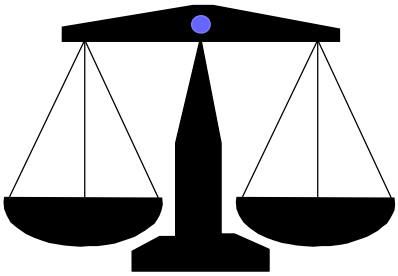

General Counsel Corner

By Peter H. Gunst, Esquire

The Year In Review

In preparing for the annual SSDA legal clinic to be held in Ocean City, Maryland, I reviewed many significant decisions released by the courts since last year's clinic. Those decisions concern a variety of important issues that will be discussed during the clinic and in SSDA's annual volume of legal materials. Here are some highlights.

There were mixed results under the Petroleum Marking Practices Act.

In *L.M.P. Services v. Shell Oil,* a Maryland federal court held that a supplier, who is required to make a "bona fide offer" to a dealer before selling off the dealer's station, cannot impose a long-term supply agreement as a condition to its offer of sale. This decision seems perfectly correct because a sales offer mandated by the PMPA should not have strings attached.

On the other hand, in *Unified Dealer Group v. Tosco,* the Ninth Circuit Court of Appeals permitted Tosco to insist that its California dealers accept a rebranding to Union 76 as a condition to the renewal of their franchise relationships. This case is typical of decisions by conservative courts, that do not wish to look behind the marketing decisions of major oil companies.

In a rather bizarre decision, the Fourth Circuit Court of Appeals held in *Interstate Petroleum v. Morgan* that federal courts lack jurisdiction to hear cases brought by suppliers to obtain a declaration that their terminations or non-renewals do not violate the PMPA. This despite the fact that the federal Declaratory Judgment Act would appear to authorize such suits.

Some interesting non-PMPA, petroleum related decisions include the following.

In one of the Shell mega-dealer suits, *Chawla v. Shell Oil,* a Texas federal court dismissed the portion of the dealers' complaint that asserted that Shell had illegally required the dealers to lease island card readers and to utilize a bank chosen by Shell to process credit card transactions, in violation of the prohibition against tie-in agreements contained within §1 of the Sherman Act and §3 of the Clayton Act.

In so ruling, the court flatly refused to apply the "lock-in" tying theory recognized by the Supreme Court in *Eastman Kodak v. Image Technical Services.* The court's analysis, although consistent with some other recent franchise tie-in cases, is also directly inconsistent with others, including the very perceptive opinion by the court in *Little Caesar Enterprises v. Smith,* which held that franchisees could assert a "lock-in" claim.

Another significant decision during the past year was the California district court's denial of the motion brought by Shell and Texaco to dismiss the *Dagher v. Saudi Refining* antitrust suit brought on behalf of approximately 23,000 Shell and Texaco dealers. That

suit contends that the Shell-Texaco-Saudi joint venture is nothing more than an illegal price-fixing agreement in *per se* violation of §1 of the Sherman Act.

Significantly, other recent decisions, like *Cardizem CD Antitrust Litigation* and *State of New York v. St. Francis Hospital,* have taken an increasingly hard line approach against horizontal agreements masquerading as joint ventures or the like.

Another case that will be sure to attract significant interest is the California state court decision in *Carver v. Chevron, USA,* in which a number of dealers who had unsuccessfully asserted PMPA claims against Chevron were hit with Chevron's $6,878,686 legal bill. This decision cries out for redress, either legislative or otherwise.

A number of other antitrust cases of interest to dealers and franchisees were also decided during the past year.

In *Hoover Color v. Bayer*, the Fourth Circuit reversed a judgment permitting a defendant to escape liability for price discrimination under the meeting competition defense.

In *Pace Electronics v. Cannon Computer Systems,* the Third Circuit likewise reversed the district court's dismissal on antitrust standing grounds of a claim brought by a terminated dealer against its former supplier.

In addition, a California state appeals court found — in the very lengthy and complex *Aguilar v. Atlantic Richfield* litigation — that the major refiners had not conspired to fix the price of CARB gas in California.

This sampling illustrates the broad range of significant decisions that will be discussed in Ocean City and in SSDA's annual materials. It should be an interesting meeting.

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