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Hot Fuel Team Shook, Hardy & Bacon

Legal Champions

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Defended retailers over the way gasoline is measured

ne defense victory out of a nationwide series of law-suits might not seem like much. But considering that class actions rarely go to trial at all, defense attorneys in a series of "hot fuel" lawsuits see last September's win by three gas retailers as a special event.

"We went forward based upon these defendants' very strongly held belief that it was just fundamentally unfair to be held liable for a practice that everyone did and a practice that is specifically authorized," said Tristan Duncan, of Shook, Hardy & Bacon in Kansas City, who represented retailers 7-Eleven, QuikTrip and Kum & Go. "If they did what plaintiffs wanted, they themselves would be penalized by the regulators, who have already rejected a temperature-based system. It was a Catch-22."

The fuel industry measures a gallon of gasoline at a 60-degree Fahrenheit standard. But when the weather is warmer, the fuel expands, causing it to contain less energy per volume.

Six years ago, a series of articles in the Kansas City Star showed that because fuel retailers don't adjust for the fuel's expansion customers could get less out of a gallon of gas than they thought. The news articles helped trigger a flood of



From left, Amy Crouch, Jim Muehlberger, Tristan Duncan and Brad Bodamer Photo by Karen Elshout

lawsuits, which were consolidated as multidistrict litigation in the U.S. District Court of Kansas under Judge Kathryn Vratil.

"If you're buying alcohol, 86 proof means 86 proof — it doesn't mean 91 one day and 75 another day," said Tom Bender, of Walters Bender Strohbehn & Vaughan in Kansas City, one of the firms representing the plaintiffs. "You want some kind of benchmark."

The defendants, ranging from gas stations to refiners, argue that U.S. regulators already considered — and rejected — a temperature-based system of fuel measurement as not in consumers' best interests.

Duncan argued that the plaintiffs were "hijacking democracy" by trying to change the system through litigation.

The defendants also argued that although fuel offers less energy when it expands, it becomes more energy dense when it contracts in cold weather, so consumers' fuel purchases balance out in the long run.

That might have helped persuade a Kansas federal jury in September to unanimously reject claims that the three gas stations violated Kansas' consumer protection laws by selling hot fuel. Bender said Kansas is a "borderline" state because its cold winters and hot summers average out to close to 60 degrees.

Other suits in the MDL hail from states like California, where it's warm all year and consumers could be getting less bang for their buck consistently. The plaintiffs say a trial in one of those cases could see a different outcome.

But Duncan, whose firm remains involved in the defense of many of the other cases, doubts that will be the case. The price of fuel fluctuates daily because of competition, she said, so whether motorists are buying temperature-adjusted fuel or not, they're always getting what they paid for.

"We don't believe the outcome would be any different in any other part of the country," she said.

Several defendants, however, have chosen to settle out of the case. Costco agreed to a nonmonetary settlement in 2009. The agreement won final approval last April, though an appeal is expected as soon as Vratil approves the attorneys' fees. The settlement provides no money to class members, but Costco promised to install automatic temperature compensation, or ATC, at gas pumps in several states.

Meanwhile, a group of fuel refiners agreed last year to pay \$21.2 million, while a group of retailers agreed to post information at the pump about fuel temperature. Vratil has given preliminary approval to those settlements.

The case is In Re Motor Fuel Temperature Sales Practices Litigation, 2:07-md-1840.