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Exxon Corporation v. Governor of Maryland

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PRELIMINARY MEMORANDUM

Summer List 13, Sheet 1

Nos. 77-10, 77-11, 77-12, 77-47, 77-64 (all ASX)

EXXON CORP. v. GOV. OF MARYLAND[1]
SHELL OIL CO. v. GOV. OF MARYLAND
CONTINENTAL OIL CO. v. GOV. OF MARYLAND
GULF OIL CORP. v. GOV. OF MARYLAND
ASHLAND OIL, INC. V. GOV. OF MARYLAND

Appeal from Md. CA (Eldridge J., Murphy, C.J., + 3 JJ. of the CA; + two Assoc. JJ. of the Ct. of Special Appeals, specially assigned)

State/Civil (Timely)

1. SUMMARY: Each of the appellants challenges the validity, under federal constitutional and statutory law, of a recently enacted Maryland statute concerning the marketing of petroleum products. Appellants predicate jurisdiction on 28 U.S.C. §1257(2).

[1] There are also three motions for leave to file amicus briefs.

2. FACTS: The focus of these appeals is Chapter 854 of the Laws of Maryland of 1974, as amended by Chapter 608 of the Laws of 1975.[2] These chapters, which are reproduced in the appendix to this memorandum, add important new provisions to the Maryland Motor Fuel Inspection Law.

At the risk of oversimplification, the key aspects of the statute can be summarized as follows. Section B forbids a petroleum producer or refiner from opening a retail service station operated by company personnel. Section C requires petroleum producers and refiners to divest themselves of company-operated service stations. Section D requires every producer, refiner, and wholesaler of petroleum products supplying gasoline and special fuels to retail service stations to extend all voluntary allowances (i.e., reductions in fuel prices) uniformly to all retail service stations supplied. Section F requires that every producer, refiner, or wholesaler of petroleum products apportion uniformly all gasoline and special fuels to all retail service stations during fuel shortages.

Chapter 854 was signed into law on May 31, 1974, effective July 1, 1974. In June 1974, Exxon instituted an action in Md Circuit Court, seeking a declaratory judgment that Chapter 854 (the Chapter 608 amendments were later incorporated in the suit) is unconstitutional and invalid. Additionally,

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[2] It is codified in Maryland Code (1956, 1972 Repl. Vol., 1976 Cum. Supp.) Art. 56 §157E.

Exxon sought injunctive relief prohibiting enforcement of Chapter 854. Thereafter, other oil companies intervened. The Circuit Court granted appellants' motion for partial summary judgement as to Section D, holding that provision to be in conflict with and preempted by provisions of the Robinson-Patman Act. The Circuit Court later entered a final judgment and decree declaring the statute violative of the due process and equal protection clauses of the federal Constitution and invalid as a taking of appellants' property without just compensation. The challenge to the statute under the commerce clause was rejected. Upon appeal to the Maryland Court of Appeals, the decision of the trial court was unanimously reversed and the statute was upheld against all of the different challenges.

At trial, extensive evidence was presented relating to the nature of the retail marketing of gasoline and petroleum products in Maryland and the alleged impact that the statute would have on industry. Oil company officials testified that the Act would adversely affect consumers. They testified that by prohibiting producers and refiners from operating retail service stations, producers and refiners would lose the control over operations that is necessary to gauge accurately consumer preferences for such

innovative features as self-service stations, car wash facilities, and total car care service facilities offering a national guarantee, thus allegedly depriving the consumers in Maryland of the wide variety of automotive services now available. The oil executives also testified that company-operated[3] service stations serve as training centers for independent dealers.

Additionally, executives of the three companies[4] in Maryland that market solely through company-operated stations asserted that their type of low price-high volume stations could not be economically run with non-company personnel. Thus, according to the testimony, they would probably be forced to withdraw from the Maryland market if the Act were to become effective.

Four economists, qualified as expert witnesses, also testified on behalf of the oil companies in opposition to the Act. In general, they believed the Act would reduce competition and would therefore be detrimental to the interests of the consumer. This reduction of competition would occur because, in their view, the Act would inhibit new competitors from entering the market, force existing, aggressive independent marketers out of the market, and would limit the variety

[3]"Company-operated" station "refer to a retail service station operated directly by employees of a refiner or producer of petroleum products, or a subsidiary of a refiner or producer. It does not refer to retail service stations operated by a company engaged only in the marketing of petroleum products.

