

Opinion No. 71-49

March 31, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Office of the Attorney General of New Mexico

QUESTIONS

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1. Does Section 67-9-37 (E), NMSA, 1953 Comp. vest the New Mexico State Board of Pharmacy with the power to license and regulate any non-resident person, firm or corporation dispensing or distributing drugs in New Mexico and to impose a reasonable license fee in connection therewith?
2. Does the Interstate Commerce Clause of the United States Constitution prohibit the State from imposing reasonable regulations and license requirements on nonresidents doing interstate business in the State?

CONCLUSION

1. Yes.
2. No.

OPINION

{*68} ANALYSIS

Section 67-9-37, NMSA, 1953 Comp. defines the powers and duties of the Board of Pharmacy. Part (E) of this Section authorizes the Board to:

. . . provide for the licensing of retail pharmacies, wholesale drug dealers, drug manufacturers, hospital pharmacies and the drug rooms of hospitals, nursing home drug facilities, industrial and public health clinics and all places where dangerous drugs are dispensed and provide for the inspection of their facilities and activities; . . .

{*69} This provision clearly gives the New Mexico State Board of Pharmacy power to license resident and non-resident wholesale drug dealers and manufacturers distributing their products in this State.

The general rule in regard to imposing a license fee on certain businesses is stated in 51 **Am. Jur.** 2d, Section 40 at p. 47:

A State's police powers of regulation of certain activities, ordinarily taking the form of an occupation or business, include the power to impose a license charge, commonly designated as a fee, to assist in the procedure of regulation. The fee need not be confined to the exact expense of issuing the license, but may include any reasonably probable cost, direct or incidental, or supervision, regulation, inspection and examination that may be requisite as to the business or occupation for which the license is required.

The next question is, assuming that the fee is reasonable, can a State impose a fee on a non-resident engaged in interstate commerce, if that non-resident is merely "doing business" within the borders of our State?

This question was answered affirmatively in the decision of **Meyers v. Matthews**, 270 Wis. 453, 71 NW 2d 368, 54 ALR 2d 868, app. dismd. 350 U.S. 927, reh den 350 U.S. 977.

The facts in that case involved the power of the State to regulate collection agencies and whether in so regulating such agencies, the State could impose a license fee on a foreign corporation engaged in interstate commerce and "doing business" within the State.

In answering this question affirmatively, the Wisconsin Court stated:

The Wisconsin collection agency law does not impede the flow of interstate commerce by placing upon it an undue burden either as to discriminatory or prohibitive fees or by other discriminatory provisions. The provisions of the statute apply equally to those engaged in intrastate commerce and to those engaged in interstate commerce.

As long as the New Mexico State Board of Pharmacy does not impose a discriminatory fee, any reasonable fee imposed is permissible.

In the leading case of **Union Brokerage Co. v. Jensen**, 322 U.S. 202, 64 S. Ct. 967, 88 L. Ed. 1227, decided by the United States Supreme Court with regard to the question of the effect of the Commerce Clause on the right of a State to impose a license fee on a non-resident "doing business" within the State, the Court stated:

By its own force that Clause does not imply relief to those engaged in interstate or foreign commerce from the duty of paying an appropriate share for the maintenance of the various state governments. Nor does it preclude a State from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration.

As the New Mexico Supreme Court pointed out in **Town of Farmington v. Miller**, 64 N.M. 330, 328, P.2d 589, simply because commerce is interstate in nature does not

automatically mean it cannot be taxed at all. To so hold would, as our Court phrased it, "grant a preference to interstate commerce, a result which this court does not believe the Constitution was ever intended to produce."

For the foregoing reasons, this office concludes that Section 67-9-37 (E), NMSA, 1953 Comp. does authorize the New Mexico State Board of Pharmacy to license, regulate and impose a reasonable license fee on non-resident wholesale drug dealers and manufacturers "doing business" within the State of New Mexico, and that such action will not violate the United States Constitution.

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