SSDA SERVICE STATION DEALERS OF AMERICA AND ALLIED TRADES

SSDA News

Service Station Dealers of America and Allied Trades

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Legislative Update

By Roy Littlefield

TO BE CONTINUED

This Congress continues to plow its uncharted and unpredictable course of legislating. Both the Senate and House rejected separate different individual agency spending bills last week. Congress is now in recess for four weeks and the only certainty is that there is no such thing as "regular order" when it comes to Congress fulfilling its Constitutionally mandated responsibility to fund the government. It will not fund the government by October 1st by passing the multiple appropriations bills needed to do so under the "regular order."

It appears a temporary "continuing resolution" will be passed in September to fund the government for some specified - probably short - period of time beyond October 1st. The goal will be to buy some time. While no one is very optimistic about a "grand deal," that is what a short-term extension will buy – some time to see if a grand deal is possible. Yes, I know you are thinking why cannot they just decide that now? While their current course of legislating is through unchartered waters, some things still hold true and without an 11th hour, Congress is hard pressed to find the will to act.

The aforementioned grand deal hinges on the only decision Congress and the President have to make this fall – to increase the debt ceiling. The grand deal we are talking about is the hope that tax reform and entitlement reform could be tied to the debt ceiling increase. There is also some hope on both ends of Pennsylvania Avenue and both parties that the current sequestration rules can be modified. Those concerned about the impact of sequestration on defense and those concerned about the impact on social programs are interested in making modifications.

The course of least resistance would be a modest increase in the debt ceiling and sequestration modifications. Tax reform and entitlement reform, while not impossible goals, requires more comity than this Congress may be able to muster.

As previously noted, if there is no tax reform deal, make sure you are not

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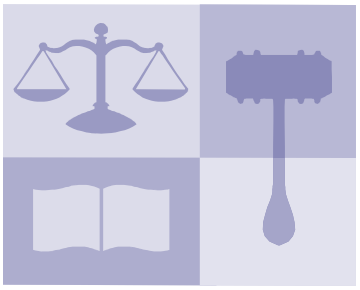
GENERAL COUNSEL CORNER



The Ethanol Blending Battle Continues

By Peter H. Gunst
pgunst@lawyers.com

Congress' enactment of the federal renewalable fuel program has led to battles between suppliers, on the one hand, and distributors and retailers, on the other, concerning the latters' right to "splash blend" ethanol with gasoline.

The issue is whether suppliers can monopolize the blending process by prohibiting splash blending so that they can obtain the valuable credits called RINs that Congress decreed should go to an entity performing the blending function.

In 2008, North Carolina enacted a blending statute that purported to preserve the right of distributors and retailers to blend below the terminal rack, and which prohibited suppliers from contractually restricting retailers from splash blending.

The suppliers, with the American Petroleum Institute as lead plaintiff, sued the state in federal court, contending that North Carolina should be prohibited from enforcing the act because it was inconsistent with federal law. API argued that the state law was preempted by the PMPA, the federal renewalable fuel program and the Lanham Act, which confers federal trademark rights.

Recently, the Fourth Circuit Court of Appeal considered the district court's rejection of API's claims in a published opinion styled *American Petroleum Institute v. Cooper,* ___ F.3d _____, 2013 WL 2443148 (4th Cir. 2013).

The Appeals court agreed with the district court on two of the three issues raised by API. First, it rejected API's argument that the North Carolina act conflicted with the PMPA's exclusive jurisdiction over issues relating to franchisee termination or nonrenewal.

API argued that the PMPA preempted the state law because the state law in effect prohibited a franchisor from terminating or nonrenewing a franchisee for violating an express contractual prohibition against splash blending. API argued further that the North Carolina statute contradicted the federal statute's prohibition against "willful alteration" of gasoline, which is specifically set forth in the PMPA as an appropriate ground for termination or nonrenewal.

