



STATE OF KANSAS

## Office of the Attorney General

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**Curt T. Schneider**  
Attorney General

January 20, 1976

ATTORNEY GENERAL OPINION NO. 76- 20

The Honorable Wesley H. Sowers  
State Senator  
3rd Floor - State Capitol Building  
Topeka, Kansas 66612

Re: Intoxicating Liquors and Beverages--Miscellaneous  
Provisions--Regulation of Sales Prices of Alcoholic  
Liquor

Synopsis: The provisions of the Kansas Liquor Control Act which provide for the determination of minimum liquor prices by the Alcoholic Beverage Control Board of Review, which cannot be characterized as fair trade legislation, were not affected by the recent amendment of the Sherman Antitrust Act concerning fair trade laws.

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Dear Senator Sowers:

You have requested an opinion of this office as to what effect, if any, the recent federal legislation eliminating fair trade practices and pricing will have on the control of liquor prices by the State Alcoholic Beverage Control Board of Review.

The legislation to which you refer is H. 6971, which was signed into law by the President on December 12, 1975. It amended section one of the Sherman Antitrust Act (15 United States Code § 1) which before being amended read as follows:

"Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. Provided,

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That nothing contained in this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State . . . in which such resale is to be made, or to which the commodity is to be transported for such resale."

In essence 15 U.S.C. § 1, as it was written, made price-fixing illegal as being in restraint of trade, if such price fixing operated as restraint on interstate commerce but exempted, in the proviso, state fair trade laws. See 54 Am.Jur.2d, *Monopolies, Etc.*, § 45. Fair trade laws permit agreements between producers and distributors of goods, and vendees which require a fixed resale price. See, 32 Am.Jur 26., *Fair Trade Laws*, § 1.

H. 6971, in striking from 15 U.S.C. § 1 the fair trade law proviso, ceased to protect agreements made under these state laws from challenge under federal antitrust legislation. More precisely, H. 6971 will, considering the broad definition of interstate commerce traditionally given by courts in antitrust cases, render completely void the fair trade now remaining in twenty-one states or limit such law to the barest of intrastate transactions.

What effect the passage of H. 6971 will have on the Kansas Liquor Control Act, more specifically the minimum price legislation contained in K.S.A. 41-1111 to K.S.A. 41-1120, depends on whether these statutes are fair trade laws, thus exempted from application of the Sherman Act for this reason, and more importantly whether these statutes are subject to the Sherman Act, with or without the fair trade law proviso, in light of the Twenty-first Amendment of the United States Constitution.

With the adoption of the Twenty-first Amendment, the Federal Government yielded much of its authority under the commerce clause of the Constitution to regulate the interstate traffic in intoxicating liquor. *State Board of Equalization v. Youngs Market Co.*, 299 U.S. 59, 81 L. Ed. 38, 57 S. Ct. 77. The Amendment circumscribes the power of Congress by prohibiting the transportation or importation

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of intoxicating liquors into any state, for use and delivery therein, in violation of state law. This renders interstate shipment of liquor subject to state law and regulation as soon as the shipment passes within the state's borders, divesting the liquor of its interstate character. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 16 L. Ed. 2d 336, 86 S. Ct. 1254. Thus, due to the operation of the Twenty-first Amendment, this State's liquor price control of legislation is not in restraint of trade and therefore it is not now, nor has it ever been, subject to the Sherman Antitrust Act.

Further the establishment of minimum resale prices for licensed distributors and licensed retailers by the Alcoholic Beverage Control Board of Review, under authority delegated by the Kansas Legislature, has never been in violation of the Sherman Antitrust Act, since the Act forbids only those trade restraints which are created by private individuals or corporations and not valid governmental action. *Eastern R. Presidents Conference v. Noerr Motors Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523.

While at this point it may be academic, it should also be mentioned that even though K.S.A. 41-1111 to K.S.A. 41-1120 do provide for fixed resale prices at the wholesale and retail levels, these statutes cannot be characterized as fair trade legislation. Here manufacturer-distillers do not by the use of contracts with distributors and retailers vertically fix the resale price of their merchandise. Instead, manufacturers are required to sell their merchandise to Kansas distributors at a price which is "no higher than the lowest price" for which the same merchandise is sold to distributors anywhere in the continental United States. K.S.A. 41-1112. From that price the Board of Review is required to determine minimum distributor and minimum retail sales prices using guidelines set out by the Legislature in K.S.A. 41-1116. Thus this legislation has never operated as a fair trade law.

Based on these reasons, it is my opinion that the recent amendment to the Sherman Antitrust Act has no effect on the provisions of the Kansas Liquor Control which provide for the establishment of minimum liquor prices by the Alcoholic Beverage Board of Review.

Yours very truly,

  
CURT T. SCHNEIDER  
Attorney General

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