O/A 1-10-89

SUPREME COURT OF THE STATE OF FLORIDA

C. LEONARD IVEY, Director,
Division of Alcoholic Beverages
and Tobacco, Department of
Business Regulation,

Defendant/Appellant

and

JACQUIN-FLORIDA DISTILLING
COMPANY, INC. and TODHUNTER
INTERNATIONAL, INC.,

Intervenor/Defendants
Appellants

v.

CASE NO: 73,424

BACARDI IMPORTS, INC. and
N. GOLDRING CORP.,

Plaintiffs/Appellees

and

THE CALIFORNIA WINE INSTITUTE
and TAMPA WHOLESALE LIQUORS, INC.,

Intervenor Plaintiffs/
Appellees.

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DEC 30 1988
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On Appeal from the Second Judicial Circuit,
Leon County Florida, Case No. 88-2881

ANSWER BRIEF OF APPELLEES
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App. Sec. B - Memorandum from Van Poole to Joe Spicola dated June 20, 1988

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App. Sec. D - November 29, 1988 Trial Transcript (2 Volumes)

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OTHERS:

STATEMENT OF THE CASE AND FACTS

Prior to 1985, Florida law provided for a scheme of taxation designed to discriminate in favor of Florida manufacturers and distributors of alcoholic beverages (the "Florida Products Exemption") by providing an excise tax exemption for beverages made in Florida from certain Florida products. Sections 564.06 and 565.12 , Florida Statutes (Supp. 1984). On June 29, 1984, the United States Supreme Court, in ***Bacchus Imports, Ltd. v. Dias,*** 468 U.S. 263, 104 S.Ct. 3049 (1984), held that application of a Hawaii excise tax favoring certain beverages made from Hawaiian products or manufactured in Hawaii violated the Commerce Clause. [1/] In response to the ***Bacchus*** decision, the Florida Legislature repealed the Florida Products Exemption and enacted Chapters 85-203 and 85-204, Laws of Florida (the "Revised Florida Products Exemption"). The Revised Florida Products Exemption obstensibly eliminated the tax preferences on beverages manufactured from Florida products, but substituted tax preferences on beverages manufactured from specified products, all of which are endemic to or commonly found in Florida.

On February 18, 1988, this Court held the Revised Florida Products Exemption an unconstitutional violation of the Commerce Clause because it:

> [placed] a clear discriminatory burden on interstate commerce which the state has failed to justify in terms of legitimate local benefits other than the admitted benefits to local industry flowing from the statute.

Div. of Alcoholic Bev. and Tobacco v. McKesson Corp., 524 So. 2d 1000, 1005 (Fla. 1988), ***cert. granted,*** 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-192).[2/] As a

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[1/] United States Constitution, Article I, Section 8, Clause 3.

[2/] The U.S. Supreme Court's review of the ***McKesson*** case will not cover the holding of this Court that the Revised Florida Products Exemption was

result, on May 2, 1988, all alcoholic beverages sold in Florida became subject to excise taxes in a nondiscriminatory, and therefore constitutional, manner. Excise tax rates ranged from $2.25 to $9.53 per gallon.

In June 1988, the Florida Legislature enacted Ch. 88-308, Laws of Florida (the "Statute"). Sections 10 and 11 of the Statute replaced the unconstitutional Revised Florida Products Exemption. The Statute was passed in apparent haste during the closing days of the 1988 session. No testimony or evidence was offered to the Legislature on its "findings" which are now argued to be premised on Twenty-First Amendment health and safety concerns. (App. Sec. A). Legislative deliberations preceding passage gave no evidence that passage resulted from a studied response to the constitutional issues addressed in ***McKesson.*** (App. Sec. A). In fact, the measure was passed over the constitutional and other objections of Joseph Sole, General Counsel, and Van Poole, Secretary, of the Department of Business Regulation of which the Division of Alcoholic Beverages and Tobacco ("DABT"), is a part, and which enforces the Statute. (App. Sec. B, pp. 1-2; App. Sec. C, pp. 6-8).

The Statute became law on July 6, 1988, without the Governor's signature, and became effective on August 7, 1988. Sections 10 and 11 provide for two types of taxes on specified alcoholic beverages: (1) excise taxes applicable to all such beverages, and (2) additional import taxes applicable only on imported (non-Florida) beverages. Imported beverages, subject to both the excise and the import taxes, are thus taxed at a higher rate than Florida beverages. The following chart shows the application of the excise and import taxes:

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unconstitutional. Instead, the issue will be whether that holding of unconstitutionality should be applied retroactively.

		CURRENT EXCISE TAX*	IMPORT TAX*	PREVIOUS EXCISE TAX*
(1)	Beverages including wine but not natural sparkling wine or malt beverages, containing between .5% - 17.259% alcohol by volume	$ .25	$2.00	$2.25
(2)	Wines, except not sparkling wines, containing 17.259% or more alcohol by volume	.50	2.50	3.00
(3)	Natural sparkling wines	1.50	2.00	3.50
(4)	Wine Coolers	.75	1.50	N/A
(5)	Non-Wine Beverages containing between 17.259% - 55.78% alcohol by volume	4.75	1.75	6.50
(6)	Non-Wine Beverages containing more than 55.78% alcohol by volume	5.95	3.58	9.53

* per gallon.

The sum of the excise and import taxes paid on imported beverages equals the excise tax paid on such beverages prior to enactment of the Statute (during the constitutional, post-***McKesson*** period). As Florida-produced beverages are subject only to the excise tax and not to the import tax, they enjoy a tax advantage of $1.50 to $3.58 per gallon over imported beverages.

The DABT has interpreted the provisions of the Statute to require that beverages be made in Florida, from produce of land inspected by Florida agricultural inspectors and, where appropriate, be distilled above 185 proof, in order that the import tax not apply. (App. Sec. D, pp. 305-308, 311-314; App. Sec. I, p. 2). An interpretation of the Statute to prohibit the manufacture of alcoholic

beverages in Florida for sale in Florida unless made of Florida produce and distilled above 185 proof was considered and rejected by the DABT. (App. Sec. D, p. 314; App. Sec. I, p. 2).

The Statute provides that, if any portion of Sections 10 and 11 are held unconstitutional, those Sections will be null and void and the previously-existing tax structure will be reinstated. That structure provided for nondiscriminatory excise taxes equally applied to Florida and imported (non-Florida) beverages. Collection of those taxes will: (1) require Florida distillers to pay taxes equal to their out-of-state competitors, and (2) increase the State tax revenue by the amount of the disparity created by the Statute between $3.2 and $6.4 million. (App. Sec. G, p. 179).

On August 5, 1988, Bacardi Imports, Inc. ("Bacardi" or "Plaintiff"), an importer of alcoholic beverages, and N. Goldring Corp. ("Goldring" or "Plaintiff"), a distributor, filed suit against Defendant C. Leonard Ivey, Director of the Division of Alcoholic Beverages, Department of Business Regulation ("Ivey" or "Defendant"), for declaratory judgment and injunctive relief, contending that the scheme of excise and import taxes contained in Sections 10 and 11 of the Statute, like that struck down in ***McKesson***, discriminates against imported (non-Florida) beverages and is therefore facially unconstitutional. Intervening in the suit were Jacquin-Florida Distilling Co., Inc. and Todhunter International, Inc. (the "Florida Distillers") as Defendants and The California Wine Institute and Tampa Wholesale Liquors, Inc. ("Intervenor Plaintiffs") as Plaintiffs.

On August 10, 1988, an emergency hearing was held on Plaintiffs' Complaint. At that time, the Trial Court scheduled a further evidentiary hearing to determine whether any legitimate Twenty-First Amendment purpose was advanced by the Statute.

After an extensive evidentiary hearing, on November 29, 1988, Judge Charles E. Miner ruled Sections 10 and 11 of the Statute unconstitutional and said:

> I do find that the Statute is violative of the commerce clause of the Constitution of the United States.

(App. Sec. D, p. 436, ls. 5-7.)

> . . . I do not find that legitimate 21st Amendment concerns of the State of Florida as expressed in the purposes paragraph justify in a constitutional sense overriding the commerce clause.
>
> The State has not justified this Statute, justified this cost differential which I believe to be clearly discriminatory on 21st Amendment concerns.

(App. Sec. D, p. 434, ls. 3-6; 9-12.)

> . . . I might look at it, at this case, a good deal differently if the State did have an inspection program, quality control to protect its citizens.

(App. Sec. D, p. 434, ls. 14-17.)

> . . . I just simply can't see the 21st Amendment purposes that would save that which is so clearly discriminatory.

(App. Sec. D, p. 434, ls. 23-25.)

On November 30, 1988, Final Judgment was entered which provided, ***inter alia***, that application of the ruling would be prospective only. On the same day, the Florida Distillers and Ivey filed a Joint Notice of Appeal which resulted in an automatic stay pursuant to Rule 9.310(b)(2), Fla. R. App. P.

On December 1, 1988, Judge Miner granted Plaintiffs' Motion to Vacate the Automatic Stay. Defendants' Motion for Review of that order was denied by the First District Court of Appeals. The Final Judgment was certified to this Court as one of great public importance.

SUMMARY OF ARGUMENT

The Statute has the clear purpose and effect of discriminating against non-Florida manufacturers and distributors of alcoholic beverages. The discriminatory effect is clear because only products made in Florida from Florida produce can escape the import tax. The discriminatory purpose is clear from Florida's history of providing a tax advantage to locally-produced alcoholic beverages, the legislative history of the Statute describing it as an aid to local industry, and the provisions of the Statute itself. The requirement that alcoholic beverages must be made from Florida produce in order to avoid the import tax has no purpose or effect other than to bestow a tax benefit upon Florida industry. Because of its discriminatory purpose and effect, the Statute violates the Commerce Clause and is therefore invalid per se.

Ivey argues that the Statute is valid, notwithstanding the Commerce Clause, because it serves Twenty-First Amendment purposes. The Trial Court found, however, after two days of trial, that the Statute had no Twenty-First Amendment purposes. Ivey asserts that the Trial Court erred in employing a strict scrutiny test to weigh the Statute's alleged Twenty-First Amendment purposes against the resulting burden on the Commerce Clause. A careful reading of the Court's opinion, however, shows that the Court never reached the strict scrutiny test. Rather, the Court found, as a fact, that that Statute had no Twenty-First Amendment purposes. The Trial Court labeled the claimed purposes as "illusory".

