

CHOREY, TAYLOR & FEIL BULLETIN:

IT'S TIME TO TAKE ON THE FOURTH CIRCUIT'S *ACTUAL FURTHERANCE/PROMOTION* TEST FOR WHEN STATES MAY BE PERMITTED TO EXERCISE THEIR 21ST AMENDMENT AUTHORITY TO REGULATE BEVERAGE ALCOHOL

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A. Heads up, Federal power wins; Tails up, State power loses: The self-same case presumes upward pressure on prices from the State's regulatory scheme in order to find a Sherman Act violation, only to find no such upward pressure on prices in order to reject the State's 21st Amendment authority to regulate.

Here's part of one commentator's take on post-and-hold requirements, one of the Maryland requirements at issue in the Fourth Circuit's *TFWS* case:

[I]t is basic antitrust law that a group of manufacturers or wholesalers who agreed among themselves to publish their price lists, to sell at no

other prices, and to keep the list unchanged for 30 days would be violating the federal Sherman Act if they had any effect on interstate commerce. . . .

One should not ignore opportunities to compliment one's adversaries. In that spirit, I express continuing admiration of defenders of price posting for their ability to maintain a straight face while asserting that its purpose is temperance. **Post and hold requirements are simply another method of reducing competition and thereby padding private profits, primarily in the middle tier.** If a state wished to reduce problematic alcohol consumption by raising prices, it would increase its excise tax on frequently abused products, not throw a prize to industry members by attempting to grant them a spurious exemption from antitrust law. None of the states whose price posting laws have been invalidated has attempted to replace the stricken law with a system providing sufficient state supervision to meet the *Midcal* test or to return to court with proof of effectiveness under the *TFWS* test, and none has reported a resulting surge of intemperance.

R. Corbin Houchins, CorbinCounsel.com, [*Has the Price Posting Bunny Run Down?*](#), [*ShipCompliant Blog*](#) (posted 21 July 2009 08:14 AM PDT) (emphasis supplied).

O.K., putting aside the issue whether wholesalers were acting under compulsion of State law or, alternatively, whether there was hybrid action, the practice of post and hold by wholesalers is said to reduce competition and apparently to drive up prices, thereby padding the wholesalers' profits. That's why, further, the Fourth Circuit held the practice to violate the Sherman Act:

Under Maryland's post-and-hold system, liquor wholesalers post prices and adhere to them for thirty days after they are in effect. Moreover, with respect to new brands and sizes, competing wholesalers may match the

prices of the posting wholesaler before the posted prices go into effect. If liquor wholesalers entered into private agreements to accomplish what is required (and allowed) under the Maryland scheme, a per se Sherman Act violation would result. There is, we recognize, a “plain distinction between the lawful right to publish prices ... on the one hand, and an agreement among competitors limiting action with respect to the published prices, on the other.” *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649-50, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980) (per curiam). This distinction makes one thing obvious: agreements to adhere to previously announced prices are unlawful per se. See *Sugar Institute v. United States*, 297 U.S. 553, 581, 56 S. Ct. 629, 80 L. Ed. 859 (1936) (noting that “steps taken to secure adherence, without deviation, to prices and terms ... announced” violate § 1). Again, Maryland's post-and-hold pricing scheme mandates the exchange of price information by wholesalers through public posting and dissemination, and it requires adherence to the publicly announced prices. The Maryland system thus mandates activity that is essentially a form of horizontal price fixing, which has been called “the paradigm of an unreasonable restraint of trade.” *N.C.A.A. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984). Maryland's post-and-hold regime is subject to § 1 as a hybrid restraint, and **we hold that it is illegal per se**.

TFWS, Inc. v. Schaefer, 242 F.3d 198, 209 (4th Cir. 2001) (emphasis supplied).

This holding, together with others, left as a “final question[] whether the Twenty-first Amendment bars application of the Sherman Act in this case,” which necessitated remand for further proceedings. 242 F.3d at 211-13.

A further appeal and remand later, “the district court heard testimony and took evidence from the parties on the effect of the regulations on liquor price, and consequently on liquor consumption and temperance. The parties compared Maryland's liquor and wine prices with those in Delaware, where TFWS also had retail operations. The district court found that Maryland's regulatory scheme was ineffective in furthering the state's purported interest in temperance and that the balance weighed in favor of the federal interest in promoting competition.” 572 F.3d 186, 190. Yet another remand later to consider “excise tax rates and their effect on prices,” 572 F.3d at 195, the district court found only a “minimal impact of Maryland's challenged regulations on prices.” 572 F.3d at 195-96.

Since the regulatory scheme did not in fact push up prices, the State's interest in temperance (apparently understood as less consumption averaged across the population of Maryland) was not in fact furthered, and the Fourth Circuit rejected the so-called 21st Amendment defense. 572 F.3d at 197. As the Fourth Circuit put it, “Once the district court made its finding of fact that the challenged regulatory scheme had minimal impact in furthering the state's interests, the legal conclusion that the federal interest outweighed the state interest followed more or less as a matter of course.” 572 F.3d at 197.¹

¹Well, maybe, but one might just as easily have concluded that the Sherman Act (and the per se rule interpretation thereof) is ineffective to ferret out actual anticompetitive behavior that in fact drives up prices. Once the ineffectiveness here of the Sherman Act had been established by the district court's finding of fact, it might just as easily have been concluded that the Federal regulatory scheme was ineffective in furthering the purported Federal interest in competition and, further, that the Federal interest did not outweigh the Maryland interest or that these interests, Federal and State, both apparently ineffectively advanced here, were in equipoise in this case. Indeed, Maryland had made a similar argument to the district court, but was rebuffed. See *TFWS, Inc. v. Schaefer*, Civil No. WDQ-99-2008, 2007 WL 2917025, at *8, 2007-2 Trade Cases ¶ 75,920 (D. Md. Sept. 27, 2007) (“The State further contends that it is not sufficient for TFWS to rely on a finding of a per se violation of the Sherman Act, and that TFWS has made no effort to demonstrate the extent to which the federal interest in competition is damaged by the challenged regulations”).

