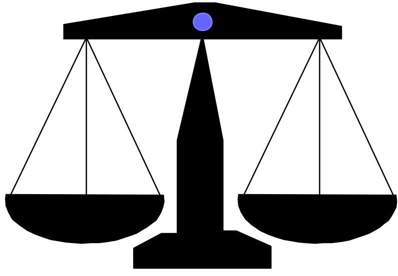

General Counsel Corner

By Peter H. Gunst, Esquire

Did the Majors Fix Prices Affecting Their Own Employees?

Normally, this column discusses marketing issues that directly pertain to independent service station dealers. A recent decision by the prestigious Second Circuit Court of Appeals involving the major oil companies alleged treatment of their own employees, however, is so interesting that it begs for treatment.

Todd v. Exxon Corp. was filed as a class action lawsuit before the merger wave by an Exxon employee on behalf of all non-union managerial, professional and technical employees of Exxon and 13 other oil companies: Shell, Sun, Mobil, B.P., Occidental, Philips, Amoco, Texaco, Chevron, Conoco, Marathon, Unocal and Atlantic Richfield.

The complaint charged that the fourteen oil companies, which among them were alleged to possess an overwhelming 80-90% market share in the United States oil and petrochemical industry, had long engaged in detailed and complex exchanges of salary and budget information for the purpose of holding down salaries paid to large numbers of their non- union employees.

According to the extensive allegations of the complaint, the oil companies periodically conducted surveys comparing past and current salary information, and participated in regular meetings as which current and future salary budgets were discussed. Some of the information took the form of a complex "Job Match Survey," which used Chevron as a benchmark, and equated the other oil companies' job descriptions to the Chevron benchmark jobs. The purpose of this was to allow the oil companies to make meaningful comparisons between their various job classifications, in order to determine how much they should pay their non-union employees.

In addition, the oil companies compiled a "Job Family Survey," which "provided the most current account of the compensation being paid in the industry," and was broken down by job classification and employee experience and education level. That information, according to the complaint, was readily exchanged among the oil companies, but was not made available to the employees themselves.

According to the complaint, each oil company could also receive subsets of the Job Family Survey, consisting of salary information from as few as three companies at a time. This, according to the complaint, enabled the oil companies to ensure that their competitors were not varying from their proposed budget numbers.

The complaint charged that the defendants' information exchanges violated §1 of the Sherman Act, the federal antitrust law that prohibits agreements and combinations that unreasonably restrain interstate commerce.

The complaint did not charge that the oil companies had directly agreed upon the salaries that each company charged, but rather that the oil companies had violated the law by exchanging information for the purpose of depressing salaries below levels that they would have reached in an open, competitive market.

In a reported opinion, *Todd v. Exxon Corp.,* 126 F. Supp.2d 321 (S.D. N.Y. 2000) Judge Sprizzo dismissed the claim in its entirety. Judge Sprizzo emphasized that exchanges of information among competitors are not illegal on their face, and concluded that the allegations of the complaint — if true — did not set forth an unreasonable restraint of trade.

On December 20, 2001, the Second Circuit released an opinion that totally rejected Judge Sprizzo's conclusion, and remanded the case for trial.

First, the appeals court rejected the oil companies' argument that the complaint was defective because it failed to define a "relevant product market." Defining such a market was absolutely vital to the plaintiff's claim because, as a matter of law, no unreasonable restraint of competition could be proven without demonstrating a real market effect on a real, definable market.

The oil companies argued successfully to Judge Sprizzo that the proposed market definition of non-union employees in the oil and petrochemical industry was improper because it was both over-inclusive and under-inclusive. It was over-inclusive, said the oil companies, because it lumped together such diverse job categories as accountants, lawyers, chemical engineers and other non-union employees. It was under-inclusive, said the oil companies, because qualified people from outside the industry could "compete" for industry jobs. Hence they also should have been included in any market definition.

The Second Circuit found that the trial court, in buying the oil companies' arguments, had "looked through the wrong end of the telescope." Because the oil companies were alleged to have conspired in their role of *buyers* of employment services, the key question was not with whom each of the employees might have competed for a job, but rather the interchangeability, from the employee's standpoint, of job opportunities in the oil industry with, for example, job opportunities in the pharmaceutical industry.

Because an oil company employee would run the risk of suffering a pay cut if he or she were forced to switch industries, it was very possible that a valid market consisted relating to employment opportunities in that specific industry.

Next, the Second Circuit rejected the oil companies' argument that there was no reasonable possibility that the information exchanges would have any real anticompetitive effect, given the relatively large number of employers involved and the difficulty they would have in equating the degree of similarity between job descriptions from company to company.

In response, the Second Circuit pointed to the complaint's detailed allegations concerning "the sophisticated

techniques" used by the oil companies to "achieve a common denominator." For example, the complaint claimed that, because not all jobs could be matched precisely from company to company, the oil companies had agreed upon percentage "offsets" to equate their employment positions with that of the Chevron benchmark.

Finally, the Second Circuit looked at the nature of the information that was allegedly exchanged. It was impressed by the complaint's allegations that "extremely detailed information concerning job classifications, salaries, bonuses, and benefits paid, or to be paid" had been exchanged, and that "subset" information had been provided so that each company could monitor whether its competitors had, in fact, made contemplated budgetary adjustments.

The court concluded:

> "The characteristics of the data exchange in this case are precisely those that arouse suspicion of anticompetitive activity …."

Obtaining reversal is only a first step for the plaintiff. For the case to have real impact, the court must agree to hear it as a class action. And, of course, the The underlying allegations still remain to be proven.

Two factors, however, appear significant. The allegations of the complaint are very detailed, and certainly suggest that a complex exchange of significant information occurred. Second, the claim, on its face, appears appropriate for class action treatment because common issues of fact and law certainly appear to predominate.

We await further developments in this very interesting litigation.

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