

STATE OF INDIANA) IN THE SUPERIOR COURT OF MARION COUNTY
))
COUNTY OF MARION) CAUSE NO: 49D060511PL045032

S.L.THOMAS FAMILY WINERY, INC.
d/b/a THOMAS FAMILY WINERY;
CHATEAU POMIJE WINERY, INC.
d/b/a CHATEAU POMIJE WINERY;
CHATEAU THOMAS WINERY, INC.
d/b/a CHATEAU THOMAS WINERY;
FERRIN'S FRUIT WINERY, LLC
d/b/a FERRIN'S FRUIT WINERY;
LANTHIER WINERY, LLC
d/b/a LANTHIER WINERY;
PFEIFFER WINERY & VINEYARD, INC.
d/b/a TURTLE RUN WINERY;
RAYMOND H. PERKINSON AND PATRICIA M. PERKINSON
d/b/a/ VINETREE WINERY;
TERRE VIN WINERY, INC.
d/b/a TERRE VIN WINERY;
and BUTLER WINERY, INC.
d/b/a BUTLER WINERY;

Plaintiffs,

v.

DAVID HEATH, EXECUTIVE DIRECTOR OF
THE INDIANA ALCOHOL AND TOBACCO
COMMISSION;

STEVEN CARTER, INDIANA ATTORNEY GENERAL;

And MITCH DANIELS, INDIANA GOVERNOR,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter is before the court on a verified complaint for a temporary restraining

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Summit Court
CLERK OF SUPERIOR COURT
MARION COUNTY, INDIANA

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order, preliminary injunction and permanent injunction against the enforcement of a rule of the Indiana Alcohol and Tobacco Commission that prohibits licensed farm wineries from delivering wine to purchasers by common carrier or package delivery service. A hearing was held on November 22, 2005, on whether the court should issue a preliminary injunction. Plaintiffs and defendants presented witness testimony, exhibits, and arguments. Plaintiffs filed a motion for findings of fact and conclusions of law, which this court hereby makes as follows:

I. FINDINGS OF FACT

1. The State of Indiana currently has about thirty (30) licensed farm wineries.
2. The rights and privileges of those wineries are set forth in Title 7.1 of the Indiana Code and Title 905 of the Indiana Administrative Code.
3. No statute, rule or regulation exists in either the Indiana Code or the Administrative Code that says Indiana wineries holding a farm winery license are prohibited from using a common carrier or parcel delivery service to deliver wine to purchasers within the state.
4. No statute, rule or regulation in either the Indiana Code or the Administrative Code explicitly says that Indiana wineries holding a farm winery license may use a common carrier or parcel delivery service to deliver wine to purchasers within the state, although two provisions say that wine retailers and wine wholesalers may “deliver” wine to the homes of purchasers. The term “deliver” is not defined either to include or exclude delivery by common carrier or parcel delivery service.
5. The Alcohol and Tobacco Commission is an administrative agency of the State of

Indiana. David Heath is its Chairman.

6. On May 16, 2005, the United States Supreme Court issued an opinion in the case of Granholm v. Heald. That case held, among other things, that if a state allowed its own in-state wineries to ship wine directly to consumers' homes, it must also allow out-of-state wineries to do so.

7. On May 17, 2005, the defendant David Heath posted a "special announcement" on the website of the Alcohol and Tobacco Commission ("ATC") saying that "Indiana law does not permit Indiana wineries to ship wine directly to consumers. However, in light of the recent decision, the Alcohol and Tobacco Commission is undergoing a thorough review of Indiana's regulatory scheme to ensure that it does not improperly favor Indiana producers of alcoholic beverages."

8. On May 20, 2005, the defendant David Heath issued an "Enforcement Bulletin" addressed to Indiana wineries stating that "directly shipping to the consumer's address ... is contrary to Indiana law." It further stated that "selling wine off the licensed premises, including shipping wine to a consumer's address, is in violation of Indiana law." This bulletin was designed to have the effect of law, to interpret the statutes governing wine sales, and to prescribe the policy of the ATC.

9. Because no statute or rule in effect at the time said that direct shipping of wine was unlawful, these pronouncements by the ATC constituted a change or modification of the existing rules and regulations of the ATC.

10. Neither the text of the May 17th announcement nor the May 20th Enforcement Bulletin was published in advance in the Indiana Register. No proposed rule of any kind

similar to the one announced on May 17th and 20th appears in the Indiana Register, nor does the Register contain any notice or publication concerning any rule related to in-state wine shipping by Indiana wineries. No public hearing was held and no public comments were solicited.

11. From 1978 to May 20, 2005, Indiana farm wineries routinely shipped their wine directly to the homes of retail customers, to restaurants and to retail wine stores using common carriers and parcel delivery services.

