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Intoxicating Liquors—Price Control—Fair Trade and Minimum Markups

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INTOXICATING LIQUORS—PRICE CONTROL—FAIR TRADE AND MINIMUM MARKUPS*—The sale of alcoholic liquor¹ in New Mexico is regulated by an intricate legal patchwork based primarily on the state's police power.² Since the whole problem of liquor control involves divergent standards and interests,³ an attempt at clarification is warranted. This comment undertakes to consider the validity of certain aspects of New Mexico's Liquor Control Act⁴ on the basis of New Mexico judicial precedent.⁵ So limiting the area of consideration is a valid approach, because each state is free to treat the problem independently and is not compelled to rely on foreign precedent.⁶

* N.M. Stat. Ann. §§ 46-9-1, -11 (1953, Supp. 1963).

1. In New Mexico, "alcoholic liquors" means any beverage (excluding medicinal bitters) that contains more than one-half of one per cent alcohol. N.M. Stat. Ann. § 46-1-1 (1953, Supp. 1963). The word "liquor" will be used in this comment for this class of beverage.

2. See Liquor Control Act, N.M. Stat. Ann. §§ 46-1-1 to 46-11-4 (1953, Supp. 1963); Division of Liquor Control, Bureau of Revenue, New Mexico Liquor Laws and Regulations (1959); Dunsford, *State Monopoly and Price-Fixing in Retail Liquor Distribution*, 1962 Wis. L. Rev. 454; Annot., 14 A.L.R.2d 699 (1950).

3.

Contemporary regulatory schemes, which in a majority of the states restrict price competition at the retail level, are artifacts of an era which was searching for a compromise between the viewpoints of powerful minorities: one with an almost religious revulsion against distilled spirits in any form, another with equally intense convictions against sumptuary legislation. With prohibition tried and discarded, there was common agreement in the 1930's that the egregious evils of the tied house, indiscriminate advertising, underage trade, and political corruption must not be permitted to return. But an impasse, reminiscent of the 19th century dispute, was met on the larger issue of what part the law should play in enforcing temperance. What emerged as a consensus was never adequately defined for purposes of implementation, and perhaps in the nature of things could not be.

Dunsford, *op. cit. supra* note 2, at 482-83. See also Pierce, *Some Aspects of Liquor Control in California*, 39 Calif. L. Rev. 82, 88 (1951).

4. N.M. Stat. Ann. §§ 46-1-1 to 46-11-4 (1953, Supp. 1963).

5. This comment will be limited to a discussion of the validity of the fair trade and minimum markup provisions of the Liquor Control Act. It will not cover the licensing situation in New Mexico with which there are many problems particularly in Bernalillo County. See Dunsford, *op. cit. supra* note 2, at 482. Nor will it touch on the problems raised in view of the commerce and equal protection clauses of the federal constitution or the Sherman Anti-Trust Act.

6. This is apparent from the wide variety of liquor laws among the fifty states. Generally, they may be divided into the following categories: (1) absolute prohibition (one state)—Mississippi; (2) state monopoly (seventeen states)—Alabama, Idaho, Iowa, Maine, Michigan, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Virginia, Vermont, Washington, West Virginia, and Wyoming; (3) fixed price with mandatory markup (nine states)—Arkansas, Florida, Georgia, Kentucky, Louisiana, New Mexico, Oklahoma, Rhode Island, and Tennessee; (4) mandatory fair trade (eleven states)—California, Connecticut, Delaware, Hawaii, Illinois, Kansas, Massachusetts, Minnesota, Nebraska, and New York; (5) permissive fair

The fair trade provision of the Liquor Control Act is found in section 46-9-1, New Mexico Statutes Annotated.⁷ It provides that any contract relating to the sale or resale of liquor shall not be deemed in violation of any law or policy of New Mexico, because it is a fair trade contract.⁸ Further, selling at a price less than that stipulated in a fair trade contract, whether the person so selling "is or is not a party to such contract,^[9] is unfair competition and is a violation of this act."¹⁰

trade (six states)—Arizona, Colorado, Indiana, Nevada, North Dakota, and Wisconsin; (6) mandatory wholesale price fixing (three states)—Maryland, Missouri, and South Dakota; (7) no price control (two states)—Alaska and Texas; and (8) maximum price control (one state)—South Carolina.

