Beverage Alcohol Litigation in the U.S. Case Law and Legal Analysis

J. Neal Insley, Sr. VP and General Counsel
As required by the Alcohol Policy 18 Conference, I/we have signed a disclosure statement and note the following conflict(s) of interest:

<table>
<thead>
<tr>
<th>Date</th>
<th>Length of Time</th>
<th>Capacity &amp; Description</th>
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<tbody>
<tr>
<td>12-96</td>
<td>8 years</td>
<td>Special Agent - Law enforcement with Virginia ABC</td>
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<tr>
<td>01-06</td>
<td>4 Years</td>
<td>Attorney - Represented beverage alcohol industry members in private practice</td>
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<tr>
<td>05-10</td>
<td>4 Years</td>
<td>Chairman/Agency Head - In charge of the Virginia ABC, also; Chair of NABCA</td>
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<tr>
<td>02-14</td>
<td>1 Year</td>
<td>Attorney - Represented beverage alcohol industry members in private practice</td>
</tr>
<tr>
<td>04-15</td>
<td>3 Years</td>
<td>Sr. VP/General Counsel - Head of NABCA legal affairs</td>
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Beverage Alcohol Litigation

Generally, litigation that challenges the legitimacy of beverage alcohol laws will fall into one of the categories:
Constitutional Challenges

42 U.S.C. § 1983

Most Constitutional challenges are brought as 42 U.S.C. § 1983 civil rights actions for, “deprivation of any rights, privileges, or immunities secured by the Constitution and law.”
OTHER CONSTITUTIONAL CHALLENGES

INJUNCTION
The courts will enjoin the government from being able to enforce/use the statute, regulation or policy.

EXTENSION
The courts will order that the law must extend and apply to the class of out of state entities that the law discriminated against.

NULLIFICATION
The courts will strike the statute and thus no one may take advantage of it.
FIRST AMENDMENT: COMMERCIAL FREE SPEECH

1. Whether the speech concerns lawful activity/not misleading
2. Whether the asserted governmental interest justifying the regulation is substantial
3. Whether the regulation directly advances the governmental interest asserted
4. Whether the regulation is not more extensive than necessary to serve that interest

Central Hudson Test
Recent Commercial Free Speech Cases
Retail Digital Network v. Prieto (formerly Appelsmith) (861 F.3d 839)

Advertising
Retail Digital Network installs advertising displays in retail stores and challenged the California law prohibiting manufacturers and wholesalers from giving a retailer something of value in exchange for advertising as a violation of the First Amendment.

Federal district court ruled that the California law was constitutional, citing the Ninth Circuit’s opinion in Actmedia v. Stroh (1986), and granted summary judgment to the California ABC.

On appeal, the Ninth Circuit reversed the lower court’s ruling and remanded the case back so the court could apply “heightened judicial scrutiny” to the California statute based on the Supreme Court’s 2011 ruling in the Sorrell v. IMS Health First Amendment case.

Oral arguments were held in January 2017 in front of a full sitting of the 9th Circuit; the panel affirmed the district court’s decision and supported the actions of the California ABC.
Recent Commercial Free Speech Cases
Missouri Broadcasters v. Lacy (Case number 2:13-cv-04034)

Alcohol Advertising
The Missouri Broadcasters Association challenged the state's alcohol advertising limits (generally, no discount advertising, no outside advertising and no single retailer advertising).

Federal District Court denied their summary judgment motion and dismissed all but one of their claims.

On appeal, the Eighth Circuit reversed the dismissal of claims and remanded the case back to district court; a bench trial is scheduled for February 2018.

At trial the State will have to show that:
  - The challenged provisions do directly advance the government's interest
  - The asserted substantial interest, are not more extensive than necessary; and,
  - The provision do not unconstitutionally compel speech (provide a list of retailers).
Recent Commercial Free Speech Cases

Utah had an ABC law the prohibited the showing of simulated sexual acts. Cinema Pub, LLC (DBA Brewvies) was showing the movie “Dead Pool” and was told they had to stop. Brewvies sued and won in federal court because the law was overly broad and violated free speech.

21st Amendment

Repealed prohibition and reserved to the states primary authority to regulate alcohol.

Dormant Commerce Clause

As interpreted by the United States Supreme Court in Grahalm vs. Heald, prohibited a state from burdening interstate commerce by discriminating against out-of-state commercial enterprises.
When a state law or a regulatory scheme places the provisions of the Commerce Clause in conflict with Section 2 of the 21st Amendment, the question becomes: is the law necessary to advance a legitimate local purpose that cannot be supported by less burdensome means, or is it truly meant to protect in-state business from out-of-state competition that would excessively burden interstate commerce?

