Missouri Law Review

Volume 70
Issue 3 *Summer 2005*

Article 11

Summer 2005

Does Competition Constitute an Injury - Defining Injury in the Missouri Motor Fuel Marketing Act

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Does Competition Constitute an Injury? Defining Injury in the Missouri Motor Fuel Marketing Act

State ex rel. Nixon v. QuikTrip Corp.[1]

I. INTRODUCTION

The purpose of the Missouri Motor Fuel Marketing Act (MFMA)[2] is to prevent predatory pricing in the motor fuel retail industry that would ultimately harm consumers through monopolistic takeovers.[3] The Act prohibits certain below-cost sales of motor fuel by a retailer intended to or having the effect of unfairly diverting trade from a competitor, inducing the purchase of other merchandise, or otherwise injuring competitors.[4] In *State ex rel. Nixon v. QuikTrip Corp.*, the Missouri Supreme Court interpreted certain language in the MFMA for the first time. The court defined the statutory terms "competitor" and "injure," and established what the State must show to prove a below-cost sale either unfairly diverted trade or "otherwise injur[ed]" a competitor.[5]

The court held that the MFMA does not prohibit all below-cost sales of motor fuel, the State must show injury to a competitor, and the State must show the below-cost sale forced the competitor to lower its motor fuel prices to the point of operating its business at an overall loss to prove a violation. These holdings are in accord with the policy behind the Act, the statutory language, prior case law, and Areeda and Hovenkamp's interpretation of federal antitrust law.[6] The dissent's argument that the majority ignores the plain meaning of the word "injure,"[7] on the other hand, overlooks these factors and contradicts both legislative intent and prior case law.

II. FACTS AND HOLDING

The instant litigation arose in 1999 when the State of Missouri, through the Attorney General, brought an enforcement action under the MFMA.[8] The

1. 133 S.W.3d 33 (Mo. 2004) (en banc).
2. MO. REV. STAT. §§ 416.600-.640 (2000).
3. Ports Petroleum Co. of Ohio v. Nixon, 37 S.W.3d 237, 241 (Mo. 2001) (en banc).
4. MO. REV. STAT. § 416.615.1 (2000).
5. State *ex rel.* Nixon v. QuikTrip Corp., 133 S.W.3d 33, 37-40 (Mo. 2004) (en banc).
6. *See infra* Section V and accompanying text.
7. *QuikTrip*, 133 S.W.3d at 40-41 (Limbaugh, J., dissenting).
8. *Id.* at 34-35; MO. REV. STAT. §§ 416.600-.640 (2000).

suit alleged that QuikTrip priced its motor fuel below its wholesale cost at its Herculaneum, Missouri, location for seventy-six days.[9] QuikTrip conceded it sold diesel fuel below its wholesale costs on twenty-two days and unleaded gasoline below cost on one day during a thirty-three month period.[10] QuikTrip also conceded the below-cost pricing on these occasions was not in response to a competitor lowering its price, which is a permitted exception absolving the retailer from liability under the Act.[11]

Many of the alleged violations involved sales of motor fuel "one-hundredth or one-thousandth of a cent per gallon below cost."[12] However, prices are only posted to consumers to the nearest one-tenth of a cent per gallon.[13] Additionally, many of the violations occurred when QuikTrip's costs increased rather than as a result of a decrease in the sale price of motor fuel instituted by QuikTrip.[14] There were at least eleven other gas stations within a three-mile radius of the QuikTrip location in question during the time period of the below-cost sales.[15] None of these gas stations exited the market during the thirty-three month period, and one new competitor entered the market during the relevant period.[16]

The Attorney General alleged QuikTrip violated the Act when its below-cost pricing of motor fuel required its competitors to choose between lowering their prices and potentially losing customers.[17] The Attorney General sought injunctive relief and civil penalties for QuikTrip's alleged unfair diversion of trade from and subsequent injury to its competitors.[18] The State did not contend QuikTrip's actions injured competition, which would have provided an alternate theory of liability.[19]

QuikTrip offered a number of arguments to refute the State's claims. Because of the Act's use of the term "unfair," QuikTrip argued the State must demonstrate QuikTrip intended to destroy or actually destroyed competition

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9. *QuikTrip*, 133 S.W.3d at 36.

10. *Id.* The thirty-three month period involved was between March 1997 and July 1999. *Id.*

11. *Id.* The MFMA provides an exception where the seller of motor fuel is selling below-cost in a good faith effort to match the price of a competitor. MO. REV. STAT. § 416.620.3 (2000).

12. *QuikTrip*, 133 S.W.3d at 39.

13. *Id.* at 39-40.

14. *Id.* at 40.

15. *Id.*

16. *Id.*

17. *Id.* at 36.

