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# CURBING PREDATORY PRACTICES IN FLORIDA'S PETROLEUM MARKETING INDUSTRY

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## I. INTRODUCTION

During the past decade significant changes have occurred in the marketing of motor fuel in the United States. These changes primarily resulted from the entry of major oil companies into the retail gasoline market. While major oil companies argue that this change in marketing strategy is in good faith and directly benefits the motoring public, wholesale marketers and independent retailers have cried "foul" while being displaced in the retail market by the major refiners. Indeed, the turmoil within the petroleum industry over this issue has resulted in both state and federal government involvement. The Florida Legislature first attempted to deal with this dilemma in 1974 by limiting direct retail marketing by refiners.<sup>1</sup> Unenforced for ten years, this law was finally declared constitutional in 1984<sup>2</sup> and became the leverage for a second legislative remedy during the 1985 Regular Session—the Motor Fuel Marketing Practices Act.<sup>3</sup>

Florida's adoption of this petroleum marketing law, on the heels of similar actions by Alabama<sup>4</sup> and Georgia,<sup>5</sup> underscores the significance of this issue. Whether Florida's latest action will eliminate predatory and anticompetitive marketing conduct remains to be seen. What seems certain, however, is the resolve of the respective interests in this fight—the refiners, the wholesalers, and the dealers—to engage in legislative and judicial war to protect or advance their positions.

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1. FLA. STAT. § 526.151 (1974).
2. State *ex rel.* Gas Kwick, Inc. v. Connor, 453 So. 2d 863 (Fla. 1st DCA 1984).
3. Ch. 85-74, 1985 Fla. Laws 429.
4. ALA. CODE § 8-22-1 (1984).
5. GA. CODE ANN. § 10-1-250 (Supp. 1985).

## II. THE PETROLEUM INDUSTRY MARKETING STRUCTURE—PAST AND PRESENT

The petroleum industry, although viewed differently during the oil crisis of the 1970's, has generally been perceived to be a stable industry controlled by a few corporate giants. The general public has been and continues to be unmindful of the various sectors that comprise the industry and how these sectors are controlled. Functionally, the petroleum industry is divided into four major interrelated sectors: production, refining, transportation, and wholesale-retail marketing.<sup>6</sup>

Production, refining, and transportation have historically been controlled by a very few large, well-known corporations such as Exxon, Chevron, Standard Oil, Mobil, Texaco, Gulf, and Phillips. In 1974, the top eight corporations controlled fifty-four percent of total U.S. crude oil production, sixty-five percent of all U.S. power oil reserves, and sixty-four percent of the U.S. crude oil and refined petroleum products transported in pipelines.<sup>7</sup> This oligopolistic trend seems to be continuing as evidenced by Sohio's recent acquisition of Gulf and other potential acquisitions or takeovers.

Marketing of refined petroleum products at the wholesale and retail levels has, on the other hand, been highly competitive, involving hundreds of thousands of independent businesses.<sup>8</sup> Historically, the major oil companies left the wholesaling and retailing of motor fuel to independent businessmen.<sup>9</sup> Refined products were generally sold or consigned to independent wholesalers (referred to as jobbers) and other consignees, who in turn supplied independent retailers and commercial accounts, for example trucking companies and municipalities. The wholesalers and consignees purchased the refined motor fuel at a wholesale price, generally known as the terminal price, and stored it in their bulk storage facilities for subsequent sale. These wholesalers or consignees, in turn, sold most of their gasoline to retailers at a price generally known as the

6. SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 93D CONG., 1ST SESS., PRELIMINARY FEDERAL TRADE COMM'N STAFF REPORT 12 (Comm. Print 1973) [hereinafter cited as FTC STAFF REP.].

7. Comment, *State Gasoline Divorcement Statutes: Legal and Economic Implications*, 28 CATH. U.L. REV. 511, 515 (1979). Some 10,000 firms operated in this sector in 1973, but 50% of all production was controlled by eight firms. FTC STAFF REPORT at 6. See also *The Industrial Reorganization Act, 1975: Hearings on S.1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 461, 465 (1975) (submission of Exxon Co. U.S.A.).

8. FTC STAFF REP., *supra* note 6, at 6.

9. *Id.* at 21.

dealer tankwagon price, plus freight charges and applicable taxes.<sup>10</sup> Traditionally, wholesalers were the collectors of state and motor fuel taxes.

Although wholesale and retail marketing of motor fuel was typically conducted by independent businessmen, they were far from independent of the control and influence of major producers and refiners. Each major refiner typically established its own wholesalers or consignees geographically. These consignees received franchises to sell that refiner's gasoline, oil, and other accessories. These franchisees were obligated by contract to purchase all of their gas and oil from the refiner, sell these products under the refiner's brand, and comply with operational requirements imposed by the refiner. Similarly, service station dealers supplied by these "branded" consignees or wholesalers were required to sell only the refiner's products and to comply with the refiner's operational requirements.<sup>11</sup>

During the past two decades, while jobbers and consignees continued to operate under contracts which required them to purchase minimum quantities of fuel each year, the refiners have begun to supply some service station dealers directly, thus bypassing the wholesalers.<sup>12</sup> This dual distribution system has had an adverse impact on wholesale marketers.<sup>13</sup> While many wholesalers had been assured that they would be the only distributor of a particular refiner's motor fuel products within a geographic region, their contracts, prepared by the refiners, did not expressly preserve this promise. Most wholesale marketers' economic lives were so closely tied to their refiner that they had to accept the new dual distribution system imposed by the refiners.<sup>14</sup>

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10. *Gasoline Marketing Since Decontrol: Hearings Before the Subcomm. on Energy, Environment, and Safety Issues Affecting Small Business of the House Comm. on Small Business, 97th Cong., 2d Sess. 59, 61 (1982)* [hereinafter cited as *Gasoline Marketing Hearings*].

11. Comment, *supra* note 7, at 518-20.

12. J. WILLIAMS, *Gasoline: Regulation of Price and Supply*, 1, 1-2 (Callaghan Energy Law Monograph No. 4A, (1978)). See also *Gasoline Marketing Hearings, supra* note 10, at 266-71 (statement of Robert I. Thornhill, President-Elect, National Oil Jobbers Council). Jobbers purchase products in bulk at a terminal and either store in it their own storage facilities for later distribution or transport it directly to a retail outlet or other customers. Jobbers profit through the distribution charge and other services they provide retailers, items which constitute the jobber margin. *Id.* at 266. In 1980, jobbers handled more than 48% of the gasoline products moving to the retail market, which represented a 15% growth in such movements. This includes sales made to retail service stations owned by jobbers. *Id.* at 605.

13. Comment, *supra* note 7, at 521-22.

14. See *id.*

Fortunately, the wholesale marketer was allowed to purchase at wholesale price (posted terminal price) which was lower than the price at which the refiner sold to his directly supplied dealers (the dealer tankwagon price). Therefore, jobbers and consignees could also continue to supply dealers at prices which were relatively competitive with those given refiner-supplied dealers. Of course, the opportunity for continued growth by jobbers and consignees was severely hampered as refiners generally chose to directly supply the most favorably located, higher volume, service stations.<sup>15</sup>

While gasoline produced by major refiners (majors) typically has been marketed through the independent wholesale-retail network, this is not the case for some of the midsize and smaller refiners (mini-majors) comprising the remaining top twenty firms in the industry.<sup>16</sup> Many of these refiners elected years ago to retail their gasoline through their own company-operated stations.<sup>17</sup> Lacking the name recognition of the majors, the mini-majors competed by offering lower prices and fewer customer services.<sup>18</sup> Their profits were built through volume sales rather than the higher profit margins enjoyed by the majors.<sup>19</sup>

Drastic price increases resulting from oil embargoes, greater retail competition from the mini-majors, and nationwide acceptance of self-serve gasoline have resulted in substantial changes in gasoline retailing since the 1970's. The majors have moved toward a third marketing system in which they market refined products through company-operated stations that are primarily self-serve with no automotive repair services. These directly-operated outlets have been opened in competition with jobbers supplied by the majors and dealers purchasing from these jobbers, as well as with refiner-supplied dealers.<sup>20</sup> This has occurred even though the jobbers and the refiner-supplied dealers continue to have minimum purchase requirements imposed upon them by their refiners and regardless of the fact that their refiners and suppliers are competing in the same market with them.

Wholesalers, further bypassed under this marketing strategy,

15. *Id.* at 519.

16. FTC STAFF REP., *supra* note 6, at 21-23. The top eight firms in gasoline sales are the same as the top eight in crude oil production and in refinery capacity. *Id.* at 22.

17. FTC STAFF REP., *supra* note 6, at 23.

18. *Id.*

19. Comment, *supra* note 7, at 519. Mini-majors "have established their own network of retail stations to utilize fully their refinery capacity, and they augment their refining income through high volume gasoline sales" at company-operated stations. *Id.*

20. J. WILLIAMS, *supra* note 12, at 2.

have diminished in number, except those wholesalers who have become chain retailers, owning and operating self-service stations and convenience stores. The number of dealers has also dwindled. Due to the separation of motor fuel sales from automobile service, these dealers are unable to compete with their supplier and the mini-majors, who operate with a lower overhead.<sup>21</sup>

According to wholesalers and retailers, existing state and federal regulation has been only partially successful in preventing abuses by refiners in the marketing of motor fuel.<sup>22</sup> Vertical integration by refiners may not be, per se, harmful but it has had a deleterious effect. Refiners have evidently used production and refining profits to subsidize their marketing efforts at their directly operated outlets and at some of their directly-supplied dealers' outlets. Jobbers and dealers have been placed in a cost-price squeeze that they interpret as an attempt to drive them out of the more lucrative retail markets.<sup>23</sup> Among the predatory refiner practices claimed by jobbers and dealers are:

1. Below cost selling at retail by majors and mini-majors;
2. Refiners raising prices to jobbers while holding down prices to company-operated retail locations and directly-supplied dealers;
3. Refiners imposing annual minimum purchase requirements on jobbers while not imposing such requirements on company-operated stations or directly-supplied dealers;
4. Refiners imposing restrictions or allocations on the motor fuel which jobbers may purchase, while no such restrictions or allocations are imposed on the company-operated stations or on directly supplied dealers;

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21. STAFF REPORT OF PA. GOV.'S ENERGY COUNCIL, GASOLINE MARKETING: TRENDS AND CHOICES (1982), reprinted in *Gasoline Marketing Hearings*, supra note 10, at 568-92. Independent dealer-operated stations dropped from 204,146 to 98,804 between 1972 and 1980 nationally—a 50% drop. As a percentage of the market, lessee dealer stations dropped from 37% to 24%. *Id.*

22. *Gasoline Marketing Hearings*, supra note 10, at 35 (testimony of Vic Rasheed, Exec. Director, Service Station Dealers of Am.). See also *id.* at 200 (testimony of Jack R. Findlay, Pres., Cal. Arco Distribs., Inc.); *id.* (testimony of Jack A. Blum, Counsel, Indep. Gasoline Marketers Council).

23. See R. CALLMAN, UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES (4th Ed. 1981) for a discussion of various types of unfair competitive practices. Included within the scope of predatory practices are sales below cost, price and supply discrimination, attempts at monopolization, and interference with a competitor's customers.

5. Increased restrictions on credit extended by refiners to jobbers and independent dealers;

6. Rack pricing by refiners which eliminates the jobbers' traditional functional margin (the difference between the price paid by jobbers for motor fuel at wholesale and the price paid by directly-supplied dealers);

7. Increased sales by refiners to commercial account customers at prices below jobber cost;

8. Volume rebates, rent reductions, and other allowances provided to refiner-supplied dealers but not provided to competing jobbers;

9. The refiner's use of superior bargaining power to force dealers to submit to terms in station leases and supply contracts which are not in the dealers' best interests, such as hours of operation, maintenance requirement, and forced conversion to self-service and convenience stores;

10. Unprecedented rent increases imposed upon dealers by refiners.<sup>24</sup>

Refiners respond that their actions are not predatory or discriminatory. They argue that the current changes in petroleum marketing are the result of recent decontrol of petroleum prices and allocations, decreased consumer demand for motor fuel, and general economics.<sup>25</sup> In this situation, refiners say, the inefficient marketers will have to streamline their operations or discontinue business.

