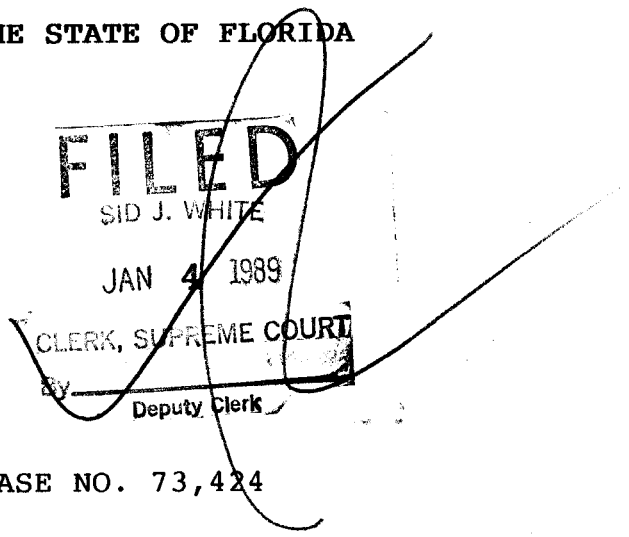
O/A 1-10-89

IN THE SUPREME COURT OF THE STATE OF FLORIDA



C. L. IVEY, DIRECTOR, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, STATE OF FLORIDA, JACQUIN-FLORIDA DISTILLING CO., INC., and TODHUNTER INTERNATIONAL, INC.,

Appellants,

CASE NO. 73,424

vs.

BACARDI IMPORTS, COMPANY,INC., N. GOLDRING CORP., CALIFORNIA WINE INSTITUTE and TAMPA WHOLESALERS, INC.

Appellees.
_____/

ON APPEAL FROM THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA, CASE NO. 88-2881

REPLY BRIEF OF APPELLANTS JACQUIN-FLORIDA DISTILLING CO., INC. AND TODHUNTER INTERNATIONAL, INC.

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ARGUMENT

I. CHAPTER 88-308 IS MATERIALLY DIFFERENT FROM SECTIONS 564.06 AND 565.12, FLORIDA STATUTES (1985).

The Trial Court erred in concluding that Ch. 88-308 is nothing more than a slightly different version of Sections 564.06 and 565.12, Florida Statutes (1985). (R. V. 9, p. 1470). Sections 564.06 and 565.12, Florida Statutes (1985), granted exemptions from Florida's beverage excise tax to products made from certain species of crops adapted to growth in Florida. Sections 9 to 11, Chapter 88-308, Laws of Florida (1988), do not provide any distinction in tax treatment based on species crops. Sections 564.06 and 565.12 made tax treatment in Florida dependent upon tax treatment in other jurisdictions. Sections 9 to 11, Ch. 88-308 do not posit Florida's tax treatment of alcoholic beverages on any such retaliatory economic basis. Sections 10 and 11, Ch. 88-308, impose a tax on the importation into this State of alcoholic beverages - a subject of regulation expressly reserved to the states by Section 2 of the Twenty-first Amendment without regard to the Commerce Clause. Sections 564.06 and 565.12, Fla. Stat. (1985), did not regulate the importation of intoxicants into this State, and were based purely on parochial industry concerns. In Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988), no evidence was presented of regulatory concerns addressed by Sections 564.06 and 565.12, Fla. Stat. (1985). The present case is replete with evidence that Sections 9 to 11, Ch. 88-308 rationally advance regulatory objectives of the State of Florida under the Twenty-first Amendment.