Rejecting API's PMPA contentions, the court emphasized that Congress' 1994 amendment to the PMPA restricted its preemptive scope by providing states with "the authority to pass substantive laws making certain franchise provisions illegal or enforceable." This opened the door to the North Carolina legislature to prohibit suppliers from contractually forbidding their franchisees from engaging in splash blending.

Likewise, the court found API's "willful alteration" argument to be unpersuasive. It

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"The issue is whether suppliers can monopolize the blending process by prohibiting splash blending so that they can obtain the valuable credits called RINs that Congress decreed should go to an entity performing the blending function."

New Taxes Threaten Emissions Progress

Thanks to technological advances spurred by private investment in energy development, the U.S. now leads the world in natural gas production – an achievement that has helped cut the nation's CO2 emission levels to 20-year lows.

However, the wrong policies can reverse this game-changing progress and jeopardize economic recovery. President Obama's climate policy agenda includes tax increases for U.S. oil and gas companies that would negatively impact job creation, energy security – and the environmental benefits of natural gas.

A Wood Mackenzie study outlines the consequences of industry tax hikes.

Raise oil and natural gas taxes:

- Lose 22,000 jobs
- Decrease government revenue by $223 billion
- Cut energy production by 280,000 barrels of oil and natural gas per day
- Increase oil and natural gas development:
- Create 1.4 million new jobs
- Increase government revenue by $800 billion
- Increase domestic energy production by 10 million barrels per day

Besides stifling job creation, raising industry taxes undermines the president's own climate goals. Between 2000 – 2010, the U.S. oil and natural gas industry invested $71 billion in technologies that reduce greenhouse gas emissions. Raising the cost of such investments and discouraging production of clean-burning natural gas jeopardizes progress in further lowering emissions from energy.

Increasing taxes on energy production will hurt the economy at no gain to the environment, and the proposal should be removed from the administration's climate plan.

Hydraulic Fracturing Facts

Technological advances in hydraulic fracturing and horizontal drilling have spurred a shale energy revolution that has been a game-changer for economic growth in America, supporting 1.7 million jobs and providing $62 billion in additional government revenue in 2012.

Misinformation about the process often goes unchallenged in the media, but the facts about hydraulic fracturing demonstrate why the technology has such a long track record of safety and success:

- Hydraulic fracturing and supporting operations are rigorously regulated at the state level and subject to federal laws including the Safe Drinking Water Act, Clean Water Act, and Resource Conservation and Recovery Act.
- Hydraulic fracturing has been safely used for over 60 years in more than 1 million wells with no documented cases of groundwater contamination from the well stimulation technique.
- Former EPA-Administrator Lisa Jackson testified before Congress that she was "not aware of any proven case where the fracking process itself has affected water."
- Hydraulic fracturing typically takes place up to a mile or more underground, separated from groundwater supplies by thousands of feet of impermeable rock.
- 99.5 percent of hydraulic fracturing fluid is made up of water and sand.
- Hydraulic fracturing is a key factor in America's transformation from energy scarcity to abundance. We now lead the world in natural gas production and are on track to become the leading oil producer by 2020 – and our energy security potential continues to grow with new finds.
- Discussions about shale energy development and hydraulic fracturing are much more constructive when based on the facts.

States Working Hard to Reduce Distracted Driving, Report Says

State transportation and highway departments have been instrumental in combating distracted driving through stronger enforcement laws, finding ways to educate the public, collecting important data, and focusing on key groups such as teens, according to a report released by the Governors Highway Safety Association.

The report compiled survey results taken from all states and the District of Columbia. All states reported actions to tackle distracted driving, and 39 of those states and D.C. identified addressing distracted driving as a priority issue. This number shows a growing concern, as only 28 states identified it as a priority issue in 2010 (representing a 43 percent increase).

"Developing effective programs and policies to keep all roadway users safe is a challenge, but it becomes even more daunting with the increase in the use of distracting technology," said GHSA Deputy Executive Director Jonathan Adkins in a statement. "This latest report confirms that states recognize the threat posed by distraction and are working hard in several areas to address it."

