



GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

Some Reassurance From the Court

As major refiners are shedding downstream assets, some dealers have been presented with the opportunity – and risk – of acquiring their leased service station properties, subject to long term branding commitments. During those commitment periods, which may last ten years or more, the dealers may only resell the branded products of their erstwhile landlord.

The opportunity to purchase is significant. Once the dealer owns the property, he or she is no longer subject to the uncertainty of rent increases. Also, because the dealer owns the property, a notice of termination or nonrenewal is no long tantamount to an eviction notice.

But the risks are real too. Not only must the dealer pay a substantial purchase price for the real estate, but he or she is also bound to a long term supply commitment.

What can a purchasing dealer do if the distributor who steps into the refiner's shoes for purposes of supply does not price competitively? A recent federal court decision in Virginia suggests that the dealer may not be without remedy.

In *BP Products North America, Inc. v. Stanley*, the dealer purchased his property subject to a lengthy deed restriction, and a commitment to purchase products from a local BP distributor, Eastern Petroleum Corporation.

When Eastern's pricing proved excessive, the dealer unsuccessfully

sought BP's intervention and warned that he would be compelled to sell non-BP fuel unless Eastern's price came into line with the marketplace. BP did nothing, so the dealer began selling unbranded fuel under the "Amerigo" name.

BP responded by filing a lawsuit in federal court, and seeking an injunction to prohibit the dealer immediately from selling unbranded products.

At the hearing on BP's preliminary injunction motion on October 23, 2009, the dealer argued that the deed restriction was overly broad and unenforceable under Virginia law. He protested that BP had long been on notice of his plight, and of his intent to go unbranded unless he could obtain branded fuel from Eastern at commercially reasonable prices.

Denying BP's request for relief, District Judge Leonie M. Brinkema found that BP had not met its burden of showing that it was entitled to a preliminary injunction. The court found that BP was not threatened with the sort of imminent harm that was required to justify the extraordinary remedy of a preliminary injunction. Significantly, the judge questioned whether BP's covenant was enforceable at all given its apparently overbroad scope.

Some caveats need be expressed about the court's decision.

First, it dealt only with BP's request for immediate injunctive relief, and does not constitute a final decision as

to the enforceability of BP's branding restriction. If BP ultimately prevails at trial, the dealer could be liable for substantial liquidated damages or lost profit damages.

Second, Judge Brinkema's opinion was oral, and no formal opinion has been issued by the court. For that reason, the opinion has limited value as precedent in other dealer disputes.

Third, even if a dealer succeeds in defeating a long term branding commitment, he or she may face a trademark claim from the former supplier whose brand has been replaced. A dealer who goes unbranded must ensure that the station's trade dress – its overall look and feel – may not be confused with that of its former supplier. The dealer must also be careful to market unbranded fuel under a name that is not confusingly similar to that of its former supplier.

Even with these caveats, the *Stanley* decision is important. It highlights the fact that a dealer who owns a service station property has far more freedom of action than a lessee dealer, who can be threatened with eviction. It also demonstrates that, if the dealer's dispute goes to court, the judge may and should consider the commercial realities of the dealer's predicament, and not merely blindly apply an overly broad and one-sided long term branding commitment.

pgunst@agtlawyers.com

To access the latest articles by the Service Station Dealer's legal counsel, please visit the "Service Station Dealers: Legal Issues" section of the Astrachan Gunst & Thomas P.C. website at:

<http://www.agtlawyers.com/resources/petroleum.html>.