Chapter 88-308 contains police power policies nowhere addressed in the prior statutes. Under Section 11, Ch. 88-308, it is now required that "All beverages distilled in this State for sale in this State shall be distilled above 185 proof, except for flavoring extracts, of produce from land inspected by Florida agricultural inspectors." §565.12, as amended by §11, Ch. 88-308, Laws of Florida. See also §564.06(7), Fla. Stat., as amended by §10, Ch. 88-308, Laws of Fla. The health concerns addressed by those requirements are amply catalogued in the evidence. Chapter 88-308, therefore is clearly different in concept and approach from the 1985 statutes challenged in McKesson.[1]

Moreover, Ch. 88-308 is directed to a regulatory policy limited to Florida's boundaries. Beverages made in this State for sale in this State alone are subject to the requirements of manufacture from Florida-inspected

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[1] Bacardi's argument that the 185 proof requirement is nothing more than a qualifying condition for tax treatment is incorrect. Their argument is premised upon a clearly erroneous interpretation of the Division of Alcoholic Beverage and Tobacco. The language of §565.12(4), Fla. Stat. as amended by §11, Ch. 88-308, is unequivocal: "All beverages distilled in this state for sale in this state shall be distilled above 185 proof, except for flavoring extracts, of produce from land inspected by Florida agricultural inspectors." §564.06(7), Fla. Stat., as amended by §10, Ch. 88-308, Laws of Florida is equally unequivocal: "All wines taxed under paragraphs (1)(a), (2)(a), (3)(a), or (4)(a) and manufactured within this state for sale in this state shall be made of produce from land inspected by Florida agricultural inspectors." Both provisions are mandatory requirements for production within this state of beverages to be sold in this state, and not mere qualification criteria for tax treatment. This Court has held that an agency interpretation which is at odds with the plain meaning of a statute cannot stand. Kimbrell v. Great American Insurance Co., 420 So.2d 1086, 1088 (Fla. 1982).

products and distillation above 185 proof. Production in Florida of beverages destined for use beyond Florida's borders is not affected by those requirements. The health objectives are thus met by a mechanism designed not to sweep into the area of other States' Twenty-first Amendment prerogatives.

Through Chapter 88-308, the legislature exercises Florida's Twenty-first Amendment powers in the least intrusive fashion. Florida could have banned the importation of all alcoholic products not manufactured in conformity with its health and regulatory objectives. The legislature chose instead the more limited approach of offering an inducement for less risky consumption rather than a draconian ban.

II. THE TRIAL COURT APPLIED AN IMPROPER STRICT SCRUTINY STANDARD OF REVIEW.

Despite Bacardi's argument to the contrary, (Bacardi Brief, pp. 6, 40-41), the trial court did not weigh the evidence presented on Twenty-first Amendment objectives and find no factual support for any of them. Indeed, the trial court could not have done so because there was undisputed testimony that the provisions of Ch. 88-308 advanced Florida's interests in regulatory control. (See Ivey's initial brief at pp. 4-5, 31-32) and agreement between the toxicologists who testified that it is a wise regulatory policy to remove exposure to harmful impurities in alcoholic beverages. (See Ivey's initial brief at pp. 5-9).

Instead, it is transparently clear from the record that the Trial Court measured Ch. 88-308 against an improper yardstick, a yardstick to which the evidence had no bearing. The trial court applied a rule of decision that

Commerce Clause values are so precious that nothing other than a compelling state interest, advanced by a strictly tailored program, which matched health control efforts tightly to costs of such a program, would "justify" the statutes. The Trial Court held that there was no evidence of the type of quality control program which it perceived to be valid under that stringent standard.

The Trial Court posed this question during final argument, which reveals its thinking:

> "Would it be permissible for the State of Florida to impose. . . .some sort of tax if in fact it had an inspection program where, much like the agricultural inspection, where randomly selected items of alcoholic beverages imported from out of the state were opened and tested for some of these things that our toxicologists have told us are there?"

(R.V. 9. p. 1440, Ivey Reply App., p. 8). Again, during final argument the trial court inquired:

> "Does in fact the State of Florida on a valiant basis open cases of, cartons of imported alcoholic beverages and inspect the contents to make certain that any of these bad substances are in them?"

(R.V. 9, p. 1455, Ivey Reply App. p. 10).

