



General Counsel Corner

By Peter H. Gunst, Esquire

Recent Reports on Predatory Pricing and Price-Gouging

Two pricing issues that have dominated the news recently are predatory pricing and price-gouging. Anyone interested in these important issues should be aware of two recent and informative reports.

Oil Express' Special Report: "Tips & Tactics to Counter Below Cost Competition" tracks the recent battles in state legislatures and courts across the nation between hypermarketers and their suppliers and branded dealers and distributors.

The Special Report emphasizes that the hypermarket challenge to branded resellers is in its infancy but is likely to increase significantly. Wal-mart, for example, is planning fifty new discount stores and 180 to 185 new super centers next year, most of which will sell gasoline. Although hypermarkets today represent less than 3% of total United States retail gasoline sales, it is estimated that their marketshare will grow to a significant 14.8% by 2005.

Three lessons can be drawn from this detailed examination of state lobbying efforts and state court challenges to below cost pricing statutes.

First, don't get greedy. If a bill, overreaches by imposing a cushy margin to protect inefficient resellers, it will likely be crucified in the media and the legislature.

Rather, any prohibition must be aimed at real pricing abuses, such as using economic power from other business lines to subsidize below cost pricing and selling at predatory levels through refiner-operated locations.

Second, the law must apply even if only one dealer feels the impact of predatory pricing. Requiring that a dealer show an adverse impact on competition throughout the market gives a retailer no protection at all. The level of proof is simply too difficult.

Probably the most effective predatory pricing statutes are those that define "competition" as "the vying for motor fuel sales between *any two sellers* in the same relevant geographic market."

That definition has been upheld in court, and is included in the Florida Motor Fuel Practices Act, which is probably the best model for a law of this type. Its provisions are also found in the proposed Fair Marketing Amendments to the federal Petroleum Marketing Practices Act.

Third, don't depend on enforcement by the state government unless you have reason to believe that the state will take its enforcement responsibilities seriously.

One of the recent successes for branded resellers was Maryland's passage of a law that provided for administrative enforcement by the Maryland Comptroller. But Maryland was an

exceptional case, where the state government made a real commitment to enforce the law's prohibition.

Usually, however, the only effective remedy is private enforcement by the dealer who is the victim of predatory pricing.

Following the horrific tragedies of September 11, there were scattered incidents involving alleged price-gouging, which resulted in state investigations and prosecutions. The California law firm of Carroll Gilbert & Bachor wrote an interesting report on the subject titled "Price Gouging — What Is It and When Is It Illegal?"

As that report pointed out, normally there is no "price-gouging" prohibition absent truly unusual circumstances.

During the 1973 and 1979 shortages, the Department of Energy imposed price-control regulations, which the report accurately characterizes as a "bewildering maze." Any one who lived through that era was forced to conclude that the DOE simply did not know what it was doing.

The report contains helpful recommendations concerning what steps should be taken if an extraordinary situation like September 11 arises. It recommends:

1. Freeze prices until you are sure of what costs you can legally pass on to your customers. Don't panic or raise prices to ridiculous levels.

2. Resist closing your station or gas islands because that may violate your lease or supply contract.
3. Carefully document your pricing and purchases.
4. Promptly submit any required regulatory exception request before the inevitable backlog gridlocks the administrative system.

These are only the highlights of these two fine reports. Both are heartily recommended.

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