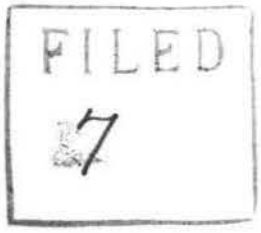
ANTI-TRUST: Arrangements among insurance companies to effectuate the price or any part thereof of competitive bids submitted by automotive repair shops is an unlawful restraint of trade in violation of Sections 416.020 and 416.040, RSMo 1969. However, any arrangement between an insurance company and an automotive repair shop whereby the former requires the latter to afford it discounts on specified work is not violative of Sections 416.020, 416.030, or 416.040, RSMo 1969, absent an arrangement among insurance companies to effectuate such a practice. Also, any arrangement among insurance companies to limit competitive bidding on automotive repair to only those automotive repair shops which agree to pre-conditioned limits on their competitive bid is violative of Sections 416.030 and 416.040, RSMo 1969, as an unlawful restraint of trade.

OPINION NO. 7

January 5, 1972



Honorable Donald E. Lamb
Prosecuting Attorney
Reynolds County
P. O. Box 52
Centerville, Missouri 63633

Dear Mr. Lamb:

This is in response to your request for an opinion on whether specified practices among insurance companies and between insurance companies and automotive repair dealers relating to the repair by the latter of the formers' insured automobiles constitutes practices inimical to the anti-trust laws of this state.

The facts as set forth in your opinion request are as follows:

> "Several automobile repairmen in this county have complained to me concerning the practices followed by some insurance companies in the area. These companies have entered into an agreement or understanding with one of the automobile dealers in the area, whereby this dealer gives the insurance companies an across-the-board discount of 30% on all windshields replaced and a 10% discount on all parts. The other dealers have been informed by the insurance companies that, unless they give the insurance companies an identical discount, that these dealers will not even be invited to make competitive bids on repairs. A number of the

> dealers have refused to do this, with the result that they have not been invited to make competitive bids on the various repair jobs for the insurance companies. In addition, the insurance companies have been requiring their insureds to go only to the one repair shop which has agreed to give the insurance companies the aforementioned discount.
>
> "The complaint of the remaining repair shops is, not that they are required by the insurance companies to submit the low bids in order to obtain a given job, but that they are not even given the opportunity to make a competitive bid in the absence of an overall agreement with the insurance companies to give the insurance companies the flat discount rate noted above."

Specifically, by your letter, you have inquired:

> ". . . whether such an agreement or arrangement by and between the insurance companies and any participating repair shop would be in violation of the provisions of the anti-trust laws of the State of Missouri, specifically Sections 416.020, 416.030 or 416.040, RSMo."

In the following opinion, this office accepts the facts as stated in your request, This office, itself, has no specific information as to the existence of those facts.

It is the opinion of this office that any "agreement, combination, confederation or understanding" among insurance companies to fix, stabilize or in any manner effectuate the price, i.e., competitive bid, or any part thereof, at which an insurance company, a member to such understanding, will allow its insureds' automobiles to be repaired by an automotive shop is a restraint of trade in violation of Section 416.020, RSMo 1969. The latter statutory section provides that any ". . . agreement, combination, confederation or understanding . . . to regulate, control or fix the price of . . . repair, . . . [is a] conspiracy in restraint of trade, . . ." The specific mention of repairs in Section 416.020 necessitates the conclusion by this office that the service exemption (see State ex rel. Star Pub. Co. v. Associated Press, 60 S.W. 91 (Mo. banc 1900) and State v. Green, 130 S.W.2d 475 (Mo. 1939)) from the Missouri anti-trust laws is not applicable to the factual situation presented in your opinion request. An agreement among competitors