Those comments by the trial court disclose that it did not weigh the evidence and find no factual support for Florida's health care concern addressed by these statutes. The trial court did not find that the evidence of such concerns was illusory, as Bacardi argues. Rather, as the basis for concluding that Ch. 88-308 is unconstitutional, the trial court said:

> "The State has not justified this statute, this cost differential which I believe to be clearly discriminatory on Twenty-first Amendment concerns. The State has never

> even, how could it, for instance, I might look at it, at this case, a good deal differently if the State did not have an inspection program, a quality control to protecft its citizens. The State didn't have any quality control program as that, they never have prior to now. They do not now inspect any property upon which grain or other vegetables are grown that are used in the distilling process. I think that all of that is just illusory."

(R.V.9, p. 1471, Ivey Reply App. p. 11).

What the Court found to be illusory was not the evidence of regulatory and health care concerns put forward by the State, but the absence of any in-place "quality control" program which met its perception of a workable program and its perception of a tax tied to the cost of such a program. Under a strict scrutiny test, that sort of value-weighing process might be appropriate. But under the proper standard of review, the Trial Court unjustiably substituted its judgment for that of the legislature on the question of how to approach the problem of quality control. The trial court then elevated that disagreement with the legislature's choice of means to the basis of invalidating the statutes on constitutional grounds.

Since the evidence showed that the regulatory concerns addressed by the laws are fairly debatable, as the trial court conceded its comments above, then the constitutional question is whether the means chosen by the legislature to address those concerns are rational, not whether they are the ones the trial court would choose.

As demonstrated below in Point III, there is no requirement, even under the Commerce Clause, much less under the Twenty-first Amendment, that a general revenue tax, such as the import tax, which reaches valid Twenty-first Amendment objectives must be measured against the cost of the resources

expended to regulate the activity in order to be constitutional. See Commonwealth Edison Co. v. Montana, 453 U.S. 607, 620-628 (1981).

III. BACARDI'S ARGUMENT OF EXCESSIVE REVENUES MISCONSTRUES CONSTITUTIONAL PRECEDENTS.

Bacardi asserts, commencing at page 31 of its Brief, that the Twenty-first Amendment could not sustain the import tax "if the revenues collected exceed the amount reasonably necessary to achieve" regulatory purposes. To support that proposition, Bacardi relies on two cases from the early part of the century[2], part of a line of cases which held that the States could not directly tax interstate commerce. Under that line of cases, the only exception was when a measure was designed as inspection program and the fee exacted was reasonably related to the cost of the inspection program. That mode of constitutional analysis was long ago discarded. It is now quite clear that a general revenue tax, such as the importation tax, need not be limited to the costs incurred by the State on account of interstate activity. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 620-628 (1981). In any event, Ivey demonstrated that the evidence shows an overall close apportionment of the tax burden to the contribution of imported wines and liquors to Florida's alcohol consumption problems.

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[2] Foote v. Stanley, 232 U.S. 494 (1914); Great No. R.R. Co. v. Washington, 300 U.S. 154 (1937).

IV. THE EXPORT-IMPORT CLAUSE AND EQUAL PROTECTION ARGUMENTS WERE ABANDONED BELOW BY BACARDI AND WINE INSTITUTE.

Both California Wine and Bacardi now argue that Ch. 88-308, Laws of Florida, violates the Export-Import Clause (Cal. Wine Brief, p. 44, Bacardi Brief, p. 44). At no time during trial were the Export-Import Clause or the equal protection clause, now argued by Appellees, presented to the trial court for decision. They were tangentially raised at the preliminary injunction hearing on August 10, 1988, but never again mentioned to the trial court by the Appellees either at pretrial or at trial. Appellees did not suggest that the trial court modify or expound its judgment to include rulings on those arguments, and the Trial Court did not address them. Nor did Appellees cross appeal the failure of the Trial Court to reach and decide these issues. They have therefore abandoned them. See St. Paul Fire & Casualty Ins. Co. v. Hodor, 200 So.2d 205, 207 (Fla. 3d DCA 1967). In any event, those claims lack merit.

The argument of Appellees on both points, nevertheless, are without merit.