The report found that states are succeeding in addressing distracted driving through multiple actions, such as:

- Passing distracted driving laws—47 states and D.C. have specific laws banning forms of distracted driving, and 41 of those states ban all texting by drivers (up from 28 states in 2010);
- Increasing enforcement—law enforcement officers in almost all states are actively enforcing these laws, a major change from 2010, the report says;
- Educating the public—47 states and D.C. report taking steps to educate the public about distracted driving (37 states reported doing so in 2010). States report high usage of social media to do so;
- Focusing on teenagers—States are putting a lot of resources and attention on educating teens, as they are the strongest adapters of technology and the age group with the highest rate of incidents;
- Harnessing the power of public private partnerships—States are partnering with outside groups to reinforce safety messages. While the number of states working with groups has not changed since 2010, those partnerships are stronger and better utilized than before; and
- Continuing to improve data collection—47 states and D.C. (up from 43 in 2010) collect distracted driving data from sources such as crash reports. Many states also reported that they were upgrading data collection efforts in the next year.

"States face major obstacles including a lack of funding for enforcement, media, and education," Adkins said. "That, coupled with the motoring public's unwillingness to put down their phones, despite disapproving of and recognizing the danger of this behavior, makes for a challenging landscape."

Senate Confirms McCarthy as EPA Administrator

In a 59-40 vote, the Senate approved Gina McCarthy as President Obama's new Environmental Protection Agency administrator. Her confirmation comes two months after the Senate Committee on Environment and Public Works moved her nomination forward with a vote along party lines.

McCarthy has served as EPA assistant administrator since 2009. Before her time at EPA, McCarthy was commissioner of the Connecticut Department of Environmental Protection from 2004-2009. She has also worked as deputy secretary at the Massachusetts Office of Commonwealth Development and was undersecretary for policy at the Massachusetts Executive Office of Environmental Affairs. McCarthy has served as an environmental advisor to five Massachusetts governors.

"I am pleased that the Senate took bipartisan action to confirm Gina McCarthy as the next administrator of the Environmental Protection Agency," President Obama said in a statement upon McCarthy's confirmation. "With years of experience at the state and local level, Gina is a proven leader who knows how to build bipartisan support for commonsense environmental solutions that protect the health and safety of our kids while promoting economic growth. Over the past four years, I have valued Gina's counsel and I look forward to having her in my cabinet as we work to slow the effects of climate change and leave a cleaner environment for future generations."

Connecticut Stage II Repeal

Connecticut Governor Malloy signed the bill mandating the removal of STAGE II vapor recovery equipment at service stations by July 1, 2015. The bill had strong support from refiners and jobbers.

As a result of the new law, DEEP terminated the administrative hearing that challenged its issuance of a general permit for decommissioning of STAGE II vapor recovery systems, which now is no longer necessary. The issuance of a permit to decommission was being challenged by Arid Technologies, a STAGE II equipment company which feared a major loss of business. The administrative hearing in March consumed two weeks of testimony. API, and its consultant, Todd Tamura, provided DEEP with technical data earlier this year showing that Arid's equipment wasn't needed in light of onboard refueling vapor recovery (ORVR).

Healthcare Delay

SSDA-AT has been working in conjunction with the Small Business Council of America to support the Authority for Mandate Delay Act (H.R. 2667) and the Fairness for American Families Act (H.R. 2668). Through coalition meetings and letters of support, these two Acts have successfully passed the House. These two pieces of legislation would delay implementation of the health care reform law. The Authority for Mandate Delay Act amends the Patient Protection and Affordable Care Act so to delay until December 31, 2014 enforcement of the law's requirement that employers with 50 or more employees provide enrollment opportunities for minimal health insurance coverage. Likewise, employer and insurance company reporting on the matter is also delayed one year. And the Fairness for American Families Act is a bill to delay for one year the Affordable Care Act's individual mandate.

