

## Opinion No. 43-4402

October 30, 1943

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Honorable Robert W. Reidy, Assistant District Attorney, Albuquerque, New Mexico

I have your letter of October 25, 1943 wherein you state that a question has been submitted to your office by the Brewing Industry Foundation as to whether or not that organization may refuse to sell beer (shut-off) to those liquor retailers who violate the laws of the State of New Mexico. You state further that the Foundation intends to make their own investigations of those retailers who constantly violate the criminal laws of the state, such as, serving liquor to minors, being open on Sunday, serving and selling liquor after hours, and permitting undesirables to frequent their establishments. The Foundation will then give ample warning to the retailer to cease such practice and in the event that he does not a "shut-off" will be invoked. The period of time of the "shut-off" depends upon the offense.

Article 4, Section 38 of the Constitution of New Mexico provides:

"The legislature shall enact laws to prevent trusts, monopolies and combinations in restraint of trade."

Sections 51-1101 to 51-1108 inclusive of the New Mexico 1941 Compilation pertains to business monopolies and trade practices.

Section 51-1101 provides:

"Every contract or combination between individuals, associations or corporations, having for its object or which shall operate to restrict trade or commerce **or control the quantity, price or exchange of any article of manufacture or product of the soil or mine, is hereby declared to be illegal.**"

Section 51-1102 provides:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce of this state, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars (\$ 1,000) or by imprisonment not exceeding one (1) year, or by both said punishments in the discretion of the court."

It is noted that these Sections attempt to prevent any competition, contracts or monopolies that would control the quantity, price or exchange of any article of manufacture or which shall operate to restrict trade or commerce.

The case of Gross, Kelly and Company v. Bibo, 19 N.M. 495, 145 Pac. 480; and Nichols v. Anderson, 43 N.M. 296, 92 Pac. (2d) 781 held that a naked agreement by one party not to engage in business in competition with another party is in contravention of public policy and therefore void, unless such agreement and restriction be incidental to some general or principal transaction. Its main object must not be to stifle competition.

It is stated at 19 R. C. L. 7:

"In its broadest meaning, 'monopoly' signifies the sole power of dealing in an article, or doing a specified thing, either generally or in a particular place."

At 19 R. C. L. 41 it is stated:

"It is often difficult to draw with precision the line between combinations and agreements in partial restraint of trade or competition, and those having for their purpose the suppression of competition, which are condemned by the courts as monopolies, trusts, or conspiracies or as being in restraint of trade. It is not essential that the illegality in the agreement or in its operation amount to a criminal offense. **The main general test should be whether the contract, trust, or combination is monopolistic in purpose or natural tendency.** If it tends to control the given market, it unreasonably affects competition and prices to the detriment of the public and is obnoxious to both the common law and the anti-trust statute."

Our Supreme Court has held, in the case of Alamogordo Implement Co. v. Prendergast, 45 N.M. 40, 109 P. (2d) 254, that a violator has no inherent right to sell intoxicating liquors and liquor business is attended with danger to the community and is subject to regulation or prohibition.

In view of the above principles I cannot see anything in the proposed plan which indicates a purpose to stifle competition or to unlawfully monopolize any part of the trade or commerce of the liquor business or an attempt to control the price of any article. The question is simply whether or not it is legal in the State of New Mexico for the wholesaler or a group of wholesalers to refuse to sell a product to a person or firm which they know will and intends to use the product in violation of the laws of the State of New Mexico. If any wholesaler or group of wholesalers have positive information that the liquor that they would sell to a particular person or firm would be used in furtherance of a continuous practice and policy of violating the criminal statutes of this state, it is my opinion that it would not be illegal to refuse to sell a product under these circumstances. The purpose of our monopoly statutes is not to give criminal violators a cloak to hide behind, but is to protect legal free enterprise and business against unfair business practices.

The plan which you have presented to me is not what was intended to be prohibited by our statutes. I believe it very commendable that the liquor business intends to "clean their own house" and to see that the statutes of this state are complied with by all persons engaged in the liquor business. I, however, wish to point out that these plans

could not be used as a cloak for discriminating against particular persons and if these policies should be invoked against a person who was not and had not been violating our criminal laws pertaining to the sale of liquor, an entirely different question would be presented.

However, if this policy as you set out in your letter should be carried out impartially to achieve the purposes of seeing that the retail establishments in this state comply with our liquor laws, it is my opinion that this plan is legal in all aspects.

It is interesting to note that the Attorney Generals of Arkansas and Louisiana have also ruled that this plan would not violate their monopoly statutes, which are very similar to the ones we have in New Mexico.

Hoping that the above fully answers your questions.

By HARRY L. BIGBEE,

Assistant Attorney General