Although spread over a decade of litigation, these holdings present a scenario of heads up, Federal power wins; tails up, State power loses. At the outset of the decade, the courts in the *TFWS* case presume upward pressure on prices from the State's regulatory scheme in order to find a Sherman Act violation. At the close of the litigation, these courts find no such upward pressure on prices in order to reject the Maryland's 21st Amendment authority to regulate. This cannot be a rational way to proceed.

B. This recurrent conflict of Federal power and State power plays out on at least two levels: 1) on the level of these powers *as exercised* and 2) on the level of the proper scope of the powers as such.

One way to look at this recurrent conflict of Federal power and State power is through the guise of legal process. *See generally Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 (2d Cir. 2009) (Calabresi, Circuit J., concurring). Now consider that the conflict plays out on at least two levels: on the level of these powers *as exercised* and on the level of the proper scope of the powers as such.

1. Appropriately comparing and harmonizing powers *as exercised* in hopes of uncovering a false conflict.

It is a perfectly appropriate and customary legal process exercise, it is submitted, for courts to compare and harmonize powers *as exercised* when the result will be that there is no conflict at all. We know this sort of exercise from conflicts of law, for instance.

On the surface, the laws of two jurisdictions seem to be applicable and to point in different directions, but upon closer inspection, one jurisdiction does not have an interest in the matter. The surface conflict was a false conflict. Upon uncovering a false conflict, a court may safely put to one side the laws of the jurisdiction with no interest in the matter and apply the laws of the remaining jurisdiction full-throatedly – that is, without limitation or balancing or compromise.

This is the essence of one of the alternative holdings in the case of *Manuel v. State of Louisiana*, 982 So.2d 316, 2007-1620 (La. App. 3d Cir. Apr. 30, 2008). As the Court of Appeal wrote, "Short of assessing the relative power of the State and the Federal Government to adopt competing policies to govern the regulation of alcoholic beverages in Louisiana, this case also presents the question whether there is a conflict in the policies each has adopted." 982 So.2d at 325.

2. Where examination of the competing powers *as exercised* reveals a persisting true conflict, it is not appropriate for a court to resolve the conflict by picking one jurisdiction's regulation or legislation over another's.

If, however, as in the *TFWS* case, examination of the competing powers *as exercised* reveals a persisting true conflict, it seems inappropriate, in a legal process sense, for a court to resolve the conflict by picking one jurisdiction's regulation or legislation over another's. Inevitably, this will involve the court in itself making policy choices.

Stepping back from the minute rulings over the decade-long litigation in the *TFWS* case and looking at the full

sweep of the case, one take-away might be as follows:

- The United States, in exercise of its power to regulate beverage alcohol, may adopt prophylactic rules (the per se rule approach) that may not actually advance, further, promote the Federal interest in a way that can be proven by evidence in the individual case before the court.
- On the other hand, the individual State, in exercise of its power to regulate beverage alcohol, may not – is not permitted to – adopt prophylactic rules (the post-and-hold requirement and the ban on volume discounts) that may not actually advance, further, promote the State interest in a way that can be proven by evidence in the individual case before the court – at least not when the State's regulation conflicts with Federal regulation.

To reach this result, the courts are implicitly picking and choosing one jurisdiction's policy over another. Alternatively, the courts are applying, in a knee-jerk fashion, the Supremacy Clause to a State's exercise of its 21st Amendment power, a situation in which the Supremacy Clause does not apply. Either way, in the end, courts are making legislative and regulatory policy choices.

3. When each jurisdiction has, on the surface at least, acted within its power, and if a false conflict has been ruled out, then the harmonization has to take place – for a court, can only legitimately take place – at the level of the competing powers themselves.

If each jurisdiction has, on the surface at least, acted within its power, and if a false conflict has been ruled out, then the conflict cannot be legitimately resolved by courts (legitimately in a legal process sense) by comparing and harmonizing (by picking and choosing from) the competing provisions as enacted by each jurisdiction in exercise of its power. Rather, the harmonization has to take place – for a court, can only legitimately take place – at the level of the competing powers themselves.

To see the point in another way, we can take a cue from a case such as *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997). Even with the remedial enforcement power of Section 5 of the 14th Amendment, Congress did not have the power to refashion the substance of the 1st Amendment² in derogation and diminishment of the power of the States.³ How much more to the point in a case such as the *TFWS* case where, on one hand, Congress has no special supplemental power such as Section 5 of the 14th Amendment and where, on the other hand, Maryland enjoys an express additional power in the 21st Amendment. By making the Sherman Act (Congress's power as exercised) the measure of Maryland's power as such under the 21st Amendment,⁴ the Fourth Circuit contravenes the principles of *Flores* and like cases.

²*E.g.*, 521 U.S. at 519, 117 S. Ct. at 2164: "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is."

³*E.g.*, 521 U.S. at 534, 117 S. Ct. at 2171: "This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."

⁴Anachronistically at that, given that the Sherman Act and the Federal power (and its scope) pursuant to which it was enacted were later modified by the 21st Amendment power pursuant to which Maryland was acting vis-à-vis the Federal Government. *See generally Manuel*, 982 So.2d at 324-25.



Reserved for other occasions:

- discussion whether the cases of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937 (1980) and *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S. Ct. 720 (1987), compelled *this outcome*
- discussion of how the competing powers themselves might be harmonized.

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