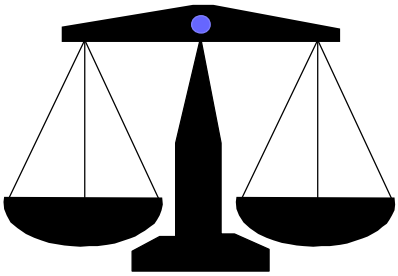

General Counsel Corner

By Peter H. Gunst, Esquire

Further Developments In The Exxon "Discount For Cash" Program

Earlier this year, we wrote of the extraordinary verdict entered in the class action lawsuit tried before a federal jury in Miami, *Allapattah Services, Inc. v. Exxon Corp.* Basically, the jury found Exxon liable for failing to provide a 1.7 cents per gallon reduction from wholesale that Exxon had promised to its dealers throughout the nation in connection with its "Discount For Cash" program.

The potential recovery for the class of present and former Exxon dealers was immense because it covered a damage period lasting for more than a decade — from March 1, 1983 to August 25, 1994 — and related to affected all sales made by Exxon of motor fuel through its national dealer network throughout that period. Sources estimated that damages could approach one billion dollars, if the dealers were also permitted to receive pretrial interest.

On August 7, 2001, Judge Gold, who presided over the *Allapattah* trial, entered an important supplemental opinion concerning many issues in the case that remained for resolution.

There will, no doubt, be many further twists and turns in *Allapattah* as it wends its way through the judicial system. Nevertheless, Judge Gold's opinion resolved at least temporarily a number of significant issues.

First, Judge Gold rejected the dealers' proposal that the court immediately enter a final judgment against Exxon for "an aggregate damage award," consisting of a lump sum equal to the total amount of Exxon's overcharges throughout the time period. Only after the entry of such an award, the dealers proposed, should adjustments be made with respect to dealers who elect not to participate as members of the class, or as to dealers whose claims are barred by state statutes of limitation or who have released their claims against Exxon.

Rejecting the dealers' request, Judge Gold expressed doubt that he had authority to enter an award before the adjustments were computed, and concluded, in any event, that entry of an immediate award would be "inappropriate".

Ominously, the court raised "serious questions" as to whether class members whose claims fail to satisfy the requirements of federal diversity jurisdiction could recover anything from Exxon. If that were so, all individual claims of $75,000 or less would be barred as failing to meet the minimum jurisdictional requirement.

Recognizing the significance of both the aggregate compensation and jurisdictional issues, Judge Gold certified those questions for immediate appeal to the Eleventh Circuit Court of Appeals. The appeals court will now independently determine whether it desires to immediately consider either or both issues, before the administrative process of calculating independent claims is concluded at the district court level.

The dealers fared much better with the remaining damages and pretrial interest issues. First, Judge Gold rejected Exxon's argument that damages should only be based on the dealers' gasoline purchases, and not on their diesel fuel purchases as well. The court found that the dealers' claims "consistently encompassed Exxon's pricing of both gasoline and diesel fuel," and that there was no significant difference with respect to Exxon's pricing of either product.

Second, Judge Gold considered Exxon's argument that statutes of limitation enacted in Ohio and Florida materially limited the recovery of damages by dealers located in those states. This was so, Exxon argued, because neither Ohio nor Florida law suspended the running of the statue of limitations for the considerable period before Exxon's pricing scheme came to light.

Although agreeing with Exxon as to the impact of Ohio law, which in effect limits the recovery of Ohio dealers to products purchased in May 1987 and thereafter, the court disagreed with Exxon's interpretation of Florida law. Florida dealers, therefore, can claim damages dating back to March 1983.

Third, and probably most importantly, Judge Gold held that all dealers would be entitled to prejudgment interest dating back to the year in which they purchased product from Exxon. Given the length of time that has elapsed since the March 1983 through August 1994 damage period, the amount of pretrial interest on each claim will be extremely significant, and will also help to satisfy any $75,000 jurisdictional requirement.

Judge Gold found that the dealers were entitled to prejudgment interest because their claims were for "liquidated" amounts. In other words, because Exxon could have determined the proper price it should have charged its dealers, it was responsible not only for the 1.7 cents per gallon overcharge, but also for the dealers' loss of the use of money over time.

Finally, Judge Gold considered at length the claims administration process that will be employed to adjudicate the claims of all former and present Exxon dealers who do not decide to opt-out of the dealer class.

First, the court noticed that apparently only sixty-one potential class members had decided to opt out of the litigation. Exxon was given a short fifteen day period, which presumably has already expired, to identify any objection that it might have to the list of opt-out dealers.

Second, the court directed the parties to develop a process for filing, handling and administering individual class member claims. The court's schedule envisioned a 60-day period for the parties to work out all such administrative issues before any further judicial intervention.

Third, the court provided Exxon with an opportunity to assert "set-offs" against any counterclaim dealer, based upon any claim that Exxon might have for unpaid gasoline or rent or the like. Determining the amount and application

of such set-offs will, by itself, likely prove to be a lengthy and time-consuming matter.

Finally, Judge Gold concluded that, while the claims administration process may proceed through notice and receipt of claims, no further action should be made concerning the determination of individual claims until the court of appeals determines whether or not it will accept an appeal of the aggregation and jurisdiction issues prior to final judgment.

In sum, although the dealers' case remains on track, it is apparent from Judge Gold's multi-faceted opinion that much remains to be decided and done before the jury's verdict is converted into collectable judgments for independent dealers. In other words, if you are a member of the dealer class, the old advice remains, it is far to early to quit your day job.

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