General Counsel Corner

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Shell Tanks In California

We hear repeated complaints about how limited the Petroleum Marketing Practices Act is, and how some courts have grudgingly interpreted its scope. The Ninth Circuit's recent opinion in *Kamel v. Shell Oil Co.*, 1999 WL 413414 (9th Cir. 1999), however, reaffirms the power of the PMPA to rein in supplier overreaching, and to protect legitimate dealer interests.

Following the formation of the Shell/Texaco joint venture, Shell advised numerous lessee dealers that it was terminating their franchises and closing their stations. Its stated reason was that it did not want to spend money to upgrade their tanks in order to comply with environmental regulations scheduled to go into effect in December 1998.

Shell attempted to justify its terminations under the PMPA by referring to § 2802(b)(2)(C), which permits the franchisor to terminate or nonrenew based upon the "occurrence of an event," as a result of which "termination of the franchise or nonrenewal of the franchise relationship is reasonable. . . ."

One problem with Shell's reliance on that PMPA provision was that §20802(b)(2)(C)(i) goes on to state that the franchisor may only terminate if it "first acquired actual or constructive knowledge" of the underlying occurrence "not more than 120 days prior to the date on which notification of termination or nonrenewal is given."

But Shell had been on notice of the December 1999 environmental compliance date for many years prior to the dates upon which it sent out termination letters based upon that "occurrence."

When Kamel and other dealers filed suit to stop Shell from terminating their franchises, they emphasized not only the limitations on Shell's ability to terminate their franchise set forth in § 2802, but also the liberal preliminary injunction standards set forth in § 2805(b)(2) of the PMPA.

The dealers' need for preliminary injunctive relief could hardly be overstated. They were facing immediate extinction, not only as a result of termination, but also because their tanks would shortly become non-compliant and inoperable.

Federal District Judge Morrow employed both the procedural and substantive portions of the PMPA in deciding the first case to attack Shell's actions, *Kamel v. Shell Oil*.

Procedurally, she used § 2805 not only to enjoin termination, but also to require Shell to immediately undertake the necessary environmental upgrades.

Substantively, she relied on § 2802(b)(c)(C) to determine that Shell was likely to lose at an ultimate trial because of its long-held knowledge of the need for compliance with the environmental regulations.

In June, a three-judge panel of the Ninth Circuit Court of Appeals unanimously affirmed Judge Morrow's decision and order. Addressing the dealer's likelihood that he would ultimately succeed on the merits of his claim, the Ninth Circuit held:

> [N]othing in the legislative history [of the PMPA] indicates that Congress contemplated circumstances that would permit a franchisor to circumvent the procedural requirements of § 2802(b). Instead, the legislative history contravenes Shell's position, for "'the overriding purpose of . . . the PMPA is to protect the franchisee's reasonable expectation of continuing the franchise relationship.'"

Further, the Ninth Circuit found that, "[i]n light of the permissive standard for injunctive relief under PMPA § 2805(b)," the district court "did not abuse its discretion when it required Shell to complete the environmental upgrades."

Without the PMPA, it is very unlikely that the dealer would have been able to save himself. Under standard contract law, Shell might have been held accountable for damages for lost profits for the balance of the lease term, but it quite likely would have been permitted to put the dealer out as soon as his lease expired.

Similarly, without the PMPA, it is very doubtful that the dealer could have obtained a preliminary order requiring Shell to perform immediately all required environmental upgrades.

First, without the PMPA, the dealer would have had to demonstrate a likelihood of ultimate success and not merely show the existence of "sufficiently serious questions going to the merits to make such questions a fair ground for litigation." §2805(b)(2)(A)(ii).

Second, even had the dealer been able to satisfy the traditional "likelihood of success" test, he would have had small chance — without the PMPA — of requiring Shell to make environmental upgrades. This is because courts are normally reluctant to upset the *status quo* by requiring affirmative relief as a preliminary matter, and because most courts would hold — under standard contract law — that all that the dealer would ultimately receive would be an award of lost profits for the relatively brief period of time that remained before his dealership agreement expired.

As the Ninth Circuit held, the PMPA changed all of that. Because it protected the dealer's long-term interest in his station, and provided a flexible procedure for obtaining immediate relief, the dealer kept his station and was able to remain in operation. *Kamel v. Shell Oil* provides a welcome reminder of the positive aspects of a sometimes maligned statute.

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