Ohio Case Will Likely Determine Whether Other States Use 21st Amendment Enforcement Act

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As was widely reported in the alcohol trade press, the state of Ohio filed suit against several online retail outlets a week ago after an investigation into direct-to-consumer shipments of wine and spirits into the state. The suit follows an investigation where employees of the Division of Liquor Control ordered wine and spirits online through retail outlets and received the alcohol at the Division's headquarters. Ohio argues that the online retail outlets did not have a license to ship the alcohol directly to consumers in Ohio, and therefore violated Ohio law. The crux of the suit is that the only way to ship wine to consumers in the state of Ohio is by obtaining an "S Permit". Unfortunately for the online retail companies, an "S Permit" can only be obtained by wine manufacturers and importers who produce less than 250,000 gallons of wine per year. The lack of any other license essentially prevents the vast majority of manufacturers, wholesalers and online retail companies from shipping wine to consumers in the state of Ohio directly.

What makes this case special is it marks the first time the 21st Amendment Enforcement Act, passed in 2000 has been utilized by a state. The likely reason it hasn't been utilized is that when going through Congress the Act was stripped of the ability for states to collect monetary damages and left them with only the ability to seek injunctive relief. That said, Ohio, as a control state for spirits, generates a massive amount of revenue through the sale of spirits and taxation of wine in the state. Online retailers and direct to consumer shipments puts that revenue in jeopardy. The case also hints that Ohio is protecting instate interests of wine retailers and wholesalers who stand to lose the most money with the expansion of direct to consumer shipments. Even though the state can't seek monetary damages under the 21st Amendment Enforcement Act, this suit is on its face all about money as the state makes no argument regarding the need to protect the public health and safety of Ohio residents.

The interesting part will be if and how the online retailers companies defend their actions. The case seems to go against both the trend of loosening direct to consumer laws across the country (such as neighboring Kentucky's recent expansion of direct to consumer rights) as well as successful retailer challenges to state laws that run afoul of the "dormant" Commerce Clause of the U.S. Constitution. The online retailers could use this as an opportunity to test the recent Supreme Court's holding in Tennessee Wine and Spirits Retailers Assn. v. Thomas reinforcing the "dormant" commerce clause. In the Tennessee Retailers case the Supreme Court held that the two-year residency law implemented by the state was not justified by the public health and safety measures raised and was unconstitutional under the Commerce Clause. As a reminder the Commerce Clause limits states authorities to regulate economic activity in interstate commerce. Among other things, this has been interpreted to prevent states from enacting neutral laws that place an unreasonable burden on interstate commerce. The balance between the limitation on states authority under the Commerce Clause and states' rights under the Twenty-first Amendment is something that is still being played out, and this case could certainly test exactly where that line is. While factually the Ohio case is different from the Tennessee Retailers case, most notably Ohio seems to simply ignore the Supreme Court's requirement that the state law advances public health and safety, the case certainly has the potential to test the limits of a state's economic protectionist behavior.

How the defendants will choose to structure their defense and their ultimate success will likely determine if other states try to use the 21st Amendment Enforcement Act in protecting their own instate licensee economic interests. Whether this case will be the catalyst to further determine just how much immunity states have from the commerce clause or further weaken states attempt at restricting direct to consumer laws remains to be seen.

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