



GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

Loss Leader Leads to Loss

A recent federal court decision in Colorado demonstrates that below cost pricing statutes have real teeth, but that considerable care must be taken to interpret them properly.

King Soopers had long operated a “Buy Groceries/Get Gas” discount program, under which it offered the customer an additional 7-cents-a-gallon discount at its pumping stations based on the volume of the customer’s grocery purchases, generally within the past 30 day period.

Competing resellers cried foul. Filing suit in an action styled *Parish Oil Co. v. Dillon Companies*, they contended that King Soopers’ program violated the Colorado Unfair Practices Act because it resulted in the below cost sale of gasoline.

The resellers relied on the core language of the statute, which provides:

It is unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state to engage in a pattern of selling, offering for sale or advertising for sale motor fuel for less than the cost thereof to such vendor, when such pattern has the effect of injuring one or more competitors or destroying competition.

King Soopers argued that its activities fell under a separate “safe harbor” provision contained within the statute, and moved for summary judgment. That provision suggested that the statute was not violated if the total sum paid by the customer for both gasoline and groceries was not less than the aggregate cost to King Soopers of all the separate products that it resold to the customer.

Denying King Soopers’ motion for summary judgment in a decision released this past September, District Court Judge Robert Blackburn acknowledged the difficulty of reading the two statutory provisions together in a consistent manner, without undermining the law’s overall purpose of prohibiting loss leader sales.

Holding that that overall purpose of the law trumped any conflict between its separate provisions, the court refused to interpret the provision relied upon by King Soopers to, in effect, nullify the statute. He concluded:

Defendant’s interpretation of the statute permits sellers to evade the [law’s] ultimate goal of promoting competition by prohibiting below cost and loss leader sales. The legislature could not have intended to create an exception that would

swallow the rule in the manner defendant's preferred interpretation would permit. Therefore, I must conclude that the only rational interpretation must be one in which the cost of each item and the cost of the concomitant concession is considered separately to determine whether that individual price is below cost.

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The court's decision cleared the way for a trial on the merits before a jury, which was held in November. The jury ruled that King Soopers indeed had engaged in prohibited below cost sales to the injury of the complaining resellers, awarding one \$281,250 and the other \$200,000 in damages. Under the Colorado statute, those damages are automatically tripled.

Twenty or more states presently have statutes prohibiting below cost sales of gasoline. Those statutes vary significantly from state to state and many, like the Colorado statute, require close scrutiny to assess properly where the proper balance should be struck between pro-competitive activities and predatory pricing conduct. As the Colorado case illustrates, however, these laws can provide an effective deterrent against unfair below cost pricing schemes.

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