Pricing at the Pump: The Impact of Recent Litigation on the Interpretation of Below Cost Motor Fuel Statutes

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INTRODUCTION

Several state legislatures have enacted below cost motor fuel statutes, which prevent the below cost sale of gasoline where the intent or effect is to injure competition.¹ A below cost sale of gasoline occurs when a customer purchases motor fuel at a price that is less than the cost of the fuel to the retailer.² Recent litigation has addressed practices within the gasoline industry that may violate these below cost statutes.³ One such practice is offering a rebate to certain customers because they have paid a membership fee or purchased a gift card from a store that has an agreement with the fuel retailer.⁴ The practice of using these membership fees and gift cards is a result of hypermarkets entering into the marketplace.⁵ A hypermarket is “[a] very large commercial establishment that is a combination of a department store and a supermarket.”⁶ Another practice courts have not conclusively addressed is the use of co-branded credit cards to offer a rebate on future motor fuel purchases for cardholders.⁷

⁵ See, e.g., Campbell & Sons Oil Co., 2001 U.S. Dist. LEXIS 25127, at * 4-5.
Recent cases have also called on the courts to clarify the definitions and provisions in these statutes. The courts in these cases have attempted to resolve the difficulty in defining the "geographic market area" for the purposes of a "meeting competition" defense. The courts have also demonstrated when a defendant may assert meeting competition as an affirmative defense and have clarified how the meeting competition defense is to be used in a "rising wholesale price scenario."

This Note will address the issues facing the gasoline industry in light of recent litigation regarding below cost motor fuel statutes. Part I will explain the current below cost legislation regarding motor fuel sales. While there are federal antitrust statutes that apply to below cost fuel sales, states have enacted fuel-specific statutes that have a lower burden of proof and provide a retailer with a remedy for violations. Part II will discuss the most common components of state below cost motor fuel statutes and address the different approaches these statutes take in defining cost to the retailer. It will also describe what it takes to be in violation of the statutes as well as some of the situations where a retailer is exempt from violations.

Part III of this Note will then examine the stance courts have taken on rebates, membership fees, and gift cards that result in below cost sales. Although several courts have held that gift cards which result in below cost sales violate below cost motor fuel statutes, these same courts have suggested that credit card rebates offered through co-branded credit cards do not violate those statutes. Courts are also hesitant to allow retailers to include membership fees in the


9. See, e.g., Speedway/SuperAmerica, L.L.C., 782 So. 2d at 256.

10. See, e.g., Speedway/SuperAmerica, L.L.C., 782 So. 2d 255; Young Oil Co., 757 So. 2d at 382-83; R.L. Jordan Oil Co., 572 S.E.2d at 290-91. For an explanation of a "rising wholesale price scenario," see infra Part IV.A.

11. See infra Part I.

12. See infra Part I.

13. See infra Part II.

14. See infra Part II.

15. See infra Part III.

16. See infra Parts III.A, C.
calculation of cost for purposes of below cost statutes. Finally, Part IV will address the problems associated with interpreting these statutes, such as the difficulty in defining retailers' geographic market and when courts will allow a meeting competition defense. Courts have recently attempted to define these terms and clarify when fuel retailers may assert a meeting competition defense and who may be considered a "competitor" within the meaning of the statutes.

I. CURRENT BELOW COST LAWS

There are both federal and state statutes regarding the below cost sale of fuel in the United States. The federal statutes addressing general antitrust issues include the Sherman Act, the Clayton Act, and the Robinson-Patman Act. Congress did not specifically direct these acts toward the sale of motor fuels; rather, they apply generally to predatory pricing in all industries. The acts "prohibit the predatory practice of deliberately selling below cost to discipline a competitor, either to drive the competitor out of business or to raise prices to a level that will enable the predator to recover its losses and, in the long run, earn additional profits." However, they do not usually provide an adequate remedy for injured competitors. One court explained:

> [E]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal

17. See infra Part III.B.
18. See infra Part IV.
19. See infra Part IV.
24. See id. at 225.
antitrust laws; those laws do not create a federal law of unfair competition or “purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.”

This places an extremely high burden of proof on plaintiffs trying to prove unfair competition under these acts.

Because federal antitrust laws may not provide a remedy and violations are difficult to prove under those laws, a majority of states have enacted below cost statutes to promote fair competition within the state. Many states have also enacted fuel-specific statutes to provide a remedy for unfair competition within the petroleum industry. States have passed these below cost laws to promote the public interest. As the Alabama Motor Fuel Marketing Act explains:

It is hereby declared that marketing of motor fuel in Alabama is affected with the public interest. It is hereby declared to be the legislative intent to encourage fair and honest competition, and to safeguard the public against creation of monopolies or unfair methods of competition, in transactions involving the sale of, or offer to sell, or inducement to sell motor fuel in the wholesale and retail trades in this state. It is further declared that the advertising, offering for sale, or sale of motor fuel below cost or at a cost lower than charged other persons on the same marketing level with the intent of injuring competitors or destroying or substantially lessening competition is an unfair and deceptive trade practice. The policy of the state is to promote the general welfare through the prohibition of such sales. The purpose of the Motor Fuel Marketing Act is to carry out that policy in the public

