General Counsel Corner

By Peter H. Gunst, Esquire

Open Price Term Litigation at a Crossroads

We have been following the twists and turns in the massive "open price term" litigation brought by dealer groups and through class action suits against major oil companies in courts across the land. Recent opposing legal briefs filed by dealers and refiners before the Supreme Court of Texas in *HRN, Inc. v. Shell Oil Co.* illustrate where the battle lines are being drawn.

First, a word of explanation. "Open price term" refers to contractual relationships in which a supplier is given the discretion to set future prices charged to its customers. Those prices are not predetermined but fluctuate depending upon market conditions. This, of course, is how gasoline prices are set by refiners to dealers.

Under § 2-305(2) of the Uniform Commercial Code, which has been enacted by states across the country, a supplier is obligated to exercise good faith in setting its prices pursuant to an open price term.

In this age of shrinking margins, legal battles over whether refiners have satisfied their open price obligations are extremely significant. Indeed, in many if not most circumstances, § 2-305(2) may be the dealer's only legal recourse against economic termination caused by a supplier's unfair pricing practices.

Massive "open price term" lawsuits have become common. At last count, over a dozen class actions and mega-dealer suits were pending against ExxonMobil, Shell, Sunoco, BP and others in Alabama, California, Florida, Georgia, Michigan, Pennsylvania and Texas. And that is only a partial list.

Texas has become the preferred venue, in part because of a victory gained by a number of dealers in a federal court decision governed by Texas state law, *Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002). Because so much of the litigation is pending in Texas, any decision by the Supreme Court of Texas clarifying the meaning of Texas law becomes extremely significant.

The present battleground is the appeal before the Supreme Court of Texas in the *HRN* litigation. There, an intermediate state appeals court reversed the grant of summary judgment that had been obtained by Shell in a case brought by hundreds of dealers who challenged Shell's pricing policies. Shell has sought an immediate appeal to the Supreme Court of Texas.

Basically, the dealers complain that Shell is attempting to use high tankwagon prices to end run their protection against termination or non-renewal as set forth in the Petroleum Marketing Practice Act, §§ 15 USC 2801 *et seq.*, and as a means of converting a significant portion of its service station base from dealer-operation to company operation.

Shell counters that there is no substantive evidence that it had any such intent. It further contends that it should be immune from the dealers' pricing claims because it did not discriminate in price among dealers in any price zone, and that its tankwagon prices are legitimate because they fall within the range of prices charged by competitive refiners in the marketplace.

Shell emphasizes that the law normally protects suppliers from open price term claims so long as they utilize publicly available "posted prices" and do not discriminate in price among competing purchasers. But there may be some soft spots in Shell's argument.

The "posted prices" comment to the statute upon which Shell relies only permits a broad "safe harbor" defense "in the normal case." The comment does *not* state that the only exception to "the normal case" is price discrimination.

Other decisions -- most notably *Mathis* and *Allapattah v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003) -- have recognized that exceptions may also exist where the supplier is attempting to drive dealers out of business or is otherwise acting in a faithless manner.

As the dealers respond in their countering brief:

> A normal case is not one in which the price "in effect" is set for the purpose of destroying those who must pay it.

Further, the dealers emphasize that they are particularly vulnerable to bad faith pricing because they are "captive buyers." They are not free to buy from other suppliers and have no alternative other than to purchase products from their refiner/franchisor.

Not surprisingly, Shell emphasizes in its briefing the recent decision by the Sixth Circuit Court of Appeals rejecting pricing claims asserted against Sunoco in *Tom-Lin Enterprises, Inc. v. Sunoco, Inc.*, 349 F.3d 277 (6th Cir. 2003). That court refused to consider the disparity in Sunoco's pricing to different classes of trade, specifically the difference between Sunoco's rack price to jobbers and its tankwagon price to dealers. Dealers in the *HRN* case have likewise complained of their difficulty in attempting to compete with the jobber class of trade.

Further, the Sixth Circuit in *Tom-Lin* refused even to consider what Sunoco's subjective intent was in setting its prices, concluding that Sunoco remained within the law so long as its prices were objectively reasonable.

That means that Sunoco could to anything it wanted to do, so long as its dealer tankwagon prices fell within the range of prices charged by other refiners in the marketplace. This is at odds with the subjective intent analysis contained within the *Mathis* and *Allapattah* decisions, which examined whether the refiners were using their pricing power to achieve unfair results.

How the Supreme Court of Texas will react to these arguments is anyone's guess. One way or another, the consequences of its decision will be significant.

pgunst@agtlawyers.com

astrachan gunst thomas
attorneys at law
a professional corporation