

## Opinion No. 63-47

May 7, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** Mr. Howard Babcock, Chief Division of Liquor Control Capitol Building Santa Fe, New Mexico.

### QUESTION

#### QUESTIONS

1. Must the minimum price, as set in Section 46-9-11, N.M.S.A., 1953 Compilation, be published in the Beverage Journal contemplated in Section 46-9-1, N.M.S.A., 1953 Compilation, in view of the requirements of Section 46-9-3, N.M.S.A., 1953 Compilation?
2. May the Chief of the Division of Liquor Control require, by regulation, that price lists be submitted to him for audit prior to publication in the Beverage Journal?

#### CONCLUSIONS

1. See Analysis.
2. Yes.

### OPINION

#### {\*98} ANALYSIS

The relevant portion of Section 46-9-1, N.M.S.A., 1953 Compilation, reads as follows:

"(d) Notice of the existence {\*99} and terms of fair trade contracts and/or the minimum fair trade prices thereunder, shall be adequate notice under this section if published in any trade paper or trade magazine under the following conditions: . . ."

The relevant portion of Section 46-9-3, N.M.S.A., 1953 Compilation, reads as follows:

"No alcoholic liquor shall be sold in this state . . . unless uniform, standard, minimum fair trade prices be set thereon and posted in accordance with Section 1301, Article 13 (46-9-1) when sold by the package."

It at once becomes clear that prices established by fair trade contracts must be published in the Beverage Journal. This is required by 46-9-1, supra. We think that the phrase "minimum fair trade prices thereunder" can only refer to minimum fair trade

prices established by a valid and subsisting fair trade contract, as provided for in § 46-9-1, supra. The problem arises, however, under § 46-9-3, supra, when no fair trade contracts are in existence. How then can uniform standard minimum prices be set and published? We think the legislature intended the minimums established under § 46-9-11, N.M.S.A., 1953 Compilation, be then published in the Journal to meet the requirements of § 46-9-3, supra. If that section did not mean that these minimums had to be published in the absence of minimums established by contract, there would be no possible way to publish a standard minimum fair trade price as required by that section. Certainly it cannot be said that the statute requires that wholesalers and retailers must enter into fair trade contracts when these firms do not choose to contract, and, if § 46-9-11, supra, minimums, are not published, the requirements of § 46-9-3, supra, cannot be met.

We conclude, therefore, that reading the two sections together, the result is that where fair trade contracts exist, the prices thereunder become the minimum and must be published in the Journal. Where, however, no fair trade contract exists, the minimum established under § 46-9-3, supra, must be published in the Journal.

Your second question is whether the Chief may, by regulation, require that price lists be submitted to him for audit prior to their publication in the Journal. Section 46-2-3, N.M.S.A., 1953 Compilation vests powers in the Chief of the Division of Liquor Control as follows:

"The Bureau, Commissioner of Revenue, Division and Chief of Division shall be vested with the powers enumerated in this Act and with such additional powers as may be necessary to effectuate the same."

It is conceded by all that the Chief may issue and promulgate any regulation necessary to carry out the provisions of the statutes. Sections 46-9-5 and 46-9-6, N.M.S.A., 1953 Compilation, prohibit fair trade contracts which contain a mark-up in excess of a specific limit. To enforce the provisions of these sections, in addition to the provision of Section 46-9-11, supra, it is our opinion that the Chief of the Division may, by regulation, require that price lists be submitted to his office for audit to determine compliance with these sections prior to publication in the Journal.

By: Boston E. Witt

First Assistant Attorney General