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Trade Regulation--Sale Below Cost--Evidence of Intent

Eugene Mullins
University of Kentucky

precedent. The court reviewed the merits of the habeas corpus petition and affirmed the lower court's dismissal of the petition. The court reviewed the merits of the petition in order to eliminate the circuity of action that would have occurred had the court simply held that the petitioner's exclusive remedy was under *RCr* 11.42. Had the court so held, the petitioner's sole recourse would then have been to resort to *RCr* 11.42 to present the same question which was then before the court. Since the grounds set forth in the petition were not sufficient to justify relief from the judgment by habeas corpus or under *RCr* 11.42, the court, under the authority of *Hobbs*, considered the merits of the petition and affirmed the dismissal on that basis.

Kentucky has taken two important steps forward in 1964 in the area of post conviction remedy. The first was the holding in *Ayers* that *RCr* 11.42 is exclusive in the absence of a showing that it is inadequate. The second was the holding in *Langdon*, which qualified the *Ayers* decision by incorporating the *Hobbs* decision within its scope. The Kentucky rule, in light of these decisions, is that where the validity of a petitioner's imprisonment can be tested by a motion to vacate judgment, filed pursuant to *RCr* 11.42, such procedure is exclusive. However, if the allegation in the petition for habeas corpus is taken as true, and such allegation does not render the original judgment void, the court will not only affirm the necessity of proceeding pursuant to *RCr* 11.42, but will also negatively dispose of the merits of the allegation just as if it had arisen on appeal from a denial of a motion to vacate judgment.

Ralph R. Kinney

TRADE REGULATION—SALE BELOW COST—EVIDENCE OF INTENT.—Plaintiff laundry brought an action against defendant laundry for alleged violation of *Ky. Rev. Stat.* 365.030(1) [hereinafter cited as KRS]. Defendant's salesmen, in efforts to expand the firm's linen rental service among motels and nursing homes, solicited some of plaintiff's regular customers by offering two weeks' free service. Plaintiff does ordinary laundry and dry cleaning only. Two of the customers switched to defendant, thus causing plaintiff to lose accounts totaling some 160 dollars per week. Defendant admitted giving the free service and, strictly as a conciliatory gesture, promised to cease this practice. The trial court, on the basis of pre-trial depositions, opening statements of counsel, and the testimony of plaintiff's president, entered a summary judgment for defendant after agreement that no

additional facts would have been brought forward at trial. The trial court felt there was not sufficient evidence that defendant had intended to injure competitors and destroy competition, as required by *KRS* 365.030(1). *Held*: Proof that defendant laundry intended to gain business from its competitor was proof of intent to injure the plaintiff competitor under the terms of the statute. *Laundry Operating Co. v. Spalding Laundry–Dry Cleaning Co.*, 383 S.W.2d 364 (Ky. 1964).

KRS 365.030(1) reads as follows:

> Except as provided in *KRS* 365.040, no person engaged in business within this state shall sell, offer for sale, or advertise for sale any article or product, or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade, for the purpose of injuring competitors and destroying competition.

Most of the states which have enacted "sale-below-cost" statutes require two elements for a violation: a sale below cost and an intent to injure competition or competitors.[1] In nine states, a sale below cost alone raises a presumption of the requisite intent, while four states require, in addition, some showing of the effect on competition.[2] However, no provision for such a presumption is to be found in the Kentucky act.

The wording of the Kentucky act is in the conjunctive, but the court in the principal case dispenses with any argument that an intent to injure competitors and destroy competition are two distinct elements, each of which is necessary to establish a violation. "Considering the nature and policy of the statute . . . ," the court concludes that the phrase "injuring competitors and destroying competition" describes one single activity, "a reduction of competition at the expense of a competitor."[3]

The decision seems a clear departure from earlier interpretations of *KRS* 365.030(1) as to the way in which the necessary intent is to be established. *Kentucky Utils. Co. v. Carlisle Ice Co.*[4] involved a contract under which defendant ice company was selling its product below cost. The defendant's refusal to renew the contract after the effective date of the statute was held to be evidence that defendant was without intent to harm competition. The court there also stated that it could not presume, under the terms of the Kentucky statute, that the acts of the defendant were destructive in purpose.[5]

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[1] La Rue, *Pitfalls for Price Competitors*, 15 W. Res. L. Rev. 35, 38 (1963).
[2] *Id.* at 46 n. 56.
[3] 383 S.W.2d at 366.
[4] 279 Ky. 585, 131 S.W.2d 499 (1939).
[5] *Id.* at 592, 131 S.W.2d at 503.

