

Spirits and the Sherman Act

The California Supreme Court in Rice v. Alcoholic Beverage Control Appeals Board invalidated California's retail distilled spirits price posting law because of its impermissible conflict with policies underlying the Sherman Antitrust Act. This casenote examines the reasoning used by the Court in that case, and reviews a California Court of Appeal decision invalidating wine price posting laws. The note demonstrates how the California Supreme Court's reasoning can be applied to invalidate other price posting laws still in effect and concludes that the courts, when confronted with the issue, should invalidate the remaining price posting laws.

In *Rice v. Alcoholic Beverage Control Appeals Board*,¹ the California Supreme Court began an assault on one of the last remnants of California fair trade legislation:² liquor price maintenance laws. Because of the statute's impermissible conflict with the policies underlying the Sherman Antitrust Act,³ the Court invalidated section 24755 of the California Business and Professions Code,⁴ which required liquor manufacturers to file, and liquor retailers to sell in accordance with, minimum retail prices for distilled spirits. The California First District Court of Appeal followed the state Supreme Court's lead in *Capiscean Corporation v. Alcoholic Beverage Control Appeals Board*⁵ and, citing *Rice*, invalidated wine retail and wholesale price maintenance laws. In light of the remaining statutory provisions and a recent California constitutional amendment, however, these decisions have not completely won the war against liquor price fixing. This article assesses the effect of these decisions and concludes that

¹ 21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978).

² The Cartwright Act (1975 Cal. Stats. 878, ch. 402) repealed California's general fair trade laws, formerly found in CAL. BUS. & PROF. CODE §§ 16900-16905 (West 1964).

³ 15 U.S.C. §§ 1-7 (Supp. V 1975).

⁴ CAL. BUS. & PROF. CODE § 24755 (West Cum. Supp. 1978) (hereinafter § 24755) requires that a manufacturer or brand owner file with the ABC a minimum price schedule for distilled spirits and prohibits an off-sale retail licensee from selling at less than the prescribed price. [Unless otherwise indicated, all references will be to the Cal. Bus. & Prof. Code.]

⁵ ____ Cal. App. 3d ____, 151 Cal. Rptr. 492 (1st Dist. 1979).

the courts' reasoning can be used to invalidate the remaining price posting provisions for alcoholic beverages. Nevertheless, further judicial or legislative action is necessary to assure the ultimate victory over liquor price fixing.

I. RICE V. ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

On two occasions in 1975, Christine and Richard Corsetti, retail liquor dealers doing business as Bob's Market, sold several bottles of distilled spirits to undercover employees of the California Department of Alcoholic Beverage Control (ABC). They sold the liquor for an amount less than the posted price. These sales violated section 24455.⁶

After a hearing, the ABC suspended the Corsettis' liquor license for ten days. The Corsettis appealed the suspension to the ABC Appeals Board, claiming that Section 24755 violated the Sherman Antitrust Act and the Fourteenth Amendment of the United States Constitution. The Board agreed and reversed the ABC's decision. The ABC appealed to the California Supreme Court, seeking to annul the Appeals Board's order.

The Supreme Court affirmed the Board's order.⁷ The court's decision turned on the resolution of two issues: first, whether section 24755 violated the Sherman Act; and second, if so, whether the 21st Amendment gave the state enough power that the statute was valid despite the Sherman Act violation.⁸ The Court also addressed several prior California Supreme Court decisions which upheld section 24755 and its predecessors.

A. Prior California Supreme Court Decisions

The statutes that preceded section 24755 required all retail sales of alcoholic beverages to be made at prices set forth in fair trade contracts filed with the ABC, whether or not the seller was actually a party to the filed contract.⁹ In *Allied Properties v.*

⁶ CAL. BUS. & PROF. CODE § 24755 (West Cum. Supp. 1978) provides in part: "(f) No off-sale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package . . ."

⁷ *Rice v. ABC Appeals Bd.*, 21 Cal. 3d 431, 459, 579 P.2d 476, 495, 146 Cal. Rptr. 585, 604 (1978).

⁸ *Id.* at 436-437, 579 P.2d at 480, 146 Cal. Rptr. at 589.

⁹ 1937 Cal. Stats. 2173, ch. 758, § 55.5 (current version at CAL. BUS. & PROF. CODE §§ 24750-24753 (West 1964)) authorized fair trade contracts prohibiting the buyer from reselling, except at the price stipulated by the seller, alcoholic beverages in open competition of others of the same class. The statute further provided that selling at less than the price stipulated in such contracts, whether or not the person selling was a party to the contract, was unfair competition.

