

# LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

*Attorneys and Counselors at Law*

## LEGAL NEWS FOR CLIENTS

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## **THE U.S. SUPREME COURT RULES STATE LAWS PROHIBITING DIRECT SHIPMENTS FROM OUT-OF-STATE WINERIES ARE UNJUSTIFIED**

The Commerce Clause of the United States Constitution prohibits state laws that burden out-of-state businesses simply to give a competitive advantage to in-state businesses. Michigan and New York regulate the sale and importation of wine through three-tier systems requiring separate licenses for producers, wholesalers, and retailers. Both states, until recently, permitted in-state wineries to make direct sales to consumers, but not out-of-state wineries.

Residents of Michigan and New York, joined by out-of-state wineries, brought separate lawsuits against their respective states alleging that this differential treatment violated the Commerce Clause by unjustifiably discriminating against out-of-state wineries. The states, joined by in-state wholesalers and retailers, mounted a two-pronged defense.

First, the states argued that the laws were a proper exercise of their power under the Twenty-first Amendment. Section One of the Twenty-first Amendment repealed Prohibition. Section Two provides that: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” The states argued for an interpretation of the law broad enough to permit discrimination against out-of-state wineries. Second, the states also argued that their laws advanced two legitimate local purposes that could not be adequately served by reasonable nondiscriminatory alternatives: 1 – keeping alcohol out of the hands of minors; and 2 – facilitating tax collection. The states argued that they had to prohibit direct sales to consumers by out-of-state wineries because they had less control over the out-of-state wineries.

Michigan’s law was upheld at trial but struck down on appeal. New York’s law was struck down at trial but upheld on appeal. The U.S. Supreme Court granted *certiorari* and held that the laws of both states discriminate against interstate commerce in violation of the Commerce Clause, Art. I, §8, cl.3, and therefore affirmed the Sixth Circuit and reversed the Second Circuit. According to the Supreme Court, states can ban direct sales to consumers by out-of-state wineries, but only if they also ban such sales by in-state wineries.

In reaching its decision, the Court rejected the states’ expansive interpretation of the Twenty-first Amendment, citing modern cases holding: 1 – state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment; and 2 – Section Two of the Amendment does not abrogate Congress’ Commerce Clause powers with regard to liquor.

The Court also rejected the states’ policy justifications. The states’ claim that direct shipping of wine increases the risk of underage drinking is unfounded, according to the Court, because wine is not usually the first choice of minors, and if it was, they could get it more easily in other ways. Moreover, minors are no more likely to order wine from out-of-state producers than in-state ones. With regard to the tax collection justification, the Court found no reason to believe that the tax collection systems used by the states in connection with the three-tiered system wouldn’t work for direct shipments from out-of-state.

In response to the states' argument that they had less control over out-of-state wineries and would have a more difficult time enforcing state law, the Court cited two provisions of federal law, one permitting the Tax and Trade Bureau to revoke a winery's federal license if it violates state law, and the second giving state attorneys general the power to sue wineries in federal court to enjoin violations of state law. The Court thus concluded that Michigan and New York failed to show, through concrete evidence, that nondiscriminatory alternatives would not suffice to police direct shipments by out-of-state wineries. The discriminatory laws are thus unjustified.

### **ORDER HOLDING PERSONAL REPRESENTATIVE IN CIVIL CONTEMPT OVERTURNED**

When an individual disobeys a court's order, that person may be held in civil contempt of court. Civil contempt is generally used to compel compliance with a court order. Because of its remedial nature, civil contempt requires that an individual have the present ability to comply with the court order. If an individual does not have the ability to comply with a court order, then a court cannot hold the individual in civil contempt. A common example of civil contempt is when a court holds a parent in contempt for not paying child support. However, if that parent has no money, then the court cannot hold the person in civil contempt. In other words, a court cannot punish an individual for failing to do something that is practically impossible.

In Jensen v. the Estate of Gina Gambidilla, the trial court held Lorna Jensen in civil contempt for not returning personal property to her daughter's estate. Gina Gambidilla passed away, and her mother, Jensen, was appointed personal representative of her estate. In carrying out her duties as personal representative, Jensen went to Gambidilla's home and removed some personal property. Jensen later sold some of that personal property to pay for funeral expenses. Jensen kept for herself the remaining personal property that was not sold.

After some time, Wayne Bisso, Gambidilla's boyfriend, discovered a will that named him as personal representative. Upon Bisso's motion, the trial court removed Jensen as personal representative and ordered the return of all of the estate's property within fifteen days. In response to the court order, Jensen returned all of the personal property except: (1) Gambidilla's pet cat; (2) \$3,000 in cash; (3) two guns; (4) eleven pieces of original artwork made by Gambidilla; and (5) a compressor. Jensen told the court that she returned all of the personal property she had in her possession. Jensen explained that the pet cat had run away, she never removed \$3,000 in cash, she was in the process of shipping the guns, and she had sold the remaining items to pay for funeral expenses. Despite this explanation, the trial court held Jensen in civil contempt and ordered her immediate incarceration.

Jensen appealed this civil contempt order, and the Florida District Court of Appeal for the Fourth District overturned the trial court's order of civil contempt. The appellate court found the civil contempt order failed to state that Jensen had the present ability to comply with the trial court's order to return all personal property. Jensen, in fact, did not have the present ability to comply. She had returned all personal property she could. The remaining property was not in her possession or control. Accordingly, the trial court erred when it held Jensen in civil contempt since it was impossible for Jensen to comply with its order.

