1980 WL 120666 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
February 11, 1980

***1 Re: S. 398; Primary Source Law**

Michael A. Molony, Esquire
Staff Counsel
Labor, Commerce and Industry Committee
South Carolina House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Mr. Molony:
You have requested an opinion on the applicability of the South Carolina antitrust laws (Code §§ 39-3-10 through 39-3-360) and of the South Carolina Unfair Trade Practices Act (Code §§ 39-5-10 through 39-5-160) to Senate Bill 398, the 'primary source law' relating to the alcoholic beverage industry. This bill would amend Code § 61-7-60 and add Code § 61-9-625. Unless I specifically address a particular section in this opinion, references to the proposed statute will include both sections. Though your letter did not question the applicability of federal antitrust laws, I will address that issue also.

It is the opinion of this office that there is no conflict between the proposed act and the existing state antitrust and unfair trade practices statutes. In addition, though with less certainty, it is our opinion that the proposed act itself would not violate federal antitrust laws nor would individuals obeying the amended statutes be subject to prosecution under the federal antitrust laws.

For the following analysis, we have assumed that this bill calls for anticompetitive action by private citizens. This assumption is made for two reasons. First, it would appear at first blush that this action would be anticompetitive if done by the liquor industry privately and without State sanction, though we do not have enough data about the economics of the liquor industry nor about its structure to fully understand the impact of the bill. Second, if the action could be shown not to be anticompetitive, then there would be no possible violation of antitrust laws, and the entire question would be moot. No state protection would be needed.

A. The State Statutes

It is a settled rule of statutory construction that a newly enacted statute will repeal an earlier statute to the extent that the two statutes have irreconcilable conflicts. A special act (such as S. 398) will supercede a general law (such as the state antitrust law or the Unfair Trade Practices Act), though only to the extent that is absolutely necessary to remedy any conflicts.

As stated above, we are assuming that the action called for would violate the state antitrust laws and the Unfair Trade Practices Act if not compelled by the State. However, since the proposed act would require and enforce this anticompetitive behavior, then the state antitrust laws (enacted in 1897 and 1902) and the Unfair Trade Practices Act (enacted) in 1971) would be impliedly repealed to whatever degree necessary to bring the statutes into harmony.

In addition to any implied repeal, the antitrust laws and Unfair Trade Practice Act would not be applicable to actions under Code § 61-7-60 because Code § 61-7-20 specifically states that 'The provisions of this chapter [7] shall be applicable notwithstanding any other provision of law.' There is no parallel section in Chapter 9 of Title 61 that would accomplish the same thing for Code § 61-9-625.

***2** That actions done by command of the proposed act would not be governed by the Unfair Trade Practices Act is reinforced by Code § 39-5-40, which reads as follows:

Nothing in this article shall apply to:

(a) Actions or transactions permitted under laws administered by a regulatory body or officer acting under statutory authority of this State or the United States or actions permitted by any other South Carolina State law (emphasis added).

B. The Federal Statutes

While § 2 of the Twenty-first Amendment gave each state the right to control importation of liquor for use inside its boundaries, the Supreme Court has interpreted that right very narrowly. Any conflict between a state law and a federal enactment under the commerce clause (such as the Sherman Act) must be resolved by a balancing of the underlying policies. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964). The basic policy of the Sherman Act calls for free and unfettered competition as the rule of trade. The only state policy that appears to underly the proposed primary source law is ease of administration of the liquor laws. If one is allowed to assume that restrictions on competition in the liquor industry will stabilize or raise prices to the consumer, then this must be weighed against the alternative costs of increased administrative staff. As stated above, we do not have the facts or expertise in this office to perform this balancing function. For the sake of this opinion, however, we must assume that the balance would tip in favor of the Sherman Act's open competition and thus remove any shield offered by the Twenty-first Amendment.