A presumption of validity attaches to the Trial Court's decision which can be overturned only upon a showing of clear error. Abundant evidentiary support for the Trial Court's factual finding that the Statute had no Twenty-First Amendment purposes is found in the record. No clear error has been shown by Ivey.

In addition to violating the Commerce Clause, the Statute also violates the Import-Export and Equal Protection Clauses of the U.S. Constitution and the Equal Protection Clause of the Florida Constitution.

For all these reasons, the decision of the Trial Court declaring Sections 10 and 11 of the Statute unconstitutional should be upheld.

ARGUMENT

I. STANDARD OF REVIEW

The findings of facts and conclusions of law in this case are set forth in the Trial Court's Final Judgment and opinion. The findings of fact therein are clothed with a presumption of correctness and cannot be disturbed unless Defendants prove that they are clearly erroneous. ***Cowen v. Cowen,*** 95 So. 2d 584 (Fla. 1957); ***State v. Town of Sweetwater,*** 112 So. 2d 852 (Fla. 1959); ***Marsh v. Marsh,*** 419 So. 2d 629 (Fla. 1982); ***Strate v. Strate,*** 328 So. 2d 29 (Fla. 3d DCA), ***cert. denied,*** 336 So. 2d 1184 (Fla. 1976); ***Trushin v. City of Miami Beach,*** 328 So. 2d 27 (Fla. 3d DCA), ***cert. denied,*** 336 So. 2d 605 (Fla. 1976). On review of a trial court's decision, any reversible error must clearly, definitely, and fully appear; failure to meet this burden compels the conclusion that there is no error and that the judgment must be affirmed. **Strate,** 328 So. 2d at 30.

II. THE SCHEME OF EXCISE AND IMPORT TAXES IMPOSED BY SECTIONS 10 AND 11 OF CHAPTER 88-308 VIOLATES THE COMMERCE CLAUSE

As the trial court observed early on (App. Sec. E, p. 46, ls. 15-20), and admitted by counsel for the Florida Distillers (App. Sec. D, p. 420, ls. 4-6), Sections 10 and 11 of the Statute violate the Commerce Clause because they discriminate against non-Florida manufacturers and distributors of specified alcoholic beverages by bestowing a significant commercial advantage upon manufacturers and distributors of the same Florida beverages.

The United States Supreme Court recently restated the cardinal rule of the Commerce Clause regarding state taxation. "[N]o State . . . may 'impose a tax which discriminates against interstate commerce . . . by providing a direct

commercial advantage to local business'." ***Bacchus Imports Ltd. v. Dias***, 468 U.S. 263, 268, 104 S.Ct. 3049, 3053 (***quoting Boston Stock Exch. v. State Tax Comm'n.***, 429 U.S. 318, 329, 97 S.Ct. 599, 606 (1977) and ***Northwestern States Portland Cement Co. v. Minnesota***, 358 U.S. 450, 458, 79 S.Ct. 357, 362 (1959)).

This Court, in holding Florida's previous discriminatory beverage tax (the Revised Florida Products Exemption) unconstitutional, cited ***Brown-Forman Distillers Corp. v. New York State Liquor Auth.***, 476 U.S. 573, 106 S.Ct. 2080 (1986):

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. ***See, e.g., Philadelphia v. New Jersey***, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); ***Shafer v. Farmers Grain Co.***, 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925); ***Edgar v. MITE Corp.***, 457 U.S. 624, 640-43, 102 S.Ct. 2629, 2639-41, 73 L.Ed.2d 269 (1982) (plurality opinion). When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. ***Pike v. Bruce Church, Inc.***, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the ***Pike v. Bruce Church*** balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. ***See Raymond Motor Transportation, Inc. v. Rice***, 434 U.S. 429, 440-441, 98 S.Ct. 787, 793-94, 54 L.Ed.2d 664 (1978).

Div. of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So. 2d 1000, 1005 (Fla. 1988), ***cert. granted***, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-192).

A. The Statute is Invalid Per Se Because It Constitutes Economic Protectionism

The Statute violates the Commerce Clause because it directly discriminates against interstate commerce by imposing an additional tax on alcoholic beverages produced outside of Florida thus favoring Florida economic interests over out-of-state economic interests.

The Supreme Court has consistently held that "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." ***Philadelphia v. New Jersey,*** 437 U.S. 617, 624, 98 S.Ct. 2531, 2535 (1978). State legislation constitutes "economic protectionism", even if it is facially neutral, if it was enacted for a discriminatory purpose or has a discriminatory effect. Either condition is sufficient to condemn a statute. ***See, e.g., Bacchus Imports,*** 468 U.S. at 270, 104 S.Ct. at 3054-5 (***citing Hunt v. Washington Apple Advertising Comm'n.,*** 432 U.S. 333, 352-3, 97 S.Ct. 2434, 2446-7 (1977); ***Philadelphia,*** 437 U.S. at 624, 98 S.Ct. at 2535).

1. The Statute's Purpose is Discriminatory

When considering the purpose of a challenged statute, the court is not bound by the name, description or characterization given it by the legislature, but may determine for itself the practical impact of the law. ***Hughes v. Oklahoma,*** 441 U.S. 322, 335, 99 S.Ct. 1727 (1979) (***citing Lacoste v. Louisiana Dept. of Conservation,*** 263 U.S. 545, 550, 44 S.Ct. 186, 188 (1924)). ***See also, Foster-Fountain Packing Co. v. Haydel,*** 278 U.S. 1, 10, 49 S.Ct. 1, 3 (1928); ***Pike v. Bruce Church Inc.,*** 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970). A statute cannot avoid scrutiny under the Commerce Clause merely because it is couched as a health measure. Otherwise the Commerce Clause would be meaningless "save for the

rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate commerce." ***Dean Milk v. City of Madison,*** 340 U.S. 349, 354, 71 S.Ct. 295, 297 (1951).

Such was the case with the statutory predecessor (the Revised Florida Products Exemption) to Ch. 88-308. Its undisputed purpose was to provide economic assistance to a particular Florida industry. This protectionist purpose caused it to be declared unconstitutional by the Florida Supreme Court in ***McKesson.*** Sections 10 and 11 of the Statute smack of the same economic protectionism.

In introducing the amendment to Senate Bill 1326 providing for the excise and import taxes here challenged, enacted as Chapter 88-308, Laws of Florida, Senator Robert Crawford made the following statements:

> What this bill does, for the last 27 years, there has been an incentive that the State of Florida has had for companies to use certain agriculture products and for distilleries in Florida. As a result of that, we have about 300 jobs in Polk County that were produced by that tax incentive. A few years ago we had trouble in the courts with that incentive and so we rewrote it, had a big discussion about it, came back, thought we had it worked out with the courts, went back into the courts again, Supreme Court struck it, after actually we had come here to session so it kind of got thrown on us right in the middle of the session.
>
> At the same time, the State of Georgia had another differential tax and they had the same problem as we did. So they actually had their tax challenged, it was upheld, and I think the cert was denied to the Supreme Court so we think we have now the right way of delivering this tax and this bill would then rewrite that tax so that distilleries in Florida do have a small preference over out-of-state and this is an attempt to make that law constitutional. (App. Sec. A, p. 73, ls. 3-25; p. 74, ls. 1-3).

Proponents of the measure in the House of Representatives had this to say:

Representative Meffert: . . . the way it is written if it involves the use of Florida grown products, it involves producing in Florida and many states have promotional items for various things whether agricultural or manufactured in their states and, frankly, I wish at this point we could go further in promoting our own Florida products and those people who locate and furnish jobs in this state and who are very important and furnish these economic benefits. (App. Sec. A, p. 22, ls. 3-12).

Representative Jones: Our whole-hearted effort here is to protect something that has been in Florida for some 27 years. It was first granted to Old Florida Rum and we have been using Florida raw materials to make alcohol now for yea these many years. (App. Sec. A, p. 30, ls. 11-16).

Representative Hargrett: Ladies and Gentlemen, what we have here is a measure that's designed to build an industry in Florida, to create job opportunities in areas where jobs are needed. (App. Sec. A, p. 57, ls. 11-14).

What this bill does is encourage new agricultural crops that can grow in these areas, grapes and other crops that will withstand cold.

In addition to the agricultural encouragement, what we are talking about is creating an industry in Florida that's one of the largest industries in the world, that is, producing wine and spirits . . .. (App. Sec. A, p. 58, ls. 3-11)

. . . it's a program that's has been successfully operated in a lot of states where they protected their industries, their infant industries, allowed them to grow, create jobs and economic development . . .. (App. Sec. A, p. 58, ls. 15-19).

Representative Silver: . . . this bill is attempting to cure a problem that I know that Mr. Jones and Senator Crawford and others are concerned about. Senator Crawford is a personal friend. He is a good senator, and he suggests to me that his purpose in doing this is to save substantial amount of jobs down in that particular area of the state. I am not objecting to the bill on the basis of what the motive is because I believe that's a good motive and I believe that is what Senator Crawford's motive is. (App. Sec. A, p. 50, ls. 14-25).

Nowhere in committee and floor debate by the Florida Legislature were any concerns voiced about health, safety, welfare, increasing regulatory control, or discouraging consumption of alcoholic beverages. Nor was any evidence indicating that such concerns were presented to the lawmakers offered by Ivey or the Florida Distillers. Had the Legislature considered such purposes the record would contain some reference or discussion thereon. Yet there is none. To the contrary, the bill's purpose is invariably described as an aid to Florida industry, not by one or two isolated legislators but by every person who spoke for or against the measure. Such a purpose, while politically understandable, is also unconstitutional.

Indeed, the first time any discussion of health and safety concerns took place was after this suit was filed, when, in mid-September 1988, the Florida Distillers, not Ivey, submitted the names of certain experts it intended to use at trial. These experts had never heard of the Statute or considered any health concerns related to it until first contacted to serve as witnesses in September 1988. (App. Sec. D, p. 273, ls. 10-20). Obviously the Florida legislators never heard of or from them.

The taxing provisions of the Statute were neither suggested nor endorsed by the DABT. In fact, Joseph Sole, General Counsel for the Department of Business Regulation, which oversees the DABT, sent a memorandum to Lieutenant Governor Bobby Brantley in which he stated the agency's position on the excise and import taxes:

> It is the Department's position that this is a wholly unconstitutional act, that it will be attacked in court, and that it will be declared unconstitutional. A savings clause may keep the state from suffering catastrophic losses of revenue. It is the Department's position that the risk associated with this scheme are so great in comparison to the benefits, that the entire bill of which this is a part should be vetoed. (App. Sec. C, pp. 7-8).