Department of Alcoholic Beverage Control,¹⁰ the California Supreme Court held these fair trade statutes to be a valid exercise of the state's police power. Applying a presumption of constitutionality and a minimal standard of review, the *Allied Properties* court found that the fair trade provisions were not an unquestionably improper means of accomplishing the legitimate state objectives of promoting an orderly market and preventing intemperance.¹¹ Moreover, the court stated that most courts uphold the constitutionality of such statutes against similar challenges in other states.¹²

The court did not overrule *Allied Properties* in *Rice*, but instead chose to distinguish it. The *Rice* Court noted that when *Allied Properties* and the cases relying on it were decided, fair trade laws involving liquor were exempt from the Sherman Act. The court reasoned therefore, that *Allied Properties* and its progeny had not actually decided whether liquor price maintenance laws violated the Sherman Act. Since the Sherman Act exemptions had been repealed by the time the court decided *Rice*, *Allied Properties* did not apply to that case.¹³

1947 Cal. Stats. 1698, ch. 657, § 55.6 (current version at CAL. BUS. & PROF. CODE §§ 24754-24757 (West 1964 & Cum. Supp. 1978)) provided that all retail sales of distilled spirits be made pursuant to fair trade contracts entered into under § 55.5. The section also provided that all manufacturers and wholesalers must file a price list with the ABC, setting the prices at which their products were to be sold to retailers.

¹⁰ 53 Cal. 2d 141, 346 P.2d 737 (1959).

¹¹ *Id.* at 146, 148-149, 346 P.2d at 739, 740-741.

¹² *Id.* at 147, 346 P.2d at 740. The court reaffirmed *Allied Properties* in *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Beverage Control*, 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966).

In 1969, after the legislature changed the price maintenance laws to rely primarily on the present price posting scheme of § 24755 (rather than the fair trade contracts and nonsigner provisions (see note 9 *supra*)), the Court stated that the change was one of form, not substance, and, following *Allied Properties* and *Wilke & Holzheiser*, upheld the validity of § 24755. *Samsom Market Co. v. ABC Appeals Bd.*, 72 Cal. 2d 1215, 1220, 459 P.2d 667, 671, 81 Cal. Rptr. 251, 256 (1969).

¹³ *Rice v. ABC Appeals Bd.*, 21 Cal. 3d 431, 446-447, 579 P.2d 476, 486-487, 146 Cal. Rptr. 585, 595-596 (1978). The Miller-Tydings Act amended the Sherman Act and exempted "contracts . . . prescribing minimum prices for the resale" of certain commodities, if such contracts were lawful under state law. 50 Stat. 693 (1937) (repealed 1975). The McGuire Act provided that nonsigner provisions were not unlawful under the Sherman Act. Pub.L. No. 82-542. § 2, 66 Stat. 632 (1952) (repealed 1975). California enacted fair trade contract laws and nonsigner provisions for alcoholic beverages which are respectively found in CAL. BUS. & PROF. CODE §§ 24750, 24752 (West 1964).

The Miller-Tydings and McGuire Acts' exemptions were repealed by the Con-

B. *The Sherman Act and Price Maintenance Laws*

In determining whether section 24755 violated the Sherman Act, the court recognized that without government involvement liquor price maintenance would clearly violate the Sherman Act.¹⁴ The question then became whether the court should consider the price posting provisions an act of the state, thereby exempting it from the Sherman Act. For its answer, the court analyzed four United States Supreme Court decisions to ascertain the limits of the Sherman Act's "state action" exemption.

In *Parker v. Brown*,¹⁵ the United States Supreme Court first established the principles of the state action exemption, and held that Congress did not intend the Sherman Act to apply against certain state action. In that case, a raisin producer-packer brought suit against California officials challenging a state program designed to restrict competition among growers and thereby maintain prices in the raisin market. The Supreme Court held that the Sherman Act did not prohibit restraints imposed by the state as a sovereign governmental act.¹⁶

The United States Supreme Court limited the state action exemption in *Goldfarb v. Virginia State Bar*¹⁷ and *Cantor v. Detroit Edison Company*.¹⁸ In *Goldfarb*, the Court held that publication of a minimum fee schedule by a county bar association and enforcement of that fee schedule by the State Bar violated the Sherman Act. The Supreme Court distinguished *Goldfarb* from *Parker* because in *Goldfarb* the anticompetitive conduct of set-

sumer Goods Pricing act of 1975, Pub.L. No. 94-195, § 2-3, 89 Stat. 801 (1975). Thus, fair trade contracts and nonsigner provisions are no longer exempt from the Sherman Act. See 15 U.S.C. §§ 1, 45 (Supp. V 1975).

