



General Counsel Corner

By Peter H. Gunst, Esquire

Dealer Triumphs in the Sixth Circuit

Chalk one up for the good guys.

Tom Schwartz began working at a service station while in high school in Flint Michigan, and got his first station shortly thereafter. He obviously did a good job, winning awards from Shell and eventually obtaining five stations.

In the mid 1990's, his life changed for the worse. Sun became his supplier and landlord, and pricing problems followed. First, Sun introduced zone pricing. Then it began providing jobbers with preferential pricing arrangements. Tom was left in a price zone limited to himself, and could see the handwriting on the wall.

In 1996, represented by attorney Harry Storm, Tom filed suit in the federal court in the Eastern District of Michigan, complaining that Sun's pricing scheme violated the federal price discrimination act, the Robinson-Patman Act, 15 U.S.C. §13(a), and also violated the open price term provision of the Uniform Commercial Code and constituted a breach by Sun of his franchise agreement.

Massive and expensive discovery followed. Ultimately, 34 depositions were taken at a cost, for transcripts alone, of in excess of \$10,000. Following over two years of discovery, trial began on November 17, 1998.

Not surprisingly, given the parties' financial positions, the trial turned into a David v. Goliath affair. Sun used four lawyers and could afford to

retain an expensive expert. Harry Storm tried the case alone.

Following nine trial days the jury entered its verdict on December 4, 1998, awarding Tom \$2,353,283 in trebled damages. In addition, Tom would be entitled to his attorney's fees, litigation costs and interest, which would likely increase his total recovery to over \$3,000,000.

But this was only Tom's first hurdle. Over ten months later, on October 21, 1999, the trial court judge entered a judgment against him, holding that he had failed to submit sufficient evidence to the jury of "antitrust injury."

What that meant is that the trial judge did not believe, despite the jury's finding, that Tom had adequately proved that the injuries that he had suffered were directly attributable to the pricing benefits that Sun had conferred upon his jobber competitors.

A lengthy appeal followed to the Sixth Circuit Court of Appeals, which was not argued until January 25, 2001. Another year followed before the appeal court decided the case on January 16, 2002.

Finally, Tom was vindicated. In a 2-to-1 decision, the appeals court reversed the trial judge's decision and reinstated the jury's original verdict on Tom's price discrimination claim.

The majority of the court said:

Schwartz showed that the volume of gasoline sold at his stations decreased when the jobbers opened Sun stations nearby that sold the same gas at a lower retail price. It was reasonable for the jury to infer from this that Schwartz customers became customers of the jobbers, who were offering lower prices because of the lower price at which they were receiving the gas from Sun. Indeed, credit card receipts introduced at trial indicated that numerous former Schwartz customers began to patronize the jobber locations for their gasoline needs. Furthermore, we find that the documentary evidence of differences in retail price insisted upon by [the trial judge], assuming that it does not in fact exist in the record, was unnecessary for a verdict in Schwartz's favor. It is sensible to acknowledge that whenever there is price discrimination of the sort involved here, the overall financial health of the disfavored purchaser will usually be affected for the worse.

The case is not over yet. Sun has filed a request for rehearing and asked for review by the full panel of Sixth Circuit judges. If and when this fails, Sun will

probably ask for review by the Supreme Court as well.

But the Sixth Circuit opinion seems to be the ultimate turning point in this lengthy struggle. The fight was not easy, Tom is now down to operating one service station. But it certainly appears that he has scored a signal victory.

His case demonstrates the financial and emotional cost involved in fighting a major oil company. It is not a battle for the faint hearted. But his case also shows that the battle can be won.

Harry Storm will attend the April meeting in Arizona, where he will be available to answer questions about the *Schwartz* case. We look forward to seeing him there.

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