



## GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

### *An Open Price Term Conundrum*

Independent service station dealers are particularly vulnerable to pricing abuse by their suppliers because they are tied to long-term, sole-source supply agreements with open price terms, which on their face permit their suppliers to charge whatever they wish for petroleum products.

The primary legal defense against unfair supplier pricing is found in § 2-305 of the Uniform Commercial Code, which requires that prices set by a supplier under an open price term be set in good faith, which means that the supplier must act honestly and in accordance with reasonable commercial standards.

Seeking to represent a national class of wholesale purchasers, two BP jobbers filed suit claiming that BP had violated § 2-305 by promising its jobbers a one percent prompt payment discount, but then had secretly added the cost of the discount back into its wholesale price to the jobbers. The plaintiffs argued that BP was playing what they characterized as a “shell game,” and either was “not setting the open price term in good faith” or, in fact, “not providing the promised prompt pay discount.”

The jobbers argued:

[I]n either event, BP “giveth with one hand,” while secretly it “taketh with the other.” That is the antithesis of good faith.

Responding aggressively, BP moved for summary judgment, even though it conceded that a real dispute existed concerning whether it had raised its prices to recoup the prompt payment discount. BP argued, in effect, that it was irrelevant whether it had played a “shell game” on its jobbers. This was so, BP contended, because it had in fact provided a one percent discount when prompt payment was made, even it that meant exacting a one percent penalty in all other circumstances.

In an opinion released earlier this year, *Autry Petroleum Co., v. BP Products North America, Inc.*, 2008 WL 360628 (M.D. Ga. Feb. 8, 2008), the federal district court agreed with BP and granted its motion for summary judgment.

First considering the general requirement of good faith imposed by the Uniform Commercial Code on all contractual dealings, the court emphasized that the requirement only applied to the good faith performance of explicit contractual provisions, and did not impose on the contracting parties any additional obligations not explicitly set forth in their contract.

Finding nothing within the standard form BP supply contract that affirmatively prohibited BP from recouping the promised discount by upping its sales price, the court said:

[T]he Court rejects Plaintiffs’ contention that Defendant breached any

contractual duty by recouping the cost of the discount as part of the Jobber Buying Price. Nothing in the Contract prevented the Defendant from recouping the discount, nor did the Contract restrict what Defendant could consider in setting the ultimate Jobber Buying Price. To impose upon Defendant an obligation that it may not consider any prompt payment discount cost when it determines the price of its product would have the effect of re-writing the parties' contract, something not authorized or contemplated by [the generalized good faith requirement of the UCC].

Next, the court considered the separate and more focused good faith requirement expressly incorporated in the UCC's open price term provision, § 2-305. There, the court held that the plaintiffs had failed to present sufficient evidence that BP had acted dishonestly or contrary to reasonable commercial standards because they could not show that BP had made any express promise "that it would calculate the Jobber Buyer Price by any particular method," and because "every jobber that paid promptly actually received a one percent discount from the Jobber Buying Price."

The court's reasoning is difficult to swallow. When a supplier promises its customer a discount, presumably to permit the customer to compete more effectively with its competitors, isn't it

reasonable for the customer to assume that the supplier will not turn around and secretly negate its promise by upping its customer's wholesale price? Isn't such conduct in fact dishonest?

In their unsuccessful opposition brief, the plaintiffs not surprisingly relied upon the well-known Exxon "discount for cash" case, *Allapattah Services, Inc., v. Exxon Corp.*, 61 F. Supp 2d 1308 (S. D. Fla. 1999), *aff'd*, 333 F. 3d 1248 (11<sup>th</sup> Cir. 2003).

In *Allapattah*, it will be recalled, Exxon was ultimately compelled to pay its dealers over one billion dollars after the court held that it had violated § 2-305 by raising its dealers' wholesale prices to cancel discounts that it had pledged to its dealers.

Distinguishing that decision from the case at hand, the court emphasized that in *Allapattah* "the dealers produced evidence that Exxon undertook an affirmative obligation to price its wholesale gasoline in a particular way, failed to perform its obligation, and then lied to its dealers in an effort to avoid its obligation and intentionally drive selected dealers out of business."

But except for the final phrase concerning an express intention to "drive selected dealers out of business," aren't the allegations made by the jobbers clearly comparable to those raised by the Exxon dealers? And the court found in *Allapattah* that *all* the affected dealers had been injured by Exxon's misconduct, and not just those who had been targeted for extinction.

In sum, the *Autry Petroleum* decision appears to be a conundrum when

contrasted to *Allapattah*. It will be interesting to see how it fares on appeal to the Eleventh Circuit Court of Appeals, the same court that affirmed the *Allapattah* decision for the dealers.

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