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**Retroactivity - Though Subsequent Case Found Price Affirmation Statutes Unconstitutional, Prior Opinion Would Be Applied: Stroh Brewery Co. v. Director of the New Mexico Department of Alcoholic Beverage Control**

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# RETROACTIVITY—Though Subsequent Case Found Price Affirmation Statutes Unconstitutional, Prior Opinion Would Be Applied: *Stroh Brewery Co. v. Director of the New Mexico Department of Alcoholic Beverage Control*

## I. INTRODUCTION

In *Stroh Brewery Co. v. Director of the New Mexico Department of Alcoholic Beverage Control*,<sup>1</sup> the New Mexico Supreme Court found that its prior ruling which confirmed a price affirmation statute was constitutional and was the controlling law of the case, and that a subsequent United States Supreme Court opinion invalidating all price affirmation statutes did not have a retroactive effect. *Stroh Brewery*, therefore, was required to pay damages to the Director of the Department of Alcoholic Beverage Control (“Director”) pursuant to a preliminary injunction bond.<sup>2</sup> The court further determined that a retroactive application of the United States Supreme Court holding in *Healy v. Beer Institute* (“*Healy II*”)<sup>3</sup> to the *Stroh* case would not promote any purpose of the Commerce Clause of the Constitution. Singling out one brewer by applying *Healy II* retroactively would be inequitable and subject the state of New Mexico to liability.<sup>4</sup> This Note examines price affirmation laws and the theory of retroactivity as discussed in the *Stroh* case, as well as its negative implications on the law of New Mexico.<sup>5</sup>

## II. STATEMENT OF THE CASE

In 1979, *Stroh’s* predecessor<sup>6</sup> sought declaratory and injunctive relief based on its belief that a price affirmation requirement of the 1979 Discrimination in Selling Act<sup>7</sup> (“1979 Act”) violated the Commerce Clause of the United States Constitution.<sup>8</sup> The trial court temporarily enjoined

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1. 112 N.M. 468, 816 P.2d 1090 (1991).

2. *Id.*

3. 491 U.S. 324 (1989) [hereinafter “*Healy II*”].

4. *Stroh*, 112 N.M. 468, 816 P.2d 1090.

5. The U.S. Supreme Court effectively overruled *Stroh* in *Harper v. Va. Dept. of Taxation*, No. 91-794 (June 18, 1993) (LEXIS, Genfed library). In *Harper*, which was decided as this Note went to print, the Court said that its interpretation of federal law “is the controlling interpretation and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of this rule.” *Id.* at 8. The *Harper* court adopted a position similar to that of Justice Montgomery’s dissent in *Stroh*.

6. *Stroh Brewery Company*, along with other brewers, joined the action in *United States Brewer’s Ass’n v. Director of N.M. Dep’t of Alcoholic Beverage Control*, 100 N.M. 216, 668 P.2d 1093 (1983). By the time of the 1984 appeal to the United States Supreme Court, *United States Brewers Ass’n v. Rodriguez*, 465 U.S. 1093 (1984), *Stroh Brewery* acquired the *United States Brewer’s Association* assets and was substituted as plaintiff-appellant in the appeal before the New Mexico Supreme Court.

7. N.M. STAT. ANN. §§ 60-12-1 to -10 (1978), repealed by 1981 N.M. Laws ch. 39, § 128.

8. *Stroh*, 112 N.M. at 469, 816 P.2d at 1091.

the Director from enforcing the law, requiring Stroh's predecessor to execute a bond agreeing to pay the difference in the price at which it would have sold its beer under the statute and the amount at which it did, with interest, if the statute was later found to be valid.<sup>9</sup> In 1980, the court granted summary judgment in favor of the Director, upholding the constitutionality of the 1979 law by relying on *Joseph E. Seagram & Sons v. Hostetter*.<sup>10</sup> Stroh's predecessor appealed the summary judgment. While the appeal was pending, the New Mexico Legislature repealed the 1979 Act<sup>11</sup> and enacted a newer 1981 Act.<sup>12</sup> The 1979 Act required that liquor prices to wholesalers in New Mexico during any month be no higher than the lowest price sold to any wholesaler in any other state in the previous month. The 1981 Act eliminated the previous month affirmation requirement for a simultaneous one; the supplier had to attest that the price in New Mexico was no higher than that being charged at that moment anywhere else in the country.<sup>13</sup>