12. By letter dated December 29, 1978, the predecessor to the ATC, the Indiana Alcoholic Beverage Commission, stated its understanding that licensed Indiana farm wineries could use United Parcel Service ("UPS") to deliver wine to their customers.

13. The agreement that UPS could deliver wine within the state was communicated to the Indiana Winegrowers' Guild, a trade organization of Indiana farm wineries, which in turn communicated this agreement to the wineries.

14. The wineries have been using UPS to deliver wine within the state ever since that agreement.

15. Although officials of the ATC now say that the policy of the agency is that such shipments are unlawful, no such change in interpretation was ever communicated to the Winegrowers' Guild or to Indiana farm wineries until May 17, 2005.

16. State officials were aware prior to May 17, 2005, that Indiana farm wineries were delivering their wine by common carrier and parcel delivery service. A publication of the Indiana Wine Grape Council, which is part of the Department of Agriculture, contains descriptions of which wineries will ship wine. The Chairman of the ATC, Bart

Herriman, was briefed on the issue in 2003. Several winery owners including Dr. Charles Thomas and James Butler so testified before a legislative committee in 2004 at which ATC officials Herriman and Don Okey were present.

17. Since May 20, 2005, Indiana farm wineries have stopped using common carriers and parcel delivery services to deliver wine because of the enforcement bulletin that was sent to them.

18. Indiana farm wineries, like other businesses, make substantial sales during the holiday seasons on mid-November and December. Such sales account for up to 40% of yearly sales and shipments. The "Enforcement Bulletin" prevents these wineries from filling their normal holiday orders and delivering them using common carriers.

19. Plaintiffs Chateau Thomas and Butler Winery stand to lose substantial amounts of business and revenue if they are prohibited from shipping holiday packages containing wine.

20. Plaintiff Chateau Thomas has already lost substantial revenue by being unable to ship wine to members of its wine club, who formerly received monthly shipments of wine, and such revenue loss will continue in the future if the prohibition on direct shipping remains in place.

21. All wineries will lose some revenue if they are unable to fill future orders that request delivery by common carrier or package delivery service.

II. CONCLUSIONS OF LAW

1. Preliminary injunctions are governed by Trial Rules 65 and 52.
2. Plaintiffs gave reasonable notice to the defendants of this complaint and the

hearing, and defendants have had an adequate opportunity to present evidence, which the court find to be sufficient to satisfy the requirements for entering a preliminary injunction under Rule 65(A)(1).

3. It clearly appears from specific facts shown by plaintiffs that they will suffer immediate and irreparable injury, loss, and damage in the form of lost Christmas season sales and other lost revenue if there is any delay in issuing the preliminary injunction, which the court finds to be adequate under Rule 65(B)(1).

4. The Alcoholic Beverage and Tobacco Commission ("ABTC") is an "agency" as defined in Ind. Code § 4-22-2-3(a).

5. The "Announcement" dated May 17 and the "Enforcement Bulletin" dated May 20, 2005, and distributed by the ATC to Indiana farm wineries, which prohibit the wineries from delivering wine by common carrier or parcel delivery service, constitute a "Rule" within the meaning of Ind. Code § 4-22-2-3(b) in that it is designed to have the effect of law and implements, interprets, or prescribes agency policy.

6. The issuance of the "Enforcement Bulletin" was a "Rulemaking action" within the meaning of Ind. Code § 4-22-2-3(c) in that it constituted the formulation and adoption of a rule.

7. Under the terms of Ind. Code § 4-22-2-13, the issuance of the Announcement and Enforcement Bulletin were subject to the procedural requirements of the Indiana Administrative Rules and Procedures Act, § 4-22-2-3 et seq.

8. Under the terms of Ind. Code § 4-22-2-16, the issuance of the Enforcement Bulletin was an official action of the ATC, which agency was therefore required to

comply with IC 5-14-1.5 (the Open Door Law).

9. Pursuant to Ind. Code § 4-22-2-23(b), the ATC was required to notify the public of its intention to adopt the rule expressed in the May 17 Announcement and the May 20 Enforcement Bulletin, by publishing a notice of intent to adopt a rule in the Indiana Register. No such notice was published, so the agency is in violation of this section.

10 Pursuant to Ind. Code § 4-22-2-26, an agency is required to hold a public hearing on a proposed rule. No such hearing was held prior to the adoption of the Enforcement Bulletin, so the ATC is in violation of this section.

11. Pursuant to Ind. Code § 4-22-2-27, an agency is required to consider public comments prior to adopting a rule. The ATC did not consider public comments prior to the adoption of the Enforcement Bulletin, so the ATC is in violation of this section.

12. Pursuant to Ind. Code § 4-22-2-31, the ATC was required to submit the proposed rule to the Attorney General for review. The ATC did not submit the rule for review, so the agency is in violation of this section.

