



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 86- 114

John A. Lamb, Director
Alcoholic Beverage Control Division
Kansas Department of Revenue
700 Jackson Street
Topeka, Kansas 66612

Re: Intoxicating Liquors and Beverages -- Miscellaneous
Provisions -- Constitutionality of Affirmation
Provisions

Synopsis: Kansas is one of 21 states that currently requires affirmation and price posting by all suppliers of liquor who sell their products to distributors (wholesalers) in the state. Price posting is a requirement that each supplier notify Alcoholic Beverage Control of the price to be charged for each item to be sold in the state. Affirmation is a sworn statement that the prices as posted are at the same level as the lowest prices offered to wholesalers in any other state. The statement also serves as an agreement not to discriminate among Kansas distributors in terms of prices or other services.

On June 3, 1986, the United States Supreme Court held that New York's price affirmation laws were unconstitutional because they placed a substantial burden on interstate commerce. In that the price affirmation laws of Kansas and New York are virtually identical, it is our opinion that Kansas affirmation laws relating to pricing in any other state is unconstitutional. Furthermore,

enforcement of this interstate affirmation should cease immediately.

The Supreme Court's decision did not address intrastate affirmation or posting. It is our opinion that intrastate affirmation and intrastate posting should continue to be enforced. This will ensure that no discrimination among Kansas wholesalers will occur. Cited herein: K.S.A. 1985 Supp. 41-1101; K.S.A. 41-1111; 41-1112; K.A.R. 14-4-7; K.A.R. 14-4-11 (1985).

* * *

Dear Mr. Lamb:

As Director of Alcoholic Beverage Control for the State of Kansas, you request our opinion concerning the Commerce Clause of the Constitution of the United States. Specifically, you are concerned with interstate price affirmation and enforcement of current Kansas law.

The Kansas laws relevant to price affirmation are K.S.A. 41-1111, K.S.A. 41-1112 and K.A.R. 14-4-11(a)(1). K.A.R. 14-4-11(a)(1) (1985) states:

"On the 15th day of each month, every manufacturer or vendor filing prices pursuant to K.S.A. 1983 Supp. 41-1101, and whose prices are required to be filed under the provisions of K.A.R. 14-4-7, shall file the current price and F.O.B. point of shipment of each item of alcoholic liquor. The filed price shall be the price for which the item will be sold by the manufacturer or vendor to licensed distributors during the second calendar month immediately following the month in which the price is required to be filed. The filed price shall be no more than the lowest price for which the item will be sold in any other state in the continental United States by the manufacturer of the item or by any vendor of the item who sells the item under any contract or arrangement with the manufacturer, during the period in which the filing is in effect. Each

manufacturer or vendor shall submit, with the field prices, an affirmation that each filed price is in compliance with this paragraph." (Emphasis added.)

K.S.A. 41-1111 states in part:

"In the public interest and in order to promote the orderly sale and distribution of alcoholic liquor, to foster temperance and to promote the public welfare, the legislature finds: (a) That sales prices of alcoholic liquor sold by manufacturers and others to distributors licensed in this state should be no higher than the lowest price for which the same is sold to distributors anywhere in the continental United States;"

Finally, K.S.A. 41-1112 states:

"The prices filed by manufacturers and others authorized to sell alcoholic liquors to licensed distributors, pursuant to subsection (1) of K.S.A. 41-1101, shall be the current prices, F.O.B. point of shipment, and said price as filed by each manufacturer or vendor shall be as low as the lowest price for which the item is sold anywhere in any state in the continental United States by such manufacturer or vendor: Provided, That in determining the lowest price for which an item of alcoholic liquor is sold in any such state there shall be taken into consideration all advertising, depletion and promotional allowances and rebates of every kind whatsoever made to purchasers in such state by the vendor."

Similar to the above-cited Kansas laws, section 101-b(3)(d) of the Alcoholic Beverage Control Law for the State of New York requires any distiller or agent that files a schedule of prices (price posting) to include with that schedule an affirmation (a sworn statement) that:

"the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such [distiller] to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state [or state agency] which owns and operates retail liquor stores [during the month covered by the schedule]."

On June 3, 1986, the United States Supreme Court ruled in Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986), that the New York law quoted above was unconstitutional as violative of the Commerce Clause of the Constitution of the United States.

Prior to the Brown-Forman decision, the Kansas Supreme Court and the United States Supreme Court had held the interstate affirmation laws constitutional. Laird & Company v. Cheney, 196 Kan. 675 (1966) and Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966).

K.A.R. 14-5-11(a) (1) (1985), K.S.A. 41-1111, in part, and K.S.A. 41-1112, all as cited above, are virtually identical to the unconstitutional New York law. For this reason it is our opinion that Brown-Forman, supra, renders the interstate affirmation laws of Kansas unconstitutional. It is our further opinion that since the interstate price affirmation laws are unconstitutional, the state should cease enforcement of the interstate affirmation laws immediately. Law which is determined unconstitutional is void. See, e.g., Marbury v. Madison, 1 Cranch 157 (1803).

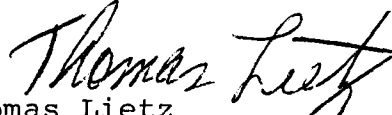
However, the sweep of Brown-Forman, supra, did not address posting and intrastate affirmation. K.S.A. 1985 Supp. 41-1101 mandates that no discrimination among Kansas wholesalers shall occur (affirmation), and that pricing lists (posting) shall be provided to the Director. K.A.R. 14-4-7 regulates intrastate posting and affirmation. These laws pertaining to price posting and intrastate affirmation should continue to be enforced. The Court addressed this matter in Brown-Forman, supra, stating "a state may seek lower prices for its consumers, . . . but may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess." Id., p. 4569.

In conclusion, the interstate affirmation laws of Kansas have been rendered unconstitutional by the United States Supreme Court's action in striking down similar (if not identical) New York law. The enforcement of these laws should cease immediately. The enforcement of intrastate affirmation and posting laws should continue.

Very truly yours,



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