IN THE SUPREME COURT OF MISSOURI

Case No. 85399

STATE OF MISSOURI, ex rel. JEREMIAH W. NIXON,

Respondent,

v.

QUIKTRIP, CORP.

Appellant.

Appeal from the Circuit Court of Jefferson County
Case No. CV199-0359-CC-J1
Honorable Timothy J. Patterson

BRIEF OF *AMICUS* MISSOURI PETROLEUM MARKETERS ASSOCIATION IN SUPPORT OF RESPONDENT STATE OF MISSOURI, ex rel. JEREMIAH W. NIXON

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STATEMENT OF INTEREST OF AMICUS CURIAE

Missouri Petroleum Marketers Association/Missouri Association of Convenience Stores (hereafter "MPMA") is a general not-for-profit corporation organized and existing pursuant to the laws of the State of Missouri. MPMA is a statewide trade organization whose membership includes approximately 300 independent motor fuel marketers and approximately 1,500 convenience stores in Missouri. These members sell over 50% of the motor fuel sold throughout the state.

MPMA is organized for the purpose, among other things, of advocating and promoting ethical business practices, promoting the welfare of its members by fair and ethical business methods, and promoting the interests of its members in the State of Missouri. MPMA expended funds and lobbied on behalf of its members in support of the enactment of Senate Bill 374 in the 87th General Assemble (1993), the Missouri Motor Fuel Marketing Act. MPMA continues to expend funds and effort in monitoring, overseeing and opposing any changes to the Missouri Motor Fuel Marketing Act which would adversely affect the interests of its members.

MPMA is appearing here in its own behalf and on behalf of its members. MPMA is here to present the viewpoint and interest of those retail motor fuel retailers who support enforcement of the Missouri Motor Fuel Marketing Act and who are directly and adversely affected by actions in violation of the Act. In addition, because of its knowledge of the day-to-day operations of the retail motor fuel industry in Missouri and its continued involvement with the Act since its enactment, MPMA is able to present a

more detailed perspective of the purposes behind the Act and economic factors at work in the industry.

In this regard, it is not MPMA's purpose or intent to respond contention by contention to every argument or sub-part thereof, made by QuikTrip in its brief. MPMA's brief is more limited to the interplay of the multiple purposes of the Missouri Motor Fuel Marketer's Act, the economic theories underlying it, and this Court's analysis of the legal issues involved.

This brief is being filed with the consent of the parties.

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D. Kamerschen, "An Economic Analysis of Motor Fuel Marketing Laws," http://www.nacsonline.com/NACS/Resource/MotorFuels/belowcost.htm (2001).

C. Phillips & G. Schwartz, "A Place for Fair Competition Acts In Motor Fuel Marketing," 26 N. KY. L. REV. 211 (1999)

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I.

THE TRIAL COURT DID NOT ERR IN GRANTING THE ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE TRIAL COURT'S INTERPRETATION OF § 416.615 AND CONCLUSIONS ON THE CONSTITUTIONALITY OF THE ACT, AS APPLIED, WERE CONSISTENT WITH THE LEGISLATIVE PURPOSE IN ENACTING THE MISSOURI MOTOR FUEL MARKETING ACT, §§416.600 TO 416.635, RSMO., IN THAT THE ACT SERVES MULTIPLE PUBLIC PURPOSES RELATED TO RETAIL SALES OF MOTOR FUEL, INCLUDING PROTECTION OF COMPETITORS AND PRESERVATION OF MARKET STRUCTURE.

(Responds to Points I, II and III of Appellant's Brief)

Underpinning QuikTrip's argument is its misunderstanding or mischaracterization of the purposes behind the Missouri Motor Fuel Marketing Act, §§416.600 TO 416.635, RSMo. (hereafter, "the Act"). Under its statutory construction argument (Point I), QuikTrip posits a singular purpose for the enactment – the prevention of "pricing practices [that] were intended to put competitors out of business or were likely to have that effect." Brief of Appellant at 20. Points II and III echo this same theme, arguing that there was no evidence of substantial diversion of trade from any of QuikTrip's

competitors, *Id.* at 24, and that there could be no violation of the Act when there is no evidence that the below-cost selling strategies of QuikTrip were driving any competitors out of business. *Id.* at 32.

In understanding why QuikTrip's arguments must fail, it is helpful to fully understand the purposes and economic theories behind the Act. As these purposes and theories will show, the trial court's order in favor of the State is consistent with the legislative intent in enacting the statute and faithfully serves the purpose of the Act in its application against QuikTrip in this instance. *See* Points II and III, *infra*.

