SUBJECT: Shipping wine directly to consumers by domestic and out-of-state wineries

COMMITTEE: Licensing and Administrative Procedures — favorable, without amendment

VOTE: 8 ayes — Flores, Geren, Chisum, Goolsby, Hamilton, Homer, D. Jones, Quintanilla

0 nays

1 absent — Morrison

SENATE VOTE: On final passage, March 29 — 31-0

WITNESSES: None

BACKGROUND: The Texas Alcoholic Beverage Commission (TABC) regulates the distribution of alcohol in the state through permitting and enforcement. Regulations maintain a separation of the three tiers of the alcoholic beverage industry — manufacturers, wholesalers, and retailers.

Alcoholic Beverage Code, ch. 107 governs the transportation and importation of liquor in the state of Texas. Sec. 107.07 allows an individual to import a certain amount of wine or liquor for personal consumption into the state only if that individual personally accompanies these beverages into the state. Sec. 107.12 creates an exception that allows a purchaser to buy wine at a Texas winery for later shipment to the purchaser if the winery verifies at the point of sale that purchaser is 21 years of age or older. The purchaser then must be present when the wine is delivered. In addition, ch. 110, subch. B governs the Texas Wine Marketing Assistance Program, under which package stores can ship wine to purchasers under certain circumstances.

A 2003 ruling by the 5th U.S. Circuit Court of Appeals upheld a Houston judge's decision to strike down Texas law against the direct sale of out-of state wine to consumers. In *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), the court held that sections of the Alcoholic Beverage Code, including sec. 107.07, discriminate against out-of-state interests in violation of the of the U.S. Constitution's commerce clause. The U.S. Supreme Court is now considering the issue.

DIGEST:

SB 877 would allow holders of winery permits and out-of-state winery direct shipper's permits, issued by TABC, to ship wine directly to Texas consumers, including consumers in dry counties. These permit holders could not sell or ship wine to a minor and could not deliver more than three gallons of wine within any 30-day period to the same Texas consumer. Out-of-state wineries could not sell more than 35,000 gallons of wine annually to direct Texas consumers.

Out-of-state permit. The bill would create an out-of-state winery direct shipper's permit, and TABC would adopt rules and forms necessary to implement this new permit. TABC could issue an out-of-state winery direct shipper's permit only to someone who paid the $75 annual fee and who:

- did not hold a Texas winery permit;
- operated a U.S. winery and held all necessary state and federal permits;
- held a Texas sales tax permit;
- submitted to personal jurisdiction in Texas and federal courts and to venue in Travis County if proceedings became necessary; and
- had no financial interest in a Texas alcoholic beverage wholesaler or retailer.

Holders of an out-of-state winery direct shipper's permit could sell and deliver wine only that was produced or bottled by the permit holder.

Delivery method. Wine would have to be delivered using a carrier that held a TABC carrier's permit. Wine would have to be in a package that clearly indicated the contents, but TABC would not need to approve an out-of-state winery brand label as long as that winery had satisfied all federal label approval requirements.

Wine could be delivered only to a person at the delivery address who was at least 21 years of age, presented proof of identity and age, and signed a receipt acknowledging delivery. The person who received the wine would have to be either the purchaser, a recipient designated in advance by the purchaser, or a person at least 21 years of age.

Recordkeeping, administration, and taxes. Out-of-state wineries would be required to maintain records of all sales and deliveries to Texas direct consumers for at least five years after the date of sale. These records would be available upon request by Texas authorities, and TABC would establish rules requiring out-of-state wineries periodically to file reports.

Sales from out-of-state wineries to Texas consumers would be treated as if the sales had originated in Texas, and the out-of-state permit holder would pay excise and sales and use taxes at the same rate and manner as if the winery were located in Texas. A Texas-based consumer who ordered wine from out-of-state would not be charged an importation fee, nor could such a consumer resell the delivered wine.

Texas wine marketing assistance program. The bill would allow a person to continue to order wine under the auspices of this program or to order wine directly from a Texas winery without needing to be physically present at the winery when the order was placed. Program participation by a package store would be voluntary.

Penalties and effective date. Any person without an out-of-state direct shipper's permit who sold and shipped alcohol from outside Texas to a consumer in Texas would commit an offense. A first offense would be a class B misdemeanor (up to 180 days in jail and/or a maximum fine of $2,000), a second offense would be a class A misdemeanor (up to one year in jail and/or a maximum fine of $4,000), and a third offense would be a state-jail felony (180 days to two years in a state jail and an optional fine of up to $10,000).