13. Pursuant to Ind. Code § 4-22-2-33, the ATC was required to submit the proposed rule to the Governor for approval. The ATC did not do so, and is in violation of this section.

14. The rule was not exempt from complying with the Indiana Administrative Rules and Procedures Act as an “emergency rule” within the meaning of Ind. Code § 4-22-2-37.1(a)(17) because it was not promulgated pursuant to Ind. Code § 7.1-3-17.5 (riverboat liquor licenses), § 7.1-3-17.7 (racetrack licenses), or § 7.1-3-20-24.4 (shopping mall licenses).

15. Under Ind. Code § 4-22-2-44, a rulemaking action in violation of chapter 2 of the Indiana Administrative Rules and Procedures Act is invalid and is of no legal effect. Therefore, the May 17 Announcement and the May 20 Enforcement Bulletin issued by defendant Heath, purporting to prohibit licensed Indiana farm wineries from delivering wine by using a common carrier or package delivery service, is invalid, void and of no legal effect. *Villegas v. Silverman*, 832 N.E.2d 598, 601 (Ct. App. Ind. 2005).
16. Under Ind. Code § 5-14-1.5-4 (Open Door Law), the ATC was required to hold an open meeting following the posting of an agenda that included the wording of the proposed rule. The agency did not do so, and so the rule is void pursuant to subsection (a) of that statute.
17. Because the agency actions sought to be enjoined are unlawful under the plain terms of a state statute, the plaintiffs do not have to show either irreparable injury or a balance of hardship in their favor under the holding of *Carson v. Ross*, 509 N.E.2d 239, 241 (Ct. App. 1987).
18. Plaintiffs do not have an adequate legal remedy against the state or its agencies.
19. Plaintiffs have demonstrated a reasonable likelihood of success on the merits of the case sufficient to justify issuing a preliminary injunction.
20. No harm will be caused to the defendants sufficient to outweigh the issuance of a preliminary injunction.
21. The public interest will not be disserved by the preliminary injunction.
22. Under the Farm Winery Act, licensed Indiana farm wineries are allowed to act as their own wholesalers and retailers. Under I.C. § 7.1-3-13-3(a), wine wholesalers may

“deliver wine to a consumer, at the consumer’s residence,” and to retailers. Under I.C. § 7.1-3-14-3(a), wine retailers may also “deliver” wine to customers’ homes. The term delivery is not defined, and no statute or rule draws a distinction among methods of delivery nor singles out delivery by common carrier or package delivery service as prohibited while allowing other methods. The ATC cannot legally announce a new rule making this distinction without going through the procedures required by the Administrative Rules and Procedures Act.

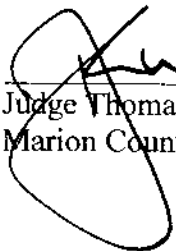
23. Because there is written evidence of a policy of the ATC from 1978 that licensed farm wineries would be allowed to use a common carrier (UPS) to deliver their wine, and because such shipments have been made openly since then, and because the ATC has never formally changed that policy, the ATC cannot legally change the rule without going through the procedures required by the Administrative Rules and Procedures Act.

24. Because the use of common carriers and package delivery services to deliver wine within the state has been taking place openly for 27 years, and because the ATC has never taken a single enforcement action against a farm winery for such shipments, and because state officials have been aware of the practice, and because the General Assembly has passed no law restricting the practice, the legislature has acquiesced in the lawfulness of the practice within the meaning of *Indiana Bell Tel. Co. v. Indiana Utility Reg. Comm’n*, 715 N.E.2d 351, 358 (Ind. 1997), which deprives the ATC of the power to “correct” a past erroneous interpretation or modify it to reflect recent developments.

25. This court finds that a preliminary injunction should be issued forthwith and extend until March 1, 2006, enjoining the defendants and their agents from utilizing the

ATC "Enforcement Bulletin" of May 20, 2005, to prevent direct sales and deliveries of wine using common carriers and package delivery services by licensed Indiana farm wineries to their consumer and retail customers, or until such time as this preliminary injunction is superseded by further orders of this court, or the law is amended by the General Assembly, or new rules are adopted by the ATC after following the Administrative Rules and Procedures Act.

WHEREFORE, the court incorporates its findings of fact and conclusions of law above, and declares that the May 17th "Announcement" and the "Enforcement Bulletin" issued by defendant Heath on May 20, 2005, purporting to ban Indiana farm wineries from making in-state shipments of wine, is invalid, void and of no legal effect, and the defendants are enjoined from enforcing them and must remove them from their website until such time as they comply with the Indiana Administrative Rules and Procedures Act and the Open Door Law.



Judge Thomas Carroll,
Marion County Superior Court #6

DATED 11/23/05