Before looking at the effect of the Sherman Act, it is worth noting the proposed statute affects only intrabrand competition and not interbrand competition. That is, each producer will be granted a monopoly on his brands but there will be no restriction on the introduction of new brands. This fact could prove important in a court challenge to the proposed statute because 'interbrand competition . . . is the primary concern of antitrust law'. Continental T.V., Inc. v. GTE Sylvania, Inc., 97 S.Ct. 2544, 2559 n. 19 (1977).

As to whether the proposed statute, if an unreasonable restraint of trade, would violate the federal antitrust laws, it is a general proposition that a state 'as sovereign' may impose certain anticompetitive restraints 'as an act of government'. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307 (1943). Since the Parker decision, the courts have worked to define the parameters of such governmental action. The rule has developed that, in order to claim implied immunity from the federal antitrust laws, parties acting under a challenged statute must show that the act in controversy is mandated by the state as sovereign (e.g., the legislature or supreme court) with the clear purpose of displacing federal antitrust law with state regulation and that there is adequate public supervision of the conduct. See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); and City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978).

***3** Goldfarb dealt with a minimum fee schedule that was issued by a county bar association, and enforced by the state bar association, the administrative agency of the state supreme court. The United States Supreme Court held that there was no implied exemption from the federal antitrust laws because the issuance of the fee schedule was not mandated by the sovereign. Approval by the state was not sufficient because a state cannot grant permission for private parties to violate the federal antitrust laws.

Cantor dealt with a utility's long-standing policy (starting in 1886) of providing free light bulbs to its electricity customers. The plaintiff, a light bulb dealer, complained about the adverse effect on competition in the light bulb market. The utility argued that the program had been approved by the Michigan Public Service Commission since 1916 and could not be changed without the Commission's approval. The United States Supreme Court denied any implied exemption for this practice because it was not mandated by the state and the utility could change the policy whenever it wanted to, subject only to filing for a rate change.

Also, the fact that the practice had started years prior to any Commission approval indicated that its origin was voluntary and private. There was no State command that the utility initiate this program.

Bates addressed a ban on attorney advertising, mandated by the Arizona Supreme Court. Though the United States Supreme Court ruled that the total ban was a violation of First Amendment rights, it ruled that there was no antitrust violation. The Arizona Supreme Court was the ultimate body wielding the State's power over the practice of law. Although the ban had been proposed to the court by the state bar and the bar played a part in enforcement, the court had adopted the rule as its own and it was the ultimate enforcement agency. Therefore, the advertising ban was State policy and the policymaker, the Arizona State Court, had a chance to re-examine the rule during any enforcement proceedings. Thus, the ban fell within the Parker exemption.

The plurality of the Court in City of Lafayette eased the burden placed on regulatory agencies to show that they acted in accordance with state policy. In this case, a private power company filed an antitrust claim against a city that operated a municipal power company. The Court rejected the city's argument that it was a subdivision of the State and so was automatically exempt from the federal antitrust laws. But it said that the city might be exempt if it could show that there was a state policy to displace competition with regulation and that the legislature contemplated the type of activity challenged in the suit.

It appears that the proposed statute closely parallels the situation in Bates. Here, the State Legislature will mandate the anticompetitive action, just as the Arizona Supreme Court did in Bates. And, here, the Alcoholic Beverage Control Commission will review the policy each time it is called upon to enforce the law, just as the Arizona Supreme Court did in its disciplinary proceedings.

***4** Based on the above discussion, it is the opinion of this office that the proposed primary source law would not violate the federal antitrust laws, because there would be an implied exemption under the Parker v. Brown ‘state action’ doctrine.

C. Summary

It is the opinion of this office that the proposed primary source law will impliedly repeal any conflicting state statutes (such as the antitrust laws and the Unfair Trade Practices Act). In addition, any anticompetitive actions that are mandated by the statute and supervised by the State should be held to be impliedly exempt from prosecution under the federal antitrust laws.

Please do not hesitate to contact me if you have any further questions.
Sincerely,

Frank L. Valenta, Jr.
Staff Attorney

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