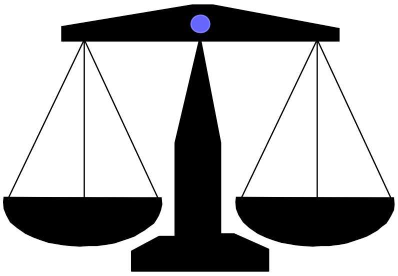

General Counsel Corner

By Peter H. Gunst, Esquire

Rebranding at the Courts

Rebranding is a dark cloud on the horizon. As fallout from the recent merger wave, we are told that Amoco will be rebranded BP, and Union 76 will ultimately replace the Exxon and Mobil brands at outlets acquired by Tosco.

Dealers' concerns about rebranding are significant and legitimate. After spending decades building brand identification and good will, they have a real vested interest in the brands that they helped to build.

Because of the significance of the rebranding issue, a recent decision by the Ninth Circuit Court of Appeals assumes importance. Unfortunately, that decision – *Unified Dealer Group v. Tosco Corp.*, 16 F.Supp. 2d 1137 (N.D. Cal. 1998), *aff'd*, 2000 U.S. App. LEXIS 6371 (9th Cir. 2000) – affords dealers no relief under the PMPA.

Unified Dealer Group concerns Tosco's effort to rebrand as Union 76 the California stations that it acquired from BP. Tosco initially gave the former BP dealers new franchise agreements – all apparently expiring on the same date – under which the dealers continued to market under the BP brand.

When the dealers' BP franchise agreements thereafter came up for renewal, Tosco instead offered the dealers Union 76 franchise agreements. Many of the dealers objected and instituted the *Unified Dealer Group* litigation.

Granting summary judgment for Tosco, the federal district court held that the PMPA does not prohibit a supplier from refusing to offer continued use of an existing brand, so long as the supplier replaces the old brand with a new brand.

Much of the trial court's reasoning was based on its interpretation of statutory language, and this portion of its opinion is not terribly persuasive.

The court emphasized that §2801(1)(B) of the PMPA defines "franchise" to include "*a* trademark which is owned or controlled by" the supplier rather than referring to the specific trademark then being used be the franchisor.

But what the court quoted was merely the definitional portion of the statute, where using the less definite article "a" only made sense. This is so because the reference to "a trademark" in §2801(1)(B) refers back to the term "any contract." As a matter of statutory construction, the language relied upon by the court does not appear to prove anything.

More significantly, the trial court emphasized that the PMPA permits a supplier to propose changes to the franchise so long as they are made "in good faith and in the normal course of business," and not for the purpose of "preventing renewal of the franchise relationship." §2802(b)(3)(A).

According to the trial court, rebranding was just such a change. All that the supplier needed to show was that it had no subjective intent to destroy the parties' franchise relationship through its rebranding program.

No evidence existed, the court held, from which it could conclude that Tosco had acted maliciously or exceeded its discretion under the loose subjective good faith standard imposed by the PMPA.

Finally, the court threw out the dealers' breach of contract and implied covenant of good faith and fair dealing claims. The court held that the dealers' previous franchise agreements had not been breached because rebranding would only occur upon renewal; and, in any event, all renewal issues were preempted by the PMPA under §2806(a).

Last month, the Ninth Circuit released its opinion affirming the district court's decision. Rejecting the dealers' PMPA challenge, the Ninth Circuit stated categorically that "[t]he PMPA plainly contemplates that franchisors will have substantial flexibility in changing the terms of a franchise upon renewal."

The appeal court's decision is not surprising. It has become painfully evident that the courts do not view the PMPA as a proper vehicle for re-examing what they deem to be purely marketing determinations. As a rule, the courts simply will not tell suppliers what marketing policies they may or may not pursue in the absence of blatant misconduct, like that found by the trial court in the *Microsoft* litigation.

This does not mean that any challenge to rebranding necessarily will be fruitless. In *Fink v. Amoco Corp.*, 55 F.Supp.2d 350 (W.D. Pa. 1999), for example, divested Amoco dealers obtained a preliminary injunction in large part because the judge recognized that they would be significantly damaged if they were forcibly converted to the Union 76 brand, which had no recognition whatsoever in the local market. Indeed, the rebranding of any particular station may be attacked if it places the dealer in an untenable competitive situation.

Unified Dealer Group is only one decision based on a specific fact pattern. It points out, however, the difficulties in attacking a supplier's rebranding determination.

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