wineries.³

Section II of this Comment provides insight into the legal background surrounding the issue in question. Section III explores the context, specifically as it applies to the case at hand. Section IV evaluates petitioner's arguments, the court's analysis and ultimate holding. Section V explores the potential implications for Kentucky and the wine industry.

II. LEGAL BACKGROUND

A. *Granholm v. Heald*

In *Granholm v. Heald*, the United States Supreme Court addressed the issues of whether specific state regulatory schemes designed to promote state wine sales discriminate against interstate commerce thus violating the Commerce Clause as articulated in Article 1, Section 8, Clause 3 of the United States Constitution, and also whether such discrimination is authorized by the Twenty-First Amendment.⁴ The case involved state laws

* Staff Member, KENTUCKY JOURNAL OF EQUINE, AGRICULTURE, & NATURAL RESOURCES LAW, 2008-2009. B.A. 2006, University of Louisville; M.Sc. 2007, University College, London, England; J.D. expected May 2010, University of Kentucky College of Law.

¹ Ky. Dep't of Agric., Grape and Wine Program, <http://www.kyagr.com/marketing/plantmktg/grape.htm> (last visited May 13, 2008).

² *Id.*

³ *Huber Winery v. Wilcher*, 488 F.Supp. 2d 592, 595 (W.D.Ky.2006) [hereinafter *Huber Winery*].

⁴ *Granholm v. Heald*, 544 U.S. 460, 466 (2005) [hereinafter *Granholm*].

of New York and Michigan that discriminated against out-of-state wineries in favor of in-state wineries. While the details of the Michigan and New York laws differed, both regimes worked:

to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or at least, to make direct sales impractical from an economic standpoint.⁵

The majority in *Granholtm* clearly stated:

In all but the narrowest circumstances, state laws violate the commerce clause if they mandate "differential treatment of an in-state and out-of-state economic interest that benefits the former and burdens the latter."⁶

To this end, the court held that states cannot "ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in state producers."⁷

In *Huber Winery*, the court interpreted the Supreme Court opinion in *Granholtm* as holding that statutory schemes treating out-of-state wine producers differently than in-state producers by prohibiting or limiting shipment of wine by out-of-state producers but not in-state producers violate the Commerce Clause.⁸ Further, *Huber Winery* applied the *Granholtm* rule that such laws cannot stand, "[a]bsent a showing that such discrimination is necessary to serve a legitimate state interest and there is not another less burdensome alternative to achieve that goal."⁹

B. *Three-Tier Distributions*

The three-tier distribution scheme is a creation of post-prohibition lawmaking designed to delineate distinct and separate roles for producers, wholesalers, and retailers. Three-tier systems require producers to sell their product to wholesalers and then wholesalers to sell the product to retailers.¹⁰ Constitutional problems do not generally arise in the operation of a state's pure three-tier distribution scheme. The Supreme Court has held that "states can mandate a three-tier distribution scheme in the exercise

⁵ *Id.* at 466.

⁶ *Id.* at 472 (citing *Ore. Waste Sys., Inc. v. Dept. of Env'tl. Quality of Ore.*, 511 U.S. 93, 99 (1994)).

⁷ *Id.* at 493.

⁸ *Huber Winery*, 488 F.Supp. 2d at 595 (citing *Granholtm*, 544 U.S. at 493).

⁹ *Id.*

¹⁰ *Granholtm*, 544 U.S. at 469-70.

of their authority under the Twenty-First Amendment.”¹¹ Problems, however, do arise when a state goes beyond operating a pure three-tier system and provides exclusive exceptions to the scheme for in-state groups. These exceptions are generally unconstitutional.