¹⁴ *Id.* at 439-440, 579 P.2d at 482, 146 Cal. Rptr. at 591. The Court cited Justice Douglas' opinion in *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384 (1951) (Nonsigner provisions of a Louisiana law that allowed, but did not compel, liquor distributors to impose minimum prices upon retailers were invalid.):

It is clear from our decisions under the Sherman Act [citations] that this interstate marketing arrangement would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it. Fixing minimum prices, like other types of price fixing, is illegal *per se* [citations] . . . The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval of Congress.

341 U.S. at 386.

¹⁵ 317 U.S. 341 (1943).

¹⁶ *Id.* at 352.

¹⁷ 421 U.S. 773 (1975).

¹⁸ 428 U.S. 579 (1976).

ting minimum fees was private and not compelled by the state.¹⁹

In *Cantor*,²⁰ an electric utility company distributed light bulbs to its residential customers without additional charge. The utility company then included the cost of the bulbs in its state-regulated utility rates. The United States Supreme Court held that the distribution of light bulbs was not state action exempt from the Sherman Act.²¹ In reaching its decision, the Court emphasized that the claim was against the private utility company rather than a state official, and that the state did not compel the distribution scheme but merely acquiesced in it by approving the rates.

The Court somewhat enlarged the state action exemption however, in *Bates v. State Bar of Arizona*.²² There the Supreme Court held that a rule adopted by the Arizona Supreme Court prohibiting advertising by lawyers was exempt from the Sherman Act. The Court found that the rule could be classified as state action because it was a direct order of that state, acting through the Arizona Supreme Court. Moreover, the rule was subject to a constant re-examination and active supervision by the state court in enforcement proceedings. The rule thus constituted state action, and the Sherman Act did not apply.²³

It was against the background of these United States Supreme Court decisions that the California Supreme Court examined the section 24755 price posting scheme in *Rice*. Although the state compelled the price posting, the court noted that the actual prices were determined by the producers according to their own economic interests.²⁴ The state did not regulate the prices posted with regard to any anti-competitive effects that might result, but merely approved prices submitted by the producers. Further, when enforcing the price posting scheme, the state did not reconsider the prices set in light of their market effect, but merely determined whether there was a section 24755 violation.²⁵ Because of this lack of state control and an absence of state participation in setting the actual price, the California Supreme Court held that section 24755 violated the Sherman Act.²⁶

¹⁹ 421 U.S. 773, 788-792 (1975).

²⁰ 428 U.S. 579 (1976).

²¹ *Id.* at 598.

²² 433 U.S. 350 (1977).

²³ *Id.* at 363.

²⁴ *Rice v. ABC Appeals Bd.*, 21 Cal. 3d 431, 445, 579 P.2d 476, 486, 146 Cal. Rptr. 585, 595 (1978).

²⁵ *Id.*

²⁶ *Id.* at 445-447, 579 P.2d at 486-487, 146 Cal. Rptr. at 595-596. In light of the court's reliance in later parts of the decision on various studies and reports,

C. *The 21st Amendment: No Alternate Basis for Liquor Price Maintenance Laws*

After concluding that section 24755 violated the Sherman Act, the court considered whether the 21st Amendment allowed such a violation. Upon reviewing several of its own decisions and those of the United States Supreme Court, the state court determined that it should test section 24755's validity by balancing the state's interest under the 21st Amendment against federal interests and the policies embodied in the Commerce Clause and the Sherman Act.²⁷

it is interesting to note the short shrift the court gives to part of a Senate Judiciary Committee Report concerning the repeal of the Miller-Tydings and McGuire Acts. The report stated: "Liquor will not be affected by repeal of the fair trade laws in the same manner as other products because the twenty first amendment gives the states broad powers over the sale of alcoholic beverages." (quoted in *Rice* at *id.*, n. 8) Stating that the report represented "only an opinion," not a declaration of antitrust policy, the court rejected the ABC's contention that this created an alcoholic beverage fair trade law Sherman Act exemption. *Id.* This is even more remarkable when one considers that this *same* report was relied on by the court to cast doubt on the effectiveness of § 24755 in serving state interests of orderly market conditions. See note 34 *infra*.

²⁷ *Rice v. ABC Appeals Bd.*, 21 Cal. 3d 431, 451, 579 P.2d 476, 490, 146 Cal. Rptr. 585, 599 (1978). The *Rice* court relied primarily on *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324 (1964) and *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) and stated:

[I]t is settled that states do not have plenary powers over all matters relating to alcoholic beverages. When a statute enacted pursuant to the 21st Amendment conflicts with an enactment based on the commerce clause, we must balance the policies furthered by each in order to determine which should prevail.