QuikTrip concedes that protection of the motor fuel market is a valid public purpose. Brief of Appellant at 31. It could hardly do likewise in light of the United States Supreme Court's recognition of "the state's legitimate purpose in controlling the gasoline retail market[.]" *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124-25 (1978). It is clear that in eschewing a facial challenge for an "as applied" challenge, QuikTrip admits the constitutionality of the statute. *See, e.g., WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195, 1198 n.1 (8th Cir. 1997)(one making an "as applied" challenge on substantive due process grounds does not attack the enactment, only the decision to apply the enactment). In admitting the constitutionality of the Act by not making a facial challenge, QuikTrip also accepts everything that inheres in a determination of facial constitutionality, i.e., that a legitimate public purpose exists, that the statute is rationally related to that public purpose and that the statute is not arbitrary or capricious. *Id.* at 1198. Indeed, having chosen to make an "as applied" challenge,

QuikTrip's only hope of success in this case is to mischaracterize the purpose behind the Act.

A. Economics Of & Public Purpose Served By Prohibiting Below-Cost Pricing

The Missouri Motor Fuel Marketing Act prohibits below cost sales or offers to sell of motor fuel if "the intent or effect of the sale or offer is to injure competition," or "the intent or effect of the sale or offer is to induce the purchase of other merchandise, to unfairly divert trade from a competitor, or otherwise to injure a competitor." § 416.615.1, RSMo.[1] The statute also defines "cost" for purposes of the Act. § 416.605(2), RSMo. Affirmative defenses are provided for, to include sales below cost for the purpose of meeting the equally low price of a competitor. § 416.620, RSMo. The statute imposes civil penalties for its violation, § 416.625, RSMo., as well as provides for a civil action by injured parties. §416.635, RSMo.

The Act, like other state motor fuel marketing fair competition acts, is broad enough to cover federal antitrust concepts of "predatory pricing," but also goes further by promoting fair competition in the motor fuel markets. C. Phillips & G. Schwartz, "A

[1] A 1995 amendment to the statute deleted the language "or effect." The act of which the amendment was a part was declared invalid because it violated Article III, Section 23 of the Missouri Constitution. *Missouri Petroleum Marketers Association v. State of Missouri*, Case No. CV195-989 (Circuit Court of Cole County). L.F. 21. QuikTrip admitted that the 1995 amendment was invalid both in its response to the motion for summary judgment, L.F. 278, and in its brief. Brief of Appellant at 3-4.

Place for Fair Competition Acts In Motor Fuel Marketing," 26 N. KY. L. REV. 211, 227 (Summer 1999)(hereafter "A Place for Fair Competition Acts"). With respect to the fair competition aspect, "[t]he espoused purpose of fair competition acts is to level the playing field so that competition can be vigorous yet fair." *Id.* at 252. Unlike the antitrust laws, the Act is aimed not just at protecting competition but at protecting competitors, and (by protecting competitors) market structure, as well.

This broader purpose for motor fuel marketing fair competition acts does not mean that economic theories relating to predatory pricing should be ignored, particularly given the nature of the economic arguments being advanced by QuikTrip. Discussion of these theories helps put QuikTrip's argument in the proper perspective. With respect to predatory pricing, there are two distinct and opposing schools of thought. *See, generally*, J. Baker, "Predatory Pricing After *Brooke Group*: An Economic Perspective," 62 ANTITRUST LAW Journal 585 (1994)(hereafter "Predatory Pricing After *Brooke Group*"); P. Bolton, et al., "Predatory Pricing: Strategic Theory and Legal Policy," 88 GEO. L. J. 2239 (2000)(hereafter "Predatory Pricing"). The view espoused by the Chicago School of Economics is that predatory pricing is both irrational and implausible economic behavior. Predatory Pricing After *Brooke Group*, 62 ANTITRUST LAW Journal at 586. A predator that cuts its prices below its costs to drive a competitor out of the market cannot reasonably expect to recoup its losses when it later increases its prices after its predatory pricing practice has had the desired effect. *Id.* As a result, predatory pricing is not likely to occur. *Id.* at 587. When below-cost pricing occurs, it either reflects some undisclosed rational cost strategy or cost has been incorrectly measured. *Id.*

The Post-Chicago economics view is that predatory pricing is economically rational behavior. *Id.* As one set of commentators summarized:

> [M]odern economic analysis has developed coherent theories of predation that contravene earlier economic writing claiming that predatory pricing conduct is irrational. More than that, it is now the consensus view in modern economics that predatory pricing can be a successful and fully rational business strategy. In addition, several sophisticated empirical case studies have confirmed the use of predatory pricing strategies.

Predatory Pricing, 88 GEO. L. J. at 2241. The theories of predatory conduct can be broken down into two types: financial market predation and signaling strategies. *Id.* at 2248-49. These strategies may be undertaken not only to drive competition from the market or to induce others from entering the market, but also as a means to thwart aggressive price competition by others in the market. Predatory Pricing After *Brooke Group*, 62 ANTITRUST LAW Journal at 590-91. Important for analyzing QuikTrip's challenge to the Missouri statute, predatory conduct is a viable economic strategy when the predator operates in numerous markets and can quickly recoup its losses from below-cost selling in one market by prices charged in other markets. *Id.* at 589-90.