C. *Kentucky Revised Statutes (KRS)*

Four Kentucky statutes are specifically challenged in *Huber Winery*: KRS §§ 243.032, 243.155, 243.156 and 244.165. KRS § 243.032 “provides that a restaurant making 50% or more of its sales as food may obtain a license to serve wine by the glass for consumption on the premises, but requires the licensee to purchase wine only from wholesalers.”¹² KRS § 244.165 “criminalizes the shipment of alcohol by out-of-state sellers to any Kentucky resident who does not hold a valid wholesaler or distributor retailer license.”¹³ KRS § 243.155 authorizes certain activities for small farm winery licensees and KRS § 243.156 authorizes certain activities for farm winery licensees.¹⁴

Plaintiffs argue that these statutes cumulatively grant “preferential access to in-state wineries” by waiving certain requirements of the three-tiered system for in-state wineries while maintaining the restrictions and prohibitions in their full force against out-of-state wineries.¹⁵ As in *Granholm*, the object of the statutes in question is to “grant in-state wineries a competitive advantage over wineries located beyond the States’ borders.”¹⁶

III. CASE HISTORY

Plaintiffs, led by Huber Winery, challenged “certain provisions of Kentucky law, which allegedly discriminate against interstate commerce by prohibiting out-of-state wineries from selling and shipping wine directly to consumers and retailers while allowing in-state wineries to do so on a limited basis.”¹⁷ Defendants were both Kentucky wine producers and wholesalers.¹⁸

¹¹ *Id.* at 466 (citing *North Dakota v. United States*, 495 U.S. 423, 432); U.S. CONST. amend. XXI, § 2 (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).

¹² *Huber Winery*, 488 F.Supp. 2d at 595.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Granholm*, 544 U.S. at 466.

¹⁷ *Huber Winery*, 488 F.Supp. 2d at 594.

¹⁸ In *Huber Winery* the wine producers and wholesalers were represented by the Wine and Spirits Wholesalers of Kentucky, Inc.

Plaintiffs filed a motion for judgment on the pleadings in July of 2005.¹⁹ The judge, after conducting a status conference, concluded that it would be most prudent to stay the proceedings since “the Kentucky General Assembly was in the process of amending the challenged statutory scheme.”²⁰ Once the new legislation was adopted, the Plaintiffs asked the judge to consider the motion for judgment on the pleadings regarding their claim that the Kentucky statutes were unconstitutional.²¹ The judge granted this request.²²

The standard of review for motions for judgment on the pleadings requires that “all well pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment.”²³

IV. ANALYSIS OF THE DISTRICT COURT

A. *Holding*

The United States District Court for the Western District of Kentucky held that the “small” and “farm” winery exceptions to KRS §§ 243.155 and 243.156 violate the Commerce Clause and are not justifiable on the grounds that they are narrowly tailored to promote a local interest.²⁴ The court determined that the most appropriate means of remedying the situation was to nullify only those provisions that espouse in-state eligibility requirements, essentially extending all benefits to out-of-state wineries.²⁵ Further, the court held the In-Person Purchasing Requirement found in KRS §§ 243.155(1)(f)(1) and 243.156(1)(h)(1) invalid.²⁶ The requirement imposed an unfair burden on states operating wineries outside of Kentucky. In regard to KRS § 243.032, the Restaurant Wine Licensing Statute, the court held that the rule requiring restaurants to purchase wine from wholesalers did not discriminate unfairly against out-of-state wineries because it applied equally to all wineries, whether in-state or out-of-state.²⁷

¹⁹ At that time the court also ruled on five then pending motions which are not relevant to the current discussion.

²⁰ *Huber Winery*, 488 F.Supp. 2d at 594 n.1 (stating that the court’s original intention to host oral arguments but proceeded otherwise in light of the many developments that occurred between the first and second stage of the proceedings).

²¹ *Id.* at 594.

²² *Id.*

²³ *Id.* (quoting *S. Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973)).

²⁴ *Huber Winery*, 488 F.Supp. 2d at 600-01.

²⁵ *Id.* at 601.

²⁶ *Id.* at 600-01.

