Opinion No. 63-57

May 27, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Clay Buchanan, Director New Mexico Legislative Council Santa Fe, New Mexico

QUESTION

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1. In view of the holding of the New Mexico Supreme Court in **Skaggs Drug Center v. General Electric Company (63 N.M. 215)** relating to non-signers provisions of the general Fair Trade Act of this state (§ 49-2-2, N.M.S.A., 1953 Compilation) as being unconstitutional, is § 46-9-1 (c) unconstitutional?

2. Is the imposition of criminal penalties in subsection (c) § 46-9-1 for violation of a civil contract unconstitutional in that it is an arbitrary and unreasonable exercise of the police powers of this state?

CONCLUSIONS

1. No.

2. No.

OPINION

*{*118}* **ANALYSIS**

While you have chosen to limit your first question to the narrow one of whether the relevant portion of § 46-9-1, N.M.S.A., 1953 Compilation, is unconstitutional on the basis of only one decision **(Skaggs Drug Center v. General Electric Company),** we prefer to treat the subject more broadly and examine its constitutionality not only on the basis of that decision but also on the basis of all relevant law in the United States. While the subject of Fair Trade legislation has been the cause of a long and continuous line of litigation in the courts throughout the several States, the more narrow subject of Fair Trade legislation as it applies to liquor traffic, while frequently in court, has not had the turbulent and controversial life that Fair Trade generally has had. Our analysis, therefore, will be based only on a consideration of Fair Trade legislation as it relates to the traffic of liquor, inasmuch as the courts universally use different lines of analysis between liquor traffic and general business regulations. Perhaps the best statement for the difference in treatment of these two subjects is stated by the Supreme Court of

North Carolina in **Paul v. Washington, 134 N. Car. 363, 47 S.E.** 2 793, wherein the Court said:

"It is recognized, however, that what might be deprivation of property without due process or infringement of personal liberty against one engaged in a useful trade, is not necessarily such where considered in connection with the property or person of one engaged in the liquor trade."

We think that it may be said without fear of contradiction that a state may, under its police power, regulate the traffic in liquor. It is equally true that the power of the state to regulate and restrict liquor traffic is far broader than the power to regulate and restrict ordinary businesses, because of its effect on the health and welfare of the public. **Ruppert v. Liquor Control Commissioner,** 138 Conn. 669, 88 Atl. 2 338. Although the liquor trade is lawful where permitted, it is admittedly dangerous to public health, safety and morals. **Pabst Brewing Company v. Crenshaw,** 198 U.S. 17, 49 L. Ed. 925, 25 S. Ct. 552; **Beauvoir Club v. State,** *{*119}* 148 Ala. 643, 40 So. 1040; **Carleton v. Rugg,** 149 Mass. 550, 22 N. E. 55. Likewise the power to regulate liquor is an incident of society's right of self-protection, **State v. Curney,** 37 Me. 156, 58 Am. Dec. 782, and rests upon the right of the state to care for the health, morals and welfare of the people. **Eberle v. Mich.,** 232 U.S. 700, 58 L. Ed. 803, 34 S. Ct. 464, and is correlative to the State's duty to support paupers, to protect the community from crime and to confine and maintain the criminal, since the liquor trade is a source of pauperism and crime. **State ex rel. Wilkinson v. Murph,** 237 Ala. 332, 186 So. 487; **State v. Arduno,** 222 Ia. 1, 268 N.W. 179. Consequently, in protecting the people from the evils of intoxicating liquor, the State may exercise large discretion in the means employed. **Ziffrin, Inc. v. Reeves,** 308 U.S. 132, 84 L. Ed. 128, 60 S. Ct. 163. Further, the form of liquor control reflected by the statutes and its wisdom is a matter exclusively within the discretion of the state legislature to decide, subject only to such restrictions as are contained in the Constitution **Trageser v. Grey,** 73 Md. 250, 20 Atl. 905. Our Supreme Court has concurred in these rules. **Rapp v. Venable,** 15 N.M. 509, 110 Pac. 834. Our Supreme Court has also said that where the public health, peace and morals call for the regulation or prohibition of any business, such as intoxicating liquors, it may become a superior public policy of the State so to regulate it, although it does create a monopoly. **Alamogordo Implement Co. v. Prendergast,** 45 N.M. 40, 109 P.2 254.

Likewise, our Supreme Court has indicated that any examination of the constitutionality of a statute must begin with a strong presumption of constitutionality. **State ex rel. Whittier v. Safford,** 28 N.M. 531, 214 Pac. 759. This includes the assumption that the legislature has performed its duty and kept within the bounds fixed by the constitution, and the judiciary will, if possible, give effect to the legislative intent unless clearly and palpably in conflict with the Constitution. **Asplund v. Alarid,** 29 N.M. 129, 219 Pac. 786, **In Re Santiallan,** 47 N.M. 140.

