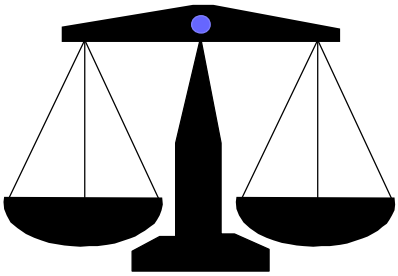

General Counsel Corner

By Peter H. Gunst, Esquire

Constructive Chutzpah and Terminal Stupidity

Recently, suppliers have diminished the scope of dealers' remedies under the Petroleum Marketing Practices Act by successfully arguing that dealers forfeit their right to pursue claims under the PMPA if they sign take-it-or-leave-it franchise renewals "under protest," rather than risk the loss of their stations.

Both the Fifth Circuit Court of Appeals in *Abrams Shell v. Shell Oil Co.*, 343 F.3rd 482 (5th Cir. 2003), and the Seventh Circuit Court of Appeals in *Dersch Engergies v. Shell Oil Co.*, 314 F.3rd 846 (7th Cir. 2002), agreed with Shell that a dealer who signed "under protest" could not sue under the PMPA because the statute only permits suit by a dealer who is terminated or non-renewed.

According to these courts, a dealer is only terminated or non-renewed if he is deprived of one of the three "core components" of the franchise relationship: "a contract to use the refiner's trademark, a contract for the supply of motor fuel to be sold under the trademark, and a lease of the premises at which the motor fuel is sold." A dealer who maintains possession and operation of his station, even if he does so by signing a renewal agreement "under protest," is not deprived of any of the "core components."

We believe that this is a far too narrow interpretation of the statute's scope. By enacting § 2805(f)(1) of the PMPA, Congress expressly prohibited a supplier from requiring a dealer, as a condition of renewal, to waive any right that the dealer possesses under applicable federal or state law. Compelling the dealer to give up his station in order to vindicate his rights under that section is, we believe, oppressive, absurd and contrary to congressional intent.

The decisions by the Fifth and Seventh Circuits at least left open the possibility that supplier over-reaching at renewal time could be attacked under state law.

Because those courts rejected the dealers' argument that they had been "constructively terminated" by being compelled to accept odious contract terms on a take-it-or-leave-it basis, the dealers presumably could contend that they were not precluded from suing under state law. Suppliers presumably could not argue the dealers' sole remedy was to bring a PMPA action, if the dealers had no remedy under the PMPA in the first place.

Or could they? In *Alford's Service, Inc. v. Sinclair Oil Corp.*, 2003 WL 22996911 (D. Minn. 2003), a supplier recently had the

chutzpah to attempt to revive the "constructive termination" argument against its dealers in order to argue that dealers who had signed renewal agreements "under protest" were precluded by the PMPA from asserting claims under state law.

Rejecting the supplier's attempt to dismiss the dealers' breach of contract and state franchise act claims, the court essentially said that what was good for the goose was good for the gander.

The court emphasized that the dealers continued to use the supplier's trademark, continued to purchase its gasoline and continued to lease from it their service station premises. Because no "constructive termination" had occurred of any "core component" of the franchise relationship, no prohibition arose under the PMPA to bar the dealers' pursuit of state law claims.

Ironically, the efforts by suppliers to insulate themselves from PMPA liability by arguing that dealers who sign "under protest" have no PMPA claim may backfire against the suppliers. Dealers often have broader rights under state law than under the PMPA. In addition, state court judges often prove to be more sympathetic to a dealer's plight than do their federal court counterparts. Finally, dealers' claims are less likely to be time-barred in state court, where they normally will not face the one-year time bar for filing claims that is imposed by the PMPA.

Turning from constructive termination to terminal stupidity, we refer to a recent article in *Oil Express*. Seems like a C-store chain had the bright idea of having local police officers disguise themselves as shotgun- and pistol-armed robbers in order to test how its employees would react during a real robbery.

At least one employee who was forced to lie face-down on the floor with a reasonable expectation that she would be shot was not amused. She has sued the C-store chain.

It's hard to imagine a better way to blunder into a serious lawsuit. Chances are a jury will not look favorably upon an employer that intimidates its own employees at gunpoint. The bottom line is to be careful how you treat your employees. They have rights too.

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