Van Poole, Secretary of the Department of Business Regulation, also protested the bill to Joe Spicola, General Counsel to the Governor, and requested its veto. Mr. Poole stated:

> I believe a veto should be considered as the bill does not serve the public interest. It contains a number of controversial issues added as amendments which concern the Department: . . .
>
> 3. An importation tax amendment that does not meet general industry needs. According to our records, this provision would grant three alcohol beverage producers located in Florida a 3.2 million dollar tax exemption on their products sold in Florida which are manufactured and/or distilled from state grown produce. (App. Sec. B, p. 1).
>
> This tax provision does not promote the efficient use of state government resources. Also, the bill does not provide an appropriation to properly implement its mandate. (App. Sec. B, p.2).

Considering such vigorous opposition, it strains credulity to say the Statute was enacted to assist the DABT in its functions; rather it served solely as an aid to the Florida Distillers. Further evidence of this purpose is the Statute's requirement that alcoholic beverages be made from produce of land inspected by Florida agricultural inspectors. Defendants offered no evidence of any legitimate purpose for that requirement, Twenty-First Amendment or otherwise. It serves only to restrict the benefits of the import tax discrimination to Florida manufacturers. Based on this fact alone the Trial Court was compelled to strike the Statute. This Court, Plaintiffs suggest, is subject to the same imperative.

2. The Statute's Effect is Discriminatory

The Statute also constitutes "economic protectionism" because it discriminates in practical effect against interstate commerce. The law

discriminates against manufacturers and distributors of imported (non-Florida) beverages by subjecting them to economic burdens that need not be borne by Florida manufacturers of beverages produced from Florida crops.

The effect of the Statute's scheme of excise and import taxation is a direct increase in the cost to manufacturers, importers and distributors of alcoholic beverages made from non-Florida products or manufactured outside of Florida [3/] as compared to Florida products. The price differential created by the import tax erodes customer brand loyalty in favor of cheaper Florida-made products. Customer defections are even more significant in the restaurant and club industry where a business is likely to choose its house brand based on price in order to increase its profits. Retail price mark-ups further increase the price differences caused by the differing tax rates on imported and domestic alcoholic beverages. (App. Sec. K, pp. 87-89). This Court, in ***McKesson,*** declared Florida's prior tax statute unconstitutional for precisely the same discrimination. Because this statute directly favors in-state economic interests over out-of-state interests, it is invalid per se.

In ***Hunt v. Washington Apple Advertising Comm'n.,*** 432 U.S. 333, 97 S.Ct. 2434 (1977), the Supreme Court found unconstitutional a North Carolina statute that had a similar practical effect, despite its facial neutrality. The law in effect prohibited the display of apple grades on closed containers shipped into North Carolina. The Court found that the statute interfered with prevailing free market forces by boosting the competitive advantage of local growers and dealers at the expense of out-of-state growers and dealers. ***Id.*** at 350-52, 97 S.Ct. at

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[3/] Many of these products could, by their very nature, never be made in Florida, e.g., French champagne, cognac, Scotch, etc. Place of manufacture is not, as Ivey implies, simply a matter of choice.

2445-46. The statute offered the North Carolina apple industry was "the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit." *Id.* at 352, 97 S.Ct. at 2446.

Thus, in addition to its discriminatory purpose, the Statute discriminates in practical effect against interstate commerce. It therefore "constitutes 'economic protectionism' in every sense of the phrase." ***Bacchus***, 468 U.S. at 272.

B. Sections 10 and 11 Cannot be Saved by the Twenty-First Amendment

Section 2 of the Twenty-first Amendment to the U.S. Constitution provides:

> 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.

It is misleading to suggest that the Twenty-first Amendment alters the previously described Commerce Clause analysis. The Amendment merely allows Florida to regulate and control the distribution and consumption of alcoholic beverages within the state. It does not provide blanket amnesty to an otherwise discriminatory tax scheme merely because the subject matter is intoxicating liquor.

In the period immediately following ratification of the Twenty-First Amendment, the Supreme Court examined the interplay between it and the Commerce Clause. In ***State Bd. of Equalization v. Young's Market Co.***, 299 U.S. 59, 57 S.Ct. 77 (1936), the Court found that the state had a valid Twenty-First Amendment purpose for imposing an import tax which justified discrimination against interstate commerce. In both ***Ziffrin, Inc. v. Reeves***, 308 U.S. 132, 60

S.Ct. 163 (1939) and ***Joseph E. Seagram & Sons, Inc. v. Hostetter,*** 384 U.S. 35, 86 S.Ct. 1254 (1966), those Courts found the state laws involved did not burden interstate commerce but operated in a nondiscriminatory manner on interstate and intrastate commerce. Despite their broad language, these decisions are consistent with ***Bacchus*** and ***McKesson.*** If no discrimination results or if the discrimination is counterbalanced by valid state interests under the Twenty-First Amendment, the Statute may be held constitutional. These cases do not support Ivey and the Florida Distillers' arguments that the states' powers are unfettered simply because alcoholic beverages are the subject matter of the regulation.

Some early decisions, however, cannot be reconciled with the ***Bacchus*** and ***McKesson*** cases. As noted in ***Loretto Winery, Ltd. v. Gazzara,*** 601 F. Supp. 850, 860 (S.D.N.Y. 1985):

> However, with the flow of history, just as the beer of yesteryear has lost its strength and flavor, the broad language of both ***Young's Market*** and ***Ziffrin, Inc.*** has been diluted in subsequent decisions by the court. More recent cases have demonstrated an unwillingness on the part of the Supreme Court to allow a state legislature to conduct a trade war against another state, contrary to the principles underlying the commerce clause, simply because the product discriminated against is an alcoholic beverage subject to regulation under the Twenty-First Amendment.

In ***Hostetter v. Idlewild Bon Voyage Liquor Corp.,*** 377 U.S. 324, 84 S.Ct. 1293 (1963), the Court said that the Commerce Clause must still be considered even if it is determined that a specific state regulation falls within the scope of the powers conferred upon the states under the Twenty-First Amendment. The Court held "[b]oth the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interest at stake in any concrete case." ***Hostetter,*** 377 U.S. at 332, 84 S.Ct. at 1298.

Young's Market cannot support the notion that a patently discriminatory statute can stand against the Commerce Clause simply because regulation of alcoholic beverages is involved. A balancing approach is now required. In ***California Retail Liquor Ass'n. v. Midcal Aluminum, Inc.***, 445 U.S. 97, 100 S.Ct. 937 (1986), the Court recognized its duty of harmonizing state and federal powers in this area. This balancing approach can also be found in ***Bacchus***, and ***Capital Cities Cable, Inc. v. Crisp***, 467 U.S. 697, 104 S.Ct. 2694 (1984).

Ivey argues in his Initial Brief (p. 15) that the Statute is subject only to an analysis under pre-***Bacchus*** case law, principally ***Young's Market.*** His premise is that:

> Contrary to the trial court's view, ***Bacchus*** was a pure Commerce Clause case. It did not change the decades of case law which had established the mode of constitutional analysis to be used when a state's exercise of the Twenty-First Amendment power is challenged under the dormant Commerce Clause . . . ***Bacchus*** did not overrule the numerous decisions, beginning with ***State Bd. of Equalization of California v. Young's Mkt, Co.***, 299 U.S. 59 (1936) (hereinafter "Young's Mkt. Co.") which have held that, when a state acts to control or regulate the importation of alcoholic beverages under the Twenty-First Amendment, its decisions in that regard are 'unfettered by the Commerce Clause,' ***Ziffrin, Inc. v. Reeves***, 308 U.S. 132 (1939), and 'totally unconfined by traditional Commerce Clause limitations.' ***Joseph E. Seagrams & Son's, Inc. v. Hostetter***, 384 U.S. 35 (1966). [Emphasis supplied]

Those who dissented in ***Bacchus*** believed the majority overruled, or substantially undermined, the ***Young's Market*** line of cases. They said:

> Today the Court, in essence, holds that the Hawaii tax is unconstitutional because it places a burden on intoxicating liquors that have been imported into Hawaii for use therein that is not imposed on liquors that are produced locally. As I [Justice Stevens] read the text of the Twenty-First Amendment, Section 2, it expressly authorizes this sort of burden. Moreover, as I read Justice Brandeis' opinion for the Court in the seminal case of ***State Board of Equalization v. Young's Market Co., supra,*** the Court has squarely so decided.

Bacchus, 468 U.S. at 282, 104 S.Ct. at 3061 (1984). Further, the dissent continues:

> But now, according to the Court, the force of the 21st Amendment contention in this case is diminished because the 'central purpose of the provision is not to empower States to favor local liquor industries by erecting barriers to competition.' *Ante*, at 3058. It follows, according to the Court, that 'State laws that constitute mere economic protectionism are not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.' *Ibid.* This is a totally novel approach to the 21st Amendment. [15]

Id. at 286, 104 S.Ct. 3063. Footnote 15 reads in part:

> It is an approach explicitly rejected in ***Young's Market***, [Citation] (rejecting argument that the 'State may not regulate importations except for the purpose of protecting the public health, safety, or morals . . . .'), and in subsequent cases as well, ***see, e.g., Seagrams & Sons v. Hostetter***, ('[N]othing in the 21st Amendment . . . requires that State laws regulating the liquor business be motivated exclusively by a desire to promote temperance').

Id. at 287, 104 S.Ct. 3064. One cannot read the *Bacchus* dissent and argue that the majority "did not change the test to be applied when a Commerce Clause challenge is brought against the Statute that does implicate police power concerns under that [21st] Amendment". (Appellant Ivey's Initial Brief, p. 16). It most certainly does change the test. Wistful citations to ***Young's Market, Hostetter,*** and others notwithstanding, the Supreme Court has spoken. The dissent demarked the rationale of the decision, and the argument advanced by Ivey concerning the effect of *Bacchus* is simply wrong.

In ***Bacchus,*** the United States Supreme Court examined the application of the Amendment to a similarly discriminatory tax scheme. The Court first reviewed the history of the Amendment, concluding that it is ". . .now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." ***Bacchus,*** 468 U.S. at 275, 104 S.Ct. at 3057. Citing ***Hostetter,*** the Court said:

> To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd over-simplification. *Id.*, 377 U.S. at 331-332, 84 S.Ct. at 1297-1298.