[4]Ashland, Petroleum Marketing, and Kayo.

of auxiliary services available to consumers by discouraging tests of innovative marketing techniques.

The State presented as its expert witness a Dr. Patterson, who is a professor of Business Administration and the author of two books on gasoline marketing. He testified that, in his opinion, the Act would actually enhance competition in gasoline marketing. Elimination of company-operated stations would preserve "intertype competition" which he described as competition among the various types of competitors in the marketplace, such as private brand, major brand, and non-integrated marketers.[5] On the other hand, increased company operation of service stations would, in his view, enable major, integrated oil companies to use increased profits, resulting from the recent increases in crude oil prices, to drive various "price competitors" from the market as well as divert available gasoline supplies from independent, unbranded marketers. Such actions would, eventually, reduce overall competition in gasoline marketing. Evidence was also adduced by the State to show that several partially or fully integrated oil companies planned either to increase the number of company-operated stations or to convert all stations to company

[5] The designation of "major" and "non-major" (or "private") producers and refiners is that of the Lundburg Survey, an industry statistical organization. There are apparently 37 private-brand producers and refiners who presently do some marketing in the U.S.

operations. This, the State argued, tended to support Dr. Patterson's opinion that the major oil companies would seek to reduce competition among gasoline marketers by reducing the number of competitors.

Considerable evidence was also introduced concerning the history and purpose of the challenged statute . This indicated that the legislation was prompted by a study of gasoline retailing in Maryland undertaken by the Comptroller at the request of the governor. The study concluded that, in times of apparent gasoline shortage, company-operated stations "were virtually unaffected insofar as gasoline availability was concerned" while both branded and unbranded independents experienced "the greatest difficulty in obtaining gasoline" and the "greatest cost per gallon increase."
After legislation designed to correct these inequities had been proposed, the state Senate and House Committees with responsibility for the legislation held public hearings on the bills. Representatives of the major oil companies appeared at the hearings in opposition to the proposed legislation.

3. CONTENTIONS: Four distinct arguments are forwarded by the various appellants and amici as to why the Maryland statute is invalid--two constitutional and two statutory.

First, it is argued[6] that the divestiture provision of the statute is an invalid exercise of the police power in violation of due process. Secondly, the statute is said to violate the commerce clause in denying out-of-state competitors access to local retail gasoline markets and thus discriminating against interstate commerce. Third, the oil companies allege that Section F of the statute conflicts with and is thus preempted by the Federal Emergency Petroleum Allocation Act of 1973 (FEPAA). Fourth and last, the oil companies allege that Section D is inconsistent with the Clayton Act as amended by the Robinson-Patman Act. 15 U.S.C. §13 (1970). The details of these contentions are given, infra.

4. DISCUSSION

a.) Due Process: Appellants' due process argument was the

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[6] Not all of the four contentions were pressed by each of the appellants or by each of the amici. Most of the briefs concentrated on the commerce clause and Robinson-Patman issues.

The three motions for leave to file amici briefs in support of appellants (with the attached briefs) should, I believe, be granted. The State opposes one such motion by the Chamber of Commerce on the mutually inconsistent grounds that a) the arguments presented by the Chamber of Commerce are duplicative of the arguments of the appellants and b) that the State should not be burdened by having to respond to additional arguments. The State also opposes the motion for leave to file submitted by Champlin Petroleum Co., et al. The contents of Champlin's brief and the reasons for allowing it to be filed are considered infra in Section 4(c).

one they relied on most heavily below. They contended, as the trial cour held, that the divestiture provisions of the statute (Sections B and C) are an invalid exercise of the State's police power. Notwithstanding the emphasis with which this point was apparently pressed in the Maryland CA, it has now been all but abandoned. Only one of the jurisdictional statements and one of the amicus briefs even raise the issue.

