General Counsel Corner

By Peter H. Gunst, Esquire

State Oil v. Kahn in Retrospect

Because over a year has passed since the Supreme Court decided in *State Oil Co. v. Kahn*, 118 S. Ct. 275 (1997), that maximum retail price fixing should no longer be considered *per se* illegal under the antitrust laws, it seemed a good time to see what others were saying about *Kahn* and its impact.

Kahn involved a lessee dealer who entered into a supply agreement with a Union 76 jobber, which for all practical purposes restricted the dealer's gross margin to a maximum of 3.25 cents per gallon. Given that spread, it is not surprising that the dealer was soon driven out of business.

Thereafter, the dealer sued the jobber for maximum retail price fixing, which was then considered to be a *per se* violation of the Sherman Act under the Supreme Court's decision in *Albrecht v. Harold Co.*, 390 U.S. 145 (1968).

Radically changing the law, the Supreme Court held in *Kahn* that maximum retail price fixing would no longer be considered to be a *per se* violation of the Sherman Act. Rather, it would only be condemned if it violated the so-called "rule of reason," which requires a finding of anticompetitive effect throughout a relevant market.

In the real world, satisfying the "rule of reason" standard is so difficult and so expensive that dealers will rarely have the means and ability to challenge even the most unconscionable margin squeeze.

For that reason, SSDA is pushing for an amendment to the PMPA to prohibit maximum price fixing in this industry and to protect dealer pricing freedom.

In the meantime, legal scholars have had time to ruminate about *Kahn* and to gauge its potential impact.

Professor Roger Blair has long opposed application of the *per se* rule against maximum price fixing. He wrote an influential article six years before *Kahn* was decided attacking the law of maximum retail price fixing as it then stood. Not surprisingly, the article that he and Professor John Lopatka wrote in the October 1998 issue of the Notre Dame Law Review applauded the Supreme Court's action in *Kahn*.

Typical of many antitrust academics, Professors Blair and Lopatka tend to regard matters in an abstract manner that is far removed from reality. Based upon their theoretical assumptions, they conclude that the dealer in *Kahn* "might have had monopoly power," and that his supplier probably acted "to prevent [the dealer] from reaping the economic rewards to which [the supplier] was entitled."

This hardly squares with the real-life dealer in *Khan,* who was squeezed out of business because his supplier would only permit him a parsimonious 3.25 cents per gallon margin!

Professors Blair and Lopatka do allow that a supplier might conceivably take unfair advantage of its dealers by squeezing their margins, once they were locked into dealer agreements. According to the professors, however, dealers "typically can protect themselves" by insisting on contract provisions protecting their pricing freedom. I would like to see them attempt to negotiate such a provision from a major oil company!

Although Professors Blair and Lopatka would have liked the court to have gone further and to have classified maximum price fixing as *per se* legal, they do not think that the Supreme Court will take that step in the near future. Ultimately, they believe that *Kahn* will not lead to any further "dramatic changes in antitrust dogma."

In his 1999 article in the Cornell Law Review, Professor Alan Meese considers the *Kahn* decision from the perspective of a trade off between "trader freedom" and "consumer welfare."

He emphasizes that, although the Court relied on supposed advances in economic theory as a basis for reversing its earlier *Albrecht* decision, it did not directly repudiate the assumption contained within cases like *Albrecht* that the antitrust laws were intended to protect dealer independence as well as consumer welfare.

For this reason, Professor Meese views the Supreme Court's decision as unlikely to have much impact on other areas of antitrust law. He does not believe that *Kahn* will impose any "unifying standard," which would, for example, generally insulate suppliers from antitrust claims brought by dealers.

From early indications, these analysts may be correct.

A key remaining area of dealer interest under the antitrust laws involves tie-in arrangements. Although the law differs markedly from circuit to circuit, dealers may still find a significant level of protection under the antitrust laws against efforts by their suppliers to force them to accept additional, unwanted goods and services.

In *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999), the defendant attempted to convince the court that the Supreme Court in Kahn "made clear that the correct standard to be applied [when assessing the legality of tie-in arrangements] is the 'rule of reason' standard," and not *per se* liability.

The Eleventh Circuit panel did not buy the argument. It found nothing in *Kahn* to support the defendant's argument that that decision "stands for a rejection of the *per se* standard in any context other than that of vertical maximum price fixing."

Kahn's impact is severe enough because of the power it gives suppliers to squeeze dealer margins. But at least there is no evidence to date that the impact of the Supreme Court's decision will spread beyond the context of maximum retail price fixing.

If you have any legal news of interest or questions or comments regarding this article, please e-mail them to me at pgunst@aggt.com.

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