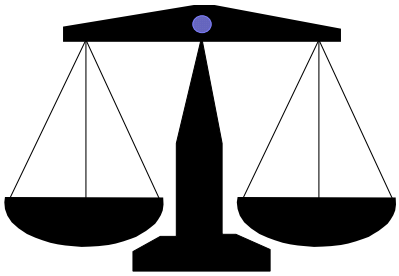

GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

The Justice Department Speaks - Unfortunately

Some months ago, this column focused upon what may be the first Petroleum Marketing Practices Act case to be accepted for review by the United States Supreme Court.

Styled below as *Marcoux v. Shell Oil Products Co.,* 524 F.3rd 33 (1st Cir. 2008), and renamed *Max's Shell Service, Inc. v. Shell Oil Products Co*. on the Supreme Court's docket, the case raises the important issue of whether the PMPA offers dealers any meaningful protection against "constructive" – as apposed to "actual" – termination or nonrenewal.

As stated in that article:

> 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.

The dealers argued successfully in the lower courts that their franchises had been constructively terminated in violation of the PMPA following their assignment by Shell to Motiva because Motiva had terminated Shell's long-standing Variable Rent Program and had increased dealer tankwagon prices, thereby materially worsening the dealers' situation.

Rather than abandon the locations that they had been operating for many, many years, the dealers persisted in attempting to keep their stations afloat, signed new Franchise agreements under protest and brought suit against Shell and Motiva for damages.

As part of its process in deciding whether or not to consider the case on appeal, the Supreme Court took the relatively rare step of asking the Justice Department to opine as to whether the Court should hear the case, and what the Justice Department thought about the underlying issues.

After several months of inactivity, the Justice Department finally submitted the its amicus brief to the Supreme Court in mid-May. It rejected the dealers' position.

In its brief, the Justice Department opined that the Supreme Court should reverse the judgment that the dealers had obtained because they had not been terminated within the meaning of the PMPA. The Justice Department said:

> Under any usual understanding of the statutory language, a franchisor can be said to "terminate" an existing franchise within the

> meaning of [the PMPA] only when it cancels or forces an end to the franchisee's purchase of the franchisor's fuel, its use of the franchisor's trademark, or its occupation of the leased marketing premises. Because the dealers in this case continued to exercise each of these three prerogatives long after the defendants withdrew the rent subsidy, the defendants cannot be found to have "terminate[d]" the franchisors in violation of the PMPA.

The Justice Department left open – or at least refused to shut completely – two narrow windows for the assertion of a constructive termination claim under the PMPA.

First, the Justice Department noted that the lower courts had recognized that a claim for constructive termination might still be maintained, even where the dealer continues to operate his or her leased station under the supplier's brand, if the supplier's assignment of the franchise to another violates state assignment law.

Under state assignment law, an assignment can be challenged if it materially worsens the dealer's situation. The Justice Department refused to consider whether that theory could also support a PMPA claim because – the Justice Department said – it had not been raised by the dealers in the courts below.

Second, the Justice Department concluded that a dealer might raise a claim for constructive termination where the supplier's misconduct had actually forced the dealer to abandon the service station location, or where the dealer promptly sought preliminary injunctive relief to prevent its supplier from carrying out an announced intent to engage in conduct that would leave the franchisee with no reasonable alternative other than to abandon the premises.

This gives scant comfort to the threatened dealer. To assert a claim for damages, the dealer must abandon the business into which he or she has poured years or decades of work. To obtain a preliminary injunction, the dealer must convince a skeptical federal judge that the danger that he or she foresees is not merely "hypothetical" or "speculative". What case law exists in the area suggests that the dealer has an uphill road to climb.

In addition, the Justice Department rejected the dealers' argument that they should be permitted to pursue a claim for constructive nonrenewal, even though they had signed new franchise agreements "under protest" so as not lose their stations. The Justice Department said that the dealers' only remedy under the PMPA was to refuse to sign the new franchise agreements in the hope of obtaining a preliminary injunction.

In that situation, of course, the dice would be loaded against the dealers. It is they alone who would face the total destruction of their businesses. And it would be their burden to convince the court of their supplier's subjective bad faith, in the face of the supplier's heated denials.

The Justice Department urged the Supreme Court to accept the appeal

because of conflicts that it perceived in previous lower courts decisions. The Supreme Court is expected to decide very soon whether it will hear the appeal, and chances are that it will.

This latest stumbling block in the Shell dealer litigation accentuates the need for dealers to continue to push state legislatures aggressively for right of first refusal protection. If the PMPA is as constricted as the Justice Department contends, there exists a heightened need to fill the gap with state legislation that permits dealers facing assignment of their franchises the opportunity to purchase their leased locations, in order to ensure that the many years of effort that they have poured into their locations are not misappropriated.

Recently, legislative bodies for New Jersey and the District of Columbia have approved right of first refusal bills modeled after the California statute, §20999.25(a) of the California Business Professions Code. These bills are presently on executive desks awaiting signing into law. A joint committee of the Massachusetts legislature also appeared to be favorably disposed toward a similar bill.

Even the Justice Department would appear to agree that such state legislation does not offend the PMPA but rather complements federal law. A footnote in its amicus curie brief recognizes that the PMPA only preempts inconsistent state or local laws governing the "termination" or "nonrenewal" of a franchise relationship, and cites with approval the statement contained in the PMPA's legislative history that "[s]tate laws dealing with [other] aspects of the [franchise] relationship are not preempted."

In sum, the time to push for state right of first refusal laws is now.

pgunst@agtlawyers.com

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