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24. *Gasoline Marketing Hearings*, *supra* note 10, at 268-269 (statement of R.J. Thornhill, President-Elect, National Oil Jobbers Council). The complaints were a summary of responses from jobbers and jobber associations across the country. *See id.* at 290-412 (compiling letters from various state jobber associations listing predatory practices engaged in by refiners to the detriment of their members). The jobber margin was estimated to have declined 44% in the 18 month period beginning in January 1981. *Jobber-dealer spread off 44% in 18 mos.*, OIL EXPRESS, October 4, 1982, at 1, reprinted in *Gasoline Marketing Hearings*, *supra* note 10, at 283. Not all refiners were accused of all of these practices, although each major refiner was seen as engaging in one or more of the practices. *Gasoline Marketing Hearings*, *supra* note 10, at 269.

Other complained of conditions included imposition of prescribed pricing policies, marketing of refiner automotive parts; tires, batteries, and accessories (TBA); and minimum volume sales. F. ALLVINE, J. HOUSTON, & O. PHILLIPS, THE CASE FOR LEGISLATIVE RELIEF FROM THE IMPENDING DESTRUCTION OF SMALL BUSINESS AND COMPETITION IN THE GASOLINE INDUSTRY (1980), reprinted in *Gasoline Marketing Hearings*, *supra* note 10, at 70.

25. *Gasoline Marketing Hearings*, *supra* note 10, at 477 (testimony of Ellis W. Gunnels, Vice President of Marketing, Texaco, U.S.A.).

Majors suggest that price structures for directly-supplied dealers and for jobbers are unrelated to each other and, therefore, that the equalization of prices to these two groups is fair. They maintain that prices to jobbers and dealers are set independently of one another, based upon current market conditions.<sup>26</sup>

Majors also argue that the maximum monthly or annual supply limits placed upon jobbers permit the refiner to supply all customers more efficiently and to avoid periodic shortages.<sup>27</sup> The majors defend, as a necessary competitive practice, volume rebates and sales-boosting incentives to directly-supplied and company-operated stations.<sup>28</sup> They disclaim any solicitation of independent dealers and commercial accounts but consider these accounts a totally different "class of trade" for which they maintain the right to respond to requests for direct refiner sales.<sup>29</sup>

The majors further contend that recent rent increases are not exorbitant<sup>30</sup> and that contract terms are not forced on dealers.<sup>31</sup> They and the mini-majors defend their operation of company-owned stations and contend that any sales at those stations made below the motor fuel cost paid by dealers are the result of higher

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26. *Id.* at 483. See also *id.* at 511 (testimony of R.C. Kiddoo, Vice President of Marketing, Exxon Co., U.S.A.). "[S]ince distributor and dealer prices vary as a result of somewhat different competitive pressures, there is no fixed relationship between the two." *Id.* The major refiners point to the few jobber bankruptcies as evidence that jobbers are not preyed upon by their suppliers. See *id.* at 515-16.

27. *Id.* at 484. Refiners also point to the fact that jobbers generally are taking average monthly quantities well under their maximum allocation. Texaco reports that a typical jobber draws 82 to 87% of their maximum monthly allocation. *Id.*

28. *Id.* at 493. (Prepared statement of R. C. Kiddoo, Vice President of Marketing, Exxon Co., U.S.A.). For example, in 1982, Texaco offered an incentive rebate that worked as follows: On monthly sales up to 50% of a predetermined base period amount, a 0 cent-per-gallon discount; on monthly sales between 50% and 100% of the base period amount, 4 cent-per-gallon discount from the refiner; and on sales over 100% of the base period amount a 5½ cent-per-gallon discount, for a price equal to the price charged to a jobber. Thus, a station that sold 100% of its base period amount received an average 2 cent-per-gallon discount on products supplied by the refiner. On all sales over 100% of the base period amount, the dealer purchased products delivered from the refiner for the same price as that which the jobber paid to pick up the product at the terminal. *Id.* at 479 (testimony of Ellis Gunnells, Texaco, U.S.A.).

29. *Id.* at 518 (prepared statement of R. C. Kiddoo, Vice President of Marketing, Exxon Co., U.S.A.).

30. *Id.* at 516.

31. *Id.* at 519-20. Exxon maintains that its annual rent increases have averaged 8% per year, with a recent spurt following petroleum price decontrol to compensate for artificially low rents. Refiners also point to the federal Petroleum Marketing Practices Act, 15 U.S.C. § 2801 (1982), as providing dealers with protection from unreasonable franchise or lease terms. *Id.* at 505 (testimony of W.J. Bittles, Jr., Vice President of Sales, Shell Oil Co.).



volumes<sup>32</sup> or market competition,<sup>33</sup> and not a result of subsidization of marketing operations by other segments of the firm's operations.<sup>34</sup>

### III. FEDERAL AND STATE RESPONSES TO PREDATORY MARKETING PRACTICES

The predatory or anticompetitive conduct allegedly occurring in petroleum marketing today is similar to conduct in other industries in the past century. A variety of measures have been taken by states and the federal government designed to curb such conduct and to insure a viable and competitive market. These measures have varied from general efforts, like antitrust and unfair sales acts which cover all products and industries, to laws designed to cure problems with specific industries or products, such as alcohol, milk, or petroleum.

#### A. *Antitrust Laws: Effect on Predatory Practices*

Beginning in the late 1800's, federal and state antitrust laws were created to curb anticompetitive practices in the free market. The federal antitrust framework is found in three statutes: (1) the Sherman Act,<sup>35</sup> with its emphasis on monopolies and combinations in restraint of trade; (2) the Clayton Act,<sup>36</sup> as amended by the Robinson-Patman Act,<sup>37</sup> emphasizing price discrimination and certain other exclusionary practices; and (3) the Federal Trade Commission Act,<sup>38</sup> which controls unfair methods of competition and unfair and deceptive business practices. Of these, the Clayton Act and the Robinson-Patman Act specifically detail proscribed practices; the other statutes are less specific, allowing the courts and the Federal Trade Commission (F.T.C.) to establish broad guidelines by which they judge the legality vel non of particular actions.

The federal policy underlying the antitrust laws reflects both economic and noneconomic goals, as can be seen from the oft-quoted statement of Mr. Justice Black in *Northern Pacific Railway Co. v. United States*:<sup>39</sup>

32. *Id.* at 493.

33. *Id.* at 499.

34. *Id.* at 514.

35. 15 U.S.C. §§ 1-7 (1982).

36. *Id.* §§ 12-14, 19-22; 29 U.S.C. §§ 52-53 (1982).

37. 15 U.S.C. §§ 13-13b, 21a (1982).

38. *Id.* § 45 (1982).

39. 356 U.S. 1 (1958).

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.<sup>40</sup>

Among antitrust scholars there is no general agreement on how to best achieve these goals.<sup>41</sup>

In addition to federal statutes, most states have enacted anti-trust laws which are patterned after the Sherman Act. These statutes provide a basis for state enforcement where the federal government declines to take action or where the activity is beyond the reach of federal statutes because it involves *intrastate* rather than interstate commerce.<sup>42</sup>

To accomplish its objectives, Congress has provided that enforcement actions under the Sherman Act may be brought by the Department of Justice or by private parties; actions under Section 5 of the F.T.C. Act may be brought by the F.T.C.; and actions under the Clayton Act (including Section 2 of the Robinson-Patman Act) may be brought by any of the three.<sup>43</sup> The key element of the private civil action is the availability of treble damages and attorney's fees to the successful plaintiff.<sup>44</sup>

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40. *Id.* at 4.

41. There are two schools of economic thought as to the proper antitrust approach: the "Harvard (Structuralist) School" of economic theory and the "Chicago (Neoclassical) School." The Harvard School emphasizes market structure and barriers to market entry as determinants of effective competition. Its members regard industry concentration of markets as particularly harmful to the competitive process and advocate government intervention to prevent concentration and to deconcentrate those markets already concentrated. The Chicago School, in general, opposes government intervention. Its members believe that the free market will ultimately determine the most efficient market structure, thereby benefiting consumer welfare. They believe that the absence of government intervention will promote the efficient allocation of resources, and that the most efficient firms will survive by producing the most desired goods at reasonable prices. See generally Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

42. Florida's antitrust laws were substantially revised in 1980. The Florida Antitrust Act of 1980 is patterned after the Sherman Act in prohibiting unreasonable restraints of trade and unlawful monopolies. See FLA. STAT. ch. 542 (1983).

43. See *supra* notes 35-38. It is beyond the scope of this Article to describe in detail the full panoply of available public and private remedies. Specifically, the Department of Justice can bring a criminal action or a civil action for damages and injunctive relief, while private parties may bring a civil action for damages and injunctive relief.

44. 15 U.S.C. § 15a (1982).

From their inception, federal antitrust laws have been an important check on the more pronounced anticompetitive practices in the marketing of motor fuel.<sup>45</sup> For example, courts have long held that predatory pricing violates the antitrust laws when used in a systematic manner to destroy competition.<sup>46</sup> The most prevalent form of predatory pricing manifests itself in below cost selling. The objective is not to promote healthy competitive pricing but is to impose losses on other firms, to drive them out of the market, and to allow the predator to establish monopolistic prices.<sup>47</sup>

Although predatory pricing clearly violates the antitrust laws, how to define and prove predatory pricing is far from clear. This has been the major impediment to using the federal antitrust laws to stop below cost selling in the petroleum industry.<sup>48</sup> Judicial formulations of the predatory pricing concept often turn on the inherently vague test of "intent". To prevail, a plaintiff must show that the alleged predator "desires" that its pricing practices injure its competitors.<sup>49</sup> This is an extremely difficult burden for the plaintiff. Further, courts have been reluctant to find that a low price is a predatory price and is not the result of vigorous price competition in the market, even when the "vigorous price competition" forces competitors out of business.<sup>50</sup>

The proof of predatory intent has been made somewhat easier by substituting an objective standard for the subjective one of "motive." To establish the intent element, the plaintiff must prove

45. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (predatory pricing is a violation of § 2 of the Sherman Act, which prohibits attempts to monopolize).

46. Predatory pricing violates: (1) section 2 of the Sherman Act when there is an attempt to monopolize, *see Standard Oil*, 221 U.S. at 43; (2) § 2 of the Clayton Act when the conduct includes price discrimination, *see Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); and (3) § 3 of the Robinson-Patman Act under any circumstances. The issues with regard to predatory pricing are the same under all these provisions. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284, 284 n.1 (1977).

47. *See P. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT AND CASES* ¶¶ 214(b), 605 (2d ed. 1981).

48. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853 (5th Cir. 1981); L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 111 (1977).

49. *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 722 (5th Cir. 1975) (the term "predatory intent" is troublesome; it has never been clearly defined). *See also Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir. 1977) (the use of the term "predatory" to describe an antitrust violation has left much to be desired).

50. *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 816, 826 (6th Cir. 1982); *Northeastern Tel. Co. v. American Tel. & Tel.*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Janich Bros. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) ("It is the very nature of competition that the vigorous efficient firms will drive out less efficient firms.").

that the defendant was selling below cost on a regular basis. By making this *prima facie* case, the plaintiff shifts the burden to the defendant to either refute the proof of "cost" or to justify its behavior as a response to competitive market pressures.<sup>51</sup> This objective standard has not eliminated the problem of proving intent, since much confusion remains over the definition of "cost." A growing number of antitrust scholars and courts have adopted a strictly economic test to measure cost. Since it is difficult to get two economists to agree on anything, it is not surprising that courts are split on which of several cost formulations to use.<sup>52</sup> Although the economists' definitions of "marginal costs," "average variable cost," and "average total cost" are susceptible to explanation and understanding in the classroom, it has been extremely difficult and ruinously expensive to quantify these costs in the courtroom. This is probably the single largest obstacle facing a plaintiff attempting to prove a predatory pricing claim under federal law.

The antitrust laws have been frequently used to halt discriminatory pricing practices in the petroleum market.<sup>53</sup> The antitrust prohibitions against certain types of price discrimination have been an important curb on the more egregious of the abusive practices in motor fuel marketing. However, their current effectiveness has been lessened by new marketing methods used by refiners and by problems of proving competitive injury. For example, under the Robinson-Patman Act there is no violation unless the discrimination involves sales to competing buyers who purchase from the same seller.<sup>54</sup> This does not cover two types of practices perceived

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51. See *supra* notes 48-49.