The Obama Administration acknowledged the detrimental effects that the employer mandate will have on businesses, workers, and the economy at large when it unilaterally elected to delay this provision for one year. With the legality of this move very much in question, the House of Representatives is wisely moving to codify the change by passing H.R. 2667. This would greatly assist – albeit only in the short-term – the many businesses that are already cutting employee hours or jobs as a result of the law.

Passage of H.R. 2667 and H.R. 2668 would help alleviate some of the harmful effects that the Affordable Care Act will impose on businesses and individuals. Enactment of these bills would be an important step toward more significant legislative goals, such as permanent repeal of both mandates and the Affordable Care Act in its entirety.

Industry Tallies Another Win in Hot Fuels Case

The federal judge in Kansas presiding over the massive hot fuels litigation handed a second big victory to the industry in its defense against the addition of costly temperature compensation devices at the pump.

The latest win involves three suits filed against Chevron in California, where plaintiffs' lawyers sought to retry the case after a Kansas jury found in favor of three major gasoline retailers last September.

In a decision earlier this month, Judge Kathryn Vratil ruled Chevron complied with California law in retailing fuel without adjusting the temperature and without disclosing to consumers the effect temperature has on the product.

Chevron's compliance was a "safe harbor" protecting it against the plaintiffs claims of unfair and deceptive practices, Vratil wrote.

"Under this safe harbor rule, plaintiffs are in the difficult position of arguing that California law does not authorize the manner in which Chevron sells motor fuel in California -- which is the same way every motor fuel retailer has sold motor fuel throughout the United States for more than a century," she said.

The decision is a blow to plaintiffs, who have filed dozens of "hot fuels" suits around the country claiming gas stations cheated them by retailing fuel hotter than the federal standard of 60 degrees Fahrenheit. As temperature rises, fuel expands by volume but not by weight or energy content.

The cases were consolidated in the U.S. District Court in Kansas. Though most of the retailers and refiners settled, three c-store chains that went to trial were vindicated by the jury.

Plaintiffs' lawyers said they would hunt for a second bellwether trial in a state with a hotter climate than Kansas where fuel buyers were more likely to buy gasoline hotter than the federal standard.

California was targeted for its consumer orientation and consistently warm climate. The average temperature of motor fuel sold in California is warmer than 60 degrees Fahrenheit. Temperatures of gasoline in storage tanks in California averaged 74.7 degrees Fahrenheit; annual statewide temperature of regular grade gasoline from the dispenser has averaged 71.1 degrees Fahrenheit, the legal record says.

California regulators handling weights and measures also view automatic temperature compensation (ATC) favorably, sources say.

Lead plaintiffs' lawyers in the case were unavailable for comment.

But Vratil's July 19 decision rules out a trial of the suits against Chevron. And industry sources say the judge will likely repeat the ruling in California hot fuels cases involving other defendants.

"California law defines a 'gallon' as a volume of liquid -- 231 cubic inches to be exact -- regardless of temperature," Vratil wrote. "The California statutory and regulatory framework insulates Chevron from liability on plaintiffs' claims."

Gas Prices Spike, Oil Speculation Soars

Within the past 30 days, the cost of WTI crude oil increased 15% to top $108 per barrel.

Every time gasoline prices increase more than a few pennies in a week, drivers start wondering what's going on. Last week, the cost of gasoline jumped 12 cents, and some analysts say this will continue, KETK-TV reports.

Within the past 30 days, the cost of WTI crude oil increased 15% to top $108 per barrel. During the same time, oil stockpiles have been drawn down. "Oil prices and gas prices are as much about the 'what if.' It's about what could happen. It's a commodity," said Jeff Lenard with NACS.

With supplies pretty much the same as they have been for the past five years, and demand lower, what's driving up gasoline prices? Speculation. "And when there's uncertainty, commodities increase in value," he said. "When there's uncertainty in the stock market, prices go down because they're not sure about the company. When there's uncertainty about the commodity, prices go up and that's what we're seeing now, largely because of Egypt."