That “legitimate local purpose” in beverage alcohol litigation means: does it promote public health, safety and welfare of the citizens.

The Dormant Commerce Clause provides that state laws violate the Commerce Clause if they mandate “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter”.

— State laws that facially discriminate against interstate commerce face “a virtually per se rule of invalidity.”

— Such laws will be declared invalid unless they “advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”

In Granholm, the Supreme Court carefully chose its words when it summarized its holding as follows: “States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of wine while simultaneously authorizing direct shipment by in-state producers.” The language of the opinion forbid states from discriminated against producer and their products. It did not address the authority of states to differentiate between in-state and out-of-state entities in the regulation of distributors and retailers.
Brooks v. Vassar, 462 F.3d 341 (4th Cir. 2006) (stating that any argument “that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart is nothing different than an argument challenging the three-tier system itself [and] ... is foreclosed by the Twenty-first Amendment and the Supreme Court’s decision in Granholm, which upheld the three-tier system as ‘unquestionably legitimate.’”).

Jelovsek v. Bredesen, 545 F.3d 431 (6th Cir. 2008) (Tennessee’s ban on the direct shipment of alcohol beverages to consumers did not violate the dormant Commerce Clause).

Arnold’s Wines, Inc. v. Boyle, 571 F.3d 185 (2nd Cir. 2009) (New York’s alcohol regulatory regime, prohibiting in-state sales by non-NY licensed out-of-state retailers was permissible under the Twenty-first Amendment and the Commerce Clause).

Siesta Village Market LLC v. Steen, 595 F.3d 249 (5th Cir. 2010) (Texas liquor laws which barred out-of-state retailers from shipping to Texas did not violate the dormant Commerce Clause).

Wine Country Gift Baskets.com v. Steen, 612 F. 3d 809 (5th Cir. 2012) (“We have held that Texas can require its authorized retailers to sell from locations physically located in Texas. Therefore, the dormant Commerce Clause does not support ordering Texas to issue retail permits for use at out-of-state locations.”).

Black Star Farms LLC v. Oliver, 600 F.3d 1225 (9th Cir. 2010) (Arizona’s small winery and in-person exceptions to three-tiered alcoholic beverage distribution system did not violate dormant Commerce Clause).

American Beverage Ass’n v. Snyder, 735 F.3d 362 (6th Cir. Beverage container deposit law requiring unique-to-Michigan mark designation violated dormant Commerce Clause).
Southern Wine & Spirits of America, Inc. v. Division of Alcohol and Tobacco Control, 2012 WL 1934408 (W.D. Missouri May 29, 2012) (Residency requirement applicable to wholesale tier of Missouri’s liquor distribution licensing system had rational basis and therefore did not violate equal protection clause, because legislature legitimately could have believed that wholesaler governed predominantly by Missouri residents was more apt to be socially responsible and to promote temperance).

Cooper v. Texas Alcoholic Beverage Commun, 820 F.3rd 730 (5th Cir. 2016) (Cooper II) (Twenty-first Amendment does not authorize states to impose a durational-residency requirement on the owners of alcoholic beverage retailers and wholesalers; under Twenty-first Amendment, distinctions between in-state and out-of-state retailers and wholesalers of alcoholic beverages are permissible only if they are an inherent aspect of the three-tier distribution system).

Byrd v. Tennessee Wine and Spirits Retailers Association, 883 F.3d 608 (6th Cir. 2018) (Two-Year residency requirements for obtaining an alcohol retailer’s license to operate liquor stores in Tennessee were discriminatory on their face towards out-of-staters, and were not demonstrably justified by state’s purported concern for its health, safety, and welfare and its desire to have higher degree of oversight, control, and accountability over those involved in ownership, management, and control of licensed retail premises).

Lebamotoff Enterprises, Inc. v. Rauner, 2017 WL 2486084 (N.D. Ill. 2017) (on appeal) (“To allow Out-of-State Plaintiffs to operate outside the three-tier system in Illinois, while in-state-retailers diligently operate within the regulatory system and help to limit the potential social problems connected with improper use of alcohol, would actually provide Out-of-State Plaintiffs with an unfair advantage over the in-state retailers rather than remove any self-perceived disadvantage to Plaintiffs. Plaintiffs’ Commerce Clause claims in this action thus seek to foster unfair advantages in commerce, which is ironically contrary to the Commerce Clause.”)
EQUAL PROTECTION

Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike, absent a strong justification otherwise.