18. *Id.*

19. *Id.* at 35. The alternate theory of liability would have rested upon Missouri Revised Statutes Section 416.415.1, which prohibits below-cost sales of motor fuel if the intent or effect of the sale is to injure competition. This provision has not yet been interpreted by the court and is outside the scope of this Note.

through its below-cost sales.[20] QuikTrip also argued the MFMA violated constitutional due process guarantees because "the [A]ct is not reasonably related to the problems it seeks to address, and . . . it is impossible for QuikTrip to comply with the [A]ct's terms."[21]

The Circuit Court of Jefferson County granted the State partial summary judgment, ruling the State established a prima facie showing that QuikTrip sold motor fuel below cost and that the effect of these sales was either injury to a competitor or an unfair diversion of trade from a competitor.[22] The State dismissed charges based on fifty-three separate alleged instances, limiting the summary judgment to the twenty-three different instances to which QuikTrip stipulated.[23] After QuikTrip moved for rehearing, the circuit court entered judgment in favor of the State and assessed civil penalties[24] against QuikTrip, finding twenty-three violations of the Act.[25] The circuit court stated "[o]n every day where QuikTrip priced below cost without a valid statutory defense, there is no dispute that such pricing caused injury to competitors."[26]

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20. *QuikTrip*, 133 S.W.3d at 36. The Act makes it unlawful to sell motor fuel below cost if "[t]he intent of the sale [is] . . . to unfairly divert trade from a competitor, or otherwise to injure a competitor." MO. REV. STAT. § 416.615.1 (2000). QuikTrip unsuccessfully argued that "unfairly" modifies "or otherwise to injure a competitor" in addition to "divert." *QuikTrip*, 133 S.W.3d at 39.

21. *QuikTrip*, 133 S.W.3d at 36. The constitutionality of the Act was previously challenged, but the Missouri Supreme Court did not address the challenge because it was not ripe for adjudication. Ports Petroleum Co. of Ohio v. Nixon, 37 S.W.3d 237, 241 (Mo. 2001) (en banc). The previous constitutional challenges included a federal constitutional due process challenge and Missouri state constitutional challenge alleging that the Act "is not rationally related to its putative goal of enhancing competition in the motor fuel industry;" a federal constitution equal protection challenge and Missouri state constitution challenge alleging that the Act "operates in a discriminatory fashion against unbranded retailers . . . and to the distinct advantage of branded retailers;" and a federal constitution Supremacy Clause challenge alleging that the Act "irreconcilably conflicts with federal antitrust law." *Id.* at 238-39.

22. *QuikTrip*, 133 S.W.3d at 36. The court's decision reinstated Section 416.640 of the MFMA, which shifts the burden of justifying the below-cost sale to the defendant once the State has made a prima facie showing of a violation of the Act. *See infra* note 72. The circuit court also ruled that the Act satisfied substantive due process requirements. *QuikTrip*, 133 S.W.3d at 36.

23. *QuikTrip,* 133 S.W.3d at 36.

24. Missouri Revised Statutes Section 416.615 imposes a $1,000 to $5,000 penalty per violation. The circuit court claimed to assess a $3,000 penalty per violation against QuikTrip but, in actuality, assessed a total of $75,000 in penalties, which calculates to over $3,260 per violation. *QuikTrip*, 133 S.W.3d at 36. A $3,000 penalty for each of twenty-three days would translate into a total penalty of $69,000. *Id.* at 36 n.4. The Missouri Supreme Court did not find any explanation from the circuit court for the $6,000 discrepancy. *Id.*

25. *QuikTrip*, 133 S.W.3d at 36.

26. *Id.*

The circuit court held QuikTrip violated the Act because "QuikTrip's sale[] of motor fuel[] below cost apparently diminished [its] competitor's profits."[27]

Because of QuikTrip's challenge of the constitutionality of the statute, the Missouri Supreme Court exercised exclusive appellate jurisdiction.[28] The court held that, in order to show injury under the MFMA, the State must show a retailer's action of lowering posted motor fuel prices below cost injured a competitor by forcing the competitor to sell motor fuel below its cost, causing an unfair diversion of trade or an injury to the competitor's overall operations.[29] The court also held that, because the State failed to demonstrate QuikTrip's below-cost sales of motor fuel had such an injurious effect on its competitors, summary judgment in favor of the State was improper.[30] Thus, the court held that every below-cost sale of motor fuel is not necessarily a violation of the MFMA; rather, only those below-cost sales that threaten a competitor's continuing financial viability constitute an actionable injury under the MFMA.[31]

III. LEGAL BACKGROUND

The MFMA[32] was enacted in 1993 to protect competition among sellers of motor fuel.[33] The Act is designed to protect consumers by preventing the formation of monopolies.[34] The overarching concern is that monopolistic takeovers may occur in the motor fuel retail marketplace as a result of below-cost sales that could, in the long run, cause harm to the consumer.[35] The MFMA makes it unlawful for a "person engaged in commerce within [Missouri] to sell or offer to sell"[36] motor fuel[37] below cost[38] if:

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27. *Id.* at 35.

28. *Id.* at 34 (citing MO. CONST. art. V, § 3).

29. *Id.* at 38-40.

30. *Id.* at 40.

31. *Id.* at 39.

32. MO. REV. STAT. §§ 416.600-.640 (2000).

33. Ports Petroleum Co. of Ohio v. Nixon, 37 S.W.3d 237, 241 (Mo. 2001) (en banc).

34. *Id.*; 1993 Mo. Legis. Serv. S.B. 374 (West) (stating that the MFMA was an act "relating to monopolies").

35. *Ports Petroleum*, 37 S.W.3d at 241. The court recognized that below-cost sales do not harm or injure consumers initially. *Id.* The court also recognized the long-run harm to the consumer is extrapolated from "economic theories that involve the application of several variables and factual assumptions." *Id.*

36. MO. REV. STAT. § 416.615.1 (2000).

37. "Motor fuel" is defined as "gasoline, diesel fuel, gasohol and all other fuels . . . designated for use as a motor fuel" for vehicles primarily used on public streets, roads and highways. MO. REV. STAT. § 416.605.4 (2000).