"There is no inherent power in a citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States." Yarbrough v. Montoya, 54 N.M. 91, 95, 214 P.2d 769, 771 (1950).

See the following cases for representative approaches that other state courts have taken: Allied Properties v. Board of Equalization, 338 P.2d 1013 (1st Dist. Ct. App. 1959) (both opinions), *aff'd*, 53 Cal. 2d 141, 346 P.2d 737 (1959); Scarborough v. Webb's Cut Rate Drug Co., 150 Fla. 754, 8 So. 2d 913 (1942); State *ex rel.* Anderson v. Mermis, 187 Kan. 611, 358 P.2d 936 (1961); Schwegmann Bros. v. Louisiana Bd. of Alcoholic Beverage Control, 216 La. 148, 43 So. 2d 248 (1949); Supreme Malt Products Co. v. Alcoholic Beverages Control Comm'n, 334 Mass. 59, 133 N.E.2d 775 (1956); Terry Carpenter, Inc. v. Nebraska Liquor Control Comm'n, 175 Neb. 26, 120 N.W.2d 374 (1963); Gaine v. Burnett, 122 N.J.L. 39, 4 A.2d 37 (1939); Pompei Winery, Inc. v. Board of Liquor Control, 167 Ohio St. 61, 146 N.E.2d 430 (1957), *affirming* 77 Ohio L. Abs. 292, 149 N.E.2d 733 (1956).

7. N.M. Stat. Ann. § 46-9-1 (1953). For the chronology of this law see N.M. Laws 1939, ch. 236, § 1301; N.M. Laws 1941, ch. 80, § 6.

8. The fair trade section allows the producer or owner of branded or trade-marked liquor to fix a price in a contract for the sale and resale of the liquor. This contract is a fair trade contract. Under the section, the producer or owner only needs one such contract with one party to bring the section into play. This agreement with a single party is sufficient to bind all the other parties (the non-signers) in the state who handle this brand of liquor and who have notice of the contract to observe the prices set in this fair trade contract. The section provides, *inter alia*, that every liquor dealer in New Mexico must receive notice of the terms of all fair trade contracts. N.M. Stat. Ann. § 46-9-1(d)(2) (1953). It is a crime to sell liquor in violation of the terms of such a fair trade contract. N.M. Stat. Ann. §§ 46-9-1(c), 46-10-19 (1953). See note 10 *infra*.

Any party to the contract (distiller, wholesaler, or retailer) may insist that a liquor sales contract be a fair trade contract. Or any group or organization of retailers or wholesalers may insist that any given liquor sales contract be a fair trade contract. N.M. Stat. Ann. §§ 46-9-1, -4 (1953). See note 50 *infra*. Thus, in effect, there is a minimum retail price set by the distiller by his first contract with a New Mexico party that determines the retail price of all liquor of his brand sold in New Mexico by any other party, even though they had no connection with the original fair trade contract.

9. How a party that "is not a party to such contract" is bound is explained in note 8 *supra*.

10. N.M. Stat. Ann. § 46-9-1(c) (1953). N.M. Stat. Ann. § 46-10-19 (1953) provides:

The violation of any provision of this act or of any valid rule or regulation promulgated under the provisions of this act . . . shall be a misdemeanor, and upon conviction thereof, any person shall be punished by a fine of not more than

Section 46-9-11 contains the Act's "minimum markup" provisions.¹¹ It prohibits any sale¹² of liquor at less than cost with intent to divert trade from or to injure a competitor. The statute declares that to do so impairs and prevents free competition, is contrary to the public policy of New Mexico, and thus is a violation of this section.¹³ Cost is defined so as to include a minimum markup of 12.5 per cent for wholesalers and 38.8 per cent for retailers over the cost of the liquor to them.¹⁴

The validity of these two statutes should be considered in view of two recent New Mexico Supreme Court decisions. An examination of the minimum markup¹⁵ provisions of the Cigarette Fair Trade Practices Act,¹⁶ as construed in *Rocky Mountain Wholesale Co. v. Ponca Wholesale Mercantile Co.*,¹⁷ is helpful in considering the minimum markup section (46-9-11) of the Liquor Control Act.

