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New Supplier Blues

Increasingly, dealers find their franchise agreements assigned to new suppliers who have less favorable marketing and pricing policies. The financial impact on the dealer can be very severe.

Whether the dealer has a legal remedy is problematic, depending upon how much violence the new supplier does to the preexisting contract terms. A recent Maryland case illustrates the problem.

As a result of fallout from the Exxon-Mobil merger, the Maryland dealer was able to purchase its leased Mobil-branded station in October 2003 from Tosco, which had obtained a license to supply Mobil-branded product on much of the East Coast.

The dealer paid a significant purchase price for the station in excess of $1,750,000, and also was required to enter into a twelve-year supply agreement with Tosco for Mobil-branded products.

The Reseller Agreement signed by the parties provided for the dealer to receive a four cent per gallon facilities allowance on each gallon of Mobil-branded motor fuel to help offset the financial burden that it accepted when it purchased the station.

In April 2004 Tosco's successor in interest, ConocoPhillips, assigned the Reseller Agreement to Sunoco as part of a massive asset sale.

Within months, the dealer's lot changed for worse. The dealer complained that Sunoco had increased its dealer tankwagon prices for gasoline significantly above the prices charged to neighboring Mobil-branded stations. As a result, the dealer said, the facilities allowance had been rendered illusory at best.

Additionally, according to the dealer, Sunoco failed to support the "Mobil" brand by eliminating support programs; repeatedly failed to pay any facilities allowance on diesel fuel; and frustrated the dealer's right under the Reseller Agreement to purchase at least a portion of its Mobil-branded requirements from independent jobbers.

The dealer was in a terrible bind. Its ability to operate profitably had been prejudiced by Sunoco's new pricing and marketing policies. But it could not simply terminate its long-term supply agreement because, among other contractual restraints, Sunoco possessed a repurchase option if the dealer terminated other than for good cause.

Attempting to escape from its predicament, the dealer filed a lawsuit in federal court styled *Convenience Retailing, LLC v. Sunoco, Inc.*, in which it sought a declaration that Sunoco's new marketing and pricing policies were not in good faith and violated its obligations under the Reseller Agreement. As a result, the dealer claimed it should be permitted to terminate the agreement without penalty.

Sunoco moved to dismiss the dealer's complaint, contending that it possessed considerable discretion to vary its pricing and marketing policies, and that any alleged contractual breach was not sufficiently serious to permit the dealer to repudiate the parties' contractual relationship.

The district court judge agreed with Sunoco. He concluded that the dealer's complaint, on its face, did not allege a material breach of contract sufficiently serious to warrant termination of the parties' continuing relationship.

But this was not the end of the story. The dealer appealed to the Fourth Circuit Court of Appeals, which on December 21, 2006 issued a unanimous decision reversing the district court's ruling and remanding the dealer's claims for trial.

The appeals court was particularly impressed by the dealer's allegations that "Sunoco has refused to pay the facility allowance on diesel fuel and has rendered illusory the allowance [on gasoline] by raising the initial price charged for fuel in violation of the established course of dealer and course of performance" between the parties.

Those allegations, the appeal court found, "directly implicate[] the purpose of the contract" and "go[] to the root" of the parties' contractual relationship. If proven at trial, those allegations could allow the dealer to escape from its long-term supply contract, and to sever all relations with its new supplier.

Unfortunately, the Fourth Circuit's opinion in *Convenience Retailing, LLC v. Sunoco, Inc.* was designated "unpublished", which means that it cannot be relied upon as a controlling precedent in other litigation. The underlying logic of the opinion, however, remains valid. A dealer should be permitted to obtain relief from the courts when a new supplier goes too far in undermining preexisting marketing and pricing policies and programs.

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