STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL WINE & SPIRITS, INC., NWS MICHIGAN INC. AND NATIONAL WINE & SPIRITS, LLC,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN,

Defendant-Appellee,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervening Defendant-Appellee.

UNPUBLISHED
March 25, 2004

No. 243524
Ingham Circuit Court
LC No. 02-000013-CZ

Before: Kelly, P.J. and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition to defendant and dismissing plaintiffs' claims that MCL 436.1205(3) of Michigan's Liquor Control Code (MLCC)[1] violates the Equal Protection Clause and the Commerce Clause. We affirm.

I. Basic Facts

National Wine & Spirits, Inc. (National Inc.) is an Indiana corporation. NWS Michigan Inc. (NWS), a subsidiary of National Inc., incorporated in Michigan in October 1996, and became an authorized distribution agent of liquor (ADA) in Michigan in December 1996. National Wine & Spirits, LLC (National LLC), also a subsidiary of National Inc., incorporated in

[1] MCL 436.1101, *et seq.*

Michigan in December 1998, and became a licensed wine wholesaler in Michigan in November 1999. The parties agree that for purposes of the statute at issue, defendant treats the three plaintiffs as one entity.

Plaintiffs filed a complaint for declaratory judgment against defendant alleging that defendant, knowing that NWS was the largest ADA in Michigan and owned by National Inc., enacted MCL 436.1205(3) which prohibits an ADA that is licensed as a wine wholesaler after September 24, 1996, from "dualing," i.e., selling a brand of wine in an area in which another wine wholesaler has already been licensed to sell that brand. It also alleged that on September 24, 1996, only in-state companies were licensed as wine wholesalers. Therefore, plaintiffs alleged MCL 436.1205(3) "effectively prohibits all out of state companies from serving as both an ADA of spirits and a licensed wholesaler of wine in Michigan." Plaintiffs alleged that MCL 436.1205(3) violates the Equal Protection Clause because it creates two classes of ADAs and the classification is not rationally related to any legitimate government purpose. Plaintiffs also alleged that MCL 436.1205(3) violates the Commerce Clause because the law precludes ADA/wholesalers from dualing if they did not do so before September 24, 1996, and prior to that date no out-of-state ADAs were licensed to wholesale wine in Michigan.

Plaintiffs filed a motion for summary disposition of its equal protection claim under MCR 2.116(C)(9) and (C)(10). The only evidence in support of their motion was the affidavit of Steve Null, director of operations for NWS, who attested to the facts alleged in plaintiffs' complaint. Defendant responded to the motion requesting that summary disposition be granted in its favor under MCR 2.116(I)(2).

Addressing plaintiffs' motion, the trial court determined that preserving an orderly and stable wholesale wine distribution network which also allows some competition is a legitimate state interest. With regard to whether the classification was rationally related to this purpose, the trial court concluded:

> Until this amendment was enacted in 1996 wine wholesalers in Michigan, and indeed all alcoholic beverage industry business in Michigan, lived in a world without ADAs. An ADA is a creature intended in most respects to take the place of direct action by the State of Michigan and its employees. . . .
>
> I think it's also undisputed that for an ADA to also be in the wine wholesaler business is a pretty good economic advantage, particularly when we have competing wholesalers in the same district wholesaling the same brand of wine, so to prevent that very specific and narrow economic disadvantage from being created by privatization, the legislature enacted this amendment and I think I cannot say that this amendment is not rationally related to that purpose.

The trial court also determined that the provision contained a legitimate grandfather clause because:

> [T]hese wine wholesalers who were wholesaling a particular brand of wine on a non-exclusive basis in a particular territory before this amendment were doing, as I say, in a world without ADAs, and once you introduce the ADA into the equation, it becomes a completely different world. And yet they made these

> investments over the years, and they may not all be hard capital, hard goods, they may be relationships, but still they costs money and time and effort to create those ongoing relationships, and I think the legislature can legitimately take the position that it's not fair to strip them of that in this new regulatory climate created by the introduction of privatization.

The trial court denied plaintiffs' motion for summary disposition and subsequently entered an order granting defendant's motion to dismiss plaintiffs' equal protection claim.

