



General Counsel Corner

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The Dealer's Unfettered Right to Receive a Bona Fide Offer of Sale

Last month, the federal district court in Maryland decided an important case involving a dealer's right to receive a bona fide offer of sale when his supplier determines to sell his leased station.

Under the PMPA, 15 U.S.C. §2802(b)(3)(D)(iii) to be exact, a supplier who desires to sell a leased station is required to make a "bona fide offer to sell, transfer, or assign the franchisee such franchisor's interests in such premises" or offer the franchisee "a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises."

The issue in *L.M.P. Service, Inc. v. Shell Oil Co.* was whether the supplier could impose a long-term supply agreement as a condition to its offer of sale. The court's answer was a resounding "no".

When Motiva determined to sell the dealer's leased station, it solicited third-party offers. Ultimately, it obtained an offer coupled with a ten-year supply agreement. Motiva then offered the dealer a right of first refusal to match the offer, including his mandatory acceptance of a supply agreement.

The dealer's attorney, Harry Storm, saw Motiva's action as self-contradictory. On the one hand, Motiva's basis for nonrenewal of the dealer's supply and lease agreement was

its desire to terminate the franchise relationship by selling the station. On the other hand, as Mr. Storm wrote, if the supplier "is insisting on a supply agreement, then it obviously wants to continue a franchise relationship -- not end it."

Motiva stuck by its guns, and the dealer was forced to file suit. Judge Chasenow decided the case based on cross-motions for summary judgment.

Motiva assumed an arrogant tone in seeking to dismiss the dealer's claims. It argued that the dealer was "entirely in error asserting that there was some illegality in the former property owner's having a supply agreement with the new owner, whether the new owner is a third party or the former franchisee itself."

The court responded that Motiva had "missed the point entirely." Although Motiva was "correct that having a supply agreement with the new owner does not violate the PMPA, . . . making a supply agreement a term of the offer to sell the premises under §2802(b)(3)(D) does."

As the court recognized, what Motiva was really trying to do was to force a substantial change in the franchise relationship, through a threat of nonrenewal, if the dealer did not agree to purchase the station and enter into a long-term supply agreement. Finding Motiva's conduct to be illegal, the court said:

[Motiva] attempted to force a substantial change in the franchise relationship (conversion to a franchisee-owned property) using a threat of nonrenewal. The PMPA offers important protections to franchisees from arbitrary changes in the terms of the franchise agreement.



The court's decision appears sound. Motiva's offer to the dealer did not signal its desire to get out of the location, but rather to renew the franchise relationship under vastly changed circumstances. Motiva did not, therefore, possess a statutory basis for threatening the dealer with nonrenewal.

The court's holding is an important one. It means that if a supplier truly desires to sell the leased premises, it cannot condition the dealer's right of first refusal on his acceptance of a long-term supply agreement. To do so, says the court, is to violate the PMPA.

The opinion only goes so far. In circumstances where nonrenewal is not at issue, a supplier can still enter into a supply agreement coupled with the station's purchase or lease. Merely tying the sale of gasoline to the lease or purchase of the premises will not normally constitute an independent violation of antitrust law.

But, as *L.M.P. Service* holds, the supplier may not ignore its duty under the PMPA to provide an unfettered right of purchase to the incumbent lessee dealer.