

Nearly 300 attorneys now involved in the case

Lawyers will be big winners in temperature compensation battle

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Listen to activists campaigning for automatic temperature compensation at retail and they'll tell you that consumers will save millions if gasoline marketers are forced to install the system at their stations.

But a check of court filings in the temperature compensation lawsuit now pending in a Kansas federal court shows that Big Law will be the largest beneficiary at the end of the day.

The number of attorneys involved in the proceedings stands at 288 as of Dec. 12, more than would fit into any U.S. courtroom.

Many of them work for "white shoe" law firms in money centers like Los Angeles, New York and Chicago, where the lowliest associate attorney earns \$285 to \$400 an hour and senior partners command from \$550 to \$1,100/hour, lawyer sources say.

All the suits have been combined into one piece of multi-district litigation but the costs facing the 105 or so majors, marketers, truck stop and store chains named as defendants continues to mount.

"This is the true meaning of a feeding frenzy for lawyers," says Peter Sodini, CEO of The Pantry chain, one of the 82 marketer-run companies being sued. The Pantry has been named in four or five of the putative class action lawsuits.

"These are not costs that people can afford to absorb, they will all have to be passed on," says Sodini.

Marketers say they're likely to be at the losing end of the litigation, no matter what happens.

Equipping or retrofitting stores with automatic temperature correction devices will cost one large retailer some \$20 million. The firm has already spent more than \$100,000 on lawyers to defend itself in the temperature compensation suit, and that's after splitting costs with other marketers, says a source with that company.

It is almost a year to the day that the first suits were filed by a group of trial attorneys on behalf of truck drivers and consumers in 17 largely southern states.

The lawyers and activists contend that fuel marketers are cheating the motoring public out of approximately \$2.3 billion/yr by selling them so-called "hot fuel" that is warmer than the standard 60 degrees Fahrenheit.

According to Joan Claybrook, president of the advocacy group Public Citizen, states are losing \$360 million/yr in highway funds because fuel retailers evade taxes by selling on a gross gallon basis.

The class action attorneys are seeking damages going back five years, not only for the 153 or so named plaintiffs but also for the class. There were approximately 101.1 million licensed drivers in the 17 states in 2005, the latest numbers available from the Federal Highway Administration show. According to the agency, gasoline and gasohol consumption in those states topped 89 billions gals in 2005.

"The numbers are mind-boggling," says Sodini.

How each of those drivers could be compensated is hard to see – after all, how do you prove how much gasoline or diesel a consumer purchased at retail?

A more likely scenario, should the case be settled, would involve a rollback of retail prices for a limited time, says marketer attorney Bill Taylor. Truck drivers may look to cut their own deal, however, given that they would be in a better position to prove their purchases, he says.

According to husband-and-wife truck-driving team Mark and Becky Rushing, two of the lead plaintiffs in the case, they spent \$88,000 on diesel in 2005. Their trade group, the Owner-Operator Independent Drivers Assn. (OOIDA), is one of the major proponents of automatic temperature compensation.

There has been little action in the case so far, only an order from the judge on which documents should be preserved for discovery purposes. There are approximately 121 attorneys representing the plaintiffs and many are almost certainly working on a contingency basis. But that still leaves 167 lawyers working for refiners and marketers. If they each earn \$400/hour, the bill for just 10 hours work would be \$668,000.

The class action attorneys in the case contend that drivers are being shortchanged on the number of Btus in each gallon of gasoline that's warmer than 60 degrees Fahrenheit.

But there are several problems with their arguments, says Taylor. For example, with the increased use of ethanol in gasoline, there is simply no way that Btu content will be a uniform amount.

"I don't see how their claim of fraud or deception stands up either," says Taylor. "I know of no oil company advertisements that suggest that gasoline is temperature-adjusted at retail." Weights and Measures officials in each state regulate the way fuel is dispensed at retail and it will be hard for the class action attorneys to overcome that fact.

The lawsuit also reflects a woeful misunderstanding of the retail gasoline market, Taylor notes. "Anyone familiar with the industry knows that the retail market is localized and highly competitive, which means that temperature variations are one of many factors reflected in the price at the pump. To allege that retailers can simply pocket billions of dollars by selling gross gallons is ridiculous," he says.

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