Open Price Agreements: Good Faith Pricing in the Franchise Relationship

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Over the last century, as commercial relationships became more complex and intertwined, the law had to evolve to keep pace. Contracts that previously would have been voided for indefiniteness became permissible, even when they left out key terms, including price.[1] That evolution resulted from the need for contracts that could confirm long-term or ongoing obligations between parties but also would allow adjustments for unforeseeable circumstances—such as market fluctuations, changes in industries, and general uncertainty occurring over extended periods of time—without which it would be commercially untenable for the parties to proceed.[2] That flexibility is critical for price provisions in long-term sale of goods contracts, including those in franchising.

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In a franchise system based on sales of the franchisor's products,[3] the franchisor and franchisee aim to establish a long-term relationship in which the franchisee continually will purchase and resell the franchisor's goods to the public, whether those products are coffee, gasoline, soft drink concentrate, or hamburger patties.[4] Those goods are the lifeblood of the franchise because they (along with the franchisor's trade and service marks) define the franchise and ensure a consistent customer experience, which is critical to the success of a network of independently operating dealers or franchisees.[5] To survive long-term, the parties' relationship, based on the perpetual sale of goods from one party to the other, must include a means for adjusting the price of goods over time. An open price term contract fills that need.

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Open price term contracts also can be important to business format franchises, even though those franchises do not directly involve sales of the franchisor's goods to consumers.[6] In business format franchises, the franchise agreement often requires the franchisee to purchase franchisor-approved goods related to the operation of the franchised business. For example, hotel franchisors might require their franchisees to purchase toiletries, sheets, or furnishings from franchisor-approved vendors; or real estate services franchisees might be required to obtain printed advertising materials from particular printing companies selected by the franchisor. In this respect, business format franchises are similar to product franchises because to continue operating, the franchisee has no choice but to purchase goods from exclusive or limited sources into the future. As a result, franchisees and approved vendors often desire open price terms related to these supply provisions to provide flexibility to adapt to changing conditions.

Despite the widespread use of (and need for) contracts with open price terms, particularly in the franchise setting, these contracts continue to breed litigation concerning their most fundamental aspects.[7] This article addresses the conflicts that arise under Uniform Commercial Code (UCC) Section 2-305, which permits the use of open price terms subject to the fulfillment of certain conditions.[8] In particular, the provision applies when a franchise agreement does not initially specify a price but instead places discretion with the franchisor to set the price at a later date.[9] The specific situation that raises the most concern arises when the party charged with setting the price of goods is alleged to have acted in bad faith in doing so.

This article discusses the background and purpose of UCC Section 2-305. It then examines the cases interpreting open price provisions under Section 2-305(2) in the franchise context, revealing the inconsistent methodology for ensuring that prices are set in compliance with the provision's good faith requirements. The courts' lack of a coherent systematic approach to resolving open price term disputes has led to significant confusion. Consequently, the article proposes a framework for analyzing future disputes that provides a more consistent method for determining whether a party's conduct is consistent with the obligation of good faith.

Overview and History

The advent of the open price term in modern contracts was a dramatic departure from the common law.[10] Under common law, price is an essential term in any valid contract.[11] Without a fixed price, there is no way to measure with any certainty whether a valid contract was ever created.[12] Consequently, under traditional common law, open price term contracts would have been invalidated as "agreements to agree" and

held not to be legally binding.[13] However, with the rapid evolution of trade and commerce, companies that needed to obtain and distribute steady streams of materials and products recognized that this legal principle was obsolete. In the modern world, the need for flexibility in volatile markets became increasingly important as parties attempted to minimize their exposure to the risk of fluctuating prices while simultaneously seeking assurances that a deal for the product was certain to take place at some future date.[14]

Perhaps no phenomenon in recent U.S. history illustrates the need for contractual open price term provisions better than the fluctuation in oil prices.[15] Even adjusting for inflation, crude oil prices have as much as tripled in the last decade as demand has begun to overtake supply, political events have intervened, and oil exporters have changed the way they set prices.[16] During that same period, downstream prices for refined gasoline have experienced similarly drastic fluctuations, with the average U.S. retail price for a gallon of gas increasing nearly 250 percent from the end of 1995 to the middle of 2005.[17]

These price increases would be disastrous to any long-term supply contract between a gasoline refiner and dealer that had fixed prices at the time of execution of the contract in the mid-1990s. Such a contract, which normally would run for a period of years, would have bankrupted the refiner because it could not have anticipated the change in its cost of crude oil. Meanwhile, the dealer would have reaped a windfall selling gasoline at more than twice its cost to a market willing to pay the higher price.

These inequities easily can arise in long-term contractual relationships that are based on the sale of goods.[18] The solution for these inequities is the open price term. Instead of setting a fixed price at the time of the agreement for a future transfer of goods, open price provisions typically allow one party to set a reasonable sale price for the goods at or near the time of transfer.[19] Stymied by the courts' intransigent stance on the common law requirement of a fixed price, business interests and legal scholars first made an unsuccessful attempt to modernize the law of open price term contracts with the Uniform Sales Act in 1906.[20] Thereafter, advocates for a more liberal approach to contract law found their solution in article 2 of the UCC, which was first published in 1951.[21]

UCC article 2 governs contracts for the sale of goods worth more than $500.[22] Every state, with the exception of Louisiana, has adopted some version of UCC article 2 with minor variations.[23] The open price term provision in article 2 of the UCC is located in Section 305 and states as follows:

> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
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> (a) nothing is said as to price; or
>
> (b) the price is left to be agreed by the parties and they fail to agree; or
>
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
>
> (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
>
> (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
>
> (4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

The drafters of the UCC avoided the problem of uncertainty by reframing the open price issue. A familiar maxim of contract law is that although courts may not rewrite contracts between parties, they may revise the terms of the writing in order to express the original agreement between the parties.[24] Such revisions may include the addition of provisions mutually intended at the time the contract was consummated.[25] Relying on the courts' power to imply terms intended by the parties, the drafters of the UCC reframed the open price problem in terms of the parties' intentions. Accordingly, under Section 2-305, a contract is valid despite the failure to fix a price if the parties intended for the contract to be valid.[26] By reframing the issue in this way, the drafters provided the courts with an excuse to imply, to the extent of the parties' original intentions, price terms not found in the agreement.[27] The provision also embraced the practical reality, ignored by most courts, that by agreeing to an open price contract, the parties intended to accomplish something.[28]

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This article deals primarily with Section 2-305(2), which applies to those contracts in which one of the parties to the agreement assumes the power to fix the price of the goods at a later time. Although a wide variety of exotic cases arise out of the section's other provisions, franchise agreements that contain open price term provisions most commonly employ the type of provision envisioned by Section 2-305(2). The reasons vary, but in franchising situations, the relative bargaining strengths of the parties often place one side at a disadvantage in contract negotiations. The resulting power disparity often permits the stronger party to retain the right to set important terms, such as price, at a future date.

Section 2-305(2) also may be implicated in the franchise context when franchisees enter into supply contracts with third-party

vendors. Specifically, the franchise relationship places the franchisor in the unique position of dictating the franchisee's relationships with third-party vendors.[29] Ostensibly to maintain the quality and image of the franchise, the franchisor may require as part of the agreement that the franchisee purchase all of its supplies from a third-party vendor (or limited group of vendors) designated by the franchisor.[30] The franchisor stands to benefit substantially from these agreements as vendors compete for the exclusive right to supply products to the franchisee.[31] Although many state laws prohibit franchisors from receiving any benefit from vendors without disclosing or transmitting the benefit to the franchisee,[32] disparity in bargaining power often leaves franchisees no choice but to accept the franchisors' terms and submit themselves to the vendor's pricing policy. This issue may be relevant in an open price term dispute because a court could hold the franchisor accountable in place of the third-party vendor upon the theory that the franchisor may not do through the vendor what it would be prohibited from doing itself.[33]

Section 2-305(2) predates the modern statutes governing franchise law and instead resulted from extensive discussion and debate about how to accommodate other industries that rely on open price terms for practically every contract.[34] In particular, industries that deal in commodities subject to rapid fluctuations in price, such as gasoline or steel, are more likely to leave the price open.[35] By leaving the price open, the risk of changing prices is not shifted to either party, and the parties avoid the risk that probable market fluctuations will significantly alter their original bargain.[36] In such cases, the seller typically is charged with setting the price because the seller is in the best position to know what price is a reasonable price at the time of delivery. Since the adoption of the UCC, these practices are entirely permissible, provided that the party with the responsibility for setting the price does so in good faith.[37]