Having set forth the general rules that govern the regulation of the liquor trade, we turn now to the specific question of whether the State may regulate the traffic of liquor through price regulation. It is beyond question that the liquor trade is affected with the

public interest. **Alamogordo Implement Co. v. Prendergast,** supra; **Floeck v. Bureau of Revenue,** 44 N.M. 194, 100 P.2 225. Can then the legislature regulate the industry through price regulation? You have pointed to one decision in this jurisdiction that has held price regulation of other commodities unconstitutional. If this decision is applicable to the present situation, then our task is an easy one.

In **Skaggs Drug Center v. General Electric Company,** 63 N.M. 215, our Supreme Court ruled unconstitutional that portion of the general Fair Trade laws of this state (§§ 49-2-1 et seq., N.M.S.A., 1953 Compilation) pertaining to the so-called "non-signer" clause, which clause had the effect of requiring the person not a party to a Fair Trade contract to observe the prices established under those contracts. The Court invalidated that portion of the statutes on the specific ground that it was an arbitrary and unreasonable exercise of the police power without any substantial relation to the public health, safety and general welfare, insofar as it concerned persons who were not parties to the contracts. In so deciding the Court commented as follows at *{*120}* page 223:

"It should be borne in mind, with respect to the Arnold case, that there this court determined that the business concerned directly affected public health and it is, therefore, not directly analogous to the present case and is not authority upon which the court should rule in the instant case. It should not require any argument whatsoever to point out that the sale of electric irons having a General Electric label cannot in any sense affect the public health."

Is this the same situation here? Is the liquor trade a business that cannot affect the public health? We think not. We think that no one can reasonably argue that a business that "is a source of pauperism and crime," as the Supreme Courts of Alabama and Iowa have characterized it, is not affected with the public interest. We think, therefore, that the **Skaggs** decision is not analogous to the present question and is not authority upon which a decision of constitutionality of the liquor regulation statutes can be based. On the contrary, we think that the case of **Arnold v. Board of Barber Examiners,** 45 N.M. 57, 109 P. 2 779 is more relevant here. In that case our Court upheld minimum price fixing statutes relating to the barber industry on the basis that it was an industry affected with the public interest.

We turn now to the state of the law throughout the United States. Our research reveals that of the 11 states that have specifically ruled on price regulation of the liquor industry, nine have upheld the statutes (Arkansas, California, Connecticut, Kentucky, Maryland, Massachusetts, New Jersey, Ohio and Rhode Island) and two have voided them (Florida and Louisiana). Two other jurisdictions have invalidated their liquor control statutes but have done so on technical grounds (Kansas and Oklahoma).

The most frequent complaint made against price regulation of the liquor trade is that it is an unreasonable and arbitrary exercise of the police power in that it has no reasonable relation to the objects sought to be achieved, and, therefore, it violates due process. This contention was best answered in **Schartz v. Kelly,** 99 Atl. 2 89 (Conn.) wherein the Courts said:

"In such a consideration it is not for the court to pass upon the economic advantages or disadvantages of the statute. It is not for the court to say whether the legislation is wise. The court's function is to determine if the object of the enactment is within the power of the legislature, and if so, whether the particular statute bears a reasonable and substantial relation to the object sought to be accomplished and is neither arbitrary nor discriminatory."

(citations)

Our liquor control statutes do not contain the precise objects sought to be accomplished, but as the Court said in the **Schartz** case:

"Although the statute here in question does not contain a statement of the objects sought to be accomplished, the purposes which the general assembly had in mind in adopting it are easily discernible. **They were both to promote temperance in the *{*121}* consumption of intoxicating liquor and, by stabilizing the industry, to encourage observance of the liquor control act by those who are permitted to sell liquor not to be consumed on the premises.** It may reasonably be assumed that without the establishment of a minimum retail price for branded liquor, price wars among retailers are apt to occur. The cutting of prices, which occurs during such wars, may induce persons to purchase and, therefore, consume more liquor than they would if higher prices were maintained. **Moreover, the cut-throat competition which ensues is apt to induce the retailers to commit such refraction of law as selling to minors and keeping open after hours to withstand the economic pressure. To prevent the occurrence of such conditions promotes public health, safety and welfare..** . . * * * Legislation, even though it is within the police power, may be violative of due process if it is discriminatory in that it deals differently with different classes of persons without the existence of some natural and substantial difference germane to the subject and purposes of the legislation between those within the class included and those it leaves untouched. (Citations). . . The fact that the act treats those who deal in intoxicating liquors differently from those that deal in other commodities cannot be a basis for such a claim since liquor traffic is a possible source of danger to the public, which is not inherent to other businesses. Those who engage in it constitute a class which is subject to regulations which might not be properly applicable to others." (Emphasis supplied)

