# *General Counsel Corner*

By Peter H. Gunst, Esquire

## *Oklahoma Unfair Sales Act Slams Sam's Club*

Oklahoma, like over thirty other states, has long had a state Unfair Sales Act – not limited to the sale of petroleum products – to combat predatory, below cost pricing.

The decision reached earlier this year by an Oklahoma federal court in *Star Fuel Marts, LLC v. Murphy Oil USA, Inc.*, 2003 WL 742191 (W.D. Okla. 2003), is of great interest because competing dealers successfully used Oklahoma's 54 year-old Unfair Sales statute to attack below-cost gasoline sales made by Sam's Club as part of its loss leader marketing strategy.

At issue were Sam's Club pricing practices at three stores in the Oklahoma City area. Two of the locations restricted gasoline sales to Sam's Club members, and the third location made 90% of its gasoline sales to members, who received a 5¢ per gallon discount from the prices charged to non-members for gasoline.

Sam's' strategy was to use gasoline as a loss leader to increase Sam's Club membership and overall sales at the three locations. Competing dealers complained that this strategy violated the Oklahoma Unfair Sales Act.

Internal documents obtained from Sam's Club established its marketing strategy. The Sam's Managers Manual emphasized that "gas increases membership," and that "gas increases frequency of shopping" at the clubs.

The Oklahoma Unfair Sales Act, which is typical of its type, was passed in 1949. It forbids the sale of any retail merchandise at prices less than the wholesale price plus all freight charges and taxes plus a 6% markup, in the absence of proof that the retailer's operating costs were less than 6%.

Typical of such laws, the Oklahoma statute forbids only pricing that adversely affects competition, but also provides that a showing of below cost selling will constitute "prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition." 15 Okla. St. § 598.5.

Such "prima facie evidence" provisions are critical to the enforcement of unfair pricing statutes because they free the complaining competitor from the herculean (and largely futile) task of demonstrating that below cost pricing will have an overall effect on competition throughout an entire geographic market. Without such a provision, enforcement of such laws becomes a virtual impossibility.

When the competing dealers filed a motion for a preliminary injunction to prohibit Sam's from further violation of the statute, the federal court carefully considered Sam's' pricing practices over an extended period of time. The court concluded that Sam's employed a markup of at most in the 2% range, and sustained significant losses attributable to its gasoline sales.

Sam's tried two strategies to escape liability. First it argued that the membership fees that it received should be treated as "a negative expense," thus raising the Club's profitability for its gasoline operation.

The court countered that the membership fees were largely paid for the privilege of shopping inside the stores, and that even a generous allocation of a percentage of the membership fees to Sam's' gasoline operation would not make enough difference "to avoid the conclusion that Sam's has repeatedly priced its gasoline below cost."

Next, Sam's attempted to rewrite its expense allocations between its gasoline and non-gasoline operations in order to boost the supposed "profitability" of its gasoline sales. The court refused to accept Sam's' eleventh-hour adjustments.

Granting the preliminary injunction requested by the dealers, the court concluded that Sam's' pricing violated the Oklahoma statute.

Rejecting Sam's' argument that the dealers were required to present detailed evidence concerning the effect of Sam's' pricing on the relevant geographic market, as well as Sam's' market share and its ability to drive competitors out of business, the court emphasized the significance of the statute's "prima facie evidence" provision.

The court concluded:

> The purpose of the gasoline business at these three stores is to pull customers in and to do so if need be by operating the gasoline facilities at a loss. This is not intrinsically immoral, but it is illegal if it violates the Unfair Sales Act.

The court's decision is significant for several reasons.

First, it deals with a generic situation that has occurred and is occurring in various markets throughout the United States.

Second, the state statute that the court enforced is by no means unique, but is found in the majority of jurisdictions throughout the United States.

Third, the court had before it detailed evidence of Sam's' pricing practices over an extensive period of time that permitted it to make accurate determinations concerning Sam's' pricing activities.

Fourth, the court properly recognized the importance of the statutory provision that gave rise to a prima facie presumption that Sam's was guilty of anticompetitive conduct.

The *Star Fuel Marts* case demonstrates that predatory pricing as employed by big box retailers can be challenged effectively under state unfair pricing laws. There appears to be no reason why similar attacks could not be employed elsewhere.

pgunst@agtlawyers.com

astrachan gunst thomas
attorneys at law
a professional corporation