²⁷ *Id.* at 601.

i. “Farm” and “Small Winery” Exceptions to the Three-Tier System

KRS §§ 243.155 and 243.156 provide limited exceptions to the three-tier system for “small” and “farm” wineries. As defined by KRS § 241.010 (46) a “small winery” must produce wine from “grapes, other fruit, or honey produced in Kentucky . . . in an amount not to exceed (50,000) gallons in one (1) year.”²⁸ Similarly, a “farm winery” must be “located on a Kentucky farm with a producing vineyard, orchard or similar growing area, manufacturing and bottling wines in an amount not to exceed twenty-five thousand (25,000) gallons per year.”²⁹

The two most controversial exceptions permit “small” or “farm” wineries to “ship up to two cases of wine to a consumer who purchased the wine in-person at the winery” and to “sell their wine directly to retailers at wholesale price if the wine has been offered to wholesalers.”³⁰ Only Kentucky wineries are permitted to utilize these exceptions because, by definition, only wineries located in Kentucky can be either “small” or “farm” wineries. The result is that local wineries are able to bypass the three-tier system and clear greater profits, much to the dismay of those small wineries outside of the territorial boundaries of the Commonwealth. Such ability of local wineries to bypass procedures otherwise required presents the potential for Commerce Clause violations.

The Supreme Court, in *Granholm*, advanced a two-step analysis for evaluating the constitutional legitimacy of such exceptions to three-tier systems. The first question must be whether the statutory scheme violates the Commerce Clause.³¹ Second, the court must ask whether the discriminatory scheme, despite violating the Commerce Clause, “advances a legitimate local purpose that cannot be served by reasonable non-discriminatory purposes.”³²

In *Huber Winery*, the court answered the first question in the affirmative, deciding that the Kentucky scheme did discriminate against out-of-state wineries in violation of the Commerce Clause. The definitions of “small” and “farm” wineries, in conjunction with KRS §§ 243.155 and 243.156, essentially criminalized behavior for out-of-state wine producers while condoning the same behavior when exercised by local, Kentucky

²⁸ *Huber Winery*, 488 F.Supp. 2d at 596 n.3 (quoting KY. REV. STAT. ANN. § 241.010(45) (2006) (amended 2008)). Author notes that the statutory definition for “small winery” was included in KRS § 241.010(46) as written in 2006 when *Huber Winery* was decided, however, the statute has since been amended and the definition is now found in KRS § 241.010(46).

²⁹ *Id.*

³⁰ *Id.* at 595.

³¹ *Granholm*, 544 U.S. at 489.

³² *Id.* (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

wineries.³³ This is the very type of behavior that the *Granholm* Court dismissed as “straightforward attempts to discriminate in favor of local producers.”³⁴ Such a regulation, said the Court, is “contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.”³⁵

The second stage of analysis, according to the *Granholm* Court, requires making a determination of whether the local interests advanced are legitimate and could be served by different “non-discriminatory” means.³⁶ The respondents attempted to justify the discriminatory behavior by arguing that temperance is a unique local interest that “cannot be served by allowing shipment of wine into dry territories.”³⁷ The court pointed out that this argument was unpersuasive because the Kentucky scheme “discriminates based upon where the wine originates, not upon where it ends up” resulting in little to no impact on the way wine is distributed in dry counties.³⁸ The court was clear that defendants “failed to demonstrate that restricting small and farm winery licenses to in-state wineries serves the ‘core value’ of temperance”³⁹

ii. *Remedy*

The court next examined the question of which remedy is most appropriate in dealing with the unconstitutional statutory scheme. The court was presented with two clear alternatives. On the one hand the court could completely nullify the statutory scheme. Alternatively, the court could extend the scheme so that out-of-state wineries would receive the same treatment as local, in-state wineries. All parties to the action agreed that extension was the more desirable of the two options and most consistent with precedent.⁴⁰ The only interested party who contested these issues were Kentucky wholesalers⁴¹ who urged, in an amicus brief, that the court should “remove the small and farm winery” exceptions in their entirety, suggesting that “nullification is necessary to preserve the intent of the legislature in creating a three-tier distribution system.”⁴²

Acknowledging the intent of the legislature and its desire to maintain a three-tier distribution system, the court determined that it would be best to strike only the “offensive provisions” while maintaining the

³³ *Huber Winery*, 488 F.Supp. 2d at 596.

³⁴ *Granholm*, 544 U.S. at 489.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Huber Winery*, 488 F.Supp. 2d at 596.

³⁸ *Id.* at 597.

³⁹ *Id.* at 596.

⁴⁰ *Id.* at 597 (quoting *Heckler v. Matthews*, 465 U.S. 728, 738 n.5 (1984)).

⁴¹ Specifically, Wine Wholesalers and Kentucky Beer Wholesalers Association.