52. For a concise discussion of the literature and case law surrounding the complex notion of cost determinations, see A.B.A. ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 126-29 (2d ed. 1984). The debate among economic and legal scholars regarding the proper cost model to use is also extensively discussed in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *Malcolm*, 642 F.2d at 854 n.17.

53. See *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969); *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963); *Littlejohn v. Shell Oil Co.*, 456 F.2d 225 (5th Cir. 1972).

54. *American Oil Co. v. McMullin*, 508 F.2d 1345, 1353 (10th Cir. 1975). Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, prohibits, under certain circumstances, two forms of price discrimination: (1) primary line discrimination, where the seller charges an artificially low (predatory) price in one market in order to drive out its competitors, while subsidizing these lower prices with higher prices in other markets or profits made at other levels in the production and distribution chain; and (2) secondary line discrimination—where the seller charges different prices for comparable goods to buyers competing in the same market.

The proof problems for a plaintiff bringing a predatory pricing action under § 2 of the Sherman Act also confront a plaintiff attempting to establish a primary line violation under

to be discriminatory. First, this loophole in the Robinson-Pactman Act allows a refiner to sell to its direct dealers at the same price it sells to its jobbers. This means that the dealers who purchase from the jobber will ultimately pay a higher dealer tankwagon price for the same product purchased by the refiner's directly-supplied dealer. Of course, this gives the refiner's directly-supplied dealers a competitive advantage over the jobber's dealers. Courts have found, however, that this does not constitute actionable price discrimination because the refiner is not selling to the jobber's dealers at a price different than it is selling to its directly-supplied dealers.<sup>55</sup> This ignores the simple fact that both the jobber's dealers and the refiner's direct dealers are competing in the same market for the same customers with the same product.<sup>56</sup>

Second, the existing federal price discrimination laws do not reach the situation where the refiner supplies its company-operated stations. To violate the Robinson-Patman Act, there must be two sales to competing buyers. Courts have taken a literal approach to the term "sale" and have uniformly held that intra-company transfers are not "sales" for purposes of the Robinson-Patman Act.<sup>57</sup> This means that a refiner is free to supply gasoline to its company-operated stations at a price lower than the price at which it supplies the same product to its jobbers or directly-supplied dealers who compete with the refiner's stations. This places the jobbers and independent dealers at a substantial competitive disadvantage.

As with violations of the Sherman Act, courts have required a plaintiff alleging price discrimination to demonstrate an injury to competition and not just injury to himself as a single competitor.<sup>58</sup>

the Clayton Act as amended by the Robinson-Patman Act. In secondary line cases, a disadvantaged plaintiff must show a discrimination in price (a net difference in price), between two buyers of the same seller competing in the same market, of commodities of like grade and quality. In both primary line and secondary line cases, the plaintiff must prove that the effect of the discriminatory pricing may substantially injure competition. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 141-206 (1962).

55. *O'Byrne v. Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984).

56. To avoid this somewhat illogical result, courts have adopted the "indirect purchaser" doctrine. This approach focuses on the competition for the ultimate purchase of the product, and not the formal chain of distribution that can be established by the refiner in an attempt to avoid the prohibitions against discrimination. *See, e.g., Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969).

57. *Shavrnock v. Clark Oil & Refining Corp.*, 726 F.2d 291 (6th Cir. 1984); *O'Byrne*, 727 F.2d 159; *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962 (5th Cir. 1979), *cert. denied*, 444 U.S. 942 (1979).

58. *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967); *see also Statement of Commission Policy With Respect to Anticompetitive Practices in the Marketing of Gasoline*, 3 TRADE

In *Sweeney & Sons, Inc. v. Texaco, Inc.*,<sup>59</sup> the Third Circuit Court of Appeals affirmed a directed verdict for the defendant-refiner after the plaintiff failed to introduce evidence from which an inference could be drawn that the alleged price discrimination had a substantially adverse effect on competition, rather than just adversely affecting the plaintiff as an individual competitor.<sup>60</sup> The practical problem is again one of proof. Attempting to prove injury to the market or injury to competition, the litigation becomes a battle of experts, with the concomitant increase in costs.

### B. Further Federal Response

The rapid emergence of state franchise protection statutes moved Congress to enact the Petroleum Marketing Practices Act (PMPA).<sup>61</sup> The major oil companies lobbied for such legislation to avoid a variety of different state laws; retail dealers also supported this effort.<sup>62</sup> The Act prohibits a franchisor from canceling or failing to renew a retail franchise without cause. The Act protects both the specific franchise and the "franchise relationship" that exists between dealer and oil company beyond the mere terms of their mutual contract.<sup>63</sup>

The PMPA has been criticized for its provision preempting conflicting state franchise laws as this denies dealers the more favorable protections under various state laws.<sup>64</sup> However, some courts have concluded that preemption extends only to state law provisions that directly conflict with the PMPA, allowing the remainder of a state law to survive.<sup>65</sup> Regardless of the preemption issue, independent branded retail dealers have been given significant statutory rights that permit them to remain in the retail market, at least to the extent of not being arbitrarily dispossessed of

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REG. REP. (CCH) ¶ 10,373 (FTC June 30, 1967).

59. 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

60. *Id.*

61. Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322 (1978) (current version at 15 U.S.C. §§ 2801-2841 (1983)).

62. H. BROWN, *FRANCHISING: REALITIES AND REMEDIES* § 7.04(4) (1982).

63. Cause which would justify termination or nonrenewal of the franchise includes failure to comply with franchise terms that are both reasonable and of material significance; the occurrence of an event relevant to the franchise relationship that makes termination reasonable; or withdrawal from the marketing area by the refiner. Strict notice requirements for nonrenewal or termination are imposed. A dealer may sue in federal court to enjoin a violation and to recover damages suffered. 15 U.S.C. §§ 2801-41 (1982).

64. H. BROWN, *supra* note 62, § 7.04(4).

65. *See, e.g., Ted's Tire Serv., Inc. v. Chevron U.S.A., Inc.*, 470 F.Supp. 163 (D.Conn. 1979); *Bates v. Chevron U.S.A. Inc.*, 260 S.E.2d 367 (Ga. Ct. App. 1979).

their stations.

In sum, the federal antitrust laws provide both public and private remedies for the more egregious anticompetitive practices in the petroleum industry. In the area of below cost sales and in certain forms of price discrimination, however, federal law does not provide a practical remedy to the small competitor suing a major refiner. This is in part the reason that numerous states have enacted legislation to address certain forms of predatory practices. It is to these efforts that we now turn.

### C. State Responses

#### 1. General Below Cost Sales Bans

In addition to federal and state antitrust laws, many states have enacted statutes banning below cost sales which injure competition in general or harm a single competitor. Until the beginning of the twentieth century, sellers had freedom to set prices as they wished. The common law recognized no cause of action by a party injured as a result of the predatory pricing policies of a competitor.<sup>66</sup> However, this situation soon changed. In 1902, South Carolina became the first state to adopt a statutory ban on sales made below cost with the "intent or purpose of driving out competitors or . . . of financially-injuring competitors."<sup>67</sup> Some state statutes adopted after South Carolina's covered all goods offered for sale, particularly when offered by the original producer, while a few acts limited themselves to specific products or categories of products.<sup>68</sup> Known as unfair practices acts, these below cost sales bans were aimed at horizontal levels of price competition so that one seller could not go below his cost to make a sale to the detriment of a competitor. The effect was to create a minimum or floor price.<sup>69</sup>

At the same time, courts began to overturn the common law view by recognizing a cause of action against a competitor who en-

66. See *Kent Stores of New Jersey v. Wilentz*, 14 F. Supp. 1, 6-8 (D.N.J. 1936) for a summary of the common law view of predatory pricing.

67. S.C. CODE ANN. § 39-3-150 (Law. Co-op. 1985). This section provides that it is unlawful for any person engaged in commerce to sell at less than cost; "such person shall be guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade," subject to a fine of up to \$5 thousand. This statute was enacted as part of South Carolina's general antitrust laws, a pattern followed by several states during the rest of that decade. See WORKS PROGRESS ADMIN. STATE PRICE CONTROL LEGISLATION XXVII n.4 (1940) (identifying 11 states as having enacted predatory pricing prohibitions) [hereinafter cited as WPA].

68. See R. CALLMAN, *supra* note 23, at § 702 and statutes cited therein.

69. WPA, *supra* note 67, at XLVIII.

gaged in a business "regardless of loss to himself, and for the sole purpose of driving his competitor out of business."<sup>70</sup> In *Dunshee v. Standard Oil Co.*,<sup>71</sup> an oil wholesaler was subject to suit when it entered the Des Moines, Iowa retail oil market with no real intent to establish a retail business of its own, but with the intent to ruin the existing business of a retailer who purchased part of his oil needs from other suppliers. Once Standard Oil made an example of the plaintiff by destroying his business, Standard Oil ceased its retail operation and restricted itself once again to wholesale distribution. Although the court recognized that a defendant would break no law in selling its product at one-half of plaintiff's retail price, such a practice "would have a distinct bearing upon the reasonableness of its method employed in diverting trade" and on whether the defendant was "actuated by malice or spirit of wanton assault upon the business of another."<sup>72</sup> Still, sales below cost were valid even if made with malice toward a competitor as long as a second legitimate motive was present, such as establishing an ongoing business for profit.<sup>73</sup>

During the Depression, state legislation barring predatory pricing flourished. Due to the advent of large retail marketing chains and discount houses, the focus shifted from the production level to the upper levels of the chain of distribution.<sup>74</sup> At the federal level, the National Recovery Administration (NRA) fashioned hundreds of industry codes of fair competition that, among other provisions, prohibited below cost sales.<sup>75</sup> The demise of the NRA, however,

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70. *Tuttle v. Buck*, 119 N.W. 946, 948 (Minn. 1909). The Minnesota Supreme Court affirmed a verdict for a plaintiff-barber against a banker who opened a competing barber shop with two salaried barbers. By virtue of his position, the defendant-banker was able to divert the plaintiff's regular customers to his competing barbershop. The court found the defendant's purpose "wicked, malicious, and unlawful . . . and not for the purpose of serving any legitimate interest." *Id.* at 946. However, if the defendant had been found to have both a malicious purpose to injure and a legitimate intent to make a profitable competing enterprise, then such a complaint could not have been brought against him. See *Beardsley v. Kilmer*, 140 N.E. 203 (N.Y. 1923) in which economic injuries caused by a competing newspaperman were held not actionable where defendant's intent was both revenge against the plaintiff and the establishment of a profitable ongoing business. The defendant's act of continuing in business after he forced out the plaintiff was seen as indicative of a legitimate purpose.

71. 132 N.W. 371 (Iowa 1911).

72. *Id.* at 375.

73. *Id.*

74. WPA, *supra* note 67, at XXVII.

75. See Comment, *Sales Below Cost Prohibitions: Private Price Fixing Under State Law*, 57 *YALE L.J.* 391, 405-406 (1948).



brought these codes to an early end.<sup>76</sup> Numerous trade groups that had helped develop the NRA codes sought the adoption of state unfair practices acts modeled after the defunct codes.<sup>77</sup>

In 1935, California became one of the first states to adopt an unfair practices statute under this effort. Its legislation created a general prohibition against below cost sales when made for the purpose of injuring and destroying competition.<sup>78</sup> In the following years, a number of other states adopted similar legislation requiring an intent to injure competition or to destroy competition before a below cost sale would be found unlawful.<sup>79</sup> Some states have done away with the "intent to injure" requirement before a violation was established, and instead found unlawful any sale made below cost that had an effect to injure competition.<sup>80</sup> Constitutional attacks on such laws met with limited success, with the most successful challenges coming against state laws that required no showing of an injurious intent before an unlawful below cost sale would be found.<sup>81</sup>

The statutes adopted during the 1930's and 1940's also differed in their scope and in their approach to defining costs. The California act, and others modeled after it, covered sales by producers, wholesalers, and retailers doing business within the state.<sup>82</sup> Other

76. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *Schechter Poultry* challenged an NRA poultry industry code for the New York City area that, among other things, barred unfair methods of competition and minimum wage and hour standards. The Supreme Court found the particular code invalid under the commerce clause because the New York poultry industry did not affect interstate commerce. The National Industrial Recovery Act was held unconstitutional as an unlawful delegation of legislative power to the NRA administrator.

