

PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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Docket No. 9309
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In the Matter of

KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.

AMICUS CURIAE BRIEF OF
THE COMMONWEALTH OF KENTUCKY

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This *amicus curiae* brief is submitted by the Kentucky Office of the Attorney General (the Attorney General) for the Commonwealth of Kentucky in support of the initial decision and order dated June 21, 2004, rendered by Administrative Law Judge D. Michael Chappell (the ALJ Decision and Order).

INTEREST OF AMICUS CURIAE

To the extent that this case involves the anti-trust and competition policy of the Commonwealth of Kentucky, the Attorney General speaks for the Commonwealth. By Kentucky statutes and Constitution the Attorney General is charged with enforcement of KRS Chapter 367 including the Consumer Protection Act which contains the Commonwealth's principal antitrust statutes.

The attorney general has a long history of aggressive antitrust enforcement, including filing an *amicus curiae* brief, along with thirty-two sister states, before the U.S. Supreme Court in the landmark case *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992).

The Attorney General has a direct interest in this case because it involves the public interest in a consumer protection matter explicitly entrusted to the Attorney General by statute and constitution. The Attorney General explores in this *amicus* brief the concordance between Kentucky law and public policy, and federal law and public policy concerning market based pricing of goods and services, and the ALJ Decision and Order relating thereto.

SUMMARY OF ARGUMENT

As mentioned above, the primary focus of this *amicus curiae* brief will be upon Kentucky law, and will address the questions of concordance of the ALJ Decision and Order and Kentucky law and public policy. The conclusion reached is that the ALJ Decision and Order is consistent with and fully supported by Kentucky law, and should be upheld.

ARGUMENT

I. **THE ATTORNEY GENERAL OF KENTUCKY IS, BY STATUTE AND CONSTITUTION, THE PRINCIPAL ENFORCEMENT OFFICER OF COMPETITION LAW IN THE COMMONWEALTH OF KENTUCKY.**

The principal competition statutes in Kentucky are set out in KRS Chapter 367 in the Consumer Protection Act. KRS 367.170 provides that “unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” The next section, relating to competition law, is set out in KRS 367.175(1), (2):

(1) Every contract, combination in the form of trust and

otherwise, or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.

(2) It shall be unlawful for any person or persons to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth.

Enforcement of the Consumer Protection Act by the Attorney General is provided for in KRS 367.190(1). Additionally the Attorney General is a Constitutional officer, and is by statute the chief law officer and advisor to the Commonwealth of Kentucky. KRS 15.020. Finally the Kentucky Supreme Court in a certification of law has opined that KRS 15.020 supercedes other statutes purporting to limit the Attorney General's antitrust powers. *Commonwealth of Kentucky v. Southern Belle Dairy Co.*, 801 S.W.2d 60 (Ky. 1990).

II. THE ALJ DECISION AND ORDER DOES NOT IMPLICATE FEDERALISM CONCERNS BECAUSE IT DOES NOT CONFLICT WITH KENTUCKY LAW OR PUBLIC POLICY.

Respondent's post-trial brief seems to reflect a misunderstanding of the underlying principles of federalism addressed in *Parker v. Brown* and *FTC v. Ticor Title Insurance Co.*¹ The state action doctrine is a means for dealing with any conflict between state law and federal competition policy.² Where there is no clash between the fundamental law and public policy of the state and federal systems, as is the case here, the supposed conflict does not exist.

¹*Parker v. Brown*, 317 U.S. 341 (1943); *FTC v Ticor Title Insurance Co.*, 504 U.S. 621 (1992).

²See Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335 (2004); Robert P. Inman, Daniel L. Rubinfeld, *Making Sense of the Antitrust State - Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 Tex. L. Rev. 1203 (1997).

