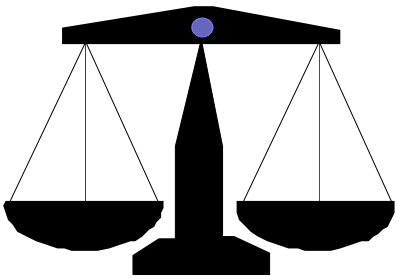

GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

Glacial Progress

Watching the glacial progress of the judicial review of the Coleman-Franken senatorial election in Minnesota is painful enough. But a recent federal court decision in this industry, *William O. Gilley Enterprises v. Atlantic Richfield Co,* shows just how extended the judicial process can be.

Thirteen years ago, in 1996, a class-action lawsuit, *Aguilar v. Atlantic Richfield Co*, was filed in California state court. The plaintiffs charged the major oil companies trading in California with conspiring in violation of California's state antitrust act, the Cartwright Act, to limit the supply of CARB gasoline and to raise its price.

The plaintiffs alleged that the oil companies had conspired to enter into an interlocking set of product exchange agreements, which were intended to limit production and thereby choke off the supply of CARB gasoline to independent marketers, whom the oil companies feared would engage in aggressive price competition in the sale of CARB gasoline.

Following extensive discovery, the California state trial court granted summary judgment to the oil companies, based largely upon affidavits given by their executives, in which they denied that their employers had conspired to limit capacity for the production of CARB gasoline or to fix the price of CARB gasoline.

Then, in a bizarre twist, the trial court basically overturned its own ruling in favor of the oil companies by granting the plaintiffs' motion for a new trial. The court said that the affidavits submitted by the oil company representatives were insufficient because they were not the principal executives of the defendant oil companies.

On appeal nine years ago, in 2000, the California Supreme Court ruled that the affidavits presented by the oil companies were sufficient to shift the burden of proof to the plaintiffs, even though the affiants were not ultimate corporate decision-makers.

Next, the California Supreme Court considered whether the plaintiffs had presented sufficient evidence to rebut the affidavits submitted by the oil companies. Concluding that they had not, the court emphasized that they had presented no evidence of any direct conspiracy among the oil companies to fix prices or limit production.

Evidence that the oil companies had entered into various agreements to exchange product, the effect of which might ultimately be to restrain competition in the marketplace, was not the same, the court said, as evidence that the oil companies had directly agreed among themselves to limit production or to raise prices.

Significantly, the California Supreme Court wrote in an aside that the plaintiffs' reliance on the exchange agreement evidence might have been

sufficient to support a different antitrust theory, that the exchange agreements were in and of themselves illegal agreements in restraint of trade because their anticompetitive effects outweighed any procompetitive benefits. That theory, the court said, simply was not before it because the plaintiffs had not asserted it in a timely manner.

The plaintiffs lawsuit, therefore, was dismissed with prejudice.

But that was not the end of the story. Plaintiffs' counsel previously had filed, in 1998, a closely-related antitrust lawsuit under the Sherman Act in federal court in California, which likewise alleged a conspiracy among the oil companies to limit production and fix the price of CARB gasoline. This was the *Gilley Enterprises* lawsuit.

Further maneuvering in the federal lawsuit followed the California Supreme Court's release of its *Aguilar* opinion. This culminated in the district court's grant of summary judgment for the oil companies in 2002.

The district court ruled that the plaintiffs were precluded by the *Aguilar* decision from relitigating whether a conspiracy existed to limit supply and raise prices. The plaintiffs were, however, permitted to amend their complaint to pursue the theory recognized but bypassed by the California Supreme Court, that the exchange agreements themselves violated the antitrust law because of their effect on competition.

Then, in 2003, the district court dismissed the plaintiffs' amended complaint with prejudice, ruling that the plaintiffs had failed to show through their revised pleading how each individual exchange agreement, which impacted only a small percentage of the relevant market, was capable of inflating the price of CARB gasoline.

The plaintiffs appealed the dismissal of their lawsuit to the Ninth Circuit Court of Appeals. In 2005, that court ruled that the district court had erred by not giving the plaintiff yet another opportunity to correct the allegations of their complaint.

Once again, the plaintiffs amended their complaint and once again the district court dismissed their revised complaint with prejudice, holding that the plaintiffs still had failed to allege sufficiently how the exchange agreements, when considered individually, were capable of producing a significant anticompetitive effect in the overall market for CARB gasoline.

Once again, the plaintiffs appealed to the Ninth Circuit Court of Appeals, setting the stage for that court's most recent opinion, released by the court on April 3, 2009.

The appellate court again reversed the district court's dismissal, holding in a 2-to-1 opinion that the district court had exceeded its discretion in concluding that the plaintiffs' legal theory concerning that the anticompetitive impact of the exchange agreements was economically unsound.

Of critical importance, the Ninth Circuit said, the district court had failed to consider the cumulative effects of each oil company's multiple exchange agreements. It was sufficient, the appeals court said, that the plaintiffs had alleged

that each defendant's exchange agreements, taken *in toto,* gave it sufficient control of a given market to keep CARB gasoline away from unbranded marketers, and thus to adversely affect competition.

So, after thirteen years of litigation, where do things stand? One of the plaintiffs' theories of recovery has been rejected, but another has not. In effect, the parties are back at square one to litigate whether the exchange agreements' anticompetitive effects outweigh any precompetitive benefits.

One must admire – if not stand in awe of – the plaintiffs' and their counsel's tenacity in pursuing this litigation for so long. How much longer it will continue, and what if any result it will achieve, remains to be seen. We should live so long.

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