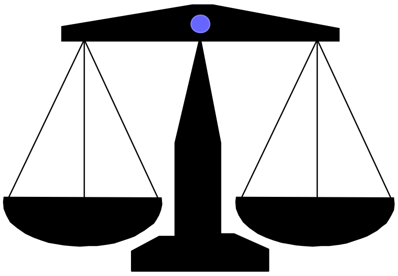

General Counsel Corner

By Peter H. Gunst, Esquire

Mega-Dealer Litigation

The last two months have seen climactic developments in three mega-dealer cases — the federal case in Indianapolis against Shell, the federal trial in Corpus Christi against Exxon and the state court case in Houston against Shell. The results have been a mixed bag.

By mega-dealer cases we mean actions brought by any where between a score and hundreds of dealers raising parallel claims in a single action against their common supplier. Such actions have been around for a long time but appear to be increasingly popular.

These cases are *not* class actions, where a few dealers seek certification to represent the interests of a multitude of other dealers. They are, instead, massive undertakings in which each involved dealer is a party presenting his or her own individual claim, and is subject to full litigation discovery.

The decisions of the past two months illustrate some of the strengths and weaknesses of this litigation strategy. The upside is demonstrated in Shell's settlement of the Indianapolis litigation, where 22 Midwestern dealers hit a homerun.

Faced with a devastating opinion from the court that Shell had "disposed" of certain critical documents that the dealers had requested for production, Shell entered into a settlement said to be valued at approximately $25,000,000.

Although the result turned on a unique set of circumstances, the case does illustrate one strength inherent in mega-dealer litigation.

Strength in numbers permitted the dealers and their counsel to probe deeply into Shell's practices, and to develop facts that otherwise might have remained undiscovered.

This advantage may result regardless of whether litigation is handled on a fee or contingency basis. If the litigation is handled on a fee basis, the accumulation of claims and plaintiffs creates a larger war chest for litigation and discovery. If the litigation is handled on a contingency basis, the aggregation of claims multiplies the litigation's potential value, thus providing counsel with extra incentive to explore discovery in greater depth.

In the Corpus Christi case the jury awarded the Exxon dealers $5,500,000 after finding that Exxon had set their dealer tankwagon prices as much as 9¢ over the pump prices at company operated stations in an effort to drive them out of business.

Although the $5,500,000 damage figure appears impressive, it broke down to awards to individual dealers that ranged between $17,000 and $203,000.

Reduction in individual recoveries may be the flip side of the strength in numbers argument that underlies mega-dealer litigation. The individual dealer's cost of litigation may be reduced, but so may be his or her recovery. Even a large pie, split too many ways, may result in a small slice.

Finally, the Houston case ended in the grant of summary judgement for Shell, when the state court judge rejected the dealers' argument that Shell had failed to exercise good faith in setting their tankwagon prices. Although recognizing the hardship that resulted from Shell's pricing policies, the court found that no law had been violated.

Strength in numbers may not be sufficient to overcome a weak case. Yet it may enhance the chances for a favorable settlement before trial because the supplier is faced with a far greater potential downside, if the ultimate ruling goes against it.

On the other hand, an individual dealer with a particularly strong claim may achieve a better result by going it alone, both because the supplier does not have to ante up a seven or eight figure sum to resolve the dealer's claims, and because the dealer does not have to split his or her recovery with a horde of co-plaintiffs.

At bottom, the sheer economics of litigation will often dictate the mega-dealer approach. Certainly, that appears to be a recent trend.

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