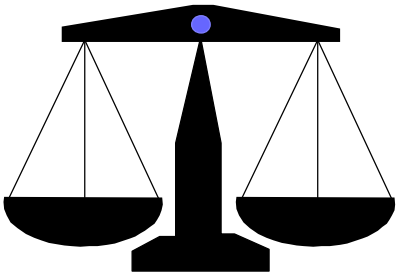

General Counsel Corner

By Peter H. Gunst, Esquire

The Peril of Fee Shifting

Recently, a state trial judge permitted Chevron to utilize a provision of its franchise agreement to impose an award of $6,878,686.94 on a number of Chevron's dealers who had dared to charge it with violation of the PMPA and other alleged wrongs. The award amounted to $229,289.56 per station location. How did this come about and what can be done about it?

Under the "American Rule" recognized in all United States jurisdictions, each party to a lawsuit ordinarily bears the expense of his or her attorneys' fees regardless of the outcome of the lawsuit. The rationale for the rule is that the threat of assessing attorneys' fees will have a chilling effect to deter the assertion of meritorious claims.

It is thought that a small plaintiff attacking a large, well-healed defendant is under enough of a disadvantage, without the threatened imposition of whatever massive legal fees the defendant may decide to roll up.

Two exceptions to the American Rule involve (1) the allowance of attorneys' fees where permitted by specific statute, and (2) the assessment of fees as a penalty where a lawsuit is determined to be vexatious and entirely devoid of merit or substance.

Examples of the first exception include the federal antitrust laws and the PMPA. In those instances, the legislature has specifically recognized the need to assist typically smaller claimants in pursuing difficult and expensive claims against far larger defendants. In these cases, it should be emphasized, the legislature has found a specific need for an exception to the American Rule.

Traditionally, the second exception has been saved for only the most egregious examples of judicial abuse. Attorneys soon learn that it is a waste of time even to seek attorneys' fees under this exception unless the opponent has blatantly lied to the court, or otherwise displayed bad faith in its conduct of litigation.

The California case of *Carver v. Chevron, USA, Inc.*, decided by the County of San Diego Superior Court, involved neither exception. Some of the statutory remedies at issue permitted the award of attorneys' fees to a successful *plaintiff*, but not to a successful defendant. Prior to reversal by the appellant court, the dealers had succeeded at trial in obtaining a multi-million dollar verdict. Hence, their claim was in no way vexatious or frivolous.

Instead, Chevron relied upon a contact provision contained within its lengthy form franchise agreement, which permitted it to obtain attorneys fees if it ultimately succeeded in resisting litigation pursued by its franchisees. Of course, Chevron could only obtain such a contractual provision because of the great disparity of bargaining power between it and its dealers.

How else can one explain the presence of a provision that requires the little guy, the dealer, to pay Chevron its

attorneys' fees and expenses if Chevron prevails, but which does not provide for the payment of attorneys fees and expenses to the dealer should the dealer prevail?

The laws of most states do not prohibit such fee shifting provisions, even when they are unilateral and serve to benefit only one party. But traditionally such provisions appeared in only narrow contexts, such as the enforcement of a note or securing the eviction of a non-paying tenant.

Some refiners and other franchisors have taken this contractual exception to ridiculous extremes. For example, a franchisor or refiner may insert a unilateral right to attorneys' fees and expenses if the franchisee sues it on *any* basis, whether related to the parties' underlying franchise agreement or otherwise. Further, the provision may be inserted in a franchise agreement on a take-it or leave-it basis, thus precluding the franchisee from any real opportunity of negotiating a more even-handed arrangement.

Unfortunately, as the *Carter* decision attests, many courts are unwilling to rein in this abuse.

In *Farmland Industries, Inc. v. Frazier-Parrott Commodities,* 111 F.3d 588 (8th Cir. 1997), for example, the defendant asserted a one-sided fee shifting provision contained within a contract existing between the parties in order to recover the attorneys' fees that it had incurred in defending a fraud claim that the plaintiff had lost.

The plaintiff protested that the fraud claim had nothing to do with the parties' contract that included the fee shifting provision, and that enforcement of the provision would violate "Missouri's public policy of open access to the courts."

Enforcing the fee shifting provision, the Eighth Circuit concluded:

> Granting an award of attorneys' fees to a successful party does not prevent any party from asserting its rights in court. Such an award does not bar the door to the courthouse, but simply makes the losing party's trip to the courthouse more expensive.

The *Carter* decision is presently on appeal. Hopefully, the appellate court will recognize the unfairness of permitting a franchisor to utilize its grossly disparate bargaining power to exact an unfair contractual provision that only further exacerbates the parties' bargaining disparity. Cases like *Farmland Industries,* however, do not fill one with confidence.

Another potential solution merits consideration. A few states have enacted laws either requiring that fee shifting provisions work both ways or — more rarely — outlawing them altogether where the parties' negotiating imbalance is obvious on its face. For example, a New York statute declares "null and void" the inclusion of a provision in a retail installment contract requiring the consumer to pay the lender's attorneys' fees.

Certainly, a compelling argument could be made for analogous legislation in the service station context, where the PMPA was initially passed in express recognition of the gross disparity in bargaining power between dealers and oil companies. In response to this problem, SSDA is exploring the potential for submitting legislation to address situations like *Carter*. In the meantime we can only hope for the best in the upcoming *Carter* appeal.

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