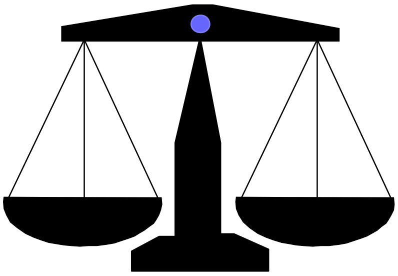

General Counsel Corner

By Peter H. Gunst, Esquire

Seeking Relief From Fee Shifting

At the recent SSDA convention, a matter of considerable concern was the California state court decision in *Carver v. Chevron, USA, Inc*. Chevron used the fee shifting provision contained in its standard franchise agreement to impose $6,878,686.94 of Chevron's attorneys fees and expenses on a number of its dealers, who had lost in litigation with Chevron.

Such fee shifting provisions only magnify the inherent inequality that exists between refiner and dealer. The threat of ruinous attorneys fees that they impose serves as a club to discourage dealers from asserting their legal rights, no matter how strong their case.

SSDA therefore authorized the preparation and distribution of a proposed statute and supporting memorandum, which can be used in an effort to obtain legislative action at the state level. But what sort of relief should be sought?

Statutes that previously have been passed in other contexts relating to fee shifting provisions have taken two forms. Some merely provide that, if a contractual provision shifts attorneys fees in one direction, it should be interpreted as shifting fees in the other direction as well.

Thus, if a franchisor imposed a provision in its franchise agreement requiring the franchisee to pay the franchisor's attorneys fees if the franchisee were unsuccessful in litigation, then the franchisor would be required to pay the franchisee's attorneys fees if the franchisee were successful in the litigation.

SSDA does not believe that such a provision would go far enough in addressing the unfair effect of fee shifting provisions in the context of the petroleum industry.

First, the threat implicit in a fee shifting provision has far more impact on the franchisee than the franchisor. A refiner can far more easily absorb its opponent's attorneys fees than can a franchisee. Equality cannot be achieved through mutuality.

Second, providing for mutuality may diminish the value of rights that already have been conferred on dealers by other statutes.

A dealer who successfully sues a supplier under the Petroleum Marketing Practices Act or under federal or state antitrust law is almost always entitled to an award of attorneys fees in any event. Permitting the award of fees to go both ways might allow the supplier to assert a contractual right to attorneys fees in circumstances where Congress or a state legislature only intended to provide a right to fees to the dealer, in recognition of the dealer's greater financial vulnerability.

The other statutory solution that has been applied in limited circumstances is to render such provisions completely null and void. That solution, SSDA believes, is particularly appropriate to the petroleum industry, where — as a practical matter — fee shifting provisions are not freely negotiated, but are imposed by the supplier on a take-it-or-else basis.

But would a state statute that rendered fee shifting provisions null and void be open to attack under the impairment of contract prohibition contained within Article 1, Section 10 of the United States Constitution?

The answer, SSDA believes, is "no".

Under modern Contract Clause analysis, a statute only infringes the constitutional prohibition against impairment of contract rights if it substantially impairs the parties' contractual relationship, and cannot be justified as being reasonable and necessary to serve an important public purpose. *See, e.g., Koster v. Iowa,* 183 F.3d 762 (8th Cir. 1999), and *Honeywell, Inc. v. Minnesota Life and Health Ins. Guar. Assoc.,* 110 F.3d 547 (8th Cir.) (en banc), *cert. denied*, 528 U.S. 858 (1997).

Outlawing fee shifting provisions would not impact the parties' performance obligations under a petroleum franchise agreement. The franchise relationship would still continue in all its aspects.

Nor would the outlawing of fee shifting provisions preclude either party from relief for the breach of the franchise agreement. Fee shifting, quite simply, is neither a performance obligation nor a legal remedy.

In any event, even if impairment were found, it would not be substantial. No excessive hardship would result from making franchisors and franchisees responsible to pay their own legal fees and expenses in accordance with the ordinary American Rule.

Fee shifting could still exist, of course, where authorized by a specific statute or where litigation was determined by a court to be frivolous.

Finally, a statute outlawing fee shifting provisions in the context of petroleum franchise agreements could well be found, in the language of the *Koster* decision, to be "reasonable and necessary to serve an important public purpose."

Franchise agreements in the petroleum industry are almost always contracts of adhesion, with the dealer having little or no bargaining power. The supplier, therefore, enjoys a massive advantage even without a fee shifting provision.

Permitting the franchisor to abuse its superior bargaining position by imposing an unfair provision on the helpless dealer is both unnecessary and grossly unfair. A state should be permitted to legislate in order to prohibit such predatory conduct.

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