2003's Bumper Crop of Direct Shipping Legislation

Part Two

By Sara Schorske and Alex Heckathorn

IN OUR last Compliance Watch column, we updated you on the direct shipping litigation around the nation and discussed the Constitutional issues raised by the direct shipping battles. In this column, we'll review the latest direct shipment laws, and explain how each of the new shipper's permits works.

But before diving into the new direct shipping legislation, we'll give you a quick update on the pending cases we described last issue.

The Litigation Update

Texas update: When we last wrote, the Texas case seemed poised to go to the US Supreme Court. In late August, however, the TABC announced it would not appeal the 5th Circuit Court decision that struck down the Texas ban on direct shipment by out-of-state wineries, after concluding that an appeal would be too costly and too risky.

The good news is, shipments to Texas consumers are now legal. The bad news is, while shipments to Texas could theoretically occur, there is no practical way of doing so at this time.

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Wine must be transported by a carrier with a permit and cannot be shipped into "dry areas." Because of the difficulty in preventing inadvertent illegal deliveries, no carriers have started handling wine shipments to Texas.

Texas is a crazy patchwork of wet, dry, and "damp" areas (damp means sales of beer, but no other alcoholic beverages, are legal). Damp and dry areas are created by local voters, and can be as small as a single judicial precinct! Wet counties are frequently dotted with dry towns; and even within a single city, such as Dallas, there are wet and dry areas. It's so confusing there, you can buy a cabernet or bourbon and then walk into a totally dry area by simply crossing the street!

Because wet and dry areas are as small as a precinct, no state-wide master list of wet and dry areas exists. Only the local county clerks for each county keep records, and of course, the landscape changes with each election. The California Wine Institute is attempting to compile a list of wet zip codes for its members, but in a state as big as Texas the task is daunting.

Michigan update: In another resounding victory for pro-direct shipping forces, the Federal 6th Circuit Court of Appeals ruled Michigan's ban on direct-to-consumer wine shipments by out-of-state wineries was unconstitutional, reversing the lower court's ruling. Like Texas, Virginia, and North Carolina, Michigan had allowed consumers to order direct from its in-state wineries, but not from out-of-state wineries. It's too soon to pop a cork in celebration, however. Since the state has requested a re-hearing before the appeals court, wine shipments have not started to flow to Michigan.

New York update: Another court case being closely watched is the New York lawsuit. The trial judge had ruled that the New York laws are discriminatory and therefore unconstitutional. The State's appeal was argued before the three-judge Court of Appeals panel on September 4, 2003. Although no decision has been rendered by the Court of Appeals, and wine still cannot be shipped to NY consumers, the case has generated considerable valuable publicity, including a series of articles on direct shipping in the influential New York Times and a televised debate on CNBC, featuring an all-star cast of constitutional lawyers arrayed on both sides of the issue.

2003 Harvest of New Legislation

Catalyzed directly or indirectly by the recent flurry of litigation, 2003 has seen a host of new laws bringing new direct shipping privileges to the nation's wineries.

Virginia: After Virginia's law prohibiting out-of-state wineries from shipping direct to Virginia consumers was declared unconstitutional by a federal trial court, Virginia created a new direct shipping license. Effective July 1, both in-state and out-of-state wineries are required to hold this license in order to ship wine to Virginia consumers.

The "Shipper's License" is issued by the Virginia ABC and costs $50 per year. There is also a $50 initial application fee and a $15 background check fee for each owner, partner, officer or stockholder owning 10% of the winery's stock. To apply for the Shipper's License, a winery uses the ABC's standard license application form. A summary of the application process and the application form are available on the VA ABC web site at the following link: http://www.abc. state.va.us/licensing/shipperslicense.html

Virginia's direct shipping law has several additional requirements, such as submission of a list of brands the winery intends to sell, and notification of the winery's current Virginia wholesalers of its application for the Shipper's License. The law also requires monthly reporting and payment of excise and sales taxes, if they have not already been paid. Packages containing wine are required to be marked: "Contains alcohol: signature of person age 21 or older required for delivery," and must be transported by ABC approved common carriers. The following carriers have been approved: Federal Express, United Parcel Service, FedEx Ground, and DHL Worldwide Express.

The monthly report is quite extensive, requiring the name, quantity, and price of products shipped, and names and addresses of purchasers. Copies of the invoices must be provided. The shipper's report form is available from the following link: http://www.abc.state.va.us/enforce/forms/D_SHIPPERS.pdf

It has been widely reported that the new Virginia law made Virginia a reciprocal state; however, from our reading of the statute, there is no language which supports this position. In a recent interview Shawn Walker, head of the MIW (non-retail) Enforcement Section of the VA ABC, stated that the Virginia ABC interprets the new law as a "permit" law, not a reciprocal shipping law. According to Walker, whether the other reciprocal states would interpret the Virginia law as a reciprocal shipping law "still needs to be ironed out with those states." He added that any necessary negotiations with the other states would be up to industry trade organizations to initiate. Wineries outside of Virginia can use the state's new permit to reach Virginia consumers no matter how the reciprocity issue is decided. At stake is whether Virginia wineries can ship into the several reciprocal states—most of which do not require permits.

North Carolina: North Carolina made its direct ship law effective October 1, allowing wineries to ship directly to North Carolina consumers by obtaining a new Wine Shipper Permit. Like the Virginia law, both in-state and out-of-state wineries must obtain a permit. The permit allows the holder to ship up to two cases per month to residents for personal use only. As in Virginia, packages containing wine are required to be marked: "Contains alcohol: signature of person age 21 or older required for delivery," and must be shipped using an approved common carrier. The only carrier approved so far is DHL Worldwide Express.