Type of classification determines the level of judicial review/scrutiny:

- **Race** – strict scrutiny
- **Sex-based** – intermediate
- **Economic** – rational basis (this is most often the category beverage alcohol litigation fall into).
EQUAL PROTECTION


**Two Texas craft brewers**—Deep Ellum Brewing and Grapevine Craft Brewery (collectively, the Brewers)—brought suit against the Texas Alcoholic Beverage Commission (TABC), arguing that the statutes treating brewer’s permittees and manufacturer’s licensees differently than wineries, distilleries and brewpubs with respect to off-premises retail sales violated their (I) equal protection and (II) substantive due process rights under the US Constitution.

**The Court ruled in favor of the TABC**, finding that the proffered legitimate state interests—(a) maintaining the integrity of the three-tier system, (b) promoting temperance, and (c) ensuring fair competition in the industry—are rationally related to the challenged scheme.

Prior to the final decision, the Court ruled for the Plaintiffs to exclude certain expert testimony proffered by the Defendants.
Retail Liquor Association of Oklahoma v. Oklahoma Alcoholic Beverage Laws Enforcement Commission (Case 5:17-co-00049)

EQUAL PROTECTION

Oklahoma spirits retailers filed suit against the state alcohol agency following passage of Question 792, amending the Oklahoma Constitution to allow grocery and convenience stores to sell wine and full-strength beer among other regulatory changes. Spirits retailers alleged that this violates the Equal Protection Clause of the Fourteen Amendment of the federal Constitution.

The federal district court judge ruled against the spirits retailers and noted, citing an affidavit by Bill Kerr of the Alcohol Research Group, “as a matter of general knowledge, beer and wine are materially different products than spirits due to their social uses and alcohol content.”
Thank You!

J. NEAL INSLEY
Sr. VP and General Counsel

NABCA
Alcohol Regulation, Litigation and Public Health

PAMELA S. ERICKSON, FORMER DIRECTOR, FORMER EXECUTIVE DIRECTOR, OREGON LIQUOR CONTROL COMMISSION AND FOUNDER OF CAMPAIGN FOR A HEALTHY ALCOHOL MARKETPLACE, ALCOHOL POLICY 18 CONFERENCE, APRIL 11, 2018
Conflict of Interest Statement

As a private business with a large number of clients, my work is entirely based on a mission to defend alcohol regulation. To that end, I operate as an educator, researcher, public speaker, trainer and legal expert. I work with and for governments, organizations, and individuals that are in a position to defend alcohol regulation, including both prevention organizations and members of the alcohol industry. I have served as a conference speaker for various associations including NABCA, the American Beverage Licensees, the National Beer Wholesalers Association, the Wine and Spirits Wholesalers Association, various state level distributor/package liquor store associations and a number of prevention organizations. More information at healthyalcoholmarket.com.
We are in a period of apathy about alcohol

- Legislators are ever eager to change laws when there’s a promise of more jobs and business.
- Courts are asked to treat alcohol like any other “legal” commodity.
- Few remember our history with alcohol and the reason we regulate the way we do.
- Court cases challenging regulations often do not include a full explanation of the history and rationale for the law and how the law works to curb alcohol problems.
- Alcohol regulations are often characterized as “antiquated” or from the Prohibition era.
The folly of alcohol deregulation can be demonstrated by the United Kingdom experience.
At one time, the UK had a model regulatory system. But, they deregulated over 50-60 years.

- Today, big box grocery chains are “vertically integrated” and dominate local markets with cheap alcohol available 24 hours a day, 7 seven days a week.
- The UK experienced a major increase in consumption and “out-of-control” bar sales that reached epidemic proportions with high rates of underage drinking, public drunkenness and over 1 million alcohol related hospital admissions.
- Three of the four recent prime ministers have proposed a major strategy to address this issue only to be thwarted by a strong industry that opposes the population-based “strong strategies” preferring “personal responsibility” measures.
US Alcohol Regulations are not antiquated nor do they come from a “prohibition era.”

- Our regulations are a response to market conditions BEFORE PROHIBITION which created enormous social problems.
- These problems resulted from local markets which permitted an extreme focus on profit by large national companies that wreaked havoc on our communities.
- Regulation and control of alcohol was rare. Some localities licensed bars and saloons, but primarily for the license fees.
- Alcohol was heavily promoted with aggressive sales tactics using inducements such as gambling, prostitution and personal loans based on earnings.
- Serious social problems eventually resulted from this situation.
Decades of heavy drinking and lack of regulation resulted in serious social problems and spawned a Temperance movement.

