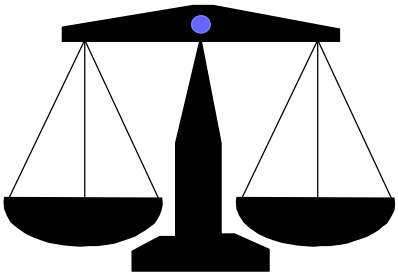

General Counsel Corner

By Peter H. Gunst, Esquire

Allapatah Update

On October 12, 2004, the United States Supreme Court took what on the surface appeared to be a merely administrative action in the thirteen-year old Exxon national dealer class action case, but in reality appears to be a major step towards resolving the massive "discount for cash" litigation.

All the Supreme Court did was to exercise its discretionary jurisdiction to review one procedural issue presented by Exxon and to decline to review another. But those procedural issues -- and particularly the one that the Supreme Court refused to review -- go to the heart of the class' right to recover damages from Exxon.

Exxon set forth the issues upon which it sought review by the Supreme Court in arcane legalese. Exxon asked:

> 1. Whether the supplemental jurisdiction statute, 28 U.S.C. §1367, authorizes federal courts with diversity jurisdiction over the individual claims of named plaintiffs to exercise supplemental jurisdiction over the claims of absent class members that do not satisfy the minimum amount-in-controversy requirement?
>
> 2. Whether Rule 23 of the Federal Rules of Civil Procedure authorizes the certification of a multi-state class action where individual reliance by each class member is at issue and where the predominance of common issues can be established only by distorting the law of the applicable states?

The Court agreed to consider question 1, which will now be briefed and argued by the parties over the ensuing months, but refused to consider question 2, thus leaving in place the lower court's determination that class action certification was appropriate under the Federal Rules of Civil Procedure.

What does the Supreme Court's ruling mean and why is it significant?

Exxon's first question raised an issue that has deeply split lower federal courts across the country, and deals with the interplay between the requirements of federal diversity jurisdiction and the class action rule. By statute, a federal court may only exercise jurisdiction over a claim that does not arise under a federal statute -- like the breach of contract claims at issue in *Allapatah* -- if the adverse parties are situated in different states and if the amount of the plaintiff's claim exceeds a statutory minimum, which was $50,000 when the *Allapatah* case was filed and has since risen to $75,000.

The dealers who were named as plaintiffs in *Allapatah* all possessed claims in excess of the statutory minimum. But they were also permitted to represent the interests of *all* dealers impacted by Exxon's discount for cash

program, regardless of whether or not the class member's claim met the $50,000 threshold requirement. This was so, said the lower courts, because they possess supplemental jurisdiction under the class action rule to consider claims below the statutory minimum that are similar to those asserted by the named plaintiffs, so long as the claims of the named plaintiffs satisfy the jurisdictional requirement.

Lower courts are split on the issue because of the somewhat obscure language of the controlling federal jurisdictional statute, and because of their differing viewpoints of the need to balance the limitations of federal court jurisdiction on the one hand, against the need to implement fully the class action rule on the other. It is no doubt because of that split among the lower courts that the Supreme Court agreed to review Exxon's first issue.

There is compelling reason for permitting the exercise of supplemental jurisdiction as to class claims below the jurisdictional amount. One of the prime reasons for permitting class actions is to discourage the commission of mass fraud directed against thousands of victims, who by and large would lack the incentive to assert their legal rights by filing independent actions. Indeed, there would be little need for class actions at all if individual claims were sufficiently large to provide such independent incentive.

Allapatah is a perfect case in point. How many present or past Exxon dealers having a claim of $50,000 or less would have pursued independently state court contract claims of the complexity of those presented in the *Allapatah* litigation? Darn few.

In any event, no matter how the Supreme Court rules upon the issue, its ruling should have only limited impact on the *Allapatah* litigation as it stands today. According to class counsel, the average claim filed to date is in excess of $130,000, far over the minimum statutory requirement. And if some claims need to be refiled in state court, depending on how the Supreme Court rules, their resolution will be aided inestimably by the evidence adduced and the law made in the federal litigation.

Of far greater importance is the issue that the Supreme Court refused to review, whether any class should have been certified at all consistent with the requirements of Rule 23, the federal class action rule.

Under Rule 23(b)(3), a class may be certified if common issues of law and fact "predominate" over issues affecting class members individually. Through its second question, Exxon urged the Supreme Court to consider whether that requirement had been satisfied, given each class member's need to show that he or she actually relied upon Exxon's misleading statements concerning its discount for cash program. Had Exxon succeeded in obtaining Supreme Court review of that issue, all but the claims of the specifically named plaintiffs would have been put at risk. But that, thankfully, did not happen.

So now the claims process goes forward. The deadline for submitting class member claims is December 1, 2004, and the claims resolution process will continue apace.

Although Exxon may well raise further legal challenges as the litigation proceeds, it would appear highly unlikely that the core finding of its liability for defrauding its dealers will be disturbed.

ExxonMobil recently announced that it had determined to take an after-tax charge of $500,000,000 with respect to its prospective liability, which will be reflected in its third quarter results. Class counsel has estimated a potential class recovery of 1.3 billion dollars. All in all, a considerable pile of change.

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