38. "Cost" is defined as the lowest invoice cost charged to the purchaser or receiver of the fuel within three days prior to the alleged unlawful resale, less any dis-

(1) The intent of the sale or offer is to injure competition; or

(2) The intent 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.[39]

The MFMA provides specific exceptions in which selling motor fuel below cost is not a violation of the Act.[40] Most pertinently, the Act is not violated if the seller is attempting in good faith to meet a competitor's lower price.[41]

The Act assesses a $1,000 to $5,000 fine per violation.[42] Each day on which a violation occurs is a separate violation.[43] Additionally, the Act provides a civil remedy allowing any person injured by a violation of the Act to recover attorneys' fees and either treble damages or an injunction.[44] A final judgment in an enforcement action brought by the State is "prima facie evi-

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counts, allowances or rebates, plus the cost of doing business, any freight charges and all taxes not already included in the invoice. *Id.* § 416.605.2. The "cost of doing business" is defined as "all costs incurred in the operation of the business for fair market rental value, licenses, taxes, utilities, insurance and nonmanagerial labor." *Id.* § 416.605.3.

39. MO. REV. STAT. § 416.615.1 (2000). The Act also prohibits selling or offering motor fuel at a price lower than charged to other persons "at the same time and on the same level of distribution, if the intent of the sale or offer is to injure competition." *Id.* § 416.615.2. In addition, the Act prohibits a person from selling or transferring motor fuel to itself or an affiliate for resale on a different marketing level of distribution at a lower price than charged to a person purchasing it for resale "at the same time and on the same level of distribution, if the intent of the sale or transfer is to injure competition." *Id.* § 416.615.3. Prior to amendment in 1995, the Act prohibited below-cost sale of motor fuel if the "intent or effect" of the sale was to "injure competition," "induce the purchase of other merchandise, to unfairly divert trade from a competitor, or otherwise to injure a competitor." 1995 Mo. Legis. Serv. H.B. 414 (West). The 1995 amendment removed the words "or effect" from the statute. *Id.*; State *ex rel.* Nixon v. QuikTrip Corp., 133 S.W.3d 33, 35 n.1 (Mo. 2004) (en banc). However, the Missouri Supreme Court held the amendment invalid under *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. 1994) (en banc). The trial court in the instant case also held the 1995 amendment unconstitutional. *QuikTrip*, 133 S.W.3d at 35 n.1.

40. MO. REV. STAT. § 416.620 (2000).

41. *Id.* § 416.620.3. Additionally, the Act is not violated if a difference exists at the same level of distribution and the price charged to a person intending to resell the motor fuel is due to a "difference in shipping method, transportation or quantity in which the motor fuel is sold." *Id.* § 416.620.1. The Act is also not violated if, at the same marketing level, the transfer or sales prices differ because of "a good faith effort to meet the equally low price of a competitor." *Id.* § 416.620.2.

42. MO. REV. STAT. § 416.625.1.

43. *Id.*

44. MO. REV. STAT. § 416.635 (2000). The private cause of action must be brought within four years of the alleged illegal occurrence. *Id.*

dence against the defendant" if the action is brought within one year of the judgment.[45]

QuikTrip is the second Missouri appellate case to interpret the MFMA. The first was *Ports Petroleum Co. of Ohio v. Nixon*.[46] In *Ports Petroleum*, the Attorney General utilized the Merchandising Practices Act (MPA)[47] to serve Ports Petroleum, an operator of a gas station, with a Civil Investigative Demand (CID) on the grounds that there was reason to believe Ports Petroleum engaged in unlawful trade practices, specifically the offering of motor fuel at below-cost prices with the intent to injure competition.[48] The MPA makes it unlawful to act, use or employ "any deception, fraud, false pretense, false promise, misrepresentation, [or] unfair practice . . . in connection with the sale or advertisement of any merchandise in trade or commerce" in or from Missouri.[49] The Attorney General argued that a violation of the MFMA was an "unfair [trade] practice" as defined by the MPA, which gave the Attorney General the authority to serve the CID.[50] In defining "unfair practice," the Missouri Supreme Court held the below-cost sale of motor fuel addressed by the MFMA is not the type of "unfair practice" addressed by the MPA.[51] Specifically, the court held the MPA protected consumers who represent the actual buyers in a sale, whereas the MFMA protected competition.[52] The Missouri Supreme Court determined the "MPA and the MFMA operate independently, [and] that the two statutes were not intended to overlap."[53] Consequently, the MPA provides little if any guidance in interpreting the MFMA.

The Unfair Milk Sales Practices Act (Milk Act)[54] may provide more guidance. The Milk Act prohibits the below-cost sale of milk with the intent or effect of unfairly diverting trade, otherwise injuring a competitor, destroying competition, or creating a monopoly.[55] Although the Milk Act is similar

45. MO. REV. STAT. § 416.630.4 (2000).

46. 37 S.W.3d 237 (Mo. 2001) (en banc).

47. MO. REV. STAT. §§ 407.010-.145 (2000).

48. *Ports Petroleum*, 37 S.W.3d at 239.

