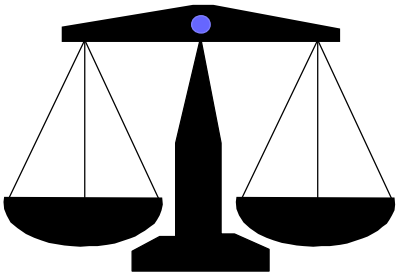

General Counsel Corner

By Peter H. Gunst, Esquire

A Remarkable Development In A Remarkable Case

After ten years of litigation, nine determined dealers and their attorneys procured a verdict on behalf of a nation-wide class of past and present Exxon direct dealers that could approach, with pretrial interest, one billion dollars in damages The litigation, *Allapattah Services, Inc. v. Exxon Corp*., which went to trial in a federal court in Miami, charged that Exxon, for over a decade, reneged on its agreement to provide the dealers with wholesale price support.

Basically, the dealers charged that Exxon acted in bad faith by not living up to its promise, made in 1982 when it instituted its Discount for Cash program, that it would provide its dealers a 1.7 cent per gallon offset from the wholesale price in order to balance out its imposition of a three percent credit card fee.

The dealers charged not only that Exxon secretly withheld the promised wholesale price relief, but also that Exxon manipulated its pricing policy in order to drive out of business dealers whom it had labeled as "non-keepers".

The intensity and scope of the litigation is most notable. Between July 1 and August 10, 1999, for example, the trial judge was required to issue five published opinions concerning various aspects of the litigation.

In so doing, the court rejected Exxon's attempt to rely upon the form integration provision contained within its dealer agreements in order to thwart the dealers' introduction of course of conduct and other related evidence; the court rejected Exxon's claim for summary judgment based upon its contention that it had no contractual obligation to reduce wholesale prices to the dealer class; the court rejected Exxon's effort to bar the dealers from introducing essential economic expert evidence concerning damages; and the court rejected Exxon's final attack on the dealers' right to represent a national class of Exxon dealers.

Very rarely does a single action generate so many issues, much less published opinions. Here, the dealers and the court were forced to simultaneously deal with, and refute, a raft of arguments intended to hamstring or entirely destroy the dealers' case.

In denying Exxon's motion for summary judgment, for example, the court said:

> A jury could find that Exxon breached its duty to act in good faith, thereby breaching its legal obligations under the contract, by charging dealers twice for the cost of credit card processing and by concealing this conduct from the dealers, who lowered prices in reliance on Exxon's promises.

Allapattah Services, 61 F.Supp. 2d 1308, 1324-25.

Ultimately, the dealers prevailed at trial on two breach of contract theories. First, they successfully argued that Exxon had breached the open-price term provision of the Uniform Commercial Code, §2-305, which imposes a good faith requirement in connection with such sales. Second, the dealers established through Exxon's own internal documents that it had breached its agreement to reduce the dealers' wholesale price in order to offset the three percent credit card fee.

According to Gene Stearns, a lead trail attorney for the plaintiffs, the victorious class consists of approximately 10,000 past and present Exxon direct dealers, who purchased gasoline from Exxon at any time between March 1, 1983 and August 25, 1994. He estimates that the average dealer recovery may approximate $100,000.

The case is far from over. Further proceedings will be required in the district court on the issues of damages and attorneys fees. That will, almost certainly, be followed by a complex and lengthy appeal process.

There is no guarantee that the jury's verdict will be upheld. However, the dealers presented powerful evidence obtained from Exxon's own files to establish their right of recovery. They and their attorneys are to be congratulated for the success they have obtained to date in pursuing their Herculean task.

pgunst@aggt.com