Although courts and commentators have debated the point,[38] the consensus view is that where one party is charged with setting the price, *good faith* means "honesty in fact"[39] and the "observance of reasonable commercial standards."[40] The debate has centered on whether good faith requires proof of one standard or both, particularly in light of the ambiguity in the comments to Section 2-305[41] and the UCC drafters' decision to vary the definition of *good faith* throughout the code depending on the context.[42] However, the most recent revision to the UCC has clarified the definition of *good faith* by definitively requiring both honesty in fact and the observance of commercially reasonable standards.[43]

Scholars had argued before enactment of the code that without further clarification, the good faith standard in Section 2-305 would breed continual litigation.[44] Specifically, they contended that commercial reasonability, which is necessary to satisfy the good faith standard, is sufficiently ambiguous to permit buyers to challenge the reasonableness of prices set by sellers in every contract containing an open price provision.[45] That problem would be particularly vexing in those industries where all contracts have open price provisions because in that context, no external standard or market price would exist against which to compare when determining the reasonableness of the price set by the seller.[46]

The drafting committee addressed Section 2-305's perceived deficiency by supplementing the rule with comments that provide a safe harbor provision.[47] The safe harbor provision indicates that in the "normal case," the good faith requirement is met if the agreement specifies that the price will be a posted price, given price, price in effect, or market price.[48] Accordingly, in normal cases, the buyer cannot allege that the price was set in bad faith if the original agreement indicated that the price would be equal to the seller's posted price on the date of delivery.[49]

Unfortunately, the safe harbor has not accomplished the goal of clarifying Section 2-305(2). Instead, it has become an ambiguous standard that increasingly has mired courts in disputes.[50] In the authors' view, judicial involvement often has done little more than legitimize seemingly frivolous claims, particularly given the courts' inconsistent application of the good faith rules. Each time a court refuses to apply the safe harbor rules to dismiss a claim, those rules effectively narrow in scope and become increasingly irrelevant. The following part of this article addresses court consideration of open price term cases, focusing on judicial definitions of good faith and the normal case safe harbor.

Judicial Analysis of Open Term Contracts

The rules governing open price provisions are simple but ambiguous. A party setting a price pursuant to an open price contract satisfies the good faith requirement of Section 2-305(2) when there is honesty in fact and observance of reasonable commercial standards of fair dealing in the trade; or, in the normal case, the price set is the seller's posted price. Unfortunately, judicial decisions have failed to define clearly the key elements of the rules: honesty in fact, reasonable commercial standards, and the normal case. Consequently, courts have spent countless pages trying to establish the boundaries of those terms. The resulting, often circular, legal discourse is anything but instructive and has realized many of the worst fears of the UCC drafting committee.[51] In order to provide an accurate guide on how courts analyze Section 2-305(2) claims, the following subsections outline the legal precedents set by courts interpreting commercial reasonability, honesty in fact, and the normal case safe harbor in the context of open price provisions.

Commercial Reasonability

The majority of courts addressing good faith under Section 2-305(2) have framed the analysis primarily in terms of the commercial reasonability of the price set.[52] Although some scholars argue that Section 2-305 does not place the burden of proof on either party,[53] in practice judicial analysis of commercial reasonability is complicated by several factors relating to the burden of proof.[54] The first is whether the price set pursuant to the open price provision is a posted price in compliance with the safe harbor rule. Acknowledging the validity of the safe harbor rule, courts have changed the burden of proof requirements, both in terms of the party bearing the burden and the sufficiency of evidence necessary to satisfy the burden, when the price set is a posted price.[55] Second, when the price is a posted price, courts have broken the issue of commercial reasonability into a two-tier analysis under which the plaintiff ultimately bears the burden of proving that the defendant discriminated in price or set the price acting on some improper motivation.[56]

In those cases where the price is not determined by the seller's posted price, courts have been generous to claims that the price was commercially unreasonable.[57] Absent a posted price, a plaintiff's bare allegation of price discrimination is generally sufficient to defeat a motion to dismiss an open price term claim.[58] Courts find themselves unable to conclude as a matter of law whether the case involves an open price term because of a lack of objective evidence of the parties' intentions.[59] Accordingly, courts have shifted the burden to the seller to prove that the price was commercially reasonable and therefore set in good faith.[60] Similarly, courts typically will not enter summary judgment when there are factual disputes over whether a contract contained an open price provision, even in the face of strong circumstantial evidence favoring one party's version of events.[61] Therefore, absent express language in the agreement indicating that the price will be the posted price, courts often will deny summary judgment or other dismissal motions and leave the issue to the fact finder.[62]

In contrast, in those cases in which the parties have agreed that the future price will be the seller's posted price, courts generally will not permit the case to proceed without significant evidence that the price is commercially unreasonable.[63] When there is a posted price, the plaintiff bears the burden of challenging the commercial reasonableness of the defendant's posted price.[64] Consequently, any claim made under a contract specifying a posted price will not survive a motion for a directed verdict or summary judgment if it is supported solely by an allegation of price discrimination.[65] Thus, in the context of a contract calling for prices set by the seller's posted price, a plaintiff alleging that the price was commercially unreasonable must satisfy a significantly higher burden of proof to avoid dismissal of its claims.[66]

The plaintiff must demonstrate that the defendant set the prince without regard to reasonable commercial standards in the trade.

Although courts have not couched their decisions in terms of a multifactor test, the higher burden of proof that attaches when the price is a posted price can be characterized as a two-step test.[67] In order to guarantee survival on a motion for summary judgment, a plaintiff alleging that the posted price is commercially unreasonable must present sufficient evidence to meet both steps.[68] First, the plaintiff must demonstrate that the price is not facially commercially reasonable.[69] A price is facially commercially reasonable as long as it is within the range of prices charged by competitors and the seller does not discriminate in price among buyers.[70] Accordingly, the price set by the seller does not need to be the lowest possible price.[71] Instead, to satisfy the first step, the plaintiff must present evidence that the seller either charged different prices to different buyers (price discrimination)[72] or that the price charged is not within the range of prices charged by the seller's competitors in the same market.[73]

Second, the plaintiff must demonstrate that the defendant set the price without regard to reasonable commercial standards in the trade.[74] The second step is necessary because mere proof of price discrimination, or pricing outside the range of competitors' prices, is irrelevant without context and comparison to industry standards.[75] The fact finder must have some standard with which to compare the seller's conduct because a seller may have a legitimate and lawful reason for charging different effective prices,[76] or for charging a price that is higher than that of its competitors.[77] Consequently, courts have upheld the use of price differentials for zone pricing schemes,[78] volume rebate programs,[79] company-owned retailers,[80] and wholesale pricing.[81] Similarly, courts have upheld prices set by the seller that are higher than those set by the seller's competitors unless the difference in price is attributable to an improper motive of the party setting the price.[82] However, in the latter case, some courts have invoked the "honesty in fact" good faith analysis, thereby circumventing the commercial reasonableness aspect of good faith altogether.[83]

Although courts follow no set practice when analyzing the reasonable commercial standards in the trade, there is some consensus on evidentiary issues. First, courts limit evidence of trade practices to dealers with the same or substantially similar contractual arrangements as the parties in the dispute.[84] Contracts with dealers that are not similarly situated do not provide a meaningful comparison and are therefore irrelevant.[85] Such evidence also may be prejudicial because introducing it in isolation might unfairly create the appearance that the seller's price is unreasonably high.[86] Second, any divergence between the seller's practices and industry standards must be material.[87] Mere differences in the outcome of prices set pursuant to common industry practice are insufficient.[88] Finally, the evidence presented must provide concrete information demonstrating price discrimination or pricing outside the range of competitors.[89] Plaintiffs may not introduce the naked fact of the defendant's price discrimination.[90]

Ultimately, the complex burden shifting that takes place in open price cases reflects a judicial desire to limit the buyer's ability to challenge the legitimacy of the contract between the parties.[91] To underscore the importance of this policy objective, some courts have adopted the captive buyer exception, which limits the buyer's ability to challenge the seller's good faith in setting the price.[92] Under the captive buyer exception, the court need not evaluate industry standards if there is evidence that suggests the buyer was free to purchase from other sellers or failed to take advantage of the lower price offered by the seller.[93] The exception also reflects a growing consensus, well rooted in Section 2-305(2)'s legislative history, that good faith is satisfied as long as the buyer has access to a reasonable price.[94] As long as the buyer is not held captive by the seller, it is free to purchase goods from a different seller in the competitive market.

