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FUNDAMENTALS OF PETROLEUM MARKETING LAW

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Petroleum marketing law is a complex area bringing together a colorful palette of legal issues. The basic areas of law that are implicated in petroleum marketing litigation include federal and state franchise statutes, most important of which is the Petroleum Marketing Practices Act (“PMPA”), state unfair competition and unfair trade practices laws and numerous contract and tort-based common law principles. The relationships between active players in the industry (refiners, dealers, distributors, convenience store chain store retailers and, more recently, “big box” or high volume retailers and supermarkets) present ever changing legal issues. The daily interplay between the petroleum marketers and the general public, focused in particular on retail gasoline prices, creates many opportunities for litigation and new legislative efforts. No other commodity receives so much “price-attention” from the public and, not surprisingly, from politicians and government enforcement officials.

This presentation seeks to shed some light on the complex legal issues that face the players in the petroleum marketing industry. Many of these issues are similar to those faced by the franchise industry in general and can be instructive in the franchise arena. This presentation is intended to be a basic primer on the statutory scheme of the PMPA and a summary of recent legislative and regulatory activity in the area. It is not intended to be an in-depth or exhaustive discussion into arcane or complex decisional law or statutory construction under the PMPA.

I. THE PETROLEUM MARKETING PRACTICES ACT

The PMPA governs the sale of “branded” motor fuel – that is motor fuel branded with the trademark of a refiner. The PMPA does not extend to the sale of unbranded motor fuel. It was enacted on June 19, 1978, to address the perceived imbalance in bargaining power between oil companies and refiners and the distributors and retailers who purchased the fuel. The PMPA was intended to protect dealers and wholesale distributors (“jobbers”) from arbitrary or discriminatory termination or nonrenewal of their franchise. This goal is balanced against the legitimate needs of a franchisor to be able to terminate a franchise based upon certain acts of the franchisee.

In order to level the perceived disparity in bargaining power, the PMPA established requirements for termination of contracts between gasoline refiners and their distributors and retailers. Unlike the Disclosure Requirements for Franchising and Business Opportunity Ventures (“FTC Rule”) that govern pre-sale disclosure in connection with the sale of a franchise, the PMPA applies only in the context of terminations and nonrenewal of franchise agreements. It prohibits suppliers from terminating or nonrenewing a franchise except for certain specific reasons enumerated in the statute. The reasons include franchisee misconduct, certain changes in the supplier’s marketing strategy or the marketing environment in general. The PMPA encompasses (and in fact generally preempts) many of the same and similar provisions

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1 15 USC sec. 2801-2806

2 A “refiner” is “a person engaged in the refining of crude oil to produce motor fuel” and includes the affiliates of such entity.

3 16 CFR 436.8(a)(4)
found in various state franchise and distributor relationship and termination laws. In 1994, the PMPA was amended to provide further important protections to franchisees.4

While the FTC Rule requires pre-sale disclosure by use of a Uniform Franchise Offering Circular (“UFOC”), as of July 1, 2007, a PMPA franchise is exempt from the pre-sale disclosure requirements of the FTC Rule.5 The PMPA has been litigated quite extensively since its enactment in 1978. Courts have been asked to determine the breadth of its application, to interpret nearly all of its substantive provisions, and to consider the scope of federal preemption of state legislative efforts to regulate petroleum franchise relationships and state common law claims. The purpose of this section of this paper is to discuss the more important and more often litigated sections of the PMPA.

A. What is a PMPA Franchise?

In simple terms, the PMPA does not apply to all aspects of the contractual arrangements between a petroleum franchisor and franchisee. A PMPA “franchise”6 includes just three aspects of the typical petroleum franchise relationship: (i) the lease for the real property (if the franchisor owns or controls the service station premises); (ii) the trademark agreement pursuant to which the franchisee is authorized to sell motor fuel branded with the trademark of a petroleum refiner; and (iii) a motor fuel supply agreement, pursuant to which the franchisee

4 The 1994 amendments were as follows:

a. Despite federal preemption under the PMPA, a franchisor cannot terminate a franchise for failure to comply with any provision of a franchise agreement that is illegal or unenforceable under state law. 15 USC section 2801(13)(C).

b. A franchisor may nonrenew a franchise if the franchisee fails to agree to changes to the provisions of the franchise that are made by franchisor in good faith and the normal course of business and are not made to convert the leased marketing premises to company operation. 15 USC 2802(b)(3)(A).

c. A franchiser must offer an assignment of any underlying lease for the marketing premises to the franchisee under certain conditions. 15 USC 2802(c)(4).

d. States are prohibited from legislating payment of “goodwill” of a franchise upon any termination or nonrenewal. 15 USC 2802(c)(4).

e. States are permitted to govern the terms and conditions under which a franchisee may dispose of the franchise for succession upon the death of a franchisee. 15 USC section 2806(b)(2).

f. The franchisee cannot be required to waive any rights it has under any other applicable federal or state law and the permitted applicable state law is the law of the principal place of business of the franchisee. 15 USC section 2805(f)(1)(2).

5 16 CFR 436.1

6 A “franchise” is defined as “any contract between: (i) a refiner and a retailer, (ii) a refiner and a retailer, (iii) a distributor and another distributor, or (iv) a distributor and a retailer, under which a refiner or distributor authorizes or permits a retailer or distributor to use, in connection with the sale, consignment or distribution of motor fuel, a trademark which is owed or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorized or permits its use”. A “franchisee” is defined as “a retailer or distributor who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment or distribution of motor fuel.” 15 USC section 2801(4). Important in this definition is that a distributor of fuel that resells the fuel to retailers who then resell the fuel to the public, can be both a franchisee and franchisor at the same time.
purchases branded fuel.\(^7\) In *C.K. Smith & Co. v. Motiva Enters.*,\(^8\) the court explained that “the term ‘franchise’ covers the essential contracts between a retailer and a supplier (e.g., lease of retail premises, provision of motor fuel, use of the supplier’s trademark in connection with retail sales).” *Id.* at 74. “The broader term ‘franchise relationship’ encompasses ‘the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise’.”\(^9\) The PMPA does not limit or impair the franchisor’s contractual or state law right to terminate any aspect of the franchisor relationship – other than the three central components.

Cases have raised the question of whether relationships that were not reflective of this standard franchise scenario constituted a “franchise” under the PMPA. The most common of these arrangements involve situations where the dealer did not “purchase” motor fuel from the supplier, but merely sold the fuel for the account of the supplier on commission: so-called “commission marketers”. In *Checkrite Petroleum, Inc. v. Amoco Oil Co.*,\(^10\) the court reasoned that, because Checkrite did not purchase motor fuel, it was “neither a ‘distributor’ nor a ‘retailer’ within the plain wording of the PMPA.”\(^11\) Other courts also have held that a commission type of agreement is not subject to the PMPA because the station operator does not “purchase” the fuel, as that term is used in the PMPA.\(^12\)

The courts have not, however, allowed a franchisor to exalt form over substance, adopting a more flexible test for “franchise” status than a simple (and somewhat technical) determination if the franchisee actually “purchases” the motor fuel. In *Farm Stores, Inc. v. Texaco, Inc.*,\(^13\) clearly the leading case on the subject, the Eleventh Circuit enumerated several factors to determine whether the station operator assumed the entrepreneurial risk associated with the purchase and sale of motor fuels, typically associated with a “franchise” under the PMPA. The operator in *Farm Stores* “did not: (i) pay for the gasoline inventory until it was sold; (ii) take title; (iii) pay ad valorem taxes on the gasoline inventory; (iv) bear the risk of loss of the gasoline (except for its own carelessness); (v) retain any funds from the sale of the gasoline to motorists; (vi) set the price or assume the market risk in fluctuations in gasoline prices; (vii) pay sales taxes or extend credit to motorists on resale; and (viii) hold a gasoline retailers business

\(^7\) *Abrams Shell v. Shell Oil Co.*, 343 F.3d 482 (5th Cir. 2003)

\(^8\) 269 F.3d 70 (1st Cir. 2001)

\(^9\) *Id.* (quoting 15 U.S.C. § 2801(2)).

\(^10\) 678 F.2d 5 (2d Cir. 1982)

\(^11\) *Id.* at 8 (footnote omitted).

\(^12\) See, e.g., *Dunlap v. Schrader Oil Co.*, 758 F Supp. 633, 634 (D. Colo. 1991) (PMPA did not apply to operator who never took title to fuel and bore no significant market risks; state law claims left to state courts); *Miller v. W.H. Bristow, Inc.*, 739 F. Supp. 1044, 1046-48 (D.S.C. 1990) (PMPA did not apply where operator did not take title to fuel and was paid based on the volume of fuel sold); *Automatic Comfort v. D & R Service, Inc.*, 620 F. Supp. 1349, 1357-58 (D.Conn.1985) (PMPA did not apply where operator did not take title to fuel and bore no substantial risks connected with sale); *Karak v. Bursaw Oil Corp.*, 147 F. Supp. 2d 9, 13-15 (D.Mass.2001) (PMPA did not apply where contract provided that operator had title to fuel only during few seconds it took to pass from underground storage tanks through pumps and into customer’s vehicle).

\(^13\) 763 F.2d 1335, 1343 (11th Cir.1985).
license.” *Farm Stores*, at 1340. Under those circumstances the court concluded that the operator was not a “retailer” under the PMPA.14

**B. Grounds for Franchise Termination**

As set forth above, the PMPA, even if applicable to a relationship, does not govern all aspects of the franchise relationship, but rather only limits the grounds and circumstances under which the franchisor can end the relationship. Contrary to any provision in the contract, a PMPA-protected franchise runs in perpetuity, unless there is a statutory basis to end the relationship. Of course, the statute is designed to give franchisors a fair basis to terminate based on changing market conditions and franchisee performance – consistent with the notion of trying to level the playing field.

A franchise termination, as distinguished from a “nonrenewal,” is a termination of the relationship during the term of what are commonly three (3) year franchise agreements. A nonrenewal, on the other hand, is an ending of the relationship at the expiration date of the franchise term. The allowable statutory bases for each are not identical. The PMPA permits a supplier to *terminate or nonrenew* a franchise: (a) for noncompliance with the terms of the franchise agreement; (b) if the franchisee’s fails to carry out the terms of the franchise in good faith; (c) by mutual agreement; (d) if the supplier withdraws from the marketing area in which the retailer or distributor does business; or (e) for certain other articulated reasons.15 Some of the more often litigated grounds for termination or nonrenewal are outlined below.

