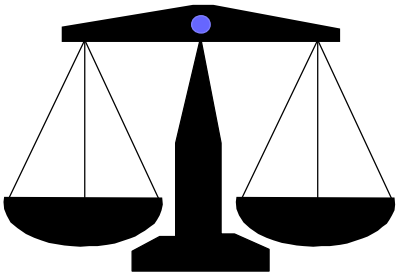

General Counsel Corner

By Peter H. Gunst, Esquire

Signing Renewal Agreements "Under Protest": Safeguard or Pitfall?

For many years, the accepted strategy when receiving a renewal agreement that contained provisions of questionable legality was to execute the agreement "under protest" with respect to the obnoxious provisions, and then to file suit under the Petroleum Marketing Practices Act to bar enforcement of those provisions. This permitted the dealer to defend his or her PMPA rights without risking non-renewal and franchise loss. Recent case law, unfortunately, brings this strategy into question.

Judicial support for the signing "under protest" strategy had appeared to be rock solid. The lead case was the decision of the Ninth Circuit Court of Appeals in *Pro Sales, Inc. v. Texaco, USA*, 792 F.2d 1394 (9th Cir. 1986).

In *Pro Sales,* Texaco offered a distributor a renewal agreement, which reduced the volume of gasoline that it would be permitted to purchase. To avoid termination, the distributor signed "under protest," and instituted suit under the PMPA charging that Texaco had acted in bad faith in reducing is fuel allocations.

The trial court accepted Texaco's argument that the PMPA only applied to *actual* terminations and non-renewals, and dismissed the suit because the distributor had signed the new agreement, and thus had avoided termination.

The Ninth Circuit Court of Appeals reversed. It pointed out that Congress, in enacting the PMPA, had addressed a number of specific concerns, including "the use of actual or threatened termination or non-renewal to compel compliance with franchise or marketing policies."

Finding that "Congress was concerned about *threats* of non-renewals as well as non-renewals themselves," the court held that the statute's purpose "would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA."

The court concluded:

> We therefore hold that a franchisee whose signs a successor contract under protest and promptly seeks to invoke its rights under the PMPA, as [the distributor] did here, has not "renewed" the franchise relationship so as to bar relief under the PMPA.

A number of other federal courts have agreed with that conclusion. Their decisions include *RKJ Enterprises, Inc. v. Sun Co.*, 1998 WL 833857 (E.D. Pa. 1998); *Dean v. Kerr-McGee Refining Corp.*, 714 F.Supp 1155 (W.D. Okla. 1988); and *Meyer v. Amarada Hess Corp.*, 541 F.Supp. 321 (D.N.J. 1982).

This past November, however, a federal district judge in Illinois reached a contrary conclusion. In *Jet Inc v. Shell Oil Co.*, 2002 WL 31641627 (N.D. Ill. 2002), five Shell-branded dealers accused Equilon of presenting them with renewal agreements so onerous as to be intended to

drive them out of business. Four of the complaining dealers signed "under protest" and stayed in business. The fifth closed up shop.

The court dismissed the PMPA claims of the four dealers who signed "under protest." Although recognizing that the Senate Report, which accompanied the PMPA, expressly recognized that "[t]he prospect of non-renewal for arbitrary or discriminatory grounds threatens the independence of the franchisee as a competitive influence in the market place," the court found that Congress did not makes threat of non-renewal actionable. According to the court, the PMPA only addresses illegal termination or non-renewal, and a dealer who signs a franchise agreement "under protest" is neither non-renewed or canceled.

According to the court, the only injunctive remedy open to a dealer who receives an oppressive renewal agreement is to await a formal notice of non-renewal, and then file for a preliminary injunction during the ninety-day period between notice of non-renewal and actual non-renewal.

This is hardly a satisfactory remedy. First, ninety days is an inadequate time frame in which to make the difficult decision to sue one's supplier, to locate and obtain competent counsel possessing necessary expertise, and to seek and secure sufficient injunctive relief.

Second, what becomes of the dealer if a preliminary injunction is denied or, even if it is granted, the trial ultimately goes against the dealer? Is he then forced out of business? Visiting such uncertainty on the dealer only exacerbates the disparity in bargaining power that exists between dealer and supplier, which Congress expressly recognized in its passage of the PMPA.

The result of the court's decision is that the dealers who signed "under protest" are stuck without any chance of judicial review for the duration of their multiyear dealer agreements. Thus, their "protest" becomes meaningless.

Another recent decision, although not directly on point, is also disturbing.

In *Abrams Shell v. Shell Oil Co.*, 216 F.Supp.2d 634 (S.D. Tex. 2002), a number of California, Texas and New York Shell-branded dealers charged that they had been offered renewal agreements so oppressive as to drive them out of business. Although they did not allege that they had received actual notices of termination, Equilon's cover letter warned ominously:

> If you do not sign and return the Lease and other enclosed documents in a timely manner, be advised that Equilon will issue without further warning a non-rescindable notice of non-renewal pursuant to the terms of the Petroleum Marketing Practices Act.

Dismissing their complaint, the federal court in Texas emphasized the dealers' failure to allege either that they had actually received a formal notice of non-renewal or that their franchise relationship actually had been terminated.

Implicitly rejecting the notion that the dealers could have signed "under protest" and retained the right to challenge specific terms of the renewal agreements,

the court described the dealers' exclusive remedies as either accepting termination and suing for damages or seeking injunctive relief during the ninety-day period between notice of termination and termination.

The court in *Abrams Shell* did not expressly reject the Ninth Circuit's holding in *Pro Sales*, emphasizing that none of the complaining Shell dealers alleged that they had signed the renewal agreements, either "under protest" or otherwise.

But the court appeared extremely lukewarm towards the holding of the Ninth Circuit in *Pro Sales*, noting that it had not been accepted in its circuit, the Fifth Circuit Court of Appeals, and that "this Circuit has not given an indication whether it would" follow *Pro Sales.*

In the recent Illinois federal court decision, *Jet*, the dismissed dealers clearly had signed the renewal agreements "under protest," just as had occurred in *Pro Sales.* Nevertheless, the *Jet* decision completely ignored *Pro Sales* and the other cases that had agreed with its conclusion.

One hopes that the *Jet* and *Abrams Shell* decisions are appealed and reversed. Until and unless that occurs, dealers face real uncertainty as to whether they can challenge oppressive renewal provisions without risking the continuation of their franchise relationships.

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