UNFAIR MILK SALES PRACTICES ACT: A supermarket which demands and receives ninety days credit from dairy suppliers would be in violation of Section 416.440(3), RSMo 1959, if the nature of said credit demand is that of a discriminatory gift not available to all purchasers nor extended by all suppliers and if the effect thereof is to divert trade or injure competition.

OPINION NO. 319

September 15, 1969

FILED
319

Honorable Dexter D. Davis, Commissioner
State Department of Agriculture
Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Davis:

This official opinion is issued in response to your request for a ruling acknowledged by this office on July 2, 1969, and asking the following question:

> Is a supermarket which demands dairy suppliers give ninety days credit in violation of Section 416.440(3), RSMo 1959, the Unfair Milk Sales Practices Act?

Section 416.440(3), RSMo 1959, provides:

> "3. No milk product purchaser shall accept from any milk processor or distributor any rebate, discount, free service or services, any advertising allowance, pay for advertising space used jointly, donation, free merchandise, rent on space used by retailer for storing or displaying the milk processor's or distributor's merchandise, financial aid, free equipment, or any other thing of value; . . ."

Subsection (4) provides that proof of such acceptance shall be prima facie evidence of a violation. Under Section 416.440(1) a processor or distributor who offers or gives any of the advantages to a purchaser which are listed in subsection (3) above, does not violate the Unfair Milk Sales Practices Act unless said offer or gift is ". . . with the intent or with the effect of unfairly diverting trade from a competitor, or otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, . . ." This office is of the opinion that a purchaser does not violate subsection (3) unless he is a party to a transaction in which the intent or

effect is as enunciated in subsection (1), supra. In this conclusion we are in accord with the Supreme Court of Missouri which in Foremost Dairies, Inc. v. Thomason, 384 S.W.2d 651, 658 (Mo. en banc 1964), stated, in regard to all sections of the Act, that:

> ". . . In general, in order to constitute a violation, all of the practices prohibited must be shown to have been done with the intent or effect of unfairly diverting trade from a competitor or of destroying competition or of creating a monopoly."

You will note that subsection (3) does not explicitly require that a purchaser, who receives something prohibited thereby, intend to divert trade, injure a competitor, etc., nor that this be the effect of said reception. However, to reason from this fact that a milk product purchaser could violate this Act by entering into a transaction which in no way was intended nor has the effect of diverting trade or injuring his competition is clearly not warranted nor is it a reasonable interpretation of the legislative intent.

Therefore, in order to make proper response to your request for an opinion, two questions must be considered. 1. Is ninety days credit a ". . . rebate, discount, . . . donation, . . . financial aid, . . . or any other thing of value; . . ." meant to be prohibited by the Unfair Milk Sales Practices Act? 2. If so, is the demand for and reception of ninety days credit done with the intent to, or does it have the effect of, ". . . unfairly diverting trade from a competitor, or of destroying competition, or creating a monopoly. . ."? Foremost Dairies, Inc. v. Thomason, supra at 658. The particular facts of any situation could be determinative of the answers to either of these two questions. Therefore, certain assumptions will be made in the following discussion which, hopefully, will enable you to dispose of individual cases.

On the question of whether the demand for ninety days credit is in violation of Section 416.440(3), RSMo 1959, as the acceptance by a purchaser of any of a number of things (including "financial aid" or "any other thing of value") from a milk products supplier, you are again referred to Foremost Dairies, Inc. v. Thomason, 384 S.W.2d 651 (Mo. en banc 1964). That case concerned the issue of whether volume pricing policies of two dairies constituted a prohibited "discount." Recognizing that the term "discount" was ambiguous, as are other terms in the statute (especially "any other thing of value"), the Supreme Court applied the technique of construction known as noscitur a soccis (it is known by its associates). After listing each of the things prohibited by Section 416.440, the Court came to the following conclusion:

> ". . . Disregarding for the moment the word 'discount,' it will be noted that the other words and clauses all carry the connotation of a donation or a discriminatory gift. The words indicate the return of a part of the purchase price or the giving of something of value as an inducement to buy the seller's products . . . In the manner used, the word [discount] does not suggest any intent to prohibit the use of volume pricing policies which do no more than reflect varying distribution costs, sometimes characterized as earned discounts, which are available to all customers of the distributor . . . ." (loc. cit. 660)

In some situations the demand for ninety days credit would not connote the demand for a discriminatory gift. This would be true if similar credit terms are made available to all purchasers and are extended by all suppliers. Reasoning from the facts (1) that the legislature defined costs to the processors as including credit losses, Section 416.410(5), and (2) that Section 416.440 is made explicitly not to apply to two per cent discount credit terms by subsection (6) thereof, it is manifestly apparent that credit sales of milk products was anticipated by the legislature and that the extension of credit is not per se a violation.

However, reasoning from the practicalities attendant to particular fact situations, it is the opinion of this office that ninety days credit could qualify as "financial aid" or "any other thing of value" meant by the legislature to be prohibited. It is apparent that credit is a thing of value. The supermarket purchaser not only has the milk products to sell but the use of a purchase price for a period of ninety days. In the present market situation, the cost of borrowing money often approaches ten percent. A milk product purchaser who was to accept ninety days credit would, in effect, have the use of the supplier's money during this period without having to pay interest, and could use this purchase price to benefit his operations in the same way a loan could be used. As an example of how such credit could constitute "financial aid," if a very large supermarket chain were to have a dairy bill of $120,000, under ninety day credit terms, and using a ten percent interest figure, said supermarket chain would be saving $3,000 as compared to what borrowing such a sum would cost. There is no doubt that credit constitutes valuable financial aid and is a thing of value when accepted. It is also obvious that if the ninety day credit is received by only certain purchasers it takes the form of a discriminatory gift.

This raises the second question implicit in your request for an opinion. Does the demand for ninety days credit, which under

the particular circumstances qualifies as a prohibited thing of value having ". . . the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, . . ."?

As a general rule, the requisite intent to and effect of unduly diverting trade or of injuring a competitor are issues dependent on the facts and circumstances of each individual case. State ex rel. Thomason v. Adams Dairy Co., 379 S.W.2d 553, 556 (Mo. 1964); State ex rel. Davis v. Thrifty Foodliner, Inc., 432 S. W.2d 287, 290 (Mo. 1968). It is the province of the courts and not of this office to make the necessary determination in each case. Please note that if the extension of ninety days credit is found to have the requisite discriminatory nature, under the circumstances, this is enough to get the issue of a violation of Section 416.440 (3) before the courts. However, the courts can find no violation unless the intent or effect of diverting trade, etc., is found. State ex rel. Thomason v. Adams Dairy Co., 379 S.W.2d 553, 556 (Mo. 1964).

It is certainly possible that a court might find the necessary intent manifested toward a competitor or effect to a competitor when a supermarket demands and receives a ninety day extension of credit.

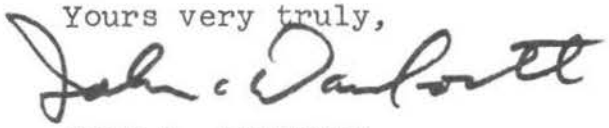
In any event the question of effect or intent in regard to injuring competition is one of fact to be determined in each individual circumstance by the courts.

## CONCLUSION

Therefore, it is the opinion of this office that a supermarket which demands and receives ninety days credit from dairy suppliers would be in violation of Section 416.440(3), RSMo 1959, if the nature of said credit demand is that of a "discriminatory gift" and, if it shown that it was received with the intent to or effect of diverting trade or injuring a competitor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Alfred C. Sikes.

Yours very truly,



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