



## GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

### *When a Dealer Agreement Renewal Slips Between the Cracks*

Throughout many parts of the country, major oil companies are retreating from their direct supply relationships with branded lessee dealers. They either have assigned dealer leases and supply agreements to their branded jobbers, or are considering doing so.

As a result of such transfers or dithering by the supplier as to its intentions, it appears that renewal dates on many franchise agreements are passing without any action being taken by the supplier or, where applicable, by the jobber to whom the dealer's franchise agreement has been assigned. It is as if those franchise agreements have simply slipped between the cracks.

What is the legal position of a dealer whose franchise agreement has been allowed to expire without receiving either a new agreement or a notice of nonrenewal?

On the one hand, the dealer's position appears unchanged. He or she continues to operate the location and receive branded products. On the other hand, the dealer is in the state of limbo, not knowing what the future will bring.

Under the Petroleum Marketing Practices Act, can the dealer assert that the supplier's inaction has resulted in an automatic renewal of his or her expired franchise agreement?

There is surprisingly little law in the area, but a case can be made for automatic renewal.

A decision announced twenty years ago by an Oregon state appeals court, *Wirkkula v. Union Oil Co.*, 98 Or.App. 282, 780 P.2d 233 (Or.Ct.App. 1989), held that a lessee dealer's franchise agreement was "automatically renewed" for an additional three-year term because the supplier failed to issue notice of nonrenewal until after the previous lease term had expired.

In so ruling, the court emphasized that the PMPA defined "nonrenewal" as a failure to extend the franchise relationship upon the expiration date of the parties' franchise agreement.

The court emphasized:

The *only* date on which [the supplier's] nonrenewal of plaintiff's lease could be effective under that definition is the date on which the lease expired.

If the supplier blows that date, the court said, the franchise agreement automatically renews with no change of terms.

A dealer relying on the *Wirkkula* decision, however, should be aware that it may not be applicable in all circumstances.

In *Wirkkula*, the supplier initially extended the term of the franchise agreement for an additional two months in order to attempt to negotiate a renewal

agreement, but failed to send a notice of nonrenewal either during the contract term or during the extension period. The notice of nonrenewal, therefore, was clearly untimely because it came at a time when the contract term, including the extension, had fully expired and the old franchise agreement was no longer in existence.

Would the result have been the same had the supplier sent out notice of nonrenewal either at the end of the old contract term or during the two-month extension period? The dealer would argue that the notice was insufficient because it failed to comply with the ninety-day advance notice requirement of the PMPA. The *Wirkkula* court would probably agree with the dealer, but other courts would not.

Some courts have reasoned that the PMPA's ninety-day notice requirement only means that the dealer must be permitted to remain in possession and to sell product for that period of time, even if it extends past the contract term or any mutually agreed upon extension period. Those courts reason that the PMPA does not expressly tie the ninety-day requirement to the contract term itself. Other courts, like *Wirkkula*, would disagree.

But in circumstances like those found in *Wirkkula*, the PMPA should protect the dealer against an untimely notice of nonrenewal. If, as was the case there, the contract term and any extension has already expired, it should be too late for the supplier to attempt to nonrenew.

One further question remains. If a franchise agreement renews automatically as a result of the supplier's inaction, how long does the "new agreement" run?

The *Wirkkula* court determined that the renewal agreement should be deemed to be continued for the same term as the previous franchise agreement, there for a three-year term.

Other courts have said that the renewal period should be consistent with the minimum franchise period established by state franchise law, which is usually between one and three years. But even then, any subsequent renewal would be governed by the PMPA, so that the dealer would retain full rights under the PMPA.

The bottom line remains that a dealer may not necessary be compelled to accept more onerous terms contained within a supplier's untimely renewal proposal. Rather, the dealer should examine whether he or she has a right to contend that the expired franchise agreement renewed as a matter of law, thus permitting the dealer to benefit from a continuation of the old agreement's terms.

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