However, the court in the principal case stated, as a matter of law, that the statute appeared violated when free service was given to a competitor's customer for the purpose of obtaining that customer's patronage.[6] When a seller seeks the business of a customer of a competitor, the intent to bring about a loss to a competitor is, "inextricable from the intent to effect a gain in business. . . ."[7] Thus the entire basis for satisfaction of the requisite intent is shifted, in effect, to a presumption. The basis for such presumption is taken from a Colorado case, where that court said: "It may be presumed in a civil action that the natural and probable consequences of the act were intended by the actor."[8]

Several weak points in the court's reasoning should be obvious. First, the court's sole comment concerning the policy question is, "considering the nature and policy of the statute. . . ."[9] The court establishes no guidelines as to exactly what it considers the underlying policy of the statute to be. Secondly, the policy underlying the statute was explicitly stated at the time of its passage in 1936 in a section of the act which has since been repealed.[10]

The intention of the act was to:

> [S]afeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This Act shall be literally construed that its beneficial purposes shall be subserved.[11]

The court points to no subsequent statement of legislative purpose controverting this original declaration of policy. Obviously the benefit of the statute was to accrue to the public and to competition as a whole. It was a measure to promote orderly competition and economic stability. A requirement that violations be systematic, or at least frequent, is implicit in the policy concept of preventing unfairness detrimental to honest competition. The intent must be shown by more than the simple acquisition of customers at the expense of a competitor. The legislature has done more than merely declare it unfair competition to sell below cost or give away products or services. An intention to injure competitors and destroy competition must also be established.

The decision here, stating that a violation of *KRS* 365.030(1)

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[6] 383 S.W.2d at 366.
[7] *Ibid.*
[8] Dikeou v. Food Distrib's Ass'n, 107 Colo. 38, 108 P.2d 529, 534 (1940).
[9] 383 S.W.2d at 366.
[10] Ky. Acts 1940, ch. 191. Repealed along with a large number of other statutes to "simplify and clarify the Statute Laws of Kentucky."
[11] Ky. Acts 1940, ch. 191.

occurred *as a matter of law*, represents an extreme position. It would seem to go even further than those states which provide by statute for a presumption of intent from the mere act of selling below cost, since the defendant might be deprived of an opportunity to negative a violation established as a matter of law and not merely presumed.

Nevertheless, demanding that a plaintiff prove a design to undermine the competitive system with each and every sale below cost might place an unrealistic burden on the plaintiff, rendering the statute ultimately ineffective. A sale below cost may or may not be made to injure competition. This is recognized by the exceptions specifically provided in *KRS* 365.040. Placing a burden of explanation upon the defendant who has sold merchandise or services below his own cost should not work any undue hardship if his conduct was directed to legitimate commercial ends. The motivations behind such a departure from ordinarily sound business practices are peculiarly within the knowledge of the actor and often difficult to prove. In most cases, the jury should determine whether the defendant's explanation is satisfactory.

The trial court should not have granted summary judgment against the plaintiff. On the other hand, stating that as a matter of law the statute seemed violated, and thus appearing to find conclusively the requisite intent from the mere act of making a free trial offer of a service, is likewise unjustified. The court may need to clarify its position by limiting the holding strictly to this fact situation, or by relegating much of what was said to the realm of dicta.

Eugene Mullins

FIRST CLASS MUNICIPALITY—ADEQUATE POLICE POWER TO ENACT A PENAL CIVIL RIGHTS ORDINANCE.—Whitson, doing business as the Corner Restaurant, was brought before the police court on warrants which charged him with violating the Louisville Penal Public Accommodations Ordinance by his refusal to serve food to Negroes in his restaurant. The lower court dismissed the charges on the ground that the ordinance was unconstitutional; the Jefferson Circuit Court held that the city of Louisville did not have sufficient police power to enact such an ordinance. One of appellee's defenses was that the general statutory powers of first class cities set out in *Ky. Rev. Stat.* 83.010-.012 [hereinafter referred to as *KRS*] do not authorize a compulsory integration ordinance because such ordinance is neither specifically authorized by the legislature nor indispensable to the operation