

MALA PRESENTATION ON MAY 19, 2022

Presented by:

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I. THE CONSTITUTIONALITY OF ALCOHOLIC BEVERAGES LICENSE RESIDENCY REQUIREMENTS IN LIGHT OF *TENNESSEE WINE & SPIRITS RETAILERS ASSOCIATION V. RUSSELL F. THOMAS, EXECUTIVE DIRECTOR OF THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, ET AL.* AND ITS PROGENY.

A. TENNESSEE WINE DECISION.

Background: Tennessee law imposed durational residency requirements on persons and companies wishing to operate retail liquor stores, requiring applicants for an initial license to have resided in the State for the prior 2 years; requiring an applicant for renewal of a license to reside in the State for 10 consecutive years; and, providing that a corporation cannot obtain a license unless all of its stockholders are residents.

The Tennessee state attorney general issued an opinion that the residency requirements discriminated against out-of-state economic interests in violation of the Commerce Clause of the U.S. Constitution. Following such opinion, the Tennessee Alcoholic Beverage Commission (TABC) declined to enforce the durational residency requirements, thereafter, after preliminary litigation, the Tennessee retailers association (the “Association”) filed an appeal of the U.S. District Court decision, holding the durational residency requirements unconstitutional under the Commerce Clause, to the Circuit Court of Appeals. The Circuit Court of Appeals affirmed the U.S. District Court.

The United States Supreme Court granted certiorari on the sole issue of the Circuit Court of Appeals decision to invalidate the 2 year residency requirement for initial license application.

No one, including the retailer association appellants, defended on appeal the 10-year durational requirement and that all stockholders be residents. Frankly, those requirements were ridiculous and blatantly discriminatory.

The Supreme Court held, 7 to 2, that the 2-year state residency requirement violated the Dormant Commerce Clause of the U.S. Constitution by discriminating against non-residents of the state, and was not saved by the 21st Amendment's reservation of state authority to regulate alcohol.

COMMENTS:

The similarities between the Tennessee regulatory scheme and that of Maryland are notable:

1. Both have a 3 tier system of licensed manufacturers, wholesalers and retailers.
2. Both have durational residency requirements for retail license applicants. While Maryland's generally are not as onerous under Maryland law, most counties historically required 2-year prior residency within the county/city and current registered voter status (requiring U.S. citizenship) of at least one licensed applicant; and minimum ownership of the entity license holder for all applicants.

B. OTHER RECENT FEDERAL CASES CITING/INTERPRETING TENNESSEE WINE.

Indiana Fine Wine & Spirits, LLC v. Cook, 459 F. Supp. 3d 1157, 1161 (S.D. Ind. 2020)

(Involves the Trone family – Total Wine) – The United States District Court, S.D. Indiana, Indianapolis Division relied on the TN case re: the residency issue.

The challenged statute declares:

The commission (alcohol tobacco commission) shall not issue an alcoholic beverage dealer's permit of any type for the premises of a package liquor store to a limited liability company unless:

- (1) at least sixty percent (60%) of the outstanding membership interest in the limited liability company is owned by persons who have been continuous and bona fide residents of Indiana for five (5) years; and
- (2) the membership interest described in subdivision (1) constitutes a controlling interest in the limited liability company.

Facts:

Plaintiff IFWS is an Indiana limited liability company with an Indiana resident agent and a principal place of business in Bethesda, Maryland. IFWS is owned by David Trone and Robert Trone—who are Maryland residents—and five trusts held for the benefit of their children. They are United States citizens, but none are residents of Indiana. The individual owners of IFWS have experience in operating retail alcoholic beverage stores through common ownership with other entities. Collectively, they own and operate more than two hundred alcoholic beverage stores in twenty-four states other than Indiana, all trading under the name Total Wine & More (“Total Wine”). Stores operating under the Total Wine name are committed to offering the nation's best selection of alcoholic beverages and having the lowest prices on wine, spirits, and beer. IFWS wants to bring the Total Wine concept to Indiana consumers. Under Indiana law, a permit from the ATC is required to sell alcoholic beverages in the state of Indiana. IFWS applied to the ATC to transfer the Package Store Permit to IFWS. The application included all the information required by Indiana law for approval of the transfer. The ATC assigned the transfer application to the local board to conduct a public hearing and recommend approval or denial. Importantly, the local board's duties are advisory, with the ultimate authority to approve the transfer remaining with the ATC. The ATC considered IFWS's application during an open hearing on March 3, 2020. **All four individual Defendants voted to deny IFWS's transfer application on the basis that IFWS's owners do not satisfy the “in-state residency” requirements of Indiana Code § 7.1-3-21-5.4(b).**

After receiving the denial, IFWS filed a Complaint for injunctive and declaratory relief, challenging the constitutionality of Indiana Code § 7.1-3-21-5.4(b) and alleging that Section 5.4(b) violates the dormant Commerce Clause of the United States Constitution.

The Court held:

IFWS is highly likely to succeed on the merits of its claims. As described above, the Supreme Court's recent decisions in Granholm and Tennessee Wine make it clear that the Twenty-First Amendment does not affect the basic non-discrimination principle of the dormant Commerce Clause, and residency requirements for alcoholic beverage licenses are subject to that principle. Where a statute on its face discriminates against out-of-state interests in violation of the dormant Commerce Clause, the statute can only be saved by the Twenty-First Amendment if there is a “legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” Granholm, 544 U.S. at 489, 125 S.Ct. 1885; *see also* Tennessee Wine, 139 S. Ct. at 2474–75. On its face, Indiana Code § 7.1-3-21-5.4(b) discriminates against out-of-state limited liability companies. The ATC's only proffered reasons to support the statute—curtailing alcohol abuse, preventing underage drinking, and collecting tax revenues—already have been determined to be constitutionally inadequate. *See* Tennessee Wine, 139 S. Ct. at 2474–76. Thus, the Court determines that IFWS is highly likely to succeed on the merits and it has no adequate remedy at law. IFWS is entitled to a preliminary injunction. IFWS has a strong likelihood of success on its challenge to the statute, has no adequate remedy at law. In addition, the balance of harms and the public interests favors IFWS. Accordingly, the motion for injunctive relief is **granted**.

II. SUBSEQUENT MARYLAND REMEDIAL LEGISLATION.

A number of more progressive Maryland counties have adopted less stringent residency requirements by statute, to wit: Baltimore County (2012), Montgomery County (2020 – House Bill 902), and Prince George’s County (2020 – House Bill 902), requiring only Maryland residency at the time of the application, with no voter registration requirement.

The Maryland General Assembly passed legislation this year, applicable to Frederick County, eliminating the county residency and substituting the state residency at the time of application and for the duration of the license.

The Howard County delegation to the Maryland General Assembly sponsored a similar bill in 2022 (HB1212); however, the sponsor withdrew it.

Other counties, such as Harford County Liquor Control Board, have by administrative policy and practice, ceased requiring Harford County residency and accepted applicants who are Maryland residents at the time of application as resident applicants.

The Maryland General Assembly repealed Maryland’s durational residency requirements for alcoholic beverages licenses and replaced them with non-durational residency requirements in 2020. Md. Laws, Chapter 462.

III. VOTER REGISTRATION/U.S. CITIZENSHIP

The Supreme Court and the Maryland Attorney General opinions would support unconstitutionality of a requirement that a license applicant be a registered voter and/or U.S. Citizen. See also Verzi v. Baltimore County, 333 Md. 411 (1994).

IV. OPINION OF MARYLAND ATTORNEY GENERAL

Our Attorney General has unequivocally opined that both minimum durational residency requirements and non-durational residency requirements are likely unconstitutional in light of the Supreme Court’s decision in Tennessee Wine & Spirits, etc. v. Thomas (106 Opinions of the Attorney General (2021)).