“I at last understood that 300,000 Americans, alarmed by the progress of drunkenness around them, had made up their minds to patronize temperance.”

-Alexis De Tocqueville, Democracy In America, 1840
Prohibition solved some problems but fostered others

- Prohibition was successful in reducing drinking rates, eliminating public order problems, and reducing social problems.
- But, nationally organized crime syndicates developed to supply alcohol.
- Illegal retail outlets, called “speak-easies”, sprung up to accommodate drinkers.
- Enforcement was weak and some states refused to enforce the law.
- Eventually, Prohibition was repealed and states got the primary responsibility to regulate alcohol.
Prohibition “reset” our relationship with alcohol

- States were given the primary responsibility to regulate alcohol allowing greater local authority to control problems, but also permitting uniformity of regulation at the state level.
- Most states relied on advice from “Toward Liquor Control,” a study of alcohol regulation world-wide financed by John D. Rockefeller.
- All states and the federal government adopted some form of the three-tiered system, a closed system of alcohol sale designed to prevent market domination by large companies that led to severe social problems before Prohibition.
- Post-Prohibition ushered in strict alcohol control, particularly for spirits. This product, the drink of choice during Prohibition, was viewed as a greater problem due to its higher alcohol content.
- Light beer and wine were made more widely available to encourage the drinking public to drink products with less alcohol content. (Beer was 3.2% ABV and wine was rarely consumed)
- These things eventually worked as consumption remained low and social problems did not immediately return.
Two case examples

1. **44 Liquormart, Inc. v. Rhode Island**: US Supreme Court commercial free speech case, decided: May 13, 1996.

   “Bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an “underlying governmental policy” that could be implemented without regulating speech. In this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy.” Justice Stevens, 44 Liquormart, 517 U.S. at 502-03.


   “Because the statute conceivably seeks to reduce access to high-alcohol products, and because the statute offends neither separation of powers nor due process principles, we REVERSE the district court’s judgment on the federal equal-protection claim and AFFIRM on the remainder,” Judge Cook, Maxwell’s Pic Pac v. Dehner.
Rhode Island banned the advertising of liquor prices except in the store itself. Court used “Hudson Test” to determine validity. Liquormart won.

Test is hard to pass, particularly the last two considerations which require a measure of omniscience not normally possessed by policy-makers. There may be no research or method to assess these matters.

Courts sometimes glibly suggest there are other means to accomplish the objective like raising taxes! Easier said than done and sometimes it doesn’t even work.

No major history discussion or full discussion of the power of price in controlling market conditions and consumption. In many states there were price wars after Prohibition which stimulated sales. A ban on price advertising would solve this problem. We have better research today that could be used to support price regulations.

The case cited research showing some states without bans had lower consumption rates. Consumption rates are impacted by many different things making state by state comparisons unreliable.

The "Central Hudson" test asks:
(1) whether the speech at issue concerns lawful activity and is not misleading;
(2) whether the asserted government interest is substantial; and, if so,
(3) whether the regulation directly advances the governmental interest asserted; and
(4) whether it is not more extensive than is necessary to serve that interest.
Kentucky bans grocery and convenience stores from selling wine and spirits, but they are eligible for a package liquor store with a separate entrance. A coalition of retailers, including the Kroger Corporation, filed suit claiming an equal protection violation.

Plaintiffs prevailed in US District Court where the judge found no rational basis for the law. He cited the fact that drug stores could sell wine and spirits but grocery stores could not. This made no sense to him.

Legal expert filed two reports and an affidavit showing that large grocery chains wanted to advertise and promote wine and spirits throughout the whole store in order to maximize sales. Sale of these products in an area with a separate entrance would not garner maximum foot traffic needed for impulse buys.

Historically, grocery stores were ideal venues for light alcohol products. Drug stores were ideal venues to sell wine and spirits and, though changed, they still sell many products subject to regulation.

