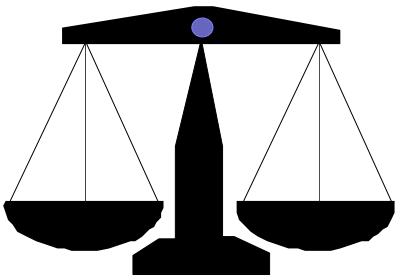

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Supreme Court May Hear PMPA Case

Unquestionably, the most significant open issue concerning the Petroleum Marketing Practices Act is the scope of the statute. How broad are its protections?

Is the Act implicated only if a dealer receives a formal notice of termination or nonrenewal from his or her supplier, or may the dealer use the Act to challenge supplier conduct, which – as a practical matter – threatens the dealer's financial survival? Stated otherwise, what if any protection does the Act provide in instances of "constructive" – as opposed to "actual" – termination or nonrenewal?

The issue is of paramount importance in today's marketplace. Suppliers are well aware that dealers can be driven from their stations by high rent and non-competitive product pricing, without recourse to formal termination or nonrenewal. Moreover, one of the few weapons available to dealers to challenge mass franchise assignments that may endanger their livelihoods is a claim of constructive termination or nonrenewal under the PMPA.

In sum, a constructive termination or nonrenewal claim may be the dealer's best, if not only, defense against supplier efforts to destroy or cripple his or her business.

The various federal circuit courts have struggled with the concepts of constructive termination and constructive nonrenewal with inconsistent results. This conflict among the circuits may or may not be resolved by the Supreme Court, depending upon how it responds to hearing requests submitted by Shell and Motiva, as well as by the group of New England dealers who asserted claims against them for constructive termination and constructive nonrenewal.

The case now before the Supreme Court arose from Shell's formation of the Motiva joint venture with Texaco and Star Enterprises in 1998, and its subsequent transfer of the dealers' franchises to Motiva.

Shortly thereafter, Motiva replaced Shell's Variable Rent Program – which had remained in place since 1982 – with its new Special Temporary Incentive Program. Effective January 1, 2000, however, Motiva terminated the subsidy program altogether, thereby drastically increasing the dealers' rent payments.

To make matters worse, Motiva offered the dealers new leases on a take-it-or-leave-it basis that further increased the dealers' rents, which the dealers were forced to accept under protest. In addition, Motiva sold them Shell-branded gasoline at dealer tankwagon prices that the dealers deemed to be uncompetitive.

The dealers sued Shell and Motiva in federal court in Boston, asserting claims for constructive termination, constructive nonrenewal and unfair pricing.

The dealers' constructive termination claim was based on Motiva's total elimination of the subsidy program in breach of Shell's long-continued promises that the program would remain in effect.

The dealers' constructive nonrenewal claim was based upon Motiva's insistence that they accept upon pain of nonrenewal the oppressive rent formula contained within the new lease agreements.

Both claims were based solely upon the dealers' theory that the PMPA embraced claims for constructive termination and nonrenewal.

After years of pretrial wrangling, the dealers finally succeeded in presenting their claims to a jury. The jury accepted all of their claims and awarded damages in excess of $4,000,000. In addition, the dealers were awarded their attorneys fees, which amounted to slightly more than $2,000,000. Their entitlement to attorneys fees hinged entirely upon their ability to assert that their claim fell under the PMPA.

On appeal, the First Circuit recognized that the cornerstone of all of the dealers' claims was that Shell and Motiva had conspired to make life impossible for them in order to drive them out of business, to be replaced by company–operation.

As the court observed in its opinion *Marcoux v. Shell Oil Products Co.,* 524 F.3rd 33 (1st Cir. 2008):

> [T]he Dealers argued that Shell assigned the franchise agreement to Motiva, even *created* Motiva, in order to squeeze them out of their franchises. They presented evidence that this was the reason for the change in the rent formulations, the elimination of the Subsidy, and the dramatic increase in rents they paid.

Indeed, the dealers had demonstrated to the jury that during the five-year period beginning in January 1998, Shell and Motiva succeeded in decreasing the number of independently operated Shell-branded service stations in Massachusetts from 177 to 96, while increasing the number of company-operated stations from 3 to 40.

On appeal, the First Circuit affirmed the dealers' constructive termination and unfair pricing claims, but reversed their constructive nonrenewal claim.

Rejecting Shell and Motiva's argument that the dealers could not assert a termination claim because they continued to operate their franchises under the adverse conditions imposed upon them, rather than abandon their stations, the First Circuit concluded:

> To require an actual abandonment of years of work and investments before we recognize a right of action under the PMPA would be unreasonable.

Rather, the court held:

> Where a franchisor has breached its obligations to the franchisee such as the

> franchisee faces the effective end of the franchise, the PMPA must treat that as a termination of a franchise.

The court parted company from the dealers, however, in considering their constructive nonrenewal claim. Rejecting the contrary view asserted by the Ninth Circuit Court of Appeals in *Pro Sales, Inc., v. Texaco, USA*, 792 F.2d 1394 (9th Cir. 1986), the First Circuit followed two other federal circuits in interpreting the PMPA as requiring – as an essential element of a nonrenewal claim – that the dealer receive an actual notice of nonrenewal from his or her supplier. Signing a renewal agreement "under protest" would not do because "the franchise had in fact been renewed."

Both sides have now filed petitions for review to the Supreme Court. The dealers challenge the First Circuit's rejection of their constructive nonrenewal claim, and Shell and Motiva challenge the lower court's acceptance of the dealers' constructive termination claim.

Both sides assert as the basis for Supreme Court review the clash of views among the circuits on each issue. About the only thing that they agree upon is that the matters at issue are of broad significance to both the dealer and franchisor communities.

In arguing that the Supreme Court should adopt the Ninth Circuit's acceptance of constructive nonrenewal, the dealers emphasize that court's rationale, which was based in large measure upon the vast financial disparity that exists between franchisor and franchisee.

Limiting the PMPA's scope to instances of actual nonrenewal, that court said, "might provide an incentive to the franchisor to insist on a contract that is illegal under the PMPA but with which the franchisee can stay in business, because the franchisee would have to go out of business and file suit to contest the legality of the terms, something few franchisees can afford to do."

With respect to the dealers' constructive termination claim, Shell and Motiva contend that actual abandonment of the service station premises should be a necessary predicate for a constructive termination claim under the PMPA, just as under state landlord law actual abandonment of the premises is a necessary precondition for the assertion of a constructive eviction defense in a case for the collection of rent.

Of course, the Supreme Court is not required to accept every petition for review that comes its way. Indeed, it refuses the vast majority of such petitions. In this case, however, the Supreme Court has taken the unusual step of inviting a brief from the Solicitor General expressing the views of the United States Government with respect to the case. This suggests that the Supreme Court may ultimately rule on issues of significant importance to the dealer community.

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