

Free the Grapes!: Wine Direct Shipping Issue Fermenting in Massachusetts

1st Circuit Court of Appeals Argument Date Set for November 2

October 15, 2009, Napa, CA – Massachusetts wine lovers live in one of the few states where access to American wineries is severely limited by state law. But that could change soon.

The 1st Circuit U.S. Court of Appeals will hear oral arguments in *Family Winemakers of California v. Jenkins* on November 2. The lawsuit challenges the state's ban on shipments from wineries and wine companies producing an aggregate of more than 30,000 gallons – about 12,600 12-bottle cases. The law does not affect any in-state wineries – which all produce less than the 30,000 gallons, including fruit wine – but affects wineries that represent 98% of wine in interstate commerce, according to the filing.

“The law creates a discriminatory, two-tier scheme that forces wineries producing more than 30,000 gallons to decide whether they sell through an in-state wholesaler or directly to in-state consumers, but imposes no such limitation on in-state wineries,” said Tracy Genesen, legal counsel to Family Winemakers of California and Coalition for Free Trade, and a partner of Kirkland & Ellis, representing the plaintiffs. Ms. Genesen will argue the case before the court with co-counsel Kenneth W. Starr, dean of Pepperdine Law School and counsel to Family Winemakers of California and Coalition for Free Trade.

“Our winery members want the court to validate that all wineries, regardless of size, can compete in the Massachusetts market,” said Paul Kronenberg, President of the Sacramento-based Family Winemakers of California. The case is funded in large part by the Coalition for Free Trade with Family Winemakers of California as lead plaintiff.

The November 2 hearing will take place at the United States Court of Appeals for the First Circuit, John Joseph Moakley U.S. Courthouse, 1 Courthouse Way in Boston. A court room and specific case order have not yet been scheduled.

Massachusetts Wine Direct Shipping Background

House Bill 4498 passed both the House and Senate in 2005, and was condemned for seeking to place conditions on out-of-state wineries that did not exist for Massachusetts' wineries. No in-state wineries produced more than the 30,000 gallons, and they could sell directly to Massachusetts consumers *as well as* through state wholesalers. Out-of-state wineries over the 30,000 gallon cap would not have this option – they would have to either sell directly to consumers or through a Massachusetts wholesaler, if a wholesaler chose to represent them. Wineries that retained a Massachusetts wholesaler and produced more than 30,000 gallons were prohibited from direct-to-consumer shipping.

Governor Mitt Romney vetoed HB 4498 in November 2005 – commenting on its “anti-consumer effect, as well as its dubious constitutionality” – but the veto was overridden. In January 2006, Governor Romney introduced, but failed to pass, a separate bill, commenting that “It’s time we end the monopoly that wholesalers have over wine sales...”

After HB 4498 became law, *Family Winemakers of California v. Jenkins* was filed on September 18, 2006, stating that it violated the nondiscrimination principle of the Commerce Clause, which prohibits “laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.” (U.S. Supreme Court, *Granholm v. Heald*, May 2005). On November 19, 2008, Judge Zobel ruled that the production cap statute was unconstitutional and, later, enjoined the state from enforcing Sections 2, 18 and 19(F) of the Massachusetts General Law Chapter 138. Despite a decisive opinion and remedy order, Massachusetts Attorney General Martha Coakley opted to spend significant taxpayer dollars to appeal the judge's decision, leading up to the argument before the 1st Circuit U.S. Court of Appeals.

For more information, visit www.freethethegrapes.org, www.familywinemakers.org, www.coalitionforfreetrade.org.

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