## **EMPLOYER THAT BREACHES EMPLOYMENT AGREEMENT CANNOT ENFORCE NON-COMPETITION COVENANT**

Defendant Carl Domino and his partners sold their company to Plaintiff Northern Trust Investments and entered into employment contracts with Northern Trust Investment. The employment contracts provided that Domino and other employees would be paid bonuses from a \$7 million pool. The contracts also contained a covenant not to compete.

After Domino signed his employment contract, Northern Trust Investment did pay him a bonus. However, Northern Trust Investment had arbitrarily included only \$4 million in the bonus pool instead of the agreed upon \$7 million. Some months later, Northern Trust Investment fired Domino for, among other things, soliciting another employee to leave the company. Northern Trust Investment then sought an injunction to enforce the covenant not to compete against Domino.

In order to obtain a temporary injunction, a plaintiff must show that it is entitled to relief, even before trial, in order to preclude some action that the defendant is taking or is likely to take. The showing requires proof of the plaintiff's likelihood of success at trial.

Here, after holding an evidentiary hearing, the trial court denied Northern Trust Investment's motion, finding that Northern Trust did not prove it was likely to succeed on the merits. The trial court reasoned that Northern Trust Investment's breach of its agreement with Domino prior to terminating his employment precluded it from obtaining an injunction to enforce the non-competition covenant.

In Northern Trust Investments, N.A. v. Carl J. Domino, Florida's Fourth District Court of Appeal affirmed based upon the general rule that one party's material breach of an agreement allows the non-breaching party to treat the other's breach as a discharge of all its contract liability. Payments to an individual employee above a guaranteed minimum are within an employer's discretion. Should the employer wrongfully refuse to pay the employee an agreed upon amount of compensation, however, the employee is relieved of any further obligations under the contract. The employer cannot obtain an injunction to enforce those obligations.

### **THE FLORIDA SUPREME COURT HOLDS THAT UNAUTHORIZED PUBLICATION OF NAME OR LIKENESS ONLY OCCURS WHEN THE LIKENESS IS USED TO DIRECTLY ADVERTISE A PRODUCT OR SERVICE**

Under Florida law, a person is not allowed to publish, print, display or otherwise publicly use for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without that person's express written or oral consent. Use of an individual's likeness for non-commercial purposes, such as in news reporting or education, is allowed. This principle is embodied in Section 540.08(1), Florida Statutes, covering unauthorized publication of name or likeness. In Tyne v. Time Warner Entertainment Co., L.P., the Supreme Court of Florida analyzed whether Section 540.08(1) applies to motion pictures that are purported to be based on true events.

In October of 1991, a fishing vessel known as the *Andrea Gail* was caught in a powerful storm off the New England coast and lost at sea. The six crew members of the *Andrea Gail*, including Billy Tyne and Dale Murphy, Sr., were never found and have been presumed dead. In 1997, based on news

reports and interviews, Sebastian Junger chronicled the storm and the last voyage of the *Andrea Gail* in his book, entitled The Perfect Storm: A True Story of Men Against the Sea. The book was a success, and Warner Bros. bought the rights to produce a motion picture based on it. In 2000, Warner Bros. released the widely popular film, The Perfect Storm. Despite being a dramatized version of the book, Warner Bros. nevertheless asserted that “THIS FILM IS BASED ON A TRUE STORY.” The children of Tyne and Murphy filed a lawsuit claiming that Warner Bros. violated Section 540.08(1) by misappropriating Tyne’s and Murphy’s likenesses for commercial and advertising purposes. The intermediate appellate court approved dismissal of the claims against Warner Bros., and the case was appealed to the Florida Supreme Court.

Warner Bros. admitted to using the likenesses of Tyne and Murphy in its film, The Perfect Storm. Warner Bros., however, argued that it did not violate Section 540.08(1), because it did not use their likenesses for advertising purposes. The issue before the Florida Supreme Court was whether Section 540.08(1) applies to a publication that does not directly promote a product or service. The Court held that Section 540.08(1) is limited to publications that directly promote a product or service. Warner Bros.’s use of the likenesses of Tyne and Murphy did not directly promote the film. In other words, Warner Bros. had not used their likenesses merely for advertisement purposes. Rather, the Supreme Court found the film to be a protected expressive work under the First Amendment and that Warner Bros. had used Tyne’s and Murphy’s likenesses as a part of that work.

The Supreme Court focused on the legislative intent behind Section 540.08(1). In enacting Section 540.08(1), the Florida Legislature sought to prevent the advertisement of a product or service through use of an individual’s name or personality without that individual’s permission. An example of such a harm is using Michael Jordan’s name and likeness to advertise Happy Cola soft drink if Michael Jordan did not consent to such an advertisement. On the other hand, the Legislature did not intend to prohibit publication of someone’s name simply because that name may be included in a publication that is sold for profit. Rather, publications sold for profit may still be entitled to First Amendment protection. As a result, despite their commercial nature, motion pictures are found to be constitutionally protected expressive work. Even though The Perfect Storm was a publication for profit, Warner Bros. was thus entitled to use Tyne’s and Murphy’s likenesses as part of its expressive work.

### **THREE NEW FACES**

Litchford & Christopher is pleased to announce the addition of Hutch Hicken as our newest Associate. Hutch graduated this past May from William & Mary School of Law in Williamsburg, Virginia. While excelling academically, Hutch also served as an editor for the William and Mary Law Review. He is working for the firm part time while he studies for the July bar exam.

We are also pleased to announce the arrival of two talented law clerks for the summer, Lori Lorenzo of Duke University and Angela Allen of Wake Forest University. Lori is a native Floridian and a University of Florida alumnae. As an undergraduate, she captained her women’s water polo team. Angela attended Wake Forest as an undergraduate, spending a summer at Oxford University, and interned for a prominent U.S. Senator prior to attending law school. Both will return to law school in the fall to complete their final year.