Honesty in Fact

Unfortunately, several courts have eschewed the commercial reasonability analysis, instead framing the issue of good faith primarily in terms of the seller's honesty in fact.[95] The primary motivation behind this trend appears to be the courts' dis-

taste for contracts under which the seller charges a commercially reasonable price but nonetheless tries to drive the buyer out of business.[96] Such conduct does not reflect honesty in fact and therefore represents subjective bad faith.[97] However, framing good faith primarily in terms of the seller's honesty in fact is problematic because that subjective good faith analysis is incompatible with the concept of a safe harbor. The reason for creating a safe harbor for a posted price is to ensure that the price charged is reasonable and fair (i.e., is objectively good faith). Unfortunately, when the standard for good faith is subjective (the intent of the party setting the price), regardless of the objective good faith (the reasonableness and fairness of the price), any negative intent on the part of the party setting the price negates the existence of good faith. As a result, the normal case safe harbor essentially becomes irrelevant when the focus of the good faith analysis is on the subjective intentions of the parties.

Despite the problem with framing the issue in terms of the seller's honesty in fact, courts have continued to raise that issue as grounds for invalidating open price term agreements.[98] Most courts have avoided the conflict between the safe harbor and the subjective good faith analysis because the plaintiff either fails to raise the issue or fails to present any evidence in support of a claim.[99]

However, in *Mathis v. Exxon Corp.*, the U.S. Court of Appeals for the Fifth Circuit was forced to reconcile the plaintiff's claims of subjective bad faith with the defendant's reliance on the posted price safe harbor.[100] In an effort to harmonize the honesty in fact analysis with the normal case safe harbor, the court concluded that any lack of subjective honesty in fact constituted an "abnormal" case outside the protection of the safe harbor.[101] In doing so, the court effectively merged the two concepts together, thereby permitting any plaintiff presenting circumstantial evidence of the seller's subjective bad faith to proceed to trial.[102] Although the court acknowledged that the drafters intended for cases to be abnormal when the seller engaged in price discrimination, the court did not consider the point dispositive.[103] Instead, it determined that price discrimination was merely a subset of behaviors that exhibit a lack of honesty in fact.[104]

In response to the potentially far-reaching decision in *Mathis*, the court in *Shell Oil Co. v. HRN, Inc.*, rejected the subjective good faith analysis in favor of the objective commercial reasonability approach.[105] The court found that the intent behind a commercially reasonable, nondiscriminatory price does not matter in a good faith analysis.[106] In doing so, the court reestablished the primacy of the normal case safe harbor.[107] The court grounded its decision in the original intent of the UCC drafting committee, holding that a posted price constitutes a price set in good faith absent evidence of price discrimination.[108]

Mathis and *Shell Oil* represent diametrically opposed views on the honesty in fact good faith analysis of Section 2-305(2). The cases also represent the two most recent major decisions on the issue of good faith. Future courts addressing the issue of good faith in open price term cases must be cognizant of the costs and benefits of these approaches, as well as the need for a new method to analyze open price term disputes. The following part of this article suggests a new way to approach the good faith analysis that embodies the original intent of the drafting committee and embraces the concerns of fairness and efficiency.

Standard for Analyzing Open Price Cases

The first step in crafting a rule for analyzing Section 2-305(2) claims is to reinstate the posted price standard as presumptively good faith. This should be a strong presumption, affording a plaintiff only a few specified scenarios in which to challenge the reasonableness of the price set. Otherwise, the rule lacks certainty and is overly susceptible to judicial intrusion. In addition, to be effective, a rule reinstating a strong posted price presumption must satisfy two long-held judicial concerns. First, a structured test must be firmly rooted in the legislative history of Section 2-305(2). Any novel approach lacks the legitimacy necessary for uniform acceptance.[109] Second, the test must address the dilemma raised in cases where the seller subjectively does act in bad faith. Such cases are anathema to the judicial sense of moral fairness, and many courts will disregard any test that eliminates the subjective component of the good faith analysis, regardless of the commercial reality of the situation or the fairness of the price.[110] The following sections suggest ways to satisfy these judicial concerns and incorporate the solutions into a comprehensive test.

Grounding in Section 2-305's Legislative History

The concern over the ambiguity of a good faith requirement in open price contracts is not a new phenomenon. In fact, the drafters intended, in crafting the language of Section 2-305(2), to eliminate any ambiguity by establishing a good faith safe harbor for parties agreeing to pay the seller's posted price.[111] The drafting committee sought to create a strong safe harbor by limiting a buyer's ability to challenge a posted price to cases of price discrimination by the seller.[112] The drafting committee understood that requiring evidence of price discrimination to overcome the posted price presumption served important policy objectives. First, the standard of price discrimination serves as a means of eliminating most frivolous challenges[113] while preserving claims against the worst type of conduct that occurs in open price term cases.[114] Second, in creating a safe harbor, the drafting committee sought to minimize judicial intrusion in disputes over open price agreements.[115] Accordingly, in addition to being firmly rooted in the legislative history of Section 2-305(2), requiring evidence of price discrimination to overcome the posted price presumption serves important policy objectives.

Although the price discrimination exception satisfies the need for a well-grounded rule, it remains necessary to define the substance and quantum of proof necessary to satisfy the plaintiff's burden. In general, although many forms of price discrimination exist, a plaintiff may only challenge a posted price with evidence of illegal price discrimination.[116] The Robinson-Patman Act[117] classifies two distinct forms of pricing practices as illegal price discrimination: primary-line violations and secondary-line violations.[118] In the franchise context, most price discrimination takes the form of secondary-line violations.[119] Secondary-line violations occur when the

seller discriminates in price between the plaintiff and other similarly situated dealers in the sale of goods of like grade and quality, and the discrimination injures the plaintiff's ability to compete with the favored purchasers.[120]

Thus, to overcome the posted price presumption, the plaintiff must present evidence supporting three points. First, the plaintiff must show that the seller sold goods at different prices to other similarly situated dealers.[121] To satisfy this burden, the plaintiff must present evidence demonstrating that it competes with the other buyers for the same customers and that the other buyers received a lower price.[122] Second, the plaintiff must show that the goods sold to the different buyers were of like grade and quality.[123] This requirement ensures that the parties are purchasing competing products,[124] and it is satisfied when the products are identical.[125] Third, the plaintiff must show that the price difference injured the plaintiff's ability to compete with the dealers that received the more favorable price.[126] To satisfy this burden, the plaintiff must present evidence demonstrating that the discrimination in price, within reasonable probability, will substantially lessen the buyer's ability to continue to compete.[127] The amount of evidence necessary to meet the third requirement (evidence of competitive injury) is generally less than that needed for the first two because "damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts."[128]

Limiting challenges to the seller's posted price to cases of actual price discrimination strikes the original balance sought by the drafters of Section 2-305. It protects sellers from frivolous challenges to the reasonableness of their prices while shielding buyers from illegal price discrimination. It also provides clear guidance for courts in analyzing open price term cases. Instead of forging new ground each time an open price case is presented, the court either may dismiss the claim under the safe harbor rule or invoke the well-defined rules of price discrimination developed under the Robinson-Patman Act.

Combining the elements of price discrimination and subjective bad faith results in a simple, easy-to-apply test.

Subjective Bad Faith

Limiting challenges to cases of price discrimination also would be beneficial because it would eliminate the need for courts to inquire into the subjective intent of the party setting the price.[129] However, despite the myriad of problems associated with having a subjective standard of bad faith,[130] a comprehensive solution to court analysis of open price terms must include a subjective component. Without such a component, courts that are confronted with the rare subjective bad faith case[131] lack the necessary tools to make consistent decisions. The resulting legal vacuum breeds new litigation and bad legal precedent.

However, any subjective bad faith exception to the posted price presumption should be as narrow as possible to minimize the problems that arise when courts are forced to assess a party's subjective intentions. The best way to limit the scope of a subjective bad faith exception is to increase the plaintiff's burden of proof. A higher burden of proof helps ensure that most claims will be dismissed early in the litigation process, saving time and money, while still allowing meritorious claims to prevail. In *Nanakuli Paving & Rock Co. v. Shell Oil Co.,* Circuit Judge Anthony M. Kennedy (now an associate justice of the U.S. Supreme Court) adopted a similar strategy.[132] Judge Kennedy suggested that the concept of good faith could not expand or change the express terms of the contract absent clear evidence of trade custom or other objective standards.[133] Although Kennedy was not addressing the issue of subjective bad faith, he was confronted with an attempt by the plaintiff to modify the terms of the contract under the nebulous standard of good faith.[134] His solution, placing a higher burden of proof on the party claiming a violation of good faith, extends logically to subjective bad faith claims. Applying this concept in the context of an open price dispute, the plaintiff may overcome the posted price presumption with clear and convincing evidence of the defendant's subjective bad faith conduct. An example of clear and convincing evidence is the classic "smoking gun" memorandum in which the defendant articulates an intention to drive the plaintiff out of business and substitute defendant-owned retailers in the plaintiff's place.

