General Counsel Corner

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Games Oil Companies Play

Imagine the consternation of the North Carolina lessee BP dealer who received what his supplier styled as a PMPA "Right of First Refusal" notice, which required him to match the purchase price of $1,052,684 offered by a local distributor or possibly lose his station. Meanwhile, BP's own appraisal valued his location as worth only $505,000.

When the dealer asked to see the contract containing the distributor's offering price, he was told he could not see it. Fearing the loss of his station, the dealer paid the exorbitant price demanded by BP under protest. He than sued BP for fraud.

The picture that emerged in the litigation was not pretty. It turned out that when the distributor initially offered BP over $10,000,000 to purchase a package of thirteen locations, consisting predominately of company-operated stations, but also including three dealer lessee-operated stations, it valued the dealer's station at only $430,000.

Later, BP and the distributor jiggled the total purchase price, which remained unchanged, to attribute far more value to the lessee-operated locations and far less to the company-operated locations. Indeed, one company-operated location was valued at zero. The final figures more than doubled the value attributed to the dealer's station to the sum of $900,000.

Their motivation for playing this numbers game appears obvious. If the dealer paid the inflated sum, BP made an exorbitant profit. If he did not, the distributor got the dealer's station. Under either scenario, only the dealer was the loser.

But how did the right of first refusal price increase from $900,000 to $1,052,684? BP added an additional $150,000 plus to make up for the future profits it expected to lose if the distributor's volume purchase requirements were reduced because it did not purchase the dealer's station. Those future profits were not, however, "lost" to BP in any event, because if the dealer purchased the station, he likewise would be required to sign a multi-year supply contract with BP.

In two decisions rendered recently by the federal district court for the Middle District of North Carolina in the dealer's lawsuit, *Simaan, Inc. v. BP Products North America, Inc.*, the court rejected a raft of legal defenses offered by BP and ordered the case to proceed to trial.

First, BP attempted to assert the boilerplate merger and integration clause contained within the dealer's purchase contract to bar him from presenting any evidence that it misrepresented the distributor's purchase offer. The contract provision recited that no representations had been relied upon other than those expressly set forth in the parties' contract, and the purchase contract contained no reference to the price supposedly offered by the distributor.

The court rejected BP's contention and applied the rule permitting a victim of fraud to present external evidence to demonstrate the nature of the fraudulent scheme. The rule could hardly be otherwise. The core of any fraud case is how the victim was induced to enter into the contract, not merely the terms of the contract itself.

Next, BP argued that the dealer was not a proper claimant because the station actually had been purchased by a holding company formed by the dealer rather than by the dealer himself. Had this argument been successful, BP would then no doubt have contended that the holding company could not complain of BP's misrepresentations because they had been made exclusively to the dealer, and not to the holding company.

Circumventing BP's contention, the court treated the dealership and the holding company as a single, unified entity. The court reasoned that "in truth all the representations were made to the Simaan family who own both [the dealership] and [the holding company]." Under those circumstances, the court concluded, "a joint judgment for both [the dealer and the holding company] will not prejudice BP."

Next, BP contended that it had made no false representations to the dealer because it could justify the $1,052,684 price tag as consisting of a combination of the $900,000 figure finally agreed upon with the distributor plus its supposed "lost profit" calculation.

Rejecting this argument, the court concluded that a jury could find that BP had defrauded the dealer by concealing the fact that its offer price "was actually a combination of an inflated cash purchase price and a present value computation of lost fuel volume," rather than an actual dollar price offered by the distributor for the station.

Finally, BP argued that the dealer never really relied upon its representations because he had testified that he doubted that the distributor had actually offered the price claimed by BP, and that he believed that either BP or the distributor was scheming to discourage him from exercising his right of first refusal. The court pointed out, however, that the dealer had been left with no choice other than to accept BP's representations or risk the possible loss of his station.

Having failed in its legal challenges, BP negotiated a settlement with the dealer rather than face a jury. This case illustrates the importance of learning the true facts when dealing with an oil company in the context of a right of first refusal.

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