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Mr. Steven G. Frost
Chairman
Uniform Law Commission
Study Committee on Direct-to-Consumer Sales of Wine

RE: Constitutional problems with licensing fulfillment houses

Dear Chairman Frost:

The Uniform Law Commission requested that we provide an in-depth analysis of the constitutional and legal issues surrounding the licensing of fulfillment house.

It's our position that licensing fulfillment houses runs afoul of the Constitution, because it would allow a state to mandate a legal regime over a business that does not have the minimum contacts necessary to establish constitutional jurisdiction in a state.

Introductory analysis

One principle of certainty in American law is that a state cannot impose personal jurisdiction over a party unless there are minimum contacts with the state. If a person or business never purposefully avails itself to the state, it cannot be hauled into the state court system. Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

These legal precepts were developed to protect a person or business from a state hauling them into court without proper legal justification. A Party cannot be hauled before a court unless personal jurisdiction is established. Insurance Corp. of Ireland v. Compaigne des Bauxites de Guinee, 102 S. Ct 2099 (1982).

Typically, a state's ability to establish jurisdiction over a business is based on its own long-arm statutes, or whether the Constitution would permit the state to establish jurisdiction.

State Long-Arm Statutes

States attempt to establish personal jurisdiction over an entity based on a state's long arm statute. If the activities of an entity meet any of the prongs of a long-arm statute, the state has a legitimate case for jurisdiction.

Let's take an example of a long-arm statute and see if under a state's long-arm statute, a fulfillment house is subject to the jurisdiction.

Under Illinois law, 735 ILCS 5/2-209, the state sets forth the conditions in which it can establish jurisdiction over an entity.

Under Illinois law, a person can become subject to jurisdiction based on its actions. For purposes of this discussion, the following relevant activities would subject a person to jurisdiction:

The transaction of any business within this State; the commission of a tortious act; The ownership, use, or possession of any real estate situated in this State; Contracting to insure any person, property or risk located within this State at the time of contracting; The making or performance of any contract or promise substantially connected with this State; The acquisition of ownership, possession or control of any asset or thing of value present within this State when ownership, possession or control was acquired; The breach of any fiduciary duty within this State

Further, under Illinois law a person can become subject to jurisdiction against its person if:

It Is a natural person present within this State when served; Is a natural person domiciled or resident within this State when the cause of action arose, the action was commenced, or process was served; Is a corporation organized under the laws of this State; or Is a natural person or corporation doing business within this State.

Illinois' long-arm statute also allows a court to exercise jurisdiction as permitted by the Constitution.

A fulfillment house performs specific activities on behalf of a winery. A fulfillment house does not direct wine to customers in other states. It can only send wine to customers in other states, if directed to do so by a winery. It takes an order from a winery and places a bottle in a box and readies it for a common carrier to pick up. Except for the state the fulfillment house resides in, it is not performing activities that would lead it to become subject to personal jurisdiction under a typical state long-arm statute. The fulfillment house does not transact business in another state, this is done by the winery, and it cannot ship a replacement if one is needed, unless the winery directs it to do so. Further, the fulfillment house does not contract with anyone in another state. There is no activity performed by an out-of-state fulfillment house that would subject it to jurisdiction under a state long-arm statute.

Under the typical long-arm statute it would seem very difficult to impose jurisdiction over a fulfillment house.

However, the Illinois long-arm statute like the long-arm statutes in other states, would allow the state to impose personal jurisdiction, if it is permitted under the U.S. Constitution.

So, it begs the question, does the Constitution allow a state to impose jurisdiction over an out-of-state fulfillment house?

Constitutional Analysis

The 14th Amendment's Due Process Clause limits a state court's power to impose personal jurisdiction over a nonresident defendant. "[T]he constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established minimum contacts' in the forum state." Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987), quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471 U.S. 474 (1985), quoting International Shoe Co. v. Washington, 326 U.S. 310 (1945).

In applying the minimum contacts test, the Supreme Court in the World-Wide Volkswagen case stated that a consumer bringing the defendant's product into a state was not a sufficient constitutional basis in which to impose personal jurisdiction over a defendant. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

To establish minimum contacts there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471. (1985).

In Asahi Metal the Supreme Court settled an important debate about the minimum contacts principle from World-Wide Volkswagen. Some lower courts interpreted World-Wide Volkswagen to allow the exercise of personal jurisdiction based on a defendant placing their product in the stream of commerce. Other lower courts stated that the Due Process Clause required the defendant's action to be "more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce." 480 U.S. at 110.

The Supreme Court concluded that "The "substantial connection," *Burger King*, 471 U.S. at [471 U.S. 475](#); *McGee*, 355 U.S. at [355 U.S. 223](#), between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an* action of the defendant purposefully directed toward the forum State. *Burger King*, *supra*, at [471 U.S. 476](#); *Keeton v. Hustler Magazine, Inc.*, [465 U.S. 770](#), [465 U.S. 774](#) (1984). The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987)

Supreme Court precedent is clear on what is necessary to establish personal jurisdiction under the Constitution. A business must purposefully avail itself to a state and direct activity towards the marketplace.

A fulfillment house does not purposefully avail itself to the markets in another state. It merely takes direction from a winery to perform a service in the fulfillment house's home state. The fulfillment house does not perform business activities in another state and earns no revenue from contracts with residents of another state.

The Supreme Court held in *Asahi* that "the "substantial connection" between a defendant and the forum State necessary for a finding of minimum contacts must derive from an action purposely directed toward the forum State, and the mere placement of a product into the stream of commerce is not such an act, even if done with an awareness that the stream will sweep the product into the forum State absent additional conduct indicating an intent to serve the forum state market." *Asahi Metal Indus. Co. Ltd. v. Superior Court*, 480 U.S. 102, 480 U.S. 102, 103-04 (1987)

Under the Constitutional standard the Supreme Court set forth, finding the minimum contacts necessary to establish jurisdiction requires the state to demonstrate that the fulfillment house purposefully directed activity towards the forum state. As the fulfillment house is performing a service on behalf of a winery and not itself, and because it is not deriving revenue or contracting with the resident of another state, a state would fail to establish the minimum contacts necessary for the fulfillment house to become subject to jurisdiction in another state.

Conclusion

If this Commission would recommend licensing fulfillment houses, it would recommend a business become licensed in a state where it performs no business activities. Consequentially, a business would be subject to jurisdiction not based on the Constitution, but based on the heavy-handed arm of government telling a business, they need a license for activity that it is not performing in the state. Some states have threatened fulfillment houses to become licensed not by threatening them directly, but by threatening the businesses they work with. It has been a heavy handed and an unconstitutional practice by the states.

One of the touchstones of the Constitution is a check on government overreach, specifically overreach in terms of the government dragging a person into court when the Constitutional does not allow for it.

This Commission if it adopted a licensing scheme for fulfillment houses, would mandate the imposition of jurisdiction and usurp one of the most sacred Constitutional principles of limiting government powers.

We urge this Commission to reject this notion and preserve this sacred Constitutional principle.

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Tom Wark,

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