1. **Breach of Provision Which Is Reasonable And Of Material Significance**

Franchise agreements can impose numerous requirements on a franchisee. The PMPA does not prohibit termination of a franchise based on a franchisee’s breach of contract, but does dictate that the provision be “reasonable and of material significance” to the franchise relationship. There are numerous cases addressing these standards. Two interesting cases are as follows. In *Chevron U.S.A., Inc. v. El-Khoury*,16 the Ninth Circuit reversed and remanded the district court’s grant of summary judgment because there was a question of fact as to whether franchisee El-Khoury’s failure to pay state sales tax was sufficiently material to the franchise relationship to allow for its termination. The court held that both §§ 2802(b)(2)(A) and (b)(2)(C), which govern termination of franchises, require an inquiry into the significance of the breach. The district court concluded, however, that because an event enumerated under § 2802(c)(11) had occurred, termination was permissible under subsection (b)(2)(C) as a matter of law. The Ninth Circuit held that the district court erred because (b)(2)(A) uses the word “failure” and (b)(2)(C) incorporates it by reference, and the statutory definition of “failure” necessarily requires an inquiry into the significance of the violation.

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14 The PMPA defines “retailer” as “any person who purchases motor fuel for sale to the general public for ultimate consumption.” 15 USC section 2801(7).

15 15 USC section 2802

16 285 F.3d 1159 (9th Cir. 2002)
In *N.I. Petroleum Ventures Corp. v. Sweet Oil Co.*,\(^{17}\) the district court considered various statutory grounds for termination or nonrenewal in deciding to deny plaintiff franchisee’s request for a preliminary injunction. Franchisor argued, in part, that the franchisee’s failure to make the contractually required minimum annual fuel order permitted nonrenewal because such failure was a breach of a reasonable and material contract provision. The court, however, ruled that “a contract term is material if it is nontechnical and represents a significant and substantive requirement relating to the way the franchisee must operate the business.” \textit{Id.} at 259 (citing *O’Shea v. Amoco Oil Co.*).\(^{18}\)

2. **Failure To Exert Good Faith Efforts**

The PMPA also allows termination where a franchisee has not made good faith efforts to perform contractual requirements. Importantly, the courts have required that the relevant provision is still “material” to the relationship. In *N.I. Petroleum Ventures Corp. v. Sweet Oil Co.*,\(^{19}\) the district court considered various statutory grounds for termination or nonrenewal in deciding to deny plaintiff franchisee’s request for a preliminary injunction. The court recognized that failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions, is a basis for termination or nonrenewal. The court also noted, however, that a materiality test applies to terminations or nonrenewals carried out on the basis of a franchisee failing to exert good faith efforts. \textit{Id.} at 257 (citing *O’Shea v. Amoco Oil Co.*).\(^{20}\) (“Although section 2802(b)(2)(B) does not explicitly state a materiality requirement, we nonetheless believe that a franchisor could not justify terminating a franchisee pursuant to [that] section for failing to exercise good faith in carrying out immaterial provisions of the franchise agreement. Congress clearly stated its purpose to prevent “arbitrary or discriminatory” terminations. . . . If franchisors could terminate franchisees when they fail to comply with immaterial terms, this purpose would be frustrated . . . .”).

As an interesting aside, many sections of the PMPA condition termination or nonrenewal on the “failure” of the franchisee to engage in certain conduct or to perform in a certain manner. Courts have examined the definition of “failure”, as set forth in the statute. In *K & SD Enters. v. Shell Oil Prods, Inc.*,\(^{21}\) franchisor Shell terminated the franchise agreement due, in part, to the franchisee’s alleged failure to operate its gas station and to maintain a sufficient amount of all grades of gas for a reasonable time. In ruling on a motion for summary judgment, the court decided that, because the term “failure” under the PMPA does not include failure for a cause beyond the reasonable control of the franchisee, a genuine issue of fact existed regarding the cause of the franchisee’s inability to keep on hand a sufficient amount of gas. Similarly, in *N.I. Petroleum Ventures Corp. v. Sweet Oil Co.*,\(^{22}\) the Court considered various statutory grounds

\(^{17}\) 333 F. Supp. 2d 251 (D. Del. 2004)  
\(^{18}\) 886 F.2d 584, 595 n.11 (3d Cir. 1989)  
\(^{19}\) 333 F. Supp. 2d 251 (D. Del. 2004)  
\(^{20}\) 886 F.2d 584, 596 n.11 (3d Cir. 1989)  
\(^{22}\) 333 F. Supp. 2d 251 (D. Del. 2004)
for termination or nonrenewal in deciding to deny plaintiff franchisee’s request for a preliminary injunction. The court noted that the PMPA excludes from its definition of “failure” any failure which is technical or unimportant to the franchise relationship. In C.K. Smith & Co. v. Motiva Enters., the First Circuit held that the dealer’s lack of action in executing the renewal was not a failure under the PMPA where dealer argued that its failure to execute the renewal was merely a “technical or unimportant” lapse, which is excluded from the definition of “failure” under 15 U.S.C. § 2801(13).

3. Relevant Events

In addition to allowing termination for, generally speaking, breaches of material contract terms, the PMPA lists other specific events upon which termination is reasonable, including the following.

a. § 2802(c)(1) Fraud or Criminal Misconduct Relevant To The Operation Of The Marketing Premises

In Rising Micro, LLC v. Exxon Mobil Oil Corp., the franchisor terminated its franchise agreement with franchisee’s principal owner because dealer pled guilty to widespread credit card fraud which he committed at the station. The court noted that “Section 2802(c) specifies certain ‘events’ warranting termination or non-renewal under Section 2802(b)(2)(C) . . . . [including] ‘fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises,’ PMPA § 2802(c)(1) . . . .” Id. at *16. In denying the franchisee’s preliminary injunction request, the court held that “criminal conduct by a franchisee’s sole shareholder and President, rather than the named franchisee itself, [was] grounds for termination.” Id. at *18 (citing Atl. Richfield Corp. v. Guerami, (holding valid a franchisor’s termination of a franchise agreement because franchisee, who signed the agreement in his individual capacity but then later assigned it to a company he controlled, was convicted of selling heroin)).

b. § 2802(c)(4) Loss of Underlying Lease

Many gas stations are operated on real property that is not owned by the franchisor, but rather is leased from a third party, and then, effectively, subleased by the franchisor to the franchisee. This is still a PMPA franchise, but the loss of the underlying lease by the franchisor is, not surprisingly, a proper ground for termination, provided the franchisee had notice of the underlying lease and that it might expire during the term of the franchise. This provision is well-tested by the courts, and terminations on this basis are routinely upheld. For example, In Sixas Gas Mart, Inc. v. Shell Oil Co., franchisee Sixas claimed that franchisor Shell did not properly terminate the lease and that it was not aware of an underlying lease that would affect the franchise agreement. The court held that the expiration of an underlying lease is an acceptable triggering event to allow Shell to terminate their franchise agreement. Also, the franchise agreement between Sixas and Shell expressly stated that there was an underlying lease.

23 269 F.3d 70 (1st Cir. 2001)
25 820 F.2d 280 (9th Cir. 1987)
lease and that Shell’s right to sub-lease the property to Sixas was dependent upon the continuation of this underlying lease.

Of course, because the PMPA is designed to protect franchisees, many circumstances have arose where the franchisor decides it wants to operate the station itself, and seemingly uses the expiration of the underlying lease as a pretextual basis to terminate the lease. For example, in Mustang Mkts., Inc. v. Chevron Prods. Co.,27 Chevron had leased a gas station from Macerich, and then subleased that gas station to franchisee Mustang. Chevron wanted extensively to renovate the station and discontinue the operation of the station as a dealer-leased site. Chevron delivered to Mustang a notice of nonrenewal, which was based solely upon expiration of the underlying lease. Chevron later signed a new lease with Macerich and reopened the station as a Chevron-operated facility. Mustang argued that Chevron failed to comply with a PMPA provision “requiring Chevron to assign to Mustang any option it possessed for an extension of the underlying lease after the underlying lease had expired.” Id. at 602. Mustang also alleged “that Chevron violated the PMPA by entering into a subsequent lease with Macerich after ending Mustang’s franchise through expiration of the original underlying lease.” Id. The court noted that “Congress intended to remedy situations where the franchisor, using its superior bargaining position and strength, could evict the operator by claiming non-renewal of the underlying lease but continuing to hold onto any options it possesses to extend the lease.” Id. at 608. The court held that if “Chevron possessed any option to extend the lease, then by law, it was required to offer that option to Mustang upon expiration of the lease.” Id. The Ninth Circuit ultimately reversed and remanded the district court’s grant of summary judgment.

c. § 2802(c)(5) Condemnation Or Other Taking, In Whole Or In Part, Of The Marketing Premises Pursuant To The Power Of Eminent Domain

The PMPA allows for termination or nonrenewal based on a condemnation or other taking. Generally speaking that provision has been applied, with the only real ground for litigation being circumstances where less than all of the service station premises has been taken. In Al’s Serv. Ctr., Inc. v. BP Prods. N. Am.,28 franchisor notified franchisee of termination and nonrenewal because of condemnation and eminent domain proceedings to acquire land, which was part of the station premises, for a road widening and resurfacing project. Id. at *10 (quoting 15 U.S.C. § 2802(c)(5)). The court held that, because the land required by the state was less then two percent of the total area of the gas station and because the project would require closing only one of the five driveways to the station, the condemnation and eminent domain proceedings would not materially affect the “marketing premises.” Id. at *13-14. The court granted the franchisee’s request for a temporary restraining order and preliminary injunction prohibiting BP from terminating or nonrenewing the franchise relationship. Id. at *15.

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27 406 F.3d 600 (9th Cir. 2005)

d. § 2802(c)(6) Franchisor’s Loss of Right To Grant Use Of Trademark

The are some circumstances, in fact getting more common after recent industry mergers, where the franchisor does not own the refiner’s trademark, but rather is simply licensed to use the trademark. When that right expires, the PMPA provides for a proper basis for nonrenewal. In Sammy’s Memorial Texaco, Inc. v. Chevron U.S.A., Inc., the plaintiff/dealer had a franchise relationship with a jobber who in turn had an agreement with Motiva allowing the jobber to brand stations with the Texaco brand. After the Chevron Texaco merger, the Federal Trade Commission required Chevron Texaco to divest Texaco's interest in the Motiva joint venture with Shell. Motiva was allowed to use the Texaco brand for a period after divestment, but then, when Motiva lost the right to use the brand, Motiva notified the distributor to cease using the brand. The distributor in turn notified the dealer that it had to debrand.

