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## Laying Down the Distribution Law



© Wine-Searcher | The laws around the three-tier system even confuse professionals.

Beverage attorney John Hinman explains why the wholesaler is always right, and how American liquor delivery laws can change.

By Liza B. Zimmerman | Posted Wednesday, 29-Nov-2017

Having covered the drinks industry for more than two decades it is easy to see how the tangle of post-Prohibition rulings are hard to follow and easy to distort. To make matters more complicated, they are enforced on a state-by-state basis, making operating in the US wine market tantamount to trying to set up shop in 50 different countries.

With average consumer and winery executives' legal comprehension of these laws on the low side, various organizations – with the aid of their in-house counsel – have been able to carefully adapt the laws to their advantage. So using alcoholic beverage attorney John Hinman – a partner at the San Francisco law firm of Hinman & Carmichael – as a guide, I delved into how these laws can be misinterpreted and manipulated to various entities' advantage.

### **Why are people in the wine business so confused by the current laws in the US?**

Because the laws are complicated and vary significantly from state to state and alcohol product to alcohol product. Many of the laws and restrictions make little business sense and are enforced only when someone complains. We used to joke that it is easier to deliver a gun than a bottle of [Chardonnay](#).

Finally, the laws are not intuitive and marketing and sales practices that are perfectly acceptable for other products are often unlawful with alcohol; except when they are not because of some special interest's exception.

The three-tier system isn't federally mandated, so it is not federally enforceable. It is a creature of individual states' laws. There is not one three-tier system but rather 50 different ones. This is likewise the subject of much confusion.

## **Are these laws really so much more complicated than in other countries?**

Yes. In other countries there are often more draconian laws dealing with consumption and retail sales, but they are generally based in some societal value. US laws are based on limiting market access so that the middlemen – the distributors – can maintain their historically large sales margins.

## **Do these laws really protect US citizens from tainted product, underage purchases and alcohol abuse?**

Tainted product protection is the responsibility of the Tax and Trade Bureau's (TTB) – which regulates the sale of alcoholic beverages on a national level. The TTB does an excellent job and clears all alcohol products produced in and imported into the US.

Underage purchasing is the responsibility of each state's individual Alcohol Control Board (ABC) and their success rate varies from state to state. Alcohol abuse is not just an American problem but one that is worldwide. Marketing, advertising and promotional regulations do make a difference. False advertising, including unsupported health claims, is prohibited; intemperate promotions, all-you-can-drink type of programs, are restricted; and advertising that encourages excessive consumption is generally discouraged through voluntary programs operated by the producers' trade associations.

## **How and why do some of our institutions such as the Wine & Spirits Wholesalers Association (WSWA) – which represents wholesalers nationally – misinterpret these laws to their own benefit?**

The wholesalers are dedicated to maintaining their position as mandatory middleman at artificially inflated margins. This is why they continue to perpetuate the fallacy that the three-tier system is necessary to protect the public. The wholesalers are, however, necessary to move boxes. They excel in that role and they deserve to be paid for that function.

Wholesalers have historically monopolized the shipment of alcoholic beverage products from state to state and within states. Shipment from a producer to a retailer by anyone other than a wholesaler represents competition that endangers their monopoly on product movement.



© Wine-Searcher | John Hinman says it's easier to transport a firearm than a bottle of Chardonnay.

## **Can you give me a few examples?**

The best example is the Internet and direct-to-consumer (DTC) sales. The wholesalers have grudgingly given up wine producer to consumer DTC but have just as stubbornly resisted beer and spirits DTC and direct to trade (DTT) which is direct producer-to-retailer sales. Intrastate DTC and DTT are happening anyway because of small businesses, but enforcing interstate DTC and DTT laws is a constant battle in the state legislatures.

**How have some of these interests used their own interpretations and misinterpretations of these laws to their own advantage?**

The anti-alcohol forces such as the Marin Institute/Alcohol Justice – a Prohibitionist "public health" group dedicated to reducing alcohol abuse through higher taxes and restrictions on advertising and points of sale – parrot the wholesalers' line because it plays into their agenda. This game plan includes raising alcohol taxes to fund social responsibility programs and generally supports their basic thesis that alcohol consumption is a scourge that needs to be stamped out. These are the folks that brought you Prohibition and voted against repeal.

**How was the historic 2005 legal case of Granholm versus Heald misinterpreted and do you think that this issue can be fixed to eventually allow retailers to ship into all states?**

There was a gratuitous observation in a footnote in the Granholm decision to the effect that the "three-tier system is unquestionably legitimate." This statement has been used by wholesalers to attempt to distinguish retailers from wineries, even though both sell to consumers at retail and all retailers have to buy through the three-tier system. Most law review commerce clause commentators point out that shipping to consumers by wineries and retailers are both legally identical acts.

**Why did UPS and FedEx decide last month not to allow retailers to ship into 36 states?**

The wholesalers forced the carriers' hand by going to state regulators and saying that the laws have to be enforced and that the carriers were being complicit in unlawful shipments. FedEx and UPS really had no choice but to crack down because if they were shipping in violation of state laws – which is a subject of much debate – they would be at risk of having their carrier permits pulled for shipping of all products.

**Might wholesaler lobbyists push the interpretation of Granholm far enough as to not allow wineries, as well as retailers, to ship into 36 states?**

Wineries can ship to 45 states and wineries do not buy from wholesalers, but produce wines, so it would be difficult to use the three-tier system arguments that are used against retailers against wineries. However the wholesalers' position in the original Granholm case was that wineries should not be allowed to directly ship to consumers because it would disrupt the three-tier system.

**How else are the Tied House rules – which were created on federal and state levels to prohibit brewers, distillers, winegrowers and other alcohol beverage suppliers from exerting undue influence over retailers – being used inappropriately by institutions to get what they want?**

The biggest offenders are the credit laws. As credit and delivery technology gets more automated, wholesalers resist any change and want to do business with paper, strict credit rules and no or little rights of retailer return of products. Currently all the mistakes, and there are constantly mistakes made in the delivery process, are resolved in the wholesalers' favor.

**How can we, as citizens and wine professionals, better inform ourselves about our rights?**

Demand that the state ABC authorities explain the laws in a clear, concise fashion and enforce them vigorously. That way the sheer lunacy of the current policies will soon become apparent.