



Written Testimony on Senate Bill 1088 -Direct Wine Shipping
Senate Regulatory Reform Committee

POSITION:

THE NATIONAL ASSOCIATION OF WINE RETAILERS OPPOSES SENATE BILL 1088

As currently written, this new bill is exactly the same as a previous Michigan wine shipping law that was ruled unconstitutional in Michigan Federal District Court only 8 years ago. Additionally, the bill shortchanges Michigan consumers, encourages a black market in wine, will likely cost the Liquor Control Commission hundreds of thousands of dollars in legal fees, and prevents the state from collecting millions of dollars in tax revenue. However, the problems with this bill can be overcome by amending it to allow out-of-state wine retailers, in addition to Michigan Retailers, to ship to Michigan Consumers.

For the following reasons the National Association of Wine Retailers recommends Senate Bill 1088 be rejected as currently written or amended to allow retailers -both in and out of the State- to ship wine directly to consumers.

1. SENATE BILL 1088 IS UNCONSTITUTIONAL—A FEDERAL COURT ALREADY SAID SO IN 2008

In 2008, after hearing a challenge to a Michigan law that was identical to Senate Bill 1088, Michigan Federal District Court Judge Denise Page Hood wrote the following:

"IT IS FURTHER DECLARED that the statutes and regulations prohibiting out-of-state retailers from selling, delivering and shipping wine through interstate commerce directly to Michigan consumers is unconstitutional under the Commerce Clause."

Judge Hood determined this after explaining in her *Siesta Village Market v Granholm* decision that:

"The Supreme Court has held that this section of the Twenty First Amendment does not give states 'the authority to pass non-uniform laws in order to discriminate against out-of-state goods'....The State's argument that the Twenty First Amendment gives it the authority to regulate alcohol coming into the state and that the three-tier system it has designed for regulatory purposes is appropriate is flawed. While the Heald court [Granholm v. Heald, U.S. Supreme Court, 2005] did state that the three-tier system was an appropriate use of state power, it did not approve of a system that discriminates against out-of-state interests."

If Senate Bill 1088 is passed, it will undoubtedly be challenged in court where the same conditions described in Judge Hood's decision will be in play. The state of Michigan and the Liquor Control Commission in particular, will end up spending hundreds of thousands of dollars to be told discrimination against out of state goods remains unconstitutional, just as it was a mere eight years ago.

2. SENATE BILL 1088 STIFLES CONSUMERS' ACCESS TO WINE

Michigan wine lovers and consumers ought to have access to all the wines now available in the national wine marketplace by allowing them to purchase and have wine shipped to them wine from both in-state

and out-of-state wine retailers. Only a very small percentage of wines available in the United States are sold in Michigan. As currently written, Senate Bill 1088 prohibits Michiganders from purchasing wines only available outside the state.

In fact, if Michigan consumers are banned from purchasing wine from out-of-state retailers it means that no imported wines sold in the U.S. (including French, Italian, German, Australian, Spanish, Argentine, New Zealand and all other non-U.S. wines) may be shipped directly to Michiganders since only retailers sell imported wines in the U.S.

3. A BAN ON WINE SHIPMENTS FROM OUT-OF-STATE WINE RETAILERS WILL COST MICHIGAN MILLIONS IN TAX REVENUE.

Simply by licensing out-of-state wine retailers in exactly the same way as out-of-state wineries are licensed and by regulating out-of-state wine retailers in exactly the same way as out-of-state wineries currently are regulated, Michigan could collect millions in tax revenue on the wines that would be shipped to Michiganders from out-of-state-retailers. Without offering out-of-state retailers such licenses and requiring the remittance of sales tax, Michigan will lose access to these tax revenues

4. A BAN ON SHIPMENTS FROM OUT-OF-STATE RETAILERS CREATES A BLACK MARKET THAT IS DIFFICULT AND EXPENSIVE TO POLICE

What's clear is that Michigan residents have not been able to find the wines they want and that they are willing to look out of state to find these wines and to pay shipping fees to obtain them. It's equally true that some out-of-state retailers, wanting to fulfill this demand, are willing to sell Michigan consumers the wines they want and arrange shipment of the wines. How much is Michigan willing to spend to chase down this black market in an item that is legal to sell and legal to consume. It is far more efficient to regulate and tax this marketplace than try to police it.

5. ALLOWING SHIPMENTS FROM OUT-OF-STATE WINE RETAILERS DOES NOT DISMANTLE THE THREE-TIER SYSTEM NOR WOULD IT HARM IN-STATE RETAILERS OR WHOLESALERS

Were Senate Bill 1088 amended to allow wine shipments from both in-state and out-of-state wine retailers, the three-tier system in Michigan would remain intact and strong. Michigan retailers would still be required to purchase their inventory from in-state wholesalers, just as they always have been.

Additionally, shipments from out-of-state retailers directly to Michigan consumers in no way take business from Michigan wholesalers and retailers. Consumers do not purchase and pay large shipping fees for wines bought out of state if they can find so same goods in-state. Michiganders will continue to purchase from in-state retailers when they can find the wines they want from a local source.

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National Association of Wine Retailers
Additional Testimony Concerning the Language in SB 1088

Regulatory Reform Committee
September 21, 2016

The National Association of Wine Retailers believes that parts of SB 1088 are entirely vague and unclear to the point of sloppiness and believes these parts of the legislation should either be entirely removed from the bill or redrafted with much more clarity.