25. Id. (quoting Hunt v. Crumboch, 325 U.S. 821, 826 (1945)).
27. See id.
28. See id.
interest, providing for exceptions under stated circumstances, providing for enforcement and providing penalties.\textsuperscript{30}

The Wisconsin Legislature enacted its statute, which covers the below cost sale of motor fuel as well as other items, due to concern over the broader reaching effects of predatory pricing.\textsuperscript{31} The policy for the Wisconsin Unfair Sales Act is as follows:

The practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce. Such practice causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and diverts business from dealers who maintain a fair price policy. Bankruptcies among merchants who fail because of the competition of those who use such methods result in unemployment, disruption of leases, and nonpayment of taxes and loans, and contribute to an inevitable train of undesirable consequences, including economic depression.\textsuperscript{32}

While many states have passed below cost legislation specifically regarding the sale of motor fuels, some states have refrained from doing so.\textsuperscript{33} In states with below cost motor fuel laws, special interest groups continuously lobby against one another regarding these laws.\textsuperscript{34} Those groups lobbying against below cost legislation argue that below cost laws do not keep gasoline prices down for the consumer, and some scholars have stated that such laws in fact increase prices for consumers.\textsuperscript{35}

\textsuperscript{30} Id.
\textsuperscript{31} Unfair Sales Act, Wis. Stat. § 100.30 (2002).
\textsuperscript{32} Id.
\textsuperscript{35} Id. Philip Sorenson, a Florida State University professor of economics, stated: “Studies conclude that [below cost] laws raise gas prices . . . These market protections cost Florida consumers about $150-
Recently, the Virginia House of Representatives defeated a bill that would have prohibited the below cost sale of motor fuels. Proponents of the bill included petroleum marketers within the state injured by other “regional high-volume retailers” who were able to offset lost profits from below cost fuel sales through operating more profitable stores in other markets. A representative for one of these marketers stated that “[i]t’s very difficult legislation, and it failed because of the misconception among the legislature that the bill would raise gas prices and limit free trade.” He went on to say that “[s]tudies show that it would increase competition, thus reducing the consumer’s cost per gallon of gasoline. Smaller independent operators basically have to be out of business before they can pursue some avenue of relief.” Those opposing the bill countered these arguments with concerns that passing the bill would send “a terrible signal” to business owners in Virginia and noted that the Federal Trade Commission called the bill “potentially anti-competitive.”

II. COMMON PROVISIONS OF BELOW COST STATUTES

State below cost motor fuel statutes generally have similar provisions, which may include prohibited activities, a definition of cost, exceptions from violations, and enforcement and remedies. Cost, as defined in these statutes, typically includes the actual cost of the fuel less any allowances or rebates, the freight costs to ship the fuel to the retailer, inspection fees, and applicable taxes. Many

million a year.” Id. at 3. However, the executive director of the Petroleum Marketers defended the law: “[T]he 1985 law has kept gas prices in Florida about 40-cents-a-gallon cheaper than the price in other states.” Id. at 2.
37. Id.
38. Id.
39. Id.
40. Id.
41. See Perkins et al., supra note 26 (explaining these and other provisions).
states also include the cost of doing business in the definition of cost so that the retailer must include overhead expenses.\footnote{See, e.g., Alabama Motor Fuel Marketing Act, ALA. CODE § 8-22-4; Motor Fuel Marketing Practices Act, FLA. STAT. ch. 526.301-309.} The required overhead expenses differ between statutes, but some examples include rental costs of the store, depreciation, and labor costs.\footnote{See, e.g., Alabama Motor Fuel Marketing Act, ALA. CODE § 8-22-4; Motor Fuel Marketing Practices Act, FLA. STAT. ch. 526.301-309 (2003).} Some statutes allow retailers to determine their cost from the cost several days prior to the date of the sale, which may keep retailers from violating the statute in a rising market.\footnote{See, e.g., Alabama Motor Fuel Marketing Act, ALA. CODE § 8-22-4(16) (2003).} For example, the Alabama statute allows the retailer to either use the lower of the invoice price of the fuel or the "replacement cost . . . within five days prior to the date of sale."\footnote{Id.} Similarly, the Wisconsin Unfair Sales Act allows a retailer to use "the invoice cost of the motor vehicle fuel . . . within 10 days prior to the date of sale."\footnote{Unfair Sales Act, WIS. STAT. § 100.30(2)(a) (2002).}

