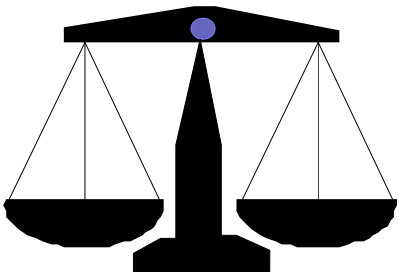

GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

When a Market Withdrawal is Not a Market Withdrawal

One of the most misunderstood provisions of the Petroleum Marketing Practices Act is the market withdrawal provision, 15 U.S.C. § 2802(b)(2)(E).

Under that provision, if a supplier seeks to discontinue its franchise relationships with its branded dealers because it wants to stop selling gasoline throughout a geographic market, the supplier must either make a bona fide offer of sale of the station premises to each impacted lessee dealer or else sell all affected station premises to another supplier, which must then offer the impacted dealers a new, non-discriminatory franchise agreement.

The PMPA also imposes more stringent notice obligations on a supplier contemplating a market withdrawal than the 90-day notice period commonly required for termination or renewal. The withdrawing supplier must supply at least 180 days notice to impacted dealers, and must also provide a copy of the notification along with a plan describing the schedule and conditions of withdrawal to the governor of each state affected by the market withdrawal

Failure to comply with the substantive or notice requirements for market withdrawal will subject a supplier to liability for monetary damages and attorney fees, as well as the specter of injunctive relief.

Dealers ask what impact the market withdrawal provision has on suppliers like Exxon and Shell, which have announced their intention to withdraw from direct supply of independent dealers throughout all or substantial portions of their marketing areas, and to sell or assign their interest in service station premises and supply agreements to branded wholesalers? The answer appears to be that the provision will have little or no impact.

The key issue is whether such broad-based withdrawals from direct supply constitute market withdrawals within the meaning of the PMPA. Critical to the resolution of that issue is the extent of the market presence retained by the supplier following the transfer of its direct-supply assets.

A recent decision of the Sixth Circuit Court of Appeals, *Equilon Enterprises LLC v. XII & Evergreen D & D Services, Inc*., 2007 WL 1455080 (6th Cir. 2007), arose from the aftermath Shell's withdrawal from direct supply in the Detroit market.

Shell first sold a number of service station premises to its lessee dealers, subject to the dealers' agreement to enter into a 10-year supply agreements with Shell. Shell then assigned those supply agreements to branded wholesalers, which continued to supply the dealers with Shell-branded products.

Seeking to free themselves from their purchase requirements under the 10-year supply agreements, the dealers relied upon a contract provision that excused them from complying with the supply

agreements if Shell elected to effect a market withdrawal as defined by the Petroleum Marketing Practices Act. A market withdrawal had occurred, the dealers contended, because Shell had rejected its direct supply obligations to the dealers.

Shell sued the dealers to compel them to perform under the terms of their supply agreements, notwithstanding Shell's assignment of their agreements to its independent wholesalers and its withdrawal from direct supply.

The trial court entered summary judgment in favor of Shell, and the dealers appealed to the Sixth Circuit Court of Appeals.

Affirming the lower court's decision, the Sixth Circuit emphasized Shell's continuing obligations under its agreements with the wholesalers to whom the dealers' 10-year supply agreement had been assigned. Under its agreements with the wholesalers, Shell obligated itself to continue to supply the wholesalers and the dealers with Shell-branded products. Because of Shell's continued – although with respect to the dealers indirect – presence in the market place, the court found that no market withdrawal had occurred and that the supply agreements remained in effect.

The Sixth Circuit concluded:

> Shell continues to "promote" and "sell" Shell-branded gasoline in the Metropolitan Detroit Market. Shell continues to manage its contracts with the Wholesalers and Dealers, including its assignment of the Retail Sales Agreements, as part of its efforts to meet its Detroit customers' needs. Consequently, and as correctly noted by the district court, "Shell has not left the market place as defined in the contract."

This does not mean that dealers have no legal rights when a supplier withdraws from direct supply. A cause of action for constructive termination may exist depending upon the circumstances and how severely the dealers are impacted by their supplier's actions. The Sixth Circuit's opinion does mean, however, that the PMPA's market withdrawal provision does not appear to be the dealers' silver bullet.

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