



GENERAL COUNSEL CORNER

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The New Jersey Right of Refusal Law's First Test

Earlier this year, the New Jersey Gasoline-C-Store-Automotive Association led a successful fight to amend the State's Franchise Practices Act to require petroleum franchisors to offer lessee service station dealers a right of first refusal to meet any third party offer for the transfer or sale of the franchise property.

This means that a franchisor operating in New Jersey can no longer bundle a package of service stations for sale to a jobber without giving the impacted lessee dealers advance notice, and an opportunity to match the price assigned under the package offer to the station that he or she operates. Other jurisdictions are considering similar laws.

Recently, the New Jersey law met its first test in court. In the interest of full disclosure, the author of this article represented the dealers who were involved, and can hardly be regarded as an unbiased observer.

In August, Motiva advised effected lessee dealers that it had received a third party offer to acquire a package consisting of at least seventy dealer-operated stations and forty company-operated stations. Motiva stated that, as required by the New Jersey statute, it was providing the dealers sixty days in which to match the third party offer, as allocated by Motiva to each individual location.

Many if not all of the dealers were concerned by the significant gaps they saw in the right of first refusal packages

sent them by Motiva. Also, they were given no access to the third party offer, so they could not compare its terms to the right of refusal offers that they were provided.

Further, Motiva did not disclose the total package price or how it had been allocated among individual service station locations. This was of particular concern to the dealers because of the high prices generally assigned by Motiva to dealer-operated locations, leading the dealers to believe that those stations had been over-priced in order discourage the dealers from exercising their right of first refusal.

Finally, the dealers were concerned that important terms had been left blank in the third party offers, including the annual minimum volume of Shell branded gasoline that each dealer would be required to purchase over a twenty-year period, the amount of liquidated damages that the dealer would be required to pay in the event that minimums were not met and the amount of fees and expenses that the dealer would be required to pay to Motiva in order to complete the purchase transaction.

A group of about thirty impacted Shell dealers banded together in an effort to deal with those issues. Following repeated exchanges between Motiva's counsel and the dealers' counsel, the dealers did receive partial responses to some of their concerns in late August.

Not until September 24, however, but eleven days before the sixty-day acceptance period was set to expire, did Motiva belatedly provide the dealers access to a redacted version of the third party offer.

The dealers' review of the redacted third party offer did nothing to alleviate their concerns. First, it failed to disclose the aggregate contract price or how it had been allocated among the various company-operated and dealer-operated stations. Second, it failed to disclose the terms of the long-term supply arrangement offered by Motiva as part of the third party offer.

In both the third party offer and right of first refusal offers, Motiva expressly conditioned the sale of the service stations upon the buyer's agreement to enter into a "brand covenant," pursuant to which only Shell branded motor fuel could be sold at the stations for a period of twenty years. Evaluating the motor fuel sales provisions of the third party offer was of critical importance to the dealers, therefore, as they needed to determine whether the product supply component of the offers made to them was identical to the third party offer with respect to pricing and other related terms.

In addition, the redacted third party offer revealed material differences between it and the right of first refusal offers provided to the dealers. The dealers were permitted only thirty days following exercise of their right of first refusal to complete their purchase transactions, which resulted in a severely limited time period within which to conduct due diligence and secure financing. By contrast, the third party

offer originally provided for an eighty-five day period, which was later extended through amendment to over six months. The dealers also were permitted a significantly shorter time period to review title commitments and surveys, and to provide Motiva with notice of any material title objections.

Given the dealers' grave concerns that their right of first refusal had been violated, and Motiva's position that the sixty-day time period had run without interruption from the date of Motiva's original and incomplete submission to the dealers in early August, they were left with no choice but to file suit in state court to assert their rights under the new New Jersey law.

The dealers secured a prompt hearing date on their request to secure an emergency injunction to toll the running of the sixty-day period and to obtain discovery of the complete third party offer and other documents pertaining to the valuation of their locations. Motiva then removed the lawsuit to federal court and extended the dealers' response period by another thirty days, until November 4.

The dealers promptly filed an amended complaint in federal court, renewed their requests for document production and secured an October hearing date on their motion to prevent Motiva from going forward with the third party offer until a full trial could be heard on the merits of the dealers' claims.

In support to their cause, the dealers presented the sworn statement of New Jersey State Senator Gerald Cardinale, the primary Senate sponsor of the New Jersey statute. Senator Cardinale explained that the New Jersey law was

intended to ensure that dealers would receive full information regarding any third party offer – including multi-unit offers such as the third party offer at issue in the litigation – so that they could fairly and adequately evaluate their rights under law.

Further, the dealers presented appraisals to document the significant disparities between Motiva's third party offers and the stations' true market value.

The day before the federal court hearing was to occur, Motiva advised the dealers that its negotiations with the third party purchaser had fallen through, and that the third party offers were therefore being withdrawn.

This result was certainly anti-climatic. But the whole proceeding demonstrated the value of the New Jersey statute. First, not only does the statute provide the dealers with a purchase opportunity, it also provides them with advance notice and sufficient time to assert their rights.

Too often, dealers are simply called to a meeting and presented with a *fait accompli*. Their stations have been sold and their franchise agreements assigned to a distributor. They have been treated like chattel, and not even given an opportunity to express their viewpoint. This can no longer happen in New Jersey.

Second, the New Jersey statute gives dealers a legal platform not only to challenge the sufficiency of a right of first refusal offer, but also to seek discovery of the terms of the third party offer. Hopefully, this will create greater transparency and will discourage franchisors from manipulating package

offers to the detriment of impacted lessee dealers.

Finally, New Jersey, by creating a private cause of action for impacted dealers, provides them with legal standing to mount a challenge against a third party offer, either by seeking a preliminary injunction or by asserting a *lis pendens* interest in the service station premises, or both.

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