



Antitrust ADVISORY ■

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Below-Cost Pricing Can Cost You

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During the COVID-19 pandemic, retailers were highly attuned to price-gouging laws the emergency triggered. But as the world has returned to its new normal, some retailers have faced scrutiny for pricing goods *below* cost.

Below-cost pricing is generally defined as setting prices at less than the seller's cost of doing business. Below-cost pricing is typically addressed at the state level; there is no federal below-cost pricing statute (though below-cost pricing can constitute an antitrust violation under the Sherman Act, which prohibits, among other things, actual or attempted monopolization through "predatory pricing"). Most states have some type of below-cost-pricing law, though enforcement varies widely. Many states' statutes apply broadly to all retail sales, but several states have carved out below-cost-pricing statutes for specific items, such as dairy, eggs, alcohol, gasoline, and tobacco.

Enforcement of Florida's motor fuel below-cost-pricing statute is currently playing out in front of Florida's Fourth District Court of Appeal. The appeal comes after Sun Gas Marketing and Petroleum LLC filed suit against its close-in-proximity motor fuel competitor BJ's Wholesale Club Inc. Sun Gas has alleged that BJ's is engaged in an ongoing violation of the Florida Motor Fuel Marketing Practices Act's (MFMPA) prohibition on predatory below-cost pricing.

In recent years, other retailers (like Buc-ee's, the beloved Texas-based convenience store chain) have faced similar scrutiny for alleged below-cost pricing of motor fuel.

Sun Gas vs. BJ's Wholesale Below-Cost Motor Fuel Pricing Showdown

In late November 2019, Sun Gas filed suit against BJ's Wholesale Club and sought injunctive relief and damages. Sun Gas alleges that BJ's continues to violate the MFMPA's prohibition on predatory below-cost pricing statutes.

The MFMPA regulates the sale of motor fuel at nearly every level, including sales by refiners, wholesalers, nonrefiners, and dealers. The MFMPA authorizes Florida's Department of Agriculture and Consumer Services to bring a civil action seeking to impose civil penalties on violators and all others to bring a civil action seeking declaratory relief, injunctive relief, and actual damages.

The Sun Gas complaint alleged that BJ's motor fuel price was the lowest in the market and well below cost, in violation of the MFMPA. Sun Gas alleged that it had been documenting BJ's below-cost sales for months, and given the continuing nature of the violation, Sun Gas claims that it was clear that BJ's below-cost pricing was intentional and that there was no indication that BJ's would cease violating Florida law without judicial intervention.

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The trial court granted summary judgment in favor of BJ's, finding that BJ's had to sell gas to the public to qualify as a "retail outlet" under the MFMPA. Because BJ's only sells gas to its members, the trial court found that it does not meet the definition of a retail outlet under the Act. Sun Gas appealed, arguing that the trial court misapplied the MFMPA and that the application was inconsistent with Florida's legislative intent. The Florida Fourth District Court of Appeal heard oral argument from Sun Gas and BJ's earlier last month and is expected to provide its ruling in 2024.

Other retailers have faced scrutiny for purported predatory pricing in recent years. For example, in early 2019, Oasis Travel Center LLC in Alabama sued Buc-ee's, alleging that its Alabama store sold gasoline at an unfairly cheap rate that is anticompetitive and harmful to other gas stations in the region. In that suit, Oasis Travel Center alleged that Buc-ee's violated Alabama's Motor Fuel Marketing Act by selling gas at less than \$2 a gallon as a way to injure competition. Oasis sought an injunction against Buc-ee's.

Key Takeaways

Particularly as we enter the holidays and door-buster deals, businesses should be mindful of selling goods below cost because they may face below-cost-pricing enforcement actions or lawsuits. Large retailers should be particularly thoughtful because the effect of injuring competition may be exacerbated by the lingering effects of the pandemic on small businesses. Below-cost-pricing statutes vary by state, with important distinctions in required elements and potential defenses. Businesses that believe they are victims of below-cost pricing by competitors, or that are selling or intend to sell specific goods at or below cost, would be wise to consult with counsel experienced in this area.

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