While many state statutes require retailers to include the cost of doing business in the calculation of its fuel cost, other states do not require retailers to include these overhead costs.\footnote{See, e.g., MD. CODE ANN., BUSINESS REGULATION § 10-301 (2002). Maryland defines cost as the total "of the most recent Oil Price Information Service (OPIS) average reseller rack cost . . . and the freight charges and all applicable federal, state, and local taxes not included in the invoice cost." Id.} Wisconsin, for example, actually sets a percentage that retailers must include in the fuel cost calculation for the cost of doing business, stating that retailers must add "a markup of 9.18% . . . to cover a proportionate part of the cost of doing business."\footnote{Unfair Sales Act, WIS. STAT. § 100.30.} However, states that require retailers to include their exact cost of doing business in their cost calculation allow costs to be different between retailers.\footnote{See Young Oil Co. v. RaceTrac Petroleum, Inc., 757 So. 2d 380, 386 ( Ala. 1999).} Thus, retailers may be able to decrease their posted prices if they are able to run more efficiently than other retailers without being in violation of below cost statutes.\footnote{See id.} Retailers can take advantage of their lower cost of doing business because, as the Supreme Court of Alabama stated

\begin{itemize}
\item Id.
\item Unfair Sales Act, WIS. STAT. § 100.30(2)(a) (2002).
\item See, e.g., MD. CODE ANN., BUSINESS REGULATION § 10-301 (2002). Maryland defines cost as the total "of the most recent Oil Price Information Service (OPIS) average reseller rack cost . . . and the freight charges and all applicable federal, state, and local taxes not included in the invoice cost." Id.
\item Unfair Sales Act, WIS. STAT. § 100.30.
\item See Young Oil Co. v. RaceTrac Petroleum, Inc., 757 So. 2d 380, 386 ( Ala. 1999).
\item See id.
\end{itemize}
in *Young Oil Co. v. RaceTrac Petroleum, Inc.*,\(^{52}\) "to the extent that [a defendant] is more efficient and can lower the cost of gas, these lower costs can be translated into lower pump prices . . . without violating the [below cost statute]."\(^{53}\)

Some statutes require that retailers possess the intent to injure competition for courts to find them in violation of below cost laws.\(^{54}\) However, most states with below cost fuel statutes will find a retailer in violation of the statute when their actions merely have the effect of injuring competition.\(^{55}\) For example, the Massachusetts below cost fuel statute requires an "intent to injure competitors" before a retailer can be in violation.\(^{56}\) Conversely, the Alabama Motor Fuel Marketing Act prohibits the below cost sale of gasoline "where the effect is to injure competition."\(^{57}\)

The Wisconsin below cost statute actually prohibits both the intent to injure competition and the effect of injuring competition.\(^{58}\) In *Gross v. Woodman's Food Market, Inc.*,\(^{59}\) the Wisconsin Court of Appeals stated that these terms plainly have different meanings.\(^{60}\) The court stated that "[t]he common meaning of 'intent' is 'purpose' and the common meaning of 'effect' is 'result.'"\(^{61}\) The Wisconsin statute prohibits a sale that has "the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor."\(^{62}\) The court in *Gross* concluded that the plain meaning of the statute, therefore, is that it prohibits sales at less than

\(^{52}\) *Id.*

\(^{53}\) *Id.*

\(^{54}\) *See, e.g.,* MASS. GEN. LAWS ch. 94, § 295P (1998).

\(^{55}\) *See, e.g.,* Alabama Motor Fuel Marketing Act, ALA. CODE § 8-22 (2003); *see also* Perkins et al., *supra* note 26 (listing states that require an intent to injure competition for a violation of below cost fuel statutes and states that require only an effect to injure competition).


\(^{58}\) Unfair Sales Act, WIS. STAT. § 100.30 (2002).

\(^{59}\) 655 N.W.2d 718, 736-37 (Wis. Ct. App. 2002).

\(^{60}\) *See id.* at 736-37.

\(^{61}\) *Id.* (finding that, despite the defendant's lack of advertising, the defendant's actions still injured the plaintiff because the plaintiff lost profits as a result of matching the defendant's below cost prices).

\(^{62}\) Unfair Sales Act, WIS. STAT. § 100.30(3).
satisfactory cost if either the defendant had an intent or the sale had an effect that the statute proscribes.\textsuperscript{63}

Most below cost statutes allow exemptions from liability under certain circumstances.\textsuperscript{64} These circumstances commonly include clearance sales of motor fuel when retailers plan to discontinue the sale of that fuel, business liquidation sales, court ordered sales, and sales for a grand opening or reopening of a retail outlet.\textsuperscript{65} Some states may also exempt retailers from a statutory violation for “an isolated, inadvertent incident” or for the sale of imperfect fuel.\textsuperscript{66}

Most statutes also provide a “meeting competition” defense for retailers selling at below cost.\textsuperscript{67} Courts generally limit the meeting competition defense to meeting prices of competitors within a “geographic market area.”\textsuperscript{68} In Wisconsin, the below cost statute includes a meeting competition defense.\textsuperscript{69} However, the statute imposes an additional requirement that the retailer asserting this defense notify the Department of Agriculture, Trade and Consumer Protection “of the lower price before the close of business on the day on which the price was lowered.”\textsuperscript{70} Failure to comply with the notification requirement “creates a rebuttable presumption that the