The dealer sued Chevron and Motiva, alleging a violation of the PMPA. The court entered summary judgment in part because under the PMPA, Motiva's termination of the franchisor relationship with the jobber was based on Section 2802(b)(2)(C) of the Act – the occurrence of an event relevant to the franchise relation and as a result of which termination is reasonable. The court noted that Section 2802(c) lists various events for which termination is reasonable. The trial court followed the precedent of the Second Circuit in Russo v. Texaco, Inc., which the trial court stated stood for the proposition that, if the event is encompassed in one of the twelve enumerated events under Section 2802(c), then a court need make no further inquiry as to the reasonableness of the termination. Motiva had relied on Section 2802(c)(6) which validates terminations grounded on the loss of the franchisor's right to grant the use of the trademark which is the subject of the franchise. Because both Motiva and the jobber lost the right to use the Texaco trademark, termination of the dealer was reasonable.

e. § 2802(c)(7) Destruction of premises

The PMPA contemplates many circumstances where a fair ground for termination or nonrenewal should be established – including destruction of the premises. The statute does not require that the franchisor rebuild the premises, but allows for termination. In Shell Oil Co. v. Hillary Farmer Serv. Station, franchisor Shell terminated the franchise agreement because it claimed, in part, that the station had been destroyed “in substantial part” by fire. The court discussed whether the part of the station that was destroyed was a “substantial part” of the “marketing premises” under § 2802(c)(7). at 753. The court held that “if the extent and nature of the damage to the Station is sufficiently serious as significantly to undermine the motoring public’s confidence in and acceptance of Shell products the destruction is reasonably considered ‘substantial.’” Id. Photographs of the station taken several days after the fire showed significant damage, including destruction of the sales office, lavatories, and repair bays; brickwork marred with soot; discolored window frames; and areas of the roof that were burned through. Because of the extent of the fire damage, the negative impression caused by the damage, and the length of time that would be required to repair the damage, the court held that the station was destroyed in substantial part, and that termination was reasonable.

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30 808 F.2d 221, 225 (2d Cir. 1986)
31 739 F. Supp. 749 (E.D.N.Y. 1990)
f. § 2802(C)(8) Failure By The Franchisee To Pay The Franchisor In A Timely Manner When Due All Sums To Which The Franchisor Is Legally Entitled

Perhaps the most common ground for the franchisor to terminate or nonrenew is the nonpayment of amounts due by the franchisee. In *Equilon Enters. v. Rahim, Inc.*, franchisor Equilon sent franchisee Rahim notice of termination on October 8, 1999, effective immediately. Termination occurred because Rahim had not operated the station for seven days and also failed to make timely rent payments. Even though it was undisputed that the rent payments were past due, the court was obligated to “scrutinize the reasonableness of terminations even when an event enumerated in § 2802(c) has occurred.” *Id.* at 467 (quoting Marathon Petroleum Co. v. Pendleton). The franchisee argued that its financial problems were caused by Equilon’s decision to eliminate a rental discount program designed to benefit franchisees, and that this decision stemmed from dealer’s participation in other franchisee litigation. The court found such allegations unsupported because the rent program was terminated for all Michigan franchisees and, moreover, it was terminated prior to the start of the litigation cited by dealer. The court also held, based on the considerable deference the PMPA affords franchisors in making broad financial decisions, that the abandonment of the rental discount program was reasonable. *Id.* at 468. Equilon’s actions in terminating the agreement lacked bad faith or unreasonableness and were within the PMPA. *Id.*

g. § 2802(C)(11) Failure To Comply With Laws

One of the “catch all” grounds for termination or nonrenewable is the failure of the franchisee to comply with laws. Surely a broad basis, but again one that is consistent with the idea to try to provide a real balance of power between the franchisee and franchisor. In *Karimi v. BP Prod. N. Am, Inc.*, franchisor BP sent notice of termination to franchisee Karimi because franchisee breached the Dealer Supply agreement due to a misdemeanor conviction of employing illegal aliens. The court held that § 2802(c)(11) provides that the “knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises” is likewise an event sufficient to permit termination.

The Court held that a statute prohibiting the employment of unauthorized aliens is a statute that is relevant to the operation of the franchise. Moreover, plaintiff's conviction of knowingly continuing to employ unauthorized aliens is an event that is relevant to the franchise relationship. Accordingly, the Court concludes that defendant's termination of the franchise is warranted by the PMPA. *Id.* at *10-11.

4. Market Withdrawal

The PMPA also allows a franchisor terminate or nonrenew franchise agreements when it makes a determination to cease marketing through retail outlets in a particular geographic area. This allows the franchisor to make business decision to change its marketing and distribution strategy. The provision has been extensively litigated – and market withdrawal determinations

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32 80 Fed. Appx. 463 (6th Cir. 2003)
33 889 F.2d, 1509, 1512 (6th Cir. 1989)
by franchisors have almost uniformly been upheld by the courts. The specific statutory requirements are very complicated, and in depth discussion here is not warranted. By way of example, in *Unocal Corp. v. Kaabipour*, several groups of former, Union Oil franchisees objected to Union’s withdrawal from the market for retail motor fuel in various states, and the sale of Union’s marketing assets to Tosco Corporation. The Certach franchise claimed that Union violated PMPA § 2802(b)(2)(E)(i) by deciding to withdraw “before franchises were renewed with group members and because relevant circumstances did not change after those franchises were renewed.” *Id.* at 763. The Ninth Circuit disagreed, holding that to be in compliance with the PMPA, Union’s decision to withdraw had to have been made after the date the franchisees’ franchises were entered into or renewed. The district court had found that Union’s decision to withdraw was made on December 2, 1996, the day that Unocal’s board approved a resolution authorizing Union Oil to enter into agreement with Tosco. *Id.*. Because the latest franchise renewal was on October 1, 1996, Union Oil met the requirements of § 2802(b)(2)(E)(i)(I). The court noted that merely “[w]eighing options is not the same as making a decision, and, absent evidence to the contrary, a corporation is not bound until its board acts.” *Id.* The Ninth Circuit also held that “relevant facts and circumstances clearly changed after October 1, 1996, because only after that was a sale to Tosco negotiated and an even semisolid decision to withdraw reached.” *Id.* at 764. As a result, Union did not violate § 2802(b)(2)(E)(i)(II). *Id.* (citing *May-Som Gulf v. Chevron U.S.A., Inc.*). The presence of a willing and acceptable buyer is a fundamental change in market conditions.

In *Equilon Enters. v. 12 & Evergreen D & D Services, Inc.*, franchisor Shell had changed its marketing strategy in metropolitan Detroit by dissolving its franchise relationships, selling its service stations to the defendant franchisees under conditional warranty deeds, and entering into ten-year gasoline supply and purchase contracts with the dealers. Shell also entered into wholesale distribution agreements with two wholesalers, and then assigned the ten-year supply and purchase contracts it had with the dealers to the wholesalers. Essentially, Shell sold gasoline to wholesalers, who then branded, sold, and delivered it to the dealers, who then retailed the Shell-branded gasoline to consumers. The franchisee-dealers filed suit arguing that Shell’s reliance on wholesalers equated to a market withdrawal under the PMPA. After noting that the PMPA does not define “market withdrawal,” the Sixth Circuit held that Shell had not withdrawn from the marketing of motor fuel. This holding was based on the parties’ stipulations that Shell, pursuant to its contractual relationship with the dealers and wholesalers, would supply Shell-branded gasoline to wholesalers who, in turn, would supply Shell-branded gasoline to Shell-branded retailers in the metropolitan Detroit market. *Id.* at *4*. The court held that Shell had retained “the right to market Shell-branded gasoline throughout Detroit, either through its own retail outlets or the Dealers’ service stations. . . . [and, therefore,] Shell ha[d] not left the marketplace.” *Id.* at *5.*

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35 177 F.3d 755, 761 (9th Cir. 1999)
36 869 F.2d 917, 926 (6th Cir. 1989)
37 No. 06-2024, 2007 WL 1455080 (6th Cir. May 17, 2007)
C. **Grounds for Franchise Nonrenewal**

In addition to the grounds for mid-term termination and nonrenewal outlined above, the statute provides other grounds that apply only for nonrenewal of the franchise – at the end of the expressly stated term.

1. **Failure To Agree To Changes**

Shortly before the expiration of what are commonly three year franchise agreement, the franchisor either issues a notice of nonrenewal (if there are grounds), or offers a new franchise agreement to the franchisee for the following term. One proper ground for nonrenewal, and a common ground for litigation, arises when the franchisee fails to agree to changes or additions to the franchise made by franchisor in good faith and in the normal course of business. In *Kevorkyan v. Texaco Refining and Marketing, Inc.*,\(^{38}\) the Ninth Circuit affirmed the district court's grant of summary judgment to Texaco. Texaco did not renew the franchise relationship because the dealer failed to agree to changes proposed in a new franchise agreement. Texaco had decided to standardize its contracts by asking for credit information. The dealer refused. The Ninth Circuit viewed the request for credit information as an attempt to alter the franchise. By refusing to provide the information, the dealer was rejecting proposed changes to the franchise. The dealer did not claim that Texaco's decision to standardize its agreements by requesting credit information was not made in good faith or within the normal course of business. Thus, as a matter of law, the nonrenewal was permissible.

In *Esso Std. Oil Co. (P.R.) v. Monroig-Zayas*,\(^{39}\) franchisor Esso sent franchisee Monroig a renewal lease/franchise agreement that reflected an increase in the monthly rent and required Monroig to cease operating certain businesses on the premises, in particular a radiator shop. The contract was never executed, the parties were unable to reach an alternate agreement, and Esso eventually sent Monroig a notice of non-renewal. After extending the termination deadline five times, Esso stopped delivering gasoline to the station. The court ruled that Monroig could not show a substantial likelihood of success on the merits because the PMPA allows, subject to two conditions, a franchisor to elect non-renewal when the parties fail to agree on changes or additions to the franchise agreement. The court ruled that franchisor Esso acted in good faith, thus fulfilling the first condition, because it did not act with evil motive nor did it discriminate selectively against franchisees.\(^{40}\) The court also ruled that Esso did not insist upon the changes at issue in an effort to prevent renewal, thus fulfilling the second condition, because Esso made concessions during negotiations with Monroig and demonstrated a willingness to negotiate by extending the termination deadline to enable such negotiations.

