*Phil Mullin* *Legislative Service Commission*
*William J. Heaphy, III*

# H.B. 300

126th General Assembly
(As Introduced)

**Reps. Domenick, Book, DeGeeter**

## BILL SUMMARY

- Prohibits the sale or delivery of beer or intoxicating liquor to a consumer in Ohio from a location within or outside Ohio under a delivery sale.

## CONTENT AND OPERATION

***Background law***

***O.A.C. Rule 4301:1-1-23***

A Liquor Control Commission rule (O.A.C. 4301:1-1-23) allows an Ohio resident, with the consent of the Division of Liquor Control, to bring into Ohio alcoholic beverages *that were brought into the United States from a foreign country or brought into Ohio from other states or territories of the United States*, subject to the following requirements and restrictions:

- The alcoholic beverage must be for the resident's personal use, not be for resale, and not be registered for sale in Ohio.

- Federal law must allow shipment of the alcoholic beverage into the United States.

- All taxes due the state must be paid at the time that consent is requested from the Division.

- The amount of the alcoholic beverage brought into Ohio must not exceed 15 gallons per family household in any three-month period.

- If the alcoholic beverage is shipped into Ohio, the shipment must be received only by the individual purchaser named on the sales or shipping order, and no other person, by way of power of attorney or another method, may receive the beverage.

***O.A.C. Rule 4301:1-1-22***

Another Liquor Control Commission rule (O.A.C. 4301:1-1-22) also contains importation into Ohio restrictions pertaining to alcoholic beverages. These restrictions include (among others) the following:

- No alcoholic beverage may be so imported without the Division's written consent, application for which must be on a form the Division provides.

- Importation into Ohio may occur only upon *prior* consent from the Division.

- *Direct importation* of an alcoholic beverage from outside Ohio or the United States to persons in this state "is prohibited, unless otherwise permitted by law or rule."

***Stahl v. Taft***

On July 19, 2005, an agreed order and injunction was entered in the United States District Court for the Southern District of Ohio (Eastern Division) by Judge George Smith in the case of *Stahl v. Taft* (Case No. 2:03cv00597). The entry finds O.A.C. Rules 4301:1-1-22 and 4301:1-1-23 summarized above to be unconstitutional as violative of the Commerce Clause of the United States Constitution insofar as they prohibit certain direct deliveries *of wine* to consumers in Ohio. The relevant portion of the entry is as follows (footnotes added):

> Plaintiffs have alleged, and Defendants concede that Ohio's statutory scheme that restricts out-of-state wineries from selling and shipping wine directly to consumers in Ohio is unconstitutional under the authority of *Granholm v. Heald*, 125 S.Ct. 1885 (May 16, 2005).[1]
>
> The specific laws at issue in this case are Ohio Revised Code §§ 4303.25 and 4303.29, and Ohio Administrative Code §§ 4301-1-22(A) and (C) and 4301:1-1-23, which apply to all alcoholic beverages. The only beverage at issue in this case is wine, and this Order does not affect the validity of those statutes with respect to other types of alcoholic beverages, such as beer and spirituous liquor.

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[1] *See* **COMMENT** *1 of this analysis.*

> IT IS THEREFORE ORDERED and ADJUDGED that Ohio Revised Code §§ 4303.25 and 4303.29, and Ohio Administrative Code §§ 4301-1-22(A) and (C) and 4301:1-1-23 violate the Commerce Clause to the extent that they prohibit out-of-state wineries from selling and delivering wine directly to Ohio residents.
>
> IT IS FURTHER ORDERED that Defendants are ENJOINED from enforcing Ohio Revised Code §§ 4303.25 and 4303.29, and Ohio Administrative Code §§ 4301-1-22(A) and (C) and 4301:1-1-23, to the extent that they prohibit out-of-state wineries from selling and shipping wine directly to Ohio residents.[2]
>
> IT IS FURTHER ORDERED that until a legislative amendment or appropriate rule change is enacted, Defendant Division of Liquor Control may use the form and procedure for direct shipment of wine from out-of-state wineries direct to Ohio consumers that is set forth in schedule A to this Order.[3]
>
> . . .

***Direct shipments of alcoholic beverages within Ohio***

It does not appear that any statutes or Liquor Control Commission rules explicitly regulate the delivery to a consumer in Ohio of beer or intoxicating liquor purchased from a manufacturer, wholesaler, or retailer *located in Ohio*, other than to require that the seller possess the appropriate liquor permit to make the sale.

***Changes proposed by the bill***

The bill prohibits a manufacturer, wholesaler, distributor, supplier, retailer, or other person from selling or delivering beer or intoxicating liquor under a "delivery sale" (see below) from a location *within or outside* Ohio (R.C. 4301.601(B)). A violation of this prohibition is a misdemeanor of the first degree (R.C. 4301.99(C)).

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[2] *See* **COMMENT** *2 of this analysis relative to R.C. 4303.25 and 4303.29.*

[3] *See* **COMMENT** *3 of this analysis for a copy of the direct shipment of wine form.*

The bill defines a "delivery sale" as a transaction for the purchase of beer or intoxicating liquor in which an offer to purchase beer or intoxicating liquor is made in Ohio electronically using a computer network or by mail or telephone and acceptance of the offer results in the sale and delivery of the beer or intoxicating liquor to a named individual at a designated address in Ohio for personal use and not for lawful resale (R.C. 4301.601(A)). (See **COMMENT** 4.)