On July 21, 1983, the New Mexico Supreme Court affirmed the trial court's summary judgment in *United States Brewer's Association v. Director of N.M. Department of Alcoholic Beverage Control* finding that the trial court correctly applied the *Seagram* holding.<sup>14</sup> Stroh, now substituted as plaintiff-appellant in the action, appealed to the United States Supreme Court, but the action was dismissed.<sup>15</sup> On June 14, 1985, the legislature amended the 1981 Act to exclude beer from the price affirmation requirement.<sup>16</sup> The damage liability period applicable to Stroh therefore ran from June 15, 1979, to February 21, 1985.<sup>17</sup>

While *United States Brewer's Association* was on remand, the United States Supreme Court overruled *Seagram*, finding all price affirmation statutes unconstitutional.<sup>18</sup> The parties both moved again for summary judgment. Stroh argued that the 1979 law was now invalid and Stroh therefore had no obligation under the bond. The Director argued that the New Mexico Supreme Court decision which upheld the 1979 law was the law of the case and the Director was entitled to damages from 1979 to 1985.<sup>19</sup> The trial court granted summary judgment in favor of the Director, and Stroh appealed to the New Mexico Supreme Court.<sup>20</sup> The Supreme Court held that the decisions regarding retroactivity recently clarified in *James B. Beam Distilling Co. v. Georgia*<sup>21</sup> did not apply to

9. *Id.*

10. 384 U.S. 35 (1966).

11. 1981 N.M. Laws ch. 39, § 128.

12. *Id.* §§ 1-130.

13. *Stroh*, 112 N.M. at 469, 816 P.2d at 1091.

14. *United States Brewer's Ass'n v. Director of N.M. Dep't of Alcoholic Beverage Control*, 100 N.M. at 220-21, 668 P.2d at 1097-98 (1983).

15. *Stroh*, 112 N.M. at 470, 816 P.2d at 1092.

16. 1985 N.M. Laws ch. 5, §§ 1-5.

17. *Stroh*, 112 N.M. at 470, 816 P.2d at 1092.

18. *Healy II*, 491 U.S. at 343.

19. *Stroh*, 112 N.M. at 470-71, 816 P.2d at 1092-93.

20. *Id.* at 471, 816 P.2d at 1093.

21. 111 S. Ct. 2439 (1991).

this case. It instead affirmed that the applicable law was that of *United States Brewer's Association*, and upheld the summary judgement.<sup>22</sup>

### III. HISTORICAL ANALYSIS OF PRICE AFFIRMATION LAWS AND RETROACTIVITY

#### A. Price Affirmation Laws

Following the fall of prohibition with the twenty-first amendment, states were able to determine the circumstances by which alcohol was sold to retailers and consumers within the state.<sup>23</sup> The majority of states eventually regulated wholesale liquor prices, requiring that suppliers guarantee that their prices in that state were at least as low as prices in any other state.<sup>24</sup> The United States Supreme Court found that such price affirmation laws were constitutional on their face in *Joseph E. Seagram & Sons v. Hostetter*.<sup>25</sup>

The price affirmation portion of the applicable 1979 and 1981 Acts required that an alcohol distributor file an affirmation as to the comparative price at which he sold alcohol in New Mexico versus other states.<sup>26</sup> Stroh's predecessor in litigation argued that this requirement violated the Commerce Clause of the Constitution, and brought the initial action in this matter.<sup>27</sup> The trial court relied on the decision in *Seagram*, initially granting summary judgement for the Director.<sup>28</sup> The United States Supreme Court, however, subsequently found all price affirmation statutes unconstitutional in *Healy II*, giving rise to the problem addressed by the *Stroh* court.

*Seagram* had upheld New York's retroactive price affirmation law.<sup>29</sup> In July 1983, the New Mexico Supreme Court held that the trial court correctly applied the *Seagram* decision.<sup>30</sup> In the six years following the *United States Brewer's Association* decision, the United States Supreme Court decided three important cases which potentially affected Stroh's position. First, in *Healy v. United States Brewer's Association*,<sup>31</sup> the United States Supreme Court upheld a decision invalidating a Connecticut price affirmation statute which required distributors to file price affirmations at the beginning of every month.<sup>32</sup> Second, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,<sup>33</sup> though dealing

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22. *Stroh*, 112 N.M. at 474, 816 P.2d at 1096.

23. U.S. CONST. amend. XXI, §§ 1-2.

24. Thomas E. Rutledge, *The Questionable Viability of the Des Moines Warranty in Light of Brown-Forman Corp. v. New York*, 78 Ky. L.J. 209, 210 (1990).

