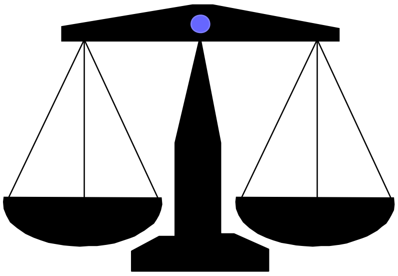

General Counsel Corner

By Peter H. Gunst, Esquire

When Laws Work and When They Don't

A recent article in *Oil Express* opened with the bold claim that "[m]ajor oil companies – and some jobbers – are likely to find themselves in legal hot water if two court cases underway in the Northwest end in victories for the retailers who are suing."

The article explained that a dealer had avoided a motion for summary judgment seeking to dismiss its claim, filed in Washington state court, that Chevron and a Chevron jobber had violated Washington's Franchise Investment Protection Act by submitting income projections prior to the construction of a station-store that "were not based on valid expertise." According to the dealer, Chevron's projections were unrealistic because its subsequent pricing practices made them unobtainable.

The dealer's claim certainly constitutes a creative use of a law not normally employed in supplier-dealer disputes. Some words of caution, however, may be appropriate.

First, state franchise investment laws vary substantially in those states where they exist, both as to what conduct is prohibited and as to what parties are subject to liability. In addition, their provisions are often ambiguous. Hence, the extent to which they may be used to address supplier-dealer disputes is open to question.

Second, the judicial decision referred to in *Oil Express* is of limited precedential value. This was an oral decision made by a state trial judge that a claim should be permitted to proceed to trial, rather than be immediately dismissed as totally without merit. Such decisions may result from a judge's measured legal analysis, or may only reflect the judge's general predisposition to have cases decided by a jury and not as a matter of law.

This not to underestimate the importance of defeating a summary judgment motion. Quite often a defendant, particularly a large corporation that fears a jury's dislike and distrust, will offer a favorable settlement rather than toss dice at trial. Such preliminary oral determinations, however, are unlikely to have any precedential effect in other litigation.

The dealer's creative use of franchise investment law raises a basic issue that lawyers face all of the time. A dealer comes to the lawyer and complains vociferously that his supplier has misused its superior economic position to the dealer's severe disadvantage. The dealer demands justice in court. How creative should the lawyer be in seeking relief?

The problem is that a remedy may only exist if a specific provision of an applicable statute has been violated. The issue for the lawyer is not what is morally right or wrong, but what is prohibited by law and what is not prohibited by law. Two recent cases involving the Petroleum Marketing Practices Act illustrate the point.

In *Ceraso v. Motiva Enterprises, LLC*, 326 F.3d 303 (2nd Cir. 2003), a Texaco dealer angered his supplier and the town zoning board by having any where from 12 to 35 vehicles at his service station as a result of his towing and service-related activities.

On September 12, 2000, Motiva wrote the dealer, complaining of his failure to respect zoning regulations and asserting that he had violated his franchise agreement because of the unkempt condition of his station. The letter warned him that termination could result.

On November 2, 2000, the zoning board revoked the dealer's special exception permit on the ground that he had maintained in excess of five vehicles on his premises. The dealer appealed the decision to state court, and the parties ultimately settled in a manner which permitted the dealer to retain his special exception.

In the meantime, on November 13, 2000, Motiva sent the dealer a termination notice stating as grounds his "failure to comply with applicable laws and regulations" and his "failure to exert good faith to carry out the provisions of the franchise." The letter also incorporated by reference the grounds stated in an earlier "September 27" letter. In fact, the letter had been dated September 12, 2000.

The Second Circuit Court of Appeals, quite possibly the second most prestigious court in the country following the United States Supreme Court, affirmed the entry of judgment in favor of the dealer prohibiting Motiva from terminating his franchise.

The court found that Motiva could not justify termination based upon the decision of the zoning board because the regulation under which the board had acted only prohibited "storing or parking of more than five cars *awaiting repair or repaired*."

The zoning board had based its determination solely on the fact that more than five vehicles had been kept on the premises without determining whether the vehicles were there as a result of the dealer's towing or repair activities. Nor had Motiva demonstrated at trial whether vehicles were awaiting repair or had been repaired, or were there as a result of the dealer's towing activities. Therefore, Mobil could not show that the dealer had failed to comply with "applicable laws and regulations" because it had failed to prove that five or more of the parked vehicles were there for repair-related purposes.

The Second Circuit further ruled that Motiva could not rely upon the dealer's alleged contract violations because the only reference to that ground for termination found in Motiva's termination notice was its erroneous reference to the non-existent "September 27" letter.

Rejecting Motiva's argument that its typographical error should be ignored because the dealer was well aware that Motiva actually was referring to the September 12 letter, the Second Circuit Court of Appeals cited earlier precedent for the rule that "there must be strict compliance with the notice provisions of the PMPA."

Compare the Second Court's opinion to the recent opinion of the Fifth Circuit Court of Appeals in *Abrams Shell v. Shell Oil Co.*, 2003 WL 21958015 (5th Cir. 2003).

After being warned by Equilon and Motiva that they would receive non-rescindable notices of non-renewal unless they signed their new lease and sales agreements "as is", the complaining dealers signed the agreements "under protest" and filed suit contending that they had been compelled to accept odious contract provisions inconsistent with the PMPA.

The district court dismissed their claim because they had not suffered actual termination or non-renewal, which it deemed to be a mandatory prerequisite for any PMPA claim.

Following the lead of the Seventh Circuit Court of Appeals' earlier decision in *Dersch Energies v. Shell Oil Co.,* 314 F.3d 846 (7th Cir. 2002), the Fifth Circuit affirmed the district court's dismissal.

Brushing aside the dealers' argument that they had been so ill-treated as to be *constructively* terminated, the Fifth Circuit insisted that no illegal termination or non-renewal – constructive or otherwise – could occur unless or until a supplier denied its dealers one of the three "core components" of their franchise relationship: use of the supplier's trademark; a supply of motor fuel to be sold under the franchisor's trademark; or a lease of the premises at which the motor fuel is sold.

According to the Fifth Circuit, the dealers had no right to challenge contract terms even if they were inconsistent with the PMPA because the dealers had signed agreements that assured them continuing access to the "core components" of the franchise relationship.

For whatever it is worth (and it isn't much), this writer totally disagrees with the results reached in *Abrams Shell* and *Dersch Energies*. Those opinions defy economic reality and nullify express statutory protections included in the PMPA. Those opinions permit large refiners to thumb their noses to rights supposedly guaranteed to dealers under the PMPA.

Small dealers simply have too much to lose by risking non-renewal. They have little choice but to knuckle under, and the courts' opinions permit suppliers to impose onerous terms upon them with impunity.

Why did dealers win in *Ceraso* and lose in *Abrams Shell?* The crucial issue in both opinions was the court's perception of the *scope* of the statute that formed the basis for the litigation.

In *Ceraso*, there clearly was a notice of termination so the Second Circuit could broadly interpret the statute to protect the dealer. In *Abrams Shell*, the Fifth Circuit refused to permit the dealers any redress at all because it viewed them as seeking to expand the statute beyond its intended scope.

All of this circles back to the innovative attempt to extend Washington's Franchise Investment

Protection Act to attack indirectly the supplier's pricing policies.

At least to this observer, there remains a real question as to whether a court will determine that what is essentially a pricing claim can form the necessary predicate for a claim under state franchise investment law. The issue will be: Did the state by enacting franchise investment legislation intend to reach supplier pricing activities? That's a tough question.

pgunst@agtlawyers.com

astrachan gunst thomas

attorneys at law
a professional corporation