

## Opinion No. 70-35

April 6, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** The Honorable Bradford H. Prince New Mexico State Representative 3505 Haines, N.E. Albuquerque, New Mexico

### QUESTIONS

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Does the Director of the Department of Alcoholic Beverage Control have authority to prevent, through rule, directive, or regulation, liquor dealers from advertising "suggested" retail prices of liquor merchandise?

#### ANSWER

Yes.

### OPINION

#### {\*62} ANALYSIS

The Liquor Control Act, Sections 46-1-1 to 46-11-4, N.M.S.A., 1953 Compilation (1969 P.S.), is administered {\*63} by the Department of Alcoholic Beverage Control. The director has the duty to supervise the operations of the department, Section 46-2-11, and is empowered and directed to issue and file as required by law all regulations or orders necessary to implement and enforce any provision of any law administered by the department, Section 46-2-14. Any regulation or order issued by the director is presumed to be a proper implementation of the provisions of the Liquor Control Act administered by the department, Section 46-2-14 (F.).

The Director has adopted, pursuant to his authority under Section 46-2-14, supra, Regulation No. 42 which reads as follows:

No New Mexico liquor licensee, including nonresident licensees, shall promulgate or publish in any news media or in any form, any suggested retail price of their products within the State of New Mexico.

This regulation is adopted to accomplish the intended results of the United States Government's Intoxicating Liquor Regulation 27 C.F.R., Subpart H, Section 5.65, **Prohibited Statements**, 34 Fed. Reg. 20335 (1969), which reads as follows:

(a) Restriction. An advertisement of distilled spirits shall not contain:

(1) Any statement that is false or untrue in any particular or that irrespective of falsity, directly or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific, or technical matter, tends to create a misleading impression.

Regulation No. 42 is intended to prevent retail purchasers from being misled by advertisements of a suggested retail liquor price which would create an illusion of a bargain that does not exist. The retail price of liquor is the price that is actually paid by the retail purchaser and nothing more.

The advertisement of suggested retail prices could also be a method of attempting to avoid the effects of the repeal of the Liquor Fair Trade Act. The liquor dealers could attempt to establish a fair trade price through advertisement of a suggested retail liquor price.

In **Drink, Inc. v. Babcock**, 77 N.M. 277, 421 P.2d 798 (1966) the Supreme Court of New Mexico held that the "fair trade" contract provisions of the Liquor Control Act, Sections 46-9-1 and 46-9-3, were unconstitutional as an improper exercise of the police power of the state. The Liquor Fair Trade Act made it unlawful for anyone to sell alcoholic liquor below fair-trade prices. The Court, however, stated as follows:

"We recognize that the legislature has the power not only to regulate the sale of alcoholic beverages, but to suppress it entirely, and may impose on the liquor industry more stringent regulations than on other businesses."

In **Rocky Mountain Wholesale Co. v. Ponca Wholesale Merchantile, Co.**, 68 N.M. 228 at 231, 360 P.2d 643 (1961) the Court held as follows:

"We think it has been firmly established that a state is free to adopt an economic policy that may reasonably be deemed to promote the public welfare and may enforce that policy by appropriate legislation without violation of the due process so long as such legislation has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory."

Although the manufacture and sale of intoxicating liquors, where permitted, is a lawful business which is fully entitled to protection, it is nevertheless regarded as dangerous to public health, safety, and morals and is thus subject to strict regulation or control by the states under their police power. This has generally been held to include the prohibition or regulation of advertising. Annot. 19 A.L.R.2d 1114, (1951).

The legislature has the power to regulate the advertisement of alcoholic liquor prices. There are no New Mexico decisions exactly in point, however, in **Head v. Board of Examiners**, 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963), the Supreme Court of the United States affirmed the New Mexico Supreme Court's holding that Section 67-7-13 (m), N.M.S.A., 1953 Compilation {\*64} was constitutional. This statute prohibited advertising by any means the quotations of prices of eye glasses and related services. The Court held this was a legitimate exercise of the state's police power relating to the

health, life and safety of their citizens and did not unlawfully burden interstate commerce.

Administrative rules or regulations prohibiting or controlling the advertisement of alcoholic liquors or their prices have generally been upheld, providing the rules or regulations are reasonable and adopted pursuant to statutory authority. The director has the authority to issue regulations or orders prohibiting liquor dealers from advertising "suggested" retail prices for liquor merchandise. This is reasonable and necessary to implement and enforce the law administered by the department.

By: Robert J. Young

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