Defendant filed a motion for summary disposition of plaintiffs' commerce clause claim under MCR 2.116(C)(8) and (C)(10).[2] Addressing this motion, the trial court pointed out that legislative intent is one way of interpreting an ambiguous statute. But plaintiffs were asking the trial court to discern the Legislature's motivation in passing the law which is "beyond the power of this Court." It further ruled that plaintiffs were confusing "what everyone knew" with "legislative intent." Finally, the trial court ruled that there was no evidence that the law singled out plaintiffs or out-of-state companies, rather, "That just happens to be the way it was at the time the statute was enacted." Accordingly, the trial court granted defendant's motion and entered an order dismissing plaintiffs' claims with prejudice.

II. Summary Disposition

Plaintiffs argue that the trial court erred in granting summary disposition of its claims that MCL 436.1205(3) violates the Equal Protection Clause and the Commerce Clause. We disagree.

A. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In evaluating a motion under MCR 2.116(C)(10), the trial court considers the pleadings, affidavits, depositions and other documentary evidence in a light most favorable to the nonmoving party and determines whether the moving party was entitled to judgment as a matter of law. *Id.* at 120. MCR 2.116(C)(8) tests the "legal sufficiency of the complaint" and permits dismissal of a claim where the opposing party has failed to state a claim on which relief can be granted. *Id*. at 119. Only the pleadings are examined; documentary evidence is not considered. *Id*. Where the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery," the motion should be granted. *Id*.

The constitutionality of a statute is also a question of law that we review de novo. *Michigan State Employees Ass'n v Liquor Control Comm No 2*, 232 Mich App 456, 463; 591 NW2d 353 (1998). "[S]tatutes are presumed constitutional, and courts have a duty to so construe a statute unless unconstitutionality is clearly apparent." *Mahaffey v Attorney General*, 222 Mich App 325, 344; 564 NW2d 104 (1997). The party asserting the constitutional challenge has the

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[2] After the trial court granted Michigan Beer & Wine Wholesalers Association's (MBWWA) motion to intervene over plaintiffs' objection, MBWWA joined in defendant's motion.

burden of overcoming this presumption. *Michigan Soft Drink Ass'n v Dep't of Treasury*, 206 Mich App 392, 401; 522 NW2d 643 (1994).

B. MCL 436.1205(3)

MCL 436.1205(3) provides in relevant part:

> After September 24, 1996, an authorized distribution agent or an applicant to become an authorized distribution agent who directly or indirectly becomes licensed subsequently as a wholesaler shall not be appointed to sell a brand of wine in a county or part of a county for which a wholesaler has been appointed to sell that brand under an agreement required by this act. A wholesaler who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act, unless that wholesaler was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996, or unless the sale and appointment is the result of an acquisition, purchase, or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.

Thus, MCL 436.1205(3) prohibits an ADA that is licensed as a wine wholesaler after September 24, 1996, from dualing. It also prohibits wine wholesalers that become ADAs after September 24, 1996, from dualing unless they already had dualing agreements before September 24, 1996, or they become appointed to dual by "acquisition, purchase, or merger" with an existing wine wholesaler with a dualing agreement.

C. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment requires that persons under similar circumstances be treated alike. *El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987); *Crego v Coleman*, 232 Mich App 284, 292; 591 NW2d 277 (1998). The rational basis test is used to review equal protection challenges to social or economic legislation. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 717; 575 NW2d 68 (1997).[3] "'Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest.'" *Shavers v Attorney General*, 402 Mich 554, 613, 624; 267 NW2d 72 (1978), quoting *United States Dep't of Agriculture v Moreno*, 413 US 528, 533; 93 S Ct 2821; 37 L Ed 782 (1973). "Under the rational-basis test, a statute will ordinarily be sustained if it can be said to advance a legitimate governmental interest, even if the law seems to be unwise or work to the disadvantage of a particular group, or if the rationale seems to be tenuous." *Westlake Transport v PSC*, 255 Mich App 589, 617; 662 NW2d 784 (2003). The wisdom, need or appropriateness of the legislation is

[3] The parties agree that this is the proper test in this case.

irrelevant. *Crego, supra*. "A legislative classification may not be set aside if any set of facts may reasonably be conceived to justify it." *Id.* "The rationale behind the classification may be supported by facts either known or reasonably assumed, even if those facts may be debatable." *Westlake, supra* at 617.

