Branded Retail Motor Fuel Facilities: Complying with the Petroleum Marketing Practices Act

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

10/03/2023

Motor fuel facilities owned and operated by Arkansas petroleum marketers supply a significant portion of the products sold in the State of Arkansas. However, Arkansas motor fuel jobbers, marketers, and other suppliers continue to use a significant number of independent retailers to move product at the retail level. Many of these retailers sell "branded" motor fuel.

Branded motor fuel is, of course, gasoline, diesel, or related fuels sold under the name of a refiner. Such refiner is usually a major integrated oil company. Non-branded (or "private brand") motor fuel is often sold under an independent motor fuel marketer's own company name.

The Arkansas and national retail and wholesale motor fuel markets have never been static. Historical developments have included changes such as the conversion of independent full-service gasoline service stations to refiner or oil jobber owned and operated, high volume, self-service stations. Grocery stores and big-box outlets offering retail motor fuel is another development. Likewise, the conversion of a number of retail motor fuel properties to other commercial uses has and continues to occur.

A more recent trend in both the State of Arkansas and the nation has been the acquisition and/or consolidation of jobbers or marketers that operate or supply a number of retail motor fuel facilities. Many of these retail facilities sell branded motor fuel.

These transactions often generate real estate, contract, or even environmental issues. However, an aspect of these transactions which is sometimes overlooked involves a federal statute that has been in place since 1978. The Federal Petroleum Marketing Practices Act ("PMPA") has been and remains an issue that must be addressed in the transfer of properties involving branded motor fuel retailers.

The PMPA prohibits a branded refiner/oil jobber from terminating or failing to renew a lease/motor fuel supply contract with a retailer without complying with notice provisions. Further, the termination/non-renewal must be based on certain statutory grounds. Since injunctive relief and damages are available in the event of non-compliance, the PMPA must be carefully considered when branded motor fuel properties are being transferred or the supply agreement terminated.

PMPA Overview

The PMPA was enacted by Congress in recognition of the unique relationship between branded motor fuel marketing franchisors (refiners/oil jobbers) and franchisees (oil jobbers/branded independent retail motor fuel outlets). The purpose in creating the legislation was to ensure an appropriate balance of rights

and obligations between the motor fuel franchisor and the motor fuel franchisee within the franchise relationship.

The prime factor under the PMPA that determines applicability is that the franchisee be a "branded" distributor, jobber, or retailer and be authorized to use a refiner's trademark. An independent convenience store's use of the trademark "Exxon" or "Shell" on its gasoline pumps and signs is, of course, an example. In contrast, a private brand or unbranded retail motor fuel outlet falls outside the scope of the PMPA.

Through two key PMPA definitions, a franchise relationship is superimposed upon the branded motor fuel distribution system, regardless of whether such a relationship was contemplated by the parties. The term "franchise" includes any contract, oral or written, for the distribution of branded motor fuel and the lease of marketing premises for such distribution. The broader term "franchise relationship" includes the motor fuel marketing obligations and the responsibilities of the franchisor and franchisee, regardless of whether these responsibilities are specified in the current written agreement.

Note that the PMPA does not cover ancillary agreements such as:

- Incentive Programs
- Reimaging Incentive Programs, etc.
- Reward and Loyalty Programs
- Credit Arrangements to Pay for Motor Fuel Deliveries

Several different types of branded motor fuel lease/supply arrangements have been utilized by Arkansas and other petroleum marketers over the years. Some are within the scope of the PMPA and others are not. Therefore, a brief review of three of the common types of agreements is important.

Lease/Motor Fuel Supply Arrangements

Branded Retail Dealer

A branded retail dealer typically purchases and leases a facility from a refiner or oil jobber pursuant to a lease/supply agreement. The lease/ supply agreement also allows the retailer to utilize the supplier's trademark.

The PMPA places a "retailer" squarely within the scope of the definition of a franchisee. The term retailer is defined to include:

. . . any person who purchases motor fuel for sale to the general public for ultimate consumption.

The retail dealer usually operates somewhat independently of the oil jobber or refiner's control. Pump prices are set by the retailer and it determines the hours of operation.

Commission Agent

A typical commission agent is an agent who operates a retail motor fuel outlet for the account of an oil jobber or a refiner. The motor fuel supplied by the oil jobber or refiner is marketed by the commission agent who is compensated through the receipt of a commission for each gallon sold (e.g., typically "x" cents per gallon). Unlike the retail dealer, title to the motor fuel remains with the supplier who sets the retail price charged at the pump. No matter what price is established, the agent's compensation does not fluctuate.

The commission agent does not purchase motor fuel and is therefore arguably not a "retailer" as defined by the PMPA. However, a court could in some circumstances look at a number of factors to determine if there is enough "entrepreneurial responsibility" to deem the agent a "constructive retailer."