21 Cal. 3d at 448, 579 P.2d at 487, 146 Cal. Rptr. at 596.

In *Hostetter*, the United States Supreme Court held that New York did not have absolute power under the 21st Amendment to control the passage of liquor through the state and therefore could not impose a state license requirement on a liquor retailer selling only to international airline passengers bound for foreign destinations. In *Sail'er Inn*, the California Supreme Court held that the 21st Amendment did not prevent a statute precluding employment of women as bartenders from being tested against the competing policies of the equal protection clauses of the state and federal Constitutions and the federal Civil Rights Act.

In addition, the Court quoted from *Craig v. Boren*, 429 U.S. 190 (1976). *Rice v. ABC Appeals Bd.*, 21 Cal. 3d at 451, 579 P.2d at 489, 146 Cal. Rptr. at 598. In *Craig*, the United States Supreme Court characterized the 21st Amendment as an exception to the commerce clause and stated, with regard to a state statute regulating drinking ages, "Even here, however, the 21st Amendment does not *pro tanto* repeal the commerce clause, but merely requires that each provision 'be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.'" *Craig v. Boren*, 429 U.S. at 206 (quoting *Hostetter*, 377 U.S. at 332).

To ascertain the federal interests involved, the court looked to the policy underlying the Sherman Act. The court adopted the description of Justice Black in *Northern Pacific Railway Co. v. United States*.²⁸

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. . . .²⁹

In determining section 24755's effect on free competition, the court started with the assumption that any trade combination which tampered with the price structure was unlawful.³⁰ The court considered statistics showing minimal or no price difference between major brands of similar types of liquor in California.³¹ In addition, the court noted that, due to section 24755's price filing requirements, producers could easily obtain competitors' price information. Because of these facts, the court felt that the section 24755 posting system actually facilitated price fixing among producers.³² Having already decided that the state action exemption did not apply, the court concluded that section 24755 "clearly" violated federal policies of free competition.³³

The court rejected the ABC's argument that the state interests served by section 24755, promoting temperance and protecting

²⁸ 356 U.S. 1 (1958).

²⁹ *Rice v. ABC Appeals Bd.*, 21 Cal. 3d 431, 453, 579 P.2d 476, 491, 146 Cal. Rptr. 585, 600 (1978) (quoting from *Northern Pacific R.Co. v. United States*, 356 U.S. 1, 4-5 (1958)).

³⁰ *Rice v. ABC Appeals Bd.*, 21 Cal. 3d 431, 453, 579 P.2d 476, 491, 146 Cal. Rptr. 585, 600 (1978).

³¹ *Id.* at 454-455, 579 P.2d at 491-492, 146 Cal. Rptr. at 600-601. Corsetti introduced into evidence figures which showed no difference in the 1976 prices of five leading brands of gin and a one cent difference in the five leading brands of scotch. Corsetti obtained these figures from price postings filed with the ABC in accordance with § 24755. The Court took judicial notice of these price postings. The court also cited a California Senate Committee report which stated that the retail price maintenance scheme had virtually eliminated any semblance of competition in the liquor industry. 1 SEN. SELECT COMMITTEE ON LAWS RELATING TO ALCOHOLIC BEVERAGES, FINAL REPORT 9 (Comm. Print 1974). *Cf.* note 26 *supra*.

³² *Rice v. ABC Appeals Bd.*, 21 Cal. 3d 431, 455, 579 P.2d 476, 492, 146 Cal. Rptr. 585, 601 (1978).

³³ *Id.* at 456, 579 P.2d at 493, 146 Cal. Rptr. at 602.

small retailers from the predatory pricing policies of large retailers, justified this interference. The court recognized that these were legitimate state interests, but noted two studies that questioned whether the statute actually served these interests.³⁴ In addition, the court found that other means, such as the statutory prohibitions against "loss leaders" and "free goods", could serve state interests in temperance and orderly market conditions without price maintenance laws.³⁵

The court further found fair trade laws to be contrary to the public interest in light of Congress' passage of the Consumer Goods Pricing Act³⁶ and California's repeal of all fair trade laws for products other than liquor.³⁷ The court concluded that the balance was in favor of the Sherman Act policies of free competition and section 24755 was, therefore, invalid.³⁸

³⁴ *Id.* at 456-457, 579 P.2d at 493-494, 146 Cal. Rptr. at 602-603. One study showed that per capita consumption of distilled spirits had *increased* 42 percent in the last twenty years and concluded that there was little evidence showing that fair trade laws promoted temperance. CALIFORNIA DEPARTMENT OF FINANCE, ALCOHOL AND THE STATE: A REAPPRAISAL OF CALIFORNIA'S ALCOHOL CONTROL POLICIES, at 15 (1974). Thus, the court reasoned, it was doubtful that the statute promoted temperance.