2. **Bona fide complaints**

Not surprisingly, the PMPA does not compel a franchisor to continue its relationship with a franchisee where there have been numerous bona fide complaints concerning franchisee’s

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\(^{38}\) No. 04-56576, 2006 WL 1722549 (9th Cir. June 14, 2006)

\(^{39}\) 352 F. Supp. 2d 165 (D.P.R. 2005) (aff’d *Esso Std. Oil Co. v. Monroig-Zayas*, 445 F.3d 13 (1st Cir. 2006))

\(^{40}\) Id. at 172 (citing *Esso Std. Oil Co. v. Dept. of Consumer Affairs*, 793 F.2d 431, 432 (1st Cir. 1986) (“[C]ourts have upheld franchisor demands for rent increases ranging from 100% to 300% when those demands were made in accord with established rental formulas . . . .”))
operations. In *Early v. Texaco Ref. & Mktg.*,\(^{41}\) franchisor sent a non-renewal notice to franchisee because of twelve bona fide customer complaints about franchisee’s station. The Ninth Circuit considered *Robertson v. Mobil Oil Corp.*,\(^{42}\) in which the Third Circuit held that to qualify as bona fide, “a customer’s complaint must be sincere, and the circumstances complained of must, in fact, exist and be one[s] for which the franchisee can reasonably be held accountable.” *Early*.\(^{43}\) The Ninth Circuit cautioned that “*Robertson*, however, did not require the franchisor to prove the validity of the complaint or the actual culpability of the franchisee in order to establish that a complaint was ‘bona fide’. . . .” *Id.* at 1060. In an effort to exclude sincere yet baseless or implausible complaints from “bona fide” complaints, “*Robertson* modified the definition of ‘bona fide’ to require not only that the complaint be sincere but that it also have a ‘reasonable basis in fact.’” *Id.* (citing *Robertson*, 778 F.2d at 1005). The required depth for such an inquiry, however, is shallow. *Id.* (citing *Robertson*, 778 F.2d 1005 (holding that none of the complaints was on its face “the expression of somebody who is responding in a wholly bizarre way to the external world”)). Under this standard, the Ninth Circuit held that “ten of the complaints [against Early] were sincere and had a reasonable basis in fact . . . .” *Id.* at 1060-61.

### 3. Failure To Operate In Clean, Safe, And Healthful Manner

Similarly, the PMPA allows for nonrenewal of the franchise relationship where the franchisee has failed to operate the station in a clean, safe and healthful manner. In *Weisenburger v. Amoco Oil Co.*,\(^{44}\) franchisor Amoco notified franchisee that his lease would not be renewed because of his failure to operate the station in a clean, safe, and healthful manner. For many years Amoco had been concerned with the dealer’s failure to observe Amoco’s standards for cleanliness and appearance at his station. On several occasions Amoco documented and informed Weisenburger of the deficiencies and required him to remedy the same. The court held that Amoco was entitled to nonrenewal of the lease for failure of the franchisee “to comply with the clean and attractive appearance requirements of the lease . . . and for a 2802(b)(3)(C) failure to operate marketing premises in a clean, safe and healthful manner.” *Id.* at 675-76.

### 4. Determination In Good Faith And In The Normal Course Of Business To Convert, Sell, Or Materially Alter

Much like the broader business decision to withdraw from a particular market, the PMPA also allows a franchisor to nonrenew based on a business decision to convert, sell or materially alter the premises – provided certain important conditions are satisfied. In *BP W. Coast Products v. May*,\(^{45}\) plaintiff franchisor BP elected to sell two of its northern Nevada retail gas facilities and not renew the franchise and lease agreements associated with each facility.\(^{46}\)

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\(^{41}\) 951 F.2d 1059 (9th Cir. 1991)

\(^{42}\) 778 F.2d 1005 (3rd Cir. 1985)

\(^{43}\) 951 F.2d at 1060 (citing *Robertson*, 778 F.2d at 1008).

\(^{44}\) 534 F. Supp. 673 (D.N.D. 1982)

\(^{45}\) 447 F.3d 658 (9th Cir. 2006)

\(^{46}\) Speaker Joan Z. Zwit is in-house counsel with BP America Inc., parent of BP West Coast Products LLC, the plaintiff in this case.
After soliciting sealed bids, BP obtained third party offers of $1.4 million and $890,000, each of which offers included an estimated value of the goodwill established by the functioning businesses. As required by the PMPA, BP offered each dealer a right of first refusal to purchase the facilities for $1.4 million and $890,000, respectively. The Ninth Circuit held that BP made the determination to sell the facilities in good faith notwithstanding the possibility that its “bid process encouraged bidders to include goodwill value . . . .” Id. at 664. Lacking any evidence that BP’s “initial determination to sell was made in bad faith; i.e, [sic] that the determination to sell involved selective discrimination, procedural irregularities, or was a pretext for nonrenewal . . . ., [the court] was precluded from second-guessing [BP’s] economic determination” to sell. Id. The Ninth Circuit also held that BP’s decisions to sell and utilize a novel bidding process in such sales were made in the normal course of business because both decisions occurred as a result of the yearly evaluation preformed by BP’s managers.

D. Applicability Of The PMPA

1. Constructive Termination / Non-Renewal

As set forth above, the PMPA applies only to terminations and nonrenewals. Franchisees often have tried to bring their claims under the purview of the PMPA even where there was no express notice of termination or nonrenewal – arguing that the franchisor’s conduct somehow constituted a “constructive” termination or nonrenewal. Courts generally have rejected such claims. In Jet, Inc. v. Shell Oil Co.,47 Equilon, the assignee of certain franchise agreements owned by franchisor Shell, provided plaintiff franchisees with renewal agreements that allegedly contained illegal and unconscionable provisions. Equilon indicated that it would issue, without further warning, a non-rescindable notice of non-renewal unless the new agreements were signed and returned in a timely manner. The franchisees signed the agreements under protest, thus renewing their contracts, but sued under what they termed a theory of constructive non-renewal. The Seventh Circuit held that Equilon’s stated intention to not renew unless the franchisees signed the new agreements was neither equivalent to actual non-renewal nor a formal notice to not renew under § 2804. “[T]he offer of a franchise renewal on a take-it-or-leave-it basis (i.e., the expression of the conditional intent not to renew) did not give rise to a claim for wrongful nonrenewal under the PMPA.” Id. at 630 (citing Dersch Energies, Inc. v. Shell Oil Co., 314 F.3d 846, 856 (7th. Cir. 2002)).

The plaintiff-franchisees’ claims in Abrams Shell v. Shell Oil Co.,48 were nearly identical to the claims made in Jet. The Fifth Circuit adopted the same reasoning as the Seventh and failed to find either constructive termination or non-renewal. The Fifth Circuit, however, also held that “the PMPA distinguishes between terminations of franchises and nonrenewals of franchise relationships.” Id. at 486 (emphasis in original) (further explaining that “a franchise consists of specific rights or obligations under the franchise agreement, but the term franchise relationship refers to the actual relationship between the parties” (internal quotation marks omitted)); see also Beachler v. Amoco Oil Co., 112 F.3d 902, 905 n.1 (7th Cir. 1997) (“The renewal provisions of the [PMPA] address the renewal of the relationship between the parties rather than the specific rights or obligations of the parties under the franchise agreement.”).

47 381 F.3d 627 (7th Cir. 2004)
48 343 F.3d 482 (5th Cir. 2003)
“[T]he constructive termination test focuses on the franchise, and the constructive non-renewal test focuses on the franchise relationship.” *Abrams Shell*, 343 F.3d at 488 n.15.

2. **Preemption Of State Common Law Claims By Franchisees**

The issue of the breadth of federal preemption of state law claims has been often litigated. Of course, the courts uniformly have held that any state attempt to govern the grounds for termination or nonrenewal of the notice requirements therefore, are preempted. But, many other efforts have been made by franchisee plaintiffs seeking to avoid the application of the Act, and bring their state statutory and common law claims. In *Unocal Corp. v. Kaabipour*, several former Union Oil franchisees objected to Union’s withdrawal from the retail motor fuel market in various states, and the sale of Union’s marketing assets to Tosco Corporation. Unocal and Union Oil sought a declaratory injunction that its withdrawal from the sale of motor fuels in California and the sale of its marketing assets to Tosco did not violate the PMPA. Kaabipour counterclaimed for declaratory and injunctive relief under California state law, seeking a right of first refusal on the transfer of the station premises to Tosco. The court held that § 2806 “provides for preemption of all state law with respect to termination of a petroleum franchise which is inconsistent with the PMPA,” but the preemptive scope “does not reach any state laws which only incidentally affect franchise termination or nonrenewal.” *Id.* at 768.

In *Bellfort Enterprises, Inc. v. Petrotex Fuels, Inc.*,


49 177 F.3d 755, 761 (9th Cir. 1999)

alleging precisely the type of behavior by the franchisor – refusing to deliver motor fuel that rendered the franchise agreement useless – that the PMPA was intended to protect against.

E. Notice Of Termination / Non-Renewal, Including Grounds For Less Than 90 Days Notice

The PMPA generally requires that the franchisor afford ninety (90) days written notice of any termination or nonrenewal. The statute also allows for shorter notice in circumstances in which it would not be “reasonable” for the franchisor to give ninety days notice, provided the franchisor furnishes notification on the earliest date which is “reasonably practicable.” Courts have even allowed for short notice, even at times immediate notice, of termination in egregious circumstances, most commonly failure to operate the station, misbranding or significant nonpayment for fuel and rent. For example, in Equilon Enters. v. Rahim, Inc., franchisor Equilon sent franchisee Rahim notice of termination on October 8, 1999, effective immediately. Termination occurred because Rahim had not operated the station for seven days and also failed to make timely rent payments. Equilon stated in its termination letter that such short notice was reasonable in light of the damage to Shell’s brand and its exposure to further revenue loss. After concluding that Equilon’s reasons for termination were properly within the PMPA, the court held that the minimal notice provided by Equilon was not inappropriate.

While most of the “proper notice” litigation centers around the reasonableness of less than ninety days notice, there are some other disputes. One interesting such dispute was Esso Std. Oil Co. v. Monroig-Zayas, in which the existing franchise agreement between Esso and Monroig was due to expire on January 1, 2004, and Esso sent Monroig a timely ninety day notice of nonrenewal. Absent other circumstances, this notice would clearly have been sufficient under of the PMPA. But Monroig argued “that the notice was essentially revoked by Esso because the parties continued to negotiate for six more months, until June 30, 2004.” The First Circuit applied the alternative notice requirements of § 2804(b)(1) and held that the notice was not revoked by the parties’ mutual agreement to extend the original contract for the purpose of continuing negotiations. “This outcome supports the policy concerns underlying the PMPA. A franchisor who initially satisfies the notice requirements of § 2804(a)(2) and then continues negotiations with a franchisee is not penalized for its efforts to reach a compromise agreement. In addition, a franchisee is not required to file a preliminary injunction motion while negotiations are ongoing, which would not be conducive to fostering an agreement between the parties.”