Id. at 274, 104 S.Ct. 3057. The Court in ***Bacchus***, continuing to quote from ***Hostetter***, said that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Id.* at 468 U.S. 275-6, 104 S.Ct. at 3057.

The Court, noting that recent Twenty-First Amendment cases emphasized federal interests to a greater degree than had earlier cases, described the mode of analysis to pragmatically harmonize state and federal powers. *Id.* The question in ***Bacchus***, and here, is ". . . whether the principles underlying the Twenty-First Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended." ***Bacchus***, 468 U.S. at 275-6, 104 S.Ct. at 3057. Ivey and the Florida Distillers were obliged to factually establish that Twenty-First Amendment purposes were served by the Statute, which purposes outweighed the burdens placed on interstate commerce.

Ivey asserts that the Trial Court employed an incorrect standard of review by requiring Ivey to justify the Statute under a strict scrutiny standard. Ivey argues that a lesser standard, the rational relationship test, is appropriate when Twenty-First Amendment concerns are involved. This Court need not reach the issue raised by Ivey of whether the standard chosen by Judge Miner was strict scrutiny or rational relationship. In order for balancing to be considered, the court must first find a Twenty-First Amendment purpose for the statute. Here, the Trial Court never had to reach the process of "weighing" the State's Twenty-First Amendment goals, using strict scrutiny or any other standard, because it

factually found that there were no Twenty-First Amendment purposes for the Statute. [4/] Even if the Statute were intended to achieve the Twenty-First Amendment purposes suggested by Defendants, it is not rationally related to achieving them.

1. Recognized Twenty-First Amendment Purposes

In ***McKesson***, which cites ***Bacchus*** and ***Brown-Forman***, a state statute is entitled to Twenty-First Amendment deference only when it is established that it was enacted to carry out a purpose of the Twenty-First Amendment. Where, as in those cases, no clear concern of the Twenty-First Amendment appears, the statute is routinely measured against Commerce Clause standards. Ivey and the Florida Distillers were required to prove that the particular purposes sought to be accomplished by the Statute qualified for the deference accorded the Twenty-First Amendment.

The Twenty-First Amendment was not intended to empower states to favor local liquor industries over out-of-state competitors. The Amendment protects state laws enacted to combat the perceived evils of unrestricted traffic in liquor. It was enacted to repeal national prohibition and to provide the states power to enforce their own temperance measures. Hence, it reserves to the states the right to promote or enforce temperance, ***Capital Cities***, 467 U.S. 691, 104 S.Ct. 2694, ***California Retail***, 445 U.S. 97, 100 S.Ct. 937, to limit traffic in

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[4/] The Trial Court stated its intent at p. 430, lines 8-11 of the November 29, 1988 Final Hearing. "I am trying to find areas where the facts that have been adduced here would support the prefatory comments for the section that deals with the purposes of the act." Following an extensive and complete evidentiary hearing, at which all evidence sought to be introduced by Ivey and the Florida Distillers was admitted, the Court found " . . . I simply can't see the Twenty-first Amendment purposes that would save that which is so clearly discriminatory."

alcoholic beverages in order to minimize well known evils, ***Hostetter***, 377 U.S. 324, 84 S.Ct. 1293, and to permit collection of revenue, so long as it is done in a nondiscriminatory manner, ***Dept. of Revenue v. James B. Beam Distilling Co.***, 377 U.S. 341, 84 S.Ct. 1247 (1964), ***Hostetter***, 377 U.S. 324, 84 S.Ct. 1293. None of those purposes is intended to be served by the Statute. Its historical heritage and its Legislative debate clearly shows it was intended to continue the tax exemption for the local liquor industry declared unconstitutional in ***McKesson***. [5/] In striking the Statute, Judge Miner observed, "... there is no question in my mind in a constitutional sense that this statute is but a warmed-over version, dressed up in different clothing, perhaps, of that which has previously been, at least on one occasion, struck down as violative of the Commerce Clause. I think the same thing is true." (App. Sec. D, p. 433, ls. 21-25, p. 434, ls. 1-2).

2. Purposes Alleged for the Statute

Section 9, the preamble to Sections 10 and 11, states:

> Effective July 1, 1988, the Legislature finds and determines that the authorized transportation and importation into the state of alcoholic beverages described in Chapters 564 and 565, Florida Statutes, require strict enforcement of state statutes regulating and administering the manufacture, distribution and sale of alcoholic beverages; the costs of regulating and administering such imported alcoholic beverages are greater than for those alcoholic beverages not imported; the production of lower quality alcoholic beverages should be discouraged; and in order to protect the health, safety,

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[5/] ***See Burstyn v. City of Miami Beach***, 663 F. Supp. 528, 536 (S.D. Fla. 1987) for the authority of a court to examine a statute's history in evaluating its constitutionality. ***Burstyn*** states that "[a] Court may properly review the general history of problems a law seeks to rectify and the history of the law's passage in evaluating its constitutionality... When the Court is convinced that the background of a decision or its particular history shows a discriminatory purpose, the Court will strike the unconstitutional provisions."

> welfare and economic integrity of the state, the costs of ensuring compliance with relevant state laws should be included in the taxes imposed upon said alcoholic beverages.

Thus the Legislature advanced two alleged Twenty-First Amendment purposes for the reduced tax rate afforded domestic beverages; (1) greater costs of regulating imported beverages, and (2) discouraging lower quality beverages. In their initial brief, Ivey and the Florida Distillers came up with three more: (1) "imposing conditions upon the importation of intoxicants in order to encourage an industry structure where Florida has maximum control of the distribution system from the manufacture of an alcoholic beverage to its retail sale"; (2) "reducing to the extent possible health risks associated with the consumption of alcoholic beverages", and (3) "apportioning the costs to society attributable to the consumption of alcoholic beverages." (Appellant Ivey's Initial Brief, pp. 30-31). Ivey and the Florida Distillers do not and, indeed cannot, explain why these lately identified objectives neither occurred to nor were identified by the Legislature as it stated the Statute's purpose. In any case, no credible evidence was adduced at trial to justify any of the five. 6/ Indeed the only mention of health and safety came from experts retained after this suit was filed, by the Florida Distillers. No mention of health and safety appears in the legislative record. (App. Sec. A).

In advancing these purposes, Ivey and the Florida Distillers cite ***Bacchus*** for the proposition that so long as a statute promotes a legitimate Twenty-First Amendment purpose, incidental benefits to local industry won't render it unconstitutional. That may be so, but it has no application here. Ivey and the

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6/ No evidence or argument was presented as to how the Statute discourages lower quality beverages. However proud we may be of our State and its products it can hardly be said that those products are of higher quality than all those produced elsewhere merely because they are made in Florida.

Florida Distillers are really asking this Court to determine that the opposite is also true; that if legitimate Twenty-First Amendment interests are accidentally or incidentally served by a statute whose actual purpose is to benefit local industry then it is likewise constitutional. Defendants are confusing purposes with effects. This reasoning was rejected by the Trial Court and by the United States Supreme Court in ***New Energy Co., v. Limbach,*** ___ U.S. ___, 108 S.Ct. 1803 (1988). In ***New Energy,*** the plaintiff argued that an Ohio statute granting tax credits for each gallon of Ohio-produced ethanol was invalid despite health benefits accruing because the credits encouraged the use of ethanol; i.e. reducing harmful exhaust emissions. The Court, while recognizing that the use of ethanol promoted a valid state health interest, also noticed that ethanol produced outside Ohio was equally healthy. Hence, it found that health was not the purpose of the statute but merely an occasional and accidental effect of its fundamental purpose; favorable tax treatment for Ohio-produced ethanol. The statute was held unconstitutional.

In order for the Statute to be a valid exercise of the State's Twenty-First Amendment powers it must be enacted for the purpose of furthering Twenty-First Amendment goals. After the fact attempts by Ivey and the Florida Distillers to rationalize the Statute by concocting Twenty-First Amendment purposes never contemplated by the Legislature usurps that body's vital policy-making role, subjecting it to the ingenuity of interested parties. Ivey asks this Court to attribute purposes to the Legislature that it clearly never intended. The Twenty-First Amendment purposes stated by Ivey and the Florida Distillers are inappropriate for consideration unless supported by some evidence in the Statute's language or legislative history. There is none. Absent proof that these purposes were those of the Legislature at the time the Statute was enacted, only those purposes stated by the Legislature in the Statute's purposes clause can be

examined to determine whether the Statute serves any legitimate Twenty-First Amendment purpose.

i. Presumption of Correctness Not Applicable

Legislative findings, such as those contained in Section 9 of the Statute, are usually entitled to a presumption of correctness. Such findings, however, ". . . are not conclusive. The Legislature cannot by false or fictitious recitals draw to itself an unconstitutional power. Courts have the power to inquire into the existence of the factual basis for such findings." ***Publix Cleaners v. Florida Dry Cleaning and Laundry Bd.***, 32 F. Supp. 31 (S.D. Fla. 1940); ***Stadnik v. Shell's City, Inc.***, 140 So. 2d 871 (Fla. 1962); ***Moore v. Thompson***, 126 So. 2d 543 (Fla. 1960). Such an inquiry is clearly warranted in light of the past history of discrimination and the clear statements of discriminatory purpose associated with this Statute.

ii. The Costs of Regulation are not Greater

Sections 10 and 11, then, are premised upon the purported legislative finding that the cost of regulating and administering imported beverages is greater than for Florida beverages. Therefore, the preamble continues, the cost of compliance with "relevant state laws" should be included in the taxes imposed on imported beverages.

Ivey's assertion that there is, and was at the time of the Statute's enactment, a cost differential between the regulation of imported beverages and domestic beverages is wrong. (App. Sec. G, p. 46, ls. 23-25, p. 47, ls. 1-2; App. Sec. H, p. 1). It was refuted by information submitted to the Legislature by Ivey and further disproved by Ivey's own witnesses' testimony. (App. Sec. G, p. 46, ls. 23-25, p. 47, ls. 1-2; App. Sec. H, p. 1).

Notwithstanding the legislative "findings", the evidence showed that it is more expensive to regulate domestic than imported beverages. While deliberating on the Statute, DABT officials informed the Legislature that " . . . the cost to regulate the imported products on a per gallon basis will be lower than the cost to regulate non-imported products". (App. Sec. H, p. 1). In fact, the DABT said its Bureau of Audit Operations currently spends 5.69 hours per 10,000 gallons of imported alcohol in performing its audit functions as opposed to 34.48 hours per 10,000 gallons of domestically produced alcohol. (App. Sec. I, p. 2).