The Court dismissed the ABC's argument that § 24755 protected small retailers by pointing to another study showing that in states with fair trade laws, small retail firms suffered higher failure rates and lower growth rates than in states without such laws. This study was part of a report by the Senate Judiciary Committee which recommended repeal of the Miller-Tydings and McGuire Acts, 1975 U.S. CODE CONG. & ADMIN. NEWS, 1569, 1571. This was the same report the Court discounted in an earlier part of its decision. *See* note 26 *supra*.

³⁵ *Rice v. ABC Appeals Bd.*, 21 Cal. 3d 431, 458, 579 P.2d 476, 494, 146 Cal. Rptr. 585, 603 (1978). Although CAL. BUS. & PROF. CODE § 24755(g) (West Cum. Supp. 1978) prohibited the sale of "loss leaders", the court cited the prohibition of CAL. BUS. & PROF. CODE § 17044 (West 1964), part of the Unfair Trade Practices Act of the Bus. & Prof. Code. A loss leader is defined in CAL. BUS. & PROF. CODE § 17030(a)-(c) (West 1964) as a sale at less than cost where the purpose is to promote the purchase of other merchandise; the effect is a tendency to mislead purchasers; or the effect is to injure competitors.

"Free goods" restrictions stem from CAL. BUS. & PROF. CODE § 25600 (West 1964); No licensee shall . . . give any premium, gift, or free goods in connection with the sale of any alcoholic beverage. Any person violating the provisions of this section is guilty of a misdemeanor."

³⁶ Consumer Goods Pricing Act of 1975, § 2, 15 U.S.C. § 1 (Supp. V 1975) (repealing fair trade and non-signer exemptions of the Sherman Act). *See* note 13 *supra*.

³⁷ 1975 Cal. Stats. 878, ch. 402, § 1 (repealing California's general fair trade laws formerly in CAL. BUS. & PROF. CODE §§ 16900-16905 (West 1964)).

³⁸ *Rice v. ABC Appeals Bd.*, 21 Cal. 3d 431, 459, 579 P.2d 476, 494-495, 146 Cal. Rptr. 585, 603-604.

II. CAPISCEAN CORPORATION v. ABC APPEALS BOARD

In November, 1976, Capiscean Corporation, doing business as Pacific Heights Liquor, sold bottles of distilled spirits and a bottle of wine to an ABC employee for less than their posted retail prices. These sales were in violation of section 24755 and section 24862, the wine price posting statute.³⁹ After a hearing for these violations, the ABC suspended Capiscean's license for ten days. On appeal to the ABC Appeals Board, the Board, following *Rice*, reversed the ABC decision with respect to the Section 24755 violation.⁴⁰ The Board, believing itself prohibited by Article III, section 3.5 of the California Constitution⁴¹ from declaring the wine price posting provisions unconstitutional, affirmed the ABC decision with respect to Capiscean's wine sale below the posted minimum retail price. Capiscean appealed, seeking annulment of the latter portion of the Appeals Board's order.

In a cursory opinion, the Court of Appeal invalidated section 24862 and annulled the Board's decision with respect to Capiscean's violation of that statute.⁴² The court found that section 24862 and related provisions differed from section 24755 only in the type of beverage and the precise language of the respective sections.⁴³ The court also found that the impact of the wine restrictions was identical to section 24755.⁴⁴ The court held that the wine price maintenance provisions could not be distinguished from section 24755 and therefore, "for the reasons stated in *Rice*" section 24862 was invalid.⁴⁵

³⁹ CAL. BUS. & PROF. CODE § 24862 (West Cum. Supp. 1978) provides in part: "No licensee in this state shall sell or resell to a consumer any item of wine at less than the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract . . ."

⁴⁰ *Capiscean Corp. v. ABC Appeals Bd.*, ____ Cal. App. 3d ____, ____, 151 Cal. Rptr. 492, 493 (1st Dist. 1979).

⁴¹ CAL. CONST. Art. III, § 3.5, No. 4 West's Calif. Legis. Service at XXIV (1978). See note 64 and accompanying text *infra*.

