GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

What's in a Name? A Lot Says the Supreme Court.

It seemed such a simple but audacious concept. In a massive class-action lawsuit filed in federal court in California, a group of dealers representing a class of 23,000 Texaco and Shell service station owners contended that the Equilon joint venture between Shell and Texaco constituted a price-fixing scheme to raise and fix motor fuel prices charged to the dealers.

The dealers argued that Shell and Texaco--two erstwhile competitors, who were each more than capable of competing independently in the marketplace-- simply put a gloss on what normally would have been deemed a *per se* illegal price-fixing scheme by renaming it a "pro-competitive" joint venture.

Critical to the dealers' argument was the legal distinction between a merger and joint venture.

When Exxon and Mobil merged, for example, only one entity remained-- a new corporation named ExxonMobil. When ExxonMobil set the price it charged for motor fuel to Exxon and Mobil dealers, it could not be accused of "conspiring" in violation of the Sherman Antitrust Act, 15 U.S.C. § 1, because it was a single corporate entity incapable of conspiring with itself.

By contrast, when Shell and Texaco formed a joint venture, they remained separate entities capable of conspiring with each other unless they were insulated from liability by the joint venture entity that they created.

Historically, the antitrust laws have had difficulty dealing with joint ventures because they are, in a sense, neither fish nor fowl. Although the participants retain their individuality and hence their ability to conspire, the result of their efforts is to create a new, economically-integrated entity, which may be pro-competitive in the sense that it reduces costs or enables the joint venture partners to compete more effectively in the marketplace.

The dealers argued that Shell and Texaco's joint venture was not deserving of any special treatment under the antitrust laws. Before entering into the joint venture, Texaco and Shell marketed motor fuel to the public through independent brands. After entering into the joint venture, they continue to hold themselves out to the public in the same manner. As far as the public could see, nothing changed. Therefore, the dealers argued, no legal basis existed for treating their agreement to fix uniform prices for the sale of motor fuel as anything other than a *per se* illegal conspiracy between competitors.

For a time it appeared that their ingenious theory might succeed. In 2004, the Ninth Circuit Court of Appeals reversed the dismissal of the dealers' lawsuit. The 2-to-1 majority emphasized the risk that "any number of companies" could utilize joint ventures as "fronts for price-fixing," and predicted that the Supreme Court would not abandon the rule stated in its previous decisions, that "'naked' price-fixing by a joint venture violates the Sherman Act."

Unfortunately, the majority's prediction was wrong. On February 28, 2006, the Supreme Court released its opinion in *Texaco, Inc. v. Dagher*, reversing the Ninth Circuit Court of Appeals. Writing for a unanimous Court, Justice Thomas treated the joint venture effectively as if it were a merger.

Concluding that Texaco and Shell "did not compete with one another in the relevant market" following the formation of the joint venture, he explained that the joint venture's "pricing policy may be price fixing in a literal sense, [but] it is not price fixing in the antitrust sense."

The Supreme Court's decision not only spells an end to the class-action antitrust litigation, but also emphasizes the almost complete failure of antitrust law to address the massive consolidation that has occurred in the petroleum industry over the past decade, which has resulted in massive profits for oil companies but little benefit to anyone else. But at least the dealers gave it a good fight.

pgunst@agtlawyers.com
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