Allowing a limited exception to the posted price presumption in cases where the plaintiff can present clear and convincing evidence of the defendant's subjective bad faith accomplishes the same goals as the price discrimination exception. Courts will have the flexibility to deal with genuine cases of subjective bad faith while plaintiffs remain severely limited in their ability to raise frivolous challenges to a seller's posted price.

A Comprehensive Test

Combining the elements of price discrimination and subjective bad faith into the posted price safe harbor results in a simple, easy-to-apply test. First, courts aggressively should apply the posted price presumption. Second, courts should keep the presumption strong by limiting challenges to posted prices to two specific circumstances tailored in such a fashion that they allay the two judicial concerns raised by open price cases (legislative history and subjective bad faith): evidence of actual price discrimination or clear and convincing evidence of the seller's bad faith intent to drive the buyer out of business. Rigorous application of this standard would eliminate a plaintiff's ability to challenge a price simply because it does not fall within the range of prices charged by a seller's competitors in the marketplace. As a result, instead of judicial interference with contractual relationships, the success or failure of a particular contract becomes a function of market forces.

Conclusion

Almost from its inception, the UCC's open price provision has been misconstrued and misapplied. The result has been a rash of legal disputes that have hampered the ability of industries that rely on open price contracts to exploit their full

potential. Franchises in particular are prone to falling victim to these disputes because the nature of the relationship between a franchisor and franchisee often necessitates the use of open price agreements. However, by returning to the original understanding of the rule, businesses can take refuge in the posted price safe harbor. The burden of proof placed on a prospective plaintiff would be sufficiently high to prevent frivolous claims but fair in those instances when the defendant discriminates in price or demonstrates a definitive intention to drive the plaintiff out of business. In the interests of uniformity, efficiency, and clarity, courts should adopt this comprehensive rule to handle future open price term disputes.

Endnotes

1. Frederick B. Miller & William D. Hawkland, Hawkland's Uniform Commercial Code Series § 2-305:1 (2004); *see also* 2 Uniform Sales Act § 9(4) (1906); U.C.C. § 2-305 (1977).

2. *Id.*; *see also* 2 W. Michael Garner, Franchise and Distribution Law and Practice § 8.26 (West Group 2002) (1990).

3. Product franchising involves the "sale of a manufacturer's product line through authorized outlets that do not follow a rigidly prescribed business format." It includes franchises such as automobile dealers, gasoline service stations and office product dealerships. 1 W. Michael Garner, Franchise and Distribution Law and Practice § 1.13 (1990).

4. *See id.*

5. *See id.* § 1.01.

6. Business format franchising "involves, in addition to the sale of a product or service under a trademark, a marketing strategy or plan, operating manuals, standards, quality control measures and heavy supervision by the franchisor." *Id.* § 1.14. It includes easily recognizable franchises such as fast-food restaurants, hotels, real estate brokerages, tax preparation services, temporary worker firms, convenience stores, and dozens of other industries.

7. 1 James J. White & Robert S. Summers, Uniform Commercial Code § 3.8 (4th ed. 1995) (relating the "rotten job that awaits a court that has to interpret [an open price term] in the face of bitter and well counseled litigants"). Many of the cases involving open price terms have been in the gasoline industry, in part because gasoline pricing is so volatile, but also because the gasoline dealer bar is sophisticated and well financed.

8. U.C.C. § 2-305 (1977).

9. *See id.*

10. Miller & Hawkland, *supra* note 1, § 2-305:1.

11. *See* William L. Prosser, *Open Price in Contracts for the Sale of Goods,* 16 Minn. L. Rev. 733, 734–35 (1932). The common law requirement that the price be fixed with reasonable certainty is an ancient legal principle. The rule can be traced back to the reign of French Emperor Napoleon Bonaparte, who himself adopted the principle from the legal code promulgated by the Roman Emperor Justinian in the sixth century. *Id.* at 734 n.4.

12. *Id.*

13. Miller & Hawkland, *supra* note 1, § 2-305:1.

14. *See* Prosser, *supra* note 11, at 734. There are also many nonlegal factors that businesses must consider when determining whether to enter into a contract with an open price provision. As a result, parties often have incentives to reach amicable solutions to disputes outside the legal arena. For example, it is often the case in the business context that personal relationships drive business operations. Accordingly, trusting relationships between buyers and sellers may lower the cost of doing business and decrease risk. Having a good reputation in the industry as a trustworthy business partner is also a potentially valuable commodity. Furthermore, in long-term arrangements, companies may face considerable expense when forced to seek a replacement for current partners. Consequently, when faced with open price provisions, in addition to their legal obligations, a multitude of incentives will drive parties to reach an agreement on price when the time arrives. *See* Robert A. Hillman, *Court Adjustments of Long-Term Contracts: An Analysis Under Modern Contract Law,* 1987 Duke L J. 1, 4-5 (1987).

15. The response by legal scholars to the crisis presented by the fluctuation of oil prices in the 1970s and 1980s illustrates the value of a clear rule for analyzing open price terms. *See* Hillman, *supra* note 14 (arguing that courts should intervene in certain circumstances to adjust long-term agreements between parties); Victor P. Goldberg, *Price Adjustments in Long-Term Contracts,* 1985 Wis. L. Rev. 527 (1985) (recommending a series of alternative contract provisions to ameliorate the severity of potential price fluctuations and arguing that market forces should determine when a court should revise a contract); Richard E. Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts,* 76 Nw.U. L. Rev. 369 (1981) (arguing that when the original balance struck between the parties is altered by the occurrence of an unforeseen event, the party gaining the advantage has a legal duty to accept an equitable adjustment to the contract as long as it is proposed in good faith by the disadvantaged party). Furthermore, although some scholars have been critical of the difficulty in analyzing the reasonableness of open price terms, *see* White & Summers, *supra* note 7, and accompanying text, such difficulty pales in comparison to the task a court would face in adjusting a long-term agreement to reflect the original expectations of the parties. *See* John P. Dawson, *Judicial Revision of Frustrated Contracts: The United States,* 64 B.U. L. Rev. 1, 17 (1984) (arguing that courts lack sufficient expertise and authority to revise contracts); E. Allen Farnsworth, *Disputes over Omission in Contracts,* 68 Colum. L. Rev. 860, 879–81 (1968) (arguing that courts are in no position to divine what the parties would have done had they been able to predict the unforeseen events). In addition to the difficulty posed by judicial adjustment of contracts, such a policy flies in the face of traditional modes of contractual interpretation by effectively replacing the bargain struck by the parties with a new, artificial agreement created by the court. Courts cannot replace a contract; they only have the power to enforce the terms of the agreement as written. *See, e.g.*, 5 Margaret N. Kniffin, Corbin on Contracts § 24.19 (Joseph M. Perillo ed., rev. ed. 1998).

16. Energy Info. Admin., U.S. Dep't of Energy, Monthly Energy Review 123 (Sept. 2006), *available at* www.eia.doe.gov/emeu/mer/pdf/mer.pdf.

17. *Id.* at 126.

18. *See* Robert E. Scott, *Conflict & Cooperation in Long-Term Contracts,* 75 Cal. L. Rev. 2005, 2013 (1987) ("Many of the contingencies that affect supply and demand conditions over the life of a long-term contract are too complex and uncertain for the parties to predict their likelihood or scope.").

19. 2A Ronald A. Anderson, Anderson on the Uniform Commercial Code § 2-305:31 (3d ed. 1997).

20. 2 Unif. Sales Act § 9(4) (1906) ("Where the price is not determined . . . the buyer must pay a reasonable price."). Although the explicit language of the Uniform Sales Act suggested that agreements with open price terms should be valid, courts interpreted the Act "as a mere declaration of the common law" and continued to strike down contracts with open price terms; *see also* Miller & Hawkland, *supra* note 1, § 2-305:1 (citing

1 SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT §§ 166–77 (rev. ed. 1948) (collected cases)).

21. AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM COMMERCIAL CODE (1951).

22. U.C.C. § 2-201(1) (1977).

23. *See* UNIF. COMMERCIAL CODE, 1 U.L.A. 1-2, n.1 (Supp. 2006); *see also* Pennzoil Co. v. Fed. Energy Regulatory Comm'n, 789 F.2d 1128, 1142 (5th Cir. 1986) ("[A]ll states except Louisiana have adopted the UCC. . . .").

24. *See* KNIFFIN, *supra* note 15.

25. *Id.* ("The court may imply whatever promise it believes the parties mutually intended.").