In *Rocky Mountain*, the court held that the provisions of the Cigarette Fair Trade Practices Act¹⁸ denying to wholesalers the right to sell cigarettes below cost ("cost" including a minimum

three hundred dollars [\$300] or by confinement in jail not more than seven [7] months or by both such fine and imprisonment: Provided that if a corporation be convicted of such a violation it shall be punished by a fine of not more than one thousand dollars [\$1000].

11. N.M. Stat. Ann. § 46-9-11 (Supp. 1963). For the chronology of this law see N.M. Laws 1939, ch. 236, § 1410; N.M. Laws 1963, ch. 258, § 2. See note 15 *infra* for a discussion of how a minimum markup law operates.

Beer, wine, and ale have different markups than other alcoholic liquors. N.M. Stat. Ann. § 46-9-11 (Supp. 1963).

12. There are a few special sales, *e.g.*, those of damaged liquor, which by specific provision in the section may ignore its effect. N.M. Stat. Ann. § 46-9-11C (Supp. 1963).

13. N.M. Stat. Ann. § 46-9-11B (Supp. 1963).

14. N.M. Stat. Ann. §§ 46-9-11A (5), (7) (Supp. 1963).

15. A minimum markup law is an exercise of the police power of the state to prevent predatory trade practices. Under such a law, cost is defined as the cost of the goods to the party involved plus a certain percentage of the cost of goods figure. This percentage supposedly approximates the minimum overhead that the reasonable businessman would have to add to his cost of goods to make a profit. Selling below this statutorily defined cost is deemed a violation of the law.

The law presumes that if a party sells below the cost, he is doing so for the purpose of injuring a competitor and lessening competition. Under certain conditions, the party may reduce the statutorily defined cost by showing that he actually can operate with a lower overhead.

16. N.M. Stat. Ann. §§ 49-3-1 to -13 (1953).

In spite of this act's name, it is a minimum markup law (like § 46-9-11 of the Liquor Control Act) rather than a "fair trade" law (like § 46-9-1 of the Liquor Control Act).

17. 68 N.M. 228, 360 P.2d 643, *appeal dismissed*, 368 U.S. 31 (1961). The appeal was dismissed for lack of a substantial federal question.

18. N.M. Stat. Ann. §§ 49-3-1 to -13 (1953).

markup¹⁹) represents a "reasonable attempt by the state, in the interest of the general welfare to protect free competition and bears a reasonable relation to the legislative purpose."²⁰

In the minimum markup section of both the Cigarette Fair Trade Practices Act and the Liquor Control Act the statement of purpose concerns business practices, with no indication that the provisions are concerned with the inherent dangers of cigarettes or liquor to the public health, morals, or safety.²¹ In *Rocky Mountain*, the court said that New Mexico is free to adopt an economic policy so long as it does not violate due process by being arbitrary or discriminatory.²² This is the holding on which the precedent value of *Rocky Mountain* to support the minimum markup provisions of the Liquor Control Act may be questioned.

Laws that prohibit sales below cost are designed to prevent the cut throat competition that puts one's competitors out of business.²³ The Cigarette Fair Trade Practices Act prohibits such sales by defining cost to include a minimum markup over the cost of the cigarettes to the wholesaler of 2.75 per cent²⁴ and to the retailer of eight per cent.²⁵ Wholesalers and retailers may reduce these figures by showing an actual lower overhead.²⁶ These requirements seem reasonably aimed to prevent predatory trade practices, and the statutory presumption that to sell at less than such a cost would be with intent to reduce competition seems valid.²⁷

19. N.M. Stat. Ann. § 49-3-2 (1953).

20. *Rocky Mountain Wholesale Co. v. Ponca Wholesale Mercantile Co.*, 68 N.M. 228, 233, 360 P.2d 643, 646 (1961).

21. See note 39 *infra*. The Cigarette Fair Trade Practices Act does have a much more detailed statement of the economic purposes than the Liquor Control Act. See N.M. Laws 1949, ch. 175, preamble.