The initial license fee is $100 and the annual renewal is $25. The permit application form is available from the NC ABCC website. Wineries applying for this permit must provide a listing of the wine brands that will be sold, and amend it whenever necessary to keep it up to date. Permit holders will be required to file quarterly shipping reports, including information similar to the Virginia form described above, and pay North Carolina excise and sales taxes. The necessary forms for all these purposes may be obtained using the following link: http://www.ncabc.com/whatsnew/wine_shipper/#forms

The law also demands that if a winery already has a North Carolina distributor, it must notify the distributor that it is applying for the permit. Wineries without a North Carolina distributor must agree to appoint one, if a distributor requests to distribute the brand, once the winery ships more than 1,000 cases a year to North Carolina consumers. (A permit is not required for wine purchased in person at a winery tasting room out of state, so case goods shipped to tasting room visitors do not count toward the 1,000 case mark.)

South Carolina: Also effective October 1, wineries may ship directly to South Carolina consumers if they obtain an Out of State Wine Shipper's license from the Department of Revenue–at the relatively high price of $600 for two years, due to an across-the-board $100/year increase in all SC licenses after this license was created. In addition, since the license renews on August 31 of even-numbered years, and the fee is not prorated, wineries obtaining the license between now and next September 1 will pay a high premium for the privilege.

The permit allows a winery to ship up to two cases per month to a resident of the state for personal use. The law requires annual reporting and payment of sales and excise taxes on August 31st of each year. As with Virginia's and North Carolina's laws, packages containing wine are require to be marked: "Contains alcohol: signature of person age 21 or older required for delivery."

The required application form is available from the South Carolina Department of Revenue web site, www.sctax.org. Please note: The instructions shown on the form are not accurate, according to the SC Department of Revenue. The instructions indicate that a Certificate of Registration is also required. That requirement has been eliminated, but the form has not been revised. And another step not mentioned on the form is now required: Each applicant must register to pay sales tax with the South Carolina Tax Commission. The fee is $50, and the Retail Sales Tax Form is available on line.

In addition, the form confusingly requests foreign corporations to attach "copy of Articles of Certificate of Authority." No need to qualify the winery's corporation in South Carolina–all they want is a copy of your home state Articles of Incorporation.

Hawaii: Hawaii became a reciprocal state on July 1, 2001; however, the Honolulu Liquor Commission initially stated it would continue to enforce an older law requiring consumers to obtain a $10 permit to import wine. This year, Hawaii cleaned up its reciprocal shipping law by eliminating the consumer permit requirement. The final version of the bill also increased the amount that can be ordered by each consumer, from two to three cases per year.

Wisconsin: Wisconsin revised its reciprocal shipping privilege on January 1, 2003. The nine liters per year limit for each consumer was not changed, but a $10 annual registration fee and an annual reporting requirement were added.

The first annual report is due on January 31, 2004, covering shipment information for the preceding calendar year.

The new report form requires the name, address, and date of birth for each customer in Wisconsin, as well as the product information and quantity for each shipment made directly to a Wisconsin consumer.

South Dakota: This year South Dakota passed a cumbersome "special order" bill that requires consumers who wish to buy brands not in distribution in South Dakota to place their orders with a retailer, who obtains the wine from the winery through a South Dakota wholesaler. Each consumer is permitted to receive up to twelve cases per year using this system.

Arizona: Arizona recently handed another small victory to wineries in the direct shipping battle. Effective September 18, 2003, two cases per year can be shipped to an Arizona resident, as long as the wine was purchased in person at the winery.

Utah: And of course, one state, Utah, felt compelled to meet the tide with a new felony penalty for direct shipment. Utah enacted a law making shipments to Utah consumers a felony. Make sure to add it to your list of states where you do *not* ship.

Federal "Airline" Shipment Law

In November 2002, President Bush signed the Dept of Justice Appropriations Authorization Act, allowing direct shipments to tasting room visitors whose home states would allow them to legally carry wine home in their airline baggage. Purchases made by the consumer in the winery's tasting room may be shipped to the consumer under this law if the purchaser resides in Delaware, Georgia, Kentucky, Maine, Michigan, Montana, North Carolina, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, or Virginia.

The law initially had little effect, as carriers failed to recognize the new privilege, but in July both UPS and Federal Express announced that they would commence shipments to the thirteen states listed above. (UPS has also recently extended services to several other areas. You should check with both shippers to see what expanded services they will make available to your winery.)

The privileges under the federal law go beyond what could be done previously under the various state laws. Tourists often visit several wineries, and may actually arrange with more than one to ship their legal allotment home to them. Nothing in the law requires the wineries to ship in coordination with each other. Therefore, in effect, the federal law allows consumers to ship to themselves *more* wine, all told, than they could have carried home when airlines still allowed the extra baggage.

The Direct Shipping Desert Is Shrinking

Like the State of Texas, with its wet, dry, and damp areas, the United States is becoming a patchwork of areas that could be called "wet," "dry," and "damp" with respect to direct shipping. Wet direct shipping areas are easily open to wineries and their consumers. "Dry" direct shipping areas, obviously, are those that still prohibit direct shipping. Areas that allow direct shipping, but only by relatively costly or restrictive means, could be called "damp." The best news is, the nation's arid area is gradually losing ground. And great headway was made this past year.

We'll toast to that!