On Wall Street, hedge fund speculators have snapped up more oil than Oklahoma has sitting in giant oil terminals. "The classic example is what happened five years ago," said Lenard. "We had gas run up to $4.11 a gallon in mid-July. People were talking about $5 gas, $6 gas. It ended the year at $1.61, dropping by $2.50."

Save The Date!!

The 40th Annual

Convention and Mega Trade Show

Ocean City, Maryland

September 26 - 28, 2013

(See Schedule and Registration, attached to newsletter)

Court of Appeals Affirms Dismissal of California Dealers' Right of First Refusal Claims

By Harry Storm, WMDA Counsel

In a brief, unreported decision filed May 16th, a split panel of the United States Court of Appeals for the Ninth Circuit affirmed the dismissal of claims brought by two California Equilon (Shell) dealers claiming that right of first refusal offers had been manipulated. The case is *Barja, Inc. v. Equilon Enterprses, LLC*, 2013 WL 2099218 (9th Cir. May 16, 2013). A subsequent request for rehearing was denied.

The case arose out of Equilon's 2005 decision to withdraw from the retail gasoline market, which entailed a sale of its station assets and a conversion to a wholesale distribution strategy. During the summer of 2008, Equilon met with its dealers and provided them with the opportunity to submit offers. Plaintiff Barja,Inc. ("Barja") did not make an offer; plaintiff Fry's 710 Freeway Investment Inc. ("Fry's") made an offer but was unable to close and remained a tenant at the station.

Equilon went through a bid process with its distributors, dividing the stations into four "clusters." Apro Distribution, LLC ("Apro") was selected as the winning bidder for two of the clusters, which included the stations at issue. As reported in the lower court's opinion, "the bids included a specific purchase price offered for Equilon's interest in each property." In early June 2010, separate contracts were executed between Equilon and Apro, whereby Apro agreed to purchase the station operated by Barja (the "Olympic Station") for $3,737,414, and the station operated by Fry's (the "Imperial Station") for $600,000. In allocating these values, Apro considered "a number of factors, including transportation costs, volume projections, margin, fuel distribution costs, overhead, rent, expenses, exclusivity, volume, potential, contract term, proximity to other stations, likelihood of contract renewal by the existing dealer, and environmental considerations." The dealers were given rights of first refusal ("ROFRS") on these offers.

The dealers notified Equilon that they were accepting the offers "under protest" and filed suit (although at some point Fry's closed on its purchase, and later told the Court that it no longer challenged the price). The suit claimed that the offers violated the California state law that required Equilon to offer a right of first refusal (the PMPA not being applicable) upon any station sale. The theory of the case was that because the bids for these stations were "bundled" with multiple other sites, and other rights (such as exclusive supply rights granted to the distributor) that were not offered to the dealers, that the offers for just the stations were inflated.

The district court rejected the argument and granted Equilon summary judgment. The court found that there was no evidence of manipulation and that the California statute did not require that the offers to the dealers "mirror" exactly the purchase agreements offered by Apro. The Court similarly rejected the claim that the deed restrictions contained in the ROFRS made the ROFRS unreasonable.

On appeal to the Ninth Circuit, that Court affirmed, in a 2 to 1 decision. The Court found that "parties to a bulk purchase transaction may allocate a portion of the total purchase price to a

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single site in order to allow an existing franchisee to exercise a right of first refusal, as long as the valuation of the individual property is readily apparent from the bulk offer and the valuation has not been manipulated to the franchisor's advantage." Here, according to the majority, there was no such manipulation shown. The dissenting judge disagreed, finding that there was sufficient evidence in the record to find that there was additional value added for the fuel supply rights, and that this was not included in the dealers' ROFR offers. Accordingly, the dissenting judge would have allowed the case to proceed to trial.

This case is another in a long line of decisions related to the "bona fides" or "good faith" of a franchisor's offer in the context of station sales. As evidenced by the split decision in *Barja*, the issue is not a simple one.