⁴² *Huber Winery*, 488 F.Supp. 2d at 597 n.5.

three-tier system.⁴³ In practicality this approach extends benefits to out-of-state wineries by nullifying all provisions espousing in-state eligibility requirements.⁴⁴ The court executed this prerogative by enjoining state defendants from enforcing KRS § 244.165 “against properly licensed out-of-state farm and small wineries.”⁴⁵ The court simultaneously struck the KRS provisions that had the practical effect of limiting the exceptions exclusively to Kentucky wineries.⁴⁶

iii. *In-Person Purchasing Requirement*

Plaintiffs also challenged the in-person purchasing requirement in KRS §§ 243.155(1)(f)(1) and 243.156(1)(h)(1).⁴⁷ The requirement provides that only Kentucky residents who have visited the winery in person and placed an order on the premises may have their wine shipped across state lines to their home in Kentucky.⁴⁸ Plaintiffs filed a supplemental brief, asserting “out-of-state wineries will have to incur a substantial cost in order to meaningfully penetrate the Kentucky market.”⁴⁹ Defendants argued that the requirement’s effect was nothing more than “incidental” and could not be held to violate the Commerce Clause.⁵⁰

The court again applied two-part Commerce Clause test from *Granholm*. First, the court had to decide whether the statutory scheme violated the Commerce Clause. Second, any discriminatory scheme would have been justified if, despite violating the Commerce Clause, it “advances a legitimate local purpose that cannot be served by reasonable non-discriminatory purposes.”⁵¹

Defendants sought to support the constitutional validity of the scheme by advocating the presumption that “a wine consumer would purchase from the closest winery[,] all things being equal.”⁵² The court quickly dismissed this presumption on the premise that wine connoisseurs consider much more than proximity in purchasing wines. The court pointed out that “wine is a unique product” and that consumers are not expected to purchase wine based purely on which producer is located closer geographically.⁵³

⁴³ *Id.* at 597.

⁴⁴ *See id.* at 597-598.

⁴⁵ *Id.* at 597-598.

⁴⁶ *Id.* at 598.

⁴⁷ *Huber Winery*, 488 F.Supp. 2d at 598.

⁴⁸ *Id.* at 595.

⁴⁹ *Huber Winery*, 488 F.Supp. 2d at 598 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

⁵⁰ *Huber Winery*, 488 F.Supp. 2d at 598.

⁵¹ *Granholm*, 544 U.S. at 489.

⁵² *Huber Winery*, 488 F.Supp. 2d at 599.

⁵³ *Id.*

In practicality, the statute required that if a Kentucky consumer wanted to purchase wine from a winery in California, they would have to visit the winery and place an order in person. After placing that order in person, the California winery would be permitted to ship their wine to the consumer in Kentucky. In attempting to justify the scheme and show its state-to-state neutrality, the defense pointed out that wineries in the seven bordering states are often closer in proximity to Kentuckians than are many other wineries located inside the Commonwealth,⁵⁴ the assertion being that in many scenarios Kentuckians are actually encouraged (or at least not discouraged) to visit other states to purchase wine. Plaintiffs, however, pointed out that only 0.6% of the nation's wine production takes place in the seven bordering states addressed by the defense.⁵⁵ The remaining 99% of wine production takes place at wineries elsewhere.⁵⁶ These wineries are, for all practical purposes, forbidden from shipping wine directly into Kentucky unless they can encourage Kentucky's wine consumers to visit their winery on-site. The practical effect of the regulation was to discourage Kentuckians from purchasing out-of-state wines while concurrently encouraging consumers to purchase local wines. The court held that this violated the Commerce Clause.⁵⁷

The statute would have still been justified if the defendant can prove that, despite violating the Commerce Clause, the statute is the least discriminatory means of achieving a justified state interest. The defendants proposed three "legitimate reasons for the challenged laws."⁵⁸ First, they renewed their argument from earlier in the case and argue that the in-person purchasing requirement promotes temperance.⁵⁹ Second, defendants argued that the "in-person requirement increases the risk of underage drinking."⁶⁰ Finally, the defendants argued that the in-person sales requirement is motivated by "concerns for tax revenue and that removing the requirement may result in a 'potential loss of revenue in excise taxes'."⁶¹ The court was not persuaded by any of the aforementioned justifications and struck down both KRS §§ 243.155(1)(f)(1) and 243.156(1)(h)(1).⁶²

⁵⁴ *Id.* at 598.

