UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 84-243

C.T. MASSEY, ET AL., PLAINTIFF,

VS: REPORT AND RECOMMENDATION

EXXON CORPORATION, DEFENDANT.

INTRODUCTION

The above-styled action was brought under the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. Sections 2801-2806, by a former wholesale distributor of Exxon products.[1] The defendant company has moved for summary judgment against the plaintiff C. T. Massey on the grounds that it complied with the Act in terminating the franchise.[2]

FACTS

Massey is one of seven former distributors who had purchased gasoline from the defendant and then resold it to retail stations in Kentucky. In May, 1981, a distributorship franchise renewal agreement, effective for the period April 1, 1981 to March 31, 1984, was executed.

Exxon made the public announcement of its decision to withdraw from the retail marketing of branded motor fuel in Kentucky in August, 1982. Shortly before this announcement, Exxon (though its sales representative Ronald Meredith) informed Massey of its decision to withdraw. The franchise was

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[1] An additional plaintiff was added by an intervening complaint.

[2] The defendant filed a separate summary judgment motion against the intervening plaintiff, which has affirmatively evaluated by previous Report and Recommendation; the extent to which any of the theories herein may be used against that particular plaintiff.

formally terminated as of October 14, 1983, as the plaintiff had been made aware by letter hand-delivered the previous March 28th.

APPLICABLE LAW

1. In Generally

The primary purpose of the PMPA was to protect the gasoline distributor franchisees from arbitrary or discriminatory termination of their franchises. Marks v. Shell Oil Company, 643 F. Supp. 1050, 1052 (E.D. Mich. 1986). However, Congress indicated that legislation must recognize the legitimate needs of a franchisor to initiate changes in marketing activities to respond to changing market conditions and consumer preferences. Southern Nevada Shell Dealers Association v. Shell Oil Company, 634 F. Supp. 65, 68 (D.C. Nev. 1985); Bauldauf v. Amoco, 553 F. Supp. 408, 415 (E.D. Mich 1981), aff'd 700 F.2d 326 (6th Cir. 1983). Thus, within certain narrowly-defined exceptions, the franchisor may act to protect his interests. Bauldauf v. Amoco, 553 F. Supp. at 415.

In one of the exceptions set out in the Act, franchise termination due to the withdrawal from a marketing area may be made if: (1) the franchise has a term of three years or longer; (2) the withdrawal was decided upon in good faith and in the ordinary course of business; (2) the withdrawal was decided upon after the date the franchises were renewed; and (4) the withdrawal was based on changes in facts and circumstances occurring after the date the franchises were renewed. 15 U.S.C. Section 2802(b)(2)(E).[3]

Once the franchisee bring the action has established that the franchise was terminated, the franchisor bears the burden of going forward with the evidence to prove that the Act's requirements have been met. 15 U.S.C. Section 2805(c); Marks v. Shell Oil Company, 634 F. Supp. at 1053.

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[3]Since the plaintiff confined his arguments to these substantive portions of the PMPA, it is assumed that no objections have been made concerning the notification requirements of the statutes.

Under these standards, the defendant contends that it is entitled to summary judgment against Massey.

2. Applicability to Franchise in Question

The plaintiff contends that the cited statutory section is inapplicable in that there was no franchise "with a term of three years or longer". The basis for this argument is that there was only some thirty-four months running in the April 1, 1981 to March 31, 1984 period when the formal written franchise renewal agreement was executed.

Under the definitiions contained in the Act, a franchise may be "any contract." 15 U.S.C. Section 2801. Thus, such contracts may be oral. See, e.g., Lasko v. Consumers Petroleum of Connecticut, Inc., 547 F. Supp. 211, 215 (D.C. Ct. 1981). As Exxon points out, the parties had an agreement and acted upon it before the formal execution date.

Alternatively, the formal written contract may be seen as one in which the parties expressly determined to make the terms of the contract retroactive, which is permissible under Kentucky law. Board of Education of Pendleton County v. Gulick, Kentucky, 398 S. W.2d 483, 485 (Ky. 1910).

At any rate, the defendant has established as a matter of law that this requirement of the statute has been met.