49. MO. REV. STAT. § 407.020.1 (2000).

50. *Ports Petroleum*, 37 S.W.3d at 239. The MFMA has no express provision allowing the Attorney General to serve a Civil Investigative Demand (CID). *Id.* at 240. Ports Petroleum sought declaratory relief against the Attorney General on a constitutional challenge to the MFMA and injunctive relief on the grounds that the Attorney General lacked power to serve the CID. *Id.* at 239.

51. *Id.* at 241.

52. *Id.*

53. *Id.*

54. MO. REV. STAT. §§ 416.410-.560 (2000).

55. MO. REV. STAT. § 416.415.1 (2000). The Milk Act also prohibits a variety of other actions, each of which must be performed with predatory intent: price discrimination between different localities, other than those resulting from transportation costs; selling bulk milk below cost; selling milk in combination with other products

to the MFMA, there are some important statutory differences between the two Acts. First, the Milk Act allows below-cost pricing when it occurs in isolated transactions not in the usual course of business.[56] Second, the Milk Act does not prohibit the pricing of one product in order to induce customers to purchase other products, commonly referred to as loss leaders, which is specifically prohibited by the MFMA.[57] Third, the Milk Act establishes the evidence necessary for a prima facie showing of a violation of the Act.[58] Specifically, the Milk Act provides that "proof of the advertising, offer to sell or sale of milk" below cost "is prima facie evidence of a violation" of the Act.[59]

Case law interpreting the Milk Act clarifies that the prima facie evidence provisions of the Milk Act do not affect the burden on the State to show the below-cost sale of milk involved predatory intent. In *State ex rel. Thomason v. Adams Dairy Co.*,[60] the Missouri Supreme Court explained:

> The provision [stating] that proof of giving milk is *prima facie* evidence of a violation of the section is a rule of evidence which may affect the burden of evidence but does not affect or change the burden of proof. In this case the burden of proof, including the risk of nonpersuasion, remained throughout on the commissioner who charged that respondent violated the provisions of the section of the law in question. The question is whether [the State] has sustained [its] burden to prove the violation as charged, upon a consideration of all the evidence.[61]

The Missouri Supreme Court further held that, despite the establishment of prima facie evidence, the burden of proof fell on the State to establish that

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for less than cost; or giving purchasers anything of value. MO. REV. STAT. §§ 416.420.1, -.430.1, -.435.1, -.440.1 (2000).

56. MO. REV. STAT. § 416.445.1 (2000); State *ex rel.* Nixon v. QuikTrip Corp., 133 S.W.3d 33, 39 (Mo. 2004) (en banc). The Milk Act also provides a similar exception when the below-cost pricing is in a good faith effort to match the price of a competitor, provided there is no predatory intent. MO. REV. STAT. § 416.445.6 (2000).

57. MO. REV. STAT. § 416.615.1(2) (2000); *QuikTrip*, 133 S.W.3d at 39.

58. MO. REV. STAT. §§ 416.415.2, -.420.2, -.425.2, -.430.2, -.435.2, -.440.2, -.440.4 (2000).

59. MO. REV. STAT. §§ 416.415.2, -.425.2 (2000).

60. 379 S.W.2d 553 (Mo. 1964) (per curiam).

61. *Id.* at 555 (alteration in original) (citation omitted) (citing City of St. Louis v. Cook, 221 S.W.2d 468, 469 (Mo. 1949) (per curiam)). In *Adams Dairy*, the State alleged the defendant dairy violated the Milk Act by giving free milk to persons "with the intent and with the effect of unfairly diverting trade . . . or otherwise injuring a competitor." *Id.* at 553. The pertinent statute of the Milk Act provides that proof of the giving of "anything of value is prima facie evidence of a violation" of the Act. MO. REV. STAT. § 416.440.2 (2000).

the sale of milk below cost was done with the "intent or with the effect of unfairly diverting trade from a competitor."[62]

In *State ex rel. Davis v. Thrifty Foodliner, Inc.*,[63] the State contended it was entitled to judgment in its favor once it established that the nonprocessing retailer advertised and sold milk below cost unless the retailer overcame the burden by demonstrating the lack of "requisite evil intent" and "predatory effect of its conduct."[64] However, the Missouri Supreme Court stated: "[w]hether or not advertising or selling milk below cost is done with the intent or has resulted in unfairly diverting trade from a competitor 'is a matter of proof in each instance and must depend on the facts and circumstances shown. The provision is subject to a reasonable interpretation.'"[65]

The court held that, although the statute provided for a prima facie showing of a violation by establishing the defendant advertised or sold milk below cost, the State still must show the defendant sold milk below cost with the "intent or . . . effect of unfairly diverting trade from a competitor or otherwise injuring a competitor."[66]

When called upon to interpret a statute, the court's "primary aim [is] to ascertain the intent of the legislature from the language used and to give effect to that intent."[67] The court must consider the legislature's goal in crafting a resolution to the problems addressed by the statute.[68]

IV. INSTANT DECISION

A. The Majority Opinion

The Missouri Supreme Court began its opinion by summarizing the stipulated facts, the MFMA itself, and the decision of the circuit court.[69] The court then addressed its standard of review. Because the case was before the

62. *Adams Dairy*, 379 S.W.2d at 555-56. The statute referred to is Missouri Revised Statutes Section 416.440 (2000), which contains the substantially same provisions as the rest of the statutes in the Milk Act that establish prima facie evidence. *See supra* note 58 and accompanying text.