These two briefs (by Continental Oil Co., et al, and Pacific Legal Foundation) argue that the Maryland statute lacks a rational relation to any constitutionally permissible objective. This contention was effectively answered by the CA. It began by noting that the function of the courts in reviewing, under the due process clause, state legislation on economic regulation is "very limited." Quoting extensively from this Court's decisions, the CA held the Act to be easily immune from judicial invalidation. The CA acknowledged that the oil companies had presented evidence questioning the wisdom and efficacy of the Act but held that they had not shown the Act be "arbitrary" or that there are "no considerations relating to the public welfare by which it can be supported." In short, the CA's opinion on this point appears to have properly applied well-established constitutional principles to the facts before it. Furthermore, most of the appellants have all but conceded the correctn of the CA's conclusion.

b.) Commerce clause: The contention that the Maryland statute runs afoul of the commerce clause is more troubling. The CA considered several Supreme Court decisions that struck down state statutes regulating the production and sale of a commodity as violative of the commerce clause. Dean Milk Co. v. Madison, 340 U.S. 349 (1951); H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949); Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935). The CA proceeded to distinguish the Maryland statute from the statutes considered in those cases on three different grounds. First, the CA stated that the Maryland statute would not restrict the free flow of petroleum products. According to the CA, the statute regulates a wholly intrastate activity, the retail marketing of gasoline. Producers and refiners would still remain free to import and sell petroleum products to wholesalers and to service station dealers.

Secondly, the Court relied on legislative history in asserting that the purpose of the statute was to preserve competition within the Maryland retail gasoline marketing industry. Its purpose was not, in the Court's view, to protect local economic interests from the competition of oil companies engaged in interstate commerce.

Third, the Court stated that the statute does not have the effect of discriminating against out-of-state economic interests in favor of local interests. The statute is equally applicable to all producers and refiners, the Court pointed out. It did concede, however, that petroleum is not now produced or refined in Maryland and never has been.

The Court also applied the three-pronged "balancing test" developed in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (a unanimous opinion), recently reaffirmed in Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976) (unanimous except for Stevens, J. who did not participate). That test provides that, once the Court finds that a "challenged exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce," then:

> [1] the extent of the burden that will be tolerated will . . . depend on the [2] nature of the local interest involved, and on [3] whether it could be promoted as well with a lesser impact on interstate activities.

See also Hunt v. Washington State Apple Advertising Commission, 45 U.S.L.W. 4746 (June 20, 1977). Under this test, the CA concluded that "the divestiture provisions of the Act do not violate the Commerce Clause."

The appellants vigorously attack the reasoning of the CA. They reject the CA's assertion that the statute regulates

a wholly intrastate activity," noting that the sale of petroleum products which are transported into a state has been regulated by Congress not only under the antitrust laws but also under the FEPAA. The appellants further note that this Court has held that the fact that a state law may strike some in-state interests as severely as it strikes out-of-state interests does not immunize it from a commerce clause challenge. Nippert v. Richmond, 327 U.S. 416,432 (1946). Moreover, the appellants believe the CA gave undue emphasis to the fact that the statute does not forbid producers and refiners from transporting petroleum into Maryland for sale.

The appellants proceed to argue that the statute does violate the commerce clause--and lessen competition in Maryland--in four ways. First, the statute forces vertically integrated oil companies, such as Exxon and Shell, that engage in producing and refining to divest themselves of the approximately 209 retail gasoline stations that they now operate in Maryland. Second, the appellants claim that the Act makes it difficult for producers or refiners not currently distributing their products in the Maryland market ever to enter that market. The appellants point to their previous experience in attempting to enter new state markets where they lack a brand image and are unfamiliar to the consuming public. In such a situation, it is

alleged, oil companies find it profitable to run their own retail operations until they build a volume of trade that makes it attractive for an independent dealer to lease a station from the company. Because companies of the size of Exxon have found it necessary to operate their own stations for a while before entering a new market, marketers with fewer resources would find it at least as difficult. Thus, the oil companies assert that the trial court was correct in finding that the statute would keep out of Maryland major brand and, especially, private brand producers and refiners who currently market elsewhere but not in Maryland.

Third, the appellants allege that the Act makes it economically prohibitive for integrated private brand marketers, who are now marketing in Maryland, to continue marketing their products there. This is said to be so because private brand marketers sell brands of gasoline that tend to have less consumer recognition in a given market and must retail their product at prices lower than those at which advertised brands are sold. The appellants claim that the private brand marketers have tried dealer operations and found that they cannot compete effectively because, inter alia, under the antitrust laws they cannot control the price of the products sold.