3. Criteria for proper Decision to Withdraw.

Massey argues that the decision to withdraw was not "made in good faith and in the normal course of business" within the meaning of Section 1202(b)(2)(E). He also indicates that the decision to withdraw was made before the franchise renewal took place.

The oft-cited legislative history for the former provision states:

> This good faith test is meant to preclude sham determinations from being used as an artifice for terminatino or non-renewal. The second test is whether the determination was made "in the normal course of business". Under this test, the determination must have been the result of the franchisor's normal decisionmaking process. These tests provide

> adequate protection of franchisees from arbitrary and discriminatory termination. . .yet avoid judicial scrutiny of the business judgment itself. Thus, it is not necessary for the courts to determine whether a particular marketing strategy, such as a market withdrawal. . .is a wise business decision.

S. Rep. No. 731, 95th Cong., 2d Sess. 37, reprinted in 1978 U.S. Code Cong. & Ad. News 873, 896. Cases citing this standard generally require only subjective good faith, without regard to the objective reasonableness of the decision. Roberts v. Amoco Oil Company, 740 F.wd 602, 606-607 (8th Cir. 1984). Thus, affidavits of the pertinent corporate officials may well be sufficent to deflect opposing arguments. E.g., Southern Nevada Shell Dealers Association v. Shell Oil Company, 634 F. Supp. at 69 (using preliminary injunction standards).

In the present case, Exxon has submitted the depositions of both the Chairman of the corporate Board of Directors and the Retail Business Manager. Collectively, they indicate that decision to withdraw resulted from sharp changes in the market environment (including a decreased product demand for petroleum products which began to become obvious at the end of 1981 and a loss of company oil concessions in the Middle East), which required Exxon to reduce the amount of oil it refined. It was also noted that while serious corporate study of the proposal to withdraw (as other major business proposals) was begun in November, 1981, the final presentation to upper level management in New York was not made until the Summer of 1982. Exxon's chairman indicated that he made the final decision in August of 1982, one day before the media announcement of the same.

The major thrust of the plaintiffs arguments seem to be directed to the fact that the decision to withdraw was actually made at a much earlier period. This basically consists of inferences made from the facts that: (1) the notification of the termination decision was done by organized task force assembled in July, 1982 (after the franchise renewal was signed); (2) the company had begun closing/selling its bulk plants in the state earlier, unaccompanied by replacement

of distribution outlets; (3) Harold Davis had told two bulk plant operators, as alleged by affidavit, after the franchise was entered into that Exxon intended to withdraw from the state;[4] and (4) market feasibility studies were being done at least by November, 1981. However, such inferential arguments may be rejected in favor of more detailed affidavits by company officials. E;g., Avramid v. Atlantic Richfield Company, 623 F. Supp. 64, 66 (D. Mass. 1985) (using preliminary injunction standards).

In summary, the undersigned finds that the defendant has established as a matter of law that the decision to withdraw was made in good faith, in the normal course of business, and based on facts and circumstances arising after the date the franchise was renewed.

4. Existence of Withdrawal

The pertinent statute concerns "withdrawal from marketing. . .through retail outlets in the relevant geographic market area." 15 U.S.C. Section 2802(b)(2)(E). Massey, as his final argument, contends that there is a genuine issue of fact concerning whether the company has, in fact, withdrawn from Kentucky.

Massey has tendered two affidavits, photographs and credit card receipts which indicate simply that Exxon brand gas has been sold at six retail outlets in Kentucky since the present suit was filed.

In turn, the company points to the detailed evidence elicited in the deposition of Harold Davis, a former Exxon employee who was aware of the situation. He stated that the outlets in question were provided with gasoline by a

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[4] In Davis' deposition, he rigorously disputes that he ever made such comments. In addition, the defendant points out that at most the affidavits indicate that Davis (who was not a member of Exxon management) felt that Exxon might withdraw.

Tennessee independent distributor. It was further indicated that Exxon itself was in no way involved with transporting the gasoline into Kentucky, and that it had no way to restrict the actions that an independent distributor might take on its own.

It is noted by the undersigned that the Act seems to refer simply to the franchisor's withdrawal from the marketing system, and would not involve, as essentially uncontradicted at this point, independently-made decision by an independent distributor.