Respondent's extended discussion of supposed conflicts between state and federal law misses the point. The discussion by respondent of Kentucky statutes underlying this case ignores the Kentucky Constitution and a long line of Kentucky Supreme Court constitutional decisions relating to interference with market-based pricing by private parties pursuant to state sanction. Extended discussion of the statutory price-setting system underlying this case is simply inapposite, since the system would surely fail to pass muster under existing Kentucky constitutional jurisprudence.

As discussed below, Kentucky has a very high constitutional standard for interference with market-based pricing by state agencies. Should the Kentucky General Assembly choose to enact legislation which does not violate the Kentucky Constitution, and which produces the necessary level of judgmental choice by the state required in setting prices, the Order clearly would not interfere with such a (very) hypothetical system. An examination of the Order in the case at bar shows that no agency or officer of the Commonwealth is impacted directly. The Order is carefully tailored and clearly avoids unnecessary interference with legitimate state concerns. Claims of litigants notwithstanding, the Order does not appear to set a higher standard than that set by the State's Constitution, and in fact, is likely a much lower threshold barrier than the Kentucky Constitution would require. Therefore, there is no conflict and the ALJ Decision and Order should be upheld.

III. THE KENTUCKY CONSTITUTION DEMANDS THAT STATE INTERFERENCE IN MARKET-BASED PRICING MUST REFLECT JUDGMENTAL CHOICE BY THE STATE.

Kentucky has a long history of holding unconstitutional state statutes which interfere with market-based pricing. In *General Electric Co. v. American Buyers Cooperative*, 316 S.W.2d 354

(Ky. 1958), a case predating the passage of the Consumer Protection Act, Kentucky's highest court unanimously held unconstitutional the part of the "Fair Trade Act" purporting to allow enforcement of a minimum retail price agreement on non-signatories to the contract. "[T]his statute, we think, is a legislative invasion of the broad constitutional liberty of the people to acquire and protect their property and engage in fair trade." 316 S.W.2d at 361. The court specifically referenced Kentucky Constitution Section 1 relating to property rights and Kentucky Constitution Section 2 which prohibits the exercise of arbitrary power by the Commonwealth.³

In a later case, very close in point, the Kentucky Supreme Court addressed the very question presented here – did a price-setting statute in which a Kentucky agency responsible for state approval of prices set by private individuals in the industry, but without independent judgmental choice by the state as to the prices, violate Section 1 of the Sherman Act. After a full

³The Kentucky Supreme Court said:

Our Bill of Rights declares as one of 'the great and essential principles of liberty and free government' and as 'inherent and inalienable * * * the right of acquiring and protecting property.' [Kentucky Constitution] § 1, Fifth. This is free enterprise. Our economic system is founded upon competition – 'the life of trade.' It is an established principle that the constitutional guaranty of the right of property protects it not only from confiscation by legislative edicts and from the physical taking for public or private use, but also (subject to reasonable regulation based upon some reasonable ground for the public good) from any unjustifiable impairment or abridgement of this right [. . .] The right of the owner to fix the price at which his property shall be sold is an inherent attribute of the property itself. [. . .] Supplemental to this property right provision is § 2 of the Constitution which forbids the exercise of arbitrary power of government over the 'property of free men.' This statute, we think, is a legislative invasion of the broad constitutional liberty of the people to acquire and protect their property and engage in free trade.

316 S.W.2d at 360-61.

discussion and analysis of *Parker v. Brown*, 317 U.S. 341 (1943), and the then recently decided case of *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), the court found such price-fixing to be a violation of the Sherman Act:

In the California wine case [*Midcal*] the State did nothing but enforce prices fixed by private individuals. In the instance of Kentucky the State participates in fixing prices only to the extent that it adds statutory minimum mark-ups to prices fixed by private individuals. From the standpoint of 'State Action' the difference is merely superficial, because it does not permit any judgmental choice by the state with respect to the resulting price. It is only a mechanical progress from the initial price set by the producer.

Alcoholic Beverage Control Board v. Taylor Drug Stores, Inc., 635 S.W.2d 319, 324 (Ky. 1982).