26. U.C.C. § 2-305(1) (1977).

27. *See* Prosser, *supra* note 11, at 736 ("The court insists that it cannot make a contract for the parties, but it sometimes is willing to read into the agreement they have made a provision which is not visibly there.").

28. *Id.* at 736–37

(It is not to be supposed that [the parties] have gone through the motions of making a contract with the intention that it shall be of no effect. Neither is it to be presumed that either party intends anything unreasonable. The fact that some pains have been taken to make a contract, where the price cannot be fixed, indicates that considerable importance is attached to the terms upon which there has in fact been agreement. If the court . . . can give effect to these terms, there is every reason why it should do so.);

cf. Project, *A Comparison of California Sales Law & Article Two of the Uniform Commercial Code,* 10 UCLA L. REV. 1087, 1134 (1963) (arguing that any uncertainty raised in the agreement by a failure to set a price should not invalidate a contract because the parties contemplated the uncertainty and nonetheless agreed to be bound to the contract terms); *see also* Abbott v. Amoco Oil Co., 619 N.E.2d 789, 796 (Ill. App. Ct. 1993) (holding open price system permissible in the context of a franchise relationship because it is obvious that franchisor's discretion to set pricing could result in adverse effect on franchisee when prices are raised, so franchisee cannot complain when the franchisor simply exercises that discretion pursuant to the agreement).

29. *See generally* Stuart Hershman, *Revisiting the Robinson-Patman Act in the Franchise Supply Setting,* 16 FRANCHISE L.J. 57, 81 (1996) (discussing the common practice in the franchise industry of franchisors receiving payments from third-party suppliers for their transactions with franchisees).

30. *Id.*

31. *Id.*

32. *See* HAW. REV. STAT. § 482E-6(2)(D) (2004); IND. CODE § 23-2-2.7-1 (2005); MD. CODE ANN., BUS. REG. § 14-229 (West 2002); *see generally* MD. CODE REGS. 02.02.08.16(E)(2) (2006); WASH. REV. CODE § 19.100.180(2)(e) (2006).

33. *Cf.* Nelson v. Nat'l Fund Raising Consultants, Inc., 842 P.2d 473, 476 (1992) (prohibiting a franchisor, under a state law franchise relationship statute, from doing through a third-party vendor that which the franchisor could not do standing alone).

34. *Hearing Before Enlarged Editorial Board January 27-29,* 6 BUS. LAW. 164, 185 (1951).

35. *See* Prosser, *supra* note 11, at 734; *see also* Project, *supra* note 28.

36. *See e.g.,* Project, *supra* note 28, at 1134; *see also* MILLER & HAWKLAND, *supra* note 1, § 2-305:1; Prosser, *supra* note 11, at 734.

37. U.C.C. § 2-305(2) (1977).

38 *See infra* Judicial Analysis of Open Term Contracts.

39. U.C.C. § 1-201(19) (1977) ("'Good faith' means honesty in fact in the conduct or transaction concerned.").

40. U.C.C. § 2-103(1)(b) (1977) ("'Good Faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.").

41. U.C.C. §2-305 cmt. 3 (1977) (stating that good faith merely "includes" observance of reasonable commercial standards without further explanation).

42. Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine,* 137 U. PA. L. REV. 335 (1988) (noting that the meaning of good faith varies depending on the article in question).

43. U.C.C. § 1-201(20) (2003). Under certain state franchise relationship statutes, franchisors are subjected to a separate, independent obligation to set prices fairly when selling goods to a franchisee. *See, e.g.,* WASH. REV. CODE § 19.100.180(2) (2006) (requiring a "fair and reasonable price" for goods sold to franchisee). The authors do not believe such a requirement to be different in effect than that imposed by U.C.C. § 2-305, but it may prompt a second claim based on the same facts by a disgruntled franchisee.

44. *Hearing, supra* note 34, at 186.

45. *Id.*

46. Some industries may even be prohibited by antitrust laws from announcing prices publicly. *Id.*

47. *Id.*

48. U.C.C. § 2-305 cmt. 3 (1977).

49. *Id.*

50. There have been two common disagreements in Section 2-305 cases. The first is over the definition of *good faith* and the relevant standards for commercial reasonability and honesty in fact. The second dispute is over the definition of what constitutes a "normal case" in the context of the safe harbor analysis. *See infra* Judicial Analysis of Open Term Contracts.

51. *Hearing, supra* note 34, at 186 ("If this section is to apply to [contracts with posted prices], it means that in every case the seller is going to be in a lawsuit, I'm afraid. . . .").

52. *See* cases cited *infra* notes 57–73.

53. MILLER & HAWKLAND, *supra* note 1, § 2-305:3.

54. Ronald J. Allen & Robert A. Hillman, *Evidentiary Problems in—and Solutions for—the Uniform Commercial Code,* 1984 DUKE L.J. 92, 100 (1984) (arguing that in light of the UCC drafters' failure to discuss burden of proof issues consistently, "it is not surprising that the cases interpreting the proof rules of the UCC have been unable to advance the Code's goal 'to make uniform the law among the various jurisdictions'").

55. *See* cases cited *infra* notes 57, 63.

56. *See* cases cited *infra* notes 72–74.

57. *See e.g.,* Capital Equip., Inc. v. CNH Am. L.L.C., No. 4:04CV00381GTE, 2004 WL 3406091 (E.D. Ark. Sept. 27, 2004); Vt. Morgan Corp. v. Ringer Enters. Inc., 461 N.Y.S.2d 446 (N.Y. App. Div. 1983).

58. *Capital Equip.,* 2004 WL 3406091, at *10–11.

59. *See id.*

60. *See id.*

61. *See Vt. Morgan,* 461 N.Y.S.2d at 448 (holding that although gasoline distributor presented evidence demonstrating that prices paid by retail dealer over a five-year course of dealing between the parties were consistently equal to the distributor's posted price, summary judgment was inappropriate because, absent an explicit posted price, the burden of proving the good faith of the prices rests with the distributor as the possessor of the

exclusive knowledge as to how prices were actually set).

62. *See, e.g., id.* at 447–48.

63. Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415 (8th Cir. 1986); Mikeron, Inc. v. Exxon Co., 264 F. Supp. 2d 268 (D. Md. 2003); Schwartz v. Sun Oil Co., No. 96-72862, 1999 U.S. Dist. LEXIS 22257 (E.D. Mich. Dec. 9, 1999); Cain v. Chevron U.S.A. Inc., 757 F. Supp. 1120 (Or. 1991).

64. *See Schwartz,* 1999 U.S. Dist. LEXIS 2257, at *57 (holding plaintiff must present evidence that the defendant's posted pricing formula was not followed, was applied uniquely to the plaintiff, or did not follow an industry norm); *see also* Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 290–91 (4th Cir. 1998) (affirming summary judgment in favor of defendant when it was undisputed that defendant charged a competitive price and did not discriminate among buyers); Wayman v. Amoco Oil Co., 923 F. Supp. 1322, 1347 (D. Kan 1996) (holding plaintiff had failed to meet its burden on defendant's motion for summary judgment when it did not allege price discrimination); Shell Oil Co. v. HRN, Inc., 144 S.W.3d 429, 434 (Tex. 2004) (reversing court of appeals and reinstating summary judgment in favor of defendant when plaintiff presented no evidence of price discrimination); s*ee also* MILLER & HAWKLAND, *supra* note 1, § 2-305:3 ("When the price is set, the initial duty may well be on the other party to prove that it is unreasonable in this situation. . . .").

65. *Schwartz,* 1999 U.S. Dist. LEXIS 2257; s*ee also Richard Short Oil,* 799 F.2d at 422–23 (affirming summary judgment when plaintiff presented no evidence that the defendant applied the posted price in a discriminatory fashion); *Mikeron,* 264 F. Supp. 2d at 276 (holding defendant entitled to summary judgment when plaintiff presented no substantial evidence that defendant charged higher prices to plaintiff than to plaintiff's competitors or set the prices in bad faith); *Cain,* 757 F. Supp. at 1124–25 (entering summary judgment for seller because buyer's evidence that seller implemented zone pricing scheme was insufficient to show price discrimination absent evidence that the pricing system compared unfavorably with other pricing systems in the industry or was implemented in bad faith); *but cf.* Montgomery Mall Serv. Inc. v. Motiva Enters. Inc., Bus. Franchise Guide (CCH) ¶ 11,839 (D.C. Md. Oct. 4, 1999) (denying defendant's motion to dismiss when plaintiff alleged that the defendant engaged in discriminatory pricing).

66. *See* cases cited *supra* note 65.