F. Enforcement

1. Timeliness of Injunction Action

51 15 U.S.C. 2804(b)(1)

52 80 Fed. Appx. 463 (6th Cir. 2003)

53 445 F.3d 13, 16 (1st Cir. 2006)
The PMPA includes its own preliminary injunction provision, with a standard far more favorable to franchisee-plaintiffs than the common law standard adopted by courts in typical litigation. The PMPA provides that a franchisee is entitled to a preliminary injunction if it can establish that “there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.”54 An interesting situation arises where the franchisee seeks an injunction after the expiration of the franchise agreement. In *Esso Std. Oil Co. v. Monroig-Zayas*,55 the court discussed the standard to review an untimely preliminary injunction request. The court noted that the PMPA provides little guidance because it “merely states that ‘the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was [not timely] commenced.’” *Id.* at 17 (quoting 15 U.S.C. § 2805(b)(4)). The district court below noted that other district courts have taken three different approaches when the franchisee is tardy in seeking equitable relief: (1) “outright dismissal of the franchisee’s claim for equitable relief”; (2) reliance “in part upon the franchisee’s failure to timely commence an action in denying equitable relief”; and (3) “adjudge the request under the common law standard.”56 The First Circuit, agreeing with the district court, held that the third option was the proper approach and applied the more stringent common law standard for preliminary injunctive relief for the tardy request.

2. Statute Of Limitations

The PMPA provides for a one year statute of limitations. In *Ester v. Amoco Oil Co.*,57 franchisor Amoco delivered to franchisee Ester on August 1, 1989 a notice of termination effective August 4, 1989. Ester filed his first complaint on August 4, 1989, which was dismissed February 19, 1992 without prejudice for lack of prosecution. Ester’s second complaint, filed on May 29, 1992, was dismissed March 3, 1993 without prejudice for failure to effect service within 120 days after filing. Ester did not appeal either dismissal. On May 25, 1993, Ester filed a third complaint. The district court dismissed with prejudice the third complaint as untimely filed. Ester argued that the filing of his first complaint tolled the PMPA’s one year statute of limitations and that, because he filed his first complaint on the day the statute began to run, he still had one full year after the dismissal of his first complaint to file his second complaint. Ester then argued that his second complaint was timely because it was filed within three months of the dismissal of the first, and that the filing of his second complaint tolled the remaining nine months of the PMPA statute of limitations. Ester finally argued that his third complaint was timely because it was filed within nine months of the dismissal of his second complaint. The Sixth Circuit held that neither the first nor the second complaints tolled the statute of limitations because they both were dismissed without prejudice. The court also noted that “[t]he PMPA does not contain a savings provision allowing refiling after a dismissal without prejudice after the statute of limitations has run.” *Id.* at *5. Furthermore, the court held that the Tennessee savings statute

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55 445 F.3d 13 (1st Cir. 2006)


would be of no avail to Ester because “when [a] federal statute contains specific limitations provision[s], [a] state savings statute will not apply.”

In *Hill v. Texaco, Inc.*, 59 the court held that “[t]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.” *Burnett v. New York Central R. Co.* 60 To determine whether equitable tolling applies, courts “examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the . . . Act.” *Id.* PMPA has a very specific purpose—protecting franchisees from wrongful termination of their franchises. It begins to run from the time of a specific event of which the claimant would have certain knowledge, i.e., the termination or nonrenewal of his/her franchise. Although Congress wished to shield franchisees from unfair business practices by giving them the right of first refusal on the sale of their leased property, it clearly did not intend to create an indefinite right of action in the event the franchiser decides at a later date to part with the property at a lower price. See *Hill*, 61 (noting that when Congress enacted the PMPA, it was aware of abusive practices by some oil franchisers yet deliberately chose a short statute of limitations). In light of the statute’s stated purpose and language, the *Hill* court concluded that PMPA represents a narrow exception to the general rule that equitable tolling applies to all federal statutes of limitation. *See id.* at 334-35.

3. Declaratory Judgment – By Franchisors / Franchisees

There has been some litigation questioning whether the PMPA confers rights on a franchisor to commence a lawsuit seeking a declaration that a termination or nonrenewal is proper under the PMPA in order to obtain possession of the service station. Courts have allowed such a claim, although the statute does not expressly so provide. In *Arco Prods. Co. v. Stewart & Young, Inc.*, 62 franchisee Stewart appealed the district court’s grant of summary judgment to franchisor Arco, claiming, in part, that the district court did not have subject matter jurisdiction over Arco’s declaratory relief action. Although the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, on its own does not confer federal question jurisdiction, when a declaratory judgment plaintiff “asserts a claim that is in the nature of a defense to a threatened or pending action, the character of the threatened or pending action determines whether federal question jurisdiction exists with regard to the declaratory judgment action.” *Id.* at 337. The Ninth Circuit held that Stewart’s action conferred federal question jurisdiction because it was initiated under the PMPA, that Arco’s claims were in the nature of a defense to Stewart’s pending action, and thus, that the district court had subject matter jurisdiction over Arco’s declaratory relief action.

In *Unocal Corp. v. Kaabipour*, 63 several former Union Oil franchisees similarly objected to franchisor Unocal’s withdrawal from the retail motor fuel market in various states, and the

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58 *Id.* (citing 4 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1056, at 192 (1987)).

59 825 F.2d 333 (11th Cir.1987)

60 380 U.S. 424, 427 (1965)

61 825 F.2d at 334

62 50 Fed. Appx. 336 (9th Cir. 2002)

63 177 F.3d 755, 761 (9th Cir. 1999)
sale of Union’s marketing assets to Tosco Corporation. Unocal sought a declaratory injunction
that its withdrawal from the sale of motor fuels in California and the sale of its marketing assets
to Tosco did not violate the PMPA. Kaabipour counterclaimed for declaratory and injunctive
relief under California state law, seeking a right of first refusal on the transfer of the station
premises to Tosco. In affirming the district court’s judgment against the franchisee’s objection
to Union’s market withdrawal, the Ninth Circuit held that “the PMPA was complied with . . . , the
substance of the PMPA was followed . . . . , and Union Oil did not violate the PMPA’s timing
provisions in any respect . . . .” Id. at 771.

4. Damages/Remedies

Few reported cases have addressed the issue of calculation of damages under the
PMPA for wrongful termination. The claims, of course, center on the fair market valuation of the
franchisee’s business. Other cases have addressed more obscure claims for relief, including
Kamel v. Equilon Enters.,64 where the franchisee appealed a favorable judgment against
franchisor Equilon that awarded him the $64,500 that he deposited with Equilon as a down
payment for the purchase of his leased facility. On appeal, Kamel claimed that the district court
should have issued an injunction requiring Equilon to sell the gas facility to him at the year 2000
market value. The Ninth Circuit held that “[t]he district court did not abuse its discretion in
fashioning the remedy it did.” Id. at *3 (citing 15 U.S.C. § 2805(b) (“In any action under
subsection (a) of this section, the court shall grant such equitable relief as the court determines
is necessary to remedy the effects of any failure to comply with the requirements of . . . [15
U.S.C. § 2802 or 2803] of this title, including declaratory judgment, mandatory or prohibitive
injunctive relief, and interim equitable relief.”)).

In Mustang Mktg., Inc. v. Chevron Prods. Co.,65 the Ninth Circuit held that “Section
2805(d) provides for actual and exemplary damages to the franchisee if the court finds that the
franchisor has violated §§ 2802 or 2803 of the PMPA.” Id. at 610. These sections depend on
whether the violations at issue were willful. “In the context of the PMPA it is reasonable to use
the term ‘willful’ to indicate an act that is not merely negligent but can be said to have [been]
taken with deliberate or intentional disregard to the requirements of the statute.” Id. at 610.
Also, the “phrase ‘willful disregard’ has been defined to mean that a franchisor ‘either knew its
conduct was prohibited by the PMPA or . . . the franchisor acted with plain indifference to its
prohibitions.” Id. “When the courts have considered the term ‘willful disregard’ with respect to
the PMPA, they have been reticent to award exemplary damages absent a clear and affirmative
showing of a deliberate and intentional act on the part of the defendant.” Id. The Ninth Circuit
ultimately remanded this case because there were controverted issues of fact on whether the
franchisor’s actions were in willful disregard of the PMPA.

The PMPA has frequently been litigated, and there are hundreds of cases interpreting
the relatively straightforward and narrow set of statutes. The cases cited herein are just a
sampling of interesting cases. To be sure, the issues in PMPA litigation are ever evolving, as
market circumstances change. And, of course, although the PMPA is essentially static, having
only been amended once materially in 1994, much of petroleum marketing litigation will be
contested in the state courts, with further activity expected by newly proposed state and federal
legislation.

64 No. 03-56162, 2005 U.S. App. LEXIS 7151 (9th Cir. Apr. 22, 2005)
65 406 F.3d 600 (9th Cir. 2005)
B. Important Legislative And Regulatory Developments Affecting Petroleum Marketing

Although the PMPA has been amended but once in the almost 30 years of its existence, legislatures persist in their tinkering with the operations and relations in petroleum marketing. They are matched regularly by numerous state attorneys general and the Federal Trade Commission. 2007 has proved to be no exception and has been accompanied by the perennial glut of legislative proposals (more often failed than enacted) and administrative activity affecting petroleum marketing. The more things change, the more they remain the same. This year has seen the usual plethora of proposals – most seemingly adding to what amounts to, as said the Bard, “sound and fury, signifying nothing.” (Macbeth, Act V, scene v). And yet, the failures had best be heeded, for they have a habit of rising again from the ashes left on the legislative table.... And again, and again.