Even if the DABT at some point in the future, increases regulation of imported beverages, such contemplated action is not enough to constitutionally support the Statute. Unilateral action by the DABT to increase regulation of imported beverages contradicts legislative intent. Ch. 88-308 is merely a taxing statute. It does not require or permit additional regulation of imported liquor. Nor does it provide additional appropriations for this purpose. The DABT itself has asserted that only minimal one-time start-up costs are necessary. (App. Sec. B; App. Sec. H). While the Legislature intended to fund a $3.2 million tax break for Florida manufacturers, it did not intend that further expenditures for regulation be made. The import tax will account for $111.5 million per year, according to the Florida Senate Finance and Tax Committee staff analysis. (App. Sec. I, p. 3). If the purpose of the import tax is to cover the additional costs involved in regulating imported beverages, as was stated by the Legislature, this should represent the portion of the total cost of regulating imported beverages attributable to their imported nature. But the entire budget for the Division of Alcoholic Beverages and Tobacco is a mere fraction of the $111.5 million expected to be raised by the import tax. Until such time as the Legislature takes action to increase regulation of imported beverages (to the extent of $111.5 million), there are no increased costs of regulation, thus no Twenty-First Amendment

purpose, and the Statute is void. Mere administrative action to increase regulation cannot change this result. ***Wuchter v. Pizzutti***, 276 U.S. 13, 24, 48 S.Ct. 259, 262 (1928); ***Sterling v. Environmental Control Board of City of New York***, 793 F.2d 52, 57 (2d Cir. 1986).[7/]

To be sure, Ivey offered substantial evidence establishing the societal cost alcohol abuse either causes, or may be associated with. None of Ivey's evidence demonstrates, however, that imported beverages account for more than their proportionate share of these problems. No correlation has been established between imported beverages and alcohol abuse. Because imported beverages pay the same excise tax per gallon as do Florida-produced beverages, problems related to alcoholic beverages in general do not justify an additional per-gallon tax only on imported beverages. Pedro Gonzalez, Audit Bureau Chief for the DABT, testified that imported beverages comprise 97.54% of alcoholic beverages sold in Florida. (App. Sec. D, pp. 104-108). Such beverages should, therefore, pay that percentage of total excise taxes collected. Imported beverages already "pay their freight" in relative costs of regulation because the tax is imposed on a per gallon basis; volume of sales is part of the formula. The only justification for a higher tax (i.e. the import tax) would be evidence that regulation of imported beverages costs more on a per-gallon basis. Ivey's testimony (principally law enforcement officers) showed that the State does not and cannot distinguish between imported and domestic beverages in alcoholic-related accidents and

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[7/] In ***Wuchter***, the U.S. Supreme Court voided a New Jersey statute allowing service of process on the Secretary of State for nonresidents in suits involving automobile accidents. Although the statute did not require it, notice of proposed execution was actually served on Wuchter. The state argued that because Wuchter received actual notice by service in Pennsylvania the constitutional infirmity was cured. The Court held that, not having been directed by the statute, the actual service could not supply constitutional validity to the statute. ***Id.***, 276 U.S. 24, 48 S.Ct. 262. ***See also, Sterling***, 793 F.2d at 57.

crimes. No evidence showed that imported beverages play a larger role in such incidents than their percentage of market share. Rather, the testimony revealed that beer is a significant factor in alcohol-related accidents and crimes, yet no increased tax on imported beer has been imposed. No increased costs of regulation of imported beverages have been shown to justify the additional tax burden of $1.50 to $3.58 per gallon imposed by the Statute.

Ivey seeks to disguise the Statute's discriminatory effect by showing the percentage of tax paid by imported beverages (98.06%) is not significantly higher than the percentage of imported beverages sold in Florida (97.54%). This is only because the market share of Florida beverages is relatively small. If the Statute succeeds in its goal in shifting consumer and commercial loyalty toward these Florida-made beverages, the discrepancy and the discrimination will increase. Ivey's choice of percentages to illustrate the Statute's effect diverts attention from the fact that sellers of imported beverages pay between $2.25 and $9.53 per gallon in taxes while sellers of domestic beverages pay only $0.25 to $5.95 for the same products. The tax savings to the Florida producers, who make up only 2.46% of the market, amounts to a whopping $3.2 million by conservative estimates and may be as high as $6.4 million. (App. Sec. G, p. 179).

This Court need not consider how unequal a tax is before concluding it unconstitutionally discriminates. "... [n]either the small volume of sales of exempted liquors nor the fact that the exempted liquors do not constitute a present competitive threat to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages, instead they go only to the extent of such competition." ***Bacchus***, 468 U.S. 276, 269, 104 S.Ct. 3049, 3054.

a. There Are No Relevant State Laws

The seriously-flawed legislative "findings" are further discredited by the fact that Florida: (1) does not inspect imported beverages for quality; and (2) has no laws or regulations that distinguish between imported and domestic beverages to create a differential in the cost of regulation, except the Statute, which as construed and regulated by the DABT, requires greater allocated expense to confirm a domestic distillers' exemption from the import tax. There are no Florida Statutes or Administrative Rules peculiar to imported beverages, except the Statute. The licensing procedures for manufacturers, distributors, importers, vendors, brokers and sales agents are the same whether they trade in imported or Florida beverages. Testimony from an official at the Florida Department of Agriculture confirmed that no inspections of land are performed by it notwithstanding the Statute requires that tax-favored beverages be made from produce of land inspected by Florida agricultural inspectors. Nor are any such inspections even contemplated, except for audit purposes. (App. Sec. D, p. 329).

The content of alcoholic beverages is subject to extensive federal regulation. ***See, e.g.,*** example, 27 C.F.R. Sections 1.1-1.59, 3.1-3.25, 4.1-4.80, 5.1-5.66, 7.1-7.60; 19 C.F.R. Sections 12.37, 12.39. In ***Div. of Beverage v. Bonanni Ship Supply, Inc.,*** 356 So. 2d 308 (Fla.), ***cert. denied,*** 439 U.S. 835, 99 S.Ct. 116 (1978), this Court held that, in light of a pervasive federal regulatory scheme, a state statute designed to prevent the diversion of imported alcoholic beverages into state commerce constituted an unreasonable burden on interstate commerce. ***See also, Capital Cities Lable v. Crisp,*** 467 U.S. 697, 104 S.Ct. 2694 (1984) (holding that federal regulations pursuant to the Communications Act of 1934 pre-empted state laws prohibiting advertising of alcoholic beverages on cable television, and that the federal regulation prevailed despite of the Twenty-First

Amendment). In fact, despite the extensive regulation of the alcoholic beverage industry, Plaintiffs know of no counterpart to the statute is either federal or state law, suggesting that Ivey's justification for the 185 proof requirement is illusory.

b) The Constitutionality Of A Statute Must Be Judged On Facts Existing When Enacted

The test of a statute's constitutionality " . . . is to be determined on the date of its passage by the enacting body." ***Grayson-Robertson Stores v. Oneida Ltd.***, 75 S.E.2d 161 (Ga. 1953), ***cert. denied***, 346 U.S. 823, 74 S.Ct. 39 (1953); ***Gallatin County v. McClue***, 721 P.2d 338 (Mont. 1986); ***State ex. rel. Woodahl v. Dist. Court***, 511 P.2d 318 (Mont. 1973). "If [the statute] is unconstitutional then, it is forever void." ***Grayson***, 75 S.E.2d at 163; ***City of Atlanta v. Gower***, 116 S.E.2d 738 (Ga. 1960); ***Christian v. Moreland***, 45 S.E.2d 201 (Ga. 1947); ***Chastleton Corp. v. Sinclair***, 264 U.S. 543, 44 S.Ct. 405 (1924).

Chapter 88-308, Laws of Florida, was enacted June 7, 1988, and became effective August 7, 1988. The legislative findings in Section 9 of the Statute purport to be "effective July 1, 1988" and recite as fact that the cost of regulating "imported alcoholic beverages" is greater than that of regulating "alcoholic beverages not imported". As Plaintiffs have shown, however, it costs the state substantially less to regulate imported than non-imported alcoholic beverages.

If the costs of regulating imported alcoholic beverages were not greater as of August 7, 1988, then the legislative finding of fact in Section 9 is simply wrong. Otherwise, the Legislature could enact, and the State would be required to enforce, a statute patently unconstitutional by reasoning that with the passage of time, facts may or will change, and that extra statutorial measures could be taken to validate the statute. As the Supreme Court in ***Chastleton*** held, ". . .a Court is

not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." ***Chastleton,*** 264 U.S. at 547, 44 S.Ct. at 406. Moreover, the Court held that "... so far as this declaration [of facts] looks to the future it can be no more than prophecy and is liable to be controlled by events." ***Id.*** If a law was not valid when it was enacted and became effective, it never becomes a valid law. ***Id.; State v. Lee,*** 1 So. 2d 193 (Fla. 1941).

The constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing that those facts have ceased to exist. See ***Chastleton; Abie State Bank v. Weaver,*** 282 U.S. 765, 51 S.Ct. 252 (1931); ***Nashville, C. & St. L. Ry. v. Walters,*** 294 U.S. 405, 55 S.Ct. 486 (1935). "A law depending upon the existence of ... a certain state of facts to uphold it may cease to operate if ... the facts change." ***Chastleton,*** 264 U.S. at 547, 44 S.Ct. at 406. It therefore follows that a statute predicated upon the existence of a particular state of facts may be challenged by showing that those facts never existed. The Statute is therefore unconstitutional because the facts upon which it is premised did not exist at the time of its enactment.

c. The Statute Raises Excessive Revenues

Even if it did cost more to regulate imported liquor than domestic liquor, this "Twenty-First Amendment purpose" could not sustain the tax if the revenues collected exceed the amount reasonably necessary to achieve that purpose. ***Foote v. Stanley,*** 232 U.S. 494, 34 S.Ct. 377 (1914); ***Great Northern Railroad Co. v. Washington,*** 300 U.S. 154, 57 S.Ct. 397 (1937). The tax scheme contained in the Statute will produce about $111 million per year more in tax from imported beverages than is collected from domestic beverages. (App. Sec. M). The entire budget of the DABT is only slightly more than $20 million per year and

nearly half of that amount goes to local government. [8/] There is no state law directing local governments to use the funds to enforce "relevant state laws." The Legislature that enacted the Statute did not increase the Division's budget, nor did it change the "relevant state laws." It simply shifted the tax burden to imported beverages. This shift is grossly out of proportion to the cost of assuring compliance with relevant state laws. Because the amount of revenue raised by the import tax is grossly disproportionate to the cost of administering the state laws, the statute is unconstitutional. [9/]

The unreasonable nature of the import tax can be graphically illustrated. The ratio of excise to import tax varies from 2.714:1 to .125:1, depending on the type of liquor. There is no rational basis for this twenty-two fold difference.