Convention Keynote Address

SSDA-AT and WMDA are proud to announce that J. Blacklock Wills, Jr., Chairman, President and CEO of the Wills Group, Inc. since 1988 will be the Keynote Speaker at the 40th annual Convention and Mega Trade Show in Ocean City.

J. Blacklock ("Lock") Wills, Jr. was elected to The Wills Group Board of Directors in 1985. Mr. Wills became the Chairman, President and CEO of The Wills Group in 1988. Prior to that, he held the position of Vice President, Marketing; Motor Fuels Department Manager and Area Manager. Mr. Wills is on the Board of Directors for the Maryland Chamber of Commerce PAC and the Lee Development Group, Inc. He has previously served as Chairman of the Mid Atlantic Petroleum Distributors Association (MAPDA); Chairman of the Better Home Heat Council, Inc; Vice President of the Charles County Chamber of Commerce; and Director of the Mercantile Southern Maryland Bank. Mr. Wills' civic duties include the Charles County 350th Anniversary Committee; Town of La Plata Vision Committee; Past Director of the Mattawoman Creek Arts Center Board; Charles County Planning Commission; La Plata Centennial; Past Chairman of the Center of Business and Industry Fund Drive; Past Chairman of the Rotary Club of Charles County; Chairman of the American Heart Association, Business Campaign; Charles County Citizen's Advisory, Committee for Comprehensive Plan and the James C. Mitchell Health Center Fund Drive Committee.

Mr. Wills received a Bachelor's Degree in Business Administration from the University of Richmond. He holds a Master's Degree in Finance and Investments from George Washington University. He is married and has four sons.

Legislative Update

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standing in the hallways of Congress when the tax lobbyists stampede begins to renew any expiring tax credits and deductions. For example, the direct expensing allowance, also known as the Section 179 allowance, will drop from the current temporary levels of an allowance of $500,000 and an asset purchase cap of $2,000,000 to $25,000 and $200,000, (both without indexing) respectively, in 2014.

STILL NOT LOOKING TOO GOOD

...for immigration reform, farm program reauthorizations, postal service reform and a bunch of other issues it in this calendar year. Since this is the first session of Congress, everything carries over to the next session. Once the debt ceiling deal is iced, interest in doing any more work during the first session of Congress will wane. We give slightly better chances, if enough noise is made, for Senate consideration of some version of the House-passed bills that formalize the delay of the health care reform penalty on employers and extending it to individuals. There is a chance the House will consider legislation, the Marketplace Fairness Act, to permit the States to require out of state sellers to collect use taxes. The Senate passed a version earlier this year.

REIN THEM IN

Before recessing the House of Representatives passed a bunch of interesting bills, among them H.R. 367, the Regulations from the Executive in Need of Scrutiny Act (REINS Act) which passed by a vote of 232-183. The REINS Act requires that federal agencies submit major regulations to Congress for approval. During the debate, amendments were approved to change the definition of a major rule from one with a $100 million dollar impact to $50 million. Amendments were also adopted to require congressional approval of any additional health care reform act implementation regulations and any carbon tax regulations if the Administration were to try to impose one by administrative action. In the latter case, there has been a lot of speculation about whether the Administration has the authority to do so under existing laws.

It is difficult to conjure up a situation in which the Senate Majority Leader would bring the House version or a Senate version to the floor this fall.

We expect the House to consider a variety of tort reform and regulatory reform bills in the fall. Most of them will be tough sells in the Senate but still merit mentioning if you are meeting with Senators and Representatives during the summer break and the proposed solution is relevant to your business profile.

On the tort reform front, we have LARA and ISFA. Both are resurrected bills from our piecemeal approach to tort reform past.

