

CHAPTER NO. 300

HOUSE BILL NO. 1128

By Representative McDaniel

Substituted for: Senate Bill No. 1800

By Senators Herron, Burks

AN ACT to amend Tennessee Code Annotated, Title 53, Chapter 3, relative to the sale of milk and milk products.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated Section 53-3-201 is amended by deleting the section in its entirety and by substituting instead the following:

As used in this part, unless the context otherwise requires:

(a) "Bulk milk" means milk in bulk form that is furnished to a processor for the purpose of processing and manufacturing into milk products.

(b) "Commissioner" means the commissioner of agriculture;

(c)

(1) "Cost to the processor or distributor" means the actual cost of bulk milk and other ingredients, plus the cost of doing business properly allocable to each item covered by the term "milk products," which cost of doing business includes, but is not limited to, labor, employee salaries, rent, maintenance and depreciation on real and personal property, shrinkage, interest, power, supplies, advertising, transportation and delivery costs, credit losses, all permits and license fees, all taxes, insurance and any and all other overhead expenses.

(2) In the absence of proof to the contrary, the actual cost of bulk milk shall be presumed to be the cost as established by a federal marketing order effective in the area or, if higher, the price established by a producer cooperative; or, in the absence of either, then such price as is effective in the nearest marketing area covered by a federal marketing order.

(3) The profit derived from the sale of one (1) product, whether the same is one (1) of those included in the term "milk products" or some other product, shall not be utilized in cost computations as a credit to, or deductions from, the cost of doing business properly allocable to any product embraced by the term "milk products." so as to subsidize or lower the cost of doing business with respect to such milk products;

(d)

(1) "Cost to the retailer" means the invoice price paid by the retailer for milk products, plus that portion of the retailer's overhead or cost of doing business properly allocable to such milk products, which cost of doing business shall include the same items of expense as are enumerated in the definition of "cost to the processor or distributor";

(2) In the absence of specific evidence, the cost of doing business of a retailer shall be presumed to be 10% of the invoice price, this cost to be calculated to the nearest whole cent on each sales unit:

(3) Such cost of doing business of a retailer includes the fair value of any concession of any kind whatever which has the effect of reducing the actual sales price or increasing the cost of the goods delivered for the price stated in the invoice, including, but not limited to, the cost to the retailer of trading stamps or redeemable coupons;

(e) "Distributor" means any person engaged in the business of selling or offering for sale within the state milk products for a consideration, where such property is sold for the purpose of resale or further processing, or is to be used or consumed by the purchaser and not resold or used for the purpose of further processing;

(f) "Milk products" means all or any one (1) of the following: Market milk, pasteurized milk, vitamin-D milk, homogenized milk, flavored milk or flavored milk drinks, sweet cream, whipping cream, homogenized cream, skim milk, cottage cheese, buttermilk, and cultured buttermilk, as such products are defined by the commissioner under § 53-3-104, bulk milk as herein defined; and all other products offered for sale by a milk processor or distributor, derived in whole or in part from milk and frozen desserts as described and defined by the commissioner under § 53-3-104;

(g) "Person" means and includes one (1) or more individuals, partnerships, associations incorporated, unincorporated, or cooperative, corporations, legal representatives, trustees in bankruptcy, receivers, or any other business unit, or any combination thereof, except where the context otherwise requires;

(h) "Processor" means any person engaged in the business of processing or packaging bulk milk and other materials into milk products;

(j) "Retailer" means any person, whether or not a processor or distributor, engaged in the business of selling or offering for sale within the state milk products for a consideration, where such milk products are to be used or consumed by the purchaser and are not to be resold or used for the purpose of manufacture or further processing;

SECTION 2. Tennessee Code Annotated Section 53-3-202 is amended by deleting the section in its entirety and by substituting instead the following:

(a) The prohibited practices described in this section are hereby declared to be unfair trade practices and are prohibited and made unlawful when done with the intent or with the effect of injuring a competitor, or of destroying competition or of creating a monopoly;

(b) No processor or distributor shall do, nor shall any retailer accept the benefit of, any of the following:

(1) Advertise, offer to sell or sell within the state of Tennessee, at wholesale or retail, any milk product for less than cost to the processor and/or distributor;

(2) Discriminate in price in the sale of any milk product between any of the towns or counties of this state; provided, that different prices which reflect actual transportation cost from point of processing to point of sale, or the actual transportation cost from point of purchase to point of resale shall not be construed as discriminatory;

(3) Give or offer to give any retailer or prospective retail customer of such processor or distributor or of their agents or employees any free service or any other thing of value, such as, but not limited to, the following, which, together with any similar practices, are hereby declared to be unfair trade practices when conducted with the intent of committing any of the acts outlined in this section: advertising allowance; brokerage fees or payments or sales commissions, a part or all of which are passed on by the ostensible recipient thereof to the customer; compensation for jointly used advertising space; advertising displays of any kind including, but not limited to, newspaper advertising, hand bills, booklets, television and/or radio advertising, and signs in or outside of the customer's place of business; furnishing of hosts or hostesses or demonstrators in stores to make sales to the store's customers; donations directly or indirectly made, whether by way of money, goods, labor or services; free equipment; cleaning and servicing of equipment, rent on space used by retailer for storing or displaying processor's or distributor's merchandise. However, nothing in this subdivision shall be construed as prohibiting the furnishing free of cost by a processor or distributor to a retailer, at the retailer's place of business, printed advertising material, such as recipes and informational materials for the promotion of the sale of such processor's or distributor's products.