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## COMMENT

1. The United States Supreme Court decision in *Granholm v. Heald*, issued on May 16, 2005, held that the laws of Michigan and New York that discriminated against out-of-state wine producers and in favor of in-state wine producers in the sale and shipping of wine within those states violated the Commerce Clause of the United States Constitution. The Michigan law allowed in-state wineries to ship directly to consumers, subject only to a licensing requirement, but out-of-state wineries, even if licensed, had to process the wine through both a wholesaler and retailer. The New York law authorized in-state wineries to ship directly to consumers, but required an out-of-state winery to open a New York branch office and warehouse and made out-of-state wineries ineligible for a "farm winery" license, which provided the most direct means of shipping to consumers in New York.

2. R.C. 4303.25 (not in the bill) prohibits a person personally or through a clerk, agent, or employee from (among other things) transporting, *importing*, or causing to be transported or imported *in or into* Ohio any beer, intoxicating liquor, or alcohol for delivery, use, or sale unless the person has fully complied with the Liquor Control and Permit Laws (R.C. Chapters 4301. and 4303.) or is the holder of an in-force liquor permit that the Division issued. R.C. 4303.29 (not in the bill) contains various types of restrictions upon the issuance of liquor permits, such as qualifications of potential permit holders and population quota restrictions.

3. The form for direct shipment of wine to Ohio consumers attached to the *Stahl* entry is as follows:

# DIRECT SHIPMENT OF BEER & WINE TO OHIO RESIDENTS

## OHIO EXCISE AND USE TAX FILING

Ohio Department of Commerce
Division of Liquor Control
Beer & Wine Section
6606 Tussing Road, P.O. Box 4005
Reynoldsburg, Ohio 43068-9005
614-644-2411

A resident of the state of Ohio may import into the state of Ohio beer or wine, provided that:

(1) The beer or wine is for the Ohio resident's personal use and not for resale
(2) The Ohio resident is an individual who is twenty-one years of age or older
(3) The laws of the United States allow the shipment of the beer or wine into the United States
(4) All taxes due the state of Ohio shall be paid prior to the importation, or within thirty days of the receipt of beer or wine

**DIVISION USE ONLY**

Received _____ Date

Sent to Taxation _____ Date

_____ Signature

**NAME OF OHIO RESIDENT**

Name _____

Street Address _____

City/State/Zip _____ Phone _____

**NAME OF COMPANY FROM WHOM BEER OR WINE IS PURCHASED**

Name _____

Street Address _____

City/State/Zip _____ Phone _____

Date of entry of the alcoholic beverages into Ohio _____

**OHIO EXCISE AND USE TAX SECTION** – for questions regarding taxes, call ***614-466-7351***

Effective January 1, 1993, Ohio **EXCISE TAX** on beer and wine is:

| | Per Gallon | Per Case | | Per Gallon | Per Case |
|---|---|---|---|---|---|
| Wine (containing 4% - 14% ABV) | $0.32 | $0.76 | Sparkling/carbonated Wine & Champagne | $1.50 | $3.57 |
| Wine (containing more than 14% - 21% ABV) | $1.00 | $2.38 | | | |
| Vermouth | $1.10 | $2.62 | Beer (per case of 24 – 12 oz. cans/bottles) | | $0.40 |

**USE TAX** is calculated on the purchase price x the applicable county (where you reside) sales/use tax rate:
*(Example:* $250.00 x 7% = $17.50)

| TYPE OF ALCOHOLIC BEVERAGE (wine/vermouth/sparkling/beer) | ALCOHOL CONTENT (% ABV – wine only) | AMOUNT | GALLONS/ BOTTLES/ OR CASES | PURCHASE PRICE | AMOUNT OF *USE TAX* DUE | AMOUNT OF *EXCISE TAX* DUE |
|---|---|---|---|---|---|---|
| | | | | | | |
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| | | | | | | |
| | | | | | | |
| | | | | TOTAL: | $ | $ |
| | | | | TOTAL AMOUNT TO BE REMITTED (USE TAX DUE + EXCISE TAX DUE) | | $ |

***MAKE CHECK OR MONEY ORDER PAYABLE TO: TREASURER OF STATE***
Mail check and form to Ohio Division of Liquor Control at the above address

**SWORN STATEMENT:**

I declare under penalties of perjury that I am 21 years of age or older, that this filing to the best of my knowledge and belief is true, correct and complete, and that the tax submitted to the State of Ohio is accurate for the above purchases.

_____
Signature of Applicant Date

DLC 1516 (Rev. 6-05) An Equal Opportunity Employer and Service Provider TY Users Dial ORS 1-800-750-0750

4. In light of the holding in the *Stahl* entry as to the unconstitutionality of O.A.C. Rules 4301:1-1-22 and 4301:1-1-23 insofar as they relate to direct shipments of wine from out-of-state wineries to Ohio consumers (the Commerce Clause infirmity), the bill's proposed prohibition, at least to the extent it affects *those* types of direct shipments, might become, if enacted, the subject of litigation in a federal or state court as to whether it contains a similar constitutional infirmity. A distinguishing factor might be that the bill prohibits direct shipments of beer and intoxicating liquor to Ohio consumers from locations *both outside and within Ohio*.

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## HISTORY

| ACTION | DATE | JOURNAL ENTRY |
|---|---|---|
| Introduced | 06-15-05 | p. 959 |

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