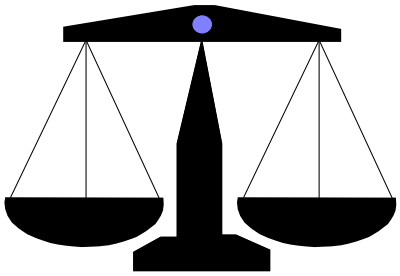

GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

The Open Supply Saga in the District Of Columbia Continues

Over four years ago, in August 2010, the Superior Court of the District of Columbia decided in *Kazemzadeh v. Eastern Petroleum Corp.* that a supplier could not, by contract, completely restrict a dealer from obtaining product from alternative suppliers.

This was so because the District of Columbia Code provided that marketing agreements could go no further than to require that motor fuels resold to the public by a dealer "be of a reasonably similar quality" to the supplier's product, and that the dealer not misrepresent the product's source. D.C. Code §36-303.01(a)(6) and (11).

The Superior Court's decision was not subject to appellate review because the defendant, Eastern Petroleum Corporation, went out of business and the lawsuit was dismissed by the parties' agreement. Thus, the issue remained unresolved.

In August 2013, the Attorney General for the District of Columbia again raised the issue of the effect of the District's open supply law in an action brought against ExxonMobil and distributor Joe Mamo's marketing entities, styled *District of Columbia v. ExxonMobil Oil Corporation*.

In his lawsuit, the Attorney General complained that Mr. Mamo's companies dominate the District of Columbia market as "the exclusive gasoline suppliers for about 60% of the approximately 107 retail gasoline stations" located in the District.

The Attorney General claimed further that Mr. Mamo's imposition of exclusive supply requirements on independently operated service stations had the effect of stabilizing the wholesale gasoline price charged for Exxon branded gasoline in the District, and thus deprived District residents "of the benefits of competition in the wholesale supply of Exxon-branded gasoline."

In May of this year, the Attorney General's suit was derailed by Judge Craig Iscoe, the Superior Court Judge overseeing the litigation. In a detailed 24-page opinion, Judge Iscoe held that, although the District of Columbia statute permitted service station dealers to pursue an unfair business claim for the statute's violation, it did not give either the Mayor or the Attorney General standing to sue.

In reaching that conclusion, Judge Iscoe first emphasized that the District's Retail Service Station Act ("RSSA") on its face provided the Mayor with authority to enforce certain of the RSSA's provisions, but not its open supply provision. The failure to provide the Mayor authority to enforce the open supply provision was not, according to the court, "a mere oversight."

The Attorney General argued for the right to pursue an implied right of action because of the Mayor's "broad authority to enforce statutory regulations in the

District." Rejecting that argument, Judge Iscoe found that the "legislative history of the RSSA clearly shows that the D.C. Council consciously chose not to grant the Attorney General or the Mayor" the ability to enforce the open supply provision.

Finally, Judge Iscoe rejected the Attorney General's claim to *parens patriae* standing to pursue any claim asserting injury to the District's "quasi-sovereign interest." In order to pursue such a claim, the Mayor had to identify an injury to the District that was "sufficiently concrete" and effected "a substantial segment of its population."

According to Judge Iscoe, this test had not been satisfied. Finding the Attorney General's allegations to be "conclusory and unsupported by any factual allegations," Judge Iscoe wrote:

> The Complaint does not allege that the price of ExxonMobil's fuel is too high at service stations, it does not allege that there is another dealer who would want to purchase fuel from a third-party supplier, and it does not allege that there exists a third-party supplier, which would sign contracts with retail dealers for lower prices.

But this may not end the open supply saga. A bill has been presented to the District of Columbia Council that, among other things, would amend the RSSA to permit the Attorney General "to maintain an action or actions in the Superior Court of the District of Columbia in the name of the District of Columbia to enjoin any person from, directly or indirectly, making, renewing, or enforcing a market agreement provision, term or condition in violation of" the RSSA.

Should this legislation fail, and the Attorney General not successfully appeal Judge Iscoe's opinion, the only remaining path to enforce the District's open supply law would be through litigation pursued by the effected dealers themselves.

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