SHIPMAN & GOODWIN LLP®
COUNSELORS AT LAW
MARCH 2011

Petroleum Marketing Alert

First Circuit Court Rejects Price Gouging and Price Fixing Claims Against Service Stations Following Hurricanes Katrina and Rita

White v. R.M. Packer Co., No. 10-1130, 2011 U.S. Dist. LEXIS 3276 (1st Cir. Feb. 18, 2011)

Residents of Martha's Vineyard complained that the prices set by operators at four of the island's gas stations were artificially high due to an illegal price-fixing conspiracy and price gouging in the aftermath of Hurricanes Katrina and Rita. The defendants' prices exceeded prices at gas stations on Cape Cod by an average of 56 cents per gallon, only 21 cents of which were attributable to higher transportation costs. The plaintiffs sued under Section 1 of the Sherman Act and the price-gouging regulation under Massachusetts' unfair trade practices law, G.L. ch. 93A § 2(a). The First Circuit affirmed a grant of summary judgment to the defendants on both claims.

The First Circuit took a limited view of the scope of the price gouging statute. The Massachusetts regulation provides that a price is unconscionably high if it represents a "gross disparity" from the price at which the same product was sold immediately prior to the market emergency, and the disparity is not substantially attributable to increased prices charged by suppliers or due to an abnormal market disruption.

Significantly, the First Circuit rejected the plaintiffs' argument that a "gross disparity" could be proved by a change in profit margin. The record showed that the defendants' profit margins hit their highest levels after their retail prices began to fall, apparently because their own costs dropped sharply, but that they reduced their retail prices more slowly. The Court found nothing wrong with that. It concluded that changes in profit margins were irrelevant if the price change was not unconscionable: "nothing in the regulation suggests that increases in gross margin alone, in the absence of any price increase and simultaneous with declining retail prices, can support a price-gouging claim."

The Court also noted that price gouging rules were designed to protect consumers from sharp increases in prices during a market emergency, "not to mandate that retailers decrease their prices as quickly as their costs decline after the most acute crisis in supply of the good has passed." The Court found that the absolute increases in price did not show any "gross disparity," which it interpreted to require evidence that "knowing advantage was taken of consumers." In additional language helpful to station operators, it stated that the price gouging regulations "are not . . . meant to give the government control over the setting of petroleum product prices."

The First Circuit also held that the gas prices set by the defendants were the result of conscious parallelism, not price fixing. It concluded that the characteristics of a small island market promoted matching higher prices: (1) a station benefited little from cutting prices since its competitors could quickly follow suit; (2) conversely, a price leader risked little by raising its price because other stations were likely to follow to increase profit margins; and (3) if competitors did not follow, the leader could easily drop its prices so quickly that few customers would be lost. Based on these unusual market features, the Court concluded, "each gas station owner is likely to reach its own independent conclusion that its best interests involve keeping prices high, including following price changes by a price 'leader' (if one emerges) in confidence that the other station owners will reach the same independent conclusion."

Our Comment: The language in "price gouging" statutes varies from state to state, and other courts may take a broader view of the scope of these statutes, so while marketers and retailers in other states should cite to this decision, it may be risky to put a lot of reliance on it.