Fourth, the statute inhibits, according to the appellants, private brand marketers of gasoline that are not currently producers or refiners from integrating backwards into refining or production of petroleum products. Alternatively, the statute would drive such private brand marketers out of Maryland if they did choose to integrate backwards.

Turning to the balancing test of Pike v. Bruce Church, supra, and Great Atlantic & Pacific Tea Co. v. Cottrell, supra, the appellants challenge the "legitimate local interests" that the CA found to outweigh the burdens which the statute places on interstate commerce. The appellants point out that the CA's conclusion on this point was based on only two findings. First, the CA noted that during the period of the gasoline shortage in 1973, some company-operated stations received greater allocations of gasoline than did dealer-operated stations, forcing many dealers out of business. Secondly, the CA stated that there was evidence that certain oil companies intended to increase the number of company-operated stations, from which the Maryland General Assembly might have concluded that this trend,"if allowed to continue," could substantially decrease competition and lead to the control of that market by a few major oil companies. The appellants argue that these CA findings must be considered in light of the trial court's

finding--and what they allege was the State's concession on appeal[7]--that retail marketing of petroleum products in Maryland is, at present, "highly competitive." App. D, p. 99a. The appellants argue that neither finding justifies measures as drastic as those adopted in the challenged statute. They further assert, rather weakly, that less drastic (but sufficient) measures have already been adopted nationwide in the FEPAA and the regulations promulgated thereunder.

In overview, it seems clear that neither the State's arguments nor those of the appellants can be easily dismissed. Applying the three-prong balancing test of Pike and Great A & P Tea Co. is, therefore, difficult. The first factor to be considered--the extent of the burden--is, of course, what the oil companies stress. And even discounting their more extravagant claims, they are correct in stating that the statute will impose some substantial hardships. This was found by the trial court and, indeed, is all but self-evident from the language of the statute. The burden falls most heavily on the three appellants

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[7] To support their contention that the State conceded this point, the appellants cite the State's brief in the CA at p. 7. That brief is not among the documents included in the appendix submitted to this Court.

that market exclusively through their private brand, company-operated stations.[8] Officials of these companies indicated at trial that they might be forced to withdraw from the Maryland market if the statute were to become effective. (However, at least two of these company witnesses on cross-examination indicated that no firm decision had been made to withdraw if the statute became effective, and that it still might be possible to distribute products in Maryland through dealer operations and on the wholesale market.)

The second factor in the Pike-Great A & P Tea Co. test--the nature of the state interest--was expressly considered by the CA. The findings that the CA felt reflected the existence and dimensions of Maryland's interest were, as noted supra, the gasoline shortages at some of the dealer-operated stations during the 1973 gasoline crisis and the evidence that certain oil companies intended to increase the number of company-operated stations. The appellants do not deny that such findings show that there is a cognizable state interest at stake.

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[8] The major brands currently marketing in Maryland have, in the past, operated only a small percentage of the retail service stations which they supply. The burden on them, though real, is not severe. As discussed, supra, however, the statute would make it considerably more difficult for major brand or private brand integrated companies that are not now marketing in Maryland to begin business operations there (i.e., by supplying gas to independent dealers).

But, as the appellants stress, the relation of this second factor to the third factor is more complex. A respectable argument can be made that these local interests could be promoted as well with a lesser impact on interstate commerce. Although it seems facile to argue (as the appellants do) that existing federal laws and regulations are sufficient to handle the perceived problems in petroleum marketing, less sweeping state statutes would probably suffice. Certainly the fear that some oil companies intend to increase the number of company-operated stations could have been alleviated simply by prohibiting the companies from opening such new stations. The extra requirement of divestiture of existing, company-operated stations is more than is necessary to serve the asserted interest. Similarly, the possibility of company-operated stations receiving greater allocations of gasoline than dealer-operated stations during fuel crises would also seem susceptible to a solution short of the divestiture required by Section C. Indeed, prevention of misallocation of petroleum products by producers and refiners during fuel shortages is precisely the purpose of Section F. If this section is valid--and it was held valid by the CA--Section C is unnecessary for the problem at hand.