The history of legislative activity is long and torturous. The 1960s and 1970s saw the rise of gasoline dealer legislation, including the PMPA and many similar state statutes governing petroleum franchise relationships, as well as the “retail divorce” proposals which became law in Maryland, Connecticut, and the District of Columbia, most prominently (followed by several other states and Puerto Rico in due time) and were upheld by the U.S. Supreme Court in *Exxon Corp. v. Governor of Maryland.*

66 437 U.S. 117 (1978)

The 1980s saw the advent of legislation challenging 24-hour provisions in petroleum franchises along with the beginning of pushes for open supply and the second coming of below cost sales laws. Retail divorce’s head rose once again. The end of the ’80s and the start of the ’90s marked the inception of the era of price-related legislation and the cessation of divorce efforts by dealers with the enactment of the considerably less draconian 1994 amendments to the PMPA, which have turned out to be eminently benign for franchisors.

The last two decades of the 20th century also witnessed an abundance of federal and state investigations of motor fuel pricing, particularly following the Exxon Valdez incident in 1988 and Desert Storm in 1989, following which there were considerable legislative activities. After those years, one would have thought that there would be a bit of an hiatus in government activity, but that was not to be when the dust of the merger wave from 1998 forward had settled. The unsettled post-September 11 world with increasing tension in the Middle East, the fall of the Hussein regime in Iraq and the resulting issue of U.S. armed presence in Iraq, along with the problems in Nigeria and the uncertainties created by the ascendancy of Hugo Chavez in Venezuela – all have led to a mighty time of legislation, administrative activities, and government investigations and studies of the petroleum industry – most focused on motor fuel pricing and refining.

What has 2007 wrought in this area? Once again, a whole lot of sound and fury, not signifying a great deal, but certainly to be observed and noted:

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66 437 U.S. 117 (1978)
1. **State Legislation**
   
a. **Price Gouging Legislation**

The pricing of motor fuels continued to be the principal issue before legislatures and governmental authorities, reflecting the consumer concerns with prices reaching the highest levels in history (on an inflation-adjusted basis).

The tsunami of price gouging legislative and enforcement activity that followed Hurricanes Katrina and Rita in late 2005 and in 2006 continued unabatedly into 2007.

Price gouging laws (whether specific to the issue or included within broad unfair and deceptive trade practice laws) exist in more than 30 states and the District of Columbia. They typically prohibit sales of essential goods (and often rental and services) at prices which grossly exceed or are unconscionably in excess of pre-declared emergency levels. Some laws specify the percentage increases that are excessive while others prohibit any increase in price.

Leaving aside the wisdom of price gouging laws in economic terms, significant difficulty with price gouging legislation is presented by the use of such vague and undefined terms as grossly excessive, unconscionable, grossly disparate, or the like in describing the violating prices (particularly where the violation is punishable as a crime). In May 2007 after an 18-month investigation, the Kentucky attorney general brought a lawsuit against Marathon Oil Co Corp. claiming that the oil company overcharged motorists more than $89 million after Hurricanes Katrina and Rita in 2005. Marathon promptly filed a suit in federal district court challenging the gouging claims and the statute on constitutional grounds – due process violations because of the vague language: violation of the Commerce Clause; and failure to adequately limit the duration of the triggering emergency declaration.

In 2007 new price gouging laws or amendments to existing laws were considered in at least 15 states. Only in Kentucky did such legislation become law.\(^{67}\) The Kentucky enactment was signed into law on April 5, amending that state’s 2004 price gouging statute,\(^ {68}\) by limiting the duration of the Governor’s authority to declare an emergency to 30 days and its geographic effect to the area covered by the Governor’s declaration of emergency.

Several states (e.g., Michigan and Ohio) considered resolutions urging Congress to enact federal price gouging legislation. Occasionally, interesting conflicts arise in the legislative arena. A notable example arose in Michigan. The Michigan House Energy and Technology Committee decided to table such a resolution and draft a substitute after learning from the state’s Department of Treasury that the state’s pension funds were heavily invested in several petroleum companies.

In New York and Connecticut, legislators introduced bills prohibiting retailers from changing motor fuel prices more than once in any 24-hour period.\(^ {69}\) The bills are very similar to

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\(^{67}\) H.B. 228, Kentucky (2007).

\(^{68}\) Kan. Rev. Stat., §367.674

existing laws in New Jersey and Wisconsin\textsuperscript{70} that were used by attorneys general in those states to challenge price increases following Hurricane Katrina.

More of the same is in the wings of the price-gouging legislative theater. In Ohio, for example, several state senators held a press conference to announce their intention to introduce a bill requiring gasoline retailers, distributors, and producers to justify any five cent per gallon increase to the state’s Department of Commerce within a week.

b. **Below Cost Sales**

Below cost sales prohibitions exist in one form or another (either of general application of product-specific in coverage – covering such products as motor fuel, milk, and cigarettes) in at least 30 states. In many of these states, the laws include minimum markup provisions ranging from four to seven percent.\textsuperscript{71}

In 2007, new laws and amendments to existing below cost sales statutes were considered in at least eight states. Of these, only in Colorado has a proposal been enacted.\textsuperscript{72} It repealed the portion of that state’s below cost sales law specifically prohibiting sales below cost of motor fuel. That change and other technical changes to the Colorado Unfair Practices Act,\textsuperscript{73} were ostensibly intended to permit “big box retailers,” such as Sam’s Club and Costco, as well as Wal-Mart, to offer discounted prices for motor fuel to their members and patrons.

c. **Whole Cent Pricing**

Legislative proposals to prohibit pricing of motor fuel other than in whole cents began in 2006 and accelerated in 2007. No less than nine states saw bills introduced to that effect (Arkansas, Iowa, Kentucky, Massachusetts, New Hampshire, New York, Rhode Island, West Virginia, and Wisconsin).\textsuperscript{74}

d. **Miscellaneous Price Legislation**

Direct price controls also remained of some interest in several jurisdictions. Legislators in New York reintroduced bills that would prohibit refiners and wholesalers from selling unleaded regular gasoline at prices in excess of those established on a weekly basis by that state’s Public Service Commission.\textsuperscript{75}

Legislation prohibiting zone pricing also continued to appear in Connecticut and New York, but failed.\textsuperscript{76}

\begin{itemize}
  \item \textsuperscript{70} E.g., Wis. Stats. §100.18(8).
  \item \textsuperscript{71} See, e.g., Minnesota, Pennsylvania, and Wisconsin.
  \item \textsuperscript{72} H.B. 07-1208, Colorado (2007).
  \item \textsuperscript{73} Colo. Rev. Stats. S §§ 6-2-101 \textit{et seq.},
  \item \textsuperscript{74} See, e.g., Mass S.B. 176 (2007).
  \item \textsuperscript{75} S.B. 267, New York (2007).
  \item \textsuperscript{76} H.B. 1136, Connecticut (2007) and S.B. 175, and A.B. 5701, New York (2007).
\end{itemize}
Hawaii’s legislature, which had enacted a direct wholesale price control regime that took effect in 2005 and was suspended by the legislatures in 2006 after a disastrous several months, continued to tinker with its substitute for controls – a detailed motor fuel distribution reporting scheme administered by the state’s Public Utilities Commission. The PUC has also been given investigatory authority and direction to refer reporting violations to the Attorney General.\(^{77}\) Remarkably, bills to appropriate $1.2 million to fund the price monitoring, reporting and analysis by the OUC have been held in committee.\(^{78}\)

In Ohio, legislation was introduced that would make it an unfair or deceptive trade practice to charge a price for any grade of gasoline that does not bear a reasonable relationship to the costs of manufacture. The bill would also require (1) refiners and wholesalers to submit monthly reports of petroleum product imports, exports, and use and (2) retailers to provide written notice if they increase the price of gasoline by seven cents per gallon or more during any calendar week.\(^{79}\)

In Florida, a proposal would make it a second degree misdemeanor for a motor fuel retailer to post a price for any grade of motor fuel that is not “readily available at the location.”\(^{80}\)

e. Retail Divorcement

The District of Columbia’s City Council, having enacted a bill prohibiting distributors from operating retail service stations as of April 2007, postponed its enforcement and held hearings on The Retail Service Station Clarification Amendment Act of 2007\(^{81}\) which would repeal the wholesaler divocement provision. Refiners have been prohibited from operating motor fuel outlets in the District for more than 25 years and are also prohibited from converting retail locations to eliminate service bays by a longstanding moratorium on such changes. A refiner divorcement bill has been introduced in Rhode Island.\(^{82}\)

New York legislators continue to consider bills, characterized as retail divorcement legislation, that are truly anti-encroachment bills that would prohibit company-operated motor fuel outlets within a specified distance of dealer-operated locations.\(^{83}\)

f. Open Supply

Despite a relative absence from state capitals chambers in recent years, open supply legislation began to reappear, not surprisingly in New York. The legislation would allow

\(^{77}\) S.B. 990, Hawaii (2007).

\(^{78}\) H.B. 1293, Hawaii (2007).

\(^{79}\) SB 193, Ohio (2007).


\(^{81}\) Bill 17-142, District of Columbia (2007).

\(^{82}\) H.B. 6036, Rhode Island. (2007).

gasoline retailers to purchase up to 40% of their total wholesale inventory from sources other than their primary contracted supplier.\textsuperscript{84}

\noindent \textbf{g. General Franchise Laws}

In Rhode Island, a Fair Dealership Act governing termination and nonrenewal was enacted and became effective without the governor’s signature on June 14, 2007.\textsuperscript{85} The law exempts certain dealerships, including fuel distribution dealerships, insurance agency relationships, and door to door sales relationships, have been passed in the respective houses. A broader franchise law of general application without any exemption for motor fuel franchises was introduced in Massachusetts, but has not received serious attention.\textsuperscript{86}

A proposal in New Hampshire to require that franchisors pay interest on deposits of funds by franchisees was reported out of committee as “Inexpedient to Pass” and has died.\textsuperscript{87}

\noindent \textbf{h. Connecticut Legislation}

The legislative session in Connecticut deserves particular attention. Several significant legislative proposals affecting petroleum marketing were introduced in that state.