The Missouri Motor Fuel Marketing Act, to the extent it seeks to address in part the evils of predatory pricing, clearly embraces the post-Chicago economics theory of predatory pricing as rational economic behavior and, likewise, clearly embraces a policy that such conduct should be prohibited. Any construction of the statute or analysis of the constitutionality of the Act, whether facial or as applied, should reflect the Legislature's

choice of competing economic theories. As was stated by the United States Supreme Court:

> We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory or business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislation takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.

Ferguson v. Skrupa, 372 U.S. 726, 731-32, 83 S.Ct. 1028, 1032 (1963). This Court expressed the same sentiment when it said, "We do not have to agree as to this projection of possible effects of the legislation if they represent conclusions the legislature might possibly draw. It is not for us to determine whether the enactment is wise or not." *Coldwell Banker Residential Real Estate Services, Inc. v. Missouri Real Estate Commission*, 712 S.W.2d 666, 669 (Mo. Banc 1986).

B. Regulating Fair Competition in the Motor Fuel Market

As noted previously, the Act was not intended merely to mirror the federal antitrust laws and their application of predatory pricing theory to the motor fuel market. A Place for Fair Competition Acts, 26 N. KY. L. REV. at 227. State fair competition acts, including those directed specifically at the motor fuel market, are designed to overcome the narrow focus of federal antitrust precedent that is concerned with "antitrust injury" and not more generalized injurious conduct that affects either competitors or market

structure. *Id.* at 226. In contrast to the fair competition statute, "federal antitrust laws have the single goal of promoting efficiency and consumer welfare by encouraging practices that reduce prices, regardless of the effect on competitors or the competitive fabric of the local market." *Id.* The fair competition acts go one step further, having as their purpose "to afford smaller, less powerful competitors an effective remedy for below cost selling and other unfair acts." *Id.* at 260.

Because motor fuel market fair competition acts are intended to promote healthy competition, benefit consumers and protect smaller competitors, and not just mirror the protections afforded by federal antitrust laws, a monopolization-effect predation requirement[2] is not only undesirable but would render any such statute meaningless. *Id.* at 261. Predation and predatory intent requirements are creatures of the antitrust laws and are designed to define unique antitrust concepts such as monopolization and price discrimination. *Id.* As one economist has explained it, the antitrust laws follow a narrow view of predation, while motor fuel marketing fair competition acts are based on a broader view that better fits the motor fuel market:

> There are two parts to the broad view of predatory conduct. The first part recognizes all the possible ways that firms can truly predate and harm competition and still stay within the traditional (narrow) static cost-price tests. The second part emphasizes that

[2] In the words of QuikTrip, this would occur when "pricing practices were intended to put competitors out of business or were likely to have that effect." Brief of Appellant at 20.

> obtaining a monopoly should not be the litmus test in retail motor fuel markets. This is because retail motor fuel markets are small, local markets. In these markets, larger firms, by selling below cost, can achieve market dominance and create barriers to entry without gaining a monopoly. Once this position is established, a below-cost seller can discipline the remaining competitors to keep prices high. It is not necessary to drive most or all firms from the market to achieve the predator's objectives. As such, below-cost selling makes good economic sense for firms realizing contemporaneous recoupment. It does not, however, result in an acceptable socioeconomic outcome when the overall effects on competitors, competition and consumers are considered.

D. Kamerschen, "An Economic Analysis of Motor Fuel Marketing Laws," at 7-8, http://www.nacsonline.com/NACS/Resource/MotorFuels/belowcost.htm (Petroleum Marketers Association of America 2001)(hereafter "An Economic Analysis")(included in the appendix to this brief).

Even proof of a predatory intent of the broader view is not required under the fair competition acts applicable to the motor fuel market because such acts have the further purpose of protecting market structure through protection of competitors in the market. *See, e.g., Sixty Enterprises, Inc. v. Roman & Ciro, Inc.*, 601 So.2d 234, 237 n.7 (Fla. Dist. Ct. 1992)(important purpose of motor fuel market below cost sales statute is to save the independent retailer as a market participant); A Place for Fair Competition Acts, 26 N. KY. L. REV. at 251 (purpose of motor fuel fair competition acts is to level the playing field). In Kamerchen's words, one objective of these acts is to promote the long-run

interests of consumers (perhaps at the expense of short-run lower prices) through the maintenance of a vital, diverse market. An Economic Analysis, Appendix, at 3. "Although state legislatures were likely aware that in the short run below-cost prices of gasoline would benefit some consumers, the legislatures determined two things: (1) in the long run, below-cost pricing would harm consumers by reducing competition and setting the stage for higher prices; and (2) by protecting both competitors and competition from the damaging effects of subsidized retail pricing of motor fuel, consumers would ultimately benefit." *Id.* at 3-4. This particular purpose of legislatures in adopting these acts and their understanding of the potential long-term and short-term effects is based on accepted economic market theory that competition as both a state and a process are furthered by diversity and independence in the marketplace. *Id.* at 4-5.

