General Counsel Corner

By Peter H. Gunst, Esquire

More Shell Litigation

Shell seems to be involved in an inordinate amount of litigation these days. One major case, *Adams v. Shell Oil*, was brought by more than a score of Shell dealers in the federal district court in Indianapolis, who complained about Shell's rebranding deal with Village Pantry.

Very recently the federal court released from an earlier confidentiality order, with some redactions, the lengthy preliminary injunction opinion that was entered in April of last year.

The opinion concerns the dealers' claim that Shell's plan to rebrand numerous Village Pantry locations would violate the Indiana Deceptive Franchise Practice Act ("IDFPA"). The dealers asserted that Shell was stabbing them in the back through its plan to sell Shell branded gasoline at Village Pantry locations at prices that its own dealers could not conceivably match.

Basically, the dealers asserted an encroachment claim under Indiana state law. Shell countered by stressing an express provision in its dealer agreement, which provides that "[n]othing in this Agreement shall be construed as a grant of exclusive territory to dealer. . . or as a restriction upon the right of Shell to market its products to any purchasers in any area."

But the IDFPA provides that –

> it is unlawful for any franchisor who has entered into any franchise agreement with a franchisee. . .[t]o establish a franchisor-owned outlet engaging in a substantially identical business to that of the franchisee within the exclusive territory granted the franchisee by the franchise agreement or, *if no exclusive territory is designated, competing unfairly with the franchisee within a reasonable area.*

The court held that the IDFPA trumped the language in Shell's dealer agreement, which purported to give it an unlimited right to compete with its own dealers.

The key statutory language that the court wrestled with was the requirement that the franchisor be "competing unfairly" with its franchisee within a "reasonable area" surrounding the franchisee's location.

With respect to the "competing unfairly" element, Shell argued that this required proof of a definite and recognized form of anticompetitive conduct, such as predatory below cost pricing.

The dealers responded that virtually any competition within a "reasonable area" of their stations should be considered to constitute unfair competition.

Taking a middle course, the court read the statute "as an attempt to the protect the franchisor from going into an area and unreasonably interfering with the franchisee's right to compete for its contemplated profits." The court continued, "When a dealer is robbed of the benefit of the bargain of his or her franchise purchase, not at the hands of the market or fickle consumers, but through the actions of the franchisor, the court considers the franchisor to be competing unfairly."

The dealers needed to prove, therefore, that Shell's conduct was likely "to squeeze the dealer's margin to the extent that the dealer will voluntarily want to quit the Shell dealer business."

With respect to the "reasonable area" standard, the court rejected the notion that a simple radius test should be applied. Rather, the court examined on a station-by-station basis the anticipated effect of the rebranding of the Village Pantry locations.

Because the precise question before the court was whether the dealers were entitled to a preliminary injunction to prohibit rebranding pending a full trial on the merits, the court examined the "likelihood of success" that the dealers might expect at such a trial. Making that determination on a location-by-location basis, the court found that a substantial number of the dealers would likely prevail at trial.

Unfortunately, this was not the end of the court's inquiry. To obtain the broad preliminary injunctive relief that the dealers requested, they were also required to demonstrate that they would suffer an irreparable injury that could not be adequately remedied by money damages. Such a showing is always ticklish.

On the one hand, it can be argued that an enforceable money judgment against a large corporation can almost always make a Plaintiff whole.

On the other hand, a very influential prior decision, *Roland Machinery Co. v. Dresser Indus.,* 749 F.2d 380 (7th Cir. 1984), recognized that – in the real world – ultimate entitlement to monetary relief is not a universal panacea. Often, such an award may come too late to save the victim's business; the victim may not be able to finance the lawsuit without obtaining preliminary injunctive relief; or other factors may justify the grant of preliminary injunctive relief.

Shell argued through its expert witness that the dealers could be amply compensated through the ultimate award of monetary damages. Interestingly, Shell's expert had argued in an earlier case, when the shoe was on the other foot, that Shell would be irreparably injured if a *single* dealer was not stopped from rebranding his station away from Shell. That apparent contradiction, however, was not enough to save the dealers' position.

Ultimately, the court concluded that the dealers had failed to demonstrate that they could not be adequately compensated through an award of damages. The court's core finding that a substantial number of the dealers were likely to prevail at trial could not, however, have been very comforting to Shell. Indeed, it was

Shell that resisted the public release of the court's opinion.

The Shell Village Pantry opinion shows that remedies do exist against franchisor overreaching. Although a preliminary injunction was not obtained, valuable legal precedent was established concerning the meaning of unfair competition in the context of franchisor encroachment.

Future developments in the case will be followed with interest.

astrachan gunst thomas
attorneys at law
a professional corporation