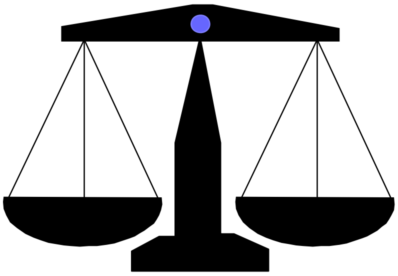

General Counsel Corner

By Peter H. Gunst, Esquire

What Remedies Do Dealers Have For Supplier Overpricing?

Past columns have dealt with many specific cases in which dealers and dealer groups have taken on suppliers for overpricing product. There have been notable dealer victories and notable dealer defeats.

This seems to be a good opportunity to get away from the specifics and to present an overview of the legal theories that have been used to attack supplier pricing.

Basically, pricing attacks can be broken down into two categories: those based upon charges of price discrimination in violation of antitrust law and those based upon the implicit requirement contained in all supplier contracts that future prices be set at reasonable levels.

The thrust of a price-discrimination claim is that the supplier has discriminated between competing retailers without having a valid reason for doing so.

A price discrimination claim may be brought under the applicable federal antitrust statute, the Robinson-Patman Act, or in some states under an analogous state statute. For example, California has a state statute permitting price discrimination suits against suppliers who sell more than 50,000 barrels a day, which means that major refiners are subject to suit but jobbers usually are not.

Pursuing a price discrimination claim under the Robinson-Patman Act has the allure of seeking triple damages and court awarded attorneys fees, but is a daunting proposition. The complaining dealer must demonstrate that the effect of the price discrimination may be to "substantially injure, destroy or prevent competition" throughout the market, and not merely have an adverse effect on the complaining dealer.

The potential injury to competition requirement normally can be satisfied by showing the existence of a significant price differential continuing over a significant period of time. What constitutes a sufficient price differential depends upon the realities of the market.

For example, in a relatively old case, *Bargain Car Wash v. Standard Oil Co.*, 466 F.2d 1163 (7th Cir. 1972), a federal appellate court found that an 11% price differential sufficed against the backdrop of a highly competitive retail gasoline market. In cases involving other industries, discounts in the 5% to 8% range have been found to be either substantial or insubstantial, depending upon their real competitive impact in a given market.

The time period over which the discrimination continues is also significant. A number of cases have held that a special introductory offer or selected "price war" reductions were not illegal because they were transitory, and thus unlikely to substantially injure competition over the long haul.

Assuming that price discrimination can be proven, the measure of single damages to be tripled as a matter of law is ***not*** the amount of the price discrimination.

Sometime ago, in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), the United States Supreme Court rejected the notion that a complaining purchaser was entitled to recover an overcharge as a matter of "automatic damages." Instead, the purchaser "must make some showing of actual injury attributable to something the antitrust laws were designed to prevent."

To satisfy that burden the purchaser must present evidence that it lost customers or sales, which had a material impact on its business, and compute its damages based upon that adverse impact.

Price-discrimination cases involve complex issues of fact, and are extremely expensive to pursue. Decisions in many jurisdictions can be read as ***requiring*** the plaintiff to present expert economic testimony to establish that the plaintiff is in actual competition with the defendant's favored customers, and to establish the anticipated or actual anticompetitive impact of the defendant's conduct. The cost of securing such expert testimony is often prohibitive.

Despite all of the hurdles, spectacular victories have been obtained under appropriate circumstances. In *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990), and *Schwartz v. Sun Co.*, 276 F.3d 900 (6th Cir. 2002), direct-serve dealers obtained significant judgements against suppliers who gave unjustifiably large discounts to jobbers who supplied retailers who competed with the direct-serve suppliers.

Pursuing such claims made sense because, by the very nature of the supply relationships, the jobber discounts were substantial and continuous. On the other hand, I am not aware of any reported decision in which price-discrimination statutes have been successfully employed to attack zone pricing. Using a price-discrimination attack in that context may be impractical, like hunting a deer with a bazooka.

Many recent significant pricing attacks have been based not on price-discrimination statutes, but on § 2-305(2) of the Uniform Commercial Code, which has been enacted in states across the country, and which obligates a supplier to exercise good faith in setting future prices pursuant to an open price term. The critical question, of course, is what constitutes good faith -- or the lack thereof -- in the context of setting future prices.

One thing appears clear. If the supplier promises to set prices in accordance with a given formula, or to allow its customers a promised discount, and then fails to perform, it is subject to suit. That appears to be the lesson to be drawn from *Allapattah Serv., Inc. v. Exxon Corp.*, 61 F. Supp.2d 1308 (S.D.Fla. 2002), *aff'd.*, 333 F.3d 1248 (11th Cir. 2003), where the supplier was nailed by a nation-wide dealer class for failing to deliver a promised discount for cash.

But what of the situation where a supplier consistently charges its dealers prices that it knows will force many of them to surrender their keys so that their stations can be converted to company-operation?

Some courts, most notably the federal appellate court in *Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002), and most recently the jury that ruled against Shell in a Massachusetts federal court, have concluded that that set of facts on its face demonstrates bad faith.

On the other hand, some courts, most notably the Texas Supreme Court in *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429 (Tx. 2004), have ruled that the supplier is on safe ground so long as the prices that it charges are within the range of those charged by competing refiners. Under that view of the law, dealers would be without protection if a limited number of suppliers in a given market pursued parallel pricing paths with the expectation that a number of their dealers would be unable to survive. But that would hardly appear to be a manifestation of good faith.

This area of the law may appear to be unsettled and uncertain in its application. But that is often the state of the law.

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