The motor fuel marketing fair competition statutes are also well-suited to concerns in the retail market with the potential for concentration and abusive practices by vertically integrated oil companies, mass retailers and mass retailer chains (such as QuikTrip) who sell gasoline as only one of several products. A Place for Fair Competition Acts, 26 N. KY. L. REV. at 213-18; An Economic Analysis, Appendix, at 5-6. Both integrated companies and mass retailers possess greater ability for the type of contemporaneous recoupment from other sales or geographic markets that makes below-cost pricing rational economic behavior. *Id.* This potential danger is exacerbated further by post-OPEC changes in the market to greater consumer emphasis on price, increased barriers to entry and exit into the market, and the small market areas in which most retail outlets operate. A Place for Fair Competition Acts, 26 N. KY. L. REV. at 215-17; An

Economic Analysis, Appendix, at 5-6, 8. Finally, the motor fuel marketing fair competition statutes were enacted at a time of, and in response to, the steady decline in the number of gasoline stations in all markets. A Place for Fair Competition Acts, 26 N. KY. L. REV. at 215-16; An Economic Analysis, Appendix, at 9-10.

In summary, the Missouri Motor Fuel Marketing Act was enacted to deal with particular problems with the motor fuel marketing industry and was based on particular economic conclusions and theories that refused to adopt the limited federal antitrust views on predatory below-cost pricing practices. In its decision and judgment, the trial court gave recognition to these concerns and theories underlying the Legislature's adoption of the Act in both its construction of the Act's language and in determining its constitutionality. The trial court understood that definitions of social and economic problems and the manner to address them, including the economic theories on which the measures for dealing with the problems might be based, are matters solely within the province of the Legislature and that it is not the role of the courts to substitute their judgment on either the scope of the problem, how they are to be addressed, or the economic theories they are to advance. *Ferguson v. Skrupa*, 83 S.Ct. at 1032; *Coldwell Banker Residential Real Estate Services, Inc. v. Missouri Real Estate Commission*, 712 S.W.2d at 669.

II.

THE TRIAL COURT DID NOT ERR IN GRANTING THE ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT OR IN DENYING QUIKTRIP'S CROSS-MOTION BECAUSE THE TRIAL COURT'S INTERPRETATION OF § 416.615.1(2) WAS CORRECT IN THAT THE EXPRESS WORDING OF THE SUBSECTION INDICATES THAT THE WORD "UNFAIRLY" DOES NOT MODIFY "TO INJURE" AND SUCH AN INTERPRETATION IS CONSISTENT WITH BOTH THE LEGISLATURE'S PURPOSE IN ENACTING THE MISSOURI MOTOR FUEL MARKETING ACT AND WITH ITS UNDERSTANDING OF THIS COURT'S PRIOR AUTHORITY ON SIMILAR LEGISLATION.

(Responds to Points I and II of Appellant's Brief)

QuikTrip's first two points on appeal are related arguments that alternatively challenge the trial court's construction of § 416.615 and the court's determination that there was sufficient evidence to support a violation of the statute by QuikTrip as a matter of law. Under Point I of its brief, QuikTrip focuses on the "unfairly divert trade from a competitor, or otherwise to injure a competitor" language in § 416.615.1(2), contending that the word "unfairly" modifies both "divert trade" and "injure a competitor" and that an unfair injury to a competitor occurs only when the below-cost pricing has a predatory effect as defined under federal antitrust, Chicago School of Economics theories of predation. Brief of Appellant at 13-20. Under Point II, QuikTrip continues to contend that the term unfair modifies both "divert trade" and "injure a competitor." Brief of

Appellant at 24. As QuikTrip readily concedes in its brief, if the term "unfairly" does not modify the term "to injure a competitor in § 416.615.1(2), then the trial court correctly interpreted the statute. Brief of Appellant at 4.

Four rules relating to statutory construction have particular application to the construction to be given § 416.615.1(2). "The seminal rule of statutory construction directs this Court to determine the true intent of the legislature, giving reasonable interpretation in light of the legislative objective," *Acme Royalty Co. v. Director of Revenue*, 96 S.W.3d 72, 74 (Mo. banc 2002), or, as stated elsewhere, to "consider the object the legislature seeks to accomplish with an eye towards finding resolution to the problems addressed therein." *Ports Petroleum Co. v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001)(internal citations omitted) Construction of a statute is also to consider the legislation's history, the circumstances surrounding passage of the act and the purpose and object to be accomplished. *Person v. Scullin Steel Co.*, 523 S.W.2d 801, 803 (Mo. banc 1975). When enacting legislation, the legislature is presumed to be aware of legal challenges to similar statutes and the results of those challenges. *State ex rel. School District of City of Independence v. Jones*, 653 S.W.2d 178, 187 (Mo. banc 1983). Finally, with respect to the specific language used, the ordinary use of the word "or" is as a disjunctive and corresponds to "either" as "either this or that." *Dodd v. Independence Stove & Furnace Co.*, 51 S.W.2d 114, 118 (Mo. 1932).

