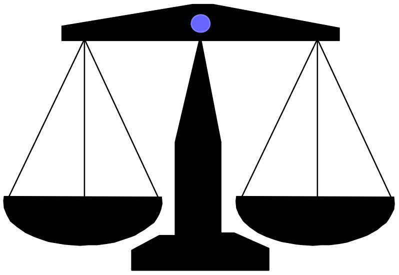

General Counsel Corner

By Peter H. Gunst, Esquire

Of Mergers and Price Discrimination

Unquestionably, the major development in the past month was the announced intention of Exxon and Mobil to merge. The news not only follows previous consolidations in this industry; but, the analysts tell us, is also a precursor to yet further consolidations.

We are told that today's merger movement, both in the petroleum industry and elsewhere, will result in efficiencies and cost-savings. Perhaps. But it is at least as likely that any such benefits will be outweighed by the reduction of consumer choice in the marketplace, and by the price increases that can be anticipated — after the present supply glut ends — in an increasingly oligopolistic market.

Many commentators have drawn the parallel between the trust era that led to the passage of the Sherman Act a little more than a century ago and the present wave of merger fever.

There is more than a little irony that an Exxon-Mobil merger would undo much of what the Supreme Court did in *Standard Oil Co. v. United States,* 221 U.S. 1 (1911), when it broke up the old Standard Oil of New Jersey company.

Now that federal and state antitrust enforcement agencies will be called upon to review the potential anticompetitive effects of the present proposed Exxon-Mobil merger, it may be an opportune time to recall the words of Justice Harlan's concurring and dissenting opinion in the original *Standard Oil* case:

> All who recall the condition in the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery,—fortunately, as all now feel,—but the conviction was universal that the country was in real danger from anther kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong.

These considerations remain valid today.

Another significant recent event, although not of the seismic proportions of the proposed Exxon-Mobil merger, was the jury's verdict in a federal price discrimination suit, *Schwartz v. Sun Company, Inc.* There, a multi-location dealer complained that he was being driven out of business by Sun's discriminatory rack pricing to distributors who both operated and resold to competing locations.

Commenting last May on the Michigan federal district court's earlier refusal to grant summary judgment to Sun on the dealer's Robinson-Patman Act claim, we said:

> We seriously doubt that suppliers will often be able to justify the significant disparities that exist between jobber and deal prices.

When the evidence came out at trial, Sun could not overcome that hurdle. Sun could not justify the unjustifiable.

In the course of a three-week trial, the dealer's attorney, Harry Storm, proved price disparities between the jobber rack price and the dealer tankwagon price that were often well in excess of ten cents per gallon. The jury did not buy Sun's argument that such significant disparities could be justified based upon the additional marketing functions that were supposedly performed by Sun's jobbers.

When the smoke cleared, the jury on December 4, 1998 awarded almost $2,500,000 in trebled antitrust and breach of contract damages. Attorneys fees will also be awarded to the dealer at a later date.

The dealer prevailed not only on his price discrimination claim, but also on his contract claim that Sun had breached its good faith obligations under the open price term of the parties' supply agreement. This is important because a breach of contract claim may well provide a fall back position to a dealer who is unable to satisfy the more rigorous competitive injury requirements of the Robinson-Patman Act.

The jury's verdict is subject to further review and appeal. Nevertheless, it points out the significant vulnerability suppliers have when they disregard legitimate dealer interests by permitting an unconscionable spread to exist between jobber and dealer prices.

Both the plaintiff dealer in the *Schwartz* case and Mr. Storm are to be congratulated for pursuing arduous litigation to, at least at this juncture, a significant victory.

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