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UP FRONT | U.S. SUPREME COURT

## High court to settle wine battle

Court will decide whether wine lovers in Florida and 23 other states can buy wine through the Internet or 800 numbers

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It's a wine lover's dream: Hop on the Internet and order a case of the hot new wine from a California vineyard or get a great price from an out-of-state wine shop and have it sent to your home.

Not so fast. That's illegal in Florida. In fact, it's a felony -- carrying hefty fines, even jail time.

Wine aficionados and those who oppose shipping across state lines are in such a tiff they've taken the fight to the U.S. Supreme Court, with legal hotshots Kenneth Starr representing the shippers and Robert Bork defending the ban.

The shipping ban infuriates Florida wine fans, who buy more California wine than those in any other state except California.

"We're such a hick state that you can buy all the porn you want over the Internet, but you can't buy a bottle of wine," said Miami wine lover Hugh Culverhouse Jr.

Ban backers say it helps keep wine from minors. "As a society, do we want to make it easier for kids to get alcohol?" asks John Fitzpatrick, a spokesman for the Wine & Spirits Wholesalers of America.

The case, to be decided this spring, pits states' rights to regulate alcohol sales against laws prohibiting discrimination against out-of-state goods.

Florida and 23 other states prohibit direct-to-consumer wine shipments into the state. In most states, it's a misdemeanor; Florida is one of only six states in which it is a felony.

Last week, Sen. Paula Dockery, R-Lakeland, filed a bill to let out-of-state wineries ship to Florida residents. In opposition, Florida Attorney General Charlie Crist said the state will prosecute those who violate the law.

Gov. Jeb Bush, a wine fan, weighed in against the ban: "The idea that you can only buy wine through a certain distribution system, I always felt that was a little unjust."

### **BIG PROFITS**

Proponents of direct shipping say wine is one of only a few legal products you can't buy over the Internet or through an 800 number. They argue that wholesalers and in-state retailers are trying to hold onto their cut of the profits -- which can account for 50 percent of the price.

Opponents damn direct shipments as a "virtual vending machine" for selling wine to minors.

Proponents want the ability to buy new wines from wineries too small to have national distributors.

Anti-shipping advocates say law enforcement stings have caught some wineries and national retailers shipping wine across state lines illegally -- putting it in the hands of minors and depriving states of revenue.

Each side cites its favorite study. Pro-shippers talk about a 2003 Federal Trade Commission survey that said shoppers in McLean, Va., could buy wine up to 21 percent cheaper on the Internet than in local shops. And it said those states that permit direct shipments report few problems collecting taxes or discouraging underage drinkers.

Anti-shippers cite a National Academy of Sciences study saying 10 percent of under-age young people obtained alcohol over the Internet or through home delivery.

## **HIGH COURT CASE**

At the Supreme Court, the case is narrowly focused on whether U.S. wineries can ship directly to consumers in states where the winery is not located and where state law prohibits the shipments.

The pro-shippers have hired Starr, the special prosecutor in former President Bill Clinton's dalliance with Monica Lewinsky; the anti-shippers have brought in rejected Supreme Court nominee Bork.

Legal experts on both sides say a ruling favorable to wine shipping could open the way for big discount wine retailers to ship nationwide -- a far bigger proposition.

That would please Al Gordon, a Miami fine wine aficionado. Gordon says his 41-year-old son bought a case of 1994 Chateau Pontet-Canet Bordeaux for \$30 a bottle plus about \$12 for shipping from a California wine discount club.

``That's a hell of a deal. Not just the price, but it's also an older vintage, ready to drink. You can't buy that locally at any price."''

Internet and telephone sales by wineries account for only 1 or 2 percent of the \$18.2 billion in annual U.S. domestic wine sales, but they are expected to soar.

When the 21st Amendment ended Prohibition in 1933, it gave control over alcohol to the states. Over time, they created a "three-tier" system in which wineries sell to wholesale distributors, who sell to in-state retailers, who sell to consumers.

But while the number of U.S. wineries has soared to more than 3,000, the nation's 50 biggest wineries -- Gallo, Mondavi -- make up 90 percent of U.S. wine sales.

Additionally, buyouts have cut the number of distributors from 10,000 to 1,000 -- making it harder for small wineries to find national distribution.

"Wholesalers don't want to bother with me," says Virginia Swedenburg, who owns a 2,000-case-a-year winery in Middleburg, Va. ``My sales in New York might be only 10 or 20 cases. A wholesaler wants somebody like Kendall-Jackson, which might sell 20,000 cases there."''

States also use the three-tier system to tax wine sales. In Florida, those taxes bring in about \$200 million a year, according to Scott Ashley, president of Wine & Spirits Distributors of Florida.

"The biggest issue is that if direct shipping is open to wine, beer and spirits, what effect it would have on the tax structure of Florida," said Wayne Chaplin, president and chief operating officer of Miami-based Southern Wine & Spirits, the nation's biggest wine wholesaler.

Chaplin said he couldn't estimate how much Southern would lose in sales if wineries could sell directly to customers in all 50 states.

## **CONSTITUTIONAL CASE**

The case before the Supreme Court involves a conflict between two provisions of the U.S. Constitution:

- The 21st Amendment gives states the power to regulate alcohol sales. Today, 24 states ban direct shipments, and 26 do not.
- The Commerce Clause prohibits states from passing laws that discriminate against out-of-state products. In the Supreme Court case, the states of New York and Michigan ban direct wine shipments from out-of-state wineries but permit them by in-state wineries.

In the Michigan case, wine fans Ray and Eleanor Heald of Troy, Mich., and 11 others sued to invalidate that state's restrictions. A U.S. district court in Michigan ruled against them. But the Sixth U.S. Circuit Court of Appeals reversed the lower court.

In the New York case, two small out-of-state wineries -- Swedenburg of Virginia and Lucas Winery of California -- and three New York "residents who consume wine" sued to overturn the New York law favoring in-state wineries. A U.S. district court in New York ruled against New York. But the Second U.S. Circuit Court of Appeals reversed the lower court.

In 2003, the Supreme Court consolidated the two cases and agreed to hear them.

In December's arguments before the court, the state of Michigan's case was supported by 35 groups, including the Traffic Safety Association of Michigan, Concerned Women for America and the National Association of Evangelicals, a group of 45,000 Christian churches.

They predicted "catastrophic consequences" if the state's ban were lifted.

The Wine Institute, a group of 725 California wineries, countered that 26 states permit direct shipment, with no negative consequences.

North Carolina, for example, allows direct shipment only by approved carriers such as UPS and FedEx and only to legal drinkers. And wineries must report sales monthly to each state and pay an 8 percent tax.

New York wine consumers argued the law is unconstitutional because it was passed to favor in-state wineries.

Previous Supreme Court rulings, they argued, say such favor can be given only if it furthers "core concerns" of the 21st Amendment such as promoting temperance.

New York argued that the law does further temperance.

In the Supreme Court proceedings, justices peppered both sides with questions.

Swedenburg was thrilled to watch the proceedings from the court gallery.

`` It was a once-in-a-lifetime experience, although I couldn't understand all of it."