Even the Twenty-First Amendment will not justify such a tax, however, if the amount raised is unreasonable in view of the amount needed to accomplish the permitted objective. If the tax is " . . . clearly excessive it is bad in toto and the state cannot collect any part of it." [Emphasis added.] ***Great Northern,*** 300 U.S. at 161, 57 S.Ct. at 401.

[8/] The already obvious deceit of the purported "Twenty-First Amendment purpose" is further emphasized by the fact that none of the import tax proceeds will go to fund the DABT. The DABT is funded entirely out of the Alcoholic Beverage and Tobacco Trust Fund, which is in turn funded by the various license and miscellaneous fees collected by the DABT. Fla. Stat. Section 561.025. The excise and import taxes under consideration go into the General Revenue Fund. Thus none of the tax proceeds go to regulation of enforcement of the Beverage Laws, at either the state or local levels.

[9/] While Ivey argues the immense societal costs of alcohol abuse exceed the tax revenues, such costs cannot reasonably be said to be included in the term "costs of regulation" used by the Legislature. Costs of regulation imply costs of monitoring and directing the flow of liquor traffic not the costs of dealing with the aftereffects of excessive consumption.

iii. The Statute Does Not Protect The Health, Safety, Welfare or Economic Integrity Of The State

Counsel for Ivey has advanced an interpretation of the Statute entirely different from that of his client. Ivey's Counsel construes the Legislature's requirements for manufacturing in Florida, using Florida produce and distilling above 185 degree proof as regulatory thus making it illegal to manufacture in Florida for sale in Florida without satisfying these requirements. That precise interpretation was considered and rejected by the DABT shortly after passage of the Statute. (App. Sec. I; App. Sec. D, p. 305). The DABT has interpreted the Statute to establish requirements a Florida manufacturer must meet to qualify for exemption from the import tax. (App. Sec. D, pp. 303-307). This inconsistency between the DABT and its counsel is easily resolved. An agency's contemporaneous interpretation of a statute is entitled to great weight, and a court should not depart from the interpretation unless it is clearly erroneous. ***Warnock v. Florida Hotel and Restaurant Comm'n,*** 178 So. 2d 917 (Fla. 3d DCA 1965). In ***United States v. Vogel Fertilizer Company,*** 455 U.S. 16, 102 S.Ct. 821 (1982), the Supreme Court held a treasury regulation invalid as an unreasonable interpretation of Section 1561(a) of the Internal Revenue Code. The Court placed "great weight" on the Treasury Department's prior representation made to Congress when they "participated in drafting and directly made known their views to Congress in Committee hearings" where Section 1561(a) was discussed. ***Id.*** at 32, 102 S.Ct. at 830-31. The Treasury Department was bound by that first interpretation of Section 1561(a) and was not allowed to recede to the contrary interpretation subsequently promulgated in its regulations. Accordingly, this Court should give great weight to the DABT's interpretation unless it is clearly erroneous. ***Shell Harbor Group, Inc. v. Dept. of Business Regulation,*** 487 So. 2d 1141 (Fla. 1st DCA 1986).

The DABT's interpretation is not clearly erroneous. In fact, it reconciles several inconsistent aspects of the Statute. The sections of the Statute imposing the import taxes actually read as follows:

> . . . there shall be imposed upon the importation into this State of all beverages [description of alcoholic beverages subject to excise tax], an import tax in the amount of $[tax varies depending on type of beverage] per gallon to be paid by manufacturers and distributors.

Sections 564.06(1)(b), (2)(b), (3)(b) and (4)(b) and Section 565.12(1)(b) and (2)(b), F.S., as amended by the Statute. No statutory guidance is given as to what events other than importation cause the tax to apply. A tax on mere importation would clearly violate the Commerce Clause. The DABT's interpretation avoids this pitfall by construing the conditions of Sections 564.06(7) and 565.12(4)[10/] as requirements to be met in order that a product not be considered "imported" and thus subject to the import tax.

To establish a valid Twenty-First Amendment concern addressed by the reduced tax on domestic beverages, Defendants had to show that <u>each</u> requirement for that tax benefit in some way promotes a Twenty-First Amendment goal. Those requirements are: (1) the beverages must be manufactured in Florida; (2) from produce of land inspected by Florida agricultural inspectors; and (3) any distilled ingredients must be distilled at over 185 proof. Defendants must show how each of these requirements promotes a valid Twenty-First Amendment purpose.

a. <u>"Florida Produce" Requirement</u>

[10/] These include: (1) the beverages must be manufactured in Florida; (2) from produce of land inspected by Florida agricultural inspectors; and (3) any distilled ingredients must be distilled at over 185 proof.

Neither Ivey nor the Florida Distillers have advanced any Twenty-First Amendment purpose served by the requirement that beverages qualifying for the lower tax rate be made from land inspected by Florida agricultural inspectors. This requirement serves only to discriminate against imported beverages, which are most likely to be made from non-Florida ingredients. It has been established that no inspections are actually done. The only purpose of this requirement is to promote the use of Florida produce. 11/ Clearly there is no Twenty-First Amendment purpose for this discriminatory requirement and Trial Court could properly have held the Statute invalid without further inquiry.

b. "Florida Manufacturing" Requirement

Ivey asserts that the requirement that alcoholic beverages be manufactured in Florida in order to qualify for a lower tax rate serves a Twenty-

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11/ In the House Floor Debate on the Statute this question was posed by Representative Rudd:

> Rudd: Mr. Jones, if another state wanted to sell a product to this particular company we're talking about, could they make an arrangement to have that product inspected by a state inspector of the State of Florida and then have it shipped therein, into the state?
>
> Jones: We're speaking of produce from land inspected by Florida agricultural inspectors. Florida agricultural inspectors do not inspect land in other states.
>
> Rudd: I want to know about special arrangement, if it were to that state's advantage to move their product to our area, could that arrangement be made?
>
> Jones: It's got to be growing in Florida on Florida land inspected by Florida inspectors and you don't do that in other states.

(App. Sec. A, pp. 32-33).

First Amendment purpose by increasing the State's control over such beverages from point of manufacture to point of sale. The evidence does not prove that either is accomplished by this requirement. To support their proposition, Ivey and the Florida Distillers cite the testimony of John Harris, Chief, Bureau of Enforcement, DABT, that licensing of Florida manufacturers gives the State greater control because "... they have a greater investment to lose if, in fact, they don't cooperate with some lawful request we make". (App. Sec. D, p. 396, ls. 23-25). Mr. Harris further testified that the ability to revoke a license to manufacture (required for in-state manufacturers only) gave the State more control than the ability to revoke a brand registration (required for all manufacturers seeking to sell in Florida). On cross-examination, however, Mr. Harris admitted that he had never been involved in revocation of a brand registration and thus had no basis for concluding that such action would be less effective in insuring cooperation than license revocation. 12/ (App. Sec. K, p. 119, ls. 13-20). His opinion concerning the relative control over Florida versus non-Florida manufacturers was not based upon any facts or experience and should be accorded little weight, certainly not enough to sustain a finding that a valid state interest is served by reducing taxes on Florida manufacturers. The Trial Court apparently recognized this weakness in the evidence. It considered the control available through brand revocation, the fact that Mr. Harris acknowledged never having had to conduct an out-of-state investigation, and the heritage of the Statute as its basis to factually determine that there was no Twenty-First Amendment purpose contemplated or effectuated by the Statute and ruled

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12/ Florida is one of the largest alcoholic beverage markets in the country. No manufacturer could afford to forfeit its right to sell here by having its brand registration revoked.

accordingly. This Court may not disturb that finding unless it finds it clearly erroneous.

The discriminatory effect of the Florida manufacturing requirement is clearly seen in the case of Bacardi products, which are actually rectified and bottled at Jacksonville, Florida. Despite a substantial investment in Florida property, plant, equipment and personnel, these products do not and cannot qualify for exemption simply because a portion of the manufacturing process takes place outside Florida and because some non-Florida products are used in the process. Thus, the discriminatory effect of the Statute is even more invidious than it may seem on its face, benefiting only a small segment of the Florida market.

c. "185 Proof" Requirement

Ivey and the Florida Distillers must also prove a valid Twenty-First Amendment purpose for the requirement that all distilled ingredients in alcoholic beverages be distilled above 185 proof. Not coincidentally, Florida Distiller Jacquin, for whose benefit the Statute was expressly enacted, had for many years prior produced all its beverage alcohol at over 185 proof. (App. Sec. D, p. 284, l. 23; p. 285, l. 7). Only after the Statute was enacted and challenged did Ivey and The Florida Distillers come up with a contrived health purpose for the law. The legislative history offers no support to Defendants' belated theory. There is no indication from the record that the Legislature ever adverted to the supposed health objective in passing the statute. Indeed, the five substances (isoamyl, propyl, and butyl alcohols; butyric acid; and urethane or ethyl carbamate) which Defendants contend are potentially harmful were not identified by the Florida Distillers' until well into the case. (Teaf, p. 273, lines 10-23). Ivey is thus asking this Court to find that a primary objective of the Statute was to cure a purported

problem not considered or even known to the Legislature at the time the Statute was passed.

Ivey argues that the 185 proof requirement serves a Twenty-First Amendment purpose by encouraging the people of Florida to consume certain beverages that are allegedly less hazardous than others. As discussed earlier, the Twenty-First Amendment was enacted principally to provide the states with the power to deal with the moral problems associated with alcoholic beverages, not health concerns that fall under the states' general police powers. It is clear from case law and logic that the "well-known evils" incident to alcoholic beverages sought to be addressed by the Twenty-First Amendment relate to their unique ability to intoxicate. This is the reason for the expanded police power granted the states in this area. ***See Loretto Winery, Ltd. v. Gazzara,*** 601 F. Supp. 850 (S.D.N.Y. 1985) (for a detailed discussion of the history of prohibition and its repeal).

The substances of concern to Ivey are found not only in alcoholic beverages but in many fermented foods including bread, orange juice, yogurt and soy sauce. These substances are by no means unique to alcohol. They were discussed pro and con by the Florida Distillers' and Plaintiffs' experts. The Court, having heard that conflicting testimony, resolved it by finding that the Statute presented no Twenty-First Amendment purpose.

