

# Commercial Litigation & PMPA Update

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# Today's Topics: State of the Industry

- 1. PMPA Litigation**
- 2. UCC § 2-305 / Pricing Cases**
- 3. Class Action Developments**

# State of the Industry: Points for Consideration

- **What challenges is the business facing?**
- **How are those reflected in these cases?**
- **How are parties—both franchisors and franchisees—handling these challenges given the economic issues?**
- **How will these cases impact the industry going forward?**

# PMPA Litigation





# Termination Notices and Adequacy of Grounds Supporting Termination



# *Scarsdale Cent. Serv. Inc. v. Cumberland Farms, Inc.*

(S.D.N.Y. Feb. 13, 2015)

- Claim under § 2802(b)(3)(D)(i)(III) – “Determination by the franchisor in good faith and in the normal course of business . . . to sell the premises”
- Court held:
  - a. In good faith and in the normal course of business? Yes.
  - b. ROFR/BFO requirements still met where offer from third party included tank removal

# *Amphora Oil & Gas Corp. v. Cumberland Farms, Inc.*

(E.D.N.Y. Oct. 19, 2015)

- Claim under § 2804(c) - Loss of underlying lease
- Court held:
  - a. Franchisee's right to assignment of ground lease limited by franchisor's right to secure release from landlord
  - b. Also irrelevant that franchisor gave notice to LL it would not renew ground lease *before* it offered to assignment option to franchisee

# *Getty Properties Corp. v. ATKR, LLC*

(Conn. 2015)

- Green Valley (distributor) issued NOT based on loss of ground lease. Franchisees appealed from evictions; also brought suit in federal court, demanding ROFR under PMPA
- Claim: challenged eviction in part based on not having established PMPA termination as “condition precedent” to LL/tenant summary process action
- Held: not sufficiently briefed so CT Supremes didn’t address



# No Wrongful Termination When Franchisee Failed to Pay for Fuel or Rent and Failed to Operate Station



# *Wynn v. Lukoil N.A., LLC*

(E.D. Pa. Apr. 29, 2015)

- Round 1: Franchisee's motion for preliminary injunction
- Injunction denied
  - Untimely: § 2805(b)(4)(C)
  - Balance of hardships weighed against franchisee

# *Wynn v. Lukoil N.A., LLC*

(E.D. Pa. Aug. 28, 2015)

- Round 2: Lukoil's motion for summary judgment
- Lukoil properly terminated under the PMPA
  - 12 days notice was sufficient in these circumstances
- Release signed by franchisee was valid

# *MS & BP, LLC v. Big Apple Petroleum, LLC*

(E.D.N.Y. May 8, 2015)

- Claim under § 2802(b)(2)(c) and § 2802(c)(8), failure to pay the franchisor in a timely manner all sums due
- Held:
  - a. Notice timely only for events within 120 days prior to NOT
  - b. Fact of security deposit doesn't save nonpayment grounds
  - c. Onus remains on franchisee to maintain funds for payment



# *Hillmen, Inc. v. Lukoil N.A., LLC*

(E.D. Pa. June 26, 2015)

- Motion for summary judgment—Granted for Lukoil
- § 2801(13): “failure”
- Lukoil properly terminated under the PMPA
- Breach and fraud claims that were intimately intertwined with termination claim were preempted by PMPA

# *Light Petroleum, Inc. v. ExxonMobil* (9<sup>th</sup> Cir. 2015)

- Claim: Exxon's sale of nearly 400 stations to Circle K violated CA Business & Professions Code § 20999.25(a) because Exxon didn't make BFO to purchase to franchisees
- Ninth Circuit affirmed SJ for Exxon and Circle K
- Held: terms of offers of sale, as a whole, were commercially reasonable, thus, BFOs to sell

# PMPA Preemption



# *Lukoil N.A. LLC v. Turnersville Petroleum Inc.*

(D.N.J. Apr. 16, 2015)

- Lukoil moved to dismiss franchisee pricing counterclaims on PMPA preemption grounds. Claims made:
  - a. NJ UCC statute;
  - b. breach of contract,
  - c. breach of the duty of good faith and fair dealing;
  - d. NJ franchise act statutory claims
- Held: not preempted - applying “intimately intertwined” test, breaches were during the life of the franchise agreement, not about the termination event



