



General Counsel Corner

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Jobbers And The PMPA

We have been asked whether dealers who are supplied by jobbers are protected under the Petroleum Marketing Practices Act. The short answer is they are. The longer answer is that they had better make sure.

On its face, the PMPA includes franchise agreements between jobbers or distributors and dealers. The term "franchise" as defined by the PMPA in 15 U.S.C. §2801(1)(A) includes "any contract . . . between a distributor and a retailer" under which the retailer is permitted to use a refiner's trademark.

Similarly, 15 U.S.C. §2801(3) states that the term "franchisor" means "a refiner or distributor (as the case may be)."

For there to be a franchise relationship, however, an *agreement* must exist between the parties, which may be oral or in writing. *See* 15 U.S.C. §2801(10). It is the existence of such a contract that establishes a PMPA relationship between a jobber and a dealer.

Recent PMPA cases involving jobber/dealer relationships emphasize the importance of this formal contractual relationship.

In *Denise Petroleum, Inc. v. Ocean Petroleum, Inc.*, 32 F.Supp. 2d 534 (E. D. N. Y. 1999), the dealer attempted to sue under the PMPA both the jobber with whom it had contracted and the refiner whose product the dealer

resold. The dealer wanted to hold the refiner liable as well as the jobber because the jobber had filed for bankruptcy. The dealer emphasized that, although its written contract was only with the jobber, the refiner had held the jobber out to the dealer as the refiner's agent.

Rejecting the dealer's argument, the court emphasized that "the plain meaning of the PMPA requires the existence of a contract in order for a franchise to exist." That meant an express contract between the refiner and the dealer, and not merely an implied relationship arising out of the dealer's use of the refiner's trademark.

Estate of Handy, 993 F.Supp 236 (D. Vt. 1998), reached a similar conclusion. A Mobil dealer was being supplied through a sub-distributor, and had no formal supply agreement directly with the jobber. When the sub-distributor was terminated for misbranding, the dealer sued to establish a PMPA relationship between himself and the jobber.

The dealer argued that a franchise relationship existed between himself and the jobber because his working relationship had, in fact, always been with the jobber, rather than the sub-distributor, with whom the dealer only had a bare contractual relationship.

Not good enough, said the court. What counted was not the parties' working relationship but the existence of an actual contract. Even though the distributor and dealer had at one time

envisioned entering into a direct contractual relationship, they had never in fact done so. Hence, the jobber owed no PMPA obligations to the dealer.

A final case emphasizing the importance of an actual franchise agreement is the Ninth Circuit's very recent decision in *University Exxon, Inc. v. Win Oil Co.*, 2000 U.S. App. LEXIS 11640 (9th Cir. 2000). There the dealer filed a PMPA suit against the jobber that supplied it with product.

Although the parties had once executed a PMPA franchise agreement, that agreement had expired by its own terms on November 30, 1993. Thereafter, in 1996, the defendant debranded the service station, thus committing an apparent PMPA violation.

Unfortunately for the dealer, the court held that the expiration of the contract stripped the dealer of PMPA protection. The court concluded:

By its plain language, the PMPA governs only "oral or written" agreements, and because the record contains no evidence of either an oral or written agreement following the expiration of the 1991 franchise, dismissal of [the dealer's] PMPA claim was appropriate.

There is a lesson to be learned from *University Exxon*. It is doubtful that a refiner would have permitted a relationship to continue without a current agreement. But a jobber may not be as organized as a refiner. A jobber-

supplied dealer, therefore, must take greater pains to make sure that he or she retains PMPA protection.

There are many potential differences between the refiner/dealer and jobber/dealer relationships. A jobber-supplied dealer may purchase product at a price tied to the jobber rack price, which may compare favorably to a dealer tankwagon price. Or it may not.

Moreover, the PMPA may provide very little protection to dealers against certain jobber conduct. In *Clark v. BP Oil Co.*, 137 F. 3rd. 386 (6th Cir. 1998), for example, the jobber to whom BP had assigned the dealer's franchise relationship persisted in selling gasoline at retail from competing jobber-operated locations at prices lower than the wholesale price it charged the dealer. According to the Sixth Circuit, the PMPA provided the dealer absolutely no protection whatsoever against such a blatantly unfair arrangement.

When PMPA protection exists, however, it is enforceable against the jobber. In *Riverdale Enterprises Inc. v. Shell Oil Co.*, 41 F.Supp. 2d 56 (D. Mass. 1999), for example, the jobber attempted to require the dealer to agree in the franchise agreement that the supplier might, at some future date, convert the station from branded to unbranded. Finding that to be illegal, the court held that a jobber could not force the dealer to waive its PMPA protections, which — as a matter of law — would no longer exist if the station were unbranded.

In sum, dealers do retain PMPA rights when they are supplied by jobbers. But they must ensure that the PMPA

relationship is properly documented, and they must understand that the PMPA will not necessarily protect them against predatory jobber conduct.

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