77. Comment, *supra* note 75, at 407-09. Chief among these proponents were associations of retail grocers and of gasoline, cigarette and confectionery distributors. *Id.*

78. 1935 CAL. STAT. 1546-1551, § 3, cited in Comment, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, 24 CALIF. L. REV. 640, 646 (1936). California law currently provides that sales below cost are unlawful when done for the purpose of injuring competitors or of destroying competition. CAL. BUS. & PROF. CODE § 17043 (West 1964).

79. Comment, *Regulation of Business—Sales-Below-Cost Statutes—The Elements of Violation and the Defense of Meeting Competition*, 58 MICH. L. REV. 905, 909 (1960).

80. See also TENN. CODE ANN. § 47-25-203 (1984). Sales at less than cost are unlawful where either the intent or effect is to injure a competitor, to impair competition, or to divert trade from a competitor.

81. See, e.g., *Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.*, 12 A.2d 201 (Md. Ct. Spec. App. 1940) (holding invalid a 1939 Maryland act which made sales below cost unlawful if made with the intent, effect, or result of injuring competitors); *State ex rel. English v. Ruback*, 281 N.W. 607 (Neb. 1938) (finding unconstitutional a statute requiring no intent necessary to declare a below cost sale). But see *McElhone v. Geror*, 292 N.W. 414 (Minn. 1940).

82. See Comment, *supra* note 78, at 646. The Act defined cost of production (raw mater-

states limited their coverage to distribution and retail sales and defined cost as invoice or replacement cost. Most states passing such laws during this time period covered all commodities offered for sale.<sup>83</sup> Some states enacted laws that required a minimum markup above cost that was presumptive of the cost of doing business. Other states followed California's lead and attempted to set out the elements of the cost of doing business. These were to be added to the invoice or replacement cost in order to arrive at the true cost of the item offered for sale.<sup>84</sup> These statutes provided certain remedies to an injured competitor, including injunctive relief and recovery of damages, with some states awarding treble damages. Violators were also exposed to potential criminal or civil sanctions in some jurisdictions.

By 1948, thirty-one states had passed laws barring predatory pricing, most of general application.<sup>85</sup> During the post-Depression era of economic growth and well-being, however, interest in these statutory bans waned. It appears that few attempts were made to enforce the provisions of these laws.<sup>86</sup> Since 1961, several states have repealed their below cost sales prohibitions of either general applicability to all commodities or of applicability to specific products.<sup>87</sup>

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ials, labor, and overhead expenses) and cost of distribution (invoice or replacement cost and overhead expenses), suggesting both production and distribution were covered. Several states followed California in covering sales by both producers and distributors. See ARK. STAT. § 14313 (Pope 1937) (current version at ARK. STAT. ANN. § 70-301-314 (1967)); COLO. STAT. ANN. ch. 48, § 302(1) (Supp. 1946) (current version at COLO. REV. STAT. §§ 6-2-101-117 (1973 & Supp. 1984)); KY. STAT. ch. 129A, § 4748h-1 to 14 (Carroll 1936) (current version at KY. REV. STAT. §§ 365.020-.070, 365.090 (1970 & Supp. 1984)); MONT. REV. CODE ch. 112A, § 7590.3 (Supp. 1939) (current version at MONT. CODE ANN. §§ 30-14-210-224 (1983)); OR. COMP. LAWS § 43-104 (1940) (repealed by 1975 Or. Laws ch. 225); UTAH CODE ANN. tit. 16A, ch. 4 (1943) (current version at UTAH CODE ANN. §§ 13-5-1 to 18 (1953 & Supp. 1983)); WASH. REV. STAT. § 5854-21 (Remington Supp. 1940) (repealed by 1983 Wash Laws ch. 288).

83. *E.g.*, ARK. STAT. ANN. § 70-301 (1957) (making it unlawful to sell any article or product, or service or output of a service trade at less than cost). WIS. STAT. ANN. § 100.30(3) (West 1982) (sale of "any merchandise" at less than cost is unlawful) (adopted 1939).

84. Compare R.I. GEN. LAWS, § 6-13-1(a) (1970) ("[a] markup [is] to cover in part the cost of doing business, which markup . . . shall be six per cent [sic] (6%) of the total cost at the retail outlet" for retailer cost, with a 2% markup required of wholesale sales); to CALIF. BUS. PROF. CODE § 17029 (West 1964) (the cost of doing business means all costs incurred in conduct of business including, without limitation, "labor, . . . rent, interest on borrowed capital, depreciation, . . . delivery costs. . . licenses, taxes, insurance and advertising").

85. Comment, *supra* note 75, at 391.

86. *E.g.*, Reiley, *Enforcement of Legislation Prohibiting Sales Below Cost in Washington*, 42 WASH. L.R. 817 (1967). The author termed the below-cost sales law as lying dormant for 20 years with only two reported cases reaching the Washington Supreme Court between 1939, the year of enactment, and 1964.

87. *See, e.g.*, CONN. GEN. STAT. ANN. § 42-104-110 (West 1960), *repealed* by 1975 Conn.

Over the years, there have been numerous challenges to the legality of these state statutes prohibiting below cost sales. These efforts have been largely unsuccessful. Recently, the West Virginia Supreme Court of Appeals upheld the below cost sales prohibition in that state's Unfair Practices Act.<sup>88</sup> In *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*<sup>89</sup>, the court rejected substantive due process and vagueness challenges, and more importantly, held that the law did not conflict with the federal antitrust law as both the state ban and the federal antitrust laws prohibit sales below cost.<sup>90</sup> This same result was obtained four years earlier by the Ninth Circuit Court of Appeals in the legendary case of *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*<sup>91</sup>

## 2. Specific Petroleum Marketing Below Cost Sales Bans

Several states have recently recognized the need for additional statutory bars to below cost sales and discriminatory pricing in petroleum marketing. In addition to Florida, five states have specific statutes barring the sale of motor fuels below cost: Alabama, Georgia, Massachusetts, New Jersey, and Utah.<sup>92</sup> Below cost sales of motor fuels in the other twenty-three states that have general below cost sales bans can be remedied under those statutes.

Massachusetts makes it unlawful to sell motor fuel at retail for less than the cost to that retail dealer when it is done with the "intent to injure competitors or destroy substantially or lessen competition."<sup>93</sup> New Jersey bars the offering of rebates or other

Pub. Acts 75-31 (Reg. Sess.); NEB. REV. STAT. § 59, art. 12 (1968), *repealed by* 1972 Neb. Laws 1410; N.H. REV. STAT. ANN. § 358 (1970), *repealed by* 1977 N.H. Laws 245:1.

88. W. VA. CODE § 47-11a-1-14 (1980 & Supp. 1985).

89. 328 S.E.2d 144 (W. Va. 1985).

90. *Id.*

91. 668 F.2d 1014 (9th Cir. 1981). The Ninth Circuit in *William Inglis & Sons*, and the West Virginia court in *Hartsock*, 328 S.E.2d 144, held that there was no conflict even though the state statutes defined "cost" in a manner different from federal antitrust laws. The prevailing attitude under federal antitrust law is to focus on marginal or average variable costs; the state statutes, on the other hand, defined cost as average total costs. 668 F.2d at 1038.

92. ALA. CODE § 8-22-1. (1984) ("Motor Fuel Marketing Act"); MASS. GEN. LAWS ANN. ch. 94, § 295P (West 1984) ("Unfair Motor Fuel Practices Act"); N.J. STAT. ANN. § 56:6-22 (1964); UTAH CODE ANN. § 13-16 (Supp. 1983); GA. CODE ANN. § 10-1-250 (Supp. 1985) ("Below Cost Sales Act") (effective July 1, 1985); Ch. 85-74, 1985 Fla. Laws 429, ("Motor Fuel Marketing Practices Act").

93. MASS. GEN. LAWS ANN. ch. 94, § 295P (West 1984). Sales made in good faith to meet the price of a competitor are allowed. A violation could result in a fine of up to \$1 thousand. Unlike other such laws, the Massachusetts provision is directed only to retail dealers; other

discounts in connection with a motor fuel sale with the intent to injure competitors or to destroy or lessen competition.<sup>94</sup> Such rebates have the effect of creating a sale which is below dealer cost.

The laws in Alabama, Georgia, and Utah have all been passed since 1980 and were influenced by a model bill drafted by the National Oil Jobbers Council (NOJC).<sup>95</sup> Below cost sales are banned except for several enumerated exceptions, including good faith attempts to meet the equally low price of a competitor. The model act also bars discrimination in the selling price charged to competitors on the same level of competition.<sup>96</sup> No requirement of an intent to injure competition or a competitor is necessary. A showing that a sale was made below cost creates a presumption that shifts the burden to the seller to show a justification for the sale.<sup>97</sup>

Many of the NOJC provisions found their way into the Utah and Alabama statutes. The Alabama law provides that an effect resulting from a below-cost sale which injured competition was adequate to establish a violation in the presence of predatory intent.<sup>98</sup> The Utah law requires no intent or detrimental effect upon competition or a competitor before a below cost sale is unlawful because any sale below made cost is per se unlawful.<sup>99</sup>

The recently enacted Georgia law<sup>100</sup> varies from both the Alabama and Utah laws. A reasonable cost of doing business, to be added to the seller's invoice or transfer price, is to be computed pursuant to generally accepted accounting principles plus transportation charges.<sup>101</sup> The Georgia statute only requires an effect

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states focus on refiners, distributors, and retailers. *Id.* §§ 295 R-S.

94. N.J. STAT. ANN. § 56:6-22 (1964). The legislature found that unfair methods of competition had emerged in motor fuel marketing which harmed the public by hampering supply. The Act does not directly bar below cost sales, but the ban on rebates and discounts has that effect. The Act further prohibits price discrimination between different buyers.

95. MODEL STATE LEGISLATION: TO PROHIBIT MOTOR FUEL SALES BELOW COST (1981) (National Oil Jobbers Council). The NOJC did not endorse the model bill but compiled it based upon provisions in existing state laws. States were urged to study the proposal and select those provisions they found warranted. This model act reflects the provision of the 1935 California law which brings producers, distributors and retailers within its scope. Cost is defined as the cost of raw materials for producers, and invoice or replacement cost, plus the cost of doing business for wholesalers and retailers. The cost of doing business is broadly defined to include, but is not limited to, labor, rent, interest, depreciation, maintenance, freight and business licenses, and taxes. *Id.* art. II §§ (1)(d)-(e).

96. *Id.* art. III, § 2. The act further provides for civil penalties.

97. *Id.* art. II, § 9.

98. ALA. CODE § 8-22-6 (1984).

99. UTAH CODE ANN. § 13-16-4 (Supp. 1983).

100. 1985 Ga. Laws 389 (codified at GA. CODE ANN. § 10-1-250 (Supp. 1985)).

101. GA. CODE ANN. § 10-1-253 (2) (Supp. 1985). This is a more flexible standard of the

that injures competition before a violation will be found but that effect must be one that acts substantially to lessen competition or tends to create a monopoly or to injure, destroy, or prevent competition.<sup>102</sup> This appears to require a greater showing of actual or potential injury before judicial relief may be sought by an injured competitor. Yet, the Georgia law exposes the *knowing buyer* in a below cost sale to liability for damages inflicted upon an injured competitor.<sup>103</sup> As will be explained below, Florida's new law differs dramatically from the efforts of her sister states.

### 3. State Franchise Protections

Several states have responded to the plight of the independent service station dealer by attempting to equalize his bargaining position with the refiner or jobber who owns the dealer's station. Most of the independent branded retailers lease or operate their stations under a franchise from their petroleum supplier. Acting individually, these dealers are often in a weak position to bargain with the refiner or jobber over contractual terms. Thus, to enhance the dealers ability to bargain effectively, states have enacted statutes giving dealers a greater economic interest in their franchise and stronger protections against arbitrary franchise cancellations.<sup>104</sup>

By 1978, a majority of states had enacted statutes that provided new protections to the franchise dealer.<sup>105</sup> Known as "good cause"

cost of doing business than the detailed list of includible costs set out in the Alabama and Utah laws.

102. *Id.* § 10-1-254(a).