Defendant asserts that the purpose of the statute is to protect against collusion, price-fixing and monopolization; specifically, the statute employs a three-tier system of supplier, wholesaler, retailer. Defendant argues that because ADAs receive state subsidies,[4] allowing them to dual would unfairly threaten to put existing wine wholesalers out of business. Defendant argues that this would essentially destroy the middle tier of the distribution system.

As stated in its preamble,[5] one of the purposes of the MLCC is "to provide for the control of the alcoholic liquor traffic within this state." This Court has acknowledged that the MLCC generally operates to bar the creation of "tied-house" systems of alcoholic beverage production, distribution, and sale:

> "Tied house" statutes are aimed at preventing the integration of manufacturing, wholesale, warehouse, and retail outlets in the liquor industry. . . . It has been a fear . . . that economic power at one level in this four-tiered system (manufacturers, warehouses, wholesalers, and retailers) could be transferred to another level in order to gain control at the second level. [*Traffic Jam & Snug, Inc v Michigan Liquor Control Commission,* 194 Mich App 640, 642; 487 NW2d 768 (1992), quoting *Borman's Inc v Liquor Comm,* 37 Mich App 738, 746; 195 NW2d 316 (1972).]

Other courts have also recognized that multi-tiered alcohol distribution systems are common among the states. After the Twenty-First Amendment was passed, states either monopolized liquor sales or devised a three-tier system which grants licenses to manufacturers, wholesalers and retailers with detailed regulations. *TFWS, Inc v Schaefer,* 242 F 3d 198, 202 (4 CA 2001). The three-tiered system used by many states was intended to prevent the perceived danger of "tied houses," i.e., large manufacturers that controlled the entire distribution process all the way down to the final sale. It was believed that this would cause increased sales, abusive sales practices and excessive consumption. *Nat'l Distrib Co, Inc v Bureau of Alcohol, Tobacco and Firearms,* 626 F 2d 997, 1004-1010 (DC Cir 1980).

Thus it is well established that preserving an orderly and stable three-tiered alcohol distribution system which also allows some competition is a legitimate government interest. Plaintiffs argue that they are "unable to imagine a legitimate state purpose for creating these two

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[4] Plaintiffs do not contest that ADAs receive state subsidies. In fact, their complaint references these subsidies.

[5] The preamble is useful for interpreting an act's subject, purpose and scope but is not controlling authority. *Malcolm v East Detroit*, 437 Mich 132, 143; 468 NW2d 479 (1991); *People v Al-Saiegh,* 244 Mich App 391, 396-397; 625 NW2d 419 (2001).

classes distinguished only by the date September 24, 1996." But the question of whether the date is arbitrary goes to whether the classification is rationally related to defendant's purpose.

We conclude that the classification based on date is rationally related to defendant's purpose. Before 1996, there were no ADAs because the distribution of alcohol was handled solely by Michigan's Liquor Control Commission. After defendant allowed ADAs to distribute alcohol, it realized that ADAs receiving state subsidies that were also wine wholesalers had an unfair economic advantage over wine wholesalers that were not ADAs. In order to prevent this specific unfair advantage, it decided to preclude ADA/wholesalers from dualing. But because some ADA/wholesalers already had dualing agreements, defendant did not take away their pre-existing right to dual. It was necessary for the Legislature to insert a date prior to the date the statute was effective because if it had not ADAs and wholesalers would have had a window of time in which to obtain licenses and/or dualing agreements. In other words, it would have allowed circumstances to be altered beyond the status quo.

Plaintiffs argue that the statute did not include a legitimate grandfather clause because it gave "existing wine wholesalers an *additional benefit* that they had never before enjoyed, i.e., the right to be both a wine wholesaler *and* an ADA." We disagree. A wine wholesaler could become an ADA both before and after September 24, 1996. The focus of the statute is on ADA/wholesalers dualing, not on allowing wholesalers to become ADAs or vice versa. Rather than penalizing a wine wholesaler that already had a dualing agreement when/if it became an ADA, the Legislature allowed the wine wholesaler to continue to operate under their preexisting agreement.

Therefore, the trial court did not err in granting defendant summary disposition of plaintiffs' equal protection claim.

D. Commerce Clause

The Commerce Clause provides that Congress "shall have power . . . [t]o regulate commerce . . . among the several states . . . ." US Const, art I, § 8, cl. 3. The "dormant Commerce Clause" "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys v Dep't of Environmental Quality*, 511 US 93, 98; 114 S Ct 1345; 128 L Ed 2d 13 (1994).

