

1982 WL 189268 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

April 27, 1982

\*1 The Honorable Phil P. Leventis  
Senator  
Post Office Box 142  
Columbia, South Carolina 29202

Dear Senator Leventis:

You have asked the opinion of this office whether a proposed bill [attached] is constitutional. The bill essentially requires a wholesaler of malt beverages to register with the South Carolina Alcoholic Beverage Control Commission a master list of the wholesale prices of all brands of beverages handled by the wholesaler. The wholesaler is proscribed from selling at a price different from that registered unless the Commission approves an amendment to the price. [The proposed bill does not define malt beverages; however, it is apparently intended to apply only to malt beverages as they are defined in the present Alcoholic Beverage Control Act. See, § 61-3-20(1) and § 61-9-10]. It is the opinion of this office that such a bill would probably be constitutional.

Pursuant to the authority of the 21st Amendment to the U. S. Constitution, many states have enacted regulatory schemes which in some manner fix or supervise the price that alcoholic beverages may be sold. The states' power to regulate the prices of intoxicating liquors has been challenged in numerous ways upon various grounds, and generally has been upheld as a valid exercise of police power. 45 Am.Jur.2d, Section 237, Intoxicating Liquors, 14 A.L.R.2d 639 Anno. 'State Power To Regulate Price of Intoxicating Liquors'; 96 A.L.R.3d 609 Anno. 'State Fixing of Minimum Price for Liquor.' Primarily, it has been submitted '... price fixing is a reasonable and appropriate means for promoting temperance and creating orderly conditions in the marketing of alcoholic beverages.' 96 A.L.R.3d, supra at 642.

It must be noted, however, that a recent U. S. Supreme Court decision constrains somewhat the states' rather broad powers under the 21st Amendment to regulate the price alcoholic liquors may be sold. In [California Liquor Dealers v. MidCal. Aluminum](#), 445 U.S. 97 (1980), California's resale price maintenance scheme was deemed to be violative of the Sherman Anti-Trust Act [15 U.S.C.A. §§ 1 et seq.]. The California scheme authorized producers of alcoholic beverages to enter into 'fair trade contracts' with wholesalers which in effect permitted the producer to fix the price at which beverages would be sold at retail. The Court noted that such 'fair trade contracts' constituted classic resale price maintenance which consistently has been held to be an illegal restraint of trade in violation of the Sherman Anti-Trust Act. The Court also found insufficient state involvement to exempt the retail price maintenance schedule as state action. See, i.e., [Parker v. Brown](#), 317 U.S. 341 (1943). An additional conclusion was reached by the Court that the power of the state under the 21st Amendment must be harmonized with the commerce clause of the U. S. Constitution [Article I, § 8, cl. 3]. See also, [Rice v. ABC Appeal's Board](#), 21 Cal.3d 431, 579 P.2d 476; but compare, [Morgan v. Division of Liquor Control](#), 664 F.2d 353 (2d Cir. 1981).

\*2 As is obvious, there exists many distinctions in the regulatory price scheme proposed in the bill and the California resale scheme determined to violate the Sherman Anti-Trust Act. The proposed scheme clearly does not involve a resale price maintenance nor does it authorize or require any wholesaler to contract, agree or conspire with any other to fix prices. [See, 15 U.S.C.A. § 1]. The scheme does not direct vertical or horizontal price fixing; it merely requires the wholesaler, licensed in South Carolina, to register a wholesale price and not deviate therefrom except with the approval of the Commission. Another substantial distinction presented in the proposed bill is that the State Alcoholic Beverage Control Commission is required to review and approve any proposed changes in the scheduled price; accordingly, the wholesaler is not free to fix any price he elects.

Thus, while it appears the proposed bill is not violative of the commerce clause or any other provision of the U. S. Constitution, such conclusion is not free from doubt.

Very truly yours,

Edwin E. Evans  
Senior Assistant Attorney General

#### **ATTACHMENT**

##### **560-8-3-19 POSTING MASTER PRICE LIST.**

(1) Every licensed wholesale dealer shall keep posted with the ABC Commission at all times, a master price list of all brands, and sizes, both military and civilian, handled by such wholesale dealer and the prices posted by such licensed wholesaler shall not be amended without the written permission of the Commission.

(2) All posted prices shall include federal and state taxes. No licensed wholesale dealer shall make any sale of malt beverages for any price other than the price posted for such beverage, either for more than such posted price or for less than such price, except that sales may be made less state tax to persons entitled to exemption from such tax.

(3) A wholesaler may not change or alter the prices posted for any brand pursuant to paragraph (1) of this regulation within a period of less than 180 days from the date of the previous posting of such brand. The Commission may grant a waiver of the 180 day period when extenuating circumstances are shown and subject to the following conditions:

(a) In the event a decrease in posted prices is requested, the wholesaler shall submit with such request, substantial documentation indicating to the satisfaction of the Commission justification for such decrease.

(b) In the event an increase in posted prices is requested, the wholesaler shall submit with such request, substantial documentation indicating to the satisfaction of the ABC Commission justification for such increase.

(4) In the event a waiver in writing is granted by the ABC Commission pursuant to section (3) of this regulation, no subsequent increase or decrease in posted prices shall be permitted within a period of less than 180 days from the date of the approval and waiver by the ABC Commission unless a subsequent waiver is obtained from the ABC Commission in the same manner and under the same conditions herein specified.

**\*3** (5) It shall be a violation of this regulation for any wholesaler to sell or any retailer to knowingly purchase any malt beverages at any price not in accordance with the provisions of this regulation.

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