63. 432 S.W.2d 287 (Mo. 1968).

64. *Id.* at 290. This case revolves around Missouri Revised Statutes Section 416.425 (2000), which involves nonprocessing retailers. *Id.*

65. *Id.* (quoting Borden Co. v. Thomason, 353 S.W.2d 735, 754 (Mo. 1962) (en banc)).

66. *Id.*

67. Gott v. Dir. of Revenue, 5 S.W.3d 155, 158 (Mo. 1999) (en banc).

68. *Id.* at 159.

69. State *ex rel.* Nixon v. QuikTrip Corp., 133 S.W.3d 33, 34-36 (Mo. 2004) (en banc).

court on appeal from an entry of summary judgment, the court reviewed the facts and law of the case *de novo*.[70]

Prior to amendment in 1995, the MFMA contained the language "intent or effect" and a provision shifting the burden of proof to the defendant upon a prima facie showing of a violation by the State or plaintiff.[71] If the defendant failed to justify the below-cost sale, judgment was to be awarded to the State or plaintiff.[72] The *QuikTrip* court found that the 1995 amendment to the Act was unconstitutional, and the court returned Sections 416.615 and 416.640 to their original form.[73] Thus, the court interpreted the statutory language "intent or effect of the sale or offer," and returned the provision shifting the burden of proof to the defendant upon a prima facie showing of a violation of the Act.[74] The court then characterized the issue before it as: "whether the statute protects the QuikTrip competitor from the effects of competition or, more narrowly, protects only against competition that injures a competitor or that unfairly diverts trade from its business."[75]

Turning its attention to the Act, the court first defined what entities constituted competitors under the MFMA.[76] The court set forth the dictionary definition of competitor as "one that is engaged in selling or buying goods or services in the same market as another."[77] Using this definition, the court determined QuikTrip's competitors were firms competing in the sale of motor fuel and other items to travelers.[78]

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70. *Id.* at 36 n.5 (citing ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993) (en banc)).

71. MO. REV. STAT. § 416.640 (repealed 1995).

72. *QuikTrip,* 133 S.W.3d at 35-36 nn.1, 3.

73. *Id.* The court found the 1995 amendment invalid under *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. 1994) (en banc). *QuikTrip*, 133 S.W.3d at 35 n.1. The court in *Hammerschmidt* found two legislative enactments invalid based on the constitutional prohibition against bills containing more than one subject. *Hammerschmidt*, 877 S.W.2d at 104 (citing MO. CONST. art. III, § 23). Although the court in the instant case does not address whether the entire 1995 amendment was invalid, the court in *Hammerschmidt* stated that once the court "concludes that a bill contain[ed] more than one subject, the entire bill is unconstitutional unless the Court is convinced beyond reasonable doubt that one of the bill's multiple subjects is its original, controlling purpose and that the other subject is not." *Id.* at 103. The court did not address this in the instant case, thus the entire amendment is presumably invalid. *See QuikTrip*, 133 S.W.3d at 35 n.1.

74. *QuikTrip,* 133 S.W.3d at 35-36 nn.1, 3.

75. *Id.* at 37.

76. *Id.* The MFMA lacks a statutory definition for the term "competitor."

77. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 464 (1993) and Hemeyer v. KRCG-TV, 6 S.W.3d 880, 881 (Mo. 1999) (en banc) ("plain and ordinary meaning of a word is derived from the dictionary")).

78. *Id.*

Next, lacking a statutory definition, the court considered the meaning of the word "injury" under the Act.[79] In doing so, the court addressed two different interpretations of the word.[80] Under the first, the injury suffered by a competitor would be the competitor's decrease in motor fuel sales resulting from the lower advertised price.[81] Under the second interpretation, which the court adopted, injury to a competitor results only when the competitor is forced to lower its motor fuel prices below cost and operate its overall business at a loss.[82]

The court dismissed the first interpretation because it suggests "competition itself is injurious" to competitors.[83] Using this interpretation would mean that the competitor, although still earning a profit, is injured because it did not earn as much profit as it could have in the absence of QuikTrip's lower, below-cost price.[84] According to the court, this interpretation would "diminish or eliminate competition" in motor fuel sales and "create a state-enforced cartel of motor fuel sellers."[85] This would result in harm to the public interest in the form of higher retail motor fuel prices for consumers.[86]

The court held that the second interpretation was proper because it protects the public interest, thereby realizing the purpose of the MFMA.[87] The court explained that causing a competitor to operate its business at an overall loss over an extended period of time would drive the competitor out of business.[88] This eliminates competition, resulting in higher prices to the consumer and harm to the public interest.[89]

Aside from lowering fuel prices in kind, the other option available to a competitor facing a lower motor fuel price is to resist a price reduction.[90] The court found that if the competitor takes this approach in order to maintain its financial viability, the effect of the retailer initially lowering its prices below cost would be an unfair diversion of trade from the competitor.[91]

The court then turned to the Milk Act for guidance in interpreting the MFMA.[92] Examining the statute and interpretive case law, the court deter-

