STATE OF TENNESSEE
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Opinion No. 12-03

Unfair Trade Practices under the Tennessee Dairy Law

QUESTIONS

1. In order to qualify for a good faith exemption to meet competition pursuant to Tenn. Code Ann. § 53-3-204(7), is it necessary that the milk products of the retailer and competitor be identical in brand, i.e., Purity, Mayfield, Kroger; or is it sufficient that the retailer meet competition in type of milk product, i.e., whole milk, 2%, buttermilk, etc.?

2. Is a rebate or volume discount offered by processors or distributors to their retailers a "thing of value" pursuant to Tenn. Code Ann. § 53-3-202(b)(3)?

3. Is the value of any rebate or volume discount received by the processor or distributor included in the "cost to the processor or distributor" in calculating the actual cost of bulk milk as defined in Tenn. Code Ann. § 53-3-201(3)(A)?

4. Are the values of "loyalty cards," e.g., "buy 9 get the 10th free," offered by retailers to their customers included in the "cost to the retailer" in calculating the cost of milk products pursuant to Tenn. Code Ann. § 53-3-201(4)?

OPINIONS

1. No, it is not necessary that milk products of the retailer and competitor be identical in brand in order to qualify for the "good faith" exemption set forth in Tenn. Code Ann. § 53-3-204(7). It is sufficient that the retailer meet competition in the type of milk product.

2. Yes, a rebate or volume discount offered by a processor or distributor to a retailer is a "thing of value" as defined by Tenn. Code Ann. § 53-3-202(b)(3).

3. Yes, the value of any rebate or volume discount received by the processor or distributor is included in the "cost to the processor or distributor" in calculating the actual cost of bulk milk as defined under Tenn. Code Ann. § 53-3-201(3)(A).

4. No.

ANALYSIS

1. The Tennessee Unfair Milk Sales Act prohibits processors, distributors, and retailers of milk products from engaging in certain defined unfair, anti-competitive trade practices. Tenn. Code Ann. §§ 53-3-201 to 204. This Act is designed to prohibit retailers from selling milk below their cost, thereby protecting small dairy farmers and small retailers from financially strong competitors who are able to sell below their cost for extended periods of time. *Hogue v. Kroger Company*, 213 Tenn. 365, 372, 373 S.W.2d 714, 717 (1963); *see also* Op. Tenn. Att'y Gen. No. 77-109 (Apr. 6, 1977).

The Act defines a number of prohibited practices, including the following prohibited practice by a retailer:

> (c) No retailer shall advertise, offer to sell or sell within the state any milk product for less than cost to the retailer.

Tenn. Code Ann. § 53-3-202(c).

The Act also delineates several exemptions to the prohibited practices outlined in Tenn. Code Ann. § 53-3-202, including the following:

> Section 53-3-202 shall not apply to advertisements or offers to sell, or sales, where:
>
> . . . .
>
> (7) The price of the items is made in good faith to meet competition; provided, that the prices shall not be cut more than once, nor, in any event, cut below the price of competition.

Tenn. Code Ann. § 53-3-204(7).

Whether the above-stated exemption requires the milk products of the retailer and competitor be identical in brand necessitates an examination of the meaning of the term "competition" as used in these statutes, as well as the definition of "milk products" found at Tenn. Code Ann. § 53-3-201(6).

Tenn. Code Ann. § 53-3-201(6) lists over a dozen specific items in providing a non-exhaustive list of products that fall within the definition of "milk products." This itemization implies that the General Assembly considered each of the listed products to have a separate and distinct economic value for purposes of defining and prohibiting unfair sales. In addition, the statute provides the Commissioner the authority by rule to further define the varieties and types of dairy products, including milk products. Tenn. Code Ann. § 53-3-104(a)(1)(A). *See also* Tenn. Comp. R & Regs. 0080-3-2-.01 (2011) (identifying thirty-seven categories of "milk products"). Neither the statute nor the regulations, however, make distinctions based on brands within each product. Given the General Assembly's demonstrated awareness of the intricacies of competition with regard to milk products, it appears the General Assembly did not intend for the

term "competition" to encompass specific product brands.[1] Such an interpretation is in accord with the rules of statutory construction that the mention of one subject in a statute implies the exclusion of other subjects that are not mentioned and that a statute should not be given any forced or subtle interpretation which would extend or limit its meaning. *See Bryant v. Baptist Health System Home Care of East Tennessee*, 213 S.W.3d 743, 749 (Tenn. 2006).

In sum, given the Act's intended purpose of maintaining equal prices on competing items and silence regarding distinctions in product brand as compared with the detailed listing of distinct product types, it is not necessary that milk products of the retailer and competitor be identical in brand to qualify for the statutory good faith exemption.

2. Your second question asks whether a rebate or volume discount offered by processors or distributors to their retailer customers is a "thing of value" under Tenn. Code Ann. § 53-3-202(b)(3). Tenn. Code Ann. § 53-3-202 prohibits certain unfair trade practices "when done with the intent or with the effect of injuring a competitor, of destroying competition or of creating a monopoly." Tenn. Code Ann. § 53-3-202(a).