Governor Rell’s energy proposal was a 60+ page bill that includes provisions that (1) prohibit zone pricing; (2) impose a uniform statewide price in the form of a “posted rack price,” (3) require the posting of the rack price at 6 p.m. each day and be maintained for the 24 hours after the succeeding midnight, (4) require the posting of rack prices at terminals and retail locations, (5) permit differing prices to wholesale customers (dealers and distributors) only for transportation costs and for discounts and rebates disclosed offered to retail sellers, (5) require dispenser display of the percentage of biodiesel or ethanol contained in motor fuels blends, and (6) prohibit refiners and distributors from placing any limitation on dealer’s purchasing or selling any defined alternative fuel (i.e., E-85, biodiesel, a methanol/gasoline blend, or hydrogen).\textsuperscript{88}

Connecticut legislators also considered a bill\textsuperscript{89} which received a decidedly negative review from the Federal Trade Commission in response to a request from a Connecticut House member. S.B. 1136 would prohibit zone pricing and prohibit price differences except for discounts and rebates disclosed by the refiner or distributor and offered equally to all retail sellers. The bill also would require each retailer of gasoline to “sell such gasoline based on the actual price such retailer paid for the gasoline located in underground storage tanks located on the premises of the retail gasoline station at which such gasoline is sold: and “shall not raise the retail price of such gasoline in anticipation of market based price increases.” The FTC staff provided a seven-page letter of comment, concluding “that SB 1136’s proposed regulation of

\begin{footnotes}
\item AB 8933, New York (2007).
\item SB 540/HB 5275, Rhode Island (2007).
\item S.B. 142, Massachusetts
\item H.B. 676, New Hampshire (2007).
\item S.B. 1136, Connecticut (2007)
\end{footnotes}
retail prices could potentially harm consumers by raising retail prices and hindering the market’s ability to respond to supply disruptions. SB 1136’s regulation of wholesale prices may also harm Connecticut consumers by reducing refiners’ incentives to locate new stations in less competitive areas. Finally, federal and state antitrust laws already address any circumstances in which zone pricing is likely adversely to affect competition among refiners or retailers.  

Despite the FTC criticism and after a 12-7 defeat in the Connecticut Senate’s General Law Committee, two additional efforts were made to force enactment of a zone-pricing amendment. First, the Judiciary Committee attempted to add a zone-pricing ban to a bill that would have prohibited gasoline wholesalers from preventing retailers from offering discount-for-cash pricing. Failing in that effort, the proponents of the zone-pricing prohibition attached it as an amendment to a bill providing protection to consumers who sign purchase contracts with heating oil and propane distributors. The amended bill passed the Senate by a vote of 19-18, but died in the House when the session ended without its having been taken up by the House.

Yet another bill would have amended Connecticut’s anti-price gouging statute. As amended, the law would be triggered by the governor’s declaration of an “energy resource market disruption, emergency” consisting of “any stress to an energy resource market resulting from weather conditions, acts of nature, failure or shortage of a source of energy, strike, civil disorder, war, national or local emergency, oil spill or other extraordinary adverse circumstance.” A violation would incur in the event of a price that represents and “unconscionably excessive” price (on that represents a “gross disparity (an increase of more than 15%) from the highest price was offered by the seller during the seven days immediately preceding the declaration.”

i. Other State Legislation

Legislation has also been introduced in various states providing for

- expedited refinery permitting and licensing
- handicapped access
- providing for heavy fines and driver license suspension for drive-offs
- point-of-sale notification of any debit card holds
- requiring that dispensers be programmed to require entry of zip codes on credit card sales

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90 For a summary and copy of the FTC staff comments, see http://www.ftc.gov/opa/2007/05/fyi07241.shtm


97 E.g., S.B. 312, Florida (2007).
• making illegal any distributor’s prohibition of the offering of discount for case by its dealers.\textsuperscript{99}
• prohibiting the use of a cell phone within a certain distance of a fuel dispenser\textsuperscript{100}
• prohibiting any minimum volume requirements imposed by a motor fuel distributor\textsuperscript{101}
• prohibiting retailers from limiting the number of gallons of fuel a customer may purchase, a bill aimed at hypermarket limitation\textsuperscript{102}

2. Federal Legislation

a. Price Gouging

Congress also introduced legislation in the petroleum marketing arena, but was certainly no more productive in following up their own proposals than were state legislatures. Joining in the trend among the states on the heels of Hurricanes Katrina and Rita in 2005, Congress saw at least a dozen price gouging bills introduced before the end of the session. Of those bills, only two reached the floor of either House. One was passed in the House by a vote of 389-34 on May 3, 2006,\textsuperscript{103} some six months after a broader bill including a price gouging provision had been passed in the House in October 2005.\textsuperscript{104} Neither received any serious attention in the Senate during the remainder of the 109\textsuperscript{th} Congress.

Undaunted by the lack of success in the previous Congress and perhaps buoyed by the 2006 elections, four price gouging bills have been introduced in the current Congress, one of which\textsuperscript{105} was passed by a 284-141 vote in the House and sent to the Senate on May 24, 2007.

H.R. 1252, titled the Federal Price Gouging Prevention Act, provides for the proclamation of an emergency by the President, stating the geographic area and gasoline or other petroleum distillate covered as well as the time period during which the proclamation will be in effect. Violations would occur if a price were charged that “grossly exceeds” the previous 30-day average of the price at which other competing sellers in the same area were selling the product on a readily available basis. Certain costs and market conditions appear to be defenses in this extraordinarily poorly composed bill. The Federal Trade Commission is authorized to enforce the statute with priority to enforcement against companies with over $500 million in gasoline and other distillate sales per year. The penalties are quite draconian, ranging from civil penalties of treble the profits from the violation or a fine of up to $3 million to criminal

\begin{footnotesize}
\item\textsuperscript{98} H.B. 3662, Illinois (2007).
\item\textsuperscript{99} H.B. 7101, Connecticut (2007).
\item\textsuperscript{100} S.B. 4385, New York (2007).
\item\textsuperscript{101} (NY A.B. 1093)
\item\textsuperscript{102} HB 4913, Minnesota (2007).
\item\textsuperscript{103} H.R. 5253, 109\textsuperscript{th} Cong., 2d Sess. (2006).
\item\textsuperscript{104} H.R. 3893, 109\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (2005).
\item\textsuperscript{105} H.R. 1252, 110\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (2007).
\end{footnotesize}
penalties of up to $150 million for corporations to up to $ two million and/or up to 10 years in prison. State Attorneys general are authorized to bring a parens patriae civil action for violations.

In addition, a bill sponsored by Senator Boxer of California would require, when “the average price of regular grade gasoline in a State increases 20 percent or more for at least 7 days during any 3-month period,” that the FTC conduct an investigation as to whether “the price of gasoline was being artificially manipulated by reducing refinery capacity of by any other form of manipulation” and report the results to Congress within 30 days. It requires the FTC, with the attorney general of any affected state, to “take appropriate [unspecified] action.”

3. Other Federal Legislation

While no less than 75 bills introduced in the current Congress have some effect on gasoline issues, several are of specific interest.

Two bills would amend the Petroleum Marketing Practices Act, each by adding a new section 107 to the Act. The first is a form of modified open supply that would prohibit any limitation on the source from which a franchisee may obtain motor fuel, except that the franchisee may be required “to obtain only motor fuels with respect to which the franchiser, or the refiner that supplies the franchisor, owns or controls a trademark.”

The second bill, titled the American Fuels Act would amend the Petroleum Marketing Practices Act to prohibit restrictions on a franchisee’s installing alternative fuel pumps, converting existing tanks and pumps for alternative fuel use (apparently regardless of ownership of the tanks and equipment), advertising alternative fuels, and selling alternative fuels on the marketing premises (specifically “including any area in which the name or logo of a franchisor or any other entity appears). The bill would also amend the Gasohol Competition Act of 1980 (part of the Clayton Act) to expand coverage of that statute by including in the definition of gasohol “any blend of ethanol and gasoline such as E-85.

Two bills would amend the Federal antitrust laws in respect to mergers in the petroleum industry. The Oil Industry Merger Antitrust Enforcement Act, introduced by Senators Kohl and Specter would place the burden of proof to show by a preponderance of the evidence that a transaction does not substantially lessen competition or tend to create a monopoly after the plaintiff has merely alleged that the transaction is between competitors in the oil or gas business and alleges such effects. It would also mandate a joint FTC/DOJ review and analysis of their Horizontal and Non-Horizontal Merger Guidelines with respect to modification of the guidelines to address oil and gas industry mergers with a report to Congress within six months of the enactment of the law.

108 H.R. 2354, 110th Cong., 1st Sess., § 5 (2007) (called “Freedom for Fuel Franchisors”). The bill’s counterpart in the Senate is S. 133, introduced by no less than Senator Obama with three co-sponsors at the outset of the 110th Congress. As testimony to the density of the legislative bureaucracy, H.R. 2354 with one sponsor has been referred to no less than six House committees, and S. 133 to the Senate Committee on Finance only. Neither bill has received either a hearing or further consideration.
The Gasoline Price Stabilization Act of 2007\textsuperscript{110} would authorize the President to issue orders and regulations “to stabilize prices for wholesale and retail gasoline at certain levels”; expand the bases for releasing crude oil from the Strategic Petroleum Reserve, (including reductions in supply by a foreign country or any producer, direct the Secretary of Energy to establish mandatory minimum inventory levels of crude oil and petroleum products to limit the impact of supply disruptions on wholesale and retail prices; amend the Clayton Act to prohibit certain oil industry mergers and establish a one-year oil industry merger moratorium; and set up a Petroleum Industry Concentration and Market Power Review Commission to study industry concentration. The second is the too cutely titled Prevent Unfair Manipulation of Prices Act or PUMP Act of 2007 which would regulate certain energy commodity transactions including those through the use of electronic energy trading facilities.

4. Federal Trade Commission

As the agency assigned responsibility and accorded expertise in assessing competitive conditions in the petroleum industry, the Federal Trade Commission has had a long history of observing and analyzing the industry, particularly in the area of petroleum marketing. The FTC’s first investigation and report to Congress on gasoline prices was conducted and a report delivered to Congress in April 1916.\textsuperscript{111} The more things change, the more they stay the same.

Over the past ten years, the FTC has had to immerse itself in the petroleum industry and more particularly in the area of gasoline marketing. Beginning with the price spikes of the last years of the last century, the tidal wave of oil company mergers at the turn of the century, and most recently the price situations after Hurricanes Katrina and Rita, the recent price increases, and the mandate of the Energy Policy Act of 2005,\textsuperscript{112} the last three Chairmen of the FTC have found themselves testifying at congressional hearings and preparing reports to Congress on an ongoing basis. In August 2004, the FTC published a major report prepared by its Bureau of Economics, entitled “The Petroleum Industry: Mergers, Structural Changes, and Antitrust Enforcement.”\textsuperscript{113} Less than year later, the agency issued its report entitled “Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition”\textsuperscript{114} In response to a mandate in the Energy Policy Act of 2005 and the FTC’s appropriations legislation for fiscal year 2006, the FTC issued its report entitled “Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases.”\textsuperscript{115}

\begin{thebibliography}{115}
\bibitem{110}H.R. 1500, 110\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (2007).
\bibitem{111}See Preliminary Report Relative to an Investigation of Gasoline Prices by the Commission, S. Doc. No. 403, 64\textsuperscript{th} Cong., 2d Sess. (1916).
\end{thebibliography}
Most recently, Commissioner Kovacic testified before the House of Representatives Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce on May 22, 2007, on “Market Forces, Competitive Dynamics, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets.” On the following day, the FTC Bureau of Economics Director Michael Salinger testified before the Joint Economic Committee of Congress on “Petroleum Industry Consolidation.”