Under traditional Commerce Clause analysis, the Supreme Court has adopted a two-tiered approach to determining the validity of the statute. *Brown-Forman Distillers Corp v New York State Liquor Auth*, 476 US 573, 578; 106 S Ct 2080; 90 L Ed 552 (1986). "The first step is to determine whether the statute discriminates against interstate interests or merely regulates evenhandedly with only incidental effects upon interstate commerce." *Westlake*, *supra* at 662, citing *Oregon Waste*, *supra* at 100. "'Discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste*, *supra* at 99.

MCL 436.1205(3) does not discriminate against out-of-state economic interests. The statute is but one provision of a comprehensive system that regulates the flow of all liquor into and within the state. MCL 436.1205(3) applies to both out-of-state and in-state ADAs. Plaintiffs assert that defendant inserted the date in the statute to discriminate against out-of-state

ADA/wholesalers because it "knew" that before that date all ADA/wholesalers were in-state entities. But plaintiffs present no evidence of the Legislature's intent, instead they rely on mere speculation. We agree with the trial court that plaintiffs confuse "what everyone knew" with "legislative intent." The trial court determined that plaintiffs were asking it to discern the Legislature's motivation in passing the law which is "beyond the power of this Court." Furthermore, we agree that the trial court could not determine the Legislature's intent, but not because it was beyond its *power*, but rather because it was beyond its *ability* as plaintiffs only presented its conjectures about what "everybody knew" and what the Legislature's intent "must have been."

As discussed above, the statute contains a legitimate grandfather clause. Defendant asserts the date in the statute had to be before the effective date because if it was not, ADAs and wholesalers would have had a window of time to acquire licenses and/or obtain dualing agreements necessary to gain the unfair advantage that the statute sought to prevent. The reason it allowed already dualing wholesalers to continue to dual after they became ADAs is that they had already entered dualing agreements and defendant did not wish to take this pre-existing right away. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp v Governor of Maryland,* 437 US 117, 126; 98 S Ct 2207; 57 L Ed 91 (1978).

Further, there are circumstances in which an out-of-state ADA could become a licensed wine wholesaler after September 24, 1996, and still be permitted to dual. MCL 436.1205(3) permits a wine wholesaler that was dualed before September 24, 1996, to subsequently become an ADA, indirectly, through affiliation with an out-of-state ADA (there are no residency requirements for ADAs), and remain dualed. It also permits a wine wholesaler that was not dualed (but was licensed) before September 24, 1996, to subsequently become an ADA indirectly, through affiliation with an out-of-state ADA, and obtain dualing rights through "acquisition, purchase, or merger" of or with a wine wholesaler with a dualing agreement. Therefore, we conclude that the statute does not discriminate against out-of-state interests.

Our next determination is whether the statute regulates evenhandedly with only incidental effects on interstate commerce. We conclude that plaintiffs have failed to establish that the statute has even an incidental effect on interstate commerce, i.e., "the interstate flow of articles of commerce." Plaintiffs have proved that they, an out-of-state ADA and in-state wine wholesaler, are precluded from dualing. They have also shown, and defendant agrees, that all wine wholesalers must meet residency requirements to obtain a license.[6] But plaintiffs have failed to show that MCL 436.1205(3) affects the interstate flow of wine and alcohol. Although a wine wholesaler's license permits the wholesaler to sell a certain brand of wine in a certain area, there is no evidence that MCL 436.1205(3) affects whether the brand sold comes from in-state or out-of-state. Nor is there any evidence that the lack of out-of-state ADA/wholesalers in Michigan affects the interstate flow of alcohol. Thus, we discern no indication that the statute

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[6] MCL 346.110(1) contains a one-year residency requirement. This provision was not challenged in the trial court or on appeal.

prohibits the flow of interstate goods, places an added cost on them or distinguishes between them in the market. The Commerce Clause "protects the interstate market, not particular interstate firm, from prohibitive or burdensome regulations." *Exxon, supra* at 217-218.

The fact that the statute prohibits plaintiffs from dualing does not implicate the Commerce Clause. Therefore, the trial court did not err in granting defendant's motion for summary disposition of plaintiffs' commerce clause claim.

III. Intervention

Based on our conclusion that the trial court did not err in granting summary disposition, plaintiffs' remaining issue regarding MBWWA's motion to intervene is moot.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Janet T. Neff