

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 01-085

Constitutionality of SB 1070/HB 576--Amendment to Unfair Sales Law

QUESTIONS

1. Does SB1070/HB 576 violate the Contract Clause of the United States Constitution?
2. Does SB1070/HB 576 violate the Supremacy Clause of the United States Constitution?
3. Does SB1070/HB 576 violate the Robinson-Patman Act?
4. Does SB1070/HB 576 conflict with Opinion 01-047 of the Attorney General?

OPINIONS

1. Without additional facts, we are unable to state whether SB 1070/HB 576 violates the Contracts Clause of either the United States or Tennessee constitutions.
2. Because the United States Bankruptcy Code preempts state law that directly conflicts with it, a prohibition against the sale of “bottled soft drinks” at below cost where such sale is pursuant to court order may violate the Supremacy Clause of the United States Constitution.
3. SB 1070 is not inconsistent with the provisions of the Robinson-Patman Act.
4. SB 1070 does not conflict with Opinion 01-047 of the Attorney General.

ANALYSIS

A. Background

SB 1070 amends the Unfair Sales Law, Tenn. Code Ann. §§ 47-25-201 *et seq.*, which together with the Robinson-Patman Act (formally known as the Robinson-Patman Price Discrimination Act), 15 U.S.C. § 13a *et seq.*, are both Depression-era efforts to prohibit certain types of price discrimination and below-cost sales of commodities. Because of the economic climate in which these two statutory schemes were enacted, some background regarding passage of both acts is in order. In the case of the Robinson-Patman Act at least, the legislation was prompted by the rise of large retail store chains throughout the United States during the 1920s and 1930s. These large corporations threatened their direct competitors, the smaller retail outlets (those we today somewhat prosaically refer to as “Mom-and-Pop-operations”), as well as certain wholesalers and distributors, whom the chains were able to bypass by purchasing directly from the manufacturers. Because of perceived weaknesses in the 1914 Clayton Act,¹ Congress responded in 1936 by passing a series of amendments to the Clayton Act, which amendments were then and are now known as the Robinson-Patman Act.² The following year, the Tennessee General Assembly passed the Unfair Sales Law, which today remains largely unchanged.

Although cases brought under the Robinson-Patman Act are in decline and the statute is viewed with some skepticism, state “fair trade” laws continue to thrive.³ In Tennessee, for example, in addition to the Unfair Sales Law, the General Assembly also has passed the Unfair Cigarette Sales Law, Tenn. Code Ann., § 47-25-301, *et seq.*; the Petroleum Trade Practices Act, Tenn. Code Ann. § 47-25-601, *et seq.*, the Motion Picture Fair Competition Act, Tenn. Code Ann. § 47-25-701, *et seq.*, and the Unfair Milk Sales Act, Tenn. Code Ann. § 53-3-201, *et seq.*

B. Unfair Sales Law

The Unfair Sales Law declares it to be the policy of the General Assembly that sales below cost

... with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, and are unfair competition and contrary to public policy, where the result of such advertising, offers, or sales is to tend to deceive or mislead any purchaser or prospective purchaser or to substantially lessen competition or unreasonably restrain trade or to tend to create a monopoly in any line of commerce.

Tenn. Code Ann. § 47-25-203

¹ The Clayton Act, together with its better-known sibling, the Sherman Act, 15 U.S.C. §1, *et seq.* constitute two legs of a three-legged federal antitrust enforcement stool. The third leg is the Federal Trade Commission Act, 15 U.S.C. §§ 41-51.

² The Robinson-Patman Act is codified as a part of the Clayton Act and consists of an amended 15 U.S.C. § 13, together with 15 U.S.C. §§ 13a, 13b and 21a, all of which were additions to the Clayton Act.

³ At one time, as many as 45 states had passed some form of fair trade act, with a number of states, including Tennessee, passing a number of such acts directed at particular commodities.

The Act defines “cost” and declares that violations of this legislative policy are Class C misdemeanors. In addition, the act provides for a private cause of action by allowing “any person damaged, or who is threatened with loss or damage” to seek an injunction to restrain violations of the act. Tenn. Code Ann. § 47-25-206. Section 47-25-204 provides that certain types of sales are exempt from coverage under the Act. These exemptions include:

- ! Isolated sales not in the usual course of business,
- ! Sales at advertised clearance sales,
- ! Sales of highly perishable merchandise,
- ! Imperfect, damaged or discontinued merchandise,
- ! Sales as part of a final liquidation of a business,
- ! Sales to government entities,
- ! Sales to meet the price of a competitor, and,
- ! Sales pursuant to court order.

C. Senate Bill 1070

On its face Senate Bill 1070 simply declares that the exemptions set out in Tenn. Code Ann. § 47-25-204 and listed above shall not apply to “bottled soft drinks” as that term is defined in Tenn. Code Ann. § 67-4-402(a)(1). As so defined, bottled soft drinks include:

... any and all nonalcoholic beverages, whether carbonated or not, such as soda water, cola drinks, orangeade, grapeade, gingerale and the like, and all bottled preparations commonly referred to as soft drinks of whatever kind or description which are closed and sealed in glass, paper, metal, plastic, or any type of container or bottle, whether manufactured with or without the use of syrup.

Tenn. Code Ann. § 67-4-402(a)(1)

D. Issues

1) Does SB 1070 violate the Contract Clause of the United States Constitution?