c.) Federal Emergency Petroleum Allocation Act of 1973

The CA considered and rejected the contention that the Maryland statute is inconsistent with and thus pre-empted by the FEPAA. On this appeal, the issue is raised by none of the appellants and by only one of the amici, Champlin Petroleum Co., et al.[9] The State has filed an objection to Champlin's motion for leave to file its brief, alleging that, as to the commerce clause and Robinson-Patman issues, Champlin's brief is duplicative and that, as to the FEPAA issue, Champlin has no more than a remote interest in the question. Moreover, the State asserts, Champlin should not be allowed to raise a question "which, for good reasons, appellants apparently felt should not be presented to this Court." To the extent that the State is worried about duplication

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[9] Champlin, et al, are companies engaged in the petroleum industry in different capacities. Some are engaged in petroleum production, refining, and marketing; others are engaged only in petroleum refining and marketing. None of the amici group is engaged in petroleum production or refining in Maryland. Some of the amici group were and are engaged in marketing petroleum products in Maryland through retail stations. Others are not now engaged in any Maryland retailing.

The motion for leave to file alleges that each member of the amici group is affected by the Maryland statute in that it affects the allocation policies of those who are now marketing in Maryland and forbids the opening of Maryland retail stations by those companies in the amici group that are producers and refiners.

of arguments, I do not believe the filing of Champlin's brief will present any great hardship to the State or to this Court. As to the FEPAA issue, Champlin's brief competently sets forth a problem that is likely to be of recurring importance and in which the amici group have a legitimate interest. Because the other side of the FEPAA problem is well presented in the CA opinion, I again see little hardship to the State or to the Court in allowing Champlin to file its brief (even though the FEPAA issue is not addressed by the State in its motion to dismiss or affirm).

All this having been said, however, I believe that the FEPAA issue was correctly resolved below and does not merit plenary consideration by this Court. The focus of Champlin's attack is Section F of the Maryland statute. It provides that during periods of shortages, producers, refiners, and wholesalers shall "apportion uniformly" gasoline and special fuels to all retail service station dealers "on an equitable basis." Champlin contends that this provision clashes with the FEPAA which provides for the promulgation of regulations for the allocation of petroleum productions. Champlin points to several factors affecting allocations under the federal regulations which may allow allocations on other than the "uniform basis" required by Section F.

In considering this argument, the CA construed the Maryland statute to avoid the problems that the appellants there asserted that it raised vis-a-vis the FEPAA. The CA noted that, although the statute refers to allocation on a uniform basis, it also states that allocation is to be on an "equitable basis." "By thus modifying 'uniformly,' it would appear that the[Maryland General Assembly] contemplated that certain equitable factors might require variations in an otherwise uniform scheme of gasoline and special fuel allocation." CA opinion, App. at 31a.

I do not believe that, under this somewhat strained interpretation, the Maryland statute is inherently in conflict with the FEPAA. Conflicts in the application of the two statutes can be considered when and if they arise.

d.) Robinson-Patman Act: A much more serious question of possible state-federal statutory conflict is raised by the appellants concerning the Robinson-Patman Act. They contend that Section D of the Maryland statute is irreconcilable with Section 2(b) of the Robinson-Patman Act which provides that a seller can rebut a prima facie case of price discrimination violative of the Act "by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor." See Standard Oil Co. v. FTC, 340 U.S.

231 (1951); FTC v. Sun Oil Co., 371 U.S. 505 (1971). As noted supra, Section D of the Maryland statute requires that suppliers of petroleum products must extend all price reductions uniformly to all retail service stations supplied. Appellants' argument boils down to the claim that Section 2(b) allows exactly what Section D forbids.

i) In considering the alleged conflict between the two statutes, the CA interpreted Section 2(b) in such a way as to avoid the conflict. According to the appellants, however, the CA's interpretation is inconsistent with virtually all other interpretations.

In Sun Oil Co., this Court specifically reserved the question of whether the Section 2(b) defense encompasses a situation where a supplier such as an oil company lowers its price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer which lower price is subsidized by a price reduction from that dealer's supplier. The Maryland CA held that the oil companies' granting of such "competitive price assistance" (or "voluntary allowances") to meet a price cut of a competing supplier to that supplier's dealers--which is plainly forbidden under Section D--is also not protected by Section 2(b) because Section 2(b) applies only when the competitive offer is made directly to the oil companies' own customers.

