



General Counsel Corner

By Peter H. Gunst, Esquire

A Big Step In A Long Trip

On June 11, the Eleventh Circuit Court of Appeals released a very significant opinion in the Exxon “Discount for Cash” case, *Allapattah Services, Inc. v. Exxon Corp.*, 2003 WL 21349968 (11th Cir. 2003). The opinion resolves numerous issues in that massive litigation. Given the case’s importance, the Eleventh Circuit’s opinion deserves close analysis.

The *Allapattah* case was filed twelve years ago on behalf of a class of approximately 10,000 present and former Exxon dealers over a 35 state area. It charged Exxon with intentionally overcharging its dealers for over 11 years, from March 1, 1983 through August 31, 1994, by reneging on its agreement to offset a 3% processing fee on credit card sales by reducing the dealer tankwagon price by 1.7 cents per gallon.

The case was tried to a hung jury in September 1999, but its retrial in January 2001 resulted in a unanimous jury verdict for the dealers. The jury’s verdict was limited to a finding of liability, however, so that no damages were then assessed.

Following the jury’s determination of liability, Exxon and the dealers raised significant issues relating to the unresolved damages issue.

The district court was asked to decide (1) whether class members whose damage claims were less than \$50,000 -

the minimum amount that existed for federal diversity claims when the suit was filed - should be permitted to participate in the litigation, and (2) whether an aggregate damages judgment for class-wide damages should be immediately entered in order to establish a fund to be divided among the class members.

The district court decided that Exxon could not use the \$50,000 jurisdictional limit to exclude claims below that amount, but that no aggregate judgment should be entered. Instead, damage awards would only be entered on behalf of class members following what promised to be a drawn out damages process.

The district court believed that its rulings were sufficiently debatable to be immediately appealed to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit’s subsequent June 11 decision resolved those issues and much more. First, the Eleventh Circuit agreed that all dealer and former dealer class members were entitled to submit damage claims, regardless of whether their claims exceeded the sum of \$50,000 per dealer.

The issue was whether Congress had overruled by statute, 28 U.S.C. § 1367, an earlier ruling by the United States Supreme Court in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that each class action member

must independently satisfy the \$50,000 jurisdictional requirement (which since has been increased to \$75,000).

That issue has deeply divided the circuit courts of appeal that have been called upon to interpret Congress' intent. Four courts, the Fourth, Fifth, Seventh and Ninth Circuit Courts of Appeal, all ruled that Congress indeed had authorized district courts to hear class claims below the jurisdictional minimum as part of their supplemental jurisdiction. Three other courts, the Third, Eighth and Tenth Circuit Courts of Appeal, ruled that the per claim restriction imposed by the Supreme Court in *Zahn* still remained in effect.

Fortunately for the dealers, the Eleventh Circuit agreed with its four sister circuits that had ruled that Congress had indeed overruled *Zahn*.

The Eleventh Circuit emphasized that Congress' enactment expressly restricted supplemental jurisdiction in certain diversity cases, but made no mention of claims brought pursuant to Federal Rule 23, which governs class actions. The court reasoned that had Congress intended the limitation on supplemental jurisdiction to apply to class action claims, it would have said so.

Because of the significance of the issue and the deep split among the federal circuits, it would not be at all surprising to see the Supreme Court accept an appeal either from the Eleventh Circuit's decision or from a decision from another circuit on the issue. Only time will tell.

Next, the Eleventh Circuit agreed with the district court's decision that any award would have to await completion of

the damages portion of the litigation. In rejecting the dealers' argument that aggregate damages should have been awarded immediately, the court of appeals identified specific "obstacles" to that procedure.

Those obstacles included accounting for dealers and former dealers who either decided not to participate in the class recovery or failed to submit damage claims; accounting for Ohio claimants who might be barred by that state's unique statute of limitations; difficulties in computing prejudgment interest that could vary widely depending upon the interest rate used in each claimant's home state; and determining whether an individual dealer's claim was subject to reduction through "set offs" claimed by Exxon.

The Eleventh Circuit then considered how the district court should handle the complex damages proceedings that would be required as a result of its decision to reject the aggregate damages approach.

The court agreed with Exxon that it had a right to participate in the process of administering the various claims that would be submitted. This means that the claims process will likely be a long, disputed affair.

The court of appeals also affirmed Exxon's right to assert "set offs" against individual claimants, based upon monies otherwise owed to Exxon by those claimants.

The class had argued that Exxon was barred from pursuing "set offs" because it had failed to raise them as counterclaims during an earlier phase of

the proceedings. The court of appeals, however, held that Federal Rule 13, which contains the requirement that counterclaims be timely alleged, had no application to the claims that Exxon might assert against individual class members.

Of significant importance, the Eleventh Circuit went well beyond the procedural issues relating to the damage phase of the litigation, and resolved critical issues relating to all aspects of the litigation.

First, the Eleventh Circuit rejected Exxon's basic contention that no class should have been certified in the first place. Exxon had argued that each dealer should have been required to submit an independent claim to the jury because his or her situation was different from that of every other Exxon dealer.

Rejecting Exxon's contention outright, the Eleventh Circuit held that the trial court had not abused its discretion in determining that common issues regarding Exxon's pricing scheme and its concealment of that scheme predominated over any individual issues of fact or law.

Next, the Eleventh Circuit rejected Exxon's argument that the jury should not have been permitted to hear evidence concerning the parties' course of dealing, in order to determine whether Exxon had violated the obligation of good faith that it owed all of its the dealers. The jury had a right, the court of appeals concluded, not only to consider the parties' written agreements, but also Exxon's oral and written representations to its dealers.

The Eleventh Circuit also planted a gem for the dealers as a footnote to its opinion. It rejected Exxon's argument

that the dealers could not challenge its dealer tankwagon prices so long as Exxon adhered uniformly to its posted prices.

The Eleventh Circuit countered that although selling at uniform posted prices might normally be sufficient to ensure legality, this was not a "normal" case because the jury had found that Exxon was attempting to drive some of its dealers out of business. The court's conclusion validated the core theory that the dealers had relied upon to support their huge damage claim.

Next, the Eleventh Circuit rejected Exxon's argument that the greater part of the claimants' damages should be barred as untimely because they resulted from transactions occurring more than four years prior to the institution of litigation.

Affirming the district court's conclusion that Exxon was barred from raising its limitations defense because it had fraudulently concealed its contract violations, the Eleventh Circuit emphasized that, in annual meetings, Exxon executives had assured dealer representatives that the 1.7 cents per gallon reduction was still in place, even though Exxon knew otherwise. That evidence, the court ruled, was sufficient to support an inference that Exxon's assurances had been reported back to affected dealers, who then relied upon them.

Finally, the Eleventh Circuit rejected Exxon's argument that the district court should not have permitted the jury to hear testimony from the dealers' expert witness on economic issues. Had the court ruled otherwise, it would have pulled the legs out from under the dealers' case.

In sum, the Eleventh Circuit ruled in favor of the class members on all substantive issues before it. As a result, Exxon cannot feel at all comfortable about what the ultimate result in the case will be.

On the other hand, the Eleventh Circuit ruled in Exxon's favor on some significant issues pertaining to the damages procedure. Exxon will be permitted to contest individual claims and to assert "set offs" against individual dealers, thereby virtually ensuring that the damages process will be long and involved.

The amount at stake remains huge. Damages and pretrial interest should amount to many hundreds of millions of dollars, perhaps over a billion dollars. But absent a settlement, the dealers' pay day will not come soon.

pgunst@agtalawyers.com

astrachan gunst thomas

attorneys at law
a professional corporation