79. *Id.* at 38.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* The court stated that this interpretation would "shield[] the competitor from the ordinary effects of competition," and that "in a competitive market, a lowering of price by a competitor is intended to divert business from the competitor." *Id.*
86. *Id.*
87. *Id.* at 39.
88. *Id.* at 38.
89. *Id.* at 38-39.
90. *Id.* at 37-38.
91. *Id.* at 38.
92. *Id.* at 39.

mined the below-cost sale of milk "is not illegal unless the intent or effect" of the sale is to unfairly divert trade.[93] The court also pointed out two important differences between the Milk Act and the MFMA.[94] First, the Milk Act allows the use of loss leaders, while the MFMA specifically prohibits such use.[95] Second, the Milk Act allows certain isolated below-cost sales not in the usual course of business.[96]

The court next addressed the language of Section 416.615 of the MFMA. Because the legislature prohibited the offer or sale of motor fuel below cost with the intent or effect of injuring competition, inducing the purchase of other goods, unfairly diverting trade, or otherwise injuring a competitor, the court determined the statute does not prohibit below-cost sales of motor fuel that do not fit those criteria.[97] The court also stated that because motor fuel prices are only advertised to one-tenth of a cent per gallon, any violations below one-tenth of a cent would not affect competitors' pricing decisions.[98]

Applying these findings to the facts of the case, the court found that the State "ha[d] not demonstrated that QuikTrip's occasional below-cost sales had an adverse effect on QuikTrip's competitors."[99] The court noted no competitors exited the market during the relevant time period and none of QuikTrip's nearest competitors seemed in danger of going out of business.[100] The court concluded the State must show QuikTrip posted prices lower than its costs and this "caused an unfair diversion of trade or an injury to a competitor's over-all operations."[101] Because the State failed to make such a showing, the court reversed the judgment of the circuit court and remanded the case.[102]

B. The Dissent

Judge Limbaugh argued that the phrase "or otherwise to injure a competitor" in the MFMA is a catchall provision.[103] Thus, any sale of motor fuel below cost that injures a competitor in any way other than as specified in the statute falls under the catchall provision and is a violation of the Act.[104]

Disagreeing with the majority's characterization of injury, Judge Limbaugh argued that the plain meaning of the word "injure" encompasses any

93. *Id.*
94. *Id.*
95. *Id. See also supra* note 57 and accompanying text.
96. *Id.*
97. *Id.*
98. *Id.* at 39-40.
99. *Id.* at 40.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* (Limbaugh, J., dissenting).
104. *Id.* (Limbaugh, J., dissenting).

reduction in profits suffered by a competitor in the face of another retailer's below-cost sale.[105] Judge Limbaugh argued the majority's definition of injury was too narrow, and that the "catchall provision" should include all injuries, regardless of their extent, suffered by a competitor.[106] According to Judge Limbaugh, "[e]ven where a competitor lowers its prices to a level that does not fall below its own costs, there still is an injury due to a reduction in profits."[107] Judge Limbaugh deemed this interpretation in accord with the policy of the MFMA, which he saw as the prevention of predatory pricing.[108] In Judge Limbaugh's view, the majority's analysis "encourage[s] price wars among competitors," which will "only result in lower prices in the short run."[109]

V. COMMENT

As the first case to construe the terms of the MFMA, *State ex rel. Nixon v. QuikTrip Corp.* sets the precedent by which future cases will be decided.[110] The primary thrust of the court's decision turns upon the construction of the phrase "or otherwise to injure a competitor."[111] In construing this ambiguous injury, the court determined the legislature did not intend to prohibit all below-cost motor fuel sales when it prohibited a retailer from otherwise injuring a competitor.[112] The court also established that the State must provide evidence of predatory intent or of a harmful effect caused by the below-cost sale and that the competitor must be forced to operate its overall business at a loss to constitute an injury under the MFMA.[113]

The court's determination that the State must show specific predatory intent by a retailer or adverse effect on a competitor is in accord with the interpretation of the Milk Act as presented in prior case law.[114] In *State ex rel. Thomason v. Adams Dairy Co.*, the State alleged the defendant dairy violated the Milk Act but failed to offer evidence that the dairy's actions destroyed

105. *Id.* (Limbaugh, J., dissenting).
106. *Id.* at 41 (Limbaugh, J., dissenting).
107. *Id.* (Limbaugh, J., dissenting).
108. *Id.* (Limbaugh, J., dissenting).
109. *Id.* (Limbaugh, J., dissenting).
110. *Ports Petroleum* involved the interrelationship between the MFMA and the Missouri Merchandising Practices Act, however it did not construe the MFMA except to the extent that the Attorney General may not utilize a Civil Investigative Demand to investigate possible violations of the MFMA. Ports Petroleum Co. of Ohio v. Nixon, 37 S.W.3d 237, 241 (Mo. 2001) (en banc). *See supra* notes 46-53 and accompanying text.
111. MO. REV. STAT. § 416.615.1(2) (2000).
112. *Supra* note 97 and accompanying text.
113. *Supra* note 101 and accompanying text.
114. *Supra* notes 92-93 and accompanying text.

competition, created a monopoly, or injured a competitor.[115] The State in *Adams Dairy* took the same position as in the instant case: all below-cost sales of the applicable product not specifically permitted by the Act are done with the intent and the effect of unfairly diverting trade from a competitor; thus the plaintiff need only show a below-cost sale.[116] The court in *Adams Dairy* rejected this contention, holding that the State carries the burden of showing the alleged violator acted with the intent or effect of unfairly diverting trade from a competitor despite the prima facie evidence provision in the Act.[117] Thus, the *QuikTrip* court's determination that the State must show a specific injury and that all below-cost sales are not injurious or prohibited by the MFMA is consistent with prior case law.

