



GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

*Release Me My Dealer, Let Me Go**

Now that the *Allapattah Services, Inc. v. Exxon Corp.* discount-for-cash case has been resolved by Exxon paying over one billion dollars to settle the case, it is time to reflect on the bullet that the dealers dodged - the releases that so many of them entered into with Exxon when they terminated their leases and supply agreements.

Approximately half of the class members - 5,193 dealers to be exact - entered into one of four forms of Mutual Termination and Release Agreement with Exxon, either before or after the *Allapattah* class action complaint was filed.

The first form purported to release the parties from all claims other than for "trade accounts," "reimbursements" and certain other specific exclusions not relevant here. The second form included an exception for "trade accounts," but not for reimbursements. A third version contained an exception for "reimbursements," but not trade accounts. The fourth version, which only appeared after the litigation was instituted, excluded neither claims for "trade accounts" nor "reimbursements." None of the four versions, however, specifically identified the claims presented in the *Allapattah* litigation as being released.

The issue of the validity and effect of all four types of releases was decided by Judge Gold, who presided over the *Allapattah* case, in a pretrial decision rendered almost seven years ago, in August 1999.

Judge Gold held that Exxon would not be entitled to enforce any of the releases that it obtained prior to the class' certification should the jury find that Exxon had fraudulently concealed from the class members its failure to pay them the promised discounts for cash. This was so, Judge Gold said, because:

[I]f Exxon did knowingly "take back" the cost of credit adjustment, and, therefore, breached its good faith contractual obligation to its dealers, it would have contracted for the Releases in bad faith, by non-disclosure, thereby nullifying the Releases as to the instant claim.

Of course, the jury did find that Exxon had acted in bad faith, and so the releases that Exxon obtained prior to class certification dissolved into dust.

With respect to the releases entered into after class certification, Judge Gold emphasized that they contained no specific reference to the then pending *Allapattah* litigation.

Applying the state contract law applicable to each individual release, Judge Gold concluded that the post-certification releases might only be valid as to dealers bound by Delaware law because only Delaware would enforce a general release that did not include a specific reference to a previously asserted claim.

But even that holding did not bar all Delaware class members from recovery. Judge Gold further held that the dealers' claims fell within both the "trade accounts" and "reimbursements" exclusions contained - in one form or another - in each of the first three versions of the Mutual Termination and Release Agreements employed by Exxon.

Because "trade accounts" claims and/or claims for "reimbursement" were not released under versions one through three of Exxon's release, only Delaware dealers who signed the fourth version of the release were out of luck.

Ironically, the release issue resurfaced in the *Allapattah* litigation in a completely different context as recently as April of this year. In his order giving final approval of the class settlement, Judge Gold dismissed the objections of the sole dissident class member because it had executed yet a fifth version of Exxon's release agreement, which expressly excluded all claims involving dealer tankwagon pricing including, specifically, those asserted in the *Allapattah* litigation.

The lesson is clear. Any dealer severing his or her franchise relationship should carefully review any proffered mutual termination agreement to understand what rights or claims he or she may be releasing. If the mutual termination agreement includes the release of claims asserted in any identified pending litigation, the dealer should find out what that litigation is about.

Thousands of dealers across the country will receive significant *Allapattah* settlements in part because

thousands of the Mutual Termination and Release Agreements that Exxon drafted proved to be ineffective. It is not likely that suppliers will repeat that mistake in the future. Therefore, it is up to the dealer to understand and protect his or her rights when presented with a mutual termination agreement that includes a release provision.

pgunst@agtlawyers.com

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