Opinion No. 51-5373

June 14, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Elfego G. Baca Chief, Liquor Control Division Bureau of Revenue Santa Fe, New Mexico and Mr. J. C. Bergere Director, School Tax Division Bureau of Revenue Santa Fe, New Mexico

*{*52}* In your letter of recent date you asked for my opinion as to the effect of the recent decision of the Supreme Court of the United States in the case of **Schwegmann Brothers, et al., v. Calvert Distillers Corp. and Seagram Distillers Corp.** upon the New Mexico Fair Trade Practice Act, as contained in the provisions of our liquor laws and as it applies to the New Mexico Fair Trade Practice Act relative to the sale of cigarettes.

An examination of that decision reveals that the statute of Louisiana under consideration by the court, being statute 9809.1, et seq., Louisiana General Statutes, is essentially the same statute as §§ 1105-1108, Ch. 51, New Mexico Statutes Annotated, commonly called the "Fair Trade Act." This was enacted by our Legislature in 1937 as Chapter 44, Laws of 1937. Both the New Mexico act and the Louisiana act provide that contracts for the sale or resale of a commodity may provide that the buyer will not resell except at a price stipulated by the vendor. Both laws not only permit a distributor, manufacturer, producer, etc., and retailer, to make a contract fixing a resale price, but provide that once there is a price fixing contract known to a seller it is unfair competition for any seller to make a sale at less than the price stipulated in the contract, even though the seller is not a party to the contract.

The decision of the court held that if a distributor, manufacturer, producer, etc., wanted to agree upon a minimum or resale price he might do so by virtue of the Miller-Tydings Act, enacted in 1937 as an amendment to § 1 of the Sherman Act, but that non-signers to any such agreement are not bound by the resale or minimum price fixed by any such agreement. Thus, non-signers to any fair trade agreements are at liberty to sell products on which a resale price maximum or minimum has been established by some agreement between the distributor, manufacturer, vendor, etc., and the retailer in such agreement, at any price they choose. In effect, this decision voided the fair trade acts as they have been enacted in most of the states, so far as non-signers to any fair trade agreements are concerned. In my opinion it thus voided the Fair Trade Act of New Mexico, Ch, 51, §§ 1105-1109, Ch. 44 Laws of 1937, so far as such laws apply to any non-signer to any fair trade agreement.

In 1939 our Legislature enacted a law establishing trade practices governing the sale of intoxicating liquors. (Laws 1939, Ch. 236, § 1301). This law was amended by the Legislature in 1941 (Laws 1941, Ch. 80, § 6). By the law of 1939 the Legislature particularly sanctioned fair trade agreements with respect to the sale of intoxicating

liquors and declared that any non-signer to any *{*53}* fair trade agreement fixing prices at which such intoxicating liquors could be sold by the retailer is bound by such agreement. The 1941 amendment merely provided a means giving notice to such non-signers of the existence of such fair trade agreements. The essential difference between the fair trade laws affecting the sale of intoxicating liquors and the general fair trade laws then in effect in New Mexico applying to all commodities subject to fair trade laws, was that the law of 1939 prohibited fair trade agreements protecting more than a gross profit of thirty-three and one-third per cent in the retail selling price of alcoholic liquors, except beer and wine. The act of 1939 also declared that concerns from outside the state entering into such fair trade agreements should not be considered as doing business within the State of New Mexico.

Section 1303, Ch. 236, Laws of 1939, further declared that no beer or wine should be sold in the state except under certain conditions as to trademarks, etc., and unless **uniform, standard, minimum fair trade prices be set thereon** * * * Section 7, Ch. 80, Laws of 1941 applied this prohibition to the sale of all alcoholic liquors. This law is presently found in § 903, Ch. 61 N.M.S.A.

In my opinion, if the laws of 1939 and 1941 establishing fair trade prices for the sale of alcoholic liquors had not contained the provisions set forth in § 1303, Ch. 236, Laws 1939, as amended by § 7, Ch. 80, Laws of 1941, being presently § 903, Ch. 61, N.M.S.A., the effect of the Supreme Court decision would be to void fair trade prices governing the sale of intoxicating liquors as to non-signers to any fair trade agreements respecting the sales price of alcoholic liquors.

