

SECRETARY

PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

Docket No. 9309

In the Matter of

KENTUCKY HONEYFIELD COOPERS CARRIERS ASSOCIATION, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE ATTORNEY GENERAL OF KENTUCKY IS, BY STATUTE AND

COMPETITION LAW IN THE COMMONWEALTH OF KENTUCKY. 2

V

CASES

Alcoholic Beverage Control Board v. Taylor Drug Stores, Inc., 635 S.W.2d 319 (Ky. 1982) 6

California Limousine Dealers v. Midcal Aluminum 445 P.2d 97 (1969) 6

Regulatory Federalism, 75 Tex. L. Rev. 1203 (1997) 3

The attorney general has a long history of aggressive antitrust enforcement, including

filings an amicus curiae brief along with thirty-two sister states before the U.S. Supreme Court

otherwise, or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.

(2) It shall be unlawful for any person or persons to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth.

Enforcement of the Consumer Protection Act by the Attorney General is provided for in KRS 367.190(1). Additionally the Attorney General is a Constitutional officer, and is by statute the chief law officer and advisor to the Commonwealth of Kentucky. KRS 15.020. Finally the Kentucky Supreme Court in a certification of law has opined that KRS 15.020 supercedes other

~~statutes purporting to limit the Attorney General's authority.~~ Commonwealth of Kentucky

Respondent's extended discussion of supposed conflicts between state and federal law misses the point. The discussion by respondent of Kentucky statutes underlying this case ignores the Kentucky Constitution and a long line of Kentucky Supreme Court constitutional decisions relating to interference with market-based pricing by private parties pursuant to state sanction. Extended discussion of the statutory price-setting system underlying this case is simply inapposite, since the system would surely fail to pass muster under existing Kentucky constitutional jurisprudence.

As discussed below, Kentucky has a very high constitutional standard for interference

with market-based pricing by state agencies. Should the Kentucky General Assembly choose to

in

(Ky. 1958), a case predating the passage of the Consumer Protection Act, Kentucky's highest court unanimously held unconstitutional the part of the "Fair Trade Act" purporting to allow enforcement of a minimum retail price agreement on non-signatories to the contract. "[T]his statute, we think, is a legislative invasion of the broad constitutional liberty of the people to acquire and protect their property and engage in fair trade." 316 S.W.2d at 361. The court

case of *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), the court found such price-fixing to be a violation of the Sherman Act:

In the California wine case [*Midcal*] the State did nothing but enforce prices fixed by private individuals. In the instance of ~~Kertner~~ the State participates in fixing prices only to the extent

that it adds statutory minimum mark-ups to prices fixed by private individuals. From the standpoint of 'State Action' the difference is

Act issue, instead declaring that any such price-fixing statute is a violation of the Kentucky

As we have previously said, the statutory purpose of the law, is to
~~prevent monopolies and unfair practices in the sale of milk and~~

milk products. As we have also said, the law is in reality and in
practice not an anti-monopoly statute, but is rather, a minimum

~~price law. We believe an enactment of such a nature is an~~

CONCLUSION

The ALJ's Decision and Order does not implicate federalism concerns because it does not

CERTIFICATE OF SERVICE

This is to certify that on August 30, 2004 I caused a copy of *Amicus Curiae* Brief of the

Commonwealth of Kentucky to be served upon the following persons:

by hand delivery to:

The Commissioners

via Office of the Secretary, Room H-159
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

overnight courier to:

Goeffrey D. Oliver, Esq., Assistant Director
Federal Trade Commission
601 New Jersey Avenue, NW, NJ-6245
Washington, DC 20580

Dana Abrahamsen, Esq.
Federal Trade Commission
601 New Jersey Avenue, NW, NJ-6209
Washington, DC 20580

James C. McMahon
Brodsky, Altman & McMahon, LLP
60 East 42nd Street, Suite 1540