QuikTrip's statutory construction argument fails on a number of levels. First, as *Dodd* would indicate, the use of the disjunctive "or" in the language, "[t]he intent or effect of the sale or offer is to induce the purchase of other merchandise, to unfairly

divert trade from a competitor, or otherwise to injure a competitor" (emphasis added) would indicate that "otherwise to injure a competitor" is completely independent from the prior phrase "to unfairly divert trade from a competitor." 51 S.W.2d at 118. The independence of, and lack of symmetry between, the two phrases is further made evident by the interposition of the work "otherwise" after the disjunctive "or" and before the words "to injure." Otherwise is defined as "in another way; differently; Under other circumstances; In other respects." THE AMERICAN HERITAGE DICTIONARY OF THE AMERICAN LANGUAGE, New College Edition (1976) at 931.

When the phrases are considered in their entirety and meaning is given to the term "otherwise," it becomes evident that the subsection is referring to injuries to competitors in a general sense by the disjunctive clause "to injure a competitor" and a more specific type of injury which occurs when trade is unfairly diverted. The legislature did not intend that "otherwise to injure a competitor" be modified by any adjective found in the disjunctive language "to unfairly divert trade from a competitor." Had it intended to do so, it would have used the very different structure and written the subsection as, "[t]he intent or effect of the sale or offer is to induce the purchase of other merchandise, [or] to unfairly divert trade from a competitor or injure a competitor."

In the part of its argument that is limited to the language of the statute, QuikTrip merely argues that "it is immediately apparent that the Act does not prohibit all below-cost sales of motor fuels," a conclusion that is somehow reached by the logic that if the legislature had intended that all below-cost sales of motor fuel were to be prohibited, it would not have included subsections (1) and (2) to § 416.615.1. Brief of Appellant at 14-

15. Nowhere in the opinion of the trial court does it hold, much less state, that § 416.615.1, including (or excluding) the two subsections thereunder, is an outright prohibition of below-cost sales. L.F. 433-437.

The absence of such language in the trial court's opinion notwithstanding, QuikTrip then jumps to its next conclusion that, since the legislature did not intend that all below-cost sales of motor fuel were to be unlawful, § 416.615.1(2) must be read in the manner that the word "unfairly" modifies both the disjunctive clause in which it is found and the independent clause which follows it. Brief of Appellant at 14-15. Yet, QuikTrip does this without any discussion or consideration of the terms in the statute or the plain and ordinary meaning given those terms. QuikTrip seeks to construe the statute not by any recognized canon of construction but by sleight of hand.

QuikTrip also relies on the Unfair Milk Sales Act cases for its proposed construction of the Missouri Motor Fuel Marketing Act. In this regard, it states, "This Court's precedents construing the milk statute have made it quite clear that the word 'unfairly' modifies both 'diverting trade' and 'otherwise injuring a competitor." Brief of Appellant at 15-16. However, QuikTrip fails to cite to the specific language in these cases where the language making this clear can be found. *Id.* In *State ex rel. Thomason v. Adams Dairy Co.*, 379 S.W.2d 553 (Mo. 1964), the Court noted that there was no issue of injury to a competitor by the dairy company's practice and specifically described the issue as the "narrow one" of "[d]id the Commissioner of Agriculture sustain his burden to prove that respondent gave away milk in the manner aforedescribed with the intent or with the effect of *unfairly* diverting trade from a competitor ?" *Id.* at 555 (emphasis in

original). The same is true with respect to *State ex rel. Davis v. Thrifty Foodliner, Inc.*, 432 S.W.2d 287, 289 (Mo. 1968)("appellant makes no contention and there is no evidence, that respondent's sales below 'cost to the retailer' tended to destroy competition, create a monopoly or injure a competitor, other than by unfairly diverting trade from competitors"). The portion of *Borden Company v. Thomason*, 353 S.W.2d 735, 754 (Mo. banc 1962), cited by QuikTrip under Point I of its brief also makes clear that it was dealing with a vagueness challenge solely to the language "unfairly diverting trade" and was not considering the meaning of "otherwise injuring a competitor."

QuikTrip's argument also fails because it erroneously bases its proposed interpretation of the Act on its conclusion that the Act serves the singular purpose of addressing predatory conduct in the narrow federal antitrust, Chicago School of Economics sense. Brief of Appellant at 20 ("QuikTrip had argued that the Act requires proof of predation – i.e., that its pricing practices were intended to put competitors out of business or were likely to have that effect"). As shown under Point I, *supra*, the motor fuel marketing fair competition statutes reject the notion that they are to be construed so narrowly as to their scope. Instead, they are intended to address a number of concerns with motor fuel markets, including protecting competitors and preserving market structure. Construction of the Missouri Act should also take these broader purposes into account in the meaning given to the Act. *Acme Royalty Co.*, 96 S.W.3d at 74; *Ports Petroleum Co.*, 37 S.W.3d at 240; *Person v. Scullin Steel Co.*, 523 S.W.2d at 803.