1) The Claimed Health Problem is Illusory

It is Ivey's contention that distillation at above 185 proof removes from the distilled product certain naturally occurring substances resulting from the fermentation process that in the opinion of Dr. Teaf, the Florida Distillers' expert, have "... The potential to cause toxic effects in human beings." (App. Sec. D,

pp. 254-256). Dr. Teaf's carefully delimited opinion that these substances have the "potential" to have toxic effects hardly supports Ivey's assertion of a health risk problem since it is indisputable that all organic compounds and chemicals have the potential at some level to cause toxic effects in man. No evidence was offered that at the levels found in alcoholic beverages, any of the identified substances were harmful or caused genotoxic or toxic effects in man.

On the contrary, the record evidenced shows the substances involved at the levels found in alcoholic beverages are not harmful. Bacardi presented as its expert, Dr. John Doull. Dr. Doull, a recent past president of the Society of Toxicology and Chairman of the Toxicology Panel of the National Academy of Science, holds an M.D. as well as a Ph.D. in Pharmacology. Dr. Doull is also a member of the expert panel of Flavor Extract Manufacturing Association ("FEMA"), which evaluates the safety of primary food additives and other chemicals. During his long distinguished career, Dr. Doull has frequently advised governmental agencies on issues of food safety (App. Sec. D, pp. 357).

Dr. Doull testified that it was his opinion to a reasonable medical certainty that butyl alcohol, propyl alcohol, isoamyl alcohol, and butyric acid were all safe as used at recommended levels. (App. Sec. D, p. 360, l. 12; p. 362, l. 23). He further testified that all four substances were generally recognized as safe by the scientific community and the Food and Drug Administration ("FDA") and appear on the GRAS (Generally Regarded As Safe) lists adopted by regulation by FDA (21 C.F.R. §§ 182, 184 and 186). FEMA also has evaluated these substances and found them to be safe.

Dr. Doull testified that urethane or ethyl carbamate was commonly found in numerous foods, including orange juice, mushrooms, bread and anything else in which the fermentation process is involved. (*Id.* p. 363, ls. 14-19). While

Dr. Doull indicated there was some concern over the possible toxicity of urethane, he concurred with FDA's judgment that there was insufficient data available to make a risk assessment on ethyl carbamate. Accordingly, he concluded that FDA's policy of imposing a temporary limit of 125 parts per billion on the amount of urethane in certain distilled spirits was a prudent one. (App. Sec. D, p. 366, ls. 14-24). In any event, urethane is distilled out of alcoholic beverages at 130 proof, well below the Statute's 185 proof requirement. (App. Sec. L, p. 3).

Consequently, there can be no question that Dr. Doull's testimony, butressed by the FDA's listing of isoamyl alcohol, propyl and butyl alcohols, and butyric acid as GRAS and its findings with regard to the appropriate levels of ethyl carbamate in alcoholic beverages, amply support the Trial Court's conclusion that the purported health objectives for the law contrived by Ivey and the Florida Distillers were illusory.

The 185 proof requirement is clearly unrelated to any actual health concerns and is not a rational reaction to any of the potential health concerns asserted by Defendants. There are hundreds, if not thousands of potential toxins in our food supply. (App. Sec. D, p. 367, ls. 10-16). Under Defendants' arguments, virtually all discrimination could be justified as protecting the health, safety and welfare of consumers because all taxation discourages consumption.

The Trial Court did not ignore Defendants' evidence, it simply did not find Dr. Teaf's testimony regarding the "potential" toxic or genotoxic effects helpful or credible. It was the exclusive province of the Court below as the trier of fact to weigh the credibility of Dr. Teaf and decide the weight, if any, to be ascribed to his opinion. ***See, e.g., Behm v. Div. of Admin.***, 292 So. 2d 437 (Fla. 4th DCA 1974); and ***Nettles v. State of Florida***, 409 So. 2d 85 (Fla. 1st DCA 1982). It is indisputable that the Trial Court was free in its discretion to accept or reject

Dr. Teaf's opinion when weighted against the other evidence, the trier of facts own wisdom and experience, and the expert opinion of the far more experienced Dr. Doull. *Id.* Not surprisingly, in view of the overwhelming evidence as to the harmlessness of the substances at the levels involved, the Trial Court found Dr. Teaf's testimony entitled to little or no weight.

2) The Statute Is Not Designed To Meaningfully Reduce The Health Concerns Alleged By Ivey And The Florida Distillers

There are many facts demonstrating that the Statute is not designed to reduce the health concerns alleged. First, the "Florida produce" and "Florida manufacturing" requirements are unrelated to any alleged health concerns and thus unnecessarily burden interstate commerce. Also, vodka, which by federal law must be distilled at 190 proof or higher (27 C.F.R., Subpart C, § 5.22(a)), is subject to the import tax if manufactured outside Florida or from non-Florida produce, even though there are no health concerns even alleged with respect to vodka. Thus, approximately 25% of the Florida spirits market is discriminatorily taxed with no alleged health objective. Further, alcoholic beverages, other than vodka, which are actually distilled at over 185 proof are still subject to the import tax if manufactured outside of Florida or from non-Florida produce even though there is, again, no alleged health concern with respect to such beverages.

The consumption of beer, which is fermented but not distilled (and therefore contains urethane as a natural by-product), is not discouraged by the Statute. Unfortified wine, which is not distilled, is given a tax break if made in Florida from Florida produce though there is no reason to believe Florida-made wine has any less urethane than its imported counterpart.

By flatly precluding non-Florida manufacturers or those using non-Florida produce from qualifying for exemption from the import tax, the Statute provides no incentive for those manufacturers to continue or to begin to distill at over 185 proof. More than 97% of alcoholic beverages sold in Florida are imported, yet the Statute fails to induce those producers to distill at 185 proof. Nor does it limit the levels of the substances of alleged concern which can be present in flavoring extracts contained in tax-favored beverages and therefore does not limit the levels of these substances that actually reach the consumer. Isoamyl, propyl, and butyric acid are all such flavorings. The have been evaluated as safe and assigned number by FEMA. (App. Sec. D, p. 359, ls. 6-12; p. 361, ls. 21, p. 362, l. 22), Mr. Hammond, Florida Distiller Jacquin's former general manager, testified that butyric acid was a flavoring and that the three alcohols were all fusel oils, which on occasion Jacquin added as flavoring to certain of their products. (App. Sec. D, p. 285, ls. 17-24; p. 292, l. 12, p. 293, l. 13). It defies reason to contend that the Statute was targeted at removing or reducing the very same substances the Statute permits Florida producers to add to their alcoholic beverage before they are sold to consumers.

Indeed, there is evidence in the record that each of the five substances Defendants contend are potentially harmful are contained in trace amounts in at least some of Jacquin's products, and Mr. Hammond testified that all the distilled alcoholic beverages made by Jacquin's have been distilled at above 185 proof. (App. Sec. D, pp. 283-287). The anomaly of Jacquin's position highlights the value it ascribes to the competitive advantage afforded by the Statute to Jacquin's and other Florida producers. In addition to the substances added as flavorings, certain Florida rums have urethane levels higher than some Puerto Rican rums. (App. Sec. M, Exhibit I).

Finally, the amount of the import tax is different for each of the six types of beverages taxed, ranging from $1.50 per gallon to $3.58 per gallon, with no apparent pattern or justification for why one type of beverage is to be more heavily discouraged than another and on what basis.

The simple facts demonstrate that the Legislature's stated purpose bears no relationship to the Statute's effect. Under similar circumstances, the court in ***Foster-Fountain Packing Co. v. Haydee, supra,*** 278 U.S. 1, 49 S.Ct. 1 (1928), examined the facts and determined that the purpose stated by the Louisiana Legislature for a law prohibiting the export of shrimp from which the heads and hulls had not been removed (to conserve the hulls and heads for the manufacture of fertilizer or chicken feed) was feigned and not the real purpose. ***Id.*** 1, 49 S.Ct. 1. The Court therefore disregarded the Legislature's statement of purpose and found that the actual purpose was to promote local packing and canning industries. ***Id.*** The law was thus stricken because of its direct burden on interstate commerce. ***Id. See also, New Energy Co. v. Limbach,*** ___ U.S. ___, 108 S.Ct. 1803 (1988) (rejecting a tax credit statute's stated health purpose because it was not effected by the law other than occasionally or accidentally).

The legislative findings were contrived in the late days of the 1988 Legislative Session to "dress-up", in the clothing of the Twenty-First Amendment, the economic protectionism stricken by ***McKesson.*** The Florida Legislature, however, had reason to try. In ***Heublein, Inc. v. Georgia,*** 351 S.E.2d 190 (Ga. 1987), the Georgia Supreme Court sanctioned, under the Twenty-First Amendment, a Georgia tax law based upon a legislative finding that the cost of regulating and administering imported beverages was greater than for Georgia beverages. But in that case the taxpayer argued that the legislative purpose of the law did not matter because, regardless of the legislative purpose, the legislation would not "fly in light of the Commerce Clause."

The taxpayer there did not question the validity of the stated purpose, or weigh it against the temperance interests protected by the Amendment. Plaintiffs here argue that the legislative finding is unsupported by either the facts or by current Florida law. In fact, the Statute's preamble is simply concocted in a vain attempt to follow ***Heublein***. Unlike the taxpayer in ***Heublein***, however, Plaintiffs refuse to accept the bona fides of the stated purpose of the Statute. Its purpose is to achieve economic Balkanization, the exact prohibition of the Commerce Clause. The Statute is therefore per se invalid.

III. THE STATUTE VIOLATES THE IMPORT-EXPORT CLAUSE [13/]

In the present case, some of the beverages sold by Bacardi to Goldring and other distributors in Florida, and some of the beverages sold by Goldring as a distributor in Florida, are manufactured outside the United States. (App. Sec. K, p. 88, ls. 1-5). In addition to violating the Commerce Clause, the Statute violates the Import-Export Clause as to these imported beverages. Article I, Section 10, Clause 2 of the United States Constitution provides:

> No State shall, without the consent of Congress, lay any imposts or duties on any imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States . . . .

The Import-Export Clause's purpose is to insure that, in regulating commercial relations with foreign governments, the United States is able to

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13/ Contrary to Ivey's assertion in his Initial Brief, Plaintiffs did not abandon their arguments under the Import-Export Clause. The record reflects that this argument was expressly preserved. (App. Sec. F, p. 50). Although Judge Miner did not rely upon the Import-Export Clause, it is available for this Court's consideration.

