

This portion must be read in connection with the rest of Section 3, and in accordance with the purpose and aims of the Act, as set forth in Sections 14 and 16. Section 14 declares:

"The legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved."

And Section 16 provides:

"The sale at less than cost of goods obtained at forced, bankrupted, close out, and other sales outside of the ordinary channels of trade is destroying healthy competition. If such practices are not immediately stopped, many more businesses will be forced into bankruptcy. In order to prevent such occurrences, it is necessary that this act go into effect immediately."

To carry out these avowed purposes, the Act has been worked out on a cost basis. Section 3, Chapter 80, is designed to prohibit the sale of goods below cost and the consequent evils that result from such practices. Merchants are prohibited from establishing sales leaders below cost to stifle competition or to attract patronage. Constant sales of items below cost tend to establish monopoly and drive the small business man out of business. The Unfair Practice Act is calculated to insure that all goods shall be sold at least at cost. Section 3 provides that it is unlawful to sell at less than cost; that it is a misdemeanor to violate this section, and then continues to define cost and the cost of doing business, and prescribes the method used for determining the cost price. And in order to prevent evasion of this section by offering of premiums and free gifts, that portion of Section 3, cited above, was included. This cannot be taken to mean an absolute prohibition against giving of free gifts or premiums but must be taken to mean a prohibition of giving gifts when the sum total cost of the free gift, plus the cost of the articles sold, plus the cost of doing business, is greater than the selling price.

Opinion No. 192.

Unfair Practice Act—Free Gifts and Premiums.

HELD: Giving of free gifts and premiums is not prohibited by the Unfair Practice Act unless the cost of the free gift plus the cost of the article sold plus cost of doing business is greater than the selling price.

November 13, 1937.

Mr. C. C. Quinn
County Attorney
Hardin, Montana

Dear Mr. Quinn:

You have asked for an opinion construing that portion of Section 3, Chapter 80, Laws of 1937, which reads as follows:

"It shall be unlawful to * * * give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition, * * *."

In other words, the aim in this specific portion of the section is the same as throughout the rest of the Act—to protect the merchant and insure that he shall get at least cost for his product. Then, in order to have a violation of this portion, the free gift or premium given away must be given with the intent to injure and destroy competition, and the value of the premium must be such that added on to the article makes it a sale below cost.

Placing this construction on Section 3, it is readily apparent that this section is constitutional under the decisions of the courts of California, and cases in other courts, as you have pointed out in your letter.