25. 384 U.S. 35 (1966).

26. *Stroh*, 112 N.M. at 469, 816 P.2d at 1091.

27. See *supra* note 6.

28. *Stroh*, 112 N.M. at 469, 816 P.2d at 1091.

29. *United States Brewer's Ass'n*, 100 N.M. at 220-21, 668 P.2d at 1097-98.

30. *Id.*

31. 464 U.S. 909 (1983) [hereinafter "*Healy I*"].

32. *Id.*

33. 476 U.S. 573 (1986).

with a "prospective" act,<sup>34</sup> the Supreme Court indicated that all price affirmation statutes would be invalid.<sup>35</sup> This indication was made explicit in the third and most crucial case, *Healy II*. In *Healy II*, the United States Supreme Court expressly overruled *Seagram* and declared all price affirmation statutes unconstitutional.<sup>36</sup> Thus, the applicability of these recent decisions to the *Stroh* case arose.

### B. Retroactivity

The New Mexico Supreme Court found no guidance within *Healy II* indicating that the decision was to be applied retroactively; therefore, the court decided the question of retroactivity for itself.<sup>37</sup> Though the New Mexico Supreme Court considered the question of retroactivity in *Lopez v. Maez*,<sup>38</sup> it applied federal retroactivity standards to the *Stroh* case.<sup>39</sup> The *Stroh* case relied heavily on a United States Supreme Court case, *Chevron Oil Co. v. Huson*.<sup>40</sup>

In *Chevron*, the United States Supreme Court specifically set out the following three factors to determine whether a decision should be given retroactive effect: 1) Does the decision establish a new principle of law by overruling clear past precedent on which litigants relied, or an issue of first impression which was not foreshadowed; 2) Would retroactive application advance the purpose of the rule; and 3) Would an inequity be imposed on the parties if the law were applied retroactively.<sup>41</sup>

In *Chevron*, the respondent had reasonably relied on previous decisions, and therefore the United States Supreme Court found that retroactive application of a superseding case would be unfair.<sup>42</sup> The *Stroh* court used the *Chevron* test to determine whether *Healy II* should be applied retroactively.<sup>43</sup> The court determined that because *Healy II* established a new principle of law,<sup>44</sup> retroactive application would not advance any

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34. The *Brown-Foreman* case dealt with a statute requiring a seller to file price affirmation at the beginning of each calendar month; the court considered this to be "prospective" in nature. *Stroh*, 112 N.M. at 470, 816 P.2d at 1092 n.7.

35. The Court wrote: "Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." *Brown-Foreman*, 476 U.S. at 580 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935)).

36. *Healy II*, 491 U.S. at 343.

37. *Stroh*, 112 N.M. at 471, 816 P.2d at 1093.

38. 98 N.M. 625, 651 P.2d 1269 (1982).

39. *Stroh*, 112 N.M. at 471, 816 P.2d at 1093. *Lopez* determined that if the application of a "new law imposes significant new duties and conditions and takes away previously existing rights, then the law should be applied prospectively." *Lopez*, 98 N.M. at 632, 651 P.2d at 1276. The rule in *Lopez* was held to be prospective because it would impose significant liabilities on those who felt they had been following the law. *Id.* The *Lopez* case created a new duty when the breach of an existing duty (i.e., selling alcohol to an intoxicated person) was the proximate cause of a plaintiff's injury. *Id.*

40. 404 U.S. 97 (1971).

41. *Id.* at 106.

42. *Id.* at 107.

43. *Stroh*, 112 N.M. at 472, 816 P.2d at 1094.

44. *Id.*

purpose of the Commerce Clause,<sup>45</sup> and such application would produce inequitable results and subject the State of New Mexico to liability.<sup>46</sup>

The New Mexico Supreme Court, however, chose to ignore the retroactive implications of the recent United States Supreme Court case, *James B. Beam Distilling Co. v. Georgia* ("Beam").<sup>47</sup> *Beam* held that a prior ruling invalidating a tax scheme similar to that of the New Mexico Acts would be applied retroactively to a claim whose facts antedated its decision.<sup>48</sup> The court in *Beam* determined that the law in *Bacchus Imports, Ltd. v. Dias*<sup>49</sup> should be applied retroactively, allowing an out of state manufacturer of bourbon to receive a refund for taxes paid under a statute invalidated by the *Bacchus* decision.<sup>50</sup> Significantly, the *Beam* decision does *not* rely on the *Chevron* test, finding the issue of retroactive application to be clear.<sup>51</sup> Justice Souter, joined by Justice Stevens, concluded that a rule of law applied to litigants in one case must be applied to all others not barred by procedural requirements or *res judicata*.<sup>52</sup> Justice White, concurring, maintained that there was no precedent for applying a new rule only to the parties of the case, and should not be allowed on the basis of *stare decisis*.<sup>53</sup> Justice Blackmun, with whom Justice Marshall and Justice Scalia concurred, felt that not applying a "newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication."<sup>54</sup> The majority in *Stroh*, along with the concurring opinion, took special care to emphasize that *Beam* was inapplicable to that case.<sup>55</sup>

