



General Counsel Corner

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Below Cost – An Update

Increasingly, state below-cost sales statutes are being used to combat unfair predatory pricing.

Cases have been pursued successfully in states possessing such statutes. Most recently, *Oil Express* reported that a Florida jobber and two Florida dealers had succeeded in obtaining an injunction against Murphy Oil.

Basically, Murphy and Wal-Mart had promoted a "gift card program" that allowed Wal-Mart customers to receive at least a three cents per gallon discount off the street price charged for gasoline by Murphy Oil.

Finding that the gift-card program had been used systematically to facilitate below-cost sales, and not merely to meet competition, the Florida trial court enjoined Murphy Oil from making below-cost sales unless it could prove that it was in good faith meeting the price of a competitor located within fifteen miles of the offending Wal-Mart facility.

Complex issues may arise concerning the scope and coverage of below-cost selling statutes, however. Take for instance *Young Oil Co. v. Racetrac Petroleum, Inc.*, 1999-2 Trade Cas. ¶172,741 (Ala. 1999).

The issue in *Young Oil* concerned the potential impact of the Alabama below-cost sales statute in a market where tankwagon prices were

increasing. Before the court was the following situation:

Retailer A had reduced its posted prices to a level slightly above its statutory costs. Retailers B and C had followed suit. Thereafter, all of the retailers received tankwagon increases so that their posted prices were all below their statutory costs. Did the statute require retailer A, which lead the downward retail pricing spiral, to lead in a price restoration?

Finding no legal precedent for the issue, the Alabama trial court analyzed the four corners of the state statute. The significant issue, the court said, was what the legislature meant when it spoke of a retailer that "knowingly establishes" a price below cost.

The complaining dealers argued that establishing a price meant *changing* a price. Since there was no equally low price when retailer A originally reduced its price, the complaining dealers argued, retailer A could not avail itself of a "meeting competition defense," and its price became illegal when its increased tankwagon price caused it to engage in below-cost selling.

The trial court rejected the dealers' argument. It concluded that a price was "established" whenever a retailer surveyed the market to consider

its options. Thus, retailer A "established" its price *after* its tank-wagon price had been increased, when it decided not to raise its retail price because its competitors had, by then, decreased their prices to meet retailer A's original price reduction.

When retailer A "reestablished" its retail price following the round of tankwagon price increases, it had no obligation to raise its retail price because it could argue that by then it was merely meeting the competitive prices by then charged at stations B and C.

The court said it –

would be hard pressed to conclude that any provision of the Act can be said to fairly disclose that a retailer, who in good faith legally lowers his price and remains above his cost, violates the Act if, when wholesale prices begin to rise and overtake his price, he fails to initiate an increase of his price to "at or above" his cost while his competitors remain at the lower price.

The Alabama Supreme Court agreed with the trial court. It held that, under the rising-price scenario, the only remedy for dealers B and C was "self help" – to raise their retail prices in the hope that retailer A would also increase its price.

Although acknowledging that "the self-help approach is not entirely

free of difficulty," the Alabama Supreme Court was swayed by the greater difficulties that it perceived in determining just when any of the impacted dealers should be required to participate in a price restoration. For example, if dealer A was compelled to raise its price, would dealer B have to follow suit if it had originally reduced its price prior to dealer C?

At the very least, said the Alabama Supreme Court, attempting to establish when dealers should be required to increase retail prices after a round of tankwagon price increases would "involve an inordinate amount of record keeping."

Young Oil illustrates the complexity of attempting to apply low-cost sales statutes in an environment of rapidly changing tankwagon prices. Although below-cost sales statutes remains a potent tool, as cases like *Murphy Oil* illustrate, their application will depend in great degree on the factual background of a specific pricing dispute.

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