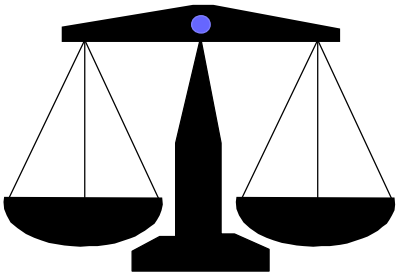

General Counsel Corner

By Peter H. Gunst, Esquire

Major Milestones in the Exxon Discount-For-Cash Case

Two major developments recently occurred in the national Exxon dealer litigation pending in federal court in Florida, *Allapattah Services, Inc. v. Exxon Corp.* In that lawsuit, a jury found over four years ago that Exxon had cheated its dealers nationwide by failing for many years to pay them a promised discount of 1.7 cents per gallon.

But that was not the end of the litigation. There remained the formidable task of converting the jury verdict into a collectible final judgment for each class member.

In two recent and important decisions, federal courts have rejected Exxon's attempts to pare down the class of successful dealers, and to delay *ad infinitum* its payment obligation. Both decisions constitute major steps toward a final resolution of this significant litigation.

One issue that remained open was whether class members whose damages amounted to less than $50,000 would be entitled to recover. Because only state law causes of action had been asserted against Exxon, the dealer class relied solely upon diversity jurisdiction as a basis for asserting their claim in federal court, and they therefore were subject to a statutory requirement that each plaintiff's claim amount to in excess of $50,000, the jurisdictional amount in effect when their complaint was filed.

But where did this leave class members who could not demonstrate the required $50,000 in damages?

The trial court and federal appellate course had overcome this obstacle by ruling that a federal court could obtain "supplemental jurisdiction" over such class-member claims of $50,000 or less, so long as the named plaintiffs' claims satisfied the jurisdictional requirement. Other federal appellate courts, however, had issued conflicting opinions on the issue so the Supreme Court decided to consider the matter.

On June 23, 2005, the Supreme Court ruled against Exxon in a close 5-4 decision. In a lengthy majority opinion and two lengthy dissents, the Justices clashed on how Congress' wording in the jurisdictional statute should be interpreted, with the majority finding that Congress intended to permit the federal courts to assert supplemental jurisdiction in diversity class actions, despite what appeared to be a statement to the contrary contained in Congress' legislative history.

It is amazing how such an arcane, procedural decision by the Supreme Court could have such a tremendous practical impact. The Supreme Court's opinion not only impacts dealer class members around the country, but also class members in a variety of other present and future lawsuits. And all this results from a deeply divided court's

interpretation of statutory language that reads like it was issued by the Oracle of Delphi.

The second milestone was the 74 page Order issued on May 18, 2005 by Judge Gold, who is presiding over the *Allapattah* litigation. Judge Gold strongly rebuked Exxon for, as he saw it, attempting to derail the litigation by filing "frivolous answers and affirmative defenses" in opposition to class member claims.

Basically, Judge Gold found that Exxon improperly had attempted to re-litigate the issue of liability and to drag out the claims process by serving thousands of oppositions to dealer claims based upon previously rejected defenses.

That Judge Gold was not amused by Exxon's conduct is clear from his comments. He wrote:

> Upon review of Exxon's arguments, and its positions taken at oral argument, I conclude that Exxon has in bad faith attempted to make a "judicial train wreck" of the claims administration process despite my clear warning. But, equally important, the totality of Exxon's actions reveals a cynical plan to prolong this litigation which has endured more than thirteen years, by pursuing the very appeals Exxon stipulated that it would not pursue when urging this Court to delay entry of final judgment following the jury's verdict over four years ago.

In his Order, Judge Gold interprets the status of the litigation as precluding Exxon from pursuing further appeals on the merits. In Judge Gold's view, all that should remain is to calculate the damages that each class member is to receive.

Even if Judge Gold is correct in his view of the status of the litigation, and he certainly appears to be, there still remains much to be done. The claims administrator is still required to adjudicate each claim on an individual basis, which -- according to class counsel -- "will take many months or even years."

But further delay will come at a price to Exxon. Prejudgment interest continues to run at an average rate of approximately 8%, thus increasing the value of each independent claim. Further, as a sanction against Exxon for its improper behavior, Judge Gold ruled that Exxon will be required to pay a far higher interest rate based upon its internal rate of return, which was 23.8% in 2004, if it pursues further appeals of issues already resolved against it.

The end may not yet be in sight, but at least it appears a lot closer than it did before the recent rulings of the Supreme Court and Judge Gold.

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