One such unfair trade practice may occur when a processor or distributor gives or offers to give "any retailer or prospective retail customer of a processor or distributor . . . . any free service or any other thing of value." Tenn. Code Ann. § 53-3-202(b)(3). The Act provides various examples of "things of value" which, if provided with requisite intent, constitute unfair trade practices. *Id.* Rebates and volume discounts are not included in the list of things of value enumerated in the statute; however, the statute explicitly states that the list of prohibited acts is non-exhaustive. *Id.* (stating things of value include, "but are not limited to," various defined items). Thus, the lack of inclusion of rebates and volume discounts among the list is not dispositive of whether they are in fact things of value.

In the absence of an explicit definition of "thing of value" in the statute, we must look to the plain, ordinary meaning of the phrase in an attempt to discern whether a rebate or volume discount is, in fact, a thing of value. *See State v. Majors*, 318 S.W.3d 850, 859 (Tenn. 2010) (stating that the words of a statute must be given their ordinary and natural meaning, and courts will refer to dictionary definitions where appropriate). "Value" is defined as an object or service possessing some monetary worth. *Black's Law Dictionary* 1586 (8th ed. 2004). By their very nature, rebates and volume discounts can be assigned a monetary value and thus they fit within the ordinary definition of a thing of value.

Accordingly, rebates or volume discounts offered by processors or distributors to their retail customers should be considered things of value within the context of Tenn. Code Ann. § 53-3-202.

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[1] If the Act were construed to apply only to milk products that are identical in brand, as well as type, then any retailer could avoid the Act's prohibitions by selling milk products under a "house" label unique to that retailer. In light of the Act's language and structure, it seems unlikely the General Assembly would have intended such a result.

3. Your third question asks whether the value of any rebate or volume discount received by the processor or distributor is to be included in the "cost to the processor or distributor" in calculating the actual cost of bulk milk under Tenn. Code Ann. § 52-3-201(3)(A).

The "cost to the processor or distributor" is defined as the "actual cost of bulk milk or other ingredients, plus the cost of doing business . . . ." Tenn. Code Ann. § 53-3-201(3)(A). A number of items are listed as being included in "the cost of doing business." *Id.* These include, but are not limited to:

> labor, employee salaries, rent, maintenance and depreciation on real or 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.

Id.

This list is not exhaustive. Furthermore, while the statute sets forth a lengthy list of items included in the "cost of doing business," there is no corresponding list or definition of the "actual cost" of bulk milk or other ingredients.

Accordingly, we again must be guided by the plain and ordinary meaning given the term "actual cost." *See State v. Majors*, 318 S.W.3d at 859. "Cost" generally means the amount paid or charged for something. *Black's Law Dictionary* at 371. Based upon this definition, the actual cost to the processor or distributor would be the cost paid for the milk products after the subtraction of any rebate or volume discount that the processor or distributor received.

Thus the value of any rebate or volume discount received by the processor is to be included in calculating the "cost to the processor or distributor."

4. Finally, you have asked whether the values of loyalty cards offered by retailers to their customers are to be included in the cost to the retailer in calculating the cost of milk products pursuant to Tenn. Code Ann. §§ 53-3-201(3) or (4). The cost to the retailer is defined as the "invoice price paid by the retailer for milk products, plus that portion of the retailer's overhead or cost of doing business . . .." Tenn. Code Ann. § 53-3-201(4)(A). The statute states that "[t]he cost of doing business includes the fair value of any concession, of any kind whatever, that has the effect of reducing the actual sales price or increasing the costs of the goods delivered . . . ." Tenn. Code Ann. § 53-3-201(4)(C). The statute lists trading stamps and redeemable coupons as examples of concessions which must be included in the cost of doing business. *Id. See also Hogue v. The Kroger Co.,* 210 Tenn. 1, 356 S.W.2d 267 (1962).

As previously mentioned, the term "cost" means the amount paid or charged for something. *Black's Law Dictionary* at 371. The statute defines a retailer's cost to include (1) the invoice price paid by the retailer for milk products and (2) the retailer's overhead or cost of doing business properly allocable to milk products, which absent evidence to the contrary is presumed to be ten percent of the invoice price and includes the fair value of any concessions that reduce

the actual sales price or increase the cost of the goods delivered, such as the cost to the retailer of trading stamps or redeemable coupons. Tenn. Code Ann. § 53-3-201(4).

The redemptive value of the discount provided to a retailer's customers by loyalty or discount cards is not part of either the invoice price paid by the retailer *or* the retailer's overhead cost. Instead such cards represent merely presumptive discounts in the actual sales price to the customer.[2] Thus, the actual redemptive value of these type cards is not part of the retailer's cost as contemplated by Section 53-3-201(4). Furthermore, such cards, unlike trading stamps or redeemable coupons which carry a cost to the retailer that is approximate to the actual redemptive value of the stamps or coupons, likely do not engender a significant overhead cost to the retailer. Such an expense could be included as part of the "cost to the retailer" but likely would be negligible. *See Hogue v. Kroger Co*., 356 S.W.2d at 269-270 (noting that the Legislature intended to include within overhead cost the actual cost to the retailer of obtaining trading stamps or redeemable coupons).

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[2] We say "presumptive" discounts because the customer may or may not ever redeem the loyalty or discount cards. Indeed this uncertainty around redemption would make it difficult to value the total discount actually provided by the retailer on an ongoing basis.

Requested by:

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