



General Counsel Corner

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1999 Judicial Highlights

With the end of the year – not the millenium, which this writer firmly believes will not properly end until after December, 2000 – it seems appropriate to review some of the past year's significant litigation successes. These cases establish that dealers *do* have legal rights, and suppliers are not free to ignore them.

In *Carter v. Exxon, Co. USA*, 177 F.3rd 197 (3rd Cir 1999), the appeals court held that Exxon could not hold the dealer's renewal hostage to its demands that he release Exxon from liability for its tank repair blunders, and that he make further investments to upgrade the station.

Additionally, the court rejected Exxon's reliance on the disclaimer of consequential damages provision contained within its equipment rental agreement in its attempt to walk away from the damages the dealer suffered as a result of Exxon's shoddy tank repairs. The court found the disclaimer both to be unconscionable and not adequately conspicuous on the face of Exxon's form agreement.

Fink v. Amoco Corp., 55 F. Supp. 2d 350 (W.D. Pa. 1999), was brought by a number of Pittsburgh Amoco dealers to challenge Amoco's termination of their leases, supposedly done to comply with the terms of the consent decree that BP/Amoco negotiated with the Federal Trade Commission.

Granting the dealers a preliminary injunction prohibiting Amoco from proceeding with the terminations, the court stressed that neither the oil company nor the FTC could negotiate away the dealers' PMPA rights.

Ironically, Amoco was told the same thing about the PMPA that many unsuccessful dealers have been told in the past, if you "are unhappy with the past, [you] should appeal to Congress for appropriate relief."

In *Kamel v. Shell Oil Co.*, 187 F. 3rd 647, 1999 WL 413414 (9th Cir. 1999), a number of California Shell dealers protested Shell's attempt to terminate their franchises because it did not want to spend the money to upgrade the dealers' tanks in order to comply with long-scheduled environmental regulations.

Not only did the trial court enjoin preliminarily the terminations, but it ordered that Shell immediately undertake the expense of upgrading the dealers' tanks.

Affirming both the lower court's prohibition on termination and its order that Shell undertake immediate repairs, the Ninth Circuit held:

In light of the permissive standard for injunctive relief under PMPA §2805(b), it is clear that the district court did not abuse its discretion when it required Shell to

complete the environmental upgrades.

Two unpublished decisions, *Korangy v. Mobil Oil Corp.*, (D. Md. 1999), and *Sawhney v. Mobil Oil Corp.*, (3rd Cir. 1998), represent rare occasions of courts giving credence to dealers' constructive termination claims. In each case, the court refused to dismiss the dealer's claim that Mobil's assignment of his franchise to a jobber was illegal because of the unique language contained in Mobil's old form dealer agreement.

Under Mobil's old form agreement, it was only expressly permitted to assign the dealer's franchise to another corporation affiliated with Mobil – which would not include a jobber or other unrelated entity.

To the extent that other old form Mobil agreements remain in existence, these decisions would have direct application to the aftermath of the present Mobil/Exxon merger.

In *Montgomery Mall Service Center, Inc. v. Motiva Enterprises, Inc.*, (D. Md. 1999), another unpublished decision, the court refused to dismiss certain of the dealer's claims attacking Texaco's zone pricing.

The court held that Texaco's zone pricing could be violative of the Uniform Commercial Code's open price term provision, §2-305, and might also breach Texaco's contractual commitments, as established through the parties' previous course of dealing. It was not necessarily fatal to the dealer's contract claims, said the court, that no express commitment prohibiting zone pricing was set forth

within the four corners of the parties' supply agreement.

These cases are not the only dealer successes during the past year. Defeats were suffered as well. But, as the year ends, they stand out as important victories that may be of importance in battles to be fought during the next year, and *then* in the next millenium.

If you want any further information on these cases, or know of other recent decisions of interest, please contact me at pgunst@aggt.com.