In April 2007, the Commission filed a complaint in federal district court in New Mexico seeking a temporary restraining order and preliminary injunction to stop Western Refining, Inc.’s proposed $1.4 billion acquisition of Giant Industries. Western operates a single refinery in El Paso and supplies west Texas, New Mexico, Arizona, and Juarez, Mexico with petroleum products. Giant operates three refineries - one in Yorktown, Virginia, and two in the Four Corners region of New Mexico at Ciniza and Bloomfield and distributed petroleum products in the mid-Atlantic and relevantly to the merger challenge in Arizona, New Mexico, and Colorado. The complaint claimed that the merger would lead to reduced competition and higher prices for the bulk supply of light petroleum products, including gasoline, to northern New Mexico, where the separate companies are direct and significant competitors. A temporary restraining order was initially issued by the district court, which later denied the FTC its request for a Preliminary injunction (a denial upheld by the federal Sixth Circuit Court of Appeals).

In April 2007, the FTC hosted a three-day conference on “Energy Markets in the 21st Century: Competition Policy in Perspective.” After a keynote address by Secretary of Energy Bodman, approximately 50 speakers and panelists discussed energy issues.

5. “Hot Fuel” Issue

At its Annual Meeting in July 2007, the National Conference on Weights and Measures (“NCWM”) considered and failed to adopt by four votes a proposal recommended by its Laws and Regulations Committee for a standard for a permissive temperature-compensated method of sale for refined petroleum products and other fuels. Currently, Hawaii is the only jurisdiction that has provided for temperature-compensated retail sales of motor fuels. Arizona, California, and Idaho laws provide for temperature-adjusted sales in certain bulk transactions.

The Conference, originally initiated in 1905 at the invitation of the National Institute of Standards and Technology, is a standards development body consisting of weights and measures authorities representing 39 states. Twenty-seven (27) states are required to pass any proposals at the NCWM annual meeting. In this case, the NCWM’s press release stated that 23 states voted for the temperature compensation proposal “while many of the remaining sixteen (16) states voiced support but felt that further development of the issue was needed for a successful implementation.”

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118 The agenda for the conference and copies of papers from many of the panelists are available at the FTC website at http://www.ftc.gov/bcp/energymarkets/index.shtm

At least one state, Missouri, has seen the introduction of a bill requiring temperature adjustment in retail sales of gasoline and diesel fuel. The Missouri bill would require the Department of Agriculture to “define the size of a temperature-adjusted gallon of gasoline and diesel fuel sold at retail” for each of ten geographic districts within the state using the historical average temperature for each district and, using 60 degrees Fahrenheit, determine the amount of expansion/contraction at such average temperature. The bill would require that each motor fuel dispenser measure dispensed gallons on a temperature-adjusted basis by December 31, 2008. Missing from the bill is any requirement of posting of notice to consumers at the point of sale of the temperature-adjustment measurement and its basis.

The issue of temperature-correction on retail sales has been discussed by the NCWM at public forums for at least 30 years. The subject has received heightened attention since a series of reports in the Kansas City Star in August 2006. The articles claimed that consumers nationwide were “spending about $2.3 billion more for fuel [in 2006] than they would if the fuel were adjusted for energy efficiency and expansion based on temperature.” The temperature-compensation cudgel has also been taken up by Public Citizen and, not surprisingly, by Representative Kucinich (D. OH) as part of June 2006 hearings on gasoline prices before the Subcommittee on Domestic Policy of the House Committee on Oversight and Governmental Reform.

As many as 28 class action lawsuits have been filed in 17 states according to media reports.

6. State Investigations (and calls therefor)

The seemingly ever-present investigations of gasoline pricing continued into 2007. Despite countless conclusions by their predecessors that there was no evidence certainly of concerted action and (save for one instance of a finding of one refiner’s unilateral conduct affecting pricing in the Midwestern U.S. in the late 1990s) no evidence of unilateral action in the form of price and supply manipulation of gasoline, the state attorneys general and legislators continue to conduct investigations of gasoline pricing. No less than 20 state legislatures have considered (and in several cases adopted) resolutions calling on the Congress and the federal competition enforcement agencies to enact price control legislation and investigate gasoline prices, respectively.

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120 Missouri H.B. 105.

121 A copy of one of the articles is available at http://www.azstarnet.com/allheadlines/144537.


In May, members of Congress from Connecticut and New York sent letters to the General Accountability Congress seeking full investigation into gasoline pricing, zone pricing practices, and the role of the FTC. In addition, Governor Rell of Connecticut wrote letters for herself to the Secretary of Energy demanding a pricing investigation and as the leader of a group of 22 state governors requesting an inquiry into gasoline prices.

In Connecticut, Attorney General Blumenthal, an anti-petroleum company activist and intense opponent of zone pricing was rebuffed in an attempt to gain broad powers over the petroleum industry in a so-called “petroleum transparency and oversight law.” His proposal, which would have limited his investigative powers to the month of June 2007, was added to a temporary 25 cents per gallon gasoline tax suspension on the last day of the legislative session, but was vetoed by Governor Rell.

During June and July, authorities in at least three states announced three new investigations of gasoline pricing. In Maryland, the state’s Comptroller reportedly sent notices to “interested parties” stating that he had begun an investigation into the gasoline prices “and the pricing schemes that big oil companies use to squeeze every penny out of hard working Marylanders.” He included zone pricing information in his requests.

In late June, the New Mexico Attorney General commenced an investigation, asking petroleum marketers and suppliers for reasons explaining why that state’s gasoline prices are higher than the national average.

7. Ethanol and Renewables – A Carrot or a Stick Approach

Any discussion of petroleum marketing these days is incomplete without some mention of ethanol and alternative fuels.

Before getting into ethanol and other alternative fuels, it should be noted that the additive methyl tertiary butyl ether that was used as an oxygenate to satisfy the federal oxygenate requirements that were removed in the Energy Policy Act of 2005 has now been banned by legislatures in fuels in 27 states with another two states to be added over the next two years. MTBE remains the subject of major litigation with the primary focus on multi-district litigation in the federal district court for the southern district of New York.

The Energy Policy Act of 2005 mandated a minimum volume of ethanol to be included in motor fuels by 2012, and the Environmental Protection Agency has issued a Renewable Fuels Standard pursuant to that legislation. Individual states are also examining the adoption of their own RFS legislation and regulations.

Uncertainty as to the wisdom of moving aggressively to an ethanol-based transportation fuel situation due to concern over supply, economic feasibility, and collateral effects (e.g., increase in the cost of corn, beef, and other items), state legislatures have charged into the fray.

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126 See MDL 1358, In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation.
by introducing mandates for certain levels of ethanol content in fuel and biodiesel. However relatively few states have adopted any form of ethanol or other alternative fuels mandate.

Only eight states have enacted some form of biofuels mandates (Hawaii, Iowa, Louisiana, Minnesota, Missouri, Montana, New Mexico, and Washington, along with the city of Portland, Oregon). Even some of those states have limited the mandate to a period during which the state indigenously produces a minimum level of ethanol. In contrast, at least 15 state legislatures considered biofuels mandates during the 2007 sessions. An example of the difficulty that can be caused by an ethanol mandate arose in Hawaii in its Legislature’s 2007 session. The Hawaii legislature, having mandated a motor fuel content of 10% ethanol has received testimony that ethanol-blended gasoline may be damaging to marine engines and small-tool engines. As a result, a committee of the Hawaii House of Representatives has been struggling with whether to require wholesalers and retailers to store and make available non-ethanol blended fuel. See Hawaii H.B. 791.

8. The PMPA Today and Beyond

While the PMPA is a relatively well-settled area of law, continued government scrutiny of oil companies and the desire to reduce dependence on foreign oil will continue to affect the legal landscape of petroleum marketing in the United States. In addition to franchise and other relationship, competition, and related laws, petroleum marketers must comply with a variety of laws that impact the way in which they can distribute and market their products and can anticipate increased regulation in the future.
Joan Zwit is a Senior Attorney at BP America Inc. where she supports a network of over 650 jobbers and nearly 11,000 BP-branded service stations. Since joining BP in 1997, she has practiced in the areas confronting the refining and marketing business including petroleum marketing, franchising, payment systems/card marketing, credit, bankruptcy and antitrust. Prior to that time, she spent 11 years as Vice President and General Counsel for a franchise consulting firm. She is a member of the American Bar Association Forum on Franchising. Ms. Zwit received a B.A. and M.A. from the University of Illinois at Chicago and her J.D. from The John Marshall Law School.
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Frank has written and spoken on topics including antitrust, legislation, state trade practices and pricing regulation, the Petroleum Marketing Practices Act, alternative fuels, and other legal topics. He is a Fellow of the American Bar Foundation and of the College of the State Bar of Texas. He is a member of the American Bar Association and served for two years as Chairman of the Oil and Natural Gas Downstream Committee of the Section on Environment, Energy, and Resources. He was the founding Chairman and is a member emeritus of the Subcommittee on Marketing Law of the Committee on Law, American Petroleum Institute. He is also a member of the ABA Antitrust Section, Forum on Franchising, Section on Environment, Energy, and Resources, and Section of Dispute Resolution and of the Houston Bar Association.

Frank earned his J.D. in 1967 from Fordham University School of Law, where he was Articles Editor of the Fordham Law Review. He received his B.A., magna cum laude, in 1964 from Providence College, where he was Editor-in-Chief of The Cowl.
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Steven served as judicial law clerk to Associate Justice David M. Shea, Connecticut Supreme Court. Steven received his law degree from the University of Connecticut School of Law, where he was Managing Editor of the Connecticut Law Review, and his undergraduate degree from the University of Pennsylvania. Steven is a past president of the Hartford (Connecticut) County Bar Association, the past chair of the American Bar Association, Section of Natural Resources, Petroleum Marketing Committee, and is a member of the House of Delegates of the Connecticut Bar Association and of the Executive Committee of the CBA's Franchise Law Committee. Steven also serves as a Trustee of The University of Connecticut School of Law Foundation.