The Lawsuit Abuse Reduction Act of 2013 (LARA), H.R. 2655 is all about the Federal Rules of Civil Procedure. Rule 11 says that attorneys or unrepresented parties are not to file suits that are being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; the claims, defenses, and other legal contentions are not warranted by existing law or by a frivolous argument for extending, modifying, or reversing existing law or for establishing new law; and the factual contentions do not have evidentiary support. The rule allows courts to impose sanctions. However, the operative word is "may" impose sanctions. This was not always the case. Until a 1993 change in the rules, the courts were required to impose sanctions. "Shall" disappeared and the lawsuit floodgates opened. LARA reverses the 1993 amendments to Rule 11 that made sanctions discretionary rather than mandatory. In addition, LARA requires that judges impose monetary sanctions against lawyers who file frivolous lawsuits. Those monetary sanctions will include the attorney's fees

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and costs incurred by the victim of the frivolous lawsuit.

The IFSA is the Innocent Sellers Fairness Act, H.R. 2746, introduced by Representative Blake Farenthold (R-TX). This bill is designed to limit the liability of sellers that had no control or input in the design, production, or any other aspect of an allegedly defective product.

One regulatory reform bill is one we have mentioned before. H.R. 2542, introduced by Representative Spencer Bachus (R-AL), would expand the scope of the Regulatory Flexibility Act, in on the move in the House. Among other things, it would require agencies to consider the indirect impact of proposed rules on small businesses, not just the direct effects.

WOTC UPDATE

Recently, there was a new dynamic rising in the Senate—a debate over Senator Reid's determination to use the "nuclear option" (51 votes) to approve presidential appointees led to a rare caucus of senators of both Parties. There, senators led by John McCain of Arizona, Bob Corker of Tennessee, and others, brought the majority of Republicans into a deal that killed the nuclear option but gave Democrats an up-or-down vote on their most important nominees, who were later confirmed.

When Republicans met the next day and Minority Leader Mitch McConnell opined he could have gotten a better deal, Corker retorted, "Bullshit!" The fact some Republicans are disillusioned with McConnell's confrontational style and ready to talk compromise to get things done is out in the open.

Senator McCain wants to end sequester caps on spending for Defense and is sympathetic to a deal with the White House to fund the government after the August recess. He's been talking to top people in the White House regularly on this score—which some might say began in April when the President started inviting groups of Republican senators to dinner at downtown restaurants.

If a number of moderate conservatives follow McCain, he could become a key negotiator between Senate Republicans and the White House—only a possibility right not, but McCain isn't the only conservative chafing at the folly of sequester hitting the folks back home.

We would list as moderate conservatives besides McCain who would work for a constructive deal, Graham of South Carolina, Collins of Maine, Ayotte of New Hampshire, Corker of Tennessee, Hoeven of North Dakota, Portman of Ohio, Toomey of Pennsylvania, Coats of Indiana, Murkowski of Alaska, Grassley of Iowa, Kirk of Illinois, Johanns of Nebraska, Chambliss of Georgia, Flake of Arizona, Heller of Nevada, and Moran of Kansas.

These seventeen are more than what's needed to join with Democrats to fix fiscal policy that's retarding the economy. If the McCain rising gains steam, there could be a better chance for a fiscal grand bargain than we've previously guessed. Any weakening of Senator McConnell's hold on his caucus means there's a better chance for a deal to extend WOTC, perhaps permanently and with the other improvements we are fighting for.

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Legislative Update

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These senators are among our top priorities for lobbying, so if you are in these states, please take note!

This play is just beginning, and it's going to be important to watch because, as we've stressed more than once, there can be no bill carrying WOTC or any other tax measure without a deal between the political Parties.

The first act came in May, when 17 Republicans voted with Democrats to pass the Senate's version of the farm bill with almost full funding for food stamp and nutrition programs which House Republicans want to cut by $20 billion—the two houses are deadloked on the issue now. Then came the caucus on the "nuclear option" which Senator McCain helped lead, and his role as a key go-between with the White House.

The next act comes tomorrow (Tuesday) when Senator Reid calls up the first appropriations bill of the session, Transportation and Housing. Senator McConnell will lead Republicans in opposing the measure because it exceeds the spending caps of the sequester.