\begin{footnotesize}
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\item \textsuperscript{63} Gross, 655 N.W.2d at 737.
\item \textsuperscript{67} Motor Fuel Marketing Practices Act, FLA. STAT. ch. 526.304 (2003). The Florida below cost statute describes the meeting competition defense as “a nonrefiner’s sale below nonrefiner cost made in good faith to meet an equally low retail price of a competitor selling motor fuel of like grade in the same relevant geographic market which can be used in the same motor vehicle.” \textit{Id.} See infra Part IV for examples of how retailers use the “meeting competition” defense. See also Perkins et al., \textit{supra} note 26, at 240 for a further explanation of when a retailer may use this defense.
\item \textsuperscript{68} See, e.g., Motor Fuel Marketing Practices Act, FLA. STAT. ch. 526.304 (2003) (stating that a retailer may make a sale “below nonrefiner cost made in good faith to meet an equally low price of a competitor . . . in the same relevant geographic market”).
\item \textsuperscript{69} Unfair Sales Act, WIS. STAT. § 100.30 (2002).
\item \textsuperscript{70} \textit{Id.}
\end{itemize}
\end{footnotesize}
retailer . . . did not lower the price to meet the existing price of a competitor.”

III. RECENT LITIGATION INVOLVING BELOW COST STATUTES AND REBATES

Recent litigation has required courts to interpret below cost statutes to determine whether relatively new practices in the gasoline industry violate below cost laws.72 Many gasoline retailers have implemented rebate or gift card programs, leaving the courts to determine if such programs violate below cost statutes.73 Additionally, some retailers now charge membership fees to purchase fuel as well as non-fuel items from their stores, and these retailers argue that courts should consider these membership fees in determining the retail cost of their fuel.74

A. Gift Cards

In Campbell & Sons Oil Co. v. Murphy Oil USA, Inc.,75 an Alabama court held that the gift card offered to Murphy customers who also shopped at Wal-Mart violated the Alabama Motor Fuel Marketing Act when the use of these gift cards resulted in the customer purchasing fuel at below cost prices.76 Wal-Mart and Murphy entered into an agreement in 1998 that allowed Murphy to sell gas at Wal-Mart SuperCenter locations in several southeastern states.77 In exchange for allowing Murphy to supply the gasoline to Wal-Mart customers, Murphy agreed to give Wal-Mart customers who bought a gift card inside the SuperCenter a three cent rebate on

71. Id.
74. See Home Oil Co., 252 F. Supp. 2d at 1314.
76. See id. at *38-44.
77. Id. at *4-5.
he each gallon of gasoline purchased. The agreement between the parties stipulated that, in states where below cost fuel sales were illegal, the discounted price was not to be below the cost of the gasoline to the retailer.

Despite this stipulation in the agreement, Murphy repeatedly sold its gasoline at below cost prices. The below cost sales resulted from the rebate given to Wal-Mart customers and from Murphy’s failure to include an adequate cost of doing business when calculating the price of fuel. The court determined that Murphy had not properly calculated its cost because it had not used a realistic figure to represent its cost of doing business. Based on these incorrect cost calculations, the court discovered that Murphy had still sold its gas below cost without justification for doing so; the court determined that none of Murphy’s competitors were selling at such a low price. The court found that Murphy had “knowingly lowered its price for regular, unleaded gasoline . . . and that it did so with the intent of solidifying its competitive position in relation to [plaintiff’s station].” Furthermore, the court held that Murphy was “required to set both its regular and Gift Card prices in accordance with state below-cost pricing statutes.” The court permanently enjoined Murphy from selling its gas at a price lower than the cost to the retailer, which included a prohibition on allowing customers to use a gift card to receive a discounted price that was below the fuel cost. In issuing a permanent injunction prohibiting below cost sales, the court looked at the possibility of future harm to other retailers and the public interest.

78. Id. at *9-10.
79. Id.
80. See id. at *21-28.
82. Id.
83. Id. at *37-38. Murphy’s Manager of Pricing and Non-Fuel Programs testified that the store manager conducted a market survey of gas prices in the area each day, and they determined the price for the station in question based on the prices from the survey of competitors’ prices. Id. at *36-37.
84. Id. at *43.
85. Id. at *39-40.
87. See id. at *44-47.
B. Membership Fees

In the 2002 Alabama case of Home Oil Co. v. Sam's East, Inc., a Sam's Club rebate offered to customers paying a membership fee received a similar fate as the gift card in Campbell & Sons Oil Co. In Home Oil Co., Sam's allegedly sold below cost fuel to members of its club in Dothan, Alabama. Sam's argued that the court should include the membership fees charged to its customers when calculating the price per gallon charged for fuel. Further, it offered a formula to determine what the cost would be when including the membership fees. Sam's based its argument on the "combined sale" provision of the Alabama Motor Fuel Marketing Act, which provides the following:

In all advertisements, offers for sale or sales involving two or more items, at least one of which items is motor fuel, at a combined price, and in all advertisements, offers of sale, or sales, involving the giving of any gift or concession of any kind whatsoever (whether it be coupons or otherwise), the wholesaler's or retailer's combined selling price shall not be below the cost to the wholesaler or the cost to the retailer, respectively, of the total of all articles, products, commodities, gifts, and concessions included in such transactions, except that if any such articles, products, commodities, gifts, or concessions, shall not be motor fuel, the basic cost thereof shall be determined in like manner as provided in subdivision (14) of Section 8-22-4.