103. *Id.* § 10-1-254(f). It is unlawful for any person engaged in sales of motor fuel "knowingly to induce or to receive a below cost or discriminatory price" as prohibited by this act. The Georgia law does reflect some of the other provisions of the NOJC model act in the evidentiary presumption which shifts justification to the defendant upon a showing of a below cost sale. Yet the law only allows recovery of actual damages, expressly excluding punitive damages and any class action enforcement. To that extent it makes the law a less attractive means of private enforcement.

104. See H. BROWN, *supra* note 62, § 7.04[1]. The terms of a retail petroleum franchise will often set the wholesale price paid for motor fuel by the dealer, the standards by which the station is to be operated, the hours of operation, and the sales of preferred products. Due to the strict terms, the dealer must exercise great care to avoid breaching the franchise terms. At renewal, oil company franchisors are free to dictate the terms and length of any extensions. It is to these potential abuses that such dealer protection laws are directed.

105. Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1132 n.100 (1981). In 15 states, such protections existed under general limitations on franchise terminations that extended to all franchises. See, e.g., DEL. CODE ANN., tit. 6, § 2251 (1975), "Security for Franchised Distributors." The failure to renew a franchise is unlawful if done without good cause or with bad faith. A franchise provision allowing termination or nonrenewal

statutes, they reflect a changing theory about the franchise relationship, moving away from a contract approach to one based on a joint venture concept.<sup>106</sup> This view finds that both the oil company and the dealer add something to the success of the enterprise; the oil company contributes its nationally-known trademark and petroleum products, and the dealer contributes his services and efforts toward realizing a profit for both.<sup>107</sup> These statutes recognize that the dealer owns the business he operates at the franchised premises. As such, he is entitled to the protection of the law before the value of his business, in the form of customer goodwill, is taken away from him without just and good cause.<sup>108</sup>

#### 4. *Prohibitions on Price Discrimination*

In addition to attempting to ban below cost sales, many states have also enacted statutory prohibitions on price discrimination between a seller's customers or between regions of a state. Thirty-one states have general laws barring discrimination in prices charged different purchasers at the same level of distribution.<sup>109</sup> Forty-six states have found the need for legislation dealing with price discrimination in sales of specific products or industries, such as insurance, alcoholic beverages, tobacco products, and agricultural products.<sup>110</sup> Many states enacted price discrimination laws, along with below cost sales bans, as part of their unfair sales laws. Other states enacted such bans as part of their antitrust laws with price discrimination seen as a monopolistic practice.<sup>111</sup>

Many of these price discrimination laws prohibit geographic discrimination between localities, such as selling a product at a lower price in one area than in another.<sup>112</sup> Other statutes prohibit price discrimination in the form of different prices charged to different

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without justification is construed to mean that a franchisor may only terminate justly. No franchisor may charge, for leased property, an excessive rent in light of the property's use and the franchisor's interest in the property.

106. Comment, *Retail Gasoline Franchise Terminations and Nonrenewals Under Title I of the Petroleum Marketing Practices Act*, 1980 DUKE L.J. 522, 527.

107. *Id.* at 527-28.

108. H. BROWN, *supra* note 62, § 7.04[1].

109. See 4 TRADE REG. REP. (CCH) ¶¶ 30,201-35,585 (1982) for a listing and the full text of each state's statute.

110. See 1 TRADE REG. REP. (CCH) ¶ 3514 (1982) for a listing of states having these special laws and the products or industries included.

111. S. OPPENHEIM & G. WESTON, *UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION* 787 (3d ed. 1974).

112. 1 TRADE REG. REP. (CCH) ¶ 3510 and ¶ 3562 (1982). Florida has such a prohibition on locality discrimination. See FLA. STAT. § 540.01 (1983).

customers at the same level of distribution,<sup>113</sup> an approach which is consistent with federal antitrust law. Most states provide that the seller entertain some intent to injure either competition in general or a single competitor. This latter standard is less restrictive than federal law, and a few states do not require a showing of intent before a violation will be found.<sup>114</sup> In those states, any sale shown to be made at a price different than that charged another customer will be presumed discriminatory and unlawful. Of course, this is also a lower standard of proof than that imposed under federal law.

As in the federal price discrimination laws, state statutes give sellers several defenses. Sales of products of different grade and quality, differences in quantities purchased, or differences in the cost of transportation will justify price discrepancies in products.<sup>115</sup> A different price offered in good faith to meet the price of a competitor may also be invoked as a defense. Additionally, certain sales are exempt from the ban on different prices charged to similar customers.<sup>116</sup>

Remedies for the violation of price discrimination statutes include injunctive relief and in some states penal sanctions.<sup>117</sup> Civil damage actions may also be brought in some states by persons who can demonstrate an injury to themselves from these anticompetitive practices.<sup>118</sup> Still, the laws appear to be rarely enforced or used in private actions.<sup>119</sup>

### 5. Florida's Geographic Price Discrimination Protection

Prior to the enactment of the Motor Fuel Marketing Practices Act, Florida had few laws that could be invoked to restrain predatory trade practices. Florida had not joined the large number of

113. S. OPPENHEIM & G. WESTON, *supra* note 111, at 787.

114. 1 TRADE REG. REP. (CCH) ¶ 3528 (1982).

115. *Id.* at ¶ ¶ 3538, 3540.

116. R. CALLMAN, *supra* note 23, § 7.53. Exempt sales include sales of damaged or perishable goods, court-ordered sales, clearance and liquidation sales, and sales to charitable and governmental organization. *Id.*

117. R. CALLMAN, *supra* note 23, at § 7.53.

118. S. OPPENHEIM & G. WESTON, *supra* note 111, at 788. Some states provide for treble damages to a successful plaintiff. *See, e.g.,* CAL. BUS. & PROF. CODE § 17082 (West 1964) ("[A]ny plaintiff . . . shall be entitled to recover three times the amount of the actual damages.").

119. S. OPPENHEIM & G. WESTON, *supra* note 111, at 788. The mere prospect of a private enforcement action, with the threat of treble damages, may be sufficient to discourage such practices. In that sense, these price discrimination laws may be self-enforcing.

states which had adopted specific bans on sales at less than cost. No reported cases have been found where an action for predatory pricing was brought solely under Florida's antitrust statutes. A geographical price discrimination statute, applicable to the sales of all commodities, was enacted to prevent discrimination "between different sections, communities, or cities of this state."<sup>120</sup>

Under the statute, the seller must engage in predatory pricing with the purpose of destroying the business of a competitor. The seller may justify different sales prices by showing a difference in transportation costs or a good faith effort to meet competition.<sup>121</sup> Enforcement lies with the Department of Legal Affairs and the state attorneys.<sup>122</sup> A violation of the law is a misdemeanor. If a corporation is found guilty of these practices, its license to conduct business in the state can immediately be revoked.<sup>123</sup> Despite its availability, this price discrimination ban has been rarely used.<sup>124</sup>

One commentator views Florida's geographical price discrimination statute to be of dubious value in eliminating injurious practices. This is due to the fact that the law does not permit private enforcement by injured competitors, as is allowed with many other unfair practices acts.<sup>125</sup> Typically, it is this private enforcement mechanism, or the threat of its use by an injured competitor, that provides meaningful enforcement against such practices.

### A. Florida's Divorcement Law

Florida was a co-leader with Maryland in attempting to deal with abusive refiner practices in 1974 when both states passed "retail divorcement" laws restricting refiners' ability to directly retail

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120. FLA. STAT. § 540.01 (1983). The law was first enacted in 1915. See ch. 6945, 1915 Fla. Laws 326.

121. *Id.*

122. FLA. STAT. § 540.03 (1983).

123. *Id.* § 540.04 (1983).

124. In *Syfo Water Co. v. Chakoff*, 182 So. 2d 17 (Fla. 3d DCA 1965), a distributor of seltzer water, Chakoff, alleged geographical price discrimination by Syfo Water Co., a competing distributor. Testimony showed Syfo Water was selling its product at eight cents per gallon in areas where Chakoff did business and at 15 cents per gallon in other areas. The trial court enjoined both parties from such practices. On appeal, the reviewing court found no evidence that Syfo Water engaged in these practices with the intent of destroying Chakoff's business and reversed the lower court. Chakoff failed to curb his competitor's practice of selling at different prices because he was unable to establish Syfo Water Co. and its employees intended to destroy his business.

125. Kemker, *Price Discrimination Under the Robinson-Patman Act*, 14 U. FLA. L. REV. 155, 156 n.10 (1984).



their motor fuel. Maryland's statute<sup>126</sup> imposes an absolute prohibition on refiners selling motor fuel at retail. Section 526.151, Florida Statutes, limits refiners' directly-owned retail operations to three percent of the total number of retail outlets selling petroleum products under the refiner's primary brand or secondary brand. While the Maryland and Florida statutes attempted to address other abusive marketing practices by refiners, the divorce-ment provisions were the substance of these laws.

Several major refiners challenged Florida's divorce-ment law in state court,<sup>127</sup> alleging it to be unconstitutional. They sought a temporary injunction prior to the law's effective date of October 1, 1974. The Second Circuit Court entered an order granting the refiners' request for a temporary injunction, and thus barred enforcement of the statute. Simultaneously, several of the mini-majors challenged the application of the new statute to their retail outlets, arguing that they did not offer a full line of automotive services and were not, therefore, "service stations" under the law.<sup>128</sup> On September 27, 1974, the same circuit court ruled in favor of the mini-majors and enjoined enforcement of the law against them.<sup>129</sup>

In January 1975, the circuit court ruled the divorce-ment statute unconstitutional, holding it to be vague and ambiguous, an invalid exercise of the police power, discriminatory, and violative of the Equal Protection Clause.<sup>130</sup> The state did not appeal this ruling and thus ended, for the moment, Florida's special regulation of refiners' marketing operations and practices.

Maryland's divorce-ment statute experienced a similar fate at the trial court level. The same major refiners attacked Maryland's law on identical grounds as those raised in Florida. The law was held unconstitutional, but Maryland appealed the lower court's ruling. In 1977, the Maryland Court of Appeals reversed the lower court and upheld the constitutionality of the law.<sup>131</sup> This decision was appealed to the United States Supreme Court by the majors, and the Court rendered a lengthy opinion upholding the law.<sup>132</sup>

126. MD. ANN. CODE art. 56, § 157E (Supp. 1977).

127. Exxon Corp. v. Conner, No. 74-1449 (Fla. 2d Cir. Ct. 1974); Shell Oil Co. v. Conner, No. 74-1577 (Fla. 2d Cir. Ct. 1974); Phillips Petroleum Co. v. Conner, Case No. 74-1772 (Fla. 2d Cir. Ct. 1974). These cases were later consolidated.

128. Direct Oil Corp. v. Conner, No. 74-1185 (Fla. 2d Cir. Ct. 1974).

129. *Id.*

130. See *supra* note 127 (final judgment entered Jan. 23, 1975).

131. Governor of Md. v. Exxon Corp., 370 A.2d 1102 (Md. 1977), *aff'd*, 437 U.S. 117 (1978).

132. *Id.*

Divorcement was thereafter accomplished in Maryland and it continues today. Florida's service station dealers continued to pursue retail divorcement by supporting such legislation in each Florida legislative session from 1975 through 1982. During each of these years, the jobbers joined the refiners in opposing and defeating the bills.

In 1983, however, the jobbers began exploring possible legislative measures to address refiner abuses. The jobbers persuaded the House Commerce Committee to conduct an informal study of the industry, particularly the marketing sector.<sup>133</sup> Furthermore, the jobbers insisted that the state begin enforcement of its divorcement statute in light of the Supreme Court's ruling in *Exxon Corp.*<sup>134</sup> Doyle Conner, Commissioner of Agriculture and Consumer Services, charged with responsibility of enforcement of the law, refused to begin enforcement. Accordingly, in June 1983, the jobbers filed a petition for writ of mandamus to compel the Commissioner's performance under the statute.<sup>135</sup>

Ironically, the petition was heard by the same circuit judge who had held the statute unconstitutional some nine years earlier. The judge remained firm, dismissing the petition for mandamus.<sup>136</sup> That order was appealed by the jobbers to the First District Court of Appeal. The First District reversed the lower court and declared the Florida divorcement law constitutional.<sup>137</sup>

On February 1, 1985, the Department of Agriculture and Consumer Services published its notice of intent to adopt proposed rules interpreting and implementing the divorcement statute.<sup>138</sup> The proposed rules were immediately attacked by the majors and mini-majors, who filed petitions to determine the invalidity of the rules.<sup>139</sup> On February 22, the Department of Agriculture and Consumer Services conducted a hearing to receive public comments regarding the proposed rules. The rule challenges were referred to

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133. See generally Florida Petroleum Marketers Ass'n, *Petrogram* page 10, col. 1-2 (Oct. 1983) [hereinafter cited as FPMA *Petrogram*].