Senator Reid needs six Republicans to vote with Democrats to take up the bill. Six Republicans voted in the Appropriations Committee to approve the bill: Cochran of Mississippi, Collins of Maine, Kirk of Illinois, Hoeven of North Dakota, Murkowski of Alaska, and Moran of Kansas—any of them could vote with McConnell to filibuster and, in effect, kill the bill. But conservatives like Collins, Hoeven, Kirk, Murkowski, and Moran are moderate and likely to act constructively, while Cochran—the Ranking Republican on Appropriations, will find it hard to oppose a bill he helped craft.

Republicans voting to take up the bill will be another blow to Senator McConnell, his leadership team (Cornyn, Blunt, Thune, Barrasso), and their hardline tactics. By the time senators return after Labor Day and take up a continuing resolution or omnibus bill to fund the government, will McConnell be in control or will others lead in the talks?

Those talks will inevitably include taxes and WOTC—taxes are on the agenda of both Parties. The President fires an opening salvo Wednesday to rally support for middle class jobs by approving his budget proposals for infrastructure, education, and manufacturing. (We've previously forwarded you a JCX document listing recommendations in the President's budget, including permanent WOTC).

In September, the likely scenario will be to fund the government short-term while negotiations are going on; those talks could well drag into December, and even beyond.

Have You Made Plans Yet?

September 26 - 28, 2013

Ocean City, Maryland

40th Annual Convention and Mega Trade Show

See the attached flyer for more information

GENERAL COUNSEL CORNER

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interpreted "adulteration" as referring only to mislabeling or misbranding of product, and not to the "accepted industry practice" of "blending fuel with renewable fuel."

The Fourth Circuit also agreed with the district court that the state law did not conflict with the federal renewable fuel program. It pointed out that the EPA's own regulatory statements anticipated that distributors and retailers, and not merely suppliers, would engage in blending activity. Congress did not intend, the court concluded, to create a supplier monopoly in trading RINs by prohibiting their customers from engaging in splash blending.

The Fourth Circuit was troubled, however, by the district court's summary rejection of API's Lanham Act preemption argument. API had complained that splash blending would result in increasing "the potential for human error in the measuring, delivering, and mixing of ethanol gasoline." The result could be potential harm to customer vehicles, thus diminishing the value of the suppliers' trademarks.

Sending the case back to the district court, the Fourth Circuit decided that the plaintiffs had presented a sufficient basis for requiring a full trial of their Lanham Act preemption claim.

The Fourth Circuit's opinion is significant not only because of its potential impact on the splash blending debate, but also because of its revised position on PMPA preemption. The court basically found that its earlier, more restrictive preemption opinion in *Mobil Oil Corp. v. Virginia Gasoline Marketers & Automobil Repair Association,* 34 F.3d 220 (4th Cir. 1994), had in large part been rendered nugatory by Congress' amendments to the PMPA.

Further, the Fourth Circuit's interpretation of the PMPA's "adulteration" prohibition, limiting it to instances of mislabeling or misbranding, could open the door to state laws requiring the separate sale of generic gasoline and additives, thus "unbundling" the sale of motor fuel. Such legislation has been considered in at least one state as a means of increasing competition in the sale of petroleum products.

The court's Lanham Act finding, although contrary to the district court decision, is not really exceptional. If a supplier can in fact demonstrate through competent evidence that splash blending actually diminishes its trademark rights by harming its product, then preemption is probably proper. But that is an evidentiary burden that the supplier will have to meet.

pgunst@agtlawyers.com

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1532 Pointer Ridge Place, Suite G
Bowie, Maryland 20716

Phone: 301-390-0900
Fax: 301-390-3161
E-mail: mgates@wmda.net

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For more information on SSDA-AT, please contact::

Marta Gates, Managing Director

mgates@wmda.net ✦ 301-390-0900 ext. 115