



GENERAL COUNSEL CORNER

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The Law and Unintended Consequences

The Petroleum Marketing Practices Act is intended to level the unequal playing field between supplier and dealer – at least somewhat – by protecting the dealer against the threat of unwarranted termination.

The Act mandates that a court grant the dealer a preliminary injunction prohibiting termination if he or she simply demonstrates that serious questions exist pertaining to the supplier's right to terminate and that the burden of hardship tilts toward the dealer, which is normally the case.

The PMPA further provides that a prevailing dealer – but not a prevailing supplier – shall be entitled to recover his or her attorneys' fees. In this era of rapidly escalating attorneys' fees, that provision of the Act is of particular value.

Those statutory provisions were directly at issue in a recent case decided by the federal district court in New Orleans, *Yousuf v. Motiva Enterprises, L.L.C.* That decision, unfortunately, appears to fly in the face of Congress' intention to provide a terminated dealer with an effective remedy under the PMPA.

Upon receiving a notice of termination from Motiva for his alleged failure to meet its image standards, Mr. Yousuf filed suit under the PMPA and sought a preliminary injunction to permit him to continue to operate his service station pending a full trial on the merits of his claim.

Rather than contest Mr. Yousuf's right to a preliminary injunction, Motiva agreed to the entry of a consent judgment that provided him preliminary injunctive relief. Before the case could be tried, however, Hurricane Katrina intervened by totally destroying Mr. Yousuf's station.

Motiva withdrew its notice of termination, leaving the court to decide only whether Mr. Yousuf was entitled to an award of attorney's fees because he had prevailed in securing the preliminary injunction.

The court decided that despite Mr. Yousuf's success in fending off termination, he was not entitled to an award of attorney's fees because no formal judicial determination had been made concerning his claim for injunctive relief.

Although its decision was partially based upon an analysis of judicial precedent, the court was also swayed by Motiva's public policy argument. The court bought Motiva's argument that if it imposed an award of attorney's fees against Motiva for consenting to the entry of a preliminary injunction, it might discourage other suppliers from entering into similar consent agreements for fear that they might also be answerable for a complaining dealer's attorney's fees.

The problem with the court's decision – like many decisions based

upon judicial notions of public policy – is that it does not appear to consider the full consequences that may result from its actions.

As is typical in PMPA litigation, Motiva only decided that it was not in its interest to contest Mr. Yousuf's preliminary injunctive claim after compelling him to undergo significant litigation expense.

Obviously, a dealer like Mr. Yousuf is far less able to bear litigation expense than is his or her supplier. That is why the fee-shifting provision was enacted by Congress in the first place. Indeed, as a practical matter it may be impossible for the dealer to pay his or her attorney's fees unless the fee-shifting provision is enforced.

The unintended consequence of the court's decision is to discourage attorneys from representing dealers in termination cases. This is so because, if the case is going badly for the supplier, it may – according to the court's logic – frustrate the dealer's statutory right to attorney's fees by crying uncle and consenting to the entry of a preliminary injunction. Then the dealer loses his or her right to attorney's fees.

This is not merely a theoretical problem. The attorney in the Louisiana case, an experienced PMPA counsel, stated his unwillingness to pursue similar litigation on behalf of dealers as a result of the court's opinion. Thus, the unintended consequence of the court's decision appears only to exacerbate the imbalance of power between dealer and supplier.

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