#### IV. ANALYSIS OF STROH

##### A. *The Chevron Test*

Applying the first prong of the *Chevron* test, the New Mexico Supreme Court found that *Healy II* invalidated all price affirmation statutes as unconstitutional, and therefore established a new principle of law.<sup>56</sup> In making the determination whether the second prong of the test was fulfilled, the court looked to the practical effects of the retroactive application of *Healy II*.<sup>57</sup> The court reasoned that the damage<sup>58</sup> of applying

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45. *Id.* at 473, 816 P.2d at 1095.

46. *Id.* at 473-74, 816 P.2d at 1095-96.

47. 111 S. Ct. 2439 (1991).

48. *Id.* at 2441.

49. 468 U.S. 263 (1984).

50. *See Beam*, 111 S. Ct. at 2446.

51. *Id.*

52. *Id.*

53. *Id.* at 2448-49.

54. *Id.* at 2449.

55. *Stroh Brewery Co. v. Director of the N.M. Dep't of Alcoholic Beverage Control*, 112 N.M. 468, 474, 816 P.2d 1090, 1096 (1991).

56. *Id.* at 472, 816 P.2d at 1094.

57. *Id.* at 473, 816 P.2d at 1095.

58. The court defined the damage as the balkanization of states against brewers attempting to sell their products in interstate commerce, and the "price gridlock" of one state interfering with another state's pricing laws. *Id.*

the rule in *Seagram* would not be alleviated nor prevented in the future by applying *Healy II* retroactively.<sup>59</sup> This reasoning is not as obvious as with the prior prong. The court further felt that allowing Stroh the benefit of a retroactive application of *Healy II* would be unfair to other brewers who complied with the 1979 Act.<sup>60</sup> Additionally, the Director might be accused of unfair dealing with respect to other brewers, subjecting the state of New Mexico to liability.<sup>61</sup> The New Mexico Supreme Court therefore found that based on the *Chevron* test, *Healy II* should not be given retroactive effect, and affirmed the trial court's determination.<sup>62</sup>

It is interesting to note, however, that in *Chevron* the respondent's injuries occurred three years prior to the decision in question.<sup>63</sup> The *Chevron* respondent could not reasonably have foreseen the change in law.<sup>64</sup> Conversely, the Stroh Brewery continuously believed that the price affirmation law was unconstitutional, a belief that became justified when the Supreme Court invalidated all such laws in *Healy II*. The *Stroh* court could have decided the case differently and applied *Healy II* retroactively because Stroh *expected* the change in law and thus met the requirement of *Chevron's* first prong.<sup>65</sup>

As to the second prong of the test, the Commerce Clause forbids such price affirmation statutes as expressed in *Healy II*.<sup>66</sup> It also seems that the retroactive application of the decision would essentially have no effect on furthering or retarding its operation. Thus, the *Healy II* decision arguably does not meet the second prong of the *Chevron* test.

The third prong of the *Chevron* test deals with the potentially inequitable results to a party of retroactive application of a law. The *Stroh* court particularly seems to have misapplied this prong. In actuality, inequitable results seem to have arisen with the non-retroactive application of the *Healy II* decision. Stroh suffered, being penalized for its ultimately correct constitutional belief, while the Director gained "damages" pursuant to the injunctive bond he would not otherwise have been able to collect by the provisions of the 1979 and 1981 Acts.<sup>67</sup> Furthermore, the wholesalers who intervened in the Stroh action benefitted from the decision at Stroh's expense, receiving money from the injunction bond they would not have been entitled to collect without joining this lawsuit.<sup>68</sup> The concern of the *Stroh* majority that retroactive application of the *Healy II* doctrine would subject the State of New Mexico to liability to other brewers who complied with the provisions of the Acts<sup>69</sup> may or may not be of real concern.