However, the inclusion of the provisions prohibiting the sale of alcoholic liquors unless uniform, standard, minimum fair trade prices be set thereon and posted, prohibits the sale of intoxicating liquors at retail at less than such prices and requires fair trade prices to be set thereon. The State of New Mexico has the authority to regulate prices of businesses affected with the public interest. While there are some decisions to the contrary in the various states, in cases considering different statutes prescribing minimum prices, in general such regulations have been upheld as constitutional.

The Supreme Court decision did not, in my opinion, vitiate the New Mexico law prohibiting the sale of alcoholic liquors at retail unless uniform, standard, minimum, fair trade prices be set thereon. Moreover, in 1939 the Legislature in Ch. 236, § 1410, Laws of 1939, being § 911, Ch. 61, N.M.S.A., prohibited the sale of spirituous liquors, wines or beers, by wholesalers at less than cost to retailers and prohibited the sale of spirituous liquors, wines or beers, by retailers at less than cost, with certain exceptions not important. The term "cost" to both wholesalers and retailers is clearly defined in that law and includes a minimum mark-up varying as to percentage for spirituous liquors, wines and beers, in both the cases of sales by wholesalers to retailers and sales by retailers. Advertising, offers to sell, or sales of, spirituous liquors, wines or beers, by wholesalers at less than cost, or by retailers at less than cost, as cost is defined in that law, with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or of otherwise injuring a competitor, is said to impair

and prevent free competition, is made contrary to the policy of this state and is declared to be a violation of Chapter 61 of the New Mexico Statutes.

An objection may be made that this law, in defining cost, includes a mark-up amounting to "less than the minimum cost of doing business by the most efficient wholesale liquor dealer" or "retailer," in the appropriate sections of the act applying to each. The act further states that the minimum cost of *{*54}* doing business in the appropriate cases is presumed to be certain percentage factors. The objection that "less than the minimum cost" is meaningless, has been obviated by the court's supplying the word "not" before the word "less" in the statutory definition of cost to carry out the plain legislative intent. (Rust v. Griggs, 113 SW 2d 733).

The recent Supreme Court decision did not touch upon this provision regulating the sale of alcoholic liquors. The State of New Mexico has the authority to regulate the prices of alcoholic liquors as a reasonable exercise of its police powers.

In my opinion, the United States Supreme Court decision in the Schwegmann case did not, in any wise, affect the provisions of § 903, Ch. 61, N.M.S.A., prohibiting the sales of alcoholic liquors by retailers unless uniform, standard, minimum, fair trade prices be set thereon and did not affect the provisions of § 911 of Ch. 61 prohibiting the sale of spirituous liquors, beer or wine, by wholesalers to retailers, or by retailers, at less than cost as defined in that section.

In 1949 the Legislature enacted the Cigarette Fair Trade Practice Act, Laws of 1949, Ch. 175, §§ 3101-3113, Ch. 51 N.M.S.A. This act forbids advertising, offers to sell, or sale of, cigarettes at retail or wholesale with intent to injure competitors or destroy or substantially lessen competition, by either wholesaler or retailer, at less than cost as defined in the act. Cost is clearly defined in that act and includes the cost of doing business, which is presumed to be a definite percentage mark-up of the basic cost of cigarettes to the wholesaler or retailer.

The same statements which have been made as to the authority of the State of New Mexico to regulate prices in businesses affected with the public interest in the exercise of its police powers can be repeated with respect to this law.

In my opinion the Schwegmann case did not affect the minimum prices provided for in the Cigarette Fair Trade Act of 1949 and this law is fully effective and governs the sale of cigarettes at wholesale or retail in this state.

It is presumed that all district attorneys charged with the prosecutions of any violations of either Ch. 61 or Ch. 51, N.M.S.A., and all others charged with the responsibility of enforcing these laws, will take notice of this opinion and will take appropriate steps to enforce the provisions of these laws.