In enacting the Act, the legislature is also presumed to be aware of other legal challenges to similar statutes and the results of those challenges. *State ex rel. School*

District of City of Independence, 653 S.W.2d at 187. Thus, the legislature is presumed to be aware of the challenge to the Unfair Milk Sales Act in *Borden Co. v. Thomason*, 353 S.W.2d 735 (Mo. banc 1962) and the outcome of that challenge. In *Borden*, the Court recognized that the legislature was setting a policy that sacrificed short-term price relief for consumers for protection of competitors and preservation of market structure. 353 S.W.2d at 742 (quoting from legislative report on Unfair Milk Sales Act that act was based on conclusion that "prices such as these are often greeted with enthusiasm by inflation-weary consumers, but the natural consequences thereof bode future difficulties for producers, distributors and consumers alike. Price wars exert tremendous pressure on smaller distributors who are without the resources to operate for extended periods of time when a loss is incurred on each sale"). The Court also recognized that the legislation went beyond adopting a federal antitrust monopoly-based predation standard, referring as it did to "the legislative attempt to remedy unfair competition and avoid the danger of monopoly in that industry" and "that it is apparent on the face of the Act that in passing it the Legislature was purporting to act under the police power of the State and that the Act is designed to prevent monopolies and unfair trade practices by competitors for the public good." 353 S.W.2d at 744. In basing the Missouri Fuel Marketing Act on the Unfair Milk Sales Act, and being aware of the outcome of the challenge to the latter in *Borden Co.*, the legislature clearly intended that the Act under consideration here be of the same scope and incorporate the same economic principles as the Unfair Milk Sales Act.

QuikTrip's argument under both Point I and II of its brief concerning the sufficiency of the evidence to establish its violation misses the mark because its analysis

of the evidence is based on its limited and incorrect view of the purpose of the Act as directed solely to federal antitrust concepts of predation. As shown above and in Point I of this brief, the purpose of the Act is not so limited as QuikTrip proposes.

III.

THE TRIAL COURT DID NOT ERR IN GRANTING THE ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT BECAUSE § 416.615.1(2) , AS APPLIED, DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS IN THAT ITS APPLICATION TO QUIKTRIP'S CONDUCT SERVES A LEGITIMATE GOVERNMENTAL INTEREST OF THE STATE AND APPLICATION OF THE STATUTE TO QUIKTRIP IS NOT TRULY IRRATIONAL.

(Responds to Point III of Brief of Appellant)

Under Point III, QuikTrip contrives what it calls an as applied substantive due process argument. The gist of its argument is that "[b]y forcing QuikTrip to abandon its low price business strategy and raise its prices, the lawsuit will only accomplish one thing: it will permit these thriving businesses to raise their prices and earn still higher profits at the expense of the consuming public." Brief of Appellant at 27. As this language and other language under Point III of QuikTrip's brief makes emphatically clear, QuikTrip is not challenging the rational relationship prong of due process analysis; it is challenging the public purpose prong. Brief of Appellant at 31.

It is ironic that in making its public purpose argument, QuikTrip cites not a single public purpose case. On this point, QuikTrip hinges its entire substantive due process argument on its view that benefiting private business interests at the expense of the

consuming public cannot be a valid public purpose. QuikTrip ignores the long line of cases dealing with the public purpose doctrine which hold that even direct and intended benefits to private individuals and business interests are not contrary to valid public purposes. *See, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243-44, 104 S.Ct. 2321, 2331, 81 L.Ed.2d 186 (1984). The key with these cases, as with the instant one, is that the grant of the purported private benefit is the means of achieving the legitimate government end.

QuikTrip's public purpose argument also flies in the face of the United States Supreme Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207 (1978). QuikTrip argues here that there cannot be a valid public purpose because the Act has an adverse impact on competition and, thereby, harms consumers. *Exxon Corp*. answered that this does not render the statute unconstitutional:

> This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act – our "charter of economic liberty." Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.

98 S.Ct. at 2218 (citations omitted). Here, as with those challenging the statute in *Exxon Corp.*, QuikTrip is arguing that valid public purpose or legitimate governmental interest should be defined as co-terminous with the federal anti-trust laws. However, here as in

Exxon Corp., the legislation in question is not intended to mirror the federal anti-trust laws or to serve the same short-term, immediate consumer gratification purpose. Here, as in *Exxon Corp*., the Act is intended to protect competitors and preserve the market structure. The clear import of *Exxon Corp*. is that this is a legitimate governmental interest even though it may benefit some competitors in the marketplace, force others like QuikTrip to continue to face competition, and discomfit consumers in the short run.

More importantly, QuikTrip's public purpose analysis also flies in the face of this Court's decision in *Borden Co. v. Thomason*, 353 S.W.2d 735 (Mo. banc 1962). As noted under Point II of this brief, *supra*, this Court recognized that the legislature was setting a policy that sacrificed short-term price relief for consumers for protection of competitors and preservation of market structure. 353 S.W.2d at 742. It also recognized that the legislation went beyond adopting a federal antitrust monopoly-based predation standard. *Id*. at 744. The Court also quoted extensively from *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 516 (1934), specifically, "If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public." See 353 S.W.2d at 745. This Court had no qualms in *Borden Co.* about finding a legitimate governmental interest in

pursuing the same types of ends and economic policies as exist with the Missouri Motor Fuel Marketing Act.