22. *Rocky Mountain Wholesale Co. v. Ponca Wholesale Mercantile Co.*, 68 N.M. 228, 231, 360 P.2d 643, 645 (1961).

23. *Id.* at 234, 360 P.2d at 647.

24. N.M. Stat. Ann. § 49-3-2(i) (1953). This includes two per cent for overhead exclusive of delivery to the retailer and $\frac{3}{4}$ of one per cent for such delivery. If the cartage to the retailer is paid for or performed by the wholesaler, he must add this $\frac{3}{4}$ of one per cent to the basic two per cent minimum markup.

The minimum markup is intended to represent the following costs of doing business: labor costs (including salaries of executives and officers), rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses and taxes, insurance, and advertising. N.M. Stat. Ann. § 49-3-2(i) (1953).

25. N.M. Stat. Ann. § 49-3-2(j) (1953). See note 24 *supra*. Under the Cigarette Fair Trade Practices Act, the parties are not bound to any minimum sales price by a fair trade contract as under the Liquor Control Act. See note 8 *supra*.

26. N.M. Stat. Ann. §§ 49-3-2(i), (j) (1953).

27. N.M. Stat. Ann. § 49-3-3(b) (1953):

Evidence of advertisement, offering to sell, or sale of cigarettes by any re-

The Liquor Control Act prohibits sales below cost in a similar manner. The minimum markup is 12.5 per cent for the wholesaler and 38.8 per cent for the retailer.²⁸ These minimum markups also may be reduced by the wholesaler or retailer showing an actual lower overhead under the procedure prescribed by the Liquor Control Division.²⁹

Thus, in principle, the minimum markup section of the Liquor Control Act seems to be valid in view of *Rocky Mountain*. However, in practice, the conclusion may be the opposite. Although the 2.75 per cent and eight per cent minimum markups of the Cigarette Fair Trade Practices Act may be sufficient and reasonable to prevent predatory trade practices, it can be argued that it does not follow that the 12.5 per cent and 38.8 per cent minimum markups required by the Liquor Control Act are reasonable—in fact they may be arbitrarily high.³⁰

The validity of the fair trade section (46-9-1)³¹ of the Liquor Control Act may be examined in view of *Skaggs Drug Center v. General Elec. Co.*,³² in which the court held that the provisions of the Fair Trade Act,³³ which bound non-signing parties to the terms

tailer or wholesaler at less than cost to him as defined by this act shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

28. N.M. Stat. Ann. §§ 46-9-11A (5), (7) (Supp. 1963).

29. N.M. Stat. Ann. § 46-9-11 (Supp. 1963).

But even if the party can reduce the prescribed minimum markup, he is still bound by the terms of the fair trade contract setting the minimum retail price at which he can sell. See note 50 *infra* and accompanying text.

The procedure for reducing the prescribed minimum markup, *i.e.*, by showing an actual lower cost of doing business (overhead), is quite complicated and must be strictly complied with; the party being required to "make strict proof of the matters . . . to be proved . . ." Division of Liquor Control, Regulation No. 4.

Regulation No. 4 provides, *inter alia*, that the dealer must submit all his records for over a two year period, all prepared and certified by a licensed certified public accountant, keeping separate records for beer, wine, and other liquor and for any other business run in conjunction with the liquor business to the chief of the Liquor Control Division with his request to establish a lower cost of doing business.

30. In *Rocky Mountain Wholesale Co. v. Ponca Wholesale Mercantile Co.*, 68 N.M. 228, 234, 360 P.2d 643, 647 (1961), the court said "we recognize that laws which prohibit sales of merchandise below cost cannot be sustained if the only purpose is to make such sales illegal." That the economics of the liquor industry are so much different would have to be shown in the legislative declaration in the statute as to its relation to the public welfare and, as such, it would be "entitled to great weight, though such declarations, of course, are not conclusive upon the courts." *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 69, 109 P.2d 779, 787 (1941).

31. N.M. Stat. Ann. § 46-9-1 (1953). See note 7 *supra*.

32. 63 N.M. 215, 315 P.2d 967 (1957).