As appellants point out, this holding answers the question reserved in Sun in a manner contrary to federal court authority as well as the stated policy of the FTC and the Department of Justice. FTC Report on Anticompetitive Practices in the Marketing of Gasoline, 3 CCH Trade Reg. Rep., ¶10,373 at 18,245 (1967); Dept. of Justice, Report on the Robinson-Patman Act, 93-97 (1977); Bargain Car Wash Inc. v. Standard Oil Co. (Indiana), 466 F.2d 1163, 1175-76 (7th Cir. 1972); Belliston v. Texaco Inc., 455 F.2d 175, 182 (10th Cir.) cert. denied, 408 U.S. 928. But see Note, Gasoline Marketing and the Robinson-Patman Act, 82 Yale L.J. 1706, 1713 n. 44 (1973).

ii.) The appellants also note that, in contrast to what they claim is their practice of tailoring price assistance to a particular competitive situation, Section D requires them to grant the same competitive allowance to all the dealers they supply in Maryland when an allowance is granted to even one. This does seem at odds with Section 2(b) which this Court has interpreted as a section "designed to protect competitors in individual transactions,"[10] and as one which guarantees to a seller a pro-competitive right of self-defense to meet his competition.[11]

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[10] FTC v. National Lead Co., 352 U.S. 419, 431 (1957). See also FTC v. A.E. Staley Manufacturing Co., 324 U.S. 746, 753 (1945).

[11] Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951).

e) Importance of the Issues: As a number of the jurisdictional statements and amici briefs point out, statutes similar to that challenged here have been adopted or are being considered by more than 25 states. (There is some disagreement as to the exact number.) And, the dual market structure--where company-operated retail outlets compete with franchised dealers--also exists in such industries as soft drink bottling, automobile and truck dealerships, automotive parts and service, fast food restaurants, and non-food retailers. To be sure, there is not as much impetus for regulation of these industries as there is with respect to the petroleum industry. Still, it is safe to say that the Maryland statute does have some precedential importance both outside of the state and outside of the industry.

5. RECOMMENDATION: In light of the decision below and its potential significance, I believe that the "questions presented [in these appeals] are so substantial as to require plenary consideration." Rule 15(1)(f) of the Sup. Ct. Rules.

There is a motion to dismiss or affirm.

8/26/77 Ellison Trial Court and CA ops in Joint Appendix

APPENDIX

Chapter 854 provides (italicized portions are those added by Chapter 608):

"(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*

"(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*

"(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

"(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

"(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

"(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

"(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts."

Out [illegible]

PRELIMINARY MEMORANDUM

Summer List 13, Sheet 1

No. 77-11 ASX — Appeal from Maryland CA

SHELL OIL COMPANY

v.

GOVERNOR OF MARYLAND — State/Civil — Timely

Please see the Preliminary Memorandum in No. 77-10, Exxon Corporation v. Governor of Maryland.

8/30/77 — Ellison — Opn in Joint Appx

Aut
Letter to Rodell 9/9/77 LW

PRELIMINARY MEMORANDUM

Summer List 13, Sheet 1

No. 77-12 ASX | Appeal from Maryland CA

CONTINENTAL OIL COMPANY

v.

GOVERNOR OF MARYLAND | State/Civil | Timely

Please see the Preliminary Memorandum in No. 77-10,

Exxon Corporation v. Governor of Maryland.

8/30/77 | Ellison | Opn in Joint Appendix

Court ..CA - Md....... Voted on.................., 19...

Argued ...., 19... Assigned ...., 19... No. 77-10

Submitted ...., 19... Announced ...., 19... (Vide 77-11, 77-12, 77-47, 77-64)

EXXON CORPORATION, ET AL., Appellants

vs.

GOVERNOR OF MARYLAND, ET AL.

7/1/77 - Appeal

out

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

Court CA - Md.
Argued ..., 19...
Submitted ..., 19...

Voted on ..., 19...
Assigned ..., 19...
Announced ..., 19...

No. 77-11
(Vide 77-10, 77-12, 77-47, ~~77-64~~)

SHELL OIL COMPANY, Appellant

vs.

GOVERNOR OF MARYLAND, ET AL.

7/1/77 - Appeal

out

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Rehnquist, J.													
Stevens, J.													

Court ..CA. ~~-~~ Md......... *Voted on*................, 19...
Argued ...., 19... *Assigned* ...., 19... No. 77-12
Submitted ...., 19... *Announced* ...., 19... (Vide 77-10, 77-11, 77-47, ~~77-64)~~

CONTINENTAL OIL COMPANY, ET AL., Appellants

vs.