Also noticeably absent from QuikTrip's argument is any designation of the standard to be applied in a "substantive due process as-applied" challenge or any citation to any authority which applies the "as applied" type of challenge in a substantive due process context. An as applied substantive due process challenge admits the constitutionality of the statute and accepts everything that inheres in a determination of facial constitutionality, i.e., that a legitimate public purpose exists, that the statute is rationally related to that public purpose and that the statute is not arbitrary or capricious. *WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195, 1198 & n.1 (8th Cir. 1997). The as applied challenge attacks only the decision that applied the legislation to the party making the challenge. *Id.* at 1198 n.1. The party making the challenge must show that the decision to apply the statute was truly irrational. *Id.*

QuikTrip does not contend that either the Attorney General in initiating the action, nor the trial court in rendering its decision, acted truly irrational. Instead, it limits its argument to its contention that States cannot, as a matter of valid public purpose, enact economic regulation which has the effect of benefiting some participants in the marketplace and adversely affecting consumers in that market. In light of QuikTrip's contentions, the actions of the Attorney General and the trial court not only failed to reach the limit of truly irrational conduct, they were actually consistent with the purpose of the legislature in enacting the Act. This is so for three reasons: (1) as noted above, the public purpose doctrine is not limited to pro-competitive exercises of the police power,

see, e.g., Exxon Corp., supra; (2) the Act has multiple purposes, including the protection of competitors and the preservation of the market structure, and is not intended to be co-terminous with the consumer orientation of the federal antitrust laws, *See* Point I; and (3) it is solely within the province of the legislature to decide how its exercise of the police power in the economic sphere is to balance the interests of different competitors in a market and that market's consumers. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 731-32, 83 S.Ct. 1028, 1032 (1963); *Coldwell Banker Residential Real Estate Services, Inc. v. Missouri Real Estate Commission*, 712 S.W.2d 666, 669 (Mo. Banc 1986). It should be axiomatic that if one of the purposes of the Act is to preserve the market structure, due process does not prohibit the states from taking action until only after competitors have been driven from the market or are on the verge of going out of business.

IV.

THE TRIAL COURT DID NOT ERR IN GRANTING THE ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT BECAUSE § 416.615.1(2) , AS APPLIED, DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS IN THAT THE UNDISPUTED EVIDENCE SHOWED THAT A MOTOR FUEL RETAILER COULD ADEQUATELY KNOW ITS COSTS AT THE TIME IT POSTED ITS PRICES.

(Responds to Point IV of Brief of Appellant)

QuikTrip's final argument is that the Missouri Motor Fuel Marketing Act, as applied, violates substantive due process because QuikTrip does not and cannot know its

costs at the time it posts its prices. There are a number of fallacies with QuikTrip's arguments.

In *Brunetti v. Borough of New Milford*, 350 A.2d 19, 31 (N.J. 1975), a case relied on by QuikTrip, the court pointed out that in analyzing this type of claim, "a legislative enactment will not be declared void unless its repugnancy to the Constitution is so manifest as to leave no room for reasonable doubt." While it stated that unworkable legislation may constitute a violation of substantive due process, the court never actually resolved this issue.[3] *Id.* at 29 & 31. The trial court in the instant case accepted the general premise that substantive due process may be violated by unworkable legislation. However, based on the undisputed facts before it and QuikTrip's position, it was led to

[3] The other cases cited by QuikTrip similarly failed to actually consider the question of impossibility at all or in the context raised in this case. *United States v. Dumas*, 94 F.3d 286 (7th Cir. 1996)("Although the issue was not raised in this case, we acknowledge that the validity of a law with which it is impossible to comply may be questioned"); *United States v. Gambill*, 912 F. Supp. 287 (S.D. Ohio 1996)(conflicting existing laws made it impossible for person to comply with both; however, discussion of due process issue is *dicta* since court held earlier in opinion that the statute under which prosecution was maintained had been repealed by implication by later conflicting statute); *Sayre & Fisher Brick Co. v. Dearden*, 93 A.2d 52 (Sup. Ct. N.J. 1952)(statutory scheme denied lienholders their property without due process of law because statutory procedures made it impossible to effectively perfect the lien).

the conclusion that QuikTrip could not as a matter of law meet the heavy burden placed on it to establish its affirmative defense by showing that the Act's "repugnancy to the Constitution is so manifest as to leave no room for reasonable doubt." 350 A.2d at 31.

The Act specifically defines cost to include three particular items: (1) the lowest invoice cost that the seller charged to the purchaser for motor fuel of like grade and quality within three days prior to the date of any alleged unlawful resale by the purchaser, less trade discounts, allowances or rebates which the purchaser receives on the particular invoice or transfer"; (2) "the cost of doing business" and (3) "[f]reight charges and all applicable federal, state and local taxes not already included in the invoice cost or transfer price." § 416.605(2), RSMo. In its substantive due process impossibility defense, QuikTrip does not contend that this statutory definition of cost violates due process. Instead, its argument centers on its alleged inability to calculate its costs in a timely manner to allow it to ensure compliance with the Act. It should also be noted that this inability is centered on the first and third items of cost listed above and does not include the cost of doing business. L.F. 331 – 333.