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2005, and would apply only to actions occurring on or after the effective date.

If the bill took immediate effect, the out-of-state winery direct shipper's permit and related penalties would take effect 90 days after the effective date of the bill. If this bill did not take immediate effect, the requirement for such an out-of-state permit and the related penalties would take effect January 1, 2006.

SUPPORTERS SAY:

SB 877 would take advantage of an important economic development opportunity by allowing Texas wineries to sell their products directly to consumers. Direct sales to consumers from American wineries are growing, and data from one survey indicates these sales will double by 2010. Texas should benefit from this economic trend and the additional sales tax revenue that would come from wine sold by out-of-state permit holders. Current law makes it difficult for small wineries in the state to expand their markets because essentially they can ship wine only to consumers who visit in person. This bill would expand the possible market for Texas wineries by allowing them to take orders over the Internet and ship wine anywhere in the world.

There are a number of economic benefits to supporting the Texas wine industry. SB 877 would help this industry grow. Many small wineries are isolated from urban markets, so being able to sell wine over the Internet would be a boon to their business. Wine holds opportunity for Texas farmers searching for new crops as subsidies decline and traditional products become less profitable. Many areas of Texas are suitable for the establishment of vineyards, so expansion of the state's wine market also could serve as a vital tool for rural economic development. In addition, the Texas winery tourism industry, which is significant, would benefit.

The bill contains provisions for the enforcement of the law and to require out-of-state permit holders to pay taxes and submit records of sales and delivery to TABC. Failure to abide by these provisions could result in the revocation of an out-of-state winery's permit as well as criminal penalties.

The bill would establish a reasonable regulatory system that has proven effective at protecting minors in other states. It would require that any direct shipment of wine be clearly and conspicuously marked, and delivery could be made only with the signature of an individual over the age of 21. Minors who wished to purchase alcohol illegally could find quicker, easier, and cheaper ways than waiting for a wine shipment through the mail.

SB 877 would remedy problems with current law governing transportation of wine that were ruled unconstitutional in *Dickerson v. Bailey*, which held that Alcoholic Beverage Code sec. 107.07 discriminates against out-of-state wine producers and shippers by compelling them to go through Texas wholesalers and retailers. Also, as a result of this ruling, out-of-state wineries now can ship to Texas consumers. However, Texas wineries currently are prohibited from doing the same thing, a situation that SB 877 would correct.

Texans have a right to purchase and enjoy wine without extensive government regulation. SB 877 provides consumers with more choices by allowing them to enjoy vintages unavailable through traditional distribution.

OPPONENTS SAY:

This bill could create a public safety problem by making it easier for minors to purchase alcohol. For practical purposes, there would be no way to prevent a person under 21 years of age from ordering wine on the Internet, and it would be difficult to enforce the signature requirement upon delivery.

SB 877 would weaken the established three-tier alcohol retail system that is easily regulated by TABC. Currently, a producer sells wine to a distributor, who in turn sells it to a retailer, who finally provides it to consumers. By allowing direct shipments of wine from out-of-state businesses, SB 877 would dilute the ability of the state to regulate the proven safeguards. It would be difficult, particularly in the case of out-of-state wineries, to monitor who sold wine, where and to whom the beverages were sent, and whether tax collections were made.

Conflicting judgments on direct shipment law have been rendered by different courts across the country. Laws governing direct wine shipments vary greatly from state to state, and the U.S. Supreme Court is expected to settle the issue soon. Texas should not establish a new regulatory system at this juncture and should wait for additional guidance from the Supreme Court regarding issues of interstate commerce regulation before establishing any new system.

Allowing wineries to ship wine to consumers in dry areas would defeat the will of the people who voted to keep these counties dry. Only 39 counties, out of over more than 250 Texas counties, allow the sale of alcohol countywide.

The bill would place improper responsibility on package delivery companies. Retailers are trained in preventing alcohol sales to minors. Package carriers are not trained to recognize false identification, nor would they likely take the extra time to check identification.

SB 877 would favor wineries over liquor stores because wineries would not be held to the same strict rules and penalties. Texas retailers can face significant fines, loss of their annual licenses, and even jail time for selling alcohol to minors. Also, if special exceptions are applied to allow direct shipment of wine, hard liquor could be next.

OTHER OPPONENTS SAY:

In order sufficiently to deter minors from ordering wine shipments online, SB 877 should establish a baseline minimum that an individual would have to order. Minors would be less likely to order from the Internet if they had to purchase a case for $150 instead of just one $15 bottle.