(c) No retailer shall advertise, offer to sell or sell within the state of Tennessee any milk product for less than cost to such retailer;

(d) No person shall advertise, offer to sell or sell any milk product with any other commodity or service at a combined price which is less than the aggregate of the prices for which such milk product and such other commodity or service are separately offered for sale.

(e) In all proceedings brought to enforce this section, proof of consistent or repeated advertisements, offers to sell or sales of milk products at less than cost to them as defined in this part, the advertisements, offers to sell and sales thereby forming a pattern of sales below cost, shall be prima facie evidence of the intent to injure competitors and destroy or lessen competition.

SECTION 3. Tennessee Code Annotated Section 53-3-203 is amended by deleting the section in its entirety and by substituting instead the following:

(a) Any person, or any trade association which is a representative of such person, claiming to be injured by reason of violation of the provisions of this part is hereby authorized to file a written complaint with the commissioner setting forth such evidence as such person may have, alleging that milk or milk products are being sold or offered for sale in violation of the provisions of this part to the injury of the petitioner or injury to competition. Upon the filing of such complaint, the commissioner shall, with reasonable notice, require the person accused of violating this part to appear and answer the complaint and show cause why penalties provided in this part should not be imposed.

(b) Upon the finding by the commissioner that a violation of this part has occurred, the commissioner may:

(1) Revoke or suspend any license or permit issued by the department to the person found in violation of this part; or

(2) Seek injunctive relief in any court of competent jurisdiction to enjoin any violation of this part, or

(3) Impose civil penalties of up to \$1,000 each day that a violation occurs.

(4) Recover any and all expenses for investigation and prosecution of violations of this part from any person found in violation.

(c) The commissioner, any aggrieved person, or any trade association which is a representative of such person, may file an original injunction in the chancery court of the county in which the person who violates the provisions of this part resides to enjoin further violations of this part.

(d) The commissioner has the following additional powers and duties to:

(1) Issue rules and regulations for the enforcement of the provisions of this part in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5;

(2) Conduct hearings in accordance with the Uniform Administrative Procedures Act and have such authority to issue subpoenas duces tecum and have access to such records of those persons regulated by this part as are necessary and reasonable for the enforcement of this part.

SECTION 4. Tennessee Code Annotated Section 53-3-204 is amended by deleting the section in its entirety and by substituting instead the following:

(a) The provisions of § 53-3-202 shall not apply to advertisements or offers to sell, or sales where:

(1) The sales are made in an isolated transaction and not in the usual course of business, such as but not limited to, date commemoration, promotional events, grand openings and other temporary price reductions not intended to injure a competitor or injure or destroy competition. Such isolated transactions

shall not exceed 3 days per month and in any event not to exceed a total of 15 days in a twelve month period;

- (2) The merchandise is damaged;
- (3) The items are sold upon the final liquidation of any business;
- (4) The items are sold or given away for any charitable purposes;
- (5) Bids are made in response to invitations from federal, state, county or municipal institutions and agencies, and contracts and deliveries pursuant thereto;
- (6) The items are sold by an officer acting under the direction of any court; or
- (7) The price of such items is made in good faith to meet competition; provided, that such prices shall not be cut more than once, nor in any event cut below the price of competition.
- (8) The items are sold for consumption on the premises where sold.
- (9) The items are sold within twenty-four (hours) of the expiration or sell-by date imprinted on the item.

SECTION 5. Tennessee Code Annotated Title 53, Chapter 3, Part 3 is hereby repealed.

SECTION 6. Tennessee Code Annotated Title 53, Chapter 3 Part 1 is amended by adding the following new section:

() Any processor or distributor required to be licensed under, or whose product is required to be registered under, the dairy law of the state of Tennessee, compiled in this chapter, who acquires or receives, on consignment or otherwise, market or fluid milk from producers or cooperative associations composed of producers, shall file with the commissioner a corporate surety bond payable to the state of Tennessee, for the use and benefit of any aggrieved person and in such form as is prescribed by the commissioner and conditioned for the payment by such processor or distributor of all amounts due for market or fluid milk purchased or otherwise acquired from producers or cooperative associations of producers by such processor or distributor. The bond shall be in an amount equal to the total purchases of market or fluid milk by such processor or distributor during the month of May of the preceding year, or if such processor or distributor was not engaged in business during such month, the bond shall be in an amount fixed by the commissioner. The bond required shall not, in any event, exceed fifty thousand dollars (\$50,000). Any producer or cooperative association of producers aggrieved by reason of a processor's or distributor's failure or refusal to pay any amount of money due for purchases of market or fluid milk shall have a right of action to sue in its own name upon the bond and against the surety in any court of law or equity of this state having jurisdiction. The processor or distributor shall, at the time of paying the annual license or registration fees, file a corporate surety bond as provided herein, which shall cover the term of such license or registration. If any applicant for the license or registration fails to file the corporate surety bond as required herein, the commissioner

may refuse to issue or renew the applicant's license or registration, or the commissioner may issue such license or registration conditioned upon the applicant's paying cash for all the applicant's market or fluid milk purchases; provided, that the applicant furnishes the commissioner with the names and addresses of all persons from whom the applicant purchases milk.

SECTION 7. This act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: May 19, 2005


JIMMY RAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES


JOHN S. WILDER
SPEAKER OF THE SENATE

APPROVED this 6th day of June 2005


PHIL BREDESEEN, GOVERNOR