⁴² *Capiscean Corp. v. ABC Appeals Bd.*, ____ Cal. App. 3d ____, ____, 151 Cal. Rptr. 492, 494 (1st Dist. 1979).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* CAL. BUS. & PROF. CODE § 24862 (West Cum. Supp. 1978) governed both retail and wholesale prices of wine, unlike § 24755, which only governed retail prices of distilled spirits and beer. The Court of Appeal did not draw a distinction between wholesale and retail price posting requirements. Although there are many similarities, the requirements can be conceptually separated, and additional reasons exist for the invalidation of wholesale price posting requirements. The Court of Appeal apparently also invalidated CAL. BUS. & PROF. CODE § 24866 (West 1964), which required wine growers and wholesalers to file prices

III. EFFECT

The immediate effect of the *Rice* decision was that producers were no longer required to file, and retailers were not bound by minimum prices for sales of distilled spirits and beer to consumers. Section 24755's retail price posting requirement however, was only part of a larger scheme for controlling the prices at which alcoholic beverages are sold to consumers. Because the court in *Rice* dealt only with section 24755, much of the total price maintenance system remained legally unchanged. Specifically, the statutes controlling retail wine prices⁴⁶ and wholesale prices of all alcoholic beverages⁴⁷ technically remained in effect, despite the court's invalidation of section 24755. Thus, the legal action culminating in the decision in *Capiscean* was necessary to invalidate the retail and wholesale wine price posting statutes. The remaining wholesale price posting provisions, however, are still in full force and effect.

The following discussion first reviews the basic statutory mechanisms by which retail and wholesale prices of alcoholic beverages are set and controlled, and then examines how the court's reasoning in *Rice* could be applied to invalidate both retail price posting requirements for wine and wholesale price posting requirements for all alcoholic beverages. This part of the discussion includes and expands the reasoning used by the *Capiscean* court to invalidate section 24862. Finally, the discussion considers constitutional barriers to eliminating the remaining price fixing laws in California without further judicial or legislative action.

A. *The Basic Statutory Price Posting Mechanism*

The basic statutory schemes for price posting of distilled spir-

with the ABC, as that provision was included in its discussion of the wine price posting statutes.

Nevertheless, a more thorough analysis of the particular provisions and a more detailed application of the *Rice* Court's reasoning to them reveals that the Court of Appeal reached the correct result. See notes 52-62 and accompanying text *infra*.

For the sake of clarity, "retail price" as used in this comment means the price charged by an off-sale licensee (retailer) to a purchaser who will consume the beverage on the premises of the licensee. "Wholesale price" as used in this comment means the price charged by manufacturers, wholesalers, distributors, or brand owners, in sales to retailers.

⁴⁶ CAL. BUS. & PROF. CODE §§ 24862, 24866-24868 (West 1964 & Cum. Supp. 1978).

⁴⁷ CAL. BUS. & PROF. CODE § 24756 (distilled spirits); §§ 24862-24867 (wine); §§ 25000, 25004 (beer) (West 1964 & Cum. Supp. 1978).

its, wine, and beer, at both the retail and wholesale level, are all similar, although each is dealt with separately in the Business and Professions Code.⁴⁸ The statutes require producers, wholesalers and brand owners to file price lists with the ABC as a condition to selling their products. The lists must include both the retail and the wholesale price for each item offered for sale. Once the ABC approves the lists, state and regional trade journals publish them. These lists regulate the prices in all transactions involving the subject products, with the posted retail price being merely a *minimum* price, while the posted wholesale price is the *only* price at which the products may be sold.⁴⁹ Failure to buy or sell in accordance with the price lists results in penalties consisting of fines and/or license suspension or revocation.⁵⁰ In addition, any person damaged by sales in violation of the price lists may bring an action for unfair competition against the violator.⁵¹

Section 24755, struck down by the Court in *Rice*, governed the retail price posting requirements for distilled spirits and beer and was the basis for the ABC's initial suspension of the Corsettis' retail liquor license in the *Rice* case. The wine price posting statutes, governing both retail and wholesale pricing for wine, were struck down by the Court of Appeal in *Capiscean*. As noted above and discussed below, the remaining statutes governing price posting are technically unaffected.

B. Wine Retail Price Posting

As the Court of Appeal held in *Capiscean*, the *Rice* Court's reasoning applies to the wine retail price posting provisions.⁵² The key element in the *Capiscean* court's decision was its finding that the wine provisions could not be distinguished from section 24755's provisions for distilled spirits and beer price posting. This being so, the court concluded that, "for the reasons stated in *Rice*", the wine price maintenance provisions were similarly invalid.⁵³

A more detailed application of the *Rice* Court's reasoning to the

⁴⁸ See CAL. BUS. & PROF. CODE §§ 24749-24757 (fair trade contracts and price posting); §§ 24850-24881 (wine); §§ 25000-25009 (beer); § 25600-25667 (other regulatory provisions) (West 1964 & Cum. Supp. 1978).

⁴⁹ See, e.g., CAL. BUS. & PROF. CODE § 24865 (West Cum. Supp. 1978).

⁵⁰ CAL. BUS. & PROF. CODE § 24755.1 (distilled spirits and beer); § 24880 (wine); § 25004 (beer) (West Cum. Supp. 1978).

