

CLIENT ALERT

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1

TENNESSEE SUES SIX ONLINE ALCOHOL RETAILERS

by Rachel Schaffer Lawson and Jacob R. White

On July 14, the State of Tennessee filed a federal lawsuit in the Middle District of Tennessee against six businesses that operate retail alcohol websites. The Complaint alleges that each website sold to consumers in Tennessee in violation of the Twenty-First Amendment and related statutes, the Tennessee Consumer Protection Act ("TCPA"), and Tennessee liquor laws.

The Twenty-First Amendment prevents the "transportation or importation into any State...for delivery or use therein of intoxicating liquors, in violation of the laws thereof." Other federal statutes empower state attorneys general to bring civil actions for injunctions against any person whom the attorney general has reasonable cause to believe a person "is engaged in, or has engaged in, any act that would constitute a violation of state law regulating the importation or transportation of any intoxicating liquor[.]"

Tennessee Code Annotated § 57-3-217(g)(1)(A) reads, "It is an offense for a person to ship alcoholic beverages or beer to residents of this state without a license authorizing such activity." There is only one license authorized by Tennessee Law – a "winery direct shipper license" – which allows a winery to ship wine (made by the license-holding winery) to Tennessee residents from its winery. No other license allows for beer or spirits shipments from any producer or retailer of alcoholic beverages to a consumer. Additionally, the TCPA prohibits "[t]he act or practice of directly or indirectly...[a]dvertising, promoting, selling, or offering for sale any good or service that is illegal or unlawful to sell in the state."

The Tennessee Alcoholic Beverage Commission ("TABC") ordered spirits from each of the named websites in the complaint between October 2021 and January 2023. TABC agents ordered for delivery to a Tennessee address, received a confirmation email containing a UPS or FedEx tracking number, and received the spirits ordered in a package with a matching tracking number shortly after that. The state has alleged that since none of these businesses hold a permit to ship spirits to Tennessee residents, these shipments are made in violation of Tennessee liquor laws. Further, the state asserts that these actions constitute "advertising, promoting, or selling" illegal spirits in Tennessee in violation of the TCPA.

The State of Tennessee has requested an injunction and civil penalties. Additionally, the state has requested reimbursement

for the costs incurred for investigating and prosecuting these alleged offenses, including attorneys' fees and court costs.

None of the defendants have filed an answer. However, each of the websites has interesting similarities in its applicable "shipping policy" or "terms of service." All contain general disclaimers or statements to the effect of "the purchaser is responsible for ensuring the purchase and shipment complies with applicable receiving state law." Half contain an additional phrase stating that the title to the spirits passes from a partner retailer to the purchaser "in the state in which the business sits" (in this case, California or Florida) and that the purchaser appoints the website as "agent" of the purchaser, authorizing the website to ship the spirits to said purchaser on the purchaser's behalf. This "Agency Method" attempts to position the website as a mere facilitator or agent, disclaim any appearance that it conducts sales, and shift the responsibility of shipping from the business to the purchaser. Tennessee Code Annotated § 57-3-401(b)(2) reads, "It shall be lawful for any individual to transport not more than five gallons of alcoholic beverages or wine into or within this state for personal or household use of that individual." The Agency Method could be an attempt to take advantage of this provision by putting the website in the purchaser's shoes for shipping.

Rachel Lawson and Dickinson Wright's alcohol team have counseled a number of clients in connection with introducing an alcohol product to the e-commerce marketplace. This case may be a valuable development in the law regarding alcohol shipping, and we will continue to track its progress. For more information, contact us today.

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