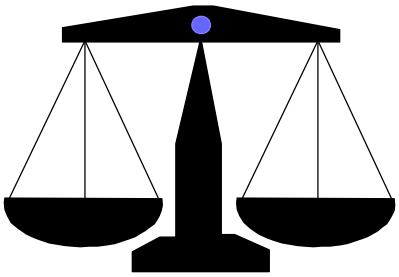

General Counsel Corner

By Peter H. Gunst, Esquire

Recent PMPA Developments - Are There Any?

Our latest sweep for recent decisions under the Petroleum Marketing Practices Act revealed little that is new. Perhaps that is not altogether bad. A law governing franchise relationships should be predictable, and not leave the parties with uncertainty. Probably, it is the relative predictability of the statute that has reduced the level of PMPA litigation.

One recent case that introduced an interesting twist in the assignment arena was the Massachusetts federal district court decision in *Riverdale Enterprises, Inc. v. Shell Oil Co.*, 1999 W.L. 85530 (D.Mass. 1999).

The scenario in *Riverdale Enterprises* was typical of many constructive termination cases, almost all of which have resulted in dealer losses under the PMPA. Shell sold twelve leased stations to a jobber to which it also assigned the dealers' franchise agreements. The franchisees screamed constructive termination, and also protested a term in the supply agreement subsequently offered to at least one of them by the jobber, which could have required them, at some future date, to accept unbranded gasoline in place of a branded product.

The dealers' constructive termination claim went the way of most constructive termination claims. The court held that the dealers' fear that the jobber might in the future lose or relinquish its right to use the Shell trademark amounted to a mere "hypothetical" concern. Quoting the Seventh Circuit in *Beachler v. Amoco Oil Co.*, 112 F.3d 902 (7th Cir. 1997), the court said that "[n]o court has ever accepted this type of argument, however, and we are unwilling to be the first."

On the other hand, the court agreed with the dealers that the jobber had gone too far by inserting in the supply agreement a provision obligating the dealer to accept and purchase all "jobber approved products." Because a potential switch from branded to unbranded product would have removed the dealers from protection under the PMPA, the contract provision could effect a release or waiver of PMPA rights. This, the court held, ran directly afoul of the PMPA's non-waiver provision, 15 U.S.C. §2805 (f).

In *RKJ Enterprises, Inc. v. Sun Company, Inc.*, 1998 W.L. 833857 (E.D. Pa. 1998), a Pennsylvania federal district court considered Sun's attack on a common practice, a dealer signing his or her franchise agreement under protest.

In that case, the lessee dealer complained that the rent figure contained in Sun's renewal agreement was set at an artificially high level as part of a scheme to drive him from his location. He signed the agreement under protest, reserving his right to challenge Sun's actions under the PMPA. Six months later he filed suit.

Sun moved to dismiss the complaint, arguing that *actual* termination or non-renewal was a prerequisite to a PMPA claim. The court soundly rejected Sun's argument, sagely noting that "Congress did not intend to force a franchisee to abandon the franchise relationship to invoke the protection of a law designed to protect a franchisee's interest in continuing that relationship."

The most troubling of recent decisions is the Sixth Circuit's unpublished affirmance of summary judgment in *Evans v. Marathon Oil Co.*, 1999 W.L. 137633 (6th Cir. 1999).

The dealer had refused to accept the significant rental increase proposed by Marathon based upon its supposedly unbiased computerized formula. After the dealer had refused to accept the proposed rent of $3,850 per month, however, Marathon put in a new dealer at a monthly rent of $2,300, a discount of approximately 40%. The old dealer, not surprisingly, filed suit under the PMPA contending that Marathon's insistence on the rent increase "was not in good faith or in the normal course of business and was for the purpose of preventing the renewal of the franchise relationship" and thus in violation of 15 U.S.C. § 2802 (b)(3)(A).

Affirming the trial court's grant of summary judgment, the Sixth Circuit held that the dealer failed to establish the existence of a material factual dispute because he could not show that Marathon's application of its computerized formula was not made "in good faith and in the normal course of business."

The dealer's proof (1) concerning the disparity between the two rent offers and (2) that Marathon's offer to him would have resulted in a whopping 23% return on investment to Marathon was not, according to the court, of sufficient significance to justify a trial on the merits.

Evans appears to symbolize some courts' almost pathological avoidance of taking any action that could conceivably rein in the "business judgment" of a supplier. Congress, however, in enacting the PMPA, decided that suppliers *should* be held liable where their true intent was to prevent the renewal of the franchise relationship.

As a practical matter, the supplier is unlikely to leave around a "smoking gun" announcing his intention to squash a dealer like a bug, and the dealer should be permitted to establish the supplier's wrongful intent through the presentation of circumstantial evidence. Arguably, the circumstantial evidence presented in *Evans* should have been sufficient to get the dealer to a jury.

These decisions illustrate the judiciary's balancing of the literal protections contained in the PMPA against interference with supplier "business judgment." This balancing effort was described in *Riverdale Enterprises*:

> Although the remedial provisions of the PMPA should be afforded a liberal construction "consisting with the overriding purpose to protect franchisees," PMPA's reach should be limited because its provisions may also cause a diminution of franchisor property rights. Thus, the PMPA should not be interpreted to reach beyond its original language and purpose.

A significant limitation in our effort to report on recent PMPA and other dealer-related decisions is the difficulty of obtaining unpublished decisions. If you are aware of any significant unpublished decisions either concerning the PMPA or other issues of interest to service station dealers would you please send them to me at pgunst@AGGT.com. Many thanks.

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