# Two Other Decisions to Note

- *Wallis Petroleum, L.C. v. Creve Coeur Oil and Car Wash*, 2016 WL 469293 (E.D. Mo. Feb. 8, 2016)
  - No jurisdiction over franchisor's breach of contract and related claims for failure to pay and failure to remove marks where not a dec action
- *AVP Metro Petroleum, LLC v. Moe's Mart*, 2016 WL 538475 (N.D. Ok. Feb. 9, 2016)
  - Court sua sponte determined that no jurisdiction over collection action; counterclaim for PMPA violation also does not give court jurisdiction

# UCC § 2-305 and Pricing Cases



# *South Gas, Inc. v. ExxonMobil Oil Corp.*

(D.N.J. Feb. 29, 2016)

- Franchisees claimed that Exxon was exercising control because Exxon allegedly:
  - Manipulated delivery times to increase prices
  - Required volumes above historical averages
  - Used “Weighted Average Margins”
  - Provided rent waivers to favored franchisees
  - Charged for more fuel than was actually delivered
  - Used zone pricing
- Franchisees also claimed Exxon misled them on Exxon’s long term plan for New Jersey



# *South Gas, Inc. v. ExxonMobil Oil Corp.*

(D.N.J. Feb. 29, 2016)

- Price Discrimination

- RPA: based on alleged control by Exxon, plaintiffs' showing of extended disparities in retail prices gives rise to an inference of price discrimination

- NJFPA



# *Lukoil N.A. LLC v. Turnersville Petroleum Inc.*

(D.N.J. Apr. 16, 2015)

- After D.N.J. held the case not preempted by PMPA, addressed motion to dismiss attacking sufficiency of franchisee pleading UCC pricing counterclaim
- Held: as applied in NJ, franchisee pled required allegations of:
  - a. Franchisor lack of good faith; and
  - b. Franchisor prices were set at or above competitor prices, which showed franchisor “arbitrarily deprived” franchisee of benefit of the bargain

# *Hogan v. BP West Coast Products LLC* (California)

- 2015 bellwether trial
- Dispute about jury instruction on reasonableness of price
- Court instructed the jury that prices had to be set in accordance with the implied covenant of good faith and fair dealing and commercially reasonable
  - Commercially reasonable: find BPWCP's DTW prices reasonable if they were within the range of prices charged by other refiners to other "branded direct supply dealers" or those contracted to purchase gas provided directly from refiners, such as Shell and Chevron
- Jury verdict for BPWCP on pricing claim

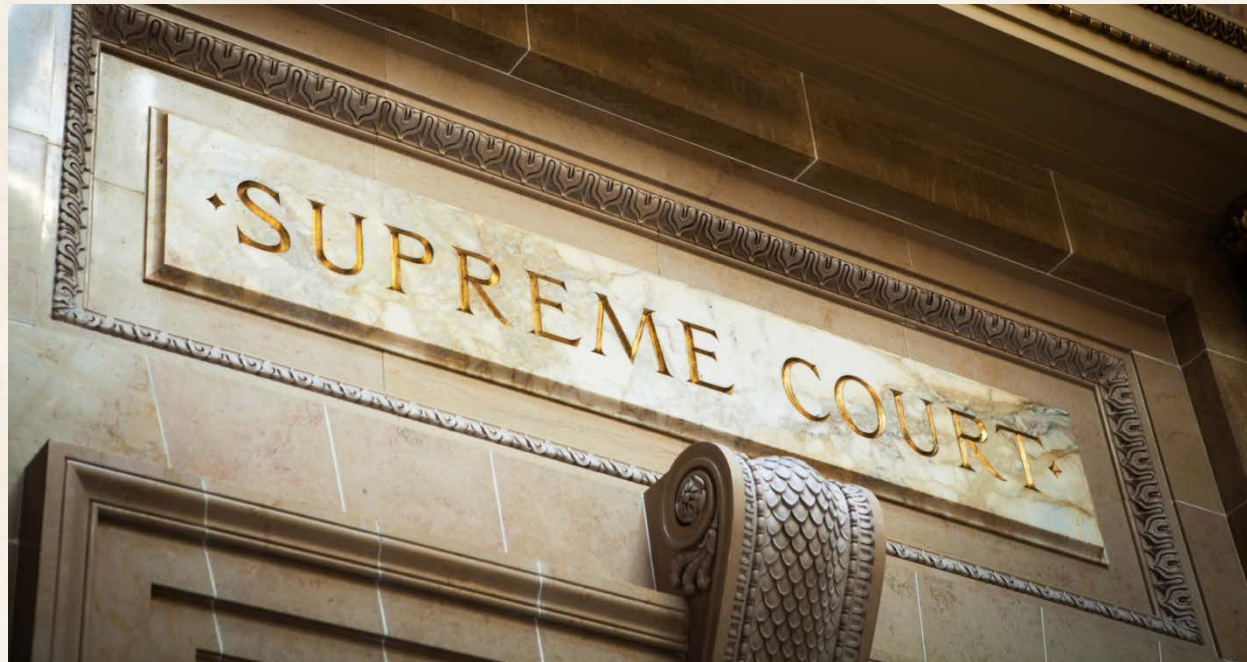
# *Go Green Realty Corp. v. Liberty Petroleum Realty, LLC*

