



GENERAL COUNSEL CORNER

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Year End Clean Up

At the end of the year, we look for judicial opinions that previously escaped notice. Here are 2006's nominees.

Autry Petroleum Co. v. BP Products North America, Inc., 2006 WL 1174443 (M.D. Ga. 2006), is of interest because it resembles the recently concluded "discount for cash" case, *Allapattah Servs., Inc. v. Exxon Corp.*

You may recall that *Allapattah* involved a nationwide class of Exxon dealers who sued under the "good faith" provision of § 2-305 of the Uniform Commercial Code, and succeeded in recovering over one billion dollars after proving that Exxon consistently had raised its dealer tankwagon prices in order to wipeout an ephemeral discount promised to its dealers.

The *Autry Petroleum* case follows the same model. Two jobbers seek to represent a nationwide class, contending that BP breached its good faith obligations by inflating the prices that it charged for product in order to recoup a one percent discount that its jobbers were supposed to receive if they paid for product by EFT within ten days of delivery. The jobbers contend that they were cheated from 1999 onwards, and estimate the class wide damages to be in the hundreds of millions of dollars.

This past year, a federal district court in Georgia denied BP's motion to dismiss the complaint. It found that if the jobbers were able to prove their allegation that BP had "engaged in a

calculated effort to cheat its jobber network" by manipulating and inflating the price of motor fuel, it could be liable for violating the good faith requirement set forth in § 2-305.

The case remains in its initial stages. No decision has yet been made as to whether the two plaintiff jobbers should be permitted to represent a nationwide class, and no determination has been made on the merits of their charges.

The *Autry Petroleum* case should be watched closely. It represents another attempt to test the judiciary's willingness to consider open price term class litigation as a means of attacking the fairness of Big Oil's pricing to jobbers and dealers. As was demonstrated in the *Allapattah* case, the amounts at stake are hardly chump change.

The other two cases of interest involve the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-06.

In *New England Petroleum Limited Partnership v. Pruitt*, 2006 WL 3332773 (D. Conn. 2006), a jobber attempted to terminate a dealer's franchise for his repeated failure to comply with the minimum hours of operation provision contained within the franchise agreement. Unfortunately for the jobber, its notice of termination gave the dealer only 89 days' notice, one day short of the 90 days notice required under the PMPA.

In an opinion issued after a full trial on the merits, a federal judge in Connecticut rejected the jobber's attempt to wiggle around the 90 day requirement. Holding that the PMPA's requirements must be strictly observed, the court said the 90 day notice requirement could only be excused if a dealer's franchise violations were truly egregious, citing as examples product misbranding, failure to pay for product and failure to maintain an adequate supply of product.

The court also rejected the jobber's ingenious argument that its failure to comply with the statute was inconsequential because the dealer did not regularly pick up his mail, so that he did in fact receive the same actual notice as if the letter had been sent a day earlier. The court responded that 90 days means 90 days.

Finally, *Chevron U.S.A., Inc. v. SSD & Associates*, 2006 WL 2619357 (N.D. Cal. 2006), considered whether termination should be permitted when the stated ground for termination, although facially sufficient, was also used to mask an illicit retaliatory motivation.

In the *SSD* case, Chevron learned that a dealership, whose principal had recently prevailed against it in an action charging it with bad faith with respect to another service station location, had failed to file federal or state income taxes for a three year period and had failed to maintain required financial statements.

Almost immediately following an audit of the dealership, Chevron fired off a notice of termination and filed suit in federal court in California to enforce the termination.

At trial, the dealership conceded its filing and record keeping deficiencies, but argued that Chevron's real motivation was to gain revenge for its earlier courtroom loss.

As evidence of Chevron's motivation, the dealership emphasized that Chevron had erected a competitive station about a mile away; Chevron had repeatedly made buy-out offers to it which had been rejected; and that Chevron had asserted the attorney/client privilege to block testimony pertaining to the internal meeting at which the decision to terminate was made, which was attended by an attorney from the firm that had represented Chevron in the earlier litigation.

The judge found merit in the dealership's revenge scenario, concluding that it had indeed "provided evidence that Chevron viewed SSD as a painful thorn in its side and was hankering for a way to get rid of SSD."

Nevertheless, the court held that Chevron was entitled to terminate the dealership because of the "severity" of its contractual violations. Its failure to submit tax returns and to maintain business records was not, according to the court, "a technical or unimportant violation" because it reflected adversely on the dealership's "business ethic," deprived Chevron of access to important business records and could have led to the imposition of tax liens on the service station.

These decisions are indicative of trends that have developed over the past years and are likely to continue in the future. Open price term litigation, virtually unknown a few years ago, has

come to the forefront because of the large amounts of money involved and the ability to pursue claims on a broad class-wide basis. The Petroleum Marketing Practices Act remains a real but limited bulwark of protection against wrongful termination or non-renewal depending upon the facts of a particular case and the luck of the draw as to what judge is assigned to a particular case.

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