33. N.M. Stat. Ann. §§ 49-2-1 to -4 (1953).

of a fair trade contract, were "unconstitutional and void as an arbitrary and unreasonable exercise of the police power without any substantial relation to the public health, safety or general welfare."³⁴ The court assumed that the merchandise³⁵ being "fair traded" was not concerned with the public health,³⁶ and thus the rule that price control is a reasonable exercise of the police power over a business having a vital relation to public health did not apply.³⁷ The purpose of the Fair Trade Act was merely to prevent unfair competition.³⁸ By the same token, the fair trade section of the Liquor Control Act does not have any stated relation to the public welfare other than preventing unfair competition.³⁹ In *Skaggs*, the court clearly con-

34. *Skaggs Drug Center v. General Elec. Co.*, 63 N.M. 215, 226-27, 315 P.2d 967, 974 (1957).

35. The merchandise being fair traded in *Skaggs* included products of General Electric Co., such as irons, and products of Miles Laboratories, Inc., including "Alka Seltzer" and "One-A-Day" vitamin tablets. The court, commenting on their relation to the public health, said:

It should not require any argument whatsoever to point out that the sale of electric irons having a General Electric label can in no sense affect the public health. Of course, it might be claimed that the sale of vitamin pills or alkaline tablets could in a sense affect public health, but it is not believed that they do in the sense intended by the framers of our Constitution.

Id. at 223, 315 P.2d at 972. Thus, the court seems to mean that when an economic purpose is given for exercising the police power, the possible effect of the item on the public health is not involved.

36. *Ibid.*

37. In *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 69-70, 109 P.2d 779, 787 (1941), the court said:

The courts have recognized a wide latitude in the legislature to determine the necessity for protecting the peace, health, safety, morals, and general welfare of the people. . . .

In attempting to fix minimum prices for service or industry, the legislature must inevitably tread close to the line which marks the zone between lawful and illegal exercise of the police power. . . .

The problem invariably presented, when we appraise such legislative declaration, is that of determining whether, under the facts at the time before the court, the declaration that the subject treated is affected with a public interest or closely related thereto is not an overstatement.

The court in *Skaggs* thus distinguished *Arnold*.

38. The statute says that to violate the Act is "unfair competition." N.M. Stat. Ann. § 49-2-2 (1953). The title of the Fair Trade Act declares it is "an act to protect trademark owners, distributors, and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinct trade-mark, brand or name . . ." N.M. Laws 1937, ch. 44, title. See notes 39-42 *infra* and accompanying text.

39. The fair trade section of the Liquor Control Act says that its provisions in themselves shall not be deemed in violation of any policy of this state and that to violate the section is "unfair competition." N.M. Stat. Ann. § 46-9-1 (1953). The minimum markup section declares that violation of its provisions "impair[s] and prevent[s] free competition." N.M. Stat. Ann. § 46-9-11B (Supp. 1963).

In *State v. Martinez*, 48 N.M. 232, 235, 149 P.2d 124, 125 (1944), the court, in in-

demned fair trade when its declared purpose is to prevent unfair competition:

[W]hat is the real purpose of the Fair Trade Act? No matter what

terpreting a section of the Liquor Control Act (N.M. Laws 1939, ch. 236, §§ 601, 1001), said "unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them."

The dictionary defines "free" as "not subject to an arbitrary external power or authority . . . specifically . . . having no trade restrictions; open to commercial purposes to all . . ." and "competition" as "the effect of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms . . ." Websters New International Dictionary 545, 1003 (2d ed. 1960). Did the Legislature use the words that they intended to use in stating the purpose of the fair trade and minimum markup sections of the Liquor Control Act?

N.M. Stat. Ann. § 46-5-1 (1953) provides:

It is hereby declared to be the policy of this act that the sale of all alcoholic liquors in the state of New Mexico shall be licensed, regulated and controlled so as to protect the public health, safety and morals of every community in this state; and it is hereby made the responsibility of the chief of division to investigate into the legal qualifications of all applicants for licenses under this act, and to investigate into the conditions existing in the community wherein are located the premises for which any license is sought, before such license is issued, to the end that licenses shall not be issued to unqualified or disqualified persons or for prohibited places or locations.