Accord: **Butler Oak Tavern v. Division of Alcoholic Beverage Control,** 20 N.J. 373, 120 Atl. 2d 24; **Gaine v. Burnett,** 122 N.J.L. 39, 4 Atl. 2d 37; **Gipson v. Morley,** 217 Ark. 560, 233 S.W. 2d 79, **Beckanstin v. Liquor Control Commission,** 140 Conn. 185, 99 Atl. 2d 119; **Dundalk v. Tawes,** 197 Md. 446, 79 Atl. 2d 525; **Supreme Malt Products Co. v. Alcoholic Beverages Control Commission** 133 N.E. 2d 775 (Mass); **Blackman v. Board of Liquor Control,** 95 Ohio App. 177, 113 N.E. 2d 893; **Nocera Bros. Liquor Marketing, Inc. v. Liquor Control Hearing Board,** 100 Atl. 2d 652 (R.I.); **Reeves v. Simons,** 289 Ky. 793, 160 S.W. 2d 149; **Allied Properties v. Board of Equalization,** 338 P.2d 1013 (Calif).

Perhaps the case most cited as being contrary to the above position is a 1949 Louisiana case, **Schwegmann Bros. v. Louisiana Board of Alcoholic Beverage Control,** 216 La. 148, 43 So. 2 248. The Court in that case invalidated a price fixing statute regulating liquor on the basis that it violated due process in that it was arbitrary as having no substantial relation to the objects sought to be accomplished. The Court pointed out and relied heavily upon the fact that prices were not fixed on beer or liquor served by the drink, and, therefore, the objects sought could not be achieved. This analysis of the problem has been the subject of severe criticism by other courts. As the Supreme Court of Ohio in **Blackman v. Board of Liquor Control,** supra, said:

"With all deference to the majority opinion in the Schwegmann case, which is a strong presentation of the rules controlling a valid exercise of the police power within the concept of constitutional *{*122}* law, we are more in accord with the conclusion reached by the dissenting opinion of McCleb, Justice, wherein he concludes that the legislation involved in the action should be supported. Both opinions concede that the police power to be exercised by the legislature may not infringe upon any inalienable constitutional rights secured by the state constitution or by the 14th Amendment of the Constitution of the United States."

Likewise, the Supreme Court of California said in **Allied Properties v. Board of Equalization,** supra:

"Schwegmann Bros. v. Louisiana Board of Alcoholic Beverage Control (citation) . . . have (has) held price regulation to be unconstitutional. They are against the weight of authority moreover, we deem the reasoning of the majority cases better. . ."

In addition, the California Court in the **Allied Properties** case, supra, noting that the Louisiana court placed much emphasis on the fact that beer and liquor by the drink was not price regulated, commented as follows:

"The fact that the legislature has not seen fit to apply fair trade requirements to the sale of beer and over the bar drinks does not invalidate the restrictions which the legislature did impose. . . The contention . . . ignores the well established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach."

Indeed, the contention is almost always advanced that the legislature has gone too far in its regulation, not that it has not gone far enough.

The only other case striking down this type of statute is **Webbs Cut Rate v. Scarborough Drug Co.,** 150 Fla. 754, 9 So. 2d 913 which follows much the same theory as the **Schwegmann** case.

It is interesting and important to note that the **Schwegmann** case, supra, did not unequivocally state that the State could not regulate prices of the liquor industry. In concluding the opinion in that case the Court commented:

"It is to be clearly understood that we are not holding that the legislature cannot under any circumstance adopt legislation, pursuant to the state's police power relating to the establishing of prices on intoxicants with the view and purpose of regulating the liquor traffic and protecting the general welfare of the people. The broad question is not presented by this case."

So, even the most often cited case for the rule of law that these types of statutes are invalid, does not really stand for that rule.

We think that the majority of the cases in this area uphold these statutes and that they are the better reasoned ones and, further, that the **Schwegmann** case has been discredited.

It is, therefore, our opinion that the provisions of § 46-9-1, supra, are not unconstitutional on the basis of the **Skaggs** case or upon the basis of the law generally.

Your second question is answered in the negative. If Fair Trade regulation of liquor is constitutional *{*123}* and within the proper exercise of the police power, and we have so held, the legislature may impose criminal sanctions to require compliance. **McCormick and Co. v. Brown,** 286 U.S. 131, 76 L. Ed. 1017, 52 S. Ct. 552.