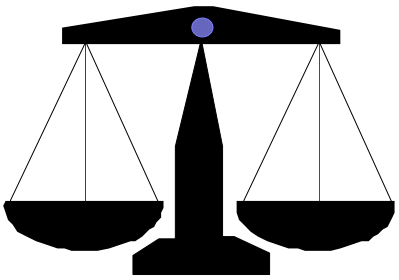

GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

Marcoux Revisited – Integration Provisions

Last month's article concerned the Supreme Court's apparent interest in reviewing the important Petroleum Marketing Practices Act issues recently addressed by the First Circuit Court of Appeals in *Marcoux v. Shell Oil Products Co.,* 524 F.3d 33 (1st Cir. 2008).

In that decision, the First Circuit ruled that an aggrieved dealer may pursue a claim for constructive termination, but not for constructive nonrenewal, if his or her business is substantially impaired by supplier misconduct.

In other words, a dealer may claim that his or her franchise was effectively, if not literally, terminated but cannot sign a franchise "under protest," and then claim that its terms were so onerous that he or she was, in actuality, nonrenewed.

The Supreme Court presently is considering whether to review either or both issues.

Another aspect of the *Marcoux* decision that was *not* submitted for potential Supreme Court review is also worthy of consideration: the First Circuit's rejection of Shell and Motiva's contention that they were insulated from liability for breach of contract by the integration provision uniformly contained in the franchise agreements that dealers are compelled to accept.

In that case, a group of independent dealers claimed that Shell and Motiva breached a contractual commitment – not found within the four corners of their franchise agreements – by canceling its long-continued Variable Rent Program ("VRP").

Shell and Motiva countered that the dealers' claim that a side agreement had been breached was barred by the integration provision contained within their franchise agreements. That provision disclaimed the existence of any collateral commitments, and provided that any subsequent modification to the franchise agreement had to be in writing.

On appeal, the First Circuit ruled that the jury did not err in its award of damages to the dealers on their contract claim, notwithstanding the limitations set forth in the integration provision.

Because the dealers' stations were located in Massachusetts, the court looked to Massachusetts law to determine the effect of the integration provision.

Under Massachusetts law, the court said, "a document is not integrated merely because it says so." Rather, the question of whether the parties also entered into a side agreement intended to supplement the terms of the franchise agreement was a question of fact, notwithstanding the prohibition set forth in the franchise agreement's integration provision.

The court concluded that the dealers had presented sufficient evidence to justify the lower court's finding that Shell and Motiva indeed had breached a

valid collateral agreement to maintain VRP in full force and effect.

Faced with very similar facts, the Sixth Circuit Court of Appeals reached a very different result in its unpublished opinion, *Equilon Enterprises, L.L.C. v. Rahim, Inc.,* 2003 WL22598325 (6th Cir. 2003). Applying Michigan contract law, that court affirmed the lower court's entry of summary judgment dismissing the dealer's claim that Equilon had breached "an independent oral contract" by discontinuing VRP.

Ruling flatly, under Michigan law, that "a contract with a merger clause nullifies all antecedent claims, including any collateral agreements that were allegedly an inducement for entering into the contract," the Sixth Circuit brushed aside the dealer's affidavit asserting the existence of an independent side agreement to maintain VRP, which the dealer asserted induced her to enter into the franchise relationship.

It is possible that the two cases may be distinguished because one applied Massachusetts law and the other Michigan law. In practice, however, it appears that some courts just seem more philosophically disposed to give a broader effect to integration provisions than do other courts.

The bottom line is that, when pursuing a claim against a supplier for breach of a side commitment not expressly set for the in the franchise agreement, the dealer must focus heavy attention on the applicable state law governing integration provisions.

A good starting point for analyzing the theories that have been used to vitiate the force of integration provisions in many jurisdictions is Judge Gold's informative analysis in rejecting Exxon's reliance upon its integration clause in the national "discount for cash" litigation, *Allapattah Services, Inc. v. Exxon Corp.,* 61 F.Supp.2d 1308 (S.D.Fla. 1999). It is worth the read.

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.