(S.D.N.Y. Mar. 30, 2015)

- Claim: violation of NY UCC § 2-305 and breach of implied covenant of GFFD for “surcharges” on fuel/unjust enrichment
- NY law hadn’t had to reach the objective/subjective split in other jurisdictions
- Held: SJ granted. Court doesn’t reach split - commercial reasonableness is the test, unless buyer demonstrates that seller acted dishonestly with intent to injure buyer.



# Class Actions: Three Before SCOTUS





# Class Actions

## *Campbell-Ewald Co. v. Gomez* (S. Ct. 2016)

- Does an unaccepted Rule 68 offer moot a plaintiff's claim and deprive court of Article III jurisdiction?
- Specifically in class action context: The decision prevents picking off a putative class representative in an effort to avoid a class action

# Class Actions

*Tyson Foods Inc. v. Bouaphakeo* (S. Ct. 2016)

- Win for the Class plaintiffs
- Majority held that the plaintiffs could use statistical inferences to prove their case

# Big Year for Class Actions in SCOTUS

Class Action Bar=2

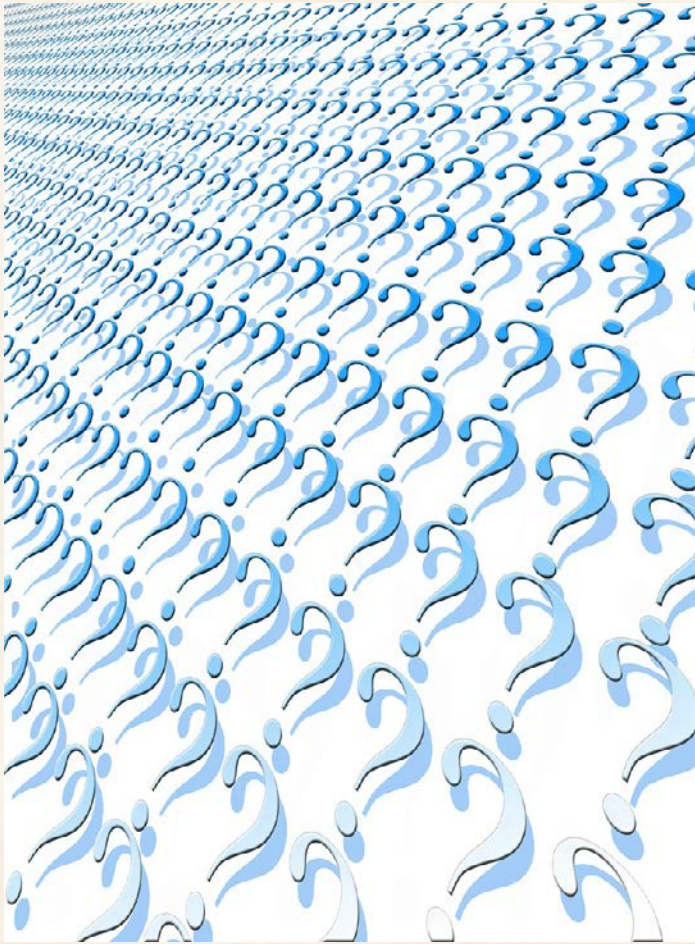
Defense Bar=0

- Next up: *Spokeo Inc. v. Robins*—the 3rd class action case pending before SCOTUS this term
- Unexpected change: Scalia

# Conclusion: State of the Industry

- Developments in how parties are handling the economic times
  - Franchisors working with franchisees
- Changes in the business models in the industry
  - pricing, exit from markets, sale of stations
- Class action developments





*Questions?*