The District Court for the Middle District of Alabama rejected this argument, stating that the combined sale statute did not apply in this

89. Id. at 1259.
90. Id. at 1251-52.
91. Id. at 1240.
92. Id. at 1240-41.
93. Id. at 1240 (quoting the Alabama Motor Fuel Marketing Act, ALA. CODE § 8-22-10 (2003)).
situation.\textsuperscript{94} The court explained that the purchase of a membership and the later purchase of gasoline were completely separate transactions for the purpose of the statute.\textsuperscript{95} The court looked to the legislative findings of the statute to determine that the legislature did not intend to allow this type of transaction; the findings specifically stated:

Unfair competition in the marketing of motor fuel occurs whenever costs associated with the marketing of motor fuel are recovered from other operations, allowing the refined motor fuel to be sold at subsidized prices . . . . Such subsidies most commonly occur . . . where a business uses profits from nonmotor fuel sales to cover losses from below-cost selling of motor fuel.\textsuperscript{96}

The District Court for the Western District of Oklahoma in \textit{Star Fuel Marts, L.L.C. v. Murphy Oil USA, Inc.}\textsuperscript{97} came closer than the court in \textit{Home Oil Co.} to allowing the defendant to include membership fees in the evaluation of pricing practices.\textsuperscript{98} The plaintiff in \textit{Star Fuel Marts} alleged that Sam’s Club violated the below cost laws, but Sam’s countered with an argument similar to the one it asserted in \textit{Home Oil Co.}\textsuperscript{99} The plaintiff owned several gas stations in the Oklahoma City area and accused Sam’s of selling fuel below cost at three different stores in the area.\textsuperscript{100} The below cost sales were attributable in part to the five cent per gallon discount offered to Sam’s members.\textsuperscript{101} Sam’s argued that the court should include the membership fees charged to its customers in the calculation of cost as

\begin{itemize}
  \item \textsuperscript{94} \textit{Home Oil Co.}, 199 F. Supp. 2d at 1241.
  \item \textsuperscript{95} \textit{Id.}
  \item \textsuperscript{96} \textit{Id.}
  \item \textsuperscript{98} See \textit{id.} at \textsuperscript{*}5.
  \item \textsuperscript{99} \textit{Id.} at \textsuperscript{*}4.
  \item \textsuperscript{100} \textit{Id.} at \textsuperscript{*}1-2.
  \item \textsuperscript{101} \textit{Id.} at \textsuperscript{*}2.
\end{itemize}
a negative expense. The fees charged to each member ranged from $30 to $100 per year, depending on the type of membership.

The court in *Star Fuel Marts* said that "[membership] fees certainly can, and, to some extent, should, make a difference in the court's evaluation of Sam's gasoline pricing practices." However, the court noted that the membership fees did not reduce fixed costs such as rent, utilities, and labor costs for the defendant. Likewise, the court said that it would be difficult to determine the amount of membership fees that it should allocate to the operations of the gasoline portion of the store because some members might not buy any of their gas at Sam's while other members might buy all of their gas there.

The case did not require the court to conclusively rule on whether or not it should allow inclusion of membership fees in operating expenses, however, because Sam's was still in violation of the below cost statute even with the membership fees included. The Oklahoma Unfair Sales Act required that, absent a showing of "proof of lower costs of operation," retailers must include a six percent markup to account for the cost of doing business. The court found that Sam's had not allocated a realistic figure for operating costs to the gasoline facility. The court concluded that Sam's used below cost sales of gasoline to bring customers into the store, which satisfied the intent to injure competition as defined by the Oklahoma Unfair Sales Act. The court held that the plaintiff had satisfied the requirements of the Act and had suffered irreparable harm; thus, injunctive relief was proper. The court noted that the grant of a preliminary injunction merely forced Sam's to comply with the Act

102. *Id.* at *4.*
104. *Id.* at *5.*
105. *Id.* at *4.*
106. *Id.*
107. *Id.* at *5.*
108. *Id.* at *3.*
110. *Id.* at *12.*
111. *Id.* at *14.*
but did not "preclude Sam’s from undertaking a course of conduct which it would otherwise be free to pursue."\textsuperscript{112}

C. Credit Card Rebates

While courts have held that gift cards may result in violation of below cost statutes, the court in \textit{Star Fuel Marts} suggested that rebates offered through co-branded credit cards, such as the Shell Citibank MasterCard, did not violate the law.\textsuperscript{113} The Shell Citibank MasterCard gives purchasers an incentive to use the credit card at Shell stations by offering a five percent rebate on all Shell gas purchases and a one percent rebate on all other purchases.\textsuperscript{114} The credit card company credits the rebates to future purchases of Shell gasoline on the cardholder’s statement.\textsuperscript{115} Similarly, the First USA Platinum BP Visa Card gives its cardholders a three percent rebate on all BP gasoline purchases and a one percent rebate on all other purchases that will be credited toward future BP gasoline purchases.\textsuperscript{116} The credit card company issues the rebates in $20 increments in the form of BP Cash that is redeemable at BP and Amoco stores.\textsuperscript{117}

