General Counsel Corner

By Peter H. Gunst, Esquire

A Step Backward

The dealer complaint that surfaces most often is that suppliers – through zone pricing or high dealer tankwagon pricing – have squeezed dealer margins to the point that the dealer's livelihood is in danger. Attorneys for dealers have long struggled to develop legal theories to counter such predatory pricing practices.

In recent years, the brightest ray of hope for dealers seeking to challenge unfair pricing practices has been the development of a considerable body of court rulings that hold that a supplier who fails to exercise "good faith" in setting dealer tankwagon prices can be held liable under the "open price term" provision of the Uniform Commercial Code.

Probably the leading decision in the area is *Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002). There, a federal appellate court upheld a jury verdict of approximately $8,000,000 in favor of a group of Texas dealers, who contended that Exxon was attempting to price them out of business through unreasonably high dealer tankwagon prices.

Other pertinent federal and state court decisions include *Allapattah Services, Inc. v. Exxon Corp.*, 61 F.Supp.2d 1300 (S.D.Fla. 1999), *Wilson v. Amerada Hess Corp.*, 733 A.2d 1121 (N.J. 2001), and *HRN, Inc. v. Shell Oil Co.*, 102 S.W.3d 205 (Tex. Ct. App. 2003).

Recently, an attempt by a group of Ohio dealers to apply the theory ran aground in *Tom-Lin Enterprises, Inc. v. Sunoco, Inc.*, 349 F.3d 277 (6th Cir. 2003), when a federal appeals court affirmed the dismissal of their claim that Sunoco had charged them excessively high prices for its gasoline.

The dealers' complaint was that Sunoco used its "pricing zones" methodology to limit them to 6 to 9 cent margins, which was well below the marketprice norm. That practice, the dealers said, violated the "good faith" pricing obligation owed them by Sunoco. The court of appeals disagreed.

The court minimized the dealers' reliance on the *Mathis* decision by observing that, although that decision's interpretation of the "good faith" requirement might be "plausible" under Texas law, it did not establish how Ohio's courts would interpret that state's version of the "open price term" provision.

Under Ohio law, the Sixth Circuit held, a supplier need only exhibit *objective* good faith, and could not be attacked for an absence of *subjective* good faith as under Texas law. This legalistic distinction helped blunt the dealers' charge that Sunoco's pricing activities were wrongful because they were intended to cause injury to the dealers.

Significantly, the court of appeals in *Tom-Lin Enterprises* found that the dealers simply had failed to advance sufficient evidence that Sunoco's pricing practices were unreasonable.

For example, the dealers' attempt to attack Sunoco's changes to its VIP rebate program failed because they did not rebut Sunoco's showing that the overall affect of the changes on the dealers had been "negligible."

Likewise, the appeals court rejected the dealers' reliance upon Sunoco's internal business plan, which envisioned an increase in jobber-supplied locations and a decrease in direct-supplied dealers over time, because the dealers failed to introduce any evidence that they had lost revenue or profits as a result of Sunoco's decision to support jobber-supplied locations, much less that any of them had been driven out of business.

Rather, the court was convinced by Sunoco's argument that it supposedly intended "to maintain the competitiveness of its independent dealers." The court emphasized that Sunoco had paid the dealers over $1,000,000 to improve their properties, and that most of them had elected to enter into new agreements with Sunoco, despite its allegedly predatory activity.

In sum, the *Tom-Lin Enterprises* case may be dismissed as merely an instance where the plaintiffs were unable to develop any significant proof to support their claims. This may be unfair to the dealers and their counsel because, quite often, courts that desire to reach a certain conclusion simply ignore evidence that is inconvenient to their intended result.

Attorney Harry Storm, no stranger to practice before the Sixth Circuit Court of Appeals, has pointed out one disturbing aspect of the court's decision. In a footnote, the court refuses even to consider the gross disparity between Sunoco's rack price to its jobbers and far higher tankwagon price to its dealers, snorting that the only "relevant standard" by which Sunoco should be judged was the dealer tankwagon price itself, and "not the price for which a middleman re-sells a refiner's gasoline to retailers."

But why is this so? It should be painfully obvious that a gross disparity between rack price and dealer tankwagon may very well result in a painful price squeeze on disadvantaged direct-supply dealers. The court's unexplained refusal even to consider the obvious interrelationship between jobber and dealer pricing ignores reality.

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