

Opinion of the Court.

KROGER GROCERY & BAKING CO. *v.* LUTZ,
ATTORNEY GENERAL OF INDIANA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF INDIANA.

No. 501. Argued December 7, 1936.—Decided December 21, 1936.

In a suit to enjoin regulation of a business which does not prevent carrying it on, the amount or value in controversy is not the value or net worth of the business, but the value of the right to be free of the regulation, measurable by the loss, if any, that would follow the enforcement of the regulation. P. 301.

Capitalization of earnings *held* not suitable as a basis of determining the loss attributable to temporary regulation of a business, it not appearing that the loss would exceed that which would be sustained in a short time to elapse before the regulatory statute and the order made upon it were to expire by limitation. Affirmed.

Mr. Robert S. Marx, with whom *Messrs. Frank E. Wood* and *Harry Kasfir* were on the brief, for appellant.

Mr. Philip Lutz, Jr., Attorney General of Indiana, *Mr. Joseph W. Hutchinson*, Assistant Attorney General, and *Mr. Urban C. Stover*, First Deputy Attorney General, were on the brief for appellees.

PER CURIAM.

Complainant brought this suit to restrain the enforcement of an order of the Milk Control Board of the State of Indiana, made June 12, 1936, fixing selling prices of milk in the Fort Wayne Marketing Area. Upon the hearing by three judges (28 U. S. C. 380) of a motion for a preliminary injunction, the District Court dismissed the cause for the want of jurisdiction upon the ground that the requisite jurisdictional amount was not involved. The court made the following findings:

"2. That complainant owns and operates a chain of grocery stores in and out of Indiana, forty-four (44) of

which are located in the City of Fort Wayne, and within a radius of seven (7) Miles thereof, and has invested in said stores in said Fort Wayne marketing area approximately Four Hundred Fifty Thousand (\$450,000.00) Dollars, making an [sic] annual sales of approximately Two Million (\$2,000,000.00) Dollars, of which said sales milk and dairy products amount to approximately Forty-five thousand (\$45,000.00) Dollars. That the number of quarts of milk sold by said stores in one year period are less than 550,000 in said area, in that complainant's profits per quart on its milk sold are .00398. That complainant's total loss in profits for a one-year period on a complete loss of its milk business would be Two Thousand Eighty-nine (\$2089.00) Dollars, on the basis of 550,000 quarts. That if complainant be required by Official Order No. 14 of the Milk Control Board of Indiana to sell its milk at a level price with other dairies and distributors in said territory, its loss in the sales of milk would not exceed twenty-five percent, and its loss in profits would not exceed Five Hundred (\$500.00) Dollars.

"3. That on March 12th, 1935 Chapter 281 of the acts of the General Assembly of the State of Indiana, commonly known as the Milk Control Law, became effective, and that said Act expires by limitation on July 1st, 1937."

In granting a temporary stay pending appeal to this Court, the District Court found that the enforcement of the order would "cause immediate and irreparable injury to the business of the complainant."

In determining whether the requisite jurisdictional amount is in controversy, where it does not appear that the complainant is deprived of its license or is prevented by the regulation from prosecuting its business, the question is not the value or net worth of the business but the value of the right to be free from the regulation, and this may be measured by the loss, if any, that would follow the enforcement of the rule prescribed. *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178.

In order to support its contention, complainant seeks to capitalize its earnings and thus to arrive at the value of the part of the business affected by the order. But that basis of ascertaining a capital loss is not available to complainant here, as the statute, and with it the order, expire by limitation on July 1, 1937. The hurt by reason of the regulation does not appear to be greater than the loss sustained while the statute is in operation. The decree of the District Court is

Affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

KAMMERER ET AL. *v.* KROEGER, SUPERINTENDENT OF BUILDING AND LOAN ASSOCIATIONS OF OHIO, ET AL.*

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 522. Motion to dismiss distributed November 28, 1936.—
Decided December 21, 1936.

The question whether the Court of Common Pleas, of Ohio, in a proceeding to liquidate a building and loan association, had jurisdiction under the laws of that State, to entertain applications by shareholders for reimbursement out of the assets of the association for counsel fees and expenses incurred by them in litigation which they had successfully conducted for the protection of the assets in behalf of themselves and the other shareholders,—*held* a question of state practice and remedy not involving any right under the Federal Constitution.

Appeals from 131 Ohio St. 330; 2 N. E. (2d) 823, dismissed.

* Together with No. 523, *Wuist et al. v. Kroeger et al.*; No. 524, *Fischer et al. v. Kroeger et al.*; No. 525, *Cotterill et al. v. Kroeger et al.*; No. 526, *Kelsey et al. v. Kroeger et al.*; No. 527, *Kimmel et al. v. Kroeger et al.*; and No. 528, *Reichert et al. v. Kroeger et al.* Appeals from the Supreme Court of Ohio.