134. 437 U.S. at 117.

135. *State ex rel. Gas Kwick, Inc. v. Conner*, 453 So. 2d 863 (Fla. 1st DCA 1984).

136. *Id.*

137. *Id.*

138. 11 Fla. Admin. Weekly 366 (Feb. 1, 1985) (proposing Rule 5F-7.01-.03)

139. The following cases were filed in the State of Florida, Division of Administrative Hearings: *Autotronics Syss, Inc. v. Dep't of Agric. and Consumer Servs.*, No. 85-0646R (1985); *Amerada Hess Corp. v. Dep't of Agric. and Consumer Servs.*, No. 85-0647R (1985); *Kayo Oil Co. v. Dep't of Agric. and Consumer Servs.*, No. 85-0649R (1985); *Exxon Corp. v. Department of Agric. and Consumer Servs.*, No. 85-0650R (1985); *Ashland Oil, Inc. v. Department of Agric. and Consumer Servs.*, No. 85-0651R (1985).

the Division of Administrative Hearings but were never heard as the legislature convened and passed the new Florida Motor Fuel Marketing Practices Act,<sup>140</sup> repealing Florida's divorcement law.

### III. FLORIDA'S MOTOR FUEL MARKETING PRACTICES ACT

#### A. Legislative History

The First District Court of Appeal decision declaring section 526.151, the retail gasoline divorcement statute, constitutional, kicked off a vigorous campaign by refiners to repeal the law.<sup>141</sup> During the first few months following the First District's decision, the refiners had two goals: to slow implementation of the enforcement of the divorcement statute by challenging rulemaking initiated by the Department of Agriculture and Consumer Services, and to marshal legislative support for the repeal of the statute during the 1985 Regular Session.

Florida's petroleum wholesalers, who had initiated the litigation due to continuing deterioration of relations with refiners, pushed for adoption and implementation of the Department of Agriculture and Consumer Services' divorcement rules. The wholesalers also organized a legislative defense of the divorcement statute<sup>142</sup> As the 1985 Regular Session approached, the industry had realigned on the divorcement issue; refiners now opposed both dealers and

140. Ch. 85-74, 1985 Fla. Laws 429.

141. Exxon Corp. v Conner, No. 74-1449 (Fla. 2d Cir. Ct. 1974); Shell Oil Co. v. Conner, No. 74-1577 (Fla. 2d Cir. Ct. 1974); Phillips Petroleum Co. v. Conner, No. 74-1772 (Fla. 2d Cir. Ct. 1974).

142. Interview with Carl Adams, Exec. Dir., Fla. Petroleum Marketers Ass'n, in Tallahassee, Fla. (July 17, 1985) [hereinafter cited as Interview]. It is significant to note that during the time the 1974 divorcement law was held in abeyance by the circuit court's injunction, retail petroleum dealers mounted extensive legislative campaigns from 1975 through 1982 to persuade Florida's legislature to replace section 526.151 with another retail divorcement statute. See e.g., Fla. HB 35 (1982); Fla. HB 802 (1981); Fla. HB 1310 (1980); Fla. HB 1462 (1975). Refiners, of course, opposed these legislative attempts by the dealers. Ironically, the wholesalers also adamantly opposed those legislative bills. By 1983, however, the wholesalers realized that peaceful coexistence with the refiners was a delusion. Wholesalers found they could not compete with refiners for retail markets. The virtually unlimited resources of refiners within the structure of the petroleum industry placed the future livelihood of wholesalers in jeopardy.

In the summer and fall of 1983, the House Comm. on Com. had a special subcommittee conduct hearings regarding petroleum industry problems. This was an ad hoc study committee chaired by Rep. Christian Meffert, Dem., Ocala. See FPMA *Petrogram* at 10, cols. 1-2. These hearings were held as a result of requests from the wholesale segment of the industry. The Subcommittee proposed no legislation at the end of these hearings; therefore, the legislature did not address the issue in 1984.

wholesalers.<sup>143</sup>

Prior to the opening of the session, the refiners solicited House and Senate members to sponsor legislative bills repealing the divorcement law. By early 1985, it appeared that Senator Fox,<sup>144</sup> a powerful member of the Senate Commerce Committee, and Representative Burnsed,<sup>145</sup> Chairman of the House Commerce Committee, would sponsor the refiners' repealer bills. At this juncture, legislators expressed mixed feelings about the issue. Some legislators felt the law, which had been judicially held in abeyance since 1973, should have an opportunity to function before judging it to be detrimental. Others, by far the majority, felt the law was ill-conceived in 1973 and equally repugnant in 1985.<sup>146</sup>

As the legislative session became imminent, the refiners could not maintain a unified legislative repose. Several of the mini-majors, with integrated refining-to-retailing operations, decided not to risk an all or nothing position with the legislature. While outright repeal of the divorcement law was their preference, they expressed a desire to negotiate with the wholesalers in an attempt to find compromise legislation, and thereby largely defuse the legislative fight.<sup>147</sup> These mini-majors—Tenneco, Hess, Marathon and others—would be required to alter their entire marketing system if the divorcement law was implemented. This defection of the mini-majors stymied the primary refiner lobbying arm, the Florida Petroleum Council. Since both majors and mini-majors belong to the Council, there was no consensus position which the Council could actively promote.

On February 20, 1985, Senator Fox prefiled the repealer bill in the Senate on behalf of the refiners.<sup>148</sup> Also at this time, the mini-majors approached the petroleum wholesaler's organization<sup>149</sup> in an effort to initiate discussions about compromise legislation. The wholesalers, believing that retention of the divorcement law would be difficult and that other legislation might provide better relief to their segment of the industry, were willing to explore other alternatives. The two groups immediately focused on the below cost

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143. Interview, *supra* note 142.

144. Dem., Miami.

145. Dem., Lakeland.

146. Interview, *supra* note 142.

147. *Id.*

148. Fla. SB 237 (1985).

149. The Florida Petroleum Marketers Association, Inc. is the trade association which represents petroleum jobbers in Florida.

sales legislation passed in 1984 by the Alabama Legislature<sup>150</sup> and the similar Georgia measure, which was under consideration by the Georgia Legislature at that time.<sup>151</sup> After spirited negotiations, the two groups agreed to propose to the Florida Legislature a compromise tailored after the Alabama law. Pertinent parts of the compromise were: (a) a prohibition on sales below cost by refiners, retailers, and wholesalers; (b) a prohibition of price discrimination, including discrimination occurring in intracompany transfers at prices lower than the sales prices to independent purchasers; (c) a prohibition on refiners selling to commercial accounts at prices lower than their prices to wholesalers; and (d) repeal of the divorcement law.<sup>152</sup>

The next step was to sell this proposal to the dealers and to block an attack by the majors and other groups on the compromise. Neither the dealers nor the majors had been part of the negotiations, and the compromise was deemed unacceptable by both groups. Even though the dealers and the majors refused to embrace the proposal, the mini-majors and the wholesalers elected to push for its adoption. The obvious method for accomplishing this objective was to have the compromise proposal substituted for Senator Fox's repealer bill. That bill was scheduled to be heard by the Senate Commerce Committee on April 11.<sup>153</sup> The morning of the 11th, before the Committee meeting, Senator Fox adamantly refused the suggestion that she amend her bill with the compromise proposal. In fact, during the Committee presentation, Senator Fox blasted the compromise as industry price fixing and predicted that the proposal would increase retail gasoline prices.<sup>154</sup> Similar attacks came from the majors, the dealers, the American Association of Retired Persons, the Florida League of Municipalities, the Florida School Board Association, the Florida Trucking Association, the Florida Farm Bureau, and others.<sup>155</sup> In the end, the compromise was soundly defeated and Senator Fox's repealer bill passed intact.<sup>156</sup>

The wholesalers were left wondering if they could now stop out-

150. ALA. CODE § 8-22-1 (1984).

151. 1985 Ga. Laws 385 (codified at GA. CODE ANN. § 10-1-250 (Supp. 1985)).

152. Interview, *supra* note 142.

153. Fla. S., Comm. on Com., tape recording of proceedings (Apr. 11, 1985) (on file with committee).

154. *Id.*

155. *Id.*

156. *Id.*

right repeal. The mini-majors were left pondering whether they had made a tactical error in breaking rank with the majors and if repeal without compromise was now possible. Nothing seemed certain; the mini-major and wholesaler coalition appeared strained. Indeed, as is constantly the case in legislative affairs, the parties had to reevaluate their respective positions and determine whether they were stronger together, separate, or realigned with others. After some reflection, the coalition determined that it would continue its attempts to achieve a compromise; recognizing, however, that the Florida Legislature was not disposed toward acceptance of legislation substantially similar to Alabama's below cost sales law.<sup>157</sup>

The mini-majors and wholesalers quickly sought the counsel of the House leadership. Representative Burnsed, who had prefiled the House repealer bill, was contacted and consideration of the House bill was delayed. This delay allowed the mini-majors and wholesalers additional time to piece together a compromise before the repealer bill was to be heard by the House Commerce Committee.<sup>158</sup> Although the parties continued to meet, they became somewhat more independent in their attempts to draft another compromise. The mini-majors backed away from several of their earlier concessions to the wholesalers. The wholesalers likewise retreated on a few points due to political realities. For example, the wholesalers recognized that the prohibition of commercial sales by refiners at prices below wholesale drew too many opponents, such as trucking interests, the Florida League of Municipalities, and other commercial end users. Both parties recognized that the prohibition of below cost sales at all levels was an overkill which had become an anti-consumer issue in the Senate.<sup>159</sup>

The mini-majors attempted to include the majors in these compromise deliberations while the wholesalers met with the dealers in an attempt to include their concerns in the negotiations. The dealers wanted two issues addressed. First, they wanted additional franchise protections whereby majors, wholesalers, and other franchisors could not mandate conversion of their gas stations to convenience stores. Secondly, the dealers wanted additional franchise protection from substantial rent increases.<sup>160</sup>

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157. Interview, *supra* note 142.

158. *Id.*

159. *Id.*

160. *Id.* Although dealer franchises are protected under the federal Petroleum Marketing Practices Act, the Act contains no prohibitions against conversion of the premises to another form of retail gasoline facility. Standard service stations with work bays and full-

The majors were still largely uninterested in substitute legislation and wanted the divorcement law repealed without compromise. They remained adamantly opposed to any below cost sales prohibitions or other marketing restrictions being advocated by the wholesalers. The two dealer issues were deemed heresy by the majors. They maintained that they had a right to convert their service stations into convenience stores to obtain maximum profits. Furthermore, the majors would not consider any proposals restricting rent increases, contending that this was exclusively within federal jurisdiction under the Petroleum Marketing Practices Act.<sup>161</sup>

The wholesalers continued to push for some type of below cost sales legislation which they believed necessary to have any meaningful legislation addressing their problems in the marketplace. The wholesalers and dealers reached an accord whereby the dealers would support the wholesalers' proposals regarding marketing restrictions in exchange for the wholesalers support of the dealer's proposals on station conversions and unjustified rent increases.<sup>162</sup> They prepared a draft bill which: (1) eliminated the below cost sales prohibition at the refining and wholesale levels and restricted only refiners at retail; (2) eliminated the restriction on refiners selling to commercial accounts at prices less than wholesale; and (3) contained a severability clause intended to reinstate divorcement if the marketing restrictions were declared unconstitutional.<sup>163</sup>

The mini-majors, now in basic accord with the majors, countered with a price discrimination bill which the majors would accept. They, like the majors, refused to consider the demands of the dealers, by arguing that the Petroleum Marketing Practices Act preempted any state action in the area of petroleum franchises. They opposed any below cost sales provisions and suggested that the

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service gasoline pumps were being converted into total self-service facilities, generally in conjunction with the convenience store or mini-convenience store concept. Dealers had traditionally engaged in gasoline sales, tire and battery sales, and auto repairs, with little training or experience in marketing food and convenience items and managing such operations. Consequently, when dealers stations were transformed into convenience stores with self-service gasoline, the dealers often failed to be successful, thereby allowing the franchisor to remove them from the locations and replace them with company personnel. See *supra* note 24 and accompanying text. The Petroleum Marketing Practices Act also addresses negotiation and renegotiation of gasoline franchises, but it does not contain any rent control provisions. 15 U.S.C. § 2801 (1983). Dealers maintain that franchisors had imposed abusive rent increases in Florida, due to their desire to directly operate the more favorable locations leased to dealers. Interview, *supra* note 142.