The District Court for the Western District of Oklahoma most recently addressed credit card rebates on gasoline purchases in \textit{Star Fuel Marts, L.L.C. v. Murphy Oil USA, Inc.}, where the court refused a meeting competition defense based on matching a competitor’s credit card rebates.\textsuperscript{118} In that case, the plaintiffs accused Sam’s Club of selling gasoline below cost as defined by statute.\textsuperscript{119} Sam’s asserted a meeting competition defense on the basis of having to compete with competitors who offer rebates or co-branded credit cards, including

\begin{itemize}
  \item \textit{Id.}
  \item \textit{See id. at *5.}
  \item \textit{See Star Fuel Marts, L.L.C., 2003 WL 742191, at *5.}
  \item \textit{Id.}
  \item \textit{Star Fuel Marts L.L.C., 2003 WL 742191, at *5. For a discussion of the findings in this case regarding membership fees, see supra Part III.B.}
  \item \textit{Star Fuel Marts L.L.C., 2003 WL 742195, at *1.}
\end{itemize}
Citgo, Murphy Oil, and Shell. The Oklahoma Unfair Sales Act provides that “[a]ny retailer or wholesaler may advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article or products of comparable quality at cost to him as a wholesaler or retailer.” Although Sam’s did not present enough evidence to demonstrate that it was meeting competition, the court said that the “Shell rebate perhaps deserve[d] some additional attention.” The court emphasized that the credit card rebates did not “reduce the price of gasoline paid by the customer to the retailer” and that the retailer did not offer the discount.

The court in Star Fuel Marts also determined that the rebate program was not relevant to the case because the retailer did not receive any part of the rebate and because the customer was able to receive future rebates even on non-fuel purchases at the defendant's store. The court emphasized that the customer paid the full price for the gasoline at the time the transaction took place and that the customer received no discount whatsoever from the retailer. In dismissing the defendant’s argument, the court also noted that “[t]he purchaser also can receive a one percent rebate on any other product which he or she might purchase with the co-branded MasterCard. For instance, the consumer could use his Shell MasterCard to purchase gasoline at Sam’s and would receive a one percent rebate.”

The District Court for the Northern District of Alabama also addressed the issue of credit card rebates in Campbell & Sons Oil Co. v. Murphy Oil USA, Inc. Defendant Murphy Oil asserted a meeting competition defense based on co-branded credit cards that offered

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120. Id. at 5.
121. Unfair Sales Act, OKLA. STAT. tit. 15, § 598.7 (2003).
123. Id.
124. See id.
125. Id.
126. Id.
rebates on gasoline purchases. The court dismissed Murphy’s argument that they were meeting competition, placing great emphasis on the fact that credit card rebates “are offered by the issuers of credit cards (i.e., banks), and that such rebates affect neither the pump price paid by the credit card holder, nor the compensation received by the retail gasoline distributor.” In dismissing the defendant’s meeting competition defense, the court also noted that Murphy “advertised the discount alongside its posted price on the station’s canopy.”

Addressing the meeting competition defense regarding credit card rebates, the District Court for the Middle District of Alabama in Home Oil Co. v. Sam’s East, Inc. suggested a similar result to that in Campbell & Sons Oil Co. Sam’s, the defendant in that case, also claimed that it was selling below cost to meet competition. Sam’s argued that the Alabama Motor Fuel Marketing Act “equate[s] advertising a price, including a discount or rebate, with the actual sale of gasoline at the discounted or rebated price” and that the Shell station it competed with was advertising the credit card rebate. Sam’s contended:

[W]hen [the competing Shell station] offers gas for sale and advertises the Shell 5% rebate, [they are] selling gas at the rebated price for purposes of the [Alabama below cost statute], regardless of whether the owner of the station receives the full pump price or pays for the rebate in any way. Accordingly, Sam’s is entitled to meet the price of gas sold by Shell after the advertised 5% rebate.

129. Id.
130. Id.
131. See Home Oil Co. v. Sam’s East, Inc., 199 F. Supp. 2d 1236, 1255-57 (M.D. Ala. 2002). For a discussion of the findings in this case regarding use of membership fees in calculating cost, see supra Part III.B.
133. Id.
134. Id.
The court rejected this argument, reasoning that the retailer received the full price for the gasoline and the rebate was for a future purchase, thus the rebate "[did] not afford the cardholder an immediate reduction of five cents a gallon at the time the customer purchases and pays for gasoline pumped at the Shell station." The court also refused to allow a meeting competition defense because the defendant did not know about the rebates offered under the co-branded Shell card at the time the violations occurred, so the defendant could not have considered the credit card rebate in the price determination on the dates that the defendant was in violation of the statute.