⁵¹ CAL. BUS. & PROF. CODE § 24752 (West 1964).

⁵² *Capiscean Corp. v. ABC Appeals Bd.*, ____ Cal. App. 3d ____, ____, 151 Cal. Rptr. 492, 494 (1st Dist. 1979).

⁵³ *Id.* See note 45 *supra*.

wine retail price provisions confirms that the Court of Appeal reached the correct result. For example, because the wine statutes are so similar to section 24755, the state involvement in wine price posting is exactly the same as in distilled spirits and beer price posting—the ABC merely approves and publishes retail prices submitted to them by manufacturers and wholesalers. The state involvement therefore, is not sufficient “state action” to exempt the statutes from the operation of the Sherman Act, and a court should balance state and federal interests to test the validity of the retail wine price posting statutes.

There appears to be nothing unique about wine or the wine retail market that alters the interests on either side of the *Rice* court’s balancing test. Although citing no statistics, the Court of Appeal in *Capiscean* found that the impact of the wine price posting provisions’ restrictions was identical to Section 24755.⁵⁴ This implies that the provisions interfered with federal interests in free competition without a counter-balancing promotion of state interests in temperance and orderly market conditions. Because other factors in *Rice* are present in the *Capiscean* context, such as the hostility toward price tampering of any kind⁵⁵ and the availability of means other than price fixing to achieve state interests,⁵⁶ the balance favors the federal interests. Thus, the Court of Appeal correctly invalidated the wine retail price maintenance provisions.

C. Wholesale Price Posting

A court could also apply the reasoning used in *Rice* to the statutes which establish wholesale prices for all alcoholic beverages.⁵⁷ The wholesale pricing sections operate the same way as

⁵⁴ *Id.*

⁵⁵ See notes 28-30 and accompanying text *supra*.

⁵⁶ See note 35 and accompanying text *supra*.

⁵⁷ See note 47 *supra*. CAL. BUS. & PROF. CODE § 24862 (West Cum. Supp. 1978), invalidated in *Capiscean Corp. v. ABC Appeals Bd.*, ____ Cal. App. 3d ____, 151 Cal. Rptr. 492 (1st Dist. 1979), required wine sales at both the retail and *wholesale* levels to be in accordance with price lists, required to be filed by CAL. BUS. & PROF. CODE § 24866 (West 1964), which was also invalidated in *Capiscean*. The Court of Appeal drew no distinction between the wholesale and retail requirements or effects but simply relied on the statutes’ overall similarity to CAL. BUS. & PROF. CODE § 24755 (West Cum. Supp. 1978) (which concerned retail price posting only) and “the reasons stated in *Rice*” to invalidate the wine price maintenance provisions. *Capiscean Corp. v. ABC Appeals Bd.*, ____ Cal. App. 3d ____, ____, 151 Cal. Rptr. 492, 494 (1st Dist. 1979). Therefore, after *Rice* and *Capiscean*, the statutes still in force affect wholesale distilled spirits and beer price posting.

section 24755; producers and wholesalers must file prices at which they will sell specific brands and quantities of alcoholic beverages to retailers. These prices are then approved by the ABC. Because there is no more state involvement at the wholesale level than at the retail level the wholesale price posting statutes do not fall within the "state action" exemption and therefore violate the Sherman Act under the standards in *Rice*.

In determining the validity of the wholesale pricing statutes, the court would then balance state and federal interests to determine if the 21st Amendment allows this Sherman Act violation.⁵⁸ In balancing the state and federal interests the Court would consider that the wholesale price posting scheme enables producers easily to determine the prices charged by their competitors. The scheme thereby facilitates price fixing among producers and violates the policies of free competition underlying the Sherman Act. On the other side of the balance are the state interests of promoting temperance and orderly marketing conditions.

Here, again, the federal interests outweigh those of the state. The wholesale price posting scheme does even less to advance the state interests than section 24755 advanced them for retail sales of distilled spirits.⁵⁹ Moreover, the statutory scheme for wholesale price posting implicitly recognizes this fact. The statutes do not provide for state supervision nor do they require posting of the prices manufacturers charge wholesalers. The California Supreme Court approved this lack of supervision in *Allied Properties*,⁶⁰ reasoning that because of the smaller number of people involved in sales to wholesalers unfettered competition would not produce disorderly market conditions and would protect the public against excessive prices without government involvement.⁶¹

The discussion following in the text above presents an analysis that can be used to invalidate these remaining statutes, as well as a more thorough application of the *Rice* reasoning to the wholesale wine price posting requirements than that used by the court in *Capiscean*. An additional ground, that the price posting scheme is even less effective at the wholesale level in advancing state interests, is presented in support of the invalidation of wholesale price posting statutes. See text accompanying notes 59-62 *infra*.