QuikTrip places total reliance on the affidavits of its officers concerning the level of knowledge of its costs at the time that it sets its prices. It is notable that QuikTrip highlights these statements, prepared at a time after it was caught with its hand in the cookie jar and could not deny that it had sold below cost on 76 days, but ignores its previous sworn statement made when it was patting itself on the back for the pains it took to ensure compliance with the Act:

> As a corporate policy, QuikTrip maintains an automatic triggering mechanism which is activated when QuikTrip's posted gasoline prices come within a specified amount in excess of its cost of doing business. . . . When the retail prices of QuikTrip and its competitors reach this automatic triggering amount, the Area Supervisor consults with the Division Manager, who may consult with the Senior Vice President of Operations. At this point, the exact cost of doing business is examined (without regard to artificial automatic triggering amount) and it is determined whether QuikTrip can meet the price without dropping below its cost of doing business.

L.F. 268. In light of this prior inconsistent sworn statement, the trial court could properly ignore the later affidavit which attempted to contradict QuikTrip's own prior sworn statement. *See, e.g., Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir. 1983).

Even if QuikTrip could create a genuine issue on this fact by submitting an affidavit which directly contradicts its own prior sworn statements, the affidavit on which QuikTrip relies is insufficient because the facts stated are not material to QuikTrip's impossibility defense. The affiant only speaks to the specific business practices of QuikTrip and how those specific practices made it impractical for it to know its costs at the time it posted its prices. L.F. 331-333. Under QuikTrip's theory, all regulatory activity by the State would be rendered meaningless because firms subject to regulation could adopt internal practices and policies that make it impossible for them to comply with the regulatory requirements. What QuikTrip fails or refuses to acknowledge is that inherent in the Act's definition of cost and the prohibition against below-cost sales is a

concomitant requirement that retail motor fuel marketers adopt practices and policies that will allow them to comply with the Act.

The affidavit submitted by QuikTrip states only that the practices and policies it chose to follow do not allow it to comply with the Act; nowhere does it address whether it was impossible for QuikTrip to adopt other policies and practices which would have made compliance with the statute possible. In stark contrast to QuikTrip's contention that its own internal practices and policies do not allow it to comply with the Act were the affidavits on which the trial court did rely. Those showed that practices and policies could be adopted by motor fuel retailers which would allow them to comply with the Act. There is no genuine issue created by these two sets of affidavits, a circumstance which is borne out by QuikTrip's failure to argue that summary judgment was inappropriate because of the existence of a genuine issue of material fact based on its affidavit and the State's affidavits as to the possibility or impossibility of accurately calculating costs at the time that prices were posted.[4]

QuikTrip's affidavit is further problematic because it only states that sometimes the conditions noted will result in errors by QuikTrip in its calculation of its costs. L.F.

[4] QuikTrip's argument is that the Attorney General's affidavits, while stating factual matters, are not as detailed as QuikTrip's affidavit and should be disregarded because conclusory in nature. Brief of Appellant at 37. It does not argue, nor can it, that if these affidavits do sufficiently state factual matter, that they are in direct contradiction to QuikTrip's affidavit.

331-333. Noticeably absent from the affidavit is any statement that these practical problems with calculating costs were in fact the reason QuikTrip's prices were below its costs on the 76 days that are the subject of this action. L.F. 331-333. At best, QuikTrip can say only that maybe its problems with timely identifying costs were the reason it sold below cost but it is equally as possible that these problems were not the cause. This hardly can be said to rise to the level of establishing that that the Act's "repugnancy to the Constitution is so manifest as to leave no room for reasonable doubt." 350 A.2d at 31.

Finally, QuikTrip's argument that the great majority of the times it was guilty of selling below cost was the result of a change in its costs and not its prices does not save its impossibility defense. Under the Act, QuikTrip was as obligated to raise its prices when its costs increased, as it was to refrain from lowering its prices when its prices were static.

The correctness of the trial court's action as to the impossibility defense is best realized through a consideration of the appropriate procedure for summary judgment motions. Because this matter involves a summary judgment for the plaintiff under the circumstance where an affirmative defense was raised, the Attorney General was required to negate at least one element required to be proven under that affirmative defense. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc). Consistent with summary judgment procedure, the Attorney General came forward with evidence by affidavit and QuikTrip's own sworn statement which showed that QuikTrip could not establish that it was impossible for a motor fuel marketer to

adopt practices that would allow it to timely know its costs at the time when it posted its prices. It was then incumbent upon QuikTrip to come forward with evidence that directly contradicted this evidence. *Id.* QuikTrip failed to do this. Under the circumstances, summary judgment for the Attorney General was appropriate. *Id.*

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 8,514 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 1/2" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Amicus Curiae were sent U.S. Mail, postage prepaid, to the following parties of record on this 3rd day of December, 2003:

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