These courts suggest that rebates offered through co-branded credit cards do not violate below cost statutes because retailers do not receive any money from the rebate and because the rebate is for future purchases. The courts addressing the issue of whether credit card rebates violate below cost statutes have placed emphasis on the time that customers receive the rebate. The courts have reasoned that, at the time of the purchase, customers are paying the full advertised price for the gasoline, and retailers are receiving the full advertised price. Since customers receive the rebate at a later date and since banks issue the rebate, retailers have no involvement in any discount to customers. Furthermore, holders of a co-branded credit card have the option of using the card at any establishments that accept such cards. Customers may purchase any brand of gasoline or non-fuel products and still receive the rebate. Thus, while customers must redeem the rebate at stores that sell the brand listed

135. Id. at 1255.
136. Id. at 1256 (interpreting Alabama Motor Fuel Marketing Act, ALA. CODE §§ 8-22-4, -10 (2003)).
141. Id.
142. Id.
on the card, customers do not have to make any other purchases at that store to receive the rebate.\textsuperscript{143} Additionally, customers may use the rebate from the credit card company to make a non-fuel purchase.\textsuperscript{144}

IV. RECENT LITIGATION INVOLVING BELOW COST STATUTES AND PROVISIONS WITHIN THE STATUTES

A. Clarification of the "Meeting Competition" Defense

Recently, courts have also attempted to clarify the provisions and definitions in below cost fuel statutes.\textsuperscript{145} In \textit{Young Oil Co. v. RaceTrac Petroleum, Inc.}, the Supreme Court of Alabama reaffirmed the meeting competition defense with respect to a rising market situation.\textsuperscript{146} The plaintiffs argued that the defendant, RaceTrac Petroleum, Inc. (RaceTrac), should not be able to assert the meeting competition defense when it was the first retailer to establish a price that, although above the retailer’s cost when originally established, later became a below cost price in a "rising wholesale [price] scenario."\textsuperscript{147} The court determined that, under the Alabama Motor Fuel Marketing Act, retailers may sell their products at below cost prices to match a competitor in the same geographic market even in a "rising wholesale price scenario."\textsuperscript{148} This type of scenario occurs while a retailer is selling at a price above its wholesale cost and other retailers are meeting that price, but then the wholesale price increases and the retailer continues to sell gas at the same price to continue to meet competition despite the fact that the selling price is now below the wholesale cost.\textsuperscript{149}

In \textit{Young Oil Co.}, the main issue before the court was whether a retailer that was the first to lower prices in the above scenario could

\textsuperscript{143} See supra notes 114-17 and accompanying text.
\textsuperscript{144} See supra notes 114-17 and accompanying text.
\textsuperscript{146} See \textit{Young Oil Co.}, 757 So.2d 380.
\textsuperscript{147} Id. at 382-83.
\textsuperscript{148} Id. at 384-85.
\textsuperscript{149} Id. at 383.
use the meeting competition defense when the cost of gas increased. 150 The statute provided that “[i]t is not a violation of this chapter if any price is established in good faith to meet an equally low price of a competitor.” 151 The court determined that the retailer “established” a new price under the meaning of the statute each time the retailer surveyed the market to determine its competitive price, whether the price increased, decreased, or stayed the same. 152 Thus, the retailer did not violate the Alabama Motor Fuel Marketing Act in a rising wholesale price scenario. 153 The court rejected the proposed “First Down/First Up Rule” suggested by the plaintiff that would require the retailer that first lowered its retail price in a declining market to be the first to raise its retail price in a rising market. 154 The court concluded that applying this rule would require “a significant amendment to or rewriting of [the below cost statute] to effectuate Plaintiff’s proposed interpretation,” and it would require that each retailer know their competitor’s cost of doing business. 155 The court agreed with defendant RaceTrac’s argument that the plaintiff’s proposed rule would be impracticable and “could actually harm competition and artificially increase the price of gasoline to the consumer, two outcomes clearly inconsistent with the intent of the Act.” 156

In R.L. Jordan Oil Co. of North Carolina, Inc. v. Boardman Petroleum, Inc., 157 the Supreme Court of South Carolina also reaffirmed its below cost exception for meeting competition. 158 The South Carolina Unfair Trade Practices Act states that “retail sales of merchandise of like grade and quality at a price to meet existing competition at any time in any town or locality are also exempt from

150. Id. at 381.
152. Id. at 384-85.
153. Id. at 385.
154. Id.
155. Id.
156. Id.
158. Id.
the provisions of this article.”¹⁵⁹ In that case, the defendant retailer raised the meeting competition defense, arguing that the law should allow an independent retailer to sell its product below the prices of a nationally branded retailer.¹⁶⁰ The retailer argued that nationally branded retailers have a “market advantage . . . based on name recognition and customer perceptions instilled by advertising.”¹⁶¹ The court rejected this argument, interpreting the statute to mean that the exemption applied only to price and not to any other competitive factors.¹⁶² In finding for the plaintiff, the court reasoned that allowing the defendant to raise the meeting competition defense based on factors other than price would negate the purpose of the below cost laws.¹⁶³ Otherwise, retailers could use any difference in business practices as a basis for exemption from the statute.¹⁶⁴

