

Is There A Constitutional Right To Sell Beer?

Law360, New York (October 19, 2015, 3:58 PM ET) -- Texas, like many states, has a patchwork of complicated, and often inconsistent, alcohol regulatory laws. A few years ago, Texas craft breweries were authorized to sell products to visitors for on-premises consumption. So, if a visitor to a craft brewery in Texas wants to enjoy a pint in a taproom, the brewery can sell it to that visitor provided the pint is consumed on the brewery premises.

Texas breweries, however, cannot sell their products to visitors for off-site consumption. Other alcohol manufacturers in Texas are permitted to sell products to customers for off-site consumption and this inconsistency is the basis of a recent lawsuit that was filed by Deep Ellum Brewing Co.



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On Sept. 14, Deep Ellum filed a lawsuit against the Texas Alcohol and Beverage Commission, claiming the alcohol sales law unconstitutionally discriminates against certain breweries. Specifically, Deep Ellum argues that Texas impermissibly and unconstitutionally creates two classes of alcoholic beverage producers: those that can sell their product on-premises for off-premises consumption and those that cannot do so.

Deep Ellum offers two principal arguments for why certain sections of the Texas Alcoholic Beverage Code are unconstitutional under the Fourteenth Amendment of the U.S. Constitution.

First, Deep Ellum argues that the regulatory laws violate the Equal Protection Clause of the Fourteenth Amendment, which provides that no state shall deny to any person the equal protection of its laws. The Equal Protection Clause requires the government to treat similarly situated persons the same, or precludes it from treating one set of persons differently than others who are similarly situated.

Deep Ellum contends the Texas Alcoholic Beverage Code precludes it from selling its products on-site for off-site consumption and such preclusion violates the Equal Protection Clause because it treats breweries different than other alcohol manufacturers.

The Equal Protection Clause is triggered any time a statute treats certain classes of people differently from others. Courts generally apply one of three standards when examining statutes that involve the classification of persons or entities.

If a suspect classification or fundamental right is involved, the strict scrutiny standard will be applied and the action will be struck down unless the government proves that it is necessary to achieve a compelling interest. If a quasi-suspect classification is involved, the courts will likely require the government to prove that the action is substantially related to an important government interest. If any other classification is involved, the action will be

upheld unless the challenger proves that the action is not rationally related to a legitimate governmental interest.

In the Deep Ellum situation, the U.S. District Court for the Western District of Texas will apply the rational basis test to the equal protection claim because breweries are not a suspect or quasi-suspect class. The burden will be on Deep Ellum to prove the purpose behind classifying breweries differently from other alcohol manufacturers is not legitimate or that it imposes a burden not rationally related to that purpose.

This is generally a very difficult burden for a plaintiff such as Deep Ellum to overcome because most governmental action examined under the rational basis standard is upheld unless it is arbitrary or irrational. The government almost always prevails under a rational basis standard of review; and while I agree with Deep Ellum's position, I have little doubt the government will prevail in this situation as well.

Next, Deep Ellum argues that the Texas Alcoholic Beverage Code violates its substantive due process rights under the Fourteenth Amendment. Substantive due process protects the right to pursue legitimate occupations, free from unreasonable government interference, subject only to regulations that are rationally related to a legitimate government purpose.

Deep Ellum maintains the regulatory statutes denying it the right to sell its products on-site for off-site consumption, while allowing other alcohol manufacturers to do so, creates an arbitrary distinction that is unreasonable and has no relationship, rational or otherwise, to a valid government interest.

Courts have generally applied two tests to determine violations of substantive due process. The nature of the violation determines which test is applied to a particular set of facts. Under the first test, a plaintiff must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. Under the second test, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but, rather, he must prove that the conduct of the state somehow "shocks the conscience."

If a statute is involved in a particular situation, then the deprivation of an identified liberty or property interests test is applied to that particular set of facts. If it is a governmental action situation, then the shocks the conscience test is applied to the particular set of facts.

The Deep Ellum situation involves the Texas Alcoholic Beverage Code, so the U.S. District Court for the Western District of Texas should analyze whether the Texas Alcoholic Beverage Code deprives Deep Ellum of an identified liberty under the Fourteenth Amendment. Substantive due process asks the question of whether the deprivation of a person's life, liberty or property is justified by a sufficient government purpose.

Deep Ellum must first prove there has been a deprivation. Second, Deep Ellum must prove that it was of life, liberty or property. And finally, Deep Ellum must demonstrate that the state of Texas did not have adequate justification for its actions. So, if the Texas Alcoholic Beverage Code is so arbitrary and capricious as to be irrational, the infringement on a constitutionally protected interest may violate substantive due process rights.

Deep Ellum alleges in its complaint that it is being deprived of its right to pursue a business interest, a protected property interest under the Fourteenth Amendment. Naturally, the question becomes whether the inability to sell of Deep Ellum to sell its products for off-site consumption is a business interest independent of its ability to manufacture and sell beer in general. If it is, the analysis becomes whether the state of Texas is justified in prohibiting such.

I am not certain that the sale of beer for off-site consumption is a severable business interest independent from the right to manufacture and sell beer; but, even if it is, it

probably gets scrutinized under the rational basis standard and will be a very difficult burden for Deep Ellum to overcome.

As the U.S. Supreme Court aptly stated in *Nebbia v. New York* in 1934: "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the State's competency."

In the end, I predict that the state of Texas probably prevails on the substantive due process argument. Notwithstanding the merit of the case, since the late 1930s, the Supreme Court has dramatically recoiled from intervening in economic-oriented substantive due process cases. Courts have become overly deferential to state regulation of economic matters, relying on a minimal rational basis to support such.

In a statement issued by Deep Ellum on its website, the company said: "Texas allows every other alcoholic beverage manufacturer to do just that, wineries, distilleries and even brewpubs are allowed to sell their products directly to the end consumer for off-premises consumption. Microbreweries cannot. ... How is this prohibition against microbreweries protecting the welfare, health, peace, temperance or safety of the people of Texas? Long story short, it isn't."

As someone that represents alcohol manufacturers, I completely agree with Deep Ellum's position. And while there may be very little constitutional basis for the claims Deep Ellum makes in its lawsuit, this lawsuit does further enlighten the emerging conversation that many of our state alcohol regulatory laws are dated, inconsistent and in need of modernization.

It will be interesting to see how this case unfolds and whether the judge believes the Texas Alcoholic Beverage Code violates the Fourteenth Amendment to the U.S. Constitution. It will also be interesting to see whether breweries in other states that have similarly prohibitive laws file suit making analogous constitutional arguments.

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