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59. *Id.*

60. *See id.*

61. *Id.* at 474, 816 P.2d at 1096.

62. *Id.*

63. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105 (1971).

64. *Id.* at 107.

65. *Stroh*, 112 N.M. at 481, 816 P.2d at 1103 (Montgomery, J., dissenting).

66. *Id.*

67. *Id.* at 477, 816 P.2d at 1099 (Montgomery, J., dissenting).

68. *Id.*

69. *Id.* at 474, 816 P.2d at 1096.

Those parties voluntarily settled with the Director,<sup>70</sup> and would never have had to pay anything close to the \$18 million in damages Stroh owed because of its injunctive bond.

### B. *Applicability of James B. Beam Distilling Co. v. Georgia*

The majority of the court further found that the recent United States Supreme Court decision in *Beam* was inapplicable to the *Stroh* case.<sup>71</sup> In a special concurrence with the decision, Justice Franchini asserted that *Beam* is inapplicable because the factual situation is distinct.<sup>72</sup> Franchini distinguished *Beam* from *Stroh* for two reasons: First, nothing in *Healy II* indicates that it should be applied retroactively. Second, *Beam's* assertion that the law should be applied to all similar litigants unless barred by procedural requirements or res judicata<sup>73</sup> does not apply because Stroh had been subject to the *United States Brewer's Association* decision,<sup>74</sup> which was the controlling law of this case. Despite the *Beam* Court's rejection of the *Chevron* test,<sup>75</sup> Justice Franchini continues to consider the test valid as applied to this case.<sup>76</sup>

Justice Montgomery, however, in his dissent, pointed out that decisions interpreting the Constitution are generally given retroactive effect,<sup>77</sup> and the *Beam* decision requires a result other than the one reached by the majority. Six of nine justices in the *Beam* decision determined that the *Bacchus* decision should be applied retroactively, with two justices determining they must promote fairness to similar litigants and maintain the principle of *stare decisis*, while three others felt *all* constitutional decisions should be applied retroactively.<sup>78</sup>

## V. IMPLICATIONS OF *STROH*

The New Mexico Supreme Court has apparently determined that it will uphold the law of the case doctrine in all situations, regardless of the circumstances. This is unfortunate because the doctrine of retroactivity is crucial in upholding the integrity of the judicial system. As Justice Blackmun expressed in *Beam*, "because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself."<sup>79</sup> Certainly, the New Mexico Supreme Court seems to have destroyed the retroactivity doctrine as it is applied against

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70. *Id.* at 482, 816 P.2d at 1104 (Montgomery, J., dissenting).

71. *Id.* at 474, 816 P.2d at 1096.

72. *See id.* at 475, 816 P.2d at 1097.

73. *Beam*, 111 S. Ct. at 2446.

74. *United States Brewer's Ass'n v. Director of N.M. Dep't of Alcoholic Beverage Control*, 100 N.M. 216, 668 P.2d 1093 (1983).

75. *Beam*, 111 S. Ct. at 2446.

76. *Stroh*, 112 N.M. at 475, 816 P.2d at 1097.

77. *Id.* at 480, 816 P.2d at 1102 (Montgomery, J., dissenting) (referring to *Beam* at 2443).

78. *Id.*

79. *Beam*, 111 S. Ct. at 2450.

the state because of its fear that the state might incur liability for not having enforced previously applicable laws. Justice Montgomery in his dissent does not believe the state could incur liability where brewers settled their potential liability with the state to avoid continued litigation.<sup>80</sup> A settlement where the state had no authority to collect money except via an injunction bond would not "give rise to liability on the part of the state or otherwise result in inequitable consequences to other parties."<sup>81</sup> The other brewers may have waived their right to sue by not previously challenging the law because they could have joined Stroh in its suit.

## VI. CONCLUSION

The *Stroh* court held that their prior ruling was the law of the case, and the Stroh company had to pay approximately \$18 million in damages to the Director of the New Mexico Department of Alcoholic Beverage Control on their injunction bond. The court found that the United States Supreme Court decision in *Healy II* should not be applied retroactively. Furthermore, the court felt that the State of New Mexico could be held liable to the other brewers who followed the original law. Those brewers settled their liability with the state, however, and the distributors who joined in action with the Director suffered no damage. The results may be considered unjust, and in the future, litigants may be wary of bringing a case against the state on constitutional issues they feel secure will be overturned.

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80. *Stroh*, 112 N.M. at 482, 816 P.2d at 1104 (Montgomery, J., dissenting).

81. *Id.*