In Gross v. Woodman’s Food Market, Inc.,¹⁶⁵ a 2002 Wisconsin case, the Wisconsin Court of Appeals determined what the term “competitors” included.¹⁶⁶ The defendant retailer, Woodman, argued that he was not the plaintiff’s competitor.¹⁶⁷ Woodman had one diesel pump for the purpose of supplying his own trucks, and the sales from this pump to non-Woodman vehicles were insignificant in comparison to other fuel sales.¹⁶⁸ The defendant reasoned that since his sales of diesel fuel to the public were insignificant and since he did not advertise diesel prices to the public, he did not compete with the plaintiff within the meaning of the statute.¹⁶⁹ The court found that there was “nothing in the statutory language to indicate that the statute [did] not apply at all unless the seller intend[ed] to have or [did] have a particular market share.”¹⁷⁰ The court concluded that

¹⁶¹. Id. at 290.
¹⁶². Id.
¹⁶³. Id.
¹⁶⁴. Id.
¹⁶⁵. 655 N.W.2d 718 (Wis. Ct. App. 2002).
¹⁶⁶. See id. at 735-36.
¹⁶⁷. Id. at 736.
¹⁶⁸. Id. at 729.
¹⁶⁹. Id. at 736.
¹⁷⁰. Id.
"Gross [was] Woodman’s competitor with respect to diesel fuel . . . because, based on the undisputed facts, they both sell diesel fuel to non-Woodman’s vehicles in the same geographic area."171

B. Definition of “Geographic Market”

The decision in Young Oil Co. raised the question of what constitutes a geographic market, which the Supreme Court of Alabama attempted to answer in Speedway/SuperAmerica, L.L.C. v. Phillips Truck Stop, Inc.172 The Alabama Motor Fuel Marketing Act states that “[i]t is not a violation of this chapter if any price is established in good faith to meet an equally low price of a competitor in the same market area on the same level of distribution selling the same or a similar product of like grade and quality.”173 In Speedway/SuperAmerica, the trial court ordered a preliminary injunction prohibiting the defendant from pricing with a truck stop that was 80 miles away.174 The Alabama Supreme Court held that the truck stop 80 miles away from the defendant truck stop was part of the same “geographic market” for pricing purposes.175 The court considered that the truck stop was “designed and geographically located to attract the long-haul-truck traffic.”176 It also relied on other factors such as “the size of the facility, its amenities, and the surveys conducted by Speedway” to determine that the competitor, although 80 miles away, was in the same geographic market.177 The court found that the trial court and the plaintiff retailer ignored “the commercial realities of the competitive truck stop market” in determining the scope of the geographic market area.178 The concurring opinion agreed with the majority’s reasoning but suggested that the burden on a plaintiff in a case such as this should

171. Gross, 655 N.W.2d at 736.
174. Speedway/SuperAmerica L.L.C., 782 So. 2d at 256.
175. Id. at 258.
176. Id.
177. Id.
178. Id. at 258 (quoting Tennessean Truckstop, Inc. v. Mapco Petroleum, Inc., 728 F. Supp. 489, 490 (M.D. Tenn. 1990)).
be extremely high in order to protect the “freedom of the marketplace.”

CONCLUSION

In states that have below cost motor fuel statutes, retailers have a remedy against others who are injuring competition without having to meet the difficult burden of proof that federal antitrust laws require. These statutes typically have similar provisions that may include the definition of cost to retailers as well as circumstances in which retailers may sell below cost without being in violation. While the statutory definition of cost may or may not include the cost of doing business, providing for these costs allows retailers to beat competition by being more efficient.

Recent litigation has addressed several relatively new pricing practices in the gasoline industry. From the cases that have come before the courts thus far, it is evident that any rebates in the form of gift cards may violate below cost motor fuel statutes if the rebated price falls below the cost to the retailer. It is also clear that courts are not likely to include membership fees paid by customers who purchase the fuel in the total price consumers pay because it is difficult to ascertain how the court should apply the membership fees since some sales are to non-members.

It is likely that courts will find that credit card rebates offered through a co-branded credit card such as the BP Visa do not violate below cost fuel statutes. The few courts that have faced this question have not yet made a decision specifically regarding credit card rebates, but current case law suggests that these rebates do not violate the law because they are for a future purchase and thus

179. Id. (Hooper, C.J., concurring specially).
180. See supra Part I.
181. See supra Part II.
182. See supra Part II.
183. See supra Part III.
184. See supra Part III.A.
185. See supra Part III.B.
186. See supra Part III.C.
involves a separate transaction. The cases suggest that the rebate does not result in a violation because it affects neither the price customers pay at the time of the transaction nor the amount retailers receive. Furthermore, customers may earn and redeem the rebates, which the bank issues, through non-fuel purchases.

Finally, courts have clarified the provisions and definitions within below cost motor fuel statutes in several states. Meeting competition is a viable defense for motor fuel retailers as long as retailers attempt to meet, but not beat, competitor prices. Furthermore, competitors must be within the same geographic area of the retailer, which generally includes other retailers who compete for the same business and sell the same product.

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187. See supra Part III.C.
188. See supra Part III.C.
189. See supra Part III.C.
190. See supra Part IV.
191. See supra Part IV.A.
192. See supra Part IV.A.