67. Although most courts have addressed the issue of commercial reasonability under provisions that are uniformly similar or identical to UCC Section 2-305, the legal analysis has varied widely. However, a common theme throughout most of the cases has been the dichotomy between outcome (how the resulting prices compare to the marketplace) and process (how the price is set). The first step forces the plaintiff to present evidence that the price set by the defendant resulted in an unfair outcome when compared to other prices in the marketplace. The second step forces the plaintiff to present evidence that the defendant used an unreasonable process (methods inconsistent with standard industry practice) to set the price. To ensure victory, the plaintiff must present evidence to satisfy both steps of the test. However, proof satisfying both steps is not necessarily required. Accordingly, even if the outcome results in prices that compare favorably to those in the marketplace, the plaintiff may still be able to prove that the process used in setting the price is commercially unreasonable. The reverse may also be true for the defendant: if the outcome results in prices outside the range of prices set by competitors, the defendant may still be able to prove that the process used in setting the price is commercially reasonable.

68. *See e.g., Shell Oil Co.,* 144 S.W.3d at 434; *see also supra* note 67 and accompanying text.

69. *See e.g., Shell Oil Co.,* 144 S.W.3d at 434 (holding that a posted price is a good faith price as long as it is a commercially reasonable price).

70. *See id; see also* Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 290–91 (4th Cir. 1998).

71. Tom-Lin Enters., Inc. v. Sunoco, Inc., 349 F.3d 277, 282 (6th Cir. 2003) (citing *Havird*, 149 F.3d at 290–91; TCP Indus. Inc. v. Uniroyal, Inc., 661 F.2d 542, 548 (6th Cir. 1981); AU Rustproofing Ctr., Inc. v. Gulf Oil Co., 755 F.2d 1231, 1235–36 (6th Cir. 1985); Ajir v. Exxon Corp., Nos. 97-17032, 97-17134, 1999 WL 393666, at *7 (9th Cir. May 26, 1999)).

72. Wayman v. Amoco Oil Co., 923 F. Supp. 1322, 1347 (D. Kan 1996) (entering summary judgment because "[p]laintiffs do not allege that they were treated differently than other similarly situated dealers").

73. Wilson v. Amerada Hess Corp., 773 A.2d 1121 (N.J. 2001) (reversing summary judgment when plaintiffs demonstrated that the prices set were outside the range of prices charged by similarly situated competitors, but they were not given the opportunity to present further evidence); *but see AU Rustproofing*, 755 F.2d at 1235–36 (holding that prices set by the manufacturer were not commercially unreasonable merely because the plaintiff's competitors sold gasoline to consumers at prices below the price the plaintiff could purchase it from the manufacturer).

74. *Tom-Lin,* 349 F.3d at 282; Auto-Chlor Sys. of Minn. v. JohnsonDiversy, Inc., 328 F. Supp. 2d 980, 1006–07 (D. Minn. 2004); Spartan Grain & Mill Co. v. Ayers, 517 F.2d 214, 217 (5th Cir. 1975); Schwartz v. Sun Oil Co., No. 96-72862, 1999 U.S. Dist. LEXIS 22257, *58–59 (E.D. Mich. Dec. 9, 1999); Cain v. Chevron U.S.A., Inc., 757 F. Supp. 1120, 1124–25 (D. Or. 1991); Adams v. G.J. Greel & Sons, Inc., 465 S.E.2d 84, 86 (S.C. 1995).

75. Schwartz v. Sun Oil Co., 276 F.3d 900, 905 (6th Cir. 2002) ("[A] jury may not decide in a vacuum whether a particular price for a particular item in a particular industry is appropriate."); *see also Auto-Chlor,* 328 F. Supp. 2d at 1007 ("A court cannot find that a merchant . . . did not observe 'reasonable commercial standards of fair dealing in the trade' when there is no evidence in the record as to what the standards of the trade were." (quoting 1A ANDERSON, *supra* note 19, § 2-103:80).

76. Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1325 (6th Cir. 1983) (holding that defendant had not illegally discriminated in price when it failed to offer special credit arrangements to the plaintiff because the decision was based on legitimate business reasons).

77. *AU Rustproofing*, 755 F.2d at 1235–36.

78. *Cain*, 757 F. Supp. at 1124 ("[D]efendant's system of zone pricing is a commercially reasonable trade practice, used by gasoline marketers for many years.") (citing Butera v. Sun Oil Co., 496 F.2d 434 (1st Cir. 1974) ("The [zone pricing] varied in different marketing areas across the nation, and enabled Sun to adjust its wholesale price in light of the local competitive area.")).

79. Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415, 422–23 (8th Cir. 1986) (holding rebate program valid in the absence of evidence that the program was not standard industry practice).

80. Auto-Chlor Sys. of Minn. v. JohnsonDiversy, Inc., 328 F. Supp. 2d 980, 1007 (D. Minn. 2004) ("'The naked fact of [defendants'] price discrimination' [in favor of company owned retailers] is insufficient." (quoting *Schwartz*, 276 F.3d at 905.)).

81. Shell Oil Co. v. HRN, Inc., 144 S.W.3d 429, 438 (Tex. 2004) ("Evidence that different prices are available to different classes of trade is not sufficient to demonstrate that [a refiner] is overcharging plaintiffs for gasoline." (quoting *Ajir v. Exxon Corp.*, No. C93-20830, 1995 WL 261412, at *4 (N.D. Cal. May 2, 1995))). In the gasoline industry, manufacturers often charge retail dealers one price, known as the Dealer Tank Wagon (DTW) price, while charging wholesale purchasers (jobbers) a lower price,

known as the "rack price." The DTW price is higher because it includes the manufacturer's cost of transportation to the retail dealer's site, while jobbers pick up the product directly from the manufacturer. *See also* Tom-Lin Enters., Inc. v. Sunoco, Inc., 349 F.3d 277, 282 (6th Cir. 2003).

82. *See AU Rustproofing*, 755 F.2d at 1235–36 (holding that prices set by the manufacturer were not commercially unreasonable merely because the plaintiff's competitors sold gasoline to consumers at prices below the price the plaintiff could purchase gasoline from the manufacturer); *cf.* TCP Indus. Inc. v. Uniroyal, Inc., 661 F.2d 542, 548 (6th Cir. 1981) ("[T]he price might be reasonable although not set pursuant to 'reasonable commercial standards of fair dealing.'").

83. *See infra* Honesty in Fact; *see also* Mathis v. Exxon Corp., 302 F.3d 448 (5th Cir. 2002); Wilson v. Amerada Hess Corp., 773 A.2d 1121 (N.J. 2001).

84. Spartan Grain & Mill Co. v. Ayers, 517 F.2d 214, 217 (5th Cir. 1975) ("The products offered by the other organizations were simply not similar enough to Spartan's package of feed and services to be used for comparative purposes."); Adams v. G.J. Greel & Sons, Inc., 465 S.E.2d 84, 86 n.2 (S.C. 1995) (holding that for purposes of evaluating open price term claims, only dealers with similar contractual relationships should be compared to determine the standard industry practice).

85. *Adams*, 465 S.E.2d at 86; *see also Tom-Lin*, 349 F.3d at 283 n.7 (refusing to compare DTW pricing and rack pricing).

86. *Spartan*, 517 F.2d at 218.

87. *See Tom-Lin*, 349 F.3d at 283.

88. *See id.* at 283 n.5 ("Compliance with standard industry practice, however, does not dictate that all refiners price their gasoline *identically*, only that they look to the same general criteria when setting prices.").

89. Mikeron, Inc. v. Exxon Co., 264 F. Supp. 2d 268 (D. Md. 2003) (holding that to support price discrimination allegations, plaintiff must present evidence such as dates of sale, identities of purchasers, or actual prices charged); E.S. Bills, Inc. v. Tzucanow, 700 P.2d 1280, 1286 (Cal. 1985) (holding that trial court erroneously excluded evidence that seller priced outside the range of competitors so that dealer could not compete with other dealers in the area). In *E.S. Bills*, the trial court improperly excluded evidence of the following: retail prices charged by seller-owned service stations, prices charged by the seller to large-volume consumers, a report of the seller's competitors' prices, wholesale prices charged by seller's competitors, the profitability of the buyer's station under the seller's predecessor, the reasons for the buyer's decline in business, and the seller's awareness of retail prices charged by the buyer's competitors. The California Supreme court deemed all of this evidence relevant for purposes of determining whether the seller set the prices in accordance with reasonable commercial standards of fair dealing in the trade. *Id.*

90. Schwartz v. Sun Oil Co., 276 F.3d 900, 905 (6th Cir. 2002).

91. Shell Oil Co. v. HRN, Inc., 144 S.W.3d 429, 433 (Tex. 2004)

(The drafters [of the UCC], however, also wished to minimize judicial intrusion into the setting of prices under open-price-term contracts. To balance these concerns, the drafters created [the] presumption under Official Comment 3 that a 'posted price' or 'price in effect' is a good faith price that may be rebutted only by evidence of discrimination.).

92. Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415 (8th Cir. 1986); Insulation Corp. of Am. v. Huntsman Corp., No. Civ. A. 98-6336, 2000 WL 49370 (E.D.Pa. Jan. 18, 2000); Cain v. Chevron U.S.A. Inc., 757 F. Supp. 1120 (Or. 1991).

93. *Richard Short*, 799 F.2d at 422 (holding that plaintiff could not prove that defendant set prices in bad faith because plaintiff was free to buy from others); *Insulation Corp.,* 2000 WL 49370, at *7 ([U]nder the terms of the Agreement, Plaintiff was not obligated to pay a cent over the best price it could obtain from another seller. . . . [Accordingly], the Court cannot conclude that Defendant acted in bad faith in fixing its prices to Plaintiff."); *see also Cain*, 757 F. Supp. at 1124 (affirming summary judgment in favor of defendant on price discrimination claim because "[p]laintiff could have taken advantage of a lower price but instead made an informed business decision to the contrary because it was more profitable to simply maintain his profit margins in accordance with the higher price he paid to Chevron").

94. *See e.g., Shell Oil Co.,* 144 S.W.3d at 434 ("Most courts have rejected the [subjective good faith analysis] approach . . . [and] it is abundantly clear . . . that the chief concern of the UCC Drafting Committee in adopting § 2-305(2) was to prevent discriminatory pricing. . . .") (quoting Wayman v. Amoco Oil Co., 923 F. Supp. 1322, 1346–47 (D. Kan 1996)). When the buyer is free to purchase the product from other sellers, any discriminatory pricing becomes irrelevant because the buyer has control over the reasonableness of the price. If the buyer is unsatisfied with the price offered by the seller, or believes the price is unfairly discriminatory, it is free to take its business elsewhere.

95. *See* Mathis v. Exxon Corp., 302 F.3d 448, 455–56 (5th Cir. 2002); Allapattah Servs. Inc. v. Exxon Corp., 333 F.3d 1248, 1262 (11th Cir. 2003).

96. *See e.g., Wayman*, 923 F. Supp. 1322, 1347 (entering summary judgment for defendant but indicating that if defendant had "tried to run plaintiffs out of business, then the court's decision might be different"); *see also* Remus v. Amoco Oil Co., 794 F.2d 1238, 1241 (7th Cir. 1986) (affirming summary judgment in favor of defendant when plaintiff failed to present "a shred of evidence that [defendant] has ever wanted to drive [plaintiff] out of business").

97. *Mathis*, 302 F.3d 448, 458 (holding that Exxon's intention to drive its franchisees out of business in order to replace them with company-owned service stations constituted subjective bad faith) (citing Allapattah Servs. Inc. v. Exxon Corp., 61 F. Supp. 2d 1308, 1322 (S.D. Fla. 1999) (holding that a merchant who acts in a manner intending to drive a franchisee out of business violates the duty of good faith)).

98. Mikeron, Inc. v. Exxon Co., 264 F. Supp. 2d 268 (D. Md. 2003) (holding defendant entitled to summary judgment when plaintiff presented no substantial evidence that defendant set the prices in bad faith); *Wayman,* 923 F. Supp. at 1347 (entering summary judgment for defendant but indicating that if defendant had "tried to run plaintiffs out of business, then the court's decision might be different"); *Cain,* 757 F. Supp. at 1124–25 (entering summary judgment for defendant because buyer's evidence that seller implemented zone pricing scheme was insufficient to show price discrimination absent evidence the pricing system was implemented in bad faith).

99. *See* cases cited *supra* note 98.

100. 302 F.3d 448 (5th Cir. 2002).

101. *Id.* at 457. The court's decision is an extension and combination of three other cases that are arguably distinct: Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981) (holding that seller failed to comply with good faith requirements of UCC Section 1-203 by failing to notify the buyer when a price increase would go into effect, a common practice in the industry); *Allapattah Servs.*, 61 F. Supp. 2d 1308 (holding that normal case safe harbor did not apply because the issue was not about the price set, but the manner in which the price was calculated); and *Wayman,* 923 F. Supp. 1322, 1347 (entering summary judgment for defendant but indicating that if defendant had "tried to run plaintiffs out of business, then the court's decision might be different"). The *Nanakuli* opinion is outside the bounds of Section 2-305 because the court's decision was ultimately about the seller's obligation to give notice under UCC Section 1-

203. Although the decision in *Allapattah* was affirmed on appeal, the Eleventh Circuit mistakenly permitted the trial court to define *normal* by its dictionary definition. Allapattah Servs. Inc. v. Exxon Corp., 333 F.3d 1248, 1262 n.16 (11th Cir. 2003). Defining the term broadly does not comport with the original intentions of the drafting committee. *See Hearing*, *supra* note 34, at 186. As a result, the decision in *Allapattah* should carry less weight. Finally, in *Wayman*, although the court indicated that its decision might be different if the defendant "tried to run the plaintiffs out of business," that statement merely reflects the general distaste for such conduct and does not warrant the massive extension of the rule implemented by the court.

102. Shell Oil Co. v. HRN, Inc., 144 S.W.3d 429, 435 (Tex. 2004); *see also* Wilson v. Amerada Hess Corp., 773 A.2d 1121 (N.J. 2001) (holding plaintiffs entitled to further discovery in order to determine whether defendant exercised its "discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract"); Autry Petroleum Co. v. BP Prods. N. Am., Inc., 2006 WL 1174443, *2 (M.D. Ga. 2006) (denying oil company defendant's motion to dismiss because jobber plaintiff's complaint alleged on its face that defendant had manipulated prices in a calculated effort to deceive and cheat jobbers).

103. *Mathis*, 302 F.3d at 457.

104. *Id.*

105. *Shell Oil Co.*, 144 S.W.3d at 434. *Shell Oil* is a Texas Supreme Court decision, but it should carry substantial weight in comparison with the *Mathis* case. Although *Mathis* was a federal appellate case, the Fifth Circuit was deciding a question of Texas state law. Pursuant to the *Erie* doctrine, the Fifth Circuit must make its decision as if it were the Texas Supreme Court. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Consequently, the Texas Supreme Court's subsequent policy reversal in *Shell Oil* has the equivalent effect of overturning the Fifth Circuit's prior decision.

106. *Shell Oil Co.,* 144 S.W.3d at 435 ("[I]f these Dealers were charged the same DTW price by another refiner who did not have a similar plan to thin their ranks, presumably the price would pass muster under [a subjective] view of section 2.305.").

107. *Id.* at 434.

108. *Id.* at 435–36 ("[W]e conclude that allegations of dishonesty under this section must also have some basis in objective fact which at a minimum requires some connection to the commercial realities of the case.").

109. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation,* 151 U. PA. L. REV. 1417, 1423 (2003) ("To resolve legislative ambiguities, courts often turn to those who write the legislation for an understanding of the legislation's meaning.").

110. *See e.g.,* Wayman v. Amoco Oil Co., 923 F. Supp. 1322, 1347 (D. Kan 1996) (entering summary judgment for defendant but indicating that if there was evidence that the defendant had acted with any subjective bad faith, "the court's decision might be different")

111. *Hearing*, *supra* note 34, at 186. During debates over the language in the proposed UCC, Bernard Broeker, a member of the sales committee, proposed two possible changes to Section 2-305(2) that would eliminate any ambiguity. The suggestions read as follows:

> An agreement to the effect that the price shall be or be adjusted to, or be based upon, or determined by reference to the seller's going price, price in effect, regular price, market price, established price, or the like, at the time of the agreement or at any earlier or later time, is not an agreement to which [Section 2-305(2)] is applicable.
>
> An agreement such as this is an agreement under which the seller or the buyer does not have any burden of showing anything other than that he has not singled out the particular other party for discrimination.

At the executive session of the editorial board, the board approved in principle both suggestions. *Id.* The actual language of Section 2-305(2) is meant to establish these suggestions in the text, but for reasons lost to history, the changes use language suggested by the official reporters.

112. *Id.*

113. *See e.g., Shell Oil Co.,* 144 S.W.3d at 435 ("The drafters [of section 2-305(2)] reasonably foresaw that almost any price could be attacked unless it benefited from a strong presumption.").