⁵⁸ See note 26 and accompanying text *supra*.

⁵⁹ The studies in the Court relied on to refute the ABC's contention that CAL. BUS. & PROF. CODE § 24755 (West Cum. Supp. 1978) promoted temperance and orderly marketing conditions covered the time period when the wholesale price posting laws were also in effect. Therefore, the results of those studies are as much caused by the wholesale price posting scheme as the retail price posting scheme of § 24755.

⁶⁰ *Allied Properties v. ABC Appeals Bd.*, 53 Cal. 2d 141, 346 P.2d 737 (1959).

⁶¹ *Id.* at 149, 346 P.2d at 741.

Enforcement of controls less restrictive than price posting, such as the free goods restrictions approved by the Court in *Rice*, is easier and more effective with fewer actors. Just as there are fewer actors in the manufacturer-wholesaler market so are there fewer actors in the wholesaler-retailer market than in the retailer-consumer market. Since the *Rice* Court struck down the price posting scheme at the retailer consumer level, where there are the most actors, and approved less restrictive methods to achieve state interests at that level, *a fortiori*, price posting at the wholesaler-retailer level cannot be a legitimate method to accomplish the state objectives of temperance and orderly market conditions. The balance therefore favors federal interests and, accordingly, a court, when confronted with the issue, should invalidate the wholesale price posting statutes. The *Capiscean* court correctly reached this result regarding the wine wholesale price posting statutes.⁶²

D. Constitutional Restrictions

The ABC has indicated that it considers the *Rice* decision to have only invalidated retail distilled spirits and beer price posting requirements.⁶³ Even if the ABC should want to apply the court's reasoning to invalidate the remaining price posting laws, a recent amendment to the California Constitution bars such action.⁶⁴ The amendment provides that an administrative agency may not refuse to enforce its own regulations or governing statutes by declaring them unconstitutional. The remaining price maintenance laws must, therefore, remain unchanged until further judicial or legislative action is taken.⁶⁵ Based on the similarity of these other price maintenance laws to section 24755 and their vulnerability to the same attack used in *Rice* to invalidate that section, when the other laws are contested, courts will invalidate them, as did

⁶² *Capiscean Corp. v. ABC Appeals Bd.*, ___ Cal. App. 3d ___, ___, 151 Cal. Rptr. 492, 494 (1st Dist. 1979). See note 57 *supra*.

⁶³ Interview with Manuel Espinoza, California Department of Alcoholic Beverage Control, in Sacramento, California (August, 1978).

⁶⁴ CAL. CONST. Art. III, § 3.5, No. 4 West's Calif. Legis. Service at XXIV (1978). This amendment, introduced as Proposition 5, was passed in June, 1978 general election.

⁶⁵ This was in fact the position taken by the ABC Appeals Board on *Capiscean* Corporation's appeal of its original license suspension by the ABC to the Board, and necessitated *Capiscean's* proceeding to the Court of Appeal in *Capiscean Corp. v. ABC Appeals Bd.*, ___ Cal. App. 3d ___, 151 Cal. Rptr. 492 (1st Dist. 1979).

the Court of Appeal in *Capiscean*.⁶⁶ To save the time and expense of litigation, and to restore free competition in the alcoholic beverage marketplace as quickly as possible, the legislature should repeal the remaining price posting statutes.

IV. CONCLUSION

The California Supreme Court's decision in *Rice* invalidated section 24755's regulation of retail prices of distilled spirits and beer because of its impermissible conflict with the policies underlying the Sherman Act. The Court of Appeal in *Capiscean* likewise invalidated the wine retail and wholesale price posting statutes. The decisions however, left the remaining price maintenance statutes intact. These remaining laws, because of their similarity to section 24755 in structure and effect, appear equally invalid, under the *Rice* Court's reasoning. Unfortunately, modification or elimination of these remaining laws must await further judicial or legislative action.

The Court's decision in *Rice* is well-reasoned and sound, and supports the *Capiscean* court's decision. The public interest is now better served by competitive pricing than by state price maintenance. The repeal of all other fair trade laws in California and the repeal of the exemptions to the Sherman Act evidence this change of philosophy, as do the studies relied on in *Rice*. State interests in temperance and an orderly market can be served more effectively by enforcement of other laws, thereby avoiding the pitfalls of any type of price fixing, and promoting free and unfettered competition in the liquor marketplace.

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⁶⁶ *Capiscean Corp. v. ABC Appeals Bd.*, ____ Cal. App. 3d ____, ____, 151 Cal. Rptr. 492, 492 (1st Dist. 1979).