The tendered information, however, also suggests that at least some of the outlets in question have retained their Exxon signs, which would only be possible through arrangement with the company. The defendant, for its part, has presented evidence indicating that all reasonable efforts were made to locate and remove the signs in question.

The evidence, taken a light most favorable to the plaintiff, indicates that there may be a disputed issue of fact concerning the very existence of withdrawal.

Thus, this issue must remain for trial

CONCLUSION

The undersigned concludes that the defendant is entitled to a partial summary judgment on the issues presented, except the issue of the existence of withdrawal itself.

Particularized objections to this Report and Recommendation must be filed within ten days of the date of entry of same or further appeal is waived. Fed. R. Civ. P. 72(b); Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984).

This the _____ day of June, 1987.

JOSEPH M. HOOD,
UNITED STATES MAGISTRATE

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C. T. MASSEY, d/b/a
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VS: REPORT AND RECOMMENDATION

EXXON CORPORATION, d/b/a
EXXON COMPANY, U.S.A., DEFENDANT.

INTRODUCTION

The above-styled action was initiated pursuant to the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. Sections 2801 et seq., by a former Exxon distributor. It is currently before the undersigned on a number of motions, including a motion for summary judgment filed against the intervening plaintiff, which will be the subject of this Report and Recommendation.

FACTS

In October, 1984, B. W. Lyons filed an intervening complaint, in which he--like the original plaintiff-alleged that the defendant Exxon violated the PMPA when it withdrew from the Kentucky market in 1983. The testimony set out in Lyons' own deposition OF April 25, 1985 describes his version of the fact situation underlying this claim.

According to his testimony, Lyons was a high school graduate who had worked as a commissioned agent for Sinclair Refining Company and its successor starting in 1956; that same year, he also became a distributor for Goodyear products, including a full line of tires, tubes, and antifreezes. Although he continued his

association with the latter company through the time of the deposition, he had switched over from Sinclair's successor to Exxon in 1976.

Lyons emphasized that he believed that Exxon, during the years prior to the termination of his distributorship, was expecting to stay in the market "for a long time." He indicated that at a September, 1980 distributor advisory counsel meeting, the Exxon representative present told the distributors that the oil company did not plan to withdraw from its markets. In January of 1981, he received a letter from the regional manager stating that the distributors would be offered three-year contracts at the expiration of the then current contract.[1] He testified that there were also unspecified oral statements from salaried people, such as sales representatives, "making us believe we need(ed) to expand our facilities, upgrade our equipment to move more volume of Exxon's products"; he noted that he had, indeed, expanded his business in this expectation.

In connection with his expanding business, Lyons had been negotiating to purchase a service station from Exxon and on August 10, 1982 made an offer on a standard form submitted by the oil company. Lyons corrected mistakes in the form, and signed the

delete line

[1] On cross-examination, however, he admitted that in the letter from the regional manager, the writer had alluded to the fact that "future analysis" might lead "to plans to withdraw from a market", although he stated that "the withdrawal would not take place for at least twelve months after decontrol, and would be preceded by sufficient advance notice to enable our customers to seek alternative supply arrangements." Lyons stated that he was award that decontrol had taken place some time after President Reagan had begun his first term in office.

release provision by which:

> "Purchaser by acceptance of this Bill of Sale releases, indemnifies and agrees to hold harmless Seller from and against any and all existing or future claims and liability. . as well as causes of action at law or in equity, for loss, damage or injury including death), whether known or unknown, to any persons and property. . ., for, whatsoever use or source, and whenever arising or occurring, whether past, present, or future, and whether from the acquisition or use of said equipment or otherwise. . .Purchaser intends and understands that the aforesaid agreement to release, indemnify and hold harmless Seller is to be inclusive of but not limited to, any claims based upon any theory of strict liability, negligence, or any other theory of liability.

Approximately two weeks after signing this document, however, he first learned that Exxon was going to withdraw from the Kentucky market. At that time, Exxon sales representative Ron Meredith called him on the telephone; that same day, he received a letter announcing the plan and indicating that he might want to consult his counsel regarding the applicability of the Federal Petroleum Marketing Practices Act to his relationship with his dealers. About thirty days thereafter, he and Meredith discussed the fact that he would lose Exxon credit card privileges, too.

