# General Counsel Corner

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## Some False Trails in the 9th Circuit

Across the country, lessee dealers consistently have been hurt by extreme disparities between the jobber rack price and the dealer tankwagon price.

Because lessee dealers are captive customers of their suppliers, they are forced to pay through the nose for product. Only that captive status explains the existence of pricing disparities of as much as fifteen cents per gallon between the jobber rack price and the dealer tankwagon price.

Many legal theories have been pursued by lessee dealers to attack this unfair situation. One recent case that pursued many of those theories and failed — *Ajir v. Exxon Corp.*, 1999-2 Trade Cas. ¶ 72,609 (9th Cir. 1999) — is worthy of note.

The allegations presented to the Ninth Circuit Court of Appeals in *Ajir* are only too common. The dealers complained that their supplier's pricing policies had placed them in an impossible situation.

They wanted Exxon to at least permit them to purchase gasoline from Exxon's own distributors, from whom they believed they could secure product at prices substantially below the dealer tankwagon.

Although decided in federal court, *Ajir* involved claims brought under the California state antitrust act, the Cartwright Act, California Business & Professions Code §§ 16700 *et seq.*, and not under the federal Sherman Act or Clayton Act. For all relevant purposes, however, the standards applied were identical to those governing federal antitrust claims.

The lessee dealers first argued that Exxon's requirement that its jobbers not sell to them be adjudged to be prohibited horizontal conduct — a conspiracy among competitors. After all, the dealers argued, in a free market Exxon would have been forced to compete with those jobbers for sales to all Exxon-branded outlets, including the plaintiffs.

Rejecting the dealers' horizontal conspiracy argument, the Ninth Circuit emphasized that Exxon was *both* the supplier and a potential competitor of its jobbers. It concluded that "[s]uch hybrid relationships are treated under the law as vertical relationships" — not as horizontal conspiracies.

That classification was dispositive. Once the restraint was classified as vertical it was no longer subject to *per se* condemnation, but was to be adjudged under the rule of reason.

Under the rule of reason, Exxon was not liable because it possessed less than 10% of the California market. Therefore, its restraint could not be shown to have had "a substantially adverse effect" on overall competition in the interbrand market for gasoline sales.

A further level of analysis apparently was not addressed in *Ajir*. If not only Exxon but its competitors engaged in parallel practices, the possibility remained of showing an overall anticompetitive impact on the entire interbrand market.

Whether the operative facts could support such a theory is indiscernable. It simply was not pursued in *Ajir.*

Next, the dealers sought to revive the ancient *Bogosian* theory that Exxon had imposed an illegal tie-in agreement by requiring its dealers to purchase gasoline from Exxon, as a condition to their leasing its pumps and other equipment. The court held that such a requirement was not illegal, again stressing Exxon's lack of sufficient market power in either the product market for gasoline or for equipment.

Under the case law that has developed over the past 15 years, it is difficult to fault the court's conclusion. When the dealers originally entered into their franchise agreements with Exxon, they were fully aware that they would be required to purchase Exxon gasoline. They could not argue, therefore, that the tie-in had been imposed on them *after* they had been locked into the Exxon program.

The dealers' attempt to pursue alternative, non-antitrust theories was no more successful. They first argued that Exxon had violated § 2-305(1) of the California Commercial Code by exceeding its pricing discretion under the open price term contained within the parties' agreement .

The court dealt with that argument in but two paragraphs. Basically, it concluded that "all that the UCC requires is that a price term be reasonable, not the lowest possible."

With limited exceptions, courts have been reluctant to grant relief under § 2-305(1) of the Uniform Commercial Code. This reader's sense is that they simply are reluctant to second-guess suppliers on their pricing decisions.

Only in extreme cases does it appear likely that there is much chance for substantial success under a § 2-305(1) claim. And, in the extreme case, an alternative price discrimination theory offers the rewards of treble damages and court awarded attorneys' fees, both of which are unavailable under § 2-305(1).

Finally, the Ninth Circuit rejected the dealers' tortious interference claim. The court decided that, because Exxon was the dealers' supplier, it enjoyed a privilege to protect its financial stake in its dealer sales by ordering its jobbers to keep their hands off.

The court's rejection of the dealers' tortious interference claim is also not surprising. The authoritative *Restatement (Second) of Torts* recognizes a competitor's privilege to interfere with its competitors' prospective sales opportunities.

Exxon could thus interfere with its jobbers' prospective sales to its dealers, so long as the means it that it employed did not unduly offend the court's sensibilities. Apparently, its sensibilities were not offended.

For whatever reason, one claim was *not* raised in Ajir — price discrimination.

Where it can be shown that the disparity between the dealer rack price and the dealer tankwagon price results in discriminatory pricing between competitors and resultant dealer injury, the potential still exists for asserting a price discrimination claim either under federal or applicable state law. In an appropriate case, this remains the strongest attack on pricing disparities.

In *Ajir*, all of the dealers' arguments led nowhere. The case serves as a reminder of how difficult it often is to attack the knotty problem of pricing disparity.

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