

Second Circuit Rejects Total Wine Challenge of Connecticut Pricing Laws

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Last week, in [Connecticut Fine Wine and Spirits LLC v. Seagull](#), the US Court of Appeals for the Second Circuit affirmed a lower court's motion to dismiss a lawsuit from Total Wine & More challenging parts of Connecticut's Liquor Control Act and related regulations. Though the decision represents a victory for state alcohol regulatory regimes, the Second Circuit's ruling was decided on the basis of established antitrust law and did not raise or rely on state regulatory authority under the 21st Amendment. Nonetheless, state alcoholic beverages regulators will embrace the court's ruling.

In *Connecticut Fine Wine*, Total Wine challenged three sets of provisions in Connecticut's alcohol laws. First, Total Wine challenged "post-and-hold" provisions. Under the post-and-hold provisions, state-licensed wholesalers are required to post a "bottle price" and "case price" each month with the Connecticut Department of Consumer Protection. Those prices are then made available to industry participants. During the four days after prices are posted, wholesalers may "amend" their posted prices to match—but not drop below—lower prices offered by competitors. Wholesalers are then obligated to "hold" their prices for a month.

Second, Total Wine challenged the state's minimum-retail-price provisions. The minimum-retail-price provisions require retailers to sell alcohol beverages to customers at or above a statutorily defined "cost," which is determined by adding the posted bottle price and a markup for shipping and delivery. Combined with the post-and-hold provisions, the minimum-retail-price provisions bind retailer prices to wholesaler prices.

Third, Total Wine challenged the state's price discrimination and volume discount provisions. The price discrimination/volume discount provisions preclude wholesalers from offering a given product to different retailers at different prices and from offering discounts to retailers who are high-volume purchasers.

Total Wine alleged that these provisions violate § 1 of the Sherman Act, which prohibits contracts, combinations and conspiracies in restraint of trade or commerce. Total Wine claimed that the three sets of provisions effectively fix prices and reduce competition, leading to higher prices for consumers. Price fixing is a *per se* violation of the Sherman Act. Under the US Constitution's Supremacy Clause, a state law that creates an "irreconcilable conflict" with a federal law by "mandat[ing]" violations of the federal law is preempted by the federal law. Therefore, if the

challenged Connecticut provisions necessarily force wholesalers and retailers to violate the Sherman Act, they would be invalid.

The Second Circuit held that Connecticut's alcohol laws do not necessarily force alcohol beverage wholesalers and retailers to conspire in violation of the Sherman Act and, therefore, that the laws are not preempted by the Sherman Act. In upholding the minimum-retail-price provisions and the price discrimination/volume discount provisions, the Second Circuit relied on two Sherman Act preemptions tests from the Supreme Court's *Rice v. Norman Williams Co.* (1982) and *Fisher v. City of Berkeley, California* (1986) cases. Under the first test, the court determines if the challenged restraints are "unilateral," meaning imposed exclusively by the state law with no private discretion, or "hybrid," meaning imposed by the state law but allowing private actors a degree of discretion. Because a violation of § 1 of the Sherman Act requires an agreement or conspiracy between private actors, a state law can only be preempted by the Sherman Act if it is a hybrid law that grants the regulated parties discretion to enter into anticompetitive agreements.

Under the second test, the court determines whether the state law causes a *per se* violation of the Sherman Act or whether the conduct it causes is subject to the "rule of reason." Only certain, defined anticompetitive conduct constitutes a *per se* violation of the Sherman Act; all other conduct is analyzed under the rule of reason, a test that balances the anticompetitive and procompetitive effects of the challenged conduct. A state law is only preempted if it requires conduct that amounts to a *per se* violation of the Sherman Act; if the conduct required by the state law is subject to the rule of reason, it is not preempted.

In *Connecticut Fine Wine*, the Second Circuit held that neither the minimum-retail-price provisions nor the price discrimination/volume discount provisions cause *per se* violations of the Sherman Act and, therefore, that neither is preempted by the Sherman Act. The court cited to Supreme Court precedent, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (2007), which established that minimum-retail-price and price discrimination restraints like those challenged by Total Wine are analyzed under the rule of the reason.

In upholding the post-and-hold provisions, the court examined whether *Battipaglia v. New York State Liquor Authority* (1984)—a case in which the Second Circuit upheld New York provisions similar to those in Connecticut—is controlling. Following an extensive analysis of *Battipaglia* and related precedent, the court determined that *Battipaglia* is controlling, and that the post-and-hold provisions are not preempted by the Sherman Act.

Though the Second Circuit upheld Connecticut's post-and-hold provisions, its holding appears to be at odds with those of other federal circuit courts. Both the Fourth and Ninth Circuits have heard cases involving state alcohol post-and-hold laws, and both held that the laws were preempted by the Sherman Act. See *Costco Wholesale Corp. v. Maleng* (9th Cir. 2008); *TFWS, Inc. v. Schaefer* (4th Cir. 2001). The Second Circuit's holding may have created a circuit split, which may later require resolution from the Supreme Court.

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National Law Review, Volume IX, Number 63

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