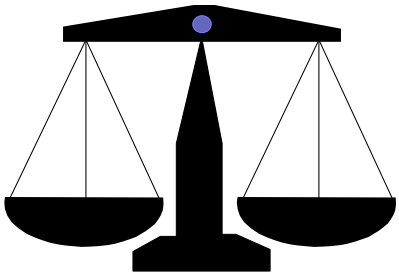

GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

Be Careful What You Ask For

There is an old adage, "Be careful what you ask for, you may get it." This could apply to the recent judgment obtained by Shell Oil in the Supreme Court, *Mac's Shell Service, Inc. v. Shell Oil Products Co,* 559 U.S. ____ (March 2, 2010).

In the *Mac's Shell* case, Shell succeeded in persuading the Supreme Court to reverse a judgment obtained against it by a group of Massachusetts dealers who claimed that their franchises had been constructively terminated in violation of the Petroleum Marketing Practices Act ("PMPA"). This was the first time that the Supreme Court had seen fit to review the scope of the PMPA.

The dealers contended that Shell's assignment of their leases and supply agreements had so worsened their position – because of Motiva's harsh rental and pricing policies – as to be tantamount to a termination of their franchises in violation of the PMPA.

They further claimed that the replacement franchise agreements presented to them by Motiva, which the dealers had signed "under protest" so as not to lose their stations, were so punitive as to constitute constructive nonrenewal of their franchises in violation of the PMPA.

The Supreme Court rejected both of the dealers' claims under the facts of the case. The Court held that the dealers' worsened condition following the assignment of their franchises to Motiva did not amount to a termination because they continued to operate their stations, selling Shell products under the Shell brand.

The dealers' nonrenewal claim also failed, the Supreme Court said, because the dealers had in fact accepted the renewal agreements, albeit signing them "under protest."

The very act of signing those renewal agreements, the Supreme Court said, was antithetical to their contention that their franchises had been nonrenewed within the meaning of the PMPA.

Significantly, the Supreme Court rejected Shell's invitation to declare categorically that no claim for constructive termination or nonrenewal could ever fall within the ambit of the PMPA. Instead, the Court left that issue for another day, thus leaving some uncertainty as to the scope of the act.

So far so good for Shell. But in asking the Supreme Court to construe the PMPA narrowly, it also opened the door for the Court to express its view on the extent of the dealers' potential remedies under state law.

The extent of a dealer's legal remedy under state law is inversely related to the scope of the PMPA because that statute contains a preemption provision, which negates any state law remedy for wrongful termination or nonrenewal. Hence, if an excessively burdensome franchise assignment is

deemed to constitute a constructive termination or nonrenewal under the PMPA, the dealer loses the right to seek redress under state law.

In its decision, the Supreme Court emphasized the limited preemptive reach of the PMPA, concluding that "franchisees can still rely on state-law remedies to address wrongful franchisor conduct that does not have the effect of ending the franchise."

In other industries, suppliers often have taken an approach quite different from that taken by Shell in the *Mac's Shell* case. They have argued that federal regulatory laws should be given broad scope, in order to preclude their customers from pursuing state law claims. They argue the benefit of applying nationwide federal standards, as opposed to having to comply with divergent state standards applied is an idiosyncratic manner by a multitude of state court judges.

The end result of the judgment obtained by Shell in the *Mac's Shell* case may be what was predicted by a marketing attorney in a recent article in the *Oil Express*. He said that the ultimate result of the *Mac's Shell* opinion might well be "an increase in state law claims for alleged wrongful conduct by marketers," which "may lead to greater, inconsistent results, complicating dealer relations for those marketers with multi-state operations."

Be careful what you ask for, you may get it.

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