GENERAL COUNSEL CORNER

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Two Significant Issues

Two significant legal issues today are the marketer's right to challenge its supplier's unfair pricing practices, and the marketer's ability to break out of long-term, economically unfavorable supply agreements. Two recent cases, although not dispositive on either issue, impact that legal landscape.

In *United Energy Distributors, Inc. v. ConocoPhillips*, a distributor sued its supplier for breach of contract, alleging that the supplier had breached its agreement to reduce the rack price charged the distributor in return for the distributor's agreement to invest nearly $2,000,000 in the supplier's new "Oasis" image standard.

ConocoPhillips moved to dismiss the distributor's claim, insisting that the open price term contained in the parties' supply agreement granted it complete pricing discretion, so long as its rack price was not discriminatory and remained within the range of competitive pricing in the market.

Such pricing disputes, which are grounded upon the "good faith" pricing requirement found in section 2-305 of the Uniform Commercial Code, have become increasingly common. The courts are still struggling with how to resolve them.

On the one hand, ruling against a large group of dealers in *Shell Oil Co. v. HRN, Inc.,* 144 S.W. 3d 429 (Tex. 2004), the Texas Supreme Court decried the vagueness that subjective notions of "good faith" pricing may wreak upon agreements in which the parties expressly agreed to respect the supplier's pricing determinations. The court was loath to introduce contractual uncertainty in that context.

On the other hand, most notably in the mammoth "discount for cash" case, *Allapattah Serves. Inc v. Exxon Corp*, 61 F.Supp. 2d 1308 (S.D. Fla. 1999), *aff'd*, 333 F.3d 1248 (11th Cir. 2003), both the federal district court and the appellate court roundly condemned Exxon's practice of negating a promised discount to its dealers by manipulating its dealer tankwagon pricing.

In denying ConocoPhillips' motion to dismiss the distributor's pricing complaint in the *United Energy Distributors* case, the court emphasized that its ruling was provisional and did not signal whether or not the distributor ultimately would prevail in the litigation. Nevertheless, the court's opinion is interesting because of the path it attempts to lay between *HRN* and *Allapattah.*

Sympathizing with the concerns raised by the Texas Supreme Court in *HRN,* but also mindful of abuses of the sort that were condemned in *Allapattah,* the court suggested that a necessary element of a good faith pricing claim is that the customer suffer some injury above and beyond a mere increase in price.

In the present case, the court said, the distributor's claim should survive because it had alleged that

ConocoPhillips induced it to sink nearly $2,000,000 in ConocoPhillips' new image standard program by promising the distributor a real rack discount. That, the court said, satisfied the additional damages requirement.

The court's requirement that the unhappy purchaser introduce evidence of commercial injury distinct from the price increase itself is more than a little perplexing and raises as many questions as it seeks to resolve.

What about the dealer who retains 24-hour operation because his supplier falsely promises pricing relief? Does merely continuing to operate at a loss constitute a commercial injury distinct from the dealer's pricing woes?

What about the dealer who enters into a long-term supply agreement with a second-tier refiner who give false assurances that its dealer tankwagon price will be more competitive than its bigger brand name rivals? Is she left out in the cold without a legal remedy?

In fact, at bottom, all open pricing cases are about the injury caused by the bad faith pricing itself, and not some collateral injury. For that reason, the standard proposed by the *United Energy Distributors* court seems somewhat artificial and beside the point. Nevertheless, it is a potentially important development in open price term litigation because of the impact it may have on other cases.

Kudlek v. Sunoco, Inc. involves a rather a narrow procedural issue, but one having considerable real world importance.

In that case, the dealer filed suit in state court seeking to rescind the 10-year supply agreement that Sunoco had compelled him to accept as a condition to purchasing his location. Sunoco then attempted to remove dealer's case to federal court, arguing that the dealer's attempt to terminate the parties' supply relationship was governed exclusively by federal law -- the Petroleum Marketing Practice Act -- which expressly overrides all state laws regarding the termination or nonrenewal of petroleum marketing franchise agreements.

Granting the dealer's motion to remand his case to state court, the federal court judge ruled that the PMPA only has a restricted preemptive effect limited to state statutes expressly governing termination or nonrenewal, but does not monopolize all aspects of law that might be pertinent to the cessation of the supplier-dealer relationship. Because absolute preemption did not exist, Sunoco should be left to attempting to convince a state court of the validity of its arguments.

The *Kudlek* decision is important because the issue of which court hears a case can have a very real impact on how a case is decided. Quite often, a state court will be more sympathetic to a dealer's plight than the largely conservative and pro-big business federal judiciary. *Kudlek*, therefore, is a welcome development in the law.

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