161. Interview, *supra* note 142.

162. *Id.*

163. *Id.*

Senate Commerce Committee's action operated as clear notice that the legislature deemed such marketing restrictions anti-consumer.<sup>164</sup>

The industry representatives met in late April to exchange and discuss the pertinent provisions of their respective proposals. Representatives from the Florida Petroleum Council, the Florida Petroleum Marketers Association, and the Service Station Dealers Association, as well as representatives from individual refineries attended this meeting.<sup>165</sup> The meeting was not fruitful. The parties seemed further from agreement than ever before. A subsequent series of meetings followed where each group presented a priority list for any new compromise. The majors, for the most part, were uncompromising throughout. However, only a few issues thwarted basic agreement between the wholesalers and mini-majors. Specifically, the mini-majors refused to accept provisions of the wholesaler-dealer draft which would have restricted their award of rebates at the wholesale and retail levels. The wholesalers were adamant that the legislation had to preclude refiners from providing rebates or discounts to their directly-supplied dealers when discounts were not offered to their wholesalers in the same market area. The wholesalers also demanded a severability clause, which provided that the entire Act would become void if any of the provisions of the law were found unconstitutional. The clause further provided that failure of the Act would reinstate Florida's divorce-law. This was unacceptable to the mini-majors; the dealer demands also continued to be unacceptable.<sup>166</sup>

With none of the parties willing to yield, the majors and the mini-majors decided to test the sentiment of the House Commerce Committee, rather than reaching an accord with the wholesalers and dealers. Representative Burnsed was informed of the parties' failure to reach an accord. The Commerce Committee staff was instructed to draft an amendment to the repealer bill for consideration at the next Commerce Committee meeting.<sup>167</sup>

On May 7, the House Commerce Committee hearing room was packed with representatives from all interested groups, as well as representatives of the press.<sup>168</sup> As expected, several of the majors

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164. *Id.*

165. *Id.*

166. *Id.*

167. Memorandum to Interested Parties from Rep. Burnsed, Chairman, Fla. H.R., Comm. on Com. (May 2, 1985).

168. Fla. H.R., Comm. on Com., tape recording of proceedings (May 7, 1985) (on file



vehemently attacked the amendment rather than seeking outright repeal of the divorcement law. An attempt was made to eliminate the restrictions on refiner rebates, but the Committee defeated the attempt overwhelmingly. The wholesalers and dealers supported the Committee staff draft. The mini-majors, sensing the tremendous Committee support for the staff amendment, also supported it. The Committee unanimously passed the amendment.<sup>169</sup>

As a result of the House Commerce Committee vote, momentum seemed to swing in favor of the wholesalers and dealers. Even though the Senate Commerce Committee had indicated a preference for outright repeal of the divorcement statute,<sup>170</sup> a repeal could only occur if both the Senate and House concurred. The House Commerce Committee action was a strong indication that the House favored legislation which would provide some relief to wholesalers and dealers in exchange for the repeal of the divorcement law.

Again, the interested parties had their own biased perceptions of the status of the matter. The majors probably felt that they could persuade the Senate to pass Senator Fox's repealer bill and then persuade the House to accept that bill, or a substantially watered down substitute for the House Commerce Committee bill. The mini-majors felt they could not lose since they felt confident that legislation was certain to pass and that whatever bill did pass would include repeal of divorcement. The wholesalers were obviously buoyed by the House Commerce Committee action, but now had to gain Senate acceptance of the new draft which contained some provisions that were still unacceptable to many senators.

Senator Fox called a meeting of all interested parties within a matter of days following the House Commerce Committee action.<sup>171</sup> At that meeting, she indicated her willingness to support the House Commerce Committee amendment on the floor of the Senate as a substitute to her repealer bill.<sup>172</sup> Rumors continued that the majors intended an intensive lobbying effort in the Senate to persuade senators not to accept the House Commerce Committee's product. In the meantime, on May 20, the House passed the Commerce Committee substitute by a vote of 114 to 0.<sup>173</sup> Three

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with committee).

169. *Id.*

170. Fla. SB 237 (1985).

171. Interview, *supra* note 142.

172. *Id.*

173. FLA. H.R. JOUR. 446-47 (Reg. Sess. 1985).

days later, Senator Fox spoke in favor of the bill when she presented it on the floor of the Senate. The Senate passed the legislation by a vote of 35-0.<sup>174</sup> On June 5, the bill was signed into law by Governor Graham.<sup>175</sup> The industry battle over this legislation came to an end.

The legislative findings and intent provide:

The Legislature finds that fair and healthy competition in the marketing of motor fuel provides maximum benefits to consumers in Florida, and that certain marketing practices which impair such competition are contrary to the public interest. Predatory practices and, under certain conditions, discriminatory practices, are unfair trade practices and restraints which adversely affect motor fuel competition. It is the intent of the Legislature to encourage competition and promote the general welfare of Florida citizens by prohibiting such unfair practices.<sup>176</sup>

Whether this law will actually preclude predatory, discriminatory, and unfair trade practices remains to be seen. The legislature had more than just a passing interest in this issue. This is evidenced by a provision which directs the Department of Agriculture and Consumer Services to compile an annual report of complaints of violations of this law for presentation to the Speaker of the House and the President of the Senate. Furthermore, Section 15 directs the Division of Consumer Services to study the operation of this law and its effect on gasoline prices. The Division is to then report its recommendations to the legislature no later than November 1987.<sup>177</sup>

## *B. Summary of Florida's New Legislation*

### *1. Below Cost Sales*

The centerpiece of the new law is section four, the prohibition against refiners selling motor fuel below cost at retail.<sup>178</sup> To understand the operation of this section, it is necessary to consider the alleged abuse. As discussed above, refiners are directly operating more and more retail motor fuel outlets in Florida. Jobbers contend that it is common for refiners to sell motor fuel to their di-

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174. FLA. S. JOUR. 402 (Reg. Sess. May 23, 1985) (Fla. CS for HB 690).

175. Ch. 85-74, 1985 Fla. Laws 429, 434.

176. *Id.* § 2, 1985 Fla. Laws at 429.

177. *Id.* § 15, 1985 Fla. Laws at 433.

178. *Id.* § 4, 1985 Fla. Laws at 433.

rectly-operated stations at prices below those charged to their jobbers and independent dealers. In most cases, and especially with branded motor fuel (Texaco, Mobil, Chevron, Exxon, Amoco), jobbers and independent dealers are required to purchase a minimum quantity of a refiner's motor fuel under a long-term supply contract, to accept the refiner's credit card, to sell only the refiner's fuel, to exhibit the refiner's brand, and to follow the refiner's policies.<sup>179</sup> It is difficult, if not impossible, for a jobber or independent dealer to compete for any length of time with its supplier that sells at retail in the same market at prices less than the supplier sells to the jobber or dealer. If the jobber and the independent dealer do not meet their supplier's lower retail price, they will lose sales and ultimately be forced out of the market. On the other hand, if they meet the refiner's lower price and sell below their cost, substantial losses will eventually force them out of business. Refiners obviously do not operate under the same profit and loss constraints as do wholesalers and dealers. They can subsidize "losses" at their retail outlets through profits earned in production and refining. In the past, refiners have shown substantial losses in their motor fuel marketing operations, which may be indicative of below cost selling.<sup>180</sup> Continued subsidization of their retail marketing losses through upstream production profits to the detriment of the jobbers and dealers suggests predatory conduct by the refiners.

Section four requires refiners to sell at retail, at or above their "cost."<sup>181</sup> Obviously, the refiner's cost of fuel must be more than its production cost. Therefore, the new law requires refiners to compute cost beginning with the refiner's posted terminal price (wholesale price), plus taxes, inspection fees, and freight charges to its retail location.<sup>182</sup> Additionally, the cost attributable to a refiner's labor at a particular retail outlet and a reasonable rental value for the outlet must be included in the cost of motor fuel at a particular outlet.<sup>183</sup> Restricting refiners from below cost sales at retail does not unduly tamper with consumer prices as the market remains totally flexible for nonrefiners to sell below cost. It is fully expected that this will happen from time to time as has been the case in the past with temporary price wars. Although refiners are prohibited from selling below cost, they are permitted to drop their

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179. See *supra* note 24 and accompanying text.

180. See ALLVINE, *supra* note 24, at 63; WILLIAMS, *supra* note 12, at 70.

181. Ch. 85-74, § 4, 1985 Fla. Laws 429, 430.

182. *Id.* § 3(7), 1985 Fla. Laws at 430.

183. *Id.*

prices below cost to meet the equally low price of a competitor selling in the same market area. This means that the refiners' retail outlets are not placed at a competitive disadvantage, only that they are unable to engage in "first strike" predatory pricing.

## 2. Price Discrimination

Section five of the Act attempts to expand the restrictions imposed on price discrimination to preclude refiners from supplying their directly-operated retail outlets with motor fuel at prices lower than prices charged to jobbers or independent dealers competing with those outlets.<sup>184</sup> Section five removes the distinction between an intracompany transfer and a sale, and thereby requires refiners to offer their jobbers or independent dealers the same price as that charged to their directly-operated retail outlets in the same market area.<sup>185</sup>

## 3. Discriminatory Allocation of Fuel

Discriminatory allocations of motor fuel by refiners is addressed in section six.<sup>186</sup> The legislature heard testimony that just as refiners discriminate by way of price, they also discriminate against jobbers and dealers by limiting or allocating the availability of motor fuel to them while fully supplying their own directly-operated outlets.<sup>187</sup> This type of discrimination can be more ruinous than price discrimination or below cost selling since it curtails or removes the jobber's or independent dealer's source of supply from its sole supplier. Thus, with many refiners intent on expanding their directly-operated locations and reducing their jobber or independent dealer locations, a prohibition on discriminatory allocations seems appropriate.

Section six directly addresses the above-described discriminatory practice. A refiner cannot favor its own retail outlets by way of product availability at the expense of its jobbers or independent dealers. Furthermore, a refiner cannot base future product allocations upon one jobber's or dealer's prior usage, unless the refiner

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184. *Id.* § 5, 1985 Fla. Laws at 430.

185. *Id.* § 3(3), defining "sale" to include any transfer of a motor fuel from a person or entity to itself or to an affiliate. Price discrimination under the Robinson-Patman Act requires two independent contemporaneous sales to customers competing in the same market area. Since intracompany transfers by a refiner to its own retail outlet have not been interpreted as sales, the federal law does not reach this obvious discrimination.

186. *Id.* § 6, 1985 Fla. Laws at 431.

187. *See Gasoline Marketing Hearings, supra* note 10, at 268.

applies that same method to all purchasers, including the refiner's own directly-operated outlets.<sup>188</sup>

#### 4. *Coercive Contract Practices*

Section seven addresses the relationship between refiners, jobbers, other suppliers, and independent dealers.<sup>189</sup> Due to the tremendous economic advantage refiners and other suppliers have over independent dealers, the dealers are often coerced into lowering the retail price of their motor fuel. Additionally, dealers claim they are coerced into modifying their contractual arrangements, including station leases and motor fuel supply contracts, particularly with regard to modification of the service station to a convenience retail outlet.<sup>190</sup> Conversion of the station to a convenience retail outlet is usually accompanied by substantial rent increases. The result is most often economic failure of the dealer and, ultimately, loss of the dealer's lease.

In section seven, the legislature specifically prohibits refiners and other suppliers from fixing or maintaining retail motor fuel prices at independent retail outlets and from coercing the purchasers in this regard.<sup>191</sup> While such actions are already prohibited under federal law, this additional state remedy can only help stop such practices. Also, section seven imposes a good faith or reasonable business practice test on supplier-lessors when there is a modification of supply contracts with dealers or when leased premises are materially altered.

