



GENERAL COUNSEL CORNER

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First Refusal Refused

The Petroleum Marketing Practices Act balances the refiner's right to sell off a service station location or to withdraw from a market against the dealer's right to continue to operate his or her business. It requires the refiner, in those instances, to offer the dealer a bona fide purchase offer or a right of first refusal to match any offer of purchase as a condition to the nonrenewal of the dealer's franchise. A recent decision by the federal Ninth Circuit Court of Appeals vindicated the dealer's rights under the statute.

ConocoPhillips decided to sell off a number of California service stations, including the Union 76 station that it leased to Mr. Fazli. Although Mr. Fazli's lease would not expire until October 31, 2004, ConocoPhillips sent him a notice of nonrenewal on April 22, 2003, along with its "bona fide" offer of sale of the premises for \$980,000.

Convinced that ConocoPhillips had overvalued the station, Mr. Fazli accepted its offer "under protest"; submitted a deposit of \$49,000; but ultimately refused to close on the station. Instead, he filed suit under the PMPA in July 2003 challenging the legitimacy of ConocoPhillips' offer, relying upon an appraisal that he had obtained, which valued the service station at only \$745,000.

Because the appraisal obtained by Mr. Fazli concluded that ConocoPhillips had overstated the fair market value of the station by over 30 percent, it appeared

that a substantial dispute of fact existed as to the sufficiency of its offer, which needed to be resolved through the jury trial that Mr. Fazli had requested. Indeed, in ruling on ConocoPhillips' motion for summary judgment, the trial judge agreed that the 30 percent plus disparity between the appraisals created a substantial dispute of fact that would preclude the grant of summary judgment.

But that was not the end of the story. In May 2004, while the litigation was still pending and over six months before Mr. Fazli's lease was to expire, ConocoPhillips informed him that it had obtained a purchase offer from a third party in the amount of \$980,000, and offered Mr. Fazli a right of first refusal to purchase the station for that amount. Mr. Fazli refused.

Pointing to Mr. Fazli's refusal to meet the competing offer of \$980,000, the trial court granted summary judgment to ConocoPhillips and dismissed his claim.

On appeal, Mr. Fazli argued that the trial court had erred by even considering his rejection of the right of first refusal that had been offered to him. He pointed out that the right of first refusal presented to him by ConocoPhillips in May 2004 failed to comply with the relevant section of the PMPA, §2802(b)(3)(D)(iii), because it was presented more than 90 days after its notice of nonrenewal.

The untimeliness of ConocoPhillips' first refusal offer was not merely a procedural defect, Mr. Fazli argued, because it had caused him real prejudice. He had been compelled to spend almost a year in litigation to defend himself against the threat of nonrenewal, which he firmly believed had been predicated illegally upon Conoco's defective evaluation of the station's worth.

In his appellate brief, Mr. Fazli emphasized the potential for abuse were a refiner permitted to bypass the PMPA's 90-day requirement through the belated offer of a right of first refusal:

If the lower court's decision is allowed to stand, franchisors would be given an incentive to give franchisees illegal offers that exceed and fail to approach fair market value, knowing that if the offer is rejected, the franchise will end. If the offer is accepted, the franchise will end and the franchisor will receive a windfall in the purchase price. If the offer is challenged in litigation, by the time the value is adjudicated, the worse that will happen is the franchise will continue and the franchisor can make a new offer based on the increase in market value or sell to a third party for a higher price. In either case, the [dealer] is left in a similar "Catch - 22" situation: pay the excessive price now, pay an even higher price later, or lose the station business altogether.

Agreeing with Mr. Fazli, the Ninth Circuit reversed the trial court's decision in an unpublished opinion, and

remanded for trial the issue of whether ConocoPhillips' initial offer had been bona fide. *Fazli v. ConocoPhillips Co.*, 241 Fed.App. 362, 2007 WL 1853944 (9th Cir. 2007).

In a terse opinion, the Ninth Circuit held that the trial court should not have considered ConocoPhillips' right of first refusal offer because it clearly failed to satisfy the 90-day requirement expressly set forth in the PMPA. Thus, at trial, the jury should only consider whether ConocoPhillips' original offer satisfied the statute's requirements at the time that that offer had been made, over a year before presentation of the deficient right of first refusal offer.

It is interesting to speculate about what the court would have decided had ConocoPhillips not merely conveyed its first refusal offer to Mr. Fazli, but also had withdrawn its previous notice of nonrenewal and substituted a new notice based on the independent offer. Mr. Fazli's lease term did not end until October 31, 2004, so there remained sufficient time to comply with 90-day notice requirement for nonrenewal set forth in §2804 of the PMPA, while at the same time satisfying 90-day requirement for submitting an offer of first refusal.

But that is an issue for another day.

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