V. CH. 88-308 DOES NOT VIOLATE THE EXPORT-IMPORT CLAUSE.

In Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964), the Unites States Supreme Court held that a State could not tax imports which were still in their original package and which were held in bonded warehouses and destined, not for use in Kentucky, but for transsshipment. The Court there noted that Kentucky retained full power to

tax alcoholic beverages destined for use within the State, the Export-Import Clause notwithstanding. Id. at 346. Florida's tax would not violate the Export-Import Clause even if the original passage doctrine as applied in that case were still the mode of analysis under the Export-Import Clause. Florida's tax is not laid on imports for transshipment and is not laid until the importer has sold to the distributor and the distributor to the retail outlet for use in Florida. §§ 561.50, 564.06(6), 565.13, Fla. Stat. (1987). Such is clearly within the State's power.

Moreover, the original package doctrine has now been replaced by an analysis which extends Commerce Clause tests to the Import-Export clause with one modification -- the "one voice" notion in regard to foreign affairs. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). If, as clearly shown by Ivey's briefs, the strictures of the Commerce Clause are lifted from the States when they act under Section 2 of Twenty-first Amendment, then the strictures of the Export-Import Clause are likewise lifted, to the extent that the Commerce Clause and the Export-Import Clause address the same concerns. Nor can there be any serious suggestion that a state's action under Section 2 of the Twenty-first Amendment violates the "one voice" notion embodied in the foreign Commerce Clause and the Export-Import Clause, because the federal government has given up that exclusive right in respect to liquor imported into a State for use in that State by addition of the Twenty-first Amendment to the United States Constitution. This issue is controlled by the analysis in Wardair Canada, Inc. v. Department of Revenue, 106 S.Ct. 2369 (1986).

Simply put, the addition of the Twenty-first Amendment to the Constitution put foreign nations on notice that the laying of a tax on the importation of alcoholic beverages into a State for use in that State does not constitute an impost, just as the absolute prohibition of importing foreign alcoholic beverages into a State for use in that State does not constitute a prohibited embargo under the foreign Commerce Clause. What the States may not do after the Twenty-first Amendment is to embargo the use of its ports for foreign beverages in transshipment to other parts of the country or to lay a duty on foreign beverages in trasshipment to other parts of the country. Chapter 88-308 does neither of those things. What the States may do, after the Twenty-first Amendment, is prohibit or tax foreign alcoholic beverages when brought into a State's boundaries for use therein. As noted in the context of the Fourteenth Amendment, a classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Export-Import Clause. See, Mahoney v. Joseph Triner Corp., 304 U.S. 401, 404 (1937).

VI. CHAPTER 88-308 DOES NOT VIOLATE EQUAL PROTECTION GUARANTEES.

Appellees rely solely on Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985) and Florida cases. E.g., Eastern Airlines, Inc. v. Florida Department of Revenue, 455 So.2d 311 (Fla. 1984). The short reply to Appellees' argument is that none of these cases involved action by a state to directly regulate the importation of alcoholic beverages under Section 2 of the Twenty-first Amendment. The case which did address that issue is Mahoney

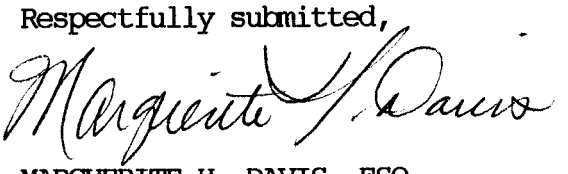
v. Joseph Triner Corp., supra. It continues to be the law and the courts are bound by it.

Even without the aid of the Twenty-first Amendment, a statute which draws policy distinctions which have a rational basis passes muster under equal protection analysis. Eastern Air Lines, Inc. v. Department of Revenue, supra., at 314. Further, this Court should note that the approach in Metropolitan Life Insurance v. Ward, supra, has been disregarded by the United States Supreme Court in ensuing decisions. See, Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System, 105 S.Ct. 2545 (1985). And see Id. at 2556 (O'Connor, J. concurring). Additionally, it has been severely criticized by legal scholars. Regan, D. H., "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," 84 Mich. L. Rev. 1091, 1277-1278 (1986).

CONCLUSION

The judgment of the Trial Court should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by the method indicated on the attached mailing list this 4th day of January, 1989.

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