



GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

A Classy Class Action

These are troubled times for class actions and class action counsel. William Lerach, lead counsel in a slew of class action securities lawsuits, began serving time for conspiracy to obstruct justice and making false statements, after admitting that he paid kickbacks to some of his former firm's name plaintiffs. Dickie Suggs, who became famous and rich as a lead counsel in tobacco and asbestos class action litigation, stands accused of conspiring to bribe a judge, a charge which he denies.

The Chamber of Commerce and other like-minded groups have jumped upon these episodes in their crusade to eliminate or curtail class action litigation, which they deem to be averse to the interest of big business.

But there is another side to the story. Class action litigation may be the only means by which a small business person can obtain a meaningful remedy for a substantial wrong.

Consider the class action litigation currently pending in a federal district court in West Virginia, *Loudermilk Services, Inc. v. Marathon Petroleum Company, LLC*.

Marathon is accused of injecting a chemical into gasoline at its Catlettsburg, Kentucky refinery that reportedly caused substantial damage to underground storage tanks at nearly 700 service station sites in West Virginia.

Representative dealers instituted suit seeking to assert claims on behalf of all impacted West Virginia dealers.

Marathon adamantly opposed the certification of a class, contending that each impacted dealer should pursue individual litigation.

As is usually is the case, the issue of class action certification assumed predominant importance in the litigation. This is because, as Marathon well knew, few if any of the dealers could afford to pursue a complex pollution case requiring counsel with special expertise and expensive expert reports and testimony, absent allowance of a class.

In granting class certification this past August, Judge Robert C. Chambers recognized the superiority of class action litigation as a means of resolving such complex claims. Judge Chambers wrote:

By litigating their claims through a class action, the plaintiffs will be able to pool their resources and thereby spread the high expense of pursuing their common claims. If a class action were not available, the cost of litigation would prevent many of the class from individually litigating their claims.... Moreover, judicial economy is best served through a class action because of the tremendous resources that otherwise would be required if each of

the nearly 700 plaintiffs individually pursued their claims against the defendants.

In late September, the Fourth Circuit Court of Appeals refused to consider Marathon's attack on Judge Chamber's decision, clearing the way for class-wide discovery and, eventually, a class settlement or trial.

During the course of the litigation, Judge Chambers also rebuffed Marathon's attempt to secure summary judgment against some of the named plaintiffs on all too familiar procedural grounds.

With respect to one named plaintiff, Marathon argued that it had obtained a "release" precluding the plaintiff from pursuing any claim for recovery for injury to its underground storage tanks.

The Court's opinion pointed out, however, that the "release" claimed by Marathon was merely a document labeled "Receipt," reimbursing the plaintiff in the amount of \$835.80 for lost gasoline and business interruption occasioned by Marathon's inspection of the service station premises. Therefore, the court concluded, factual issues remained for determination by the jury as to whether Marathon secured its "release" through fraud or by concealing the true nature and extent of the injuries that it allegedly had caused.

Marathon unsuccessfully sought to dismiss the claims asserted by another named plaintiff as

procedurally barred under West Virginia's two-year statute of limitations and under a claim of a spoliation of evidence.

Marathon argued that the dealer had admitted that he had been experiencing problems with the filter system for his underground storage tanks prior to two years before filing suit, and that the dealer had destroyed evidence wrongfully by disposing of the damaged tanks after he had sold his service station over a year before filing suit.

The dealer countered that Marathon has actively concealed from him the true cause of harm to his underground storage tanks, informing him that any problem that he had experienced was not a result of any contaminated gasoline sold by Marathon. Additionally, the dealer asserted that the tanks have been destroyed only as a result of the sale of the service station premises and that tank samples had been retained for analysis.

Denying Marathon's motion for summary judgment, the court ruled that factual issues remained for the jury to decide concerning when the dealer became aware or should have become aware of the extent of his injuries, as well as Marathon's role in concealing from him their cause. Further, the court dismissed Marathon's spoliation of evidence claim because of its failure to produce any evidence that the dealer acted in bad faith and because Marathon would have equal access to the tank samples that the dealer had retained.

Marathon's pursuit of procedural attacks on the named plaintiffs provides further rationale for class action treatment. Such attacks are commonplace in complex civil litigation and, although often unsuccessful, serve the defendant's twin purposes of driving up the plaintiff's litigation expenses and prolonging the litigation beyond the plaintiff's financial and emotional breaking point. Class action treatment, however, evens the disparity of resources that exists between megacorporation and small businessperson.

The West Virginia litigation, like the far larger Exxon "discount for cash" *Allapattah* litigation, demonstrates the proper function that class action litigation performs in the American judicial system. It is beyond question that class action abuses have occurred, but the baby should not be thrown out with the bath water. An important justification remains for class action litigation.

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>.