The court's decision adopting a more restrictive definition of injury is also well-founded and follows with the purpose of the MFMA. In its search to define what the legislature intended by "otherwise to injure a competitor," the court examines the policy behind the Act and the legislature's chosen means to further that policy.[118] The court's decision that the Act protects the public interest follows the legislative history of the Act[119] and the court's previous decision in *Ports Petroleum*.[120] As the court stated, defining injury to include any decrease in sales revenue caused by a competitor's lower price would mean defining competition itself as inherently injurious.[121] The soundness of this reasoning is grounded in business's inherent competitiveness. All pricing decisions in a successful for-profit business are made to maximize profits.[122] If it operates as intended, any lowering of prices would divert trade from a competitor, and any price drop would "injure" a competitor by reducing sales.[123] If injury were defined in the broad terms that Judge Limbaugh endorsed, every below cost sale would be injurious in some manner and every below-cost sale not specifically allowed by statute would be a violation of the Act. Indeed, following Judge Limbaugh's reasoning would result in every below-cost sale violating the Act because its injurious effect is preordained by the very nature of market competition.[124]

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115. State *ex rel.* Thomason v. Adams Dairy Co., 379 S.W.2d 553, 555 (Mo. 1964) (per curiam).

116. *Id.* at 555-56; State *ex rel.* QuikTrip Corp., 133 S.W.3d 33, 39 (Mo. 2004) (en banc) (the State argued that "below-cost sales injure competitors because competitors must either lower prices or lose customers").

117. *Adams Dairy*, 379 S.W.2d at 555.

118. *QuikTrip*, 133 S.W.3d at 37.

119. *See* 1993 Mo. Legis. Serv. S.B. 374 (West).

120. Ports Petroleum Co. of Ohio v. Nixon, 37 S.W.3d 237, 241 (Mo. 2001) (en banc).

121. *QuikTrip*, 133 S.W.3d at 38.

122. 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 725a (2d ed. 2002).

123. *Id.*

124. *See id.* at 41 (Limbaugh, J., dissenting).

Because the Act was designed to prevent monopolistic competition,[125] and because the primary focus of a court in construing a statute is to ascertain and effectuate the legislature's intent,[126] below-cost sales of motor fuel should be prohibited only to the extent such sales force competitors out of business. The court's interpretation limits the definition of injury to a showing by the State that the violation caused a competitor to operate at an overall loss.[127] The court's interpretation furthers the purpose of the MFMA by limiting the Act to monopolistic competition.

Judge Limbaugh's catch-all definition of "injury" finds injury even when profits are merely diminished and not entirely eliminated.[128] This definition sweeps too broadly by limiting competition not resulting in a monopoly. Judge Limbaugh's definition limits below-cost pricing of motor fuel that still allows competitors to attain a profit. If a competitor still profits after meeting the price, the purpose in characterizing the lost profits as an injury is not to prevent a monopoly but to, as the majority puts it, "increase the profits of already healthy private businesses at the expense of consumers."[129]

The court's decision is also consistent with the principles espoused in Areeda and Hovenkamp's treatise on federal antitrust law.[130] According to Areeda and Hovenkamp, "a firm that merely injures a rival where [a] monopoly or oligopoly is not in prospect" has not violated federal antitrust law.[131] Only a firm who "drives out, excludes, or disciplines rivals by selling at non-remunerative prices" engages in predatory behavior.[132] Federal antitrust laws only condemn attempts to monopolize when there is a "dangerous probability" a monopoly will result.[133] Monopolization is not likely to result unless the competitors operate their overall business at a loss. If the competitor realizes a profit, a "dangerous probability" of monopolization is unlikely to result, and, thus, federal anti-trust principles are not violated.[134]

Addressing the situation of predatory pricing by a motor fuel retailer with a convenience store, Areeda and Hovenkamp advocate the use of an average price structure for all products sold in computing the relevant cost measure.[135] Although the MFMA specifically defines the cost measure to be

125. *See supra* notes 2-3 and accompanying text.

126. Gott v. Dir. of Revenue, 5 S.W.3d 155, 158 (Mo. 1999) (en banc).

127. *QuikTrip*, 133 S.W.3d at 38-40.

128. *Id.* at 41 (Limbaugh, J., dissenting).

129. *Id.* at 40.

130. 3 AREEDA & HOVENKAMP, *supra* note 122.

131. 3 *id.* ¶ 725a1(B). That firm may be guilty of a business tort. *Id.*

132. 3 *id.* ¶ 723a.

133. 3 *id.* ¶ 725a1(B).

134. In the instant case, the court cited the overall profitability of QuikTrip's competitors in spite of the below-cost sales, showing the lack of a dangerous probability of monopolization in this case. *QuikTrip*, 133 S.W.3d at 40.