While this section does state that the policy of the Liquor Control Act is that the sale of liquor shall be controlled, it seems directed towards the chief of division in his function of license controller, especially since the section is not located at the beginning of the Liquor Control Act, but merely at the beginning of the sub-chapter on licensing which contains no provisions dealing with price control. And even in regard to licensing, it does not direct the chief of division to promote temperance or limit consumption.

The fair trade and minimum markup sections merely give economic purposes for their justification; they do not give, or even allude to, purposes that would be for the protection of the public health, safety, or morals in other than this economic sense. In fact, they may be said to encourage consumption by allowing a ten per cent discount to the purchaser on case lots. See N.M. Stat. Ann. § 46-9-11B (Supp. 1963).

Indeed, it has been suggested that even if an unstated purpose of price control is to control consumption, it is not effective:

Relative inelasticity of demand for distilled spirits is an additional element for judicial consideration, though it has not figured overtly in any of the decisions. In the *Schwegmann* litigation [*Schwegmann Bros. v. Louisiana Bd. of Alcoholic Beverage Control*, 216 La. 148, 43 So. 2d 248 (1949)], studies of the state department of revenue had indicated a decrease in consumption, during the year immediately following passage of the price-fixing act, of only .501 per cent. [See Note, 11 La. L. Rev. 394, 397 n.17 (1951)] Where demand is inelastic, artificially maintained prices operate to the profit of the seller with little effect on consumption habits and total sales. Even assuming some degree of elasticity and hence a pro tanto reduction in consumption, no assurance is present that the decline in sales serves temperance aims. For the likelihood is that the abstinence or reduction in buying will take place among those least likely to be objects of temperance concern.

Dunsford, *State Monopoly and Price-Fixing in Retail Liquor Distribution*, 1962 Wis. L. Rev. 454, 481.

high-sounding terms are used, such as 'free and open competition,'^[40] 'unfair competition,'^[41] and 'protection of good will'^[42] it is a matter of common knowledge that it is a price-fixing statute, designed primarily to destroy competition at the retail level. . . .

* * * *

[T]o say that it is not a price-fixing statute is to deny the obvious. . . .⁴³

* * * *

'[I]t is obvious that the whole scheme of the Fair Trade Acts is one for private, rather than public, gain, a scheme fathered by highly organized groups of distributors and retailers, interested not in the public weal, but only in their own selfish ends. . . .'⁴⁴

Does it follow that fair trade is justified by "high-sounding terms" when it is liquor that is involved? Since the stated legislative purposes of the Fair Trade Act and the fair trade section of the Liquor Control Act are nearly identical, the court's findings as to the effect and invalidity of the Fair Trade Act in *Skaggs* seems to make the Liquor Control Act's fair trade section equally invalid.⁴⁵

40. This is the stated purpose of the minimum markup section of the Liquor Control Act; see note 39 *supra*.

41. This is the stated purpose of the fair trade section of the Liquor Control Act; see note 39 *supra*.

42. See *Skaggs Drug Center v. General Elec. Co.*, 63 N.M. 215, 224, 315 P.2d 967, 973 (1957).

43. *Id.* at 226, 315 P.2d at 974.

44. *Id.* at 224-25, 315 P.2d at 973, quoting from *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635, 645 (1956). The court also said:

'[I]t is plainly apparent that the consumer is not benefited, but on the contrary is harmed by the operation of the Fair Trade Act. The consumer is the public. He is compelled to pay a higher price for a given commodity in order that the retailer may be guaranteed a higher fixed, and often unreasonable profit.'

Id. at 224, 315 P.2d at 973, quoting from *General Elec. Co. v. Wahle*, *supra*.

The those who feel that liquor must be controlled by high prices for temperance purposes, it has been suggested that these "often unreasonable" profits may be handled in another way:

A desirable substitute for any type of resale price maintenance may also be public monopoly of the sale of liquor, now in effect in seventeen states. This permits levy of high prices (which has been said to be desirable as a means of promoting temperance) without benefit to a special class of private persons. In addition, the state may use the profits to defray other expenses of government.

Note, 57 Yale L.J. 459, 474 n.57 (1948). See also Shipman, *State Administrative Machinery for Liquor Control*, 7 Law & Contemp. Prob. 600 (1940).

