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ATTORNEY GENERAL OPINION NO. 89- 34

The Honorable Wint Winter, Jr.
State Senator, Second District
State Capitol, Room 120-S
Topeka, Kansas

Re: Intoxicating Liquors and Beverages--Miscellaneous
Provisions--Discrimination in Sales, Services or
Prices Unlawful

Synopsis: The quantity discount prohibition of K.A.R.
14-14-11 constitutes a regulation imposed on the
alcoholic beverage industry by the state itself and
is therefore not subject to federal antitrust
laws. Cited herein: K.S.A. 1988 Supp. 41-210;
K.S.A. 41-211; K.S.A. 1988 Supp. 41-702; 41-703;
41-729; 41-1101; K.A.R. 14-14-11 (Jan. 7, 1988); 15
U.S.C. §§1, 13.

* * *

Dear Senator Winter:

You request our opinion regarding the legality of an Alcoholic Beverage Control Division (ABC) regulation in so far as it prohibits distributors of alcoholic beverages from offering quantity discounts to retailers. While not specifically stated, we believe you are concerned that this may be violative of the antitrust laws.

K.A.R. 14-14-11 (Jan. 7, 1988) provides in part:

"(a) No manufacturer of alcoholic
liquor, holding a manufacturer's license

issued by the director and no manufacturer of alcoholic liquor outside of this state manufacturing alcoholic liquors for sale and distribution within the state and no licensed distributor within the state, their agents, salesmen or representatives shall, directly or indirectly, offer, give or furnish any gifts, prizes, coupons, premiums, rebates, quantity discounts, entertainment decorations, services of any employee, including errands and administrative services or any other inducement or thing of value of any kind to a licensed retailer or to an applicant for a retail liquor license who has submitted an application to the director, except as provided in Article 10." (Emphasis added.)

The history clause of this regulation states that it is implementing provisions of K.S.A. 1988 Supp. 41-702, 41-703 and 41-1101. These statutes generally prohibit manufacturers and distributors from offering gifts and other things of value to retailers, and from discriminating in the form of offering different prices to different retailers. The statute authorizing adoption of ABC regulations provides for the proposal and adoption of "such rules and regulations as necessary to carry out the intent and purpose of this act. . . . It is intended by this act that the director of alcoholic beverage control shall have broad discretionary powers to govern the traffic in alcoholic liquors and to enforce strictly all the provisions of this act in the interest of . . . honest dealings in such manner as generally will promote the public health and welfare." K.S.A. 1988 Supp. 41-210. Further, K.S.A. 41-211 provides that "[t]he rules and regulations adopted . . . shall include rules and regulations . . . providing for such other details as are necessary or convenient to the administration and enforcement of this act." The regulation in question prohibits giving quantity discounts to retailers. This prohibition is intended to and does facilitate enforcement of the statutes prohibiting discriminatory pricing and unlawful inducements. It is therefore our opinion this prohibition is authorized by the statutes and is contained in a lawfully adopted regulation.

We now look to the legality of the prohibition in light of the antitrust laws. Generally speaking, the purpose of the Sherman Antitrust Act, 15 U.S.C. §1 et seq. is "to

prevent or suppress devices or practices which create monopolies or restrain trade or commerce by suppressing or restricting competition and obstructing the course of trade." 54 Am.Jur.2d Monopolies, Restraints of Trade, and Unfair Trade Practices, §1 (1971). "The central thrust of the antitrust laws is preserving competition in those markets where competitive policy has not been displaced by direct governmental regulation or exemption." II Areeda & Turner, Antitrust Law §401 (1978). The Sherman Act does not, however, prohibit official action by, or directed by, the state. Patrick v. Burget, 486 U.S. _____, 108 S.Ct. 1658, 1662, 100 L.Ed.2d 83, 95 (1988); Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Thus, activities which might otherwise constitute antitrust violations may be authorized, under the "state action immunity doctrine," if performed by the state. In a recent decision, the United States Court of Appeals for the Seventh Circuit explains the state immunity doctrine:

"The Supreme Court has stressed that the rationale underlying the state action doctrine is the federalist interpretation that the antitrust laws do not apply to actions of the sovereign states themselves. See Lopatka, The State of 'State Action' Antitrust Immunity: A Progress Report, 46 La.L.Rev. 941, 943 (1986). Because Congress never revealed an intent to make the states subject to antitrust limitations, the Court refused to infer this purpose. Parker, 317 U.S. at 351, 63 S.Ct. at 313-14; Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56 & n. 9, 105 S.Ct. 1721, 1724 & n. 9, 85 L.Ed.2d 36 (1985). In other words, the antitrust laws do not apply to actions of the state which restrain trade, and therefore do not preempt laws authorizing such state action.

"Thus, state action immunity is not dependent on the wisdom or extent of state regulation, only on whether the state is actually acting to displace free competition. See P. Areeda and H. Hovenkamp, Antitrust Law (1987 Supp.) ¶212.1f (hereinafter 'Areeda and Hovenkamp'). A court's analysis under

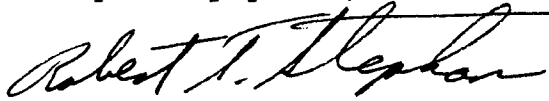
the doctrine therefore focuses on whether it may be sufficiently confident that the state, rather than a private party hiding behind a 'gauzy cloak' of state involvement, Midcal, 445 U.S. at 105. 100 S.Ct. at 943, is the relevant actor." Fuchs v. Rural Elec. Convenience Co-op Inc., 858 F.2d 1210, 1214 (7th Cir. 1988). (Footnotes omitted.)

The United States District Court for the District of Kansas in State v. Lamb, Case No. 87-4059-R (1987), held the retail alcoholic liquor minimum price markup statutes violative of section one of the Sherman Act, 15 U.S.C. §1. The court found the state immunity doctrine inapplicable because the markup policy was not actively supervised by the state. "The State simply authorizes price setting by private industry and then enforces those prices." Id., at p. 5. See also 324 Liquor Corp. v. Duffy, 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987). In other words, the state was merely tacking a minimum markup percentage on to prices which were actually fixed by private industry; the liquor distributors were fixing the prices at which retailers were required to sell. By contrast, the quantity discount prohibition does not authorize distributors to set resale prices. Retailers are restricted only by the statutory provision prohibiting a sale at less than the cost of acquisition. K.S.A. 1988 Supp. 41-729. Thus, in our opinion the quantity discount prohibition is action taken by the state itself (by the director of ABC pursuant to statutory authority) and is therefore not restricted by the antitrust laws.

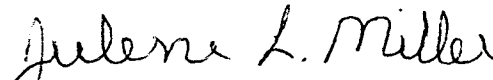
By prohibiting quantity discounts to retailers, the state is eliminating a form of price discrimination which prefers large retailers, with extra buying power, over smaller retail operations. The Robinson-Patman Act, 15 U.S.C. §13, has been held to operate in a similar fashion. F.T.C. v. Motton Salt Co., 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196, 1202 (1947). See also Grand Union Co. v. F.T.C., 300 F.2d 92, 98 (2d Cir. 1962); Naifeh v. Ronson Art Metal Works, 117 F.Supp. 690, 694 (W.D. Ok. 1953); Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1326 (6th Cir. 1983). While the United States Supreme Court may no longer adhere to the theory that quantity discounts not based on cost justification are necessarily prohibited by the Robinson-Patman Act, we believe the cases cited above support the conclusion that the state is authorized to prohibit such discounts.

In conclusion, we believe the quantity discount prohibition of K.A.R. 14-14-11 constitutes a regulation imposed on the alcoholic beverage industry by the state itself and is therefore not subject to federal antitrust laws.

Very truly yours,



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RTS:JLM:jm