General Counsel Corner

By Peter H. Gunst, Esquire

Some Progress in Fee-Shifting Dispute

We have written previously about what we consider a significant supplier abuse: The insertion of fee-shifting provisions governing attorneys' fees in petroleum franchise agreements.

Fee-shifting provisions consist of two types. The most obviously obnoxious require the dealer to pay the attorneys' fees incurred by the supplier in successfully defending any litigation brought by the dealer, but provide no reciprocal obligation that the supplier pay the dealer's attorneys' fees if the dealer is ultimately successful in litigation.

An example of such a one-sided provision is found in Mobil's form PMPA Franchise Agreement, which provides that the dealer "shall pay Mobil's legal fees and costs if … Mobil successfully defends any litigation alleging … Mobil's breach of any obligation to Franchise Dealer under this Agreement or … Mobil's noncompliance with any Laws including the [Petroleum Marking Practices Act]."

More subtle, but almost as bad, are the reciprocal provisions contained in many franchise agreements requiring the losing litigant — whether supplier or dealer — to pay the winning litigant's attorneys' fees. In some states, such as California, one-sided provisions of the first type are automatically converted into reciprocal provisions by operation of law.

The *cause celebre* on this issue is a case pending in California state court, *Carver v. Chevron U.S.A., Inc.* This case involves twenty-three dealers, who sued Chevron in 1992 for violations of California's antitrust statute, the Cartwright Act, as well as for unfair business practices, tortious conduct and breach of contract.

Initially, the dealers were successful on some of their claims, obtaining a jury verdict in excess of $3,450,000 in December 1995. Chevron, however, prevailed on appeal and then sought to recover its attorneys fees and expert witness costs from the dealers.

Chevron made little secret that its intent was to break the dealers and to make an example of them. It pressed a claim of almost $5,160,000 in attorneys' fees and over $3,160,000 in costs, a total of $8,320,000. The trial judge reduced Chevron's claim to something over $6,878,000, but the impact was the same. The dealers were devastated.

When the dealers appealed, SSDA filed an *amicus curiae* (friend of the court) brief in support of their position. SSDA opposed the award of attorneys' fees to Chevron for its defense of the dealers' Cartwright Act claims, asserting that it contravened the basic policy underlying many statutes enacted for dealer protection — including the Cartwright Act, the PMPA and numerous federal and state antitrust laws — which provide for the recovery of attorneys' fees *only* by the successful dealer.

SSDA pointed out that the legislative purpose behind such provisions was "to encourage — not inhibit — the assertion of private claims." Permitting the supplier to enforce a contract provision to collect its attorneys' fees would stand that legislative purpose on its head.

SSDA argued further that even reciprocal contract provisions were impermissible because they, too, were "intended to chill the dealer's resort to his or her judicial remedies." Addressing the case at hand, SSDA argued:

> Chevron is a mammoth corporation grossing revenues in excess of two billion dollars *per quarter*, and — as this litigation demonstrates — can easily retain major law firms that no dealer could ever afford to pay. The result of any judicial loss to Chevron would scarcely amount to even a rounding error. Conversely, imposing Chevron's legal fees on an unsuccessful dealer would more likely than not result in the dealer's financial ruin. Moreover, Chevron's two-way provision is largely illusory because a dealer who successfully asserts a PMPA or antitrust claim is entitled to the recovery of attorney's fees in any event, as a matter of law.

On March 27, 2002, the California appellate court filed its opinion, agreeing that the legislative policy underlying the Cartwright Act prohibited the enforcement of Chevron's attorneys' fee provision with respect to its defense of the dealers' antitrust claims.

In so ruling, the court cited SSDA's argument regarding the legislative policy underlying the PMPA "as showing there is a companion public policy stated in this professional field to allow those challenges to petroleum marketers' practices in dealing with their franchisees, that are based on statute, to be litigated without the plaintiffs incurring enormous exposure to contractual attorney fees." The appeals court concluded that "the statutory protections of the Cartwright Act also require as much."

Unfortunately, no legal basis existed for overturning the trial court's imposition of expenses and attorneys' fees for Chevron's defense of the non-antitrust claims unsuccessfully pursued by the dealers because California statutes specifically uphold fee-shifting provisions in more mundane circumstances. Nevertheless, the appeal court's decision is very significant because it emphasizes that statutory provisions enacted to assure that only successful dealers can recover attorneys' fees — like the provisions contained in the PMPA and federal and state antitrust laws — should not be subverted by boilerplate contract provisions imposed on dealers by their suppliers.

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