The lesson of the Supreme Court is clear - absent a showing of "judgmental choice by the state with respect to the resulting price" such conduct is illegal.⁴

Finally, in *Marketing and Anti-Monopoly Commission v. The Kroger Co.*, 691 S.W.2d 893 (Ky. 1985), the Kentucky Supreme Court held unconstitutional a price-fixing statute in which the state agency apparently would have passed the "judgmental action" test the Court had recently articulated. The statute in question, KRS 260.675 *et seq.* (since repealed) set up an extensive agency charged with controlling retail milk prices pursuant to a detailed "judgmental action" system described fully in the opinion. The trial court below had held the statute was an unconstitutional violation of the Kentucky Constitution, Section 1 and 2, as well as a violation of the Sherman Act. The Kentucky Supreme Court, however, did not even address the Sherman

⁴The Kentucky Supreme Court in the *Alcoholic Beverage* case based its decision on the Sherman Act, not the Kentucky Constitution (635 S.W.2d at 322), on the narrow grounds that the broad principles announced in *General Electric, supra*, did not apply to the regulation of alcoholic beverages, which occupies a special place under the Kentucky Constitution. 635 S.W.2d at 322-23. No such special constitutional status attaches to the regulation of household goods movers.

Act issue, instead declaring that any such price-fixing statute is a violation of the Kentucky Constitution:

As we have previously said, the statutory purpose of the law, is to prevent monopolies and unfair practices in the sale of milk and milk products. As we have also said, the law is in reality and in practice not an anti-monopoly statute, but is rather, a minimum mark-up law. We believe an enactment of such a nature is an arbitrary exercise of power of the General Assembly over the lives and property of free men.

691 S.W.2d at 899-900.

A brief comparison between the statutes in issue in the *Kroger* case and those in the case at bar should remove all doubt as to the likely outcome of a constitutional challenge here. In all respects, the milk marketing oversight more nearly met the requirements for state action than the state agency oversight presented here. The Court describes at length a system in which “costs” are defined in detail by statute and administrative regulation, prices are filed in advance, there is authority by the regulator to carefully scrutinize filings, conduct independent investigations, and impose extensive penalties. 691 S.W.2d at 895-99. Nonetheless, the Kentucky Supreme Court condemned these statutes as violations of the Kentucky Constitution. In fact, the language of the Court condemns generally any such “an enactment of such a nature” (691 S.W.2d at 900) as interfering with the constitutional protection for free-market pricing.

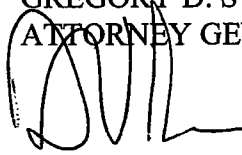
In short, it is not only federal “state action doctrine” principles that demand active supervision by Kentucky state agencies in any system of regulation of market prices, but also fundamental principles of free enterprise embedded in the Kentucky Constitution. Absent judgmental choice by the state with respect to the resulting price, a state system of market price regulation in Kentucky is likely to be unconstitutional under the Constitution of the Commonwealth.

CONCLUSION

The ALJ's Decision and Order does not implicate federalism concerns because it does not conflict with Kentucky law or public policy. The Kentucky Constitution demands that state interference in market-based pricing must reflect judgmental choice by the State. The ALJ's finding of no active supervision of the collective rate filings by the respondent here strongly suggests that the system of regulatory oversight as executed by the Kentucky Transportation Cabinet exceeds the bounds of the Kentucky Constitution.

Respectfully Submitted,

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August 30, 2004

CERTIFICATE OF SERVICE

This is to certify that on August 30, 2004, I caused a copy of *Amicus Curiae* Brief of the Commonwealth of Kentucky to be served upon the following persons:

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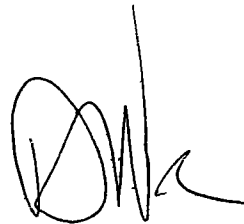
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