Defendants prevailed at US Circuit Court level. Judge extensively cited history and rationale from legal expert report.
Lessons learned:

- Judges, lawyers and even regulators don’t understand alcohol regulations and may think they are silly and ridiculous.
- Affidavits, depositions, legal expert reports should be written in clear and simple language that anyone can understand.
- History is important because it helps establish the rational basis for a state's regulations. Historical research can point to how the state approached alcohol regulation after Prohibition. There’s often a report from a committee charged to recommend a regulation method.
- Credible research from reliable sources is important in helping to establish the rational basis and efficacy of a given regulation.
- Any description of alcohol regulations should explain they are part of a complex system where multiple methods may be needed to quell a problem. Singling out one regulation and assessing its impact may not be possible.
- Judges should be reminded that policy makers are not gods and can’t determine for certain what measures will be more or less effective in the future. While research is helpful, it is not a panacea.
Litigation as a Public Health Tool: The Tobacco Example

Presented April 11, 2018

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As required by the Alcohol Policy 18 Conference, I/we have signed a disclosure statement and note the following conflict(s) of interest:

None
Overview

First Wave
Second Wave
Third Wave
Impact of Litigation
Pros/Cons of Litigation as PH Tool
First Wave of Tobacco Litigation

- 1954 to 1973
- Individuals/surviving families sued cigarette manufacturers

Claims:
- Negligence; Express and Implied Warranties; Failure to Warn; Misrepresentation

Defenses:
- Assumption of Risk, Contributory Negligence, “Personal Choice”; Lack of Proof of Causation
First Wave

Why not product liability?

- Nascent/developing jurisprudence
- 1st Restatement of Torts

“Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.”
First Wave:
*Theme of Personal Responsibility*

**INDUSTRY:** 1

**PLAINTIFFS:** 0

**PUBLIC HEALTH:** 0, but learning
Second Wave of Tobacco Litigation

- 1983 to 1992
- Individuals/surviving families sued cigarette manufacturers

Claims:
- Product Liability (defective design and manufacture); Failure to Warn; Negligence

Defenses:
- Product worked as designed; “Good” tobacco defense from Restatement
Second Wave

How about product liability now?
- More developed jurisprudence
- Risk-Utility Test for inherently dangerous products

What about negligence?
- More states adopting comparative negligence

BUT STILL . . .
Second Wave:  
*Theme of the Almost Win*

**INDUSTRY:** 1.75 (Cipollone; Horton)

**PLAINTIFFS:** 0

**PUBLIC HEALTH:** .25, and picking up speed (documents from discovery)
Third Wave of Tobacco Litigation

- 1992 to ???
- Groups bringing cases
  - Class actions—flight attendants, consumer protection (lights litigation), addicted individuals
- Government bringing cases
  - State AGs (MSA); DOJ
Third Wave

Advantages for these plaintiffs/groups:

- Avoided the defenses of contributory negligence and assumption of the risk;
- Pooled resources/used government resources and access to plaintiffs’ bar with asbestos $$;$
- Documents discovered in Cipollone
Third Wave: Theme of manufacturers as bad guys

INDUSTRY: 2.0

PLAINTIFFS: .50

PUBLIC HEALTH: .50
Negative Impact of Litigation

Tort Reform

Appeal Bond Caps

Class Action Fairness Act (2005)

*Did vilification go too far?*
Positive Impact of Litigation
Positive Impact of Litigation
Master Settlement Agreement

Smokeless Tobacco Master Settlement Agreement

Creation of FAMRI

Curtained impact of tobacco $ on legislators

Hoke Litigation as PH Tool: Tobacco AP18
Pros of Using Litigation for PH

- Generates public awareness of public health problem and engenders support for remedial measures;
- May result in the termination of the marketing of a type of product (i.e., lead paint);
- Causes manufacturers to adopt changes designed to prevent liability, which results in less negative public health impact (i.e., Smith and Wesson’s gun locks; automobile manufacturers developed and installed air bags);
Pros of Using Litigation for PH

- Substantial monetary judgments can create price increases that decrease consumption of the dangerous product (often higher than could be expected from tax increases);
- Substantial monetary judgments could put a company or industry out of business;
- Plaintiffs may achieve favorable settlement terms not available in legislature (i.e., MSA), which may be more impactful on public health.
Pros of Using Litigation for PH

- Instigates legislative or regulatory change (can no longer ignore the problem) and curtails industry capture of legislators/regulators (can no longer take industry $$);

- Resolution is more permanent since court orders are not subject to change with election cycle/party in power.
Cons of Litigation for PH

- Courts cannot (should not?) serve effectively as ongoing monitors of settlements or injunctive relief;
- Type of relief available is more limited than in legislature/regulatory realm;
- Any financial impact of big judgments is felt by the consumer;
- Legislators/regulators do not feel compelled to act.
Future of Tobacco Litigation . . .
The end.

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