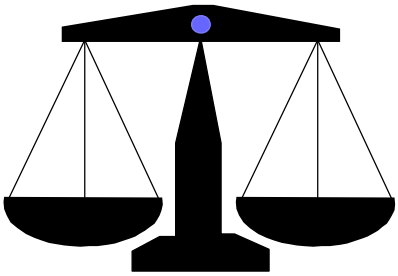

General Counsel Corner

By Peter H. Gunst, Esquire

The Appellate Courts Speak

A lot of interesting litigation has been going on in the petroleum industry recently, and the decisions discussed here may not be the sexiest. But they are significant decisions by appellate courts that should have considerable future impact.

In *Aguilar v. Atlantic Richfield Co.*, decided June 14, 2001, the massive consumer class action lawsuit charging that major petroleum companies conspired to restrict output and fix the price of CARB gasoline, finally reached the Supreme Court of California.

The litigation has been massive. Before appeal, more than 100 depositions had been taken and over 500,000 pages of documents had been produced. The extensive list of counsel reads like either a "whose who" or rogue's gallery, depending upon your view of the legal profession.

In part because of the size and significance of the case, which claimed damages on behalf of a class estimated to consist of 24,000,000 consumers, the Supreme Court of California — in upholding the dismissal of all claims — authored an extensive opinion on standards for summary judgment under state law.

The importance of summary judgment standards is immense. Risking an adverse jury verdict is anathema to large corporate defendants; if they cannot get out of the case before trial they will very likely settle. Hence, in many large cases, the outcome of a motion for summary judgment — whether or not to permit the jury to consider a case — determines the outcome of the case itself.

Traditionally, state courts have been far more hostile to summary judgment than their federal counterparts. Smart plaintiffs, therefore, often attempt to assert purely state claims in state court to avoid federal courts and federal summary judgment standards.

In *Aguilar*, the plaintiffs attempted just such a course. Instead of claiming an illegal conspiracy under Section 1 of the federal Sherman Act, 15 U.S.C. §1, they sued purely under its state counterpart, the Cartwright Act, and under state unfair competition law.

At first their decision appeared to pay off, when they defeated the oil companies' motion for summary judgment in the trial court on a motion for reconsideration. Their luck ran out, however, first in the California intermediate appellate court and, ultimately, in the California Supreme Court.

The Supreme Court of California's affirmance of summary judgment against the plaintiffs is most significant because it almost entirely incorporates federal summary judgment standards into California law. This result was partially attributable to changes in California's summary judgment rule, which signaled an intent to converge with federal standards.

Basically, under California state law as interpreted by *Aguilar*, a defendant

is no longer required to establish definitively that the plaintiff could never come up with a viable cause of action, but is only required to make a showing sufficient to shift the burden of proof upon the plaintiff, and then to show that the plaintiff has failed to introduce sufficient evidence to generate a genuine jury issue.

The shift of standards is most dramatic in an antitrust conspiracy case like *Aguilar*. Under the federal standard, now applicable to analogous claims brought under the Cartwright Act, a plaintiff opposing summary judgment has the burden of presenting evidence that would allow a reasonable jury to find that an unlawful conspiracy is *more likely than not*. In other words, it is not sufficient that the plaintiff submit evidence showing that the defendants had the opportunity, motive and mechanism for conspiracy and that their prices moved more or less in unison. The plaintiff must also show that the price movements *more likely* resulted from collusion than from independent, enlightened self-interest.

As the California Supreme Court itself acknowledged, that is a difficult burden to satisfy because, as a matter of course, "unlawful conspiracy is conceived in secrecy and lives its life in the shadows."

What the California Supreme court did in *Aguilar* is, of course, not without precedent. A majority of the states have been shifting their summary judgment standards to be more in line with the stricter test imposed by the federal courts. A significant opinion by a court like the Supreme Court of California may expedite the process.

This does not mean, however, that there is likely to be no real difference between federal and state courts with respect to the very important issue of summary judgment. The legal system is as much about psychology as it is about legal standards. Generally speaking, state court judges have not acquired the seeming sense of omniscience possessed by too many of their federal counterparts. They are less likely, therefore, to take a case away from the jury. And, since denials of summary judgment are almost always unappealable, many defendants will still negotiate a settlement, even if they believe that they may — years in the future — ultimately prevail in an appellate court.

The second appellate decision of note is the *en banc* decision of the federal Fourth Circuit Court of Appeals in *Interstate Petroleum Corp. v. Morgan,* 249 F.3rd 215, decided May 1, 2001. *En banc* decisions, involving all the federal circuit judges in a multi-state circuit rather than a mere three judge panel, are quite rare. And, in *Interstate Petroleum,* the Fourth Circuit reached the fairly radical conclusion that only a dealer, and not a supplier, may assert its rights under the Petroleum Marketing Practice Act in federal court.

It has not been unusual for suppliers to file first in federal court, seeking a declaratory judgment establishing their right to terminate or not renew, when they sniff a forthcoming dispute with a dealer. This is usually done as a preventive strike, to preclude the dealer from remaining in state court by pleading state causes of action and thus to avoid federal court, which is often more supplier-friendly.

In *Interstate Petroleum*, the Fourth Circuit showed a surprising aversion to that tactic. Of course, *Interstate Petroleum*, like all other cases, may ultimately be distinguished on its facts or not be followed by the other federal circuits. The decision is, however, well worth noting because it may assist a dealer in preserving his right to sue in a court of his choice, rather than bowing to his or her supplier's preemptive strike in federal court.

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