Retail Level Consignee

The typical retail level consignee operates a retail outlet for its supplier under a consignment lease or similar agreement. Under the terms of such an agreement, the consignee rents the outlet by paying either monthly rental or a percentage of motor fuel sold. Motor fuel is supplied to the consignee on a consignment basis. Motor fuel is not purchased (e.g., title to the motor fuel remains with the supplier and passes directly to the motorist). Pump prices may or may not be set by the consignee.

As with the commission agent, the consignee may or may not fall within the scope of the PMPA. This determination will depend upon the precise nature of the relationship.

Arguments have been made that the consignee falls outside of the PMPA definition of a retailer. This is based on the argument that a PMPA retailer purchases motor fuel. Since the consignee never takes title to the motor fuel, a purchase is argued not to have taken place. Note that a court may make a different determination for a consignee who exhibits a number of indicia of an independent entrepreneur by categorizing it as a "constructive retailer."

Franchisee Termination/Non-Renewal

Once it is determined that a particular branded motor fuel outlet fits within the scope of the PMPA, a desired transfer or sale of the property will require proper PMPA notice and termination/non-renewal of the retailer. If the retail motor fuel marketer's PMPA status is unclear, it may be wise to err on the side of caution and follow the notice and termination/non-renewal requirements. In some situations the retailer's agreement may be assigned to the new outlet owner.

Termination

The statutory grounds for termination are:

1. A failure by the franchisee to comply with any reasonable material provisions of the franchise;
2. A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise after a prior warning by the franchisor of such failure;
3. Occurrence of an event which is relevant to the franchise relationship and which makes franchise termination reasonable (a list of events that would make termination reasonable is provided which include events such as fraud or criminal misconduct by the franchisee, or franchisee bankruptcy);
4. Written agreement to terminate the franchise; and
5. A good faith determination by the franchisor to withdraw itself from a geographic area.

Non-Renewal

The grounds for franchise non-renewal include all the grounds for franchise termination, plus:

1. Failure to agree to franchise changes proposed by the franchisor in good faith and in the normal course of business;
2. Numerous customer complaints of which the franchisee is apprised and does not correct;
3. Failure to operate the premises in a clean, safe, and healthful manner on two or more previous occasions with proper notification; and
4. A good faith determination of the franchisor to sell, materially alter, or convert the premises to a use other than the sale of motor fuel.

Note that as to 4), a decision to sell the premises requires the franchisor to first make a bona fide offer to

the franchisee to sell the leased marketing premises. If an offer is made by a third party to purchase the premises, the franchisor must give the franchisee a 45-day right of refusal.

What constitutes a "bona fide offer" is often a contested issue. For example, in one situation a franchisor offered to sell the franchisee the property for $40,000 over fair market value as determined by its independent appraiser. The franchisor's own documents recognized that the asking price was above fair market value. The court rejected the franchisor's position that the PMPA does not require an offer at fair market value as long as the offer is made without malice. It ruled that the offer must at least be made in conformity with the franchisor's general practice for selling the property and a rationale shown for an adjustment in price. A third party offer at $40,000 above fair market value might have constituted such evidence.

Notice Requirements

The PMPA notice requirements for termination and non-renewal are very specific. The PMPA requires 90 days notice prior to the effective date of the termination or non-renewal. An exception is provided where it would not be reasonable to supply such notice. For example, a franchisor might be justified in terminating a retailer with less than 90 days notice if misbranding (e.g., sale of Shell motor fuel at an Exxon branded outlet) is occurring. In this example, a trademark violation would cause the franchisor immediate and continuing injury and justify a quick termination.

The notice must be written, posted by certified mail and contain a statement of the franchisor's intention as to termination or non-renewal. Further, the United States Department of Injury Summary of Dealers' Rights must be included. Notice requirements are strictly enforced.

Remedy

A franchisee is entitled to preliminary and injunctive relief if it establishes that there has been an improper termination or non-renewal. The PMPA contains a more lenient preliminary injunction standard which simply requires that the franchisee show:

1. Termination or non-renewal of the franchisee or franchise relationship of which the franchisee is a party; and
2. The existence of sufficiently serious questions going to the merits to make such questions fair ground for litigation.

The franchisee can recover reasonable attorneys' fees and costs, actual damages and exemplary damages (under certain circumstances) for PMPA violations.

Conclusion

The objective of this article is to simply remind Arkansas petroleum marketers involved in the transfer and sale of branded motor fuel properties to consider whether the PMPA is applicable. If so, careful compliance with the notice and termination/non-renewal provisions is imperative. Perhaps as important, the careful petroleum marketer will structure franchise agreements so that maximum flexibility (within PMPA limits) for a later property transfer, sale, or conversion are included.

Republished with permission. Originally published in *The Canopy* magazine, a publication of the Arkansas Oil Marketers Association.