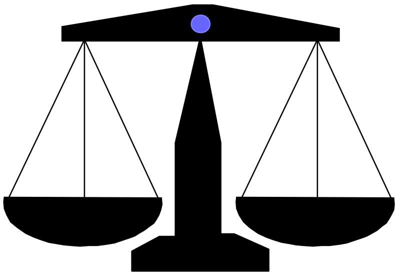

General Counsel Corner

By Peter H. Gunst, Esquire

Shell/Texaco Price-Fixing Case Passes First Hurdle

Last August, we wrote about a fascinating case that recently had been filed in the Los Angeles federal court.

Dagher v. Saudi Refining dared allege that the Shell-Texaco-Saudi joint venture was nothing more than an illegal price-fixing agreement among competitors, in *per se* violation of Section 1 of the Sherman Act.

Filed but not yet certified as a class action on behalf of approximately 23,000 Shell and Texaco dealers nationwide, *Dagher* has now passed its first major hurdle.

The critical issue in *Dagher* is how the refiners' joint venture should be classified under the antitrust laws.

Unquestionably, this case involves an agreement among entities who were competitors. Unquestionably, it restricts their ability to compete against each other by continuing what had been competitive organizations.

But should their agreement be classified as a naked combination to fix the price at which they sold gasoline in *per se* violation of the antitrust laws? Or should it be viewed more tolerantly under the "rule of reason" as a run-of-the-mill joint venture, subject to condemnation only if it can be proven to have had a significant adverse effect on competition?

The importance of this issue of classification cannot be overemphasized. Almost always, if a restraint is classified as *per se* the defendants lose. Almost always, if the restraint is subject only to rule of reason analysis the defendants win.

In *Dagher*, the oil companies took up the challenge immediately by filing a motion to dismiss the plaintiffs' closely related *per se* and "quick look" theories of liability.

"Quick look" is a hybrid form of analysis in which a restraint not previously classified as being *per se* illegal is nonetheless condemned because even a superficial analysis reveals that it will have an anticompetitive effect on customers and markets.

The refiners argued that their joint venture should not be subject either to *per se* or "quick look" liability because it was not a "naked restraint" intended *solely* to fix prices or divide markets. Rather, they emphasized that they had, in fact, pooled their refining, transportation, terminal and marketing operations and assets throughout the United States to create a single distribution entity. Any impact on price, they argued, was merely incidental to this otherwise unobjectionable joint venture relationship.

In its January ruling, the court found the refiners' argument to be "unpersuasive". To begin with, the court could not conclude from the bare papers upon which it had been asked to rule that the individual refiners had completely integrated all of their operations into the joint venture entities.

Indeed, Saudi's counsel represented in argument that his client still competed with its co-defendants at least in some areas. Hence, the possibility existed that same residual, ongoing competition was being restrained by the refiners' agreement.

More significantly, the court held that an agreement to fix prices might still be *per se* illegal even if the refiners had completely integrated their operations.

The reason why otherwise prohibited activities *may* be permitted in the context of a joint venture is because the joint venture may then deliver new or more efficient products and services, which the venturers would be unable to produce individually. Price-fixing by the venturers, therefore, should only be tolerated if it is sufficiently related to the beneficial aspects peculiar to the joint venture.

In *Dagher*, the court could not conclude that the refiners had demonstrated any compelling need to fix prices in order to effectuate any legitimate joint venture goal. Hence, the court rejected their motion to dismiss, and permitted the plaintiffs to pursue their *per se* price-fixing claim.

As we stated last August, it is difficult to find any justification for price-fixing in the context of the Shell-Texaco-Saudi joint venture. As we then said, "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." The joint venture would appear to have added no new efficiency or benefit, which would justify the price-fixing that appears to be inherent in the refiners' agreement.

One further aspect of the *Dagher* opinion is worth noting. The refiners attempted to find refuge in the fact that they had negotiated a consent decree with the FTC approving the formation of their joint venture. Unimpressed, the court quoted the Supreme Court in concluding that obtaining a consent decree "does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of non-parties."

The dealers' victory must be put in perspective. This was only the denial of a preliminary motion to dismiss, and not a final decision on the merits. Nevertheless, the court gave the oil companies plenty to think about.

If you would like further information, or know of other recent decisions of interest, please contact me at pgunst@aggt.com.

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