114. Price discrimination is considered nefarious conduct because it occurs when a party uses its power in the marketplace illegitimately to decrease competition. Absent price discrimination, the buyer is placed on a level playing field with the seller's other buyers, and the market will determine which buyers remain competitive. In the event that a different manufacturer offers to sell the product for less, the seller must follow suit or risk losing buyers as their contracts expire. A price cannot be unreasonable or unfair in this context because, over the long term, market forces will dictate the success or failure of these agreements. However, if the seller discriminates in price between similarly situated purchasers, the fate of the buyer depends not on market forces, but on the grace of the seller.

115. *Hearing, supra* note 34, at 186*; see also Shell Oil Co.,* 144 S.W.3d at 435 ("The drafters [of Section 2-305(2)] wished to minimize judicial intrusion into the setting of prices under open-price-term contracts. They understood that requiring sellers in open-price industries. . . to justify the reasonableness of their prices in order to satisfy section 2.305 would 'mean[] that in every case the seller is going to be in a lawsuit. . . .'").

116. Schwartz v. Sun Oil Co., 276 F.3d 900, 905 (6th Cir. 2002) ("[In order to challenge a posted price with evidence of price discrimination,] [i]t was incumbent upon [the plaintiff] to prove that the prices he paid [the defendant] for its gasoline, even if they were higher than what others in the same situation paid for the same product, were illegal.").

117. 15 U.S.C. § 13 (2000).

118. XIV HERBERT HOVENKAMP ET AL., ANTITRUST LAW ¶ 2301a (2d ed. 2006).

119. *See id.* ("The great majority of [secondary-line] cases involve disputes between manufacturers or other suppliers regarding the way that the manufacturer distributes its own product—more specifically, the way that the product is priced to various resellers.").

120. HOVENKAMP, *supra* note 118, ¶ 2333a, b; *see also* Mikeron, Inc. v. Exxon Co., 264 F. Supp. 2d 268, 275 (D. Md. 2003).

121. Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415, 420 (8th Cir. 1986).

122. HOVENKAMP, *supra* note 118, ¶ 2333b; *see also* I ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 450 (4th ed. 1997) ("[T]here cannot be competitive injury when the favored and disfavored purchasers (and their customers) do not operate in the same geographic market.").

123. HOVENKAMP, *supra* note 118, ¶ 2333b1.

124. *Id.*

125. *Id.* ¶ 2315. In most of the cases addressing open price terms, the products are identical in all respects. For example, the open price cases involving franchises have mostly involved the petroleum industry and gasoline distribution. Retail dealers all deal with the same grade and quality of product.

126. *Richard Short Oil,* 799 F.2d at 420–21 ("[T]o sustain its prima facie case of injury to competition, [the plaintiff] would have had to present

evidence of the amount and percentage of the discrimination, and the degree of competition it faced in the market, as well as sustained price differentials which are more than de minimus."). *But see* Hershman, *supra* note 29, at 79

(In most jurisdictions, this inquiry is not confined to competition between the favored and disfavored buyers but focuses on competition in the properly defined product and geographic markets as a whole, that is, competition between all dealers and distributors of similar products in the relevant geographic area. Given the Act's broad statutory language, however, courts often evaluate the competition between the favored and disfavored customers and, in appropriate circumstances, infer harm to competition as a whole from evidence of harm to individual competitors.).

127. *See id.* at 420–21 ("[However,] there is no liability. . . when the competitive injury is the result of the plaintiff's own competitive shortcomings, rather than a merely coincidental discrimination in price."). In addition, the requirement that the plaintiff prove competitive injury dovetails nicely with the captive buyer exception recognized by some courts. If the buyer is not held captive to the seller's prices, he is free to purchase the goods on the open market at a competitive price. If the buyer is freed in this manner, it is not reasonably probable that price discrimination by the seller will have any bearing on the ability of the buyer to compete with similarly situated dealers. *See* discussion at notes 92 and 93 and accompanying text.

128. Schwartz v. Sun Oil Co., 276 F.3d 900, 905 (6th Cir. 2002). The U.S. Supreme Court has permitted the fact finder to infer competitive injury from proof of price discrimination, the practice's tendency to injure competition, and evidence that the plaintiff experienced a decline in prices, profits, and values that could not be attributed to causes other than the price discrimination. *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946).

129. *See* Wayman v. Amoco Oil Co., 923 F. Supp. 1322, 1350 (D. Kan 1996) ("To hold otherwise would be to open the can of worms that Mr. Broeker and the other members of the drafting committee obviously wished to keep closed.").

130. *See* discussion *supra* Honesty in Fact.

131. Cases that solely implicate subjective bad faith are rare because in most cases where the seller intends to drive the buyer out of business, it will be clear from the seller's conduct (charging unreasonable prices) that it has acted in bad faith. For example, consider a scenario in which a franchisor, for a variety of reasons, would like to replace a franchisee with a company-owned business. The franchisor begins by selecting a particular franchisee that it knows is struggling financially. Then, in order to drive the franchisee out of business, the franchisor sets a price for goods just above the price at which the franchisee may operate profitably. If the franchisee has not operated the business at maximum efficiency, it is possible that the crucial level is still within a reasonable price, as compared with the franchisee's competitors. A court confronted with this case must agree that the price is a reasonable price and that no price discrimination has occurred. In spite of this fact, a number of courts have indicated that the seller's bad faith intent to drive the buyer out of business is sufficient to invalidate the price under Section 2-305. *See* cases cited *supra* notes 95–97.

132. Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 806 (9th Cir. 1981) (Kennedy, J., concurring specially); *see also Wayman,* 923 F. Supp. at 1348 ("noting that Nanakuli's good faith claim was dependent on the clear evidence of trade usage and custom . . .").

133. *Nanakuli,* 664 F.2d at 806.

134. *Id.*

"Prepaid Cards and State Unclaimed Property Laws"

(continued from page 29)

and gift cards" are property covered by the statute under the general definition of intangible property).

53. TEX. PROP. CODE § 72.1016 (a "stored value card," which would likely include a gift card, is subject to the statute unless certain expiration date and dormancy fee conditions are met).

54. IOWA CODE § 556.9 ("electronic gift card" included within the definition of *gift certificate*).

55. ARIZ. REV. STAT. § 44-301(15) ("electronic gift cards" are excluded from property subject to the statute).

56. R.I. GEN. LAWS § 6-13-12 (Rhode Island Unfair Sales Practices Act, which prohibits expiration dates on gift certificates, including "electronic gift cards," also provides that gift certificates are not subject to escheat).

57. Both the 1995 and 1981 Uniform Acts likewise expressly include gift certificates as property subject to the acts. 1995 Uniform Act § 1(13)(ii); 1981 Uniform Act § 1(10)(ii).

58. BNA UNCLAIMED PROPERTY, *supra* note 9, § VIII.A.

59. 12 DEL. CH. § 1199(g). **[Is this citation correct?]**

60. CAL. CIV. PROC. CODE § 1520.5.

61. 1981 Uniform Act § 1(8).

62. 1995 Uniform Act § 1(6).

63. For instance, a retailer may desire to record (and to require franchisees to record) identifying information on purchasers of prepaid cards in order to later conduct marketing analysis and/or targeted marketing programs.

64. Note, however, that at least two states, Rhode Island (beginning in 1992) and Wyoming (beginning in 1993), require businesses issuing gift certificates to record either the name and address of purchasers of gift certificates or the state of purchase, presumably seeking to create records of owners' last known addresses or the state of transaction for purposes of the primary or tertiary rules. R.I. GEN. LAWS § 33-21.1-14(d) (2007); WYO. STAT. ANN. § 33-24-114(d).

65. That is, the "transaction out of which the property arose," in the case of 1981 and 1995 Uniform Acts.

"The Enforceability of Arbitration Agreements in Bankruptcy

(continued from page 44)

83. *Id.* at 870.

84. *Id.*

85. *Id.* at 872.

86. Slipped Disc, Inc. v. CD Warehouse, Inc. (*In re* Slipped Disc, Inc.), 245 B.R. 342, 345 (Bankr. N.D. Iowa 2000) ("While the present adversary proceeding is indeed a core proceeding under § 157(b)(2)(C), it is not a core proceeding in the same manner as that term is used in cases dealing with enforcement of arbitration clauses.").

87. *Id.; see also* Nu-Kote Imperial, Ltd. v. Nu-Holding, Inc. (*In re* Nu-Kote), 257 B.R. 855, 864–65 (Bankr. M.D. Tenn. 2001) (court rejected wholesale reliance on the core versus noncore analysis and looked at whether the claims or defenses asserted were created by the Bankruptcy Code or were "inherited contractual claims derivative of the prebankruptcy agreements").

88. *Slipped Disc*, 245 B.R. at 345.