#### 5. *Rebates*

Refiner rebate programs were strenuously attacked by the jobbers. They argued that refiners use these programs to favor their directly-supplied dealers and to discriminate against their jobbers and the jobbers' dealers. The most typical rebates mentioned were volume rebates and rent rebates, whereby refiners allowed their directly-supplied dealers substantial discounts which result in these dealers selling motor fuel at a lower price than their competitors.<sup>192</sup> This practice occurs typically in market areas where refiners supplied jobbers without offering rebates. The jobbers were therefore

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188. Ch. 85-74, § 6, 1985 Fla. Laws 429, 431.

189. *Id.* § 7, 1985 Fla. Laws at 431.

190. *See supra* note 24 and accompanying text.

191. Ch. 85-74, § 7, 1985 Fla. Laws 429, 431.

192. *See supra* note 24 and accompanying text.

unable to pass on a rebate to their dealers who, in turn, were unable to compete with the lower prices offered by the refiners' directly-supplied dealers.

Federal law does not prohibit this type of price discrimination because it technically occurs at two different levels of distribution.<sup>193</sup> However, the impact is the same as if the discrimination occurred at the same level of distribution. Section eight of the Motor Fuel Marketing Practices Act addresses this problem. It requires all sellers of motor fuel to provide equal rebates, allowances, or concessions to all purchasers purchasing for resale in the same market area. Wholesalers are required to pass on refiner rebates to their dealers.<sup>194</sup>

### 6. *Enforcement and Penalties*

Section ten provides for public enforcement of the Act.<sup>195</sup> Complaint investigations are conducted by the Department of Agriculture and Consumer Services. The results of these investigations are given to the Department of Legal Affairs, which prosecutes violations. Violators may incur civil penalties of up to \$1 thousand per violation, with each day of noncompliance deemed a separate violation. There is a \$50 thousand cap on the civil penalty. Also, violators may be required to pay the state's legal fees if the court deems it appropriate.<sup>196</sup>

Section eleven authorizes private legal actions for injunctive and declaratory relief as well as damages.<sup>197</sup> A court *may* treble actual damages and must award attorney's fees to a prevailing plaintiff. If the defendant prevails, a court *may* award it attorney's fees.<sup>198</sup>

There is a two-year statute of limitations on prosecutions by the Department of Legal Affairs and a one-year statute of limitations on private actions, except price discrimination actions, which have a two-year limitation period.<sup>199</sup>

Like the federal and state antitrust laws, there is no violation under the Act unless there is an injury to competition.<sup>200</sup> Unlike the antitrust laws, however, injury to competition means injury to

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193. See *supra* notes 54-56 and accompanying text.

194. Ch. 85-74, § 8, 1985 Fla. Laws 429, 431-32.

195. *Id.* § 10, 1985 Fla. Laws at 432.

196. *Id.*

197. *Id.* § 11, 1985 Fla. Laws at 432.

198. *Id.*

199. *Id.* § 12, 1985 Fla. Laws at 431.

200. *Id.* § 4(1), 1985 Fla. Laws at 430.

a single competitor.<sup>201</sup> Thus, the burden of proof required to show a violation and prove damages under this Act should be substantially less than the burden of proof in antitrust cases.

Pursuant to section fifteen, the Division of Consumer Services is to compile a report of all complaints alleging violations of this law and to present it to the Speaker of the House and the President of the Senate no later than January 1 of each year.<sup>202</sup> The Division is also directed to study the operation of this law, to examine in detail its effect on motor fuel prices, and to compare vertically integrated pricing with horizontal distribution pricing. This study and the recommendations of the Division are to be presented to the Speaker and the Senate President no later than November 1987.<sup>203</sup>

Finally, the Florida divorcement law has been repealed, and present or potential actions thereunder are rendered unenforceable by sections thirteen and fourteen of the law.<sup>204</sup>

#### IV. ANALYSIS AND CRITICISM

Florida's Motor Fuel Marketing Practices Act should have a positive effect on both the petroleum industry and the consuming public, thereby increasing overall consumer welfare. Contrary to the views of its critics, the Act is *not* a minimum mark-up law or state sanctioned price-fixing, which could raise prices at the pump or a guarantee by the state that inefficient operators can remain in the gasoline business. Rather, the Act represents a necessary addition to existing federal and state laws prohibiting unfair trade practices. The Act's specific focus on prevalent practices in motor fuel marketing should make the law more effective than the repealed divorcement law. Section eleven of the Act reveals that the legislature intended the Act to eliminate certain unfair practices in order to encourage fair and unfettered competition in the marketing of motor fuel, which in turn should maximize benefits to the consumers of Florida.<sup>205</sup> Although the Act has several shortcomings as a result of the compromise process,<sup>206</sup> it is consistent and harmonious with national trade regulation policy.<sup>207</sup>

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201. *Id.* § 3, 1985 Fla. Laws at 430. "'Competition' is defined as the vying for motor fuel sales between any two sellers in the same market area." *Id.*

202. *Id.* § 15(1), 1985 Fla. Laws at 433.

203. *Id.* § 15(2), 1985 Fla. Laws at 433.

204. *Id.* §§ 13-14, 1985 Fla. Laws at 433.

205. *Id.* § 2, 1985 Fla. Laws at 429.

206. See *supra* notes 146-76 and accompanying text.

207. See *supra* notes 35-40 and accompanying text.

Specifically, the Act will improve the ability of dealers and wholesalers to compete fairly in the market with the refiners. Accordingly, more vigorous competition should benefit Florida's motoring public, both in price and nonprice areas. The prohibition against certain discriminatory practices is the key to giving the dealers and wholesalers competitive parity with the refiners. For example, the Act's discriminatory pricing provision extends to refiners' transfers to their company-operated retail stations.<sup>208</sup> This means that a refiner operating a retail station on one corner cannot supply its own station with gasoline at a price less than that same refiner supplies an independent dealer or jobber operating a station on the opposite corner. This eliminates one of the inherent historical problems with the dual distribution system and closes a loophole currently existing in the federal antitrust laws.

The prohibition against discriminatory rebates also eliminates a serious abuse that has remained unchecked under the antitrust laws.<sup>209</sup> As explained above, many of the major refiners have operated dealer rebate programs in a manner that indirectly discriminates against other retail dealers that sell the refiners' product. Invariably, this places the retail dealer who purchases from a wholesaler at a competitive disadvantage even though the wholesaler purchases from the same refiner. In giving a substantial cash rebate to the directly-supplied dealer, the refiner proportionately lowers that dealer's net price paid for fuel. The Act eliminates this practice and requires refiners to give rebates to all *resellers* (including wholesalers) who compete in the same market.<sup>210</sup> The Act also requires that wholesalers pass the rebates on to their retail dealers in the market, thereby ensuring competitive parity at the retail level.<sup>211</sup> Although refiners have threatened to eliminate dealer rebate programs and other trade credit and trade discounts to wholesalers, it is entirely too speculative at this point to determine whether this threatened action will materialize. Since all refiners do not use dealer rebate programs, those refiners who do cannot eliminate these rebates if they want to keep their dealers competitive unless they lower their dealer prices. A probable result is that the rebate programs will continue but on more equitable terms. Because of the competition between refiners who have rebate programs and those who do not, the rebate provision of the

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208. Ch. 85-74, § 4(1), 1985 Fla. Laws 429, 430.

209. See *O'Byrne v. Cheker Oil Co.*, 727 F.2d 159,164 (7th Cir. 1984).

210. See *supra* notes 192-94 and accompanying text.

211. *Id.*



Act should not increase prices at the pump.

In the urban markets of the state, the prohibition against discriminatory allocations will permit dealers and wholesalers to grow with the market. This will prevent refiners with company-operated retail units from squeezing out competing dealers and wholesalers that purchase from these refiners. This, in turn, should increase competition in the urban markets between refiners on the one hand and independent dealers and wholesalers on the other.

There are many who believe that the Act's prohibition of below cost sales does not go far enough. Since the Act only limits sales made below cost by refiners operating their own units at retail, some are concerned that this will not be effective to prevent the below cost pricing prevalent in the market. This may or may not be the case, but the intent of this provision was not to prevent below cost pricing, per se, but only to prevent below cost pricing that is predatory in nature and not the result of vigorous competition. By limiting the prohibition against below cost sales to refiners, the legislature recognized that only this group can subsidize its losses at the retail level from upstream profits earned in the production and refining of crude oil. The Act operates as a measured response aimed at the group with the greatest financial ability to engage in predatory pricing. It also stops far short of setting minimum retail price levels, which could result in higher prices.

The Act's definition of "refiner cost" is somewhere between a marginal and average variable cost definition.<sup>212</sup> This does not force refiners to keep their prices at or above average total cost, as do the Alabama and the Georgia statutes. More importantly, however, the exception which permits the refiner to sell below cost to meet competition allows the refiners to remain competitive and gives consumers the benefit of price wars. The refiner simply cannot lead the market down. One of the final problems in measuring refiner cost, however, is how to determine a reasonable rental value of the retail outlet and to apportion that value to the part of the premises attributable to the retail sale of motor fuel. This could be difficult in the instances of convenience stores that sell gasoline.

One of the major differences between the Act and the existing standards under both federal and state antitrust laws is the element of injury to competition. Florida's Act does not require a specific showing of intent to injure competition. Rather, the act of injuring competition itself provides the presumed intent to

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212. See *supra* note 52.

accomplish the result.<sup>213</sup> Hence, the unfair practices delineated in the Act are unlawful only when the *effect* is to injure competition. Moreover, "competition" is defined as competition between two persons, and means that an aggrieved plaintiff can satisfy the "injury to competition" element by showing injury to himself, as a single competitor.<sup>214</sup> This should remove a major proof obstacle and eliminate one of the impediments to private enforcement actions that exist under federal antitrust laws.

A potential criticism of the Act is that it will promote expensive and unnecessary litigation. This admittedly undesirable effect is checked in two ways. First, the legislature provided that isolated and inadvertent incidences shall not be a violation of the Act.<sup>215</sup> This should keep the crybabies out of court. Further, the Act gives courts discretion to award attorney's fees to a prevailing defendant. Although the Act does not provide specific guidelines, an award should be made where there is a lack of a substantial basis for bringing the action.<sup>216</sup> This should have a chilling effect on frivolous actions.

Overall, the enforcement scheme is intended to promote voluntary compliance. It is doubtful that the Department of Legal Affairs will actively enforce the Act except in the most egregious circumstances. The potential risk of substantial civil fines should also prove a deterrent, but the primary enforcement tool will be private treble damage actions. This too will have a strong deterrent effect. Allowing plaintiffs to litigate potential claims in state court should lessen the expense and delay of litigating under the federal antitrust laws.

With respect to the dealer provisions, there was much sentiment on behalf of the dealer organizations and others that the provisions of the Act stop short of correcting the main evils identified by the dealers. Although there is some merit to this claim, the Act does give the dealers some relief.<sup>217</sup> Although the federal antitrust laws currently prevent resale price maintenance through a supplier's use of coercive tactics,<sup>218</sup> the Act's prohibition of this practice not only provides an alternative state remedy to the dealer, but also sends a

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213. See *supra* notes 200-01 and accompanying text.

214. *Id.*

215. Ch. 85-74, § 4(1), 1985 Fla. Laws 429, 430.

216. *Id.* § 11(4), 1985 Fla. Laws at 433.

217. See *id.*, § 7, 1985 Fla. Laws at 431.

218. *Arnott v. American Oil Co.*, 609 F.2d 873 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

clear message to refiners that such practices will not be tolerated in Florida. Further, the dealers received additional relief from unreasonable modifications of their contracts and unreasonable rent increases and from forced conversions of leased premises. This gives the dealer some leverage in negotiating its contracts with refiners and forces refiners to justify decisions affecting the manner in which the leased premises are operated.

In sum, the true impact of the Act will not immediately be known. It is too soon for public and private enforcement actions to have been concluded and, therefore, to be assessed as to their effectiveness. Public enforcement by the Department of Agriculture must await the Department's education of its field investigators about the provisions of the Act. Finally, it is too early to measure the refiner's response to several key provisions of the Act, especially those addressing below cost sales and unlawful rebates. The Act should still go a long way toward alleviating the harm occurring in the petroleum marketplace in Florida today.