



## GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

### *The Gold Standard*

On July 6, 2006, Judge Alan Gold released what may be the last significant opinion in the massive, fifteen-old *Allapattah v. Exxon* class action litigation. It is a remarkable 109 page opinion that fittingly rewards class counsel and the class representatives for the victory that they achieved, but also delves deeply into the nasty dispute that developed among several law firms concerning the division of legal fees.

In federal class action litigation such as the *Allapattah* case, the presiding judge has broad but not unlimited discretion in determining how much of a class settlement fund – here over one billion dollars – should be awarded as fees to class counsel and as incentive to the named class representatives.

In performing that task, Judge Gold articulated what class counsel referred to as the “Gold Standard” for determining how attorney’s fees should be awarded. In his opinion, the judge described succinctly the “essential rationale” that he applied:

The amount of attorneys’ fees awarded should directly correlate to the number of Class Members benefited; the amount of money received by each Class Member; and the risk borne by Class Counsel, over time, in achieving the benefits obtained. Attorneys’ fees should be structured as an incentive for lawyers to risk achieving the highest

benefits for the greatest number of Class Members.

In awarding class counsel total legal fees that amounted to 31.3 % of the settlement fund – over \$300 million – Judge Gold emphasized the immensity of the task undertaken by counsel in devoting many years of effort to extraordinarily risky litigation, and the skill that they demonstrated in achieving an extraordinary result.

Throughout the fifteen years of litigation, class counsel succeeded in defeating the numerous motions to dismiss and for summary judgment presented by Exxon; managed to certify a national class of over 11,000 past and present Exxon dealers; built the case against Exxon through meticulous discovery; tried the case to a jury verdict twice; survived appeal to the Eleventh Circuit Court of Appeals and the Supreme Court; and fought their way through a highly contentious claims administration process.

As Judge Gold recognized, the result achieved by class counsel was unprecedented. In his words, “over 11,000 Class Members will receive full compensation of their claims, including nearly all of their prejudgment interest.”

At first glance, many might think that the \$300 million award of attorneys’ fees was excessive, even taking into account the extraordinary result that was achieved. After all, had the lawyers been paid at their normal hourly rate they

probably would have received only about one-sixth as much. But, as Judge Gold emphasized, competent counsel could never have been found to undertake such extremely risky, lengthy and time-consuming litigation against such a formidable adversary unless the potential reward justified the substantial risk.

In his opinion, Judge Gold quoted extensively from another class action opinion written over twenty years ago that explained how the combination of a contingency fees and class action litigation constitute the “poor man’s keys to the courthouse” when wronged by a powerful defendant. He reiterated :

[These] vehicles allow the average citizen and taxpayer to have their injuries redressed and their rights protected. [They] permit persons of limited resources to obtain competent legal counsel, an essential ingredient in our adversary system of justice.... The annals of class action case law are replete with examples of lawyers who were willing to commit their personal resources over a substantial period of time to represent a class of injured plaintiffs, motivated only by the incentive that if they succeed in vindicating the rights of their class clients, they would be paid an attorney’s fee at least commensurate with what they would have received for winning an equivalent sum representing a single client. Often, these suits are brought against

companies with resources that allow them to retain squadrons of top-flight lawyers, and all of the technological paraphernalia and human resources that have become characteristic of modern litigation.... If the plaintiffs’ bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear.

Judge Gold also recognized the significant role that the nine named class representatives played in pursuing the litigation and the risks that they ran, which included Exxon’s threat to retaliate against them and to bankrupt them for pursuing the claim on behalf of the class. The court awarded them a total of 1.5% of the settlement fund – \$15,900,000 – as an enhanced damages award, observing that “[e]ach of the gentlemen involved, and their families, have shown unusual courage and commitment” in pursuing the litigation to its conclusion.

Unfortunately, there was also a dark side to Judge Gold’s opinion. The judge was called upon to resolve the bitter dispute among the law firms that shared responsibility for pursuing the case against Exxon, and also to sanction one of the class representatives and one of the attorneys who represented the class for entering into an illicit agreement that, if successful, might have endangered the success of the litigation.

Although thoroughly regrettable, this aspect of the litigation should not unduly diminish the magnitude of what

class counsel and the class representatives achieved on behalf of over 11,000 present and former Exxon dealers.

[pgunst@agtlawyers.com](mailto:pgunst@agtlawyers.com)

To access the latest articles by the Service Station Dealer's legal counsel, please visit the "Service Station Dealers: Legal Issues" section of the Astrachan Gunst & Thomas P.C. website at:

<http://www.agtlawyers.com/resources/petroleum.html>.