to "regulate, control or fix" prices is termed a horizontal arrangement and has, since the inception of this state's restraint of trade laws, been held violative of said laws. State ex rel. Crow v. Fireman's Fund Ins. Co., 52 S.W. 595 (Mo. banc 1899). Such horizontal combinations are illegal per se. State ex rel. Barrett v. Boeckeler Lumber Co., 256 S.W. 175 (Mo. banc 1923); State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S.W. 101 (Mo. 1912); Reisenbichler v. Marquette Cement Co., 108 S.W.2d 343 (Mo. 1937). The United States Supreme Court in its interpretation of Section 1 (federal counterpart to Sections 416.010 and 416.020, RSMo 1969) of the Sherman Act (15 U.S.C. §7) has consistently held that price fixing is a per se offense. That is to say, its legality does not depend on a showing of unreasonableness, since price fixing is conclusively presumed to be unreasonable. United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956) and United States v. Container Corporation of America, 393 U.S. 333 (1969).

However, any business arrangement between an insurance company and an automotive repair shop whereby the latter agrees to afford the former specified discounts on designated work is not an unlawful agreement in restraint of trade under the factual situation depicted in your request. Such an arrangement is the prerogative of independent businessmen and does not violate Sections 416.020, 416.030 or 416.040, RSMo 1969.

It is the further opinion of this office that an "agreement, combination, confederation or understanding" among insurance companies to limit competitive bidding on automotive repair to only those automotive repair shops which agree to pre-conditioned limits on their competitive bids, i.e., the specific discounts as mentioned in your opinion request, is violative of Section 416.030, RSMo 1969. The latter section provides that any:

> ". . . two or more persons engaged in buying . . . repair, . . . who . . . enter into, . . . any . . . agreement, combination, confederation, association or understanding to control or limit the trade . . . or to limit competition in such trade . . . for the reason that such other person is not a member of or party to such . . . combination, confederation, association or understanding, or shall boycott or threaten any person from buying or selling to any other person who is not a member of . . . [is] guilty of a conspiracy in restraint of trade, . . ."

Therefore, any arrangement among insurance companies by which they refuse to accept competitive bids from automotive repair shops on

the former's insured automobiles, absent an agreement by the automotive repair shop to adhere to the insurance company's price-related concessions, is an illegal boycott of trade and violative of Section 416.030, RSMo 1969. See Walsh v. Association of Master Plumbers, 71 S.W. 455 (St.L.Ct.App. 1902); State ex rel. Barrett, supra; and Dietrich v. Cape Brewery & Ice Co., 286 S.W. 38 (Mo. 1926). Under Missouri's counterpart in the federal statute (Sherman Act, §1) group boycotts are illegal per se. See Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959).

Section 416.040, RSMo 1969, provides a further remedy of declaring:

> ". . . arrangements, contracts, agreements, combinations or understandings . . . [which] lessen, or which tend to lessen, . . . trade, . . . or . . . which . . . increase, . . . or . . . tend to increase, the market price . . . to be . . . void; . . ."

Section 416.040, RSMo 1969, does provide the substantive test of lessening competition or increasing price and under such a standard would make this statutory proviso likewise applicable to those arrangements which the foregoing opinion has determined to be inimical to the anti-trust statutes of this state.

CONCLUSION

It is the opinion of this office that arrangements among insurance companies to effectuate the price or any part thereof of competitive bids submitted by automotive repair shops is an unlawful restraint of trade in violation of Sections 416.020 and 416.040, RSMo 1969. However, any arrangement between an insurance company and an automotive repair shop whereby the former requires the latter to afford it discounts on specified work is not violative of Sections 416.020, 416.030 or 416.040, RSMo 1969, absent an arrangement among insurance companies to effectuate such a practice. Also, any arrangement among insurance companies to limit competitive bidding on automotive repair to only those automotive repair shops which agree to pre-conditioned limits on their competitive bid is violative of Sections 416.030 and 416.040, RSMo 1969, as an unlawful restraint of trade.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kermit W. Almstedt.

Yours very truly,

JOHN C. DANFORTH
Attorney General