To wit, the Committees attention is draw to the following section of the bill:

Section 14 (A): A RETAILER THAT HOLDS A SPECIALLY DESIGNATED MERCHANT LICENSE MAY USE A THIRD PARTY DELIVERY SERVICE BY MEANS OF THE INTERNET OR MOBILE APPLICATION TO FACILITATE THE SALE OF OR TO DELIVER, OR BOTH BEER OR WINE TO HT EHOME OF A DESIGNATED LOCATION OF A CONSUMER IF ALL OF THE FOLLOWING IS MET.

What does "Facilitate" mean? Does it mean the Third Party Delivery Service may handle credit card processing? Does it mean it will handle compliance matters? Does "facilitate" mean the Third Party Delivery Service may market and sell the wine in advance of the Michigan merchant even knowing what wines are being marketed and sold. It is entirely vague what "facilitate" means.

Section 14 (B): A MANUFACTURER, WAREHOUSER, WHOLESASLER, OUTSTATE SELLER OF BEER, OR OUTSTATTE SELLER OF WINE DOES NOT HAVE A DIRECT OR INDIRECT INTEREST IN THE THIRD PARTY DELIVERY SERVICE.

This language explicitly allows manufacturers, warehouseers and wholesalers of WINE to have a direct or indirect relationship with the third party delivery service, but does not allow the same for BEER. This means that the new "Third Party Deliver Service" created in this bill can not only be located out of state, but it can be a wholesaler or alcohol producers. This is a very irregular situation.

Why should an out of state wholesaler be able to deliver wine directly to a consumer, but an out of state retailer of wine is not allowed.

Section 14 (C): A MANUFACTURER, WAREHOUSER, WHOLESALER, OUTSTATE SELLER OF BEER, OR OUTSTATE SELLER OF WINE DOES NOT AID OR ASSIST A THIRD PARTY DELIVERY SERVICE BY GIFT, LOAN OF MONEY, PROPERTY, OR ANY DESCRIPTION, OR OTHER VALUABLE THING AS DEFINED IN SECTION 609, AND A THIRD PARTY DELIVERY SERVICE DOES NOT ACCEPT THE SAME

This language explicitly allows a producer (manufacturer) of wine or wholesaler of wine to give things of value in the form of gifts, loans, and property to the new Third Party Delivery Service". This too is highly irregular. It is particularly irregular because while it allows wine producers and wine wholesalers to give gifts and loans and property the Third Party Delivery Service, it explicitly prohibits beer producers or wholesalers from doing so.

Section 14 (E): THE THIRD PARTY DELIVERY SERVICE OFFERS SERVICES FOR ALL BRANDS.

It is entirely unclear what this means. Which brands? Whose brands? In-state brands? Out-of-state brands?

Section 14 (F): THE THIRD PARTY DELIVERY SERVICE MAKES ITS SERVICES REASONABLY AVAILABLE TO ANY RETAILER IN THE THIRD PARTY DELIVERY SERVICE'S AREA.

This language is completely and purposefully vague. What does "reasonably available" mean? Also, where is it determined what the "area" of the Third Party Delivery Service? Who defines this "area"? How is this "area" defined?

We believe the confusing and vague nature of parts of this bill will inevitably lead to confusion. These parts of the bill ought to be either removed entirely or re-drafted to be much more specific.

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To: Committee on Regulatory Reform
Re: SB 1088 - Direct shipment of wine by retailers
Hearing Date: September 22, 2016
From: Robert Epstein & James Tanford, Epstein Cohen Seif & Porter LLP

We are the attorneys who have successfully sued Michigan twice over its discriminatory wine shipping laws that gave favorable treatment to in-state businesses. In both *Granholt v. Heald* (wineries) and *Siesta Market v. Granholt* (retailers), the federal courts declared that it was unconstitutional for the State to allow in-state businesses to ship wine to consumers, but prohibit out-of-state businesses from doing so. We were therefore disappointed to see SB 1088 introduced that would enact the same law previously held unconstitutional that allows in-state retailers to ship wine to consumers, but prohibits out-of-state retailers from doing so. Will we really have to sue the State a third time?

The intersection between a state's 21st Amendment authority to regulate alcohol sales and the Commerce Clause's requirement that such regulations may not discriminate against out-of-state businesses is a complicated area of law. We have heard that there is misinformation floating around claiming that various loopholes, technicalities, or decisions in other states will somehow permit Michigan to enact a law allowing only in-state businesses to sell and ship wine directly to consumers. We suggest that you base your decision not on vague assurances made by lobbyists, but on the actual language in *Siesta Market*, which was made by the court that would hear a case challenging the new law. The court was absolutely clear:

IT IS FURTHER DECLARED that the statutes and regulations prohibiting out-of-state retailers from selling, delivering and shipping wine through interstate commerce directly to Michigan consumers is unconstitutional under the Commerce Clause.

IT IS FURTHER ORDERED that the State of Michigan and its officials are enjoined from prohibiting out-of-state wine retailers from selling, delivering and shipping wine through interstate commerce direct to consumers.

When a similar bill was being considered last spring in the House, another rumor was started that we had dismissed the *Siesta Market* case before the state could appeal because we realized we were going to lose. Not true. We dismissed the case at the request of the Michigan Attorney General because the law had been repealed, so the case was moot.

We urge you to resist the temptation to pass yet another wine shipping law that discriminates against out-of-state businesses. It cannot survive a court challenge.

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