

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 25, 1999

Mr. Philip S. Porter
Administrator and Consumer Advocate
South Carolina Department of Consumer Affairs
Post Office Box 5757
Columbia, SC 29250-5757

Dear Mr. Porter:

Your letter to Attorney General Condon has been referred to me for response. You have asked for an interpretation of § 39-5-325(A) of the South Carolina Code of Laws. Specifically, you have inquired whether the term "of like grade and quality" as used in that code section applies only to the octane rating of gasoline or if advertised differences in quality make branded and non-branded retailers essentially different.

The South Carolina Merchandising Unfair Trade Practices Act provides, in pertinent part, as follows:

Except as otherwise permitted to meet competition as provided by this chapter, it is declared an unfair trade practice and unlawful for any person who is in the retail business of selling motor fuel to sell motor fuel of like grade and quality at retail at a price which is below the cost of acquiring the product plus taxes and transportation where the intent or effect is to destroy or substantially lessen competition or to injure a competitor.

S.C. Code § 39-5-325(A)(1976).

The phrase "like grade and quality" is not defined within the language of South Carolina's Unfair Trade Practices Act, nor is there controlling law construing the statutory requirement of motor fuel of "like grade and quality." The state provision, which was enacted by the General Assembly in 1993, contains language similar to Section 2(a) of the Clayton Act, as amended by the Robinson-

quality” test.² *FTC v. Borden Co.*, 383 U.S. at 645-46, 86 S.Ct. at 1097-98. Thus, the Court reasoned that “like grade and quality” are to be determined by the characteristics of the product itself.

Lower courts construing the term and following the *Borden* reasoning have also held branded and unbranded products which are physically and chemically identical to be of like grade and quality. See, e.g., *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 461 F. Supp. 410, 421 (N.D. Cal. 1978), aff’d in part and rev’d in part on other grounds, 652 F.2d 917 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982)(bakery’s private label and advertised brands of bread were products of “like grade and quality” despite differences in labeling); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692, 703 (7th Cir. 1967); rev’d and remanded on other grounds, 392 U.S. 134 (1968)(holding that the Midas trade constituted an insufficient differentiation of its mufflers, even though the guarantee may have more customer appeal and command a higher market price); *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962)(various brands of whiskey held to be of like grade and quality). Thus, in applying the reasoning of the *Borden* Court to this issue as you have framed it, it would appear that, unless the dealers could show that the branded motor fuel is different from the nonbranded gas in some physical and chemical way, a court would likely determine that branded and nonbranded motor fuels are of like grade and quality for purposes of the Robinson-Patman Act. Assuming some difference could be shown in the types of fuel, then the actual differences between products would generally remove differential pricing of the two from the reach of the Robinson-Patman Act.

Because of the dearth of common law interpreting the statute, the general rules of statutory construction are relevant here. In interpreting any statute, the primary purpose is to ascertain the intent of the legislature. *Multi-Cinema Ltd. v. South Carolina Tax Comm’n*, 292 S.C. 411, 357 S.E.2d 6 (1987); *State v. Martin*, 293 S.C. 46, 358 S.E.2d 697 (1987). The court must apply the clear and unambiguous terms of the statute according to their literal meaning. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). If the intent of the legislature is clearly apparent from the language, the court may not embark upon a search for it outside the statute. *Timmons v. South Carolina Tricentennial Comm’n*, 254 S.C. 278, 175 S.E.2d 805 (1971), cert. denied, 400 U.S. 986, 91 S.Ct. 460, reh’g denied, 401 U.S. 949, 91 S.Ct. 922 (1971). The enumeration of certain matters in a statute excludes the idea of something else not mentioned. *Pennsylvania Nat. Mut. Cas. Ins. v. Parker*, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984).

² The Court suggested that money spent in creating national name recognition (and, hence, consumer preference) for a brand should be considered in the context of a cost justification defense, rather than as a “like grade and quality” issue.

Mr. Philip S. Porter
Page 4
March 25, 1999

Based on the scant case law interpreting the similar provision contained in the Robinson-Patman and giving the words of Section 39-5-325 their plain and ordinary meaning, I must advise that in my judgment the legislature did not intend to consider any advertised differences in quality to distinguish between branded and non-branded motor fuel.³ Had the General Assembly's intent been otherwise, they could have easily included language which would provide for such distinction. Therefore, consistent with the principles of statutory construction, it is my opinion that the "like grade and quality" component of Section 39-5-325 applies only to the octane rating of gasoline, unless a dealer can show that the motor fuel which he sells is physically different than that sold by another retailer. In other words, assuming the advertised differences amount to nothing more than a consumer preference for one brand over another, or for that matter, for a branded gasoline over a non-branded gasoline, the fuels are not essentially different from each other and are, therefore, "of like grade and quality" within the meaning of Section 39-5-325. Thus, this office is of the opinion that, although retailers may advertise differences in grade or quality of motor fuel, the question of whether such differences are cognizable will depend upon the existence of any actual physical differences between the products.⁴

This letter is an informal opinion only. It has been written by a designated senior assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

³ South Carolina law requires that all gasoline sold in the State is registered by brand name or grade designation and the corresponding minimum guaranteed Octane Index. S.C. Code § 39-41-250 (1976). Grades are premium, with a minimum Octane Index of ninety-one, and regular grade with an index of eighty-seven. *Id.* Octane indices below eighty-seven are sub-standard. Therefore, it can only be concluded that grade, as designated by Section 39-41-250, is the only manner in which the State is authorized to differentiate between gasoline within the meaning of Section 39-5-250.

⁴The determination of the existence of any such physical or chemical differences is beyond the scope of this opinion. This Office has previously opined: "[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body such as a legislative committee, an administrative agency or a court, we do not possess the necessary fact-finding authority and resources required to adequately determine...factual questions...." Op. Atty. Gen. No. 85-132, Dated November 15, 1985.

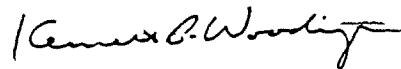
Mr. Philip S. Porter

Page 5

March 25, 1999

With kindest regards, I remain

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kenneth P. Woodington".

Kenneth P. Woodington
Senior Assistant Attorney General

KW/JJ