



General Counsel Corner

By Peter H. Gunst, Esquire

The Jury Returns: For Dealers and Against Shell

A recent federal jury award of 3.3 million dollars in favor of eight Massachusetts dealers against Shell, which may be augmented by attorney's fees, prejudgment interest, costs and punitive damages, justifiably has attracted a great deal of attention.

The themes and theories presented in the case reflect numerous complaints raised by Shell dealers across the nation in recent years concerning Shell's pricing and rental policies. The jury found:

- Shell's elimination of its VRP and subsequent rent subsidy programs constituted a constructive termination of the dealers' franchise agreements in violation of the Petroleum Marketing Practices Act.
- Shell's modifications in 2000 to its franchise lease were so burdensome as to constitute a constructive non-renewal of the dealers' franchise relationships, and were calculated to drive the dealers out of business so that Shell could convert their stations to company operation.
- Shell's pricing of product violated state contract law because it set prices in bad faith at levels that were not commercially reasonable.

Shell faces further liability in the Massachusetts federal court. Not only may the judge assess additional attorneys' fees, interest, costs and punitive damages, but Shell also faces virtually identical claims filed by fifty-two other dealers who are represented by the same law firm that represented their successful colleagues, the Greenberg Traurig firm. It is likely, however, that the trial of the remaining dealers' claims will await the result of Shell's appeal from its recent defeat.

As is usual in such litigation, Shell raised a raft of technical defenses in an effort to avoid having to present its case to a jury.

Shell filed three separate summary judgment motions that were rejected by Judge Rya Zobel in a surprisingly brief four-page memorandum decision released on October 25, 2004, shortly before trial. The Judge rejected Shell's arguments that some of the dealers were not entitled to go to trial because they had signed franchise termination agreements that included general releases of their claims; that the dealers had no right to sue under the PMPA because their franchises remained in effect and were not formally terminated or non-renewed; that the dealers could not maintain their state law claims because they were preempted by the federal PMPA statute; and that the dealers' claims were time-barred because they had waited too long before filing their lawsuit.

Judge Zobel concluded that Shell's defenses, by and large, depended upon disputed facts that were for the jury to resolve. Now the jury has spoken.

In past litigation, Shell had been successful in defeating similar VRP and product pricing claims where it could keep those claims away from a jury.

In massive multi-dealer litigation in California, *Coast Village, Inc. v. Equilon Enterprises, LLC*, 163 F.Supp.2d 1136 (C.D.Cal. 2001), *aff'd*, 2003 WL 1900843 (9th Cir. 2003), Shell was able to convince a federal judge first that the dealers had no right to have their case heard by a jury, and then that there was insufficient evidence for the judge to conclude that Shell's new franchise agreements were part and parcel of a scheme to convert the dealers' stations to company operation.

In *Abrams v. Shell Oil Co.*, 343 F.3d 42 (5th Cir. 2003), and *Dersch Energies v. Shell Oil Co.*, 314 F.3d 846 (7th Cir. 2002), Shell succeeded in persuading two federal appeals courts that complaining dealers were not entitled to present their claims to a jury because they had not been formally terminated or non-renewed, but continued to operate their stations under burdensome franchise agreements that they had signed "under protest," rather than risk the loss of their stations.

Finally, in *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429 (Tex. 2004), Shell recently persuaded the Texas Supreme Court that a multitude of dealers had no basis for presenting their "bad faith" product pricing claims to a jury because Shell's prices had been "within the range" of prices charged by other refiners

in the marketplace, so that it would be legally irrelevant even if Shell used its pricing power to force the dealers out of business in order to convert their stations to company operation.

Obviously, the Massachusetts litigation is not over because Shell will have the opportunity to present its technical defenses to a federal appeals court. It is heartening, however, that when claims against Shell finally were allowed to reach a jury, it readily recognized how severely the dealers had been harmed by Shell's rental and pricing policies.

pgunst@agtlawyers.com

astrachan gunst thomas

attorneys at law
a professional corporation