⁵⁵ *Id.*

⁵⁶ *Id.* at 598-99.

⁵⁷ *Id.* at 599.

⁵⁸ *Huber Winery*, 488 F.Supp. 2d at 599.

⁵⁹ *Id.*

⁶⁰ *Id.*, at 600.

⁶¹ *Id.*

⁶² *Id.* at 600-01.

iv. *Restaurant Wine Licensing Statute*

Plaintiffs finally challenged the constitutionality of KRS 243.032, the Restaurant Wine Licensing Statute, which provides that “restaurants in Kentucky that are licensed to serve wine on the premises ‘shall purchase wine only from licensed wholesalers.’”⁶³ Plaintiffs asserted that the statute “prohibits such restaurants from buying wine directly from out-of-state wineries.”⁶⁴ The court, however, made the point that the KRS § 243.032 requirement to purchase wine from wholesalers not only prohibits restaurants from purchasing wine from out-of-state wineries but also from in-state wineries.⁶⁵ The court held that since the statute does not “expressly favor in-state wineries at the expense of out-of-state wineries” that the statute cannot violate the Commerce Clause.⁶⁶ The statute is valid.

V. IMPLICATIONS

The rejection of the Kentucky Statutes presents difficult policy questions for the Kentucky General Assembly regarding how to ensure the continuing development of local wineries without violating the Commerce Clause. The rejection of the Kentucky statutory scheme should also serve as a warning to other states that are trying to protect local industries by offering somewhat discriminatory benefits to in-state businesses.

As previously discussed, the wine industry in both Kentucky and the United States is rapidly growing. The issues presented in *Huber Winery* are not going to disappear but will likely become more common, begging the question of how legislatures are to protect the local industry without violating the Commerce Clause.

The first and perhaps most important lesson to recognize from *Granholm* and *Huber* is that states may not distinguish between in-state and out-of-state wineries in regard to regulation. States must approve and promulgate laws that apply equally to in-state and out-of-state wineries. With this being said, there are a number of alternative ways of bolstering local industry without creating such blatantly preferential systems.

First, states can experiment in reciprocity agreements with other states “which allow direct shipment from wineries outside the State, provided the State of origin affords similar non-discriminatory treatment.”⁶⁷

Second, states can utilize other incentives such as tax breaks for what would traditionally be termed either “small” or “farm” wineries.

⁶³ *Id.* at 601.

⁶⁴ *Huber Winery*, 488 F.Supp. 2d at 601.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Granholm*, 544 U.S. at 467-68.

While not providing indiscriminate treatment, such incentives will provide motivation for small farmers who need an extra boost.

Third, states can promote the wine industry as not only an agricultural product but as a tourism and travel destination. Much of the excitement about “small” and “farm” wineries comes not from what wine they bottle but from the experience they provide when you visit their operation. Commonly these small wineries supplement their sale of wine with related forms of entertainment: concerts, dinners and art shows. Such a niche industry can thrive if properly promoted as tourism and travel destinations.

There is no doubt that the rejection of the “small” and “farm” winery exceptions will prove to be an impediment to the growth and continued prosperity of small wineries. The bottom line, however, is that the declaration that preferential statutory schemes like the one in *Huber* are unconstitutional does not have to destroy small and farm wineries. There are a number of alternative means of supporting the local wine industry, and it will be up to the legislature and the continued hard work of local farmers to ensure that these means are implemented.

VI. CONCLUSION

Wineries are going to be important to the future of agriculture in the United States. This perhaps rings even more true for Kentucky agriculture, considering the dismal state of tobacco. The Kentucky Legislature and local vintners will have to work hard to promote growth while working inside the boundaries established by the Commerce Clause. The body of law regarding wine sales and the Commerce Clause is not fully developed. It will prove useful if those influential in the drafting of new state statutes take into consideration the potential constitutional implications that the Commerce Clause has on the regulation of wine.