"speak with one voice." ***Michelin Tire Corp., v. Wages,*** 423 U.S. 276, 96 S.Ct. 535 (1976). Thus, the clause prohibits any discriminatory tax by a state on imported goods and not merely direct taxes on importation. ***Id.*** at 288 n. 7, 96 S. Ct. at 542. ***See also, Cook v. Pennsylvania,*** 97 U.S. 566 (1878). The Statute, by imposing an additional tax on imported beverages, effectively imposes a prohibited duty upon imports. As a result, the Statute violates the Import-Export Clause of the United States Constitution.

The United States Supreme Court, while upholding the tax in ***Michelin,*** made clear that a state tax may not ". . .fall on imports as such because of their place of origin." ***Id.*** at 286, 96 S. Ct. at 541. Although the Import-Export Clause does not accord imported goods preferential treatment, it ". . .clearly prohibits state taxation based on the foreign origin of the imported goods." ***Id.*** at 287, 96 S. Ct. at 541.

For over a century, the Supreme Court has not hesitated to invalidate discriminatory state taxes on imports. In ***Dept. of Revenue v. James B. Beam Distilling Co.,*** 377 U.S. 341, 84 S.Ct. 1247 (1967), for example, the Court held unconstitutional a ten-cent-a-gallon tax imposed by Kentucky on all persons bringing distilled spirits into the state. Kentucky's law, like Florida's, discriminatorily taxed liquor from other states and countries. When challenged under the Import-Export Clause by an importer of Scottish whiskey, the Kentucky law was held unconstitutional. ***See also, Brown v. Maryland,*** 25 U.S. 419, 448 (1827) (invalidating discriminatory tax on imports); ***Cook,*** 97 U.S. at 569 (invalidating taxes at retail level that favored certain specified domestic goods).

The Florida Supreme Court's analysis of the Import-Export Clause agrees with that of the United States Supreme Court. In ***Miller v. Publicker Industries, Inc.,*** 457 So. 2d 1374 (Fla. 1984), this Court held unconstitutional a

Florida tax that exempted motor fuels containing a stated percentage of alcohol. The exemption applied, however, only to alcohol distilled from United States agricultural products. This Court held the tax exemption unconstitutional because it "... constitute[d] discriminatory taxation based upon the foreign origin of a product in violation of the Import-Export Clause." *Id.* at 1376.

The Florida Supreme Court's analysis in ***Publicker*** applies here. The tax in ***Publicker*** expressly favored goods of "U.S. origin." The Statute expressly favors goods of Florida origin. As in ***Publicker***, the Legislature created discrimination based on national origin. The Statute therefore violates the Import-Export Clauses and is unconstitutional.

IV. THE STATUTE VIOLATES THE EQUAL PROTECTION CLAUSES [14/] OF THE FLORIDA AND U.S. CONSTITUTIONS [15/]

Plaintiffs have demonstrated that the scheme of taxation established by the Statute discriminates facially against the manufacturers and distributors of specified non-Florida alcoholic beverages by bestowing a significant commercial advantage upon manufacturers and distributors of the same Florida beverages. The Supreme Court recently reaffirmed:

> . . .the continuing viability of the Equal Protection Clause as a means of challenging a statute that seeks to benefit domestic industry within the State only by grossly discriminating against foreign competitors.

14/ United States Constitution, Amendment XIV, Section I and Florida Constitution, Article I, Section 2.

15/ Contrary to Ivey's assertion in his Initial Brief, Plaintiffs did not abandon their arguments under the Equal Protection Clauses. The record reflects that this argument was expressly preserved. (App. Sec. F., p. 50). Although Judge Miner did not rely upon the Equal Protection Clause, it is available for this Court's consideration.

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 879, 105 S.Ct. 1676, 1682 (1985).

In that case the Supreme Court said that the Equal Protection Clause would forbid a tax based on a discriminatory classification, unless the classification (1) has a legitimate state purpose and (2) is rationally related to achievement of that purpose. *Id.* at 875, 105 S.Ct. at 1680.

The first question under the *Metropolitan* two-part test, is whether the classification has a legitimate state purpose. Clearly in the present case, it does not. Plaintiffs proved, and Judge Miner found, that the Statute has no legitimate state purpose. That proof is summarized throughout this Answer Brief. (See pp. 21-43 above.) For example, Plaintiffs proved, through Ivey's own witnesses and internal memoranda, that the cost of regulating domestic beverages is greater than the cost of regulating imported beverages, and that there is no reason for increased state regulation of imported beverages. (App. Sec. G, p. 46, ls. 23-25, p. 47, ls. 1-2; App. Sec. H, p. 1). The record similarly fails to prove that a valid health concern is addressed by the Statute. The discriminatory classification, resulting in higher taxes on imported beverages, in fact serves only one purpose: promotion of the Florida liquor industry. The evidence shows that to be the Statute's sole purpose, and Judge Miner so found.

In *Metropolitan*, the state contended that " . . . promotion of domestic [in-state] business is a legitimate state purpose under equal protection analysis." *Id.* at 879, 105 S.Ct. at 1682. The Court held, however, that promotion of domestic business, through a discriminatory tax, is not a legitimate state purpose. Id. at 882, 105 S.Ct. at 1684. The tax was therefore invalidated under the Equal Protection Clause. Having failed the "legitimate purpose" test, the Statute in the present case also violates the Equal Protection Clause and is invalid.

Even if the Statute has a legitimate state purpose, the means chosen (discriminatory taxation) bear no rational relation to that purpose. Nothing in the record shows that the Statute's discriminatory tax scheme is rationally related to the achievement of any legitimate state purpose. Plaintiffs proved that the discriminatory tax scheme was intended simply to foster domestic (in-state) industry. It accomplishes no other purpose.

The Court in ***Metropolitan*** also noted that although the functions of the Commerce Clause and the Equal Protection Clause are different, the effect is often similar. A discriminatory tax burden on foreign business invokes equal protection restraints as well as placing a burden on interstate commerce. ***Id.*** at 881, 105 S. Ct. at 1683.

Ivey would have the Court believe that early judicial interpretations of the Twenty-First Amendment, limiting the application of Equal Protection Clause, remain current. In 1936, the Supreme Court said "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth." ***State Bd. of Equalization v. Young's Mkt. Co.***, 299 U.S. 59, 57 S.Ct. 77 (1936). Courts, however, have long since cast aside the notion that Plaintiffs' right to equal protection under the law is abrogated by the Twenty-First Amendment. The U.S. Supreme Court recently said in ***Craig v. Boren***, 429 U.S. 190, 206, 97 S.Ct. 451, 461 (1976):

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-First Amendment to other constitutional provisions becomes increasingly doubtful.

The Court went on to say that it " . . . has never recognized sufficient 'strength' in the [Twenty-First] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause. ***Id.*** at 207, 97 S. Ct. at 462. The Court concluded that " . . . the operation of the Twenty-First

Amendment does not alter the application of equal protection standards that otherwise govern this case." *Id.* at 209-10, 97 S.Ct. at 463. The Equal Protection Clause therefore applies to the present case.

Defendant's would urge the Court to distinguish between individual rights and economic rights, and to hesitate in applying the Equal Protection Clause in the present case because only Plaintiffs' economic rights are at issue. In so doing, Defendants ignore the Supreme Court's 1985 use of the Equal Protection Clause in ***Metropolitan, supra,*** to protect economic rights by invalidating a tax that discriminated in favor of local (in-state) industry. ***See also, Williams v. Vermont,*** 472 U.S. 14, 105 S.Ct. 2465 (1985); and ***Hooper v. Bernalillo County Assessor,*** 472 U.S. 612, 105 S.Ct. 2862 (1985). In fact, the distinction simply does not apply to a discriminatory tax favoring domestic business, such as the one before the Court. The right to avoid discriminatory taxation, favoring in-state business, is exactly the economic right sought to be protected by the Equal Protection Clause.

The Florida Constitution similarly prohibits discriminatory taxation. The state, in matters of taxation, must " . . . proceed upon a rational basis and may not resort to a classification that is palpably arbitrary." ***Eastern Air Lines, Inc. v. Dept. of Revenue,*** 455 So. 2d 311, 314 (Fla. 1984).

The Statute's scheme of excise and import taxation plays favorites with products produced by "home folks" at the expense of imported products. Such discriminatory legislation is not only subject to the Commerce Clause, but may also be stricken under the Federal or Florida Equal Protection Clauses. In the present case, the taxing statute, like that in ***Metropolitan,*** has no legitimate state purpose and is therefore unconstitutional under the Equal Protection Clause.

CONCLUSION

The obvious purpose and effect of Sections 10 and 11 of Ch. 88-308 is to favor in-state economic interests over out-of-state interests. Such discrimination is flatly prohibited by the Commerce Clause, the Import-Export Clause, and the Equal Protection Clauses of the United States and Florida Constitutions. Accordingly, the Judgment of the Trial Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was sent by facsimile, mail, or Federal Express this 30th day of December, 1988 to DANIEL C. BROWN, ESQ., Department of Legal Affairs, Tax Section, Capitol Building, Tallahassee, Florida 32399-1050, BRUCE ROGOW, ESQ., 2097 S.W. 27th Terrace, Fort Lauderdale, Florida 33312 and to GARY R. RUTLEDGE, ESQ, MARGUERITE H. DAVIS, ESQ. and PAUL R. EZATOFF, ESQ., Katz, Kutter, Haigler, et al., 315 South Calhoun Street, 800 Barnett Bank Building, Tallahassee, Florida 32301, JULIUS F. PARKER, JR., ESQ., JACK M. SKELDING, JR., ESQ., JENNIFER PARKER LaVIA, ESQ., Parker, Skelding & McVoy, P.O. Box 669, Tallahassee, Florida 32302, and to ARNOLD M. LERMAN, ESQ., THOMAS F. CONNELL, ESQ., Wilmer, Cutler & Pickering, 2445 M Street, N.W., Washington, D.C. 20037. Appendix served by regular mail on Daniel C. Brown and Paul R. Ezatoff.

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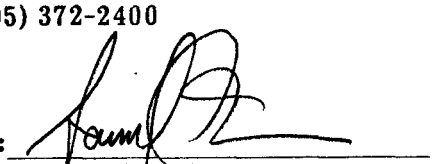
By: 
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