In October, the closing on the service station took place, without protest from Lyons, although he stated that he remarked to Meredith that he could have "gotten the place cheaper" had he known at the time he made the offer that Exxon was withdrawing; nevertheless, he did not contact an attorney with regard to his complaints and, as part of the closing papers, "scanned" and signed another release virtually identical to the one in the offer. Even in March, 1983, when a formal notice of termination for October 14, 1983, was hand-delivered which again made reference to the PMPA, Lyons did not consult an attorney.

It was not until approximately one month later that he consulted counsel for the first time in connection with a problem concerning hoses. A settlement was reached.

Lyons stated that he had considered filing suit against Exxon for its action in withdrawing from the market as early as February, 1983, but he had never gotten around to doing it until late in 1984. He also stated that, in the beginning, he felt that he would have an easier time rounding up suppliers than he in fact had.

FAILURE TO PLEAD AFFIRMATIVE DEFENSE

Fed. R. Civ. P. 8(c) provides that a party "shall set forth affirmatively. . .release. . .and any other matter constituting an avoidance or an affirmative defense." The Sixth Circuirt, however, has held that an affirmative defense is not waived, even though not specifically plead, where the defense clearly appears on the face of the pleading and is raised in a motion to dismiss. Pierson v. County of Oakland, 652 F.2d 671, 672 (6th Cir. 1981).

There is a disagreement amont the circuits on the extent to which affirmative defenses can be raised by motions for summary judgment under Fed. R. Civ. P. 56, as distinguished from a motion to dismiss. 27 Fed. Proc., L. Ed., Pleadings and Motions Section 62:71 (1984). District courts witin the Sixth Circuit have held, however, that such defenses may be raised by that motion. Sylla v. Massey-Ferguson, In., 595 F. Supp. 590 (E.D. Mich. 1984); Woods v. City of Dayton, Ohio, 574 F. Supp. 689, 692-3 (S.D. Oh. 1983), aff'd 734 F.2d 17 (6th Cir. 1984); Overseas Motors, Inc. v. IMport Motors, Ltd., 375 F. Supp. 499, 514-5 (E.D. Mich. 1974), aff'd 519 F.2d 119 (6th Cir. 1975), cert. den. 423 U.S. 987 (1975); Chambliss

v. Coca-Cola Bottling Corporation, 274 F. Supp. 401, 408 (E.D. Tenn. 1967), aff'd 414 F.2d 256 (6th Cir. 1969), cert. den. 397 U.S. 916 (1970).

It, thus, appears, that Exxon can properly raise the issue at this time.

RELEASE

Lyons admits that he, a high school graduate with familiarity in dealing with similar arrangements, signed a release after he knew that Exxon was planning to withdraw from the Kentucky market and after he had been made aware of the existence of the PMPA.

A person who has the opportunity to read a contract, but does not do so and signs the agreement, is bound by the contractual terms unless there s some fraud in the process of obtaining his singature; therefore, his negligence in failing to read the contract prevents any reliance on oral representations at the time of his signing and the contract may not be rescinded on the basis of fraud. Cline v. Allis Chalmers Corporation, 690 S.W. 2d 764, 765 (Ky. App. 1985). There is no claim of fraud in the procurement of the signature in this case.

The intervening plaintiff argues, in the alternative, that the signed release should not apply to his claims under the PMPA, which accrued only after the actual termination took place and, hence, long after the release was signed. Assuming for the sake of argument that this is true, and that in Kentucky a release is held to operate only on present rights, absent an express provision to the contrary, Leitner v. Hawkins, 223 S.W.2d 988 (Ky. 1949), there is such an express provision in this case.

Exxon should, therefore, should prevail.

RECOMMENDATION

Based on the foregoing discussion, it is RECOMMENDED that the defendant Exxon's motion for summary judgment against the intervening plaintiff. B.W. Lyons, be granted.

Objections to this Report and Recommendation must be filed within ten days of the date of same or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd _____ U.S. _____ (1984). Fed. R. Civ. P. 72.

This the _____ day of December, 1986.

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JOSEPH M. HOOD,
UNITED STATES MAGISTRATE