Both the United States and Tennessee Constitutions contain a so-called Contracts Clause.⁴ Each prohibits the passage of statutes that “impair[s] the obligations of contracts.” Tennessee’s Contracts Clause also prohibits the passage of “retrospective laws.” A substantial body of case law has arisen in this state that interprets Tennessee’s Contracts Clause, and these cases often rely on the interpretation placed on the U.S. Constitution’s version of the Contracts Clause. In each of these cases, however, the parties to the litigation have presented a specific set of facts upon which to base a challenge to a specific legislative enactment of the General Assembly. For instance, this Office recently defended the constitutionality of certain amendments to the franchise inventory statute, Tenn. Code Ann. § 47-25-1301, *et seq.*, which, in general, governs the contractual relationship between suppliers and retailers of certain statutorily-defined equipment. Amendments enacted in 1999 contained specific language regarding the permissible and impermissible contract terms between supplier and retailer. As a result of these amendments a party who was operating under pre-existing contracts asserted a Contracts Clause violation as a part of litigation between them. Because the statutory amendments were specific in their terms and because this Office had available to it the contracts that were at issue, we were able to analyze the 1999 amendments and the contracts and defend the statute’s constitutionality based upon the facts before us.

In the case of SB 1070/HB 576, no such specificity is present, nor do we have before us for review specific contracts or a set of hypothetical facts that permits the kind of in-depth analysis required in our consideration of constitutional issues. This is especially true in the case of statutes that fall under the antitrust rubric, where the outcome of cases hinges on extensive and detailed development and analysis of specific facts. Accordingly, based upon the information available to us, we are unable to state whether SB 1070/HB 576 may be subject to constitutional challenge under the Contracts Clause of either the United States or Tennessee constitutions and, more importantly, whether such a challenge, if made, would succeed.

2) Does SB 1070 Violate the Supremacy Clause of the United States Constitution?

Tennessee is bound by federal law pursuant to the Supremacy Clause of the United States Constitution, art. VI, cl. 2, which provides that the laws and Constitution of the United States “shall be the Supreme law of the Land; and the Judges in every State shall be bound thereby.” The Supremacy Clause, therefore, prohibits states from preempting or superseding federal law.

State law is displaced by federal law under the supremacy clause where (1) Congress expressly preempts state law; (2) congressional intent to preempt is inferred from the existence of a pervasive federal regulatory scheme; or (3) state law conflicts with federal law or interferes with the achievement of congressional objectives. *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 352 (5th Cir. 1993).

As outlined above, one of the exemptions in the Unfair Sales Law is for sales made pursuant to court order, *i.e.*, sales by a person or entity when such sale is ordered by a court may be below cost of the product and

⁴ Article I, § 20 of the United States Constitution provides that “[n]o state shall . . . pass any . . . law impairing the obligation of contracts.” The Tennessee Constitution, Article 1, § 20 contains virtually identical language.

escape scrutiny under the Unfair Sales Law. SB 1070/HB 576 would prohibit such exempt, below-cost sales, but only in the case of bottled soft drinks. The most common situation in which a sale pursuant to court order might occur is in the context of a bankruptcy filed in federal court pursuant to 11 U.S.C. § 101, *et seq.*, the Bankruptcy Code.

The Bankruptcy Code is one of those comprehensive federal statutes which, in general, preempts state law where conflicts exist. *See In re Cathleen M. Nation*, 236 B.R. 150 (S.D.N.Y.) “National policy codified in a statute of Congress such as the Bankruptcy Code must be given primacy over local enactments and private contracts.” *In re Nation* at 154.

In applying the provisions of SB 1070/HB576, it is not difficult to posit a fact situation in which a federal bankruptcy judge orders the trustee of a bankrupt estate to sell the estate’s assets to pay creditors. The estate happens to be a business, either retail or wholesale, that sold, among other items, bottled soft drinks. The trustee, given the wide latitude he or she has over the estate, may believe that a sale of the bottled soft drink inventory can best benefit the estate and its creditors by selling the remaining inventory below the bankrupt’s cost. SB 1070/HB 576 would appear to prohibit such a sale, thereby bringing it into conflict with the Bankruptcy Code and the duties imposed on the trustee. Under these circumstances, it is likely the bankruptcy court would find that the federal violates the Supremacy Clause of the United States Constitution.

3) Does SB 1070 Violate the Robinson-Patman Act?

This opinion discusses the history, background and purpose of the Robinson-Patman Act (15 U.S.C. § 13a, *et seq.*) in section A. above. With respect to the interplay between the federal below cost sales act (Robinson-Patman) and Tennessee’s Unfair Sales Law, this Office previously found the two statutory schemes to be compatible. In Op. Tenn. Atty. Gen. 80-180 (March 26, 1980), an opinion dealing with legislation regulating the sales of pre-need funeral services contracts, we stated that “an unfair sales law is not inconsistent” with the federal law where “sales below costs are prohibited even to the point of prohibiting certain kinds of rebates.”

4) Does SB 1070 Conflict With Opinion 01-047 of the Attorney General?

On March 26, 2001, this Office issued Op. Tenn. Atty. Gen. 01-047, which dealt with SB 1547, a bill amending the Tennessee Petroleum Trade Practices Act, Tenn. Code Ann. § 47-25-601, *et seq.* In that opinion we suggested that SB 1547 was “vulnerable to a constitutional challenge.” We so concluded based on our belief that the restrictive language in the bill would permit a petroleum dealer to fall within the statute without a showing that his or her below cost sales intended to harm competition.

No such infirmity exists in the Unfair Sales Law. The stated legislative policy of the Unfair Sales Law, Tenn. Code Ann. § 47-25-203, is that a below cost sale must be with “the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair[ing] and prevent[ing] fair competition.” Accordingly, we find SB 1070 does not conflict with our prior opinion.

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