



NEWSLETTER

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The High Cost of Lawsuits Against State Alcohol Beverage Control Agencies

By Pamela S. Erickson

Why do we need the Comprehensive Alcohol Regulatory Effectiveness Act (CARE)? The simple answer is to prevent deregulation of alcohol by lawsuit. Large corporate interests have a major advantage when they seek to challenge state alcohol regulation. They have large legal budgets and can hire top law firms. They can afford to engage skilled presenters to make their points in a compelling way. They can hire scores of assistants and researchers to build their case. On the other hand, state agencies are severely weakened by recent budget cuts. And, their legal budgets were never large to begin with. They are easily out-gunned. That is why 40 attorneys general signed a letter to Congress asking for their help with this issue.

Twenty five states have experienced lawsuits in recent years and more should be expected. A recent ruling in the state of Washington granted Costco \$1.5 million in legal fees for suing the state and **losing** on 7 out of 9 regulatory challenges. Obviously, this will encourage more private businesses to sue.

As a former Executive Director of the Oregon Liquor Control Commission, I can attest to the difficulty of regulating in the face of lawsuits. The fact that states can't afford lawsuits propels them to settle more often than they should. Case law has so eroded many state's regulations that a liquor license has become a right even though the statute calls it a privilege. The burden of proof is also thrust upon the state one way or another. Case law often sets the standard so high that it can only be met on rare occasion. Sometimes a state may only deny a liquor license if they can establish the likelihood of significant harm directly emanating from alcohol service. Proving that harm will occur in the future is not really possible. And, the prospective licensee is often given credit for a plan with numerous measures to prevent harm. Then, after getting the license, the plan is ignored or watered down because of its cost.

The CARE Act just puts the states' regulatory system back where it was when the 21st Amendment to the U.S. Constitution gave states the right to regulate alcohol. The Act reaffirms that states have the primary authority to regulate alcohol and places the burden of proof on plaintiffs that seek to challenge regulations.

The Act also prohibits states from discriminating against out-of-state businesses without justification based on regulatory purposes. Thus, states that allow in-state wineries to ship directly to customers must give out-of-state wineries the same privilege.

Oddly enough, the wine industry has been a vocal opponent. It is difficult to see how this is in their business interest as the Act reaffirms the legitimacy of allowing out-of-state producers to ship to customers. Perhaps the wine industry hopes that all regulations will eventually fall so they can have a free market where they can produce, sell, advertise, and ship in any way they want. If that scenario actually came to pass, many wineries would likely close. In states with hundreds of small wineries such as Oregon and Washington, wineries have special privileges if they are small. Some typical privileges are: tax exemptions, self-distribution, direct shipping to customers, and retailing at tasting rooms. Current regulations provide great protections for small operators from sales practices of large, economically powerful operators. If large companies could buy in bulk from large suppliers at discount prices, they would undercut small operators. The bottom line is that a free market would mean all businesses are treated the same. It would be the death knell for many small wineries.



For more information on alcohol regulation go to www.healthyalcoholmarket.com or contact Pamela S. Erickson, CEO, Public Action Management, PLC, pam@pamaction.com.