135. 3 AREEDA & HOVENKAMP, *supra* note 123, ¶ 724d.

used in computing below-cost sales,[136] the *QuikTrip* court utilizes a cost structure similar to that advocated by Areeda and Hovenkamp to calculate an injury to a competitor that constitutes a violation under the MFMA.[137] In order to drive out a competitor in this situation, a competitor must be forced to sell below its overall costs, thereby making the competitor unprofitable and monopolization more likely.

The fact that the State must show an injury to the competitor also makes logical sense under the language of the statute. As suggested by the court,[138] the legislature could have made every below-cost sale of motor fuel a violation. Instead, the legislature proscribed below-cost sales of motor fuel only if the intent or effect of the sale is to injure competition, induce the purchase of other merchandise, unfairly divert trade from a competitor, or otherwise injure a competitor.[139] This suggests the legislature did not intend to proscribe all below-cost sales of motor fuel.

The legislature also enacted provisions allowing certain below-cost sales without violating the Act.[140] One of these provisions is the "meeting competition" defense, which allows a competitor to sell motor fuel below cost in a good faith effort to match the lower price of a competitor. If the legislature had not intended to proscribe all below-cost sales, this provision seems superfluous. A good faith effort to match a competitor's price would not be motivated by intent to unfairly divert trade or to injure a competitor; it would be done with the intent of remaining competitive. Thus, this provision supplies the basis for a colorable argument that the legislature intended to proscribe all below-cost sales not specifically excepted by the Act.

If that were the legislature's intent, however, there would be no need for provisions (1) and (2) of subsection (1) of Section 416.615 of the MFMA.[141] The legislature merely could have left these provisions out and stated "[i]t is unlawful for any person . . . within this state to sell or offer to sell motor fuel below cost,"[142] thus leaving enumerated exceptions as the only legal below cost sales.[143] Because the legislature did not take this approach, it should be assumed it did not wish to prohibit all below-cost sales of motor fuel. However, if the "otherwise injure" clause were construed in accordance with Judge Limbaugh's catch-all clause and not restricted in the manner adopted by the court, it would, as previously stated, effectively proscribe all below-cost sales not specifically excepted.

136. *See supra* note 38 and accompanying text.
137. *QuikTrip*, 133 S.W.3d at 37-38, 40.
138. *Id.* at 38.
139. MO. REV. STAT. § 416.615 (2000).
140. MO. REV. STAT. § 416.620 (2000).
141. MO. REV. STAT. § 416.615.1 (2000).
142. *Id.*
143. *See* MO. REV. STAT. § 416.620 (2000).

An additional problem with Judge Limbaugh's broad interpretation of injury is it would relieve the State from showing predatory intent. All pricing decisions by a successful business are made with the intention of inflicting "injury" on the competitor by drawing customers away from the competitor and garnering them for the business itself. Thus, if injury were defined under Judge Limbaugh's catchall interpretation, the State would not be required to show intent to injure the competitor.

Similar considerations can be applied to the court's determination of what is required to prove an unfair diversion of trade. When facing a business that lowers its prices below cost, a competitor must decide if it will also lower its prices below its costs, thereby threatening its financial viability.[144] If the competitor does not lower its prices to the point at which it would operate at a loss, the court found the business's below-cost sales would be an unfair diversion of trade.[145]

This conclusion is consistent with the court's interpretation of injury and with the legislative policy and intent. Since the purpose of the MFMA is to prevent monopolistic competition, only below-cost sales unfairly diverting trade from a competitor refusing to operate unprofitably should be prohibited by the Act. Similarly, since the Act prohibits "unfair" diversions of trade, not all diversions of trade should be prohibited. By prohibiting only "unfair" diversions of trade caused by below-cost pricing, it can be inferred the legislature contemplated "fair" diversions of trade caused by below-cost pricing of motor fuel. Therefore, the majority's determination is consistent with the policy behind the Act and with the legislature's intentions.

The dissent also attacked the majority's narrow definition of injury by stating it was not in accord with the "plain meaning of the word."[146] Although the majority's definition may fail in this respect, the decision is clearly in accord with prior case law and with the legislature's stated intentions in enacting the MFMA, as previously discussed.

VI. CONCLUSION

The court in *QuikTrip* interpreted the MFMA to require the State to show a below-cost sale of motor fuel was intended to cause a competitor to operate at an overall loss. This was a well-reasoned decision mirroring prior construction of the similarly drafted Unfair Milk Sales Practices Act. The court's interpretation is also in accord with Areeda and Hovenkamp's interpretation of federal predatory pricing provisions. Additionally, the court's decision furthers the anti-monopoly policy which motivated the MFMA's enactment and is consistent with the language of the statute. In contrast,

144. State *ex rel.* Nixon v. QuikTrip Corp., 133 S.W.3d 33, 37-38 (Mo. 2004) (en banc).

145. *Id.*

146. *Id.* at 41 (Limbaugh, J., dissenting).

Judge Limbaugh's dissenting opinion contradicts the legislature's intention and contradicts prior decisions by the Missouri Supreme Court construing similar language in the Unfair Milk Sales Practices Act. With little guidance from the legislature,[147] the court correctly construed the MFMA to reflect general antitrust principles and the best interests of consumers.

TIMOTHY D. STEFFENS

147. Below-cost and predatory intent have been characterized as useless formulae that provide little or no basis for analyzing the predatory pricing offense. *See* 3 AREEDA & HOVENKAMP, *supra* note 122, ¶ 723d.