1972 WL 25270 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
April 12, 1972

***1 Re: Constitutionality of Acts (A Bill to Regulate Business Practices Between Motor Vehicle Manufacturers, Distributors and Dealers—Senate Bill No. 356, Sections 5(3)(f) and 5(3)(1))**

The Honorable Thomas F. Hartnett
Member
House of Representatives
Education and Public Works Committee
State House, P. O. Box 11225
Columbia, South Carolina 29211

The Honorable Wilson Tison
Member
House of Representatives
Education and Public Works Committee
State House
P. O. Box 11225
Columbia, South Carolina 29211

Gentlemen:
You have requested an opinion as to the constitutionality of Sections 5(3)(f) and 5(3)(1) of the above-identified Senate Bill. These sections provide as follows:
Section 5(3)—It shall be deemed a violation of paragraph (a) of Section 4 for a manufacturer, a distributor, a wholesaler, a distributor branch or division, or officer, agent or other representative thereof.

Subsection (f)—to offer to sell, lease or sell or lease any new motor vehicle to any person, except a wholesaler or distributor, at a lower actual price therefor than the actual price offered and charged to a motor vehicle dealer for the same model similarly equipped or to utilize any device which results in such lesser actual price.

Subsection (1)—to grant a competitive franchise in the relevant market area previously granted to another franchise, such relevant market area to be determined exclusively by equitable principles; provided, however, that if the manufacturer wishes to grant such a franchise to an independent dealer or to grant an interest in a new dealership to an independent person in a bona fide relationship in which such person has made a significant investment subject to loss in such a dealership and can reasonably expect to acquire full ownership of the dealership, on reasonable terms and conditions, then the manufacturer shall give notice to the existing dealer or dealers in the area, and unless the parties agree, the matter shall be submitted to final and binding arbitration under the principles herein prescribed, for a determination of the relevant market area, the adequacy of the servicing of the area by the existing dealer or dealers and the propriety of the granting of such additional dealership.

Revised Subsection (f)—to wilfully discriminate, either directly or indirectly, in price between different purchasers of a commodity of like grade or quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly or to injure or destroy the business of a competitor.

Since this Bill involves the regulation of business practices and may have an effect upon private contractual relations the constitutional guarantees in Article 1, Section 3 of the South Carolina Constitution (1971 Cum. Supp.) of liberty of contract and the right to use one's property as one wills must be considered. Of course these guarantees are subject to the State's police power which permits the legislature to enact laws for the general good of the citizens of the State. However, to be valid as a legislative exercise of police power, the legislation must be clearly demanded for the public safety, health, peace, morals or general welfare. Gasque, Inc. v. Nates, Commissioner, 191 S.C. 271, 2 S.E. (2d) 36 (1938).

***2** Considering these Sections individually, Section 5(3)(f) provides for fixing the price at which motor vehicles can be sold. Except for a wholesaler or distributor, the price for all purchasers is fixed at the actual price offered and charged to a motor vehicle dealer. This is price-fixing similarly as provided for in the Fair Trade Act which prohibited selling a commodity at less than a price stipulated in a contract containing certain provisions described in the Act. The Fair Trade Act was held to be unconstitutional in Rogers-Kent, Inc. v. General Electric Company, 231 S.C. 236, 99 S.E. (2d) 665 (1957).

In reviewing the power vested in the State Dairy Commission to fix minimum prices to be charged for milk, the South Carolina Supreme Court followed the general principle set out in Gasque, Inc. v. Nates, Commissioner, supra, and observed that the State may not fix prices in a business not 'affected with a public interest'. Gwynette v. Myers, 237 S.C. 17, 115 S.E.(2d) 673 (1960). The meaning of this phrase was described as follows:
Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to be public. Negatively, it does not mean that a business is affected with a public interest merely because it is larger or because the public are warranted in having a feeling of concern in respect of its maintenance. Gwynette v. Myers, supra, at 26.

Although the business of selling automobiles is large and the public is warranted in having a feeling of concern for it, such business is not 'affected with a public interest' as the meaning of that phrase is described above and further discussed in Gwynette v. Myers, supra. See also Nelson, et. al. v. Tilley, 289 N.W. 388 (Neb. 1939).

Since Section 5(3)(f) provides for price-fixing in a business which is not 'affected with a public interest', it is an attempt to deprive persons of liberty and property without due process of law in violation of Article 1, Section 3 of the South Carolina Constitution (1971 Cum. Supp.).

Section 5(3)(l) attempts to create limited monopolies in established dealers subject only to a complicated arbitration scheme. This would operate to exclude persons otherwise qualified from obtaining dealerships and would interfere with manufacturers' rights to establish additional dealerships for their cars.

To be valid such legislation would have to be justified as a reasonable exercise of police power. However, there does not appear to be any justification, especially in view of the fact that the automobile business is not 'affected with a public interest' as discussed hereinbefore.

Because Section 5(3)(l) attempts to create limited monopolies, would exclude otherwise qualified persons from obtaining dealerships and would interfere with the right of manufacturers to establish additional dealerships for their card, it operates to deprive persons of liberty and property without due process of law in violation of Article 1, Section 3 of the South Carolina Constitution (1971 Cum. Supp.). See also, Nelson v. Tilley, supra, and Nebraska Attorney General's Opinion of April 29, 1971, addressed to Senator Leslie A. Stull, Nebraska State Legislature.

***3** Revised Section 5(3)(f) is similar to a provision considered by the Nebraska Supreme Court in Nelson v. Tilley, supra. The Court there observed that injuries sustained as a result of fair competition are not protected by either the federal or its state constitution. However, the Court added that acts accompanied by a wrongful intent, established by sufficient and competent evidence, to lessen competition, to establish a monopoly, or to injure or destroy the business of another, are subject to reasonable

state regulations and that the provision similar to revised Section 5(3)(f) was a reasonable regulation and not an interference with the rights of property on personal liberty guaranteed by the federal and its state constitutions. Nelson v. Tilley, supra.

There is no reason to believe that the South Carolina Supreme Court would not follow the line of reasoning as set forth by the Nebraska Supreme Court. Therefore, it is my opinion than revised Section 5(3)(f) meets the requirements of the federal and South Carolina State Constitutions.

In summary, it is my opinion that Sections 5(3)(f) and 5(3)(l) as proposed are unconstitutional and revised Section 5(3)(f) as proposed is constitutional.

If I can be of any further assistance in this matter, please let me know.
Very truly yours,

Edwin B. Brading
Assistant Attorney General

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