45. *Skaggs Drug Center v. General Elec. Co.*, 63 N.M. 215, 226-27, 315 P.2d 967, 974 (1957):

[The Fair Trade Act] is unconstitutional and void as an arbitrary and unreasonable exercise of the police power without any substantial relation to the public health, safety, or general welfare insofar as it concern persons who are not parties to [fair trade] contracts

It may be concluded that (1) in principle, the minimum markup section (46-9-11) of the Liquor Control Act is a reasonable exercise of the state's police power in view of *Rocky Mountain* and thus not violative of due process, although, in practice, the section may be arbitrary;⁴⁶ and (2) the fair trade section (46-9-1) of the Liquor Control Act is unconstitutional in view of *Skaggs*, because it binds non-signers to the terms of fair trade contracts.⁴⁷

One more problem is raised in considering the effect of the possibly unconstitutional fair trade section on the minimum markup section of the Liquor Control Act.

Under the fair trade provisions,⁴⁸ any party to a liquor transaction (including the trade association to which the retailer or wholesaler belongs⁴⁹) can insist that the liquor be sold under a fair trade contract that fixes the minimum retail price for all of the liquor of that brand sold in New Mexico.⁵⁰ Thus, when a retailer is complying with the minimum markup section⁵¹ and is able to show an overhead of less than 38.8 per cent (and thereby take advantage of the minimum markup section's escape provisions⁵²), the retail price still cannot go below that set by the terms of the fair trade contract. Thus, the fair trade section being unconstitutional in itself also operates to make the minimum markup section of questionable validity by negating the effect of its escape provisions. This makes the minimum markup

46. See note 30 *supra* and accompanying text.

47. See note 45 *supra* and accompanying text.

In the recent case of *Olin Mathieson Chem. Corp. v. White Cross Stores*, 32 U.S.L. Week 2510 (Gen. Law Apr. 7, 1964), the Pennsylvania Supreme Court held that the non-signer provision of Pennsylvania's Fair Trade Act, Pa. Stat. Ann. tit. 73, §§ 7-8 (1960), which is similar to the New Mexico Fair Trade Act's non-signer provision, N.M. Stat. Ann. §§ 49-2-1 to -2 (1953), is unconstitutional under Pa. Const. art. 2, § 1, because it delegates the price regulating power to private persons:

The retailer and the buyer have no recourse. The producer enjoys the unbridled power to stipulate the price he pleases and at that price the retailer must sell and the buyer must buy. In this respect, the producer is the unrestrained sovereign. No intelligent standards control.

32 U.S.L. Week at 2511. The court overruled *Burche Co. v. General Elec. Co.*, 382 Pa. 370, 115 A.2d 361 (1955), which had sustained the constitutionality of the Pennsylvania Act: "Our careful review of that decision now leads to the conviction that it was in error." *Id.* at 2510. The case is reported in 199 A.2d 266 (Pa. 1964).

48. N.M. Stat. Ann. §§ 46-9-1 to -2, -4 to -6 (1953).

49. N.M. Stat. Ann. § 46-9-4 (1953).

50. Any party includes the distiller, the wholesaler, the retailer, or any group or organization of wholesalers or retailers. Any of these parties can insist that such a contract guarantee a gross profit to the retailer of $33\frac{1}{3}$ per cent of the retail selling price. N.M. Stat. Ann. §§ 46-9-1, -4 to -5 (1953).

51. N.M. Stat. Ann. § 46-9-11 (Supp. 1963).

52. *Ibid.*

section much more vulnerable to attack as being arbitrary and thereby invalid.⁵³ Therefore, for practical purposes retail price control is maintained with no possibility of the retailer being able to show a cost of doing business of less than 33 1/3 per cent of the retail price of the liquor.⁵⁴

If the mandatory fair trade section were eliminated from the Liquor Control Act, retailers and wholesalers could sell at a price based on actual overhead and not be rigidly bound to a price set by an out-of-state distiller.

ROBERT J. WERNER

53. See the holding in *Rocky Mountain Wholesale Co. v. Ponca Wholesale Mercantile Co.*, 68 N.M. 228, 360 P.2d 643 (1961), in note 22 *supra* and accompanying text.

54. See note 50 *supra*.