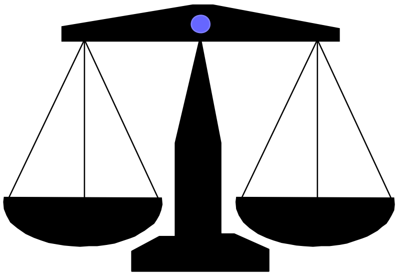

General Counsel Corner

By Peter H. Gunst, Esquire

Of Tanks, Assignments and Predatory Pricing

One goal of these articles is to note recent court decisions of interest to independent service station dealers. Recent cases of interest concern the extent of supplier liability for leaking underground storage tanks, the potential right of first refusal applicable to Mobil franchise agreements and the enforcement of Florida's below-cost pricing law.

Underground storage tanks ("USTs") were the subject of concern to the Indiana Supreme Court in *Shell Oil Co. v. Meyer*. The case attracted national interest because approximately 45 states have enacted statutes similar to Indiana's Underground Storage Tank Act. Among those appearing as amicus curiae were the attorney generals of Arkansas, Arizona, Connecticut, Guam, Hawaii, Illinois, Indiana, Iowa, Minnesota, New Mexico, New York, Utah and Vermont and the National League of Cities, the American Petroleum Institute, and SSDA.

Shell Oil v. Meyer asked whether Shell and Unocal, as successive suppliers to an independently-owned service station, were responsible as "operators" for clean up costs resulting from leaking USTs.

Both the trial court and the intermediate appellate court had held that both refiners were liable because they maintained "practical control" over the station, even though they had no direct responsibility for the station's daily operations.

The Indiana Supreme Court partially disagreed, finding Shell but not Unocal liable under a different theory.

The leaking USTs were located at a closed service station, which had been owned but not operated by an individual who also delivered gasoline to the station on a regular basis in his separate capacity as a "commission agent" truck driver, first for Shell and then for a Unocal distributor.

The Indiana Supreme Court held that a refiner like Shell or Unocal was not a "responsible operator" merely because "the refiner's brand creates practical leverage over the station's owner or operator." "Practical control" was not enough to visit direct liability on either refiner.

But the court did not stop there. It emphasized that the "commission driver" was an independent contractor providing services on behalf of Shell and later on behalf of a Unocal jobber. In that capacity, he had sufficient connection with the USTs to be deemed an "operator." And, because a UST is an inherently dangerous instrumentality, the company that utilized his services would be vicariously liable for his "operator" status.

As a result, Shell remained liable under common law agency principles. Unocal was exonerated because its use of a jobber intermediary insulated it from liability.

The decision is fascinating not only because of its potential for application in other states, but also because of the insight it provides into judicial reasoning. Complex real-world relationships are reduced to legal definitions like "operator," "contractor," "dangerous instrumentality" and the like. Based on the legal significance of those categories, one refiner walks and the other doesn't.

The second topic, Mobil's potential liability for failing to provide the right of first refusal to its lessee dealers, came up in two decisions, the Third Circuit's decision in *Sawhney v. Mobil Oil Corp.* and the Maryland federal district court's decision in *Korangy v. Mobil Oil Corp.*

In the past three years or so there have been a spate of decisions attacking as violations of the PMPA suppliers' assignments of dealer leases to distributors. Almost all such attacks have failed.

Both federal and state courts have been unwilling to find that a franchise assignment constitutes a constructive termination of the dealer's franchise.

But Mobil may have painted itself into a corner with the unique language that it inserted into its form franchise agreement. Instead of reserving to itself a general right of assignment, Mobil said only that it "may assign this agreement, franchise and franchise relationship to any other *affiliated* corporation."

Both the *Sawhney* and *Korangy* courts held that Mobil's language raised a genuine issue as to whether Mobil may *only* assign its franchises to directly-related entities. These would *not* include the independently owned jobbers and distributors that normally are the recipients of such assignments.

These decisions could have a limited impact on the Exxon/Mobil merger. The FTC's earlier tentative approval of the BP/Amoco merger was conditioned upon the divestiture of at least some outlets in some markets. If Mobil is likewise required to divest properties in some markets where the combined Exxon/Mobil market share is too great, Mobil may be compelled under the PMPA to provide a right of first refusal to affected lessee dealers.

The final decision under consideration is *Racetrac Petroleum, Inc. v. Delco Oil, Inc.* There, an intermediate appellate court in Florida affirmed the entry of a preliminary injunction prohibiting Racetrac from selling gasoline below "nonrefiner cost," as defined by Florida's Motor Fuel Marketing Practices Act, §§ 526.301-3135, Fla. Stat.

In a brief decision, the appellate court rejected Racetrac's argument that the complaining dealer had to show that below-cost motor fuel pricing had affected "competition as a whole," and not just the plaintiff's profitability. The court also rejected Racetrac's argument that no preliminary injunction should have been entered because Racetrac was faced with potential lost profits amounting to $113,000, and consumers might be required to pay as much as an additional $600,000 for motor fuel purchased at the Racetrac station.

What is most significant about the *Racetrac* decision is the statute that made it possible. The Florida Marketing Practices Act addresses predatory pricing both by refiners and non-refiners, including refiner affiliates. It also provides workable preliminary injunction and damage standards. Other states could do worse than use it as a model.

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