General Counsel Corner

By Peter H. Gunst, Esquire

Is the Shell/Texaco Joint Venture Naked Price-Fixing?

Of the several lawsuits filed by dealers around the country challenging the activities of Shell and Texaco since the creation of their joint venture with Saudi Refining, one of the most interesting is the class-action price-fixing case filed by the Alioto Law Firm and other counsel against Shell, Texaco, Saudi Refining and their joint venture entities, Equilon and Motiva, in the federal district court in Los Angeles.

The complaint in *Dagher v. Saudi Refining, Inc.* goes right for the jugular. It contends that what the oil companies term a joint venture is nothing more than a naked price-fixing agreement.

The *Dagher* complaint emphasizes that the Equilon and Motiva joint ventures were formed by existing competitors, and now control the prices and rents charged to both Shell and Texaco branded dealers. This, it argues, is classic horizontal price-fixing for which all Shell and Texaco dealers, nationwide, are entitled to treble damages under § 1 of the Sherman Act.

Joint ventures do not fit neatly under the antitrust laws. On the one hand, they may constitute naked combinations among competitors to allocate markets or to fix prices, falling squarely within the law's *per se* condemnation of horizontal agreements adversely affecting competition.

On the other hand, they may have pro-competitive impact, where they provide their members a vehicle through which they can compete in ways that they could not compete individually. For example, by forming a joint venture small competitors may acquire sufficient financial muscle to bid for work from which they would individually be excluded.

Because of these competing considerations, some courts have shown timidity in applying the full force of the antitrust laws to joint ventures. In *Addamax*

Corp. v. Open Software Foundation, Inc., 152 F.3d 48 (1st. Cir. 1998), the First Circuit Court of Appeals observed that joint venture enterprises, "unless they amount to complete shams . . . are rarely susceptible" to *per se* condemnation under the Sherman Act. The court's statement, however, was dictum and the joint venture at issue involved the creation of a new product that the venture members probably were incapable of producing independently. That venture, therefore, appeared to possess sufficient pro-competitive promise to distinguish itself from a naked restraint on competition.

The Supreme Court dealt with the other end of the spectrum in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990). There, two bar review providers entered into a joint licensing agreement pursuant to which one obtained the right to use the tradename of the other, and then agreed to pay its licensor a hefty stream of royalty payments, in return for the licensor's agreement not to compete with its licensee anywhere in the state of Georgia. Immediately following the formation of the venture, course prices jumped from $150 to over $400.

Reversing contrary holdings by both the district and circuit courts, the Supreme Court held that the arrangement violated § 1 of the Sherman Act. Mere labels could not disguise the fact that the parties had entered into a naked agreement to allocate territories in order to minimize competition.

Admittedly *Palmer* is distinguishable because it involved market allocation rather than joint pricing. It is significant, however, because it shows that the defendants' use of corporate devices as cover could only take them so far.

What about the Equilon and Motiva joint ventures? When the Federal Trade Commission looked at their formation, it was concerned only with certain specific effects that it deemed to be anticompetitive. The consent order that the FTC proposed in April 1998 did not directly attack the formation of either enterprise. The failure of the FTC to address the point, however, has no precedential impact.

What appears absent from the Equilon and Motiva enterprises is any real justification analogous to that found in cases where joint ventures have succeeded in overcoming antitrust challenges. Shell and

Texaco have more than sufficient resources to continue to compete independently, as they had done for decades preceding the creation of the joint venture entities. Their dealers continue to this date to market the same products under the same brand names. Apparently all that has occurred is that competition has been eliminated among the venturers themselves.

No one should rashly predict the outcome of a complex antitrust case. But the *Dagher* complaint raises serious issues concerning the legality of the conduct of Shell and Texaco.

astrachan gunst thomas
attorneys at law
a professional corporation