GOVERNOR OF MARYLAND, ET AL.

7/1/77 - Appeal

out

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Rehnquist, J.													
Stevens, J.													

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

out

February 15, 1978

MEMORANDUM TO THE COURT

Re: Exxon Corporation et al.; Shell Oil Co.; Continental Oil Co. et al.; Gulf Oil Corporation; and Ashland Oil, Inc. et al. v. Governor of the State of Maryland, et al. Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

The attached letter directed to the Chief Justice refers to the motion for divided argument in the above cases which has been distributed to the Court with "in chamber matters" for Friday's Conference.

I am somewhat nonplused since the request for divided argument was filed by his office.

Respectfully submitted,

M. Rodak, Jr.

Michael Rodak, Jr.
Clerk

Attachment

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301-383-3737

January 31, 1978

The Honorable Warren E. Burger
Chief Justice of the
United States Supreme Court
Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

Re: Exxon Corporation et al.; Shell Oil Company; Continental Oil Company et al.; Gulf Oil Corporation; and Ashland Oil, Inc., et al. v. Governor of the State of Maryland et al.
Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

My dear Mr. Chief Justice:

I apologize for writing to you directly on this case, and I should state to you initially that I do not believe my remarks which follow in any way prejudice or affect the rights of the Appellants. I should also add that I do not believe that my remarks are appropriate to any formal pleading before the Court. I have no objection to the contents of this letter being made available to the Appellants if you believe it desirable that I do so.

We have previously filed a Motion For Leave To Divide Oral Argument. The case breaks down into two clearly defined areas of the law, the commerce clause and the application of the Robinson-Patman Act. While there is certainly some intertwining of the two areas, as there must be in all cases, I believe that the structure of this case lends itself to divided argument particularly where the two attorneys whom I propose for the argument have mutually exclusive experience and expertise in the two areas of the case.

I ask for a favorable response to our Motion in

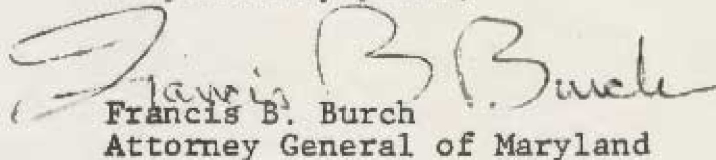
light of your suggestion to the State Attorneys General that the quality of oral arguments in the Supreme Court by members of their staffs has often failed to meet the degree of excellence and importance which such arguments demand. On at least one occasion, at which I was present in your company, you asked the State Attorneys General to address themselves to the question of whether they were sending to the Supreme Court the best available people on their staff for oral argument and whether they were insuring that the level of preparation for such arguments was receiving the necessary time and attention. It is in the spirit of your request for the best that I strive to put our best foot forward and ask that we be permitted to split our argument.

In the Court of Appeals of Maryland, where an hour was allotted to each side for oral argument in this case, we used one of my two Deputy Attorneys General and one of the Assistant Attorneys General assigned to our Antitrust Division. If our Motion is granted, we would again use the Deputy Attorney General who argued the case below, and the Chief of the Antitrust Division who is the most experienced attorney in my office in antitrust law and who possesses the greatest degree of command over the antitrust facets of this case. At the same time, I would expect and instruct both attorneys to prepare themselves so that they can answer questions in either area of the case but to concentrate on the area of their particular assignment.

I should further point out that the Appellants are represented by a panoply of attorneys too numerous to mention, all of whom are well-versed in constitutional and antitrust law. The brief of just four of the Appellants lists sixteen attorneys and five law firms and there is no question in my mind that the Appellants are provided with matchless legal representation in terms of experience and expertise.

I am aware of the reasons why divided arguments are discouraged and the potential deficiencies in such arguments. However, I believe in the instant case the ability of the State properly to present its case in oral argument and, therefore, to assist the Court, will be immeasurably enhanced if such argument can be divided. Thanking you for your kind consideration, I am

Respectfully yours,



Francis B. Burch
Attorney General of Maryland

FBB/bw

May 18, 1978

No. 77-10 Exxon Corp. v. Governor of Maryland

Dear John:

Please show at the end of the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: The Conference