

beer marketer's INSIGHTS

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Vol 39, No 3

published 23X a year

February 11, 2008

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Costco Reversed (Mostly)! Are Distribs, State Regs Regaining Traction in Fed Cts?

Post-Granholm world just got a little safer. At least for now. Distribs and state regulators across US had a love almost complete reversal by US Appeals Ct of US Dist Ct's Costco decision. All of Wash state's key alc bev laws -- save one -- stay on books: uniform pricing, bans of credit, quantity discounts, retail-to-retail sales and central warehousing, plus minimum mark-up requirement. Appeals Ct judges only upheld lower ct's tossing of post-and-hold, not key to middle-tier security (or profit). In addition, in wake of recent Tex and NY decisions that upheld state laws, Costco reversal surely suggests that states and distrib advocates landing some shots of their own after series of serious court blows to state regulation and middle tier over last decade or so. At same time, gotta note: distrib/regulators ain't gettin' the strong, pro-21st Amendment, "alcohol-is-unique" analysis they seek. But each of these courts echoed Sup Ct's position that 3-tier system is "unquestionably legitimate." So instead of creating widely feared free-for-all -- with huge big box retailers forcing deep discounts and/or unfettered interstate shipping by retailers -- status quo essentially preserved. In blow to judicial activism, Appeals Ct noted that changes Costco sought need to be achieved in legislatures, not courts. Costco execs hinted that's where they're headed as they ponder appeal. As alc bev atty Richard Blau wrote in wake of Costco: "What a change in the wind!"

Beer Inst hailed decision as "strong affirmation of the three-tier system." NBWA applauded Ct's affirmation of "right of states to regulate alcohol under the 21st Amendment." Distribs got boost from Redhook chief Paul Shipman, who told Seattle Times: "When you grind distributors out of existence, there's a small benefit to consumers with a more efficient system, but retailers and producers quickly gobble up the efficiency that's been created. In the process you reduce the number of products that are in distribution." Costco's attys claimed Court "invalidated the...heart" of Wash system (post/hold), but its chief exec copped to not being "particularly happy with the result."

While most distrib advocates pretty buoyant, another vet alc bev atty, Drew Jaglom, offered narrow view. The Costco reversal clearly a win for state regulation in general, Drew acknowledged, it's "not a victory for state alcoholic beverage regulation or three-tier systems." How come? Appeals Ct panel took straight antitrust approach. Dist Ct judge's key mistake was deeming most of pricing laws "hybrid" restraints that allowed private bizzes to collude on price. That was wrong judgment on all but post-and-hold, panel ruled. Rather, laws were "unilateral" restraints adopted legally by state and therefore legit, even if inefficient. Fact these were alc bev laws, Drew points out, "totally irrelevant to the decision." In fact, only place where Appeals Ct considered 21st Amendment (to determine if it saved post-and-hold) panel "ruled against the primacy of the 21st Amendment," since state couldn't show post-and-hold advanced temperance.

Richard Blau takes broader view. While 9th Circuit "did not go so far as to restore the 21st Amendment to its former glory," Richard sez, "appellate court did recognize that this area of law is seriously out of balance." How's that? Richard points to several

spots where decision appears to be "uniquely oriented toward the alcohol industry and tends to support traditional regulation," especially in contrast other court rulings in this and other cases. First: judges' ruling that ban of retail-to-retail sales is "a fundamental component of the State's 'unquestionably legitimate' 3-tier system." Second: statement that the central warehousing ban "inefficient" and "may decrease competition," Wash state had "opted for such inefficiency" and any relief from that is "properly achieved...through political will." Third: Appeals Ct questioned US Dist Ct judge when she insisted state laws had to be "narrowly tailored" to promote temperance. She had even suggested a higher excise tax could have accomplished same goal (higher prices) without anti-competitive price laws. But Appeals Ct explicitly rejected notion that an "alternative form of regulation necessarily means" federal pro-competition interests outweigh state interests. Such a test "has never been applied in the context of balancing the states' core concerns" with Commerce Clause. What's more, judge's tax advice "disparages the policy choices" that 21st Amendment gives to states. It ain't up to courts to assess whether States' "policy reasons are sufficiently compelling." If this thinking - and it's just a footnote in a 47-page decision - holds up, sez Richard it's "huge," given the "drubbing" 21st Amendment has been taking.

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