

# CGB LAW LETTER



## Important Information for California Branded Gasoline Retailers

Branded Dealer Special Report

## Supreme Court Throws Out Dealer Anti-Trust Suit Against Shell and Texaco

### SPECIAL INTEREST

#### TEXACO V. DAGHER

The theory of the case was that the motive for the formation of Equilon was to fix the price of gasoline sold to Shell and Texaco dealers and eliminate competition. Equilon's "price-optimization" policy was price-fixing by a different name. Far from enhancing competition the merger allowed Shell and Texaco to raise prices as crude oil prices fell.

#### SCORE CARD

Of all the lawsuits filed after the formation of Equilon in 1998, only one was successful: *Abraham vs Equilon* resulting in a \$10 million dollar award to Dealers.

#### COURT STRIKES DOWN IHOP FRANCHISEE SUIT FOR FRAUD

*Navarro v. IHOP* Franchisee of IHOP can't sue for fraud where IHOP terminated the franchise and didn't approve franchisee's buyer.

#### DEALER'S RIGHT TO "GOODWILL" IN CONDEMNATION

#### **Texaco v. Dagher, No. 04-805 (U.S. Supreme Court, February 28, 2006.)**

Several lawsuits were filed in the wake of the 1998 combining of Shell and Texaco's marketing businesses. Probably the last active lawsuit was thrown out by the U.S. Supreme Court in a unanimous decision written by Justice Clarence Thomas. Oral argument was held on January 10 and the decision was issued in record time on February 28, 2006.

#### **No Price Fixing**

The theory of the case filed in California was that the motive for the formation of the new company called Equilon (Equiva on the east coast) was to fix the price of gasoline sold to Shell and Texaco dealers and eliminate competition between them in violation of the Sherman Act.

If Shell and Texaco had gotten together and agreed to charge the same price to their retailers without forming the joint company, that would clearly have violated federal anti-trust law, a so called per se violation. But, the oil companies convinced the U.S. District Court Judge that the "joint venture" (actually a Delaware limited liability company) made all the difference because Shell and Texaco were now one company instead of two in competition and the oil company's lawyers argued that they had to charge the same prices to avoid a violation of price discrimination laws by dealers.

On appeal, the Ninth Circuit Court of Appeals in San Francisco saw through the ruse and reinstated the suit saying that Equilon's "price-optimization" policy was price-fixing by a different name. The opinion stated that far from enhancing competition the merger allowed Shell and Texaco to raise prices as crude oil prices fell. When crude reached near-historic lows, dropping \$10 to \$12 a barrel between September 1998 (Shell and Texaco formed Equilon in June of 1998) and February 1999, Equilon raised its prices 40¢ per gallon in the Los Angeles area and 30¢ in Seattle and Portland.

The reversal of the Ninth Circuit Court of Appeals by the Supreme Court was expected in light of the abandonment of strict enforcement of anti-trust laws by the federal government and courts. A victory by dealers would have been of major significance because of the large amount of money that could have been awarded against Shell and Texaco and could even have been tripled under the federal anti-trust law.

#### **Score Card**

Of all the lawsuits filed after the formation of Equilon, only one was successful. *Abraham vs Equilon* was filed by this law firm on behalf of over forty California Shell and Texaco Dealers alleging that Shell and Texaco had



failed to offer its lessee dealers the right to purchase the station properties that were being transferred to Equilon as required by California law.

As with the *Dagher* case, the U.S. District Court in San Diego threw out the case, but the Ninth Circuit reversed and sent the case back for trial. Equilon agreed to binding arbitration of the dealer's claims on the eve of trial. Arbitration was conducted last year, resulting in an award of \$10 million to the remaining 19 dealers.

Texaco was subsequently gobbled up by Chevron, collapsing Equilon, and Shell's right to use the Texaco name expires this year.

### **COURT STRIKES DOWN IHOP FRANCHISEE FRAUD SUIT**

Navarro's failure to pay amounts due to IHOP under the franchise agreement violated an earlier settlement.

IHOP Properties, Inc. appealed an order from the Orange County Superior Court denying its request to dismiss a law suit for fraud by a former franchisee (*Navarro v. IHOP*, No. G034987, Cal. App. 4th Dist., (December 7, 2005)).

IHOP filed suit against Navarro in 2003 claiming \$23,000 in rent and for possession of Navarro's leased restaurant. A settlement was reached for Navarro to pay over \$66,000 and have four months to sell the franchise. IHOP was to review any proposed sale "without undue delay."

Within weeks after entering the settlement, Navarro failed to make a payment to IHOP and a default letter was sent to her. A second default occurred a month later. On October 14, 2003 IHOP decided to enter its judgment for the money and to take possession of the restaurant. Navarro denied

that she failed to make payments and claimed that even if she had defaulted on the payments, she had until December 12, 2003, to sell the business, and that IHOP had not responded to her proposed buyer until January 2004, when her deadline had passed.

The court didn't buy her argument that she had not defaulted in her payments to IHOP and threw out her suit despite IHOP's failure to consider her proposed buyer.

The California Appellate Court held that, "The evidence shows that she was in default almost immediately, as the first default letter from IHOP [was] just weeks after the [settlement agreement.] Under the terms of the [settlement] after the second default, '[Navarro] shall no longer be entitled to receive notice of default and shall no longer have any opportunity to cure such further default.'" "Moreover, [Navarro] states that even if she did default, she was nonetheless entitled to sell the franchise until December 12. Not so. Under the terms of the [settlement] IHOP was entitled to [take possession] in the event of default. Navarro's obligation to make the scheduled payments and reports to IHOP was therefore a condition precedent to her ability to sell the franchise instead of immediately losing possession pursuant to the [settlement]."

### **Recommendations:**

1. Don't rely upon the belief that you have the right to sell the franchise after notice of default or termination. (see CGB Cal Law Letter 137).

2. When entering an agreement with a franchisor, whether a restaurant franchise or a petroleum retailing franchise, be sure the terms of your right to sell are spelled out in detail.

3. The right to sell should include the franchisor's obligation to act upon

the proposed sale and the buyer's qualification within specific time limits.

4. The agreement should state what qualification the franchisor can require of the buyer; e.g. experience, cash available, net worth, credit rating, etc. If the sale is of a service station franchise, the terms of the California service station franchise sale law, Business and Professions Code § 21148, should be incorporated.

6. DON'T IGNORE DEFAULT NOTICES FROM THE FRANCHISOR (see CGB Report No. 507).

### **California Lessee Service Station Dealers Entitled to "Goodwill" When Property Taken by Eminent Domain**

It is not all that unusual for a city or county to condemn service station property. Since most service stations are located on corners, any major street widening is likely to result in the taking of all or a part of the property.

The Petroleum Marketing Practices Acts (PMPA) requires that the oil company pay the dealer for what it receives for loss of business opportunity or goodwill. However, whether the dealer has a legal right to a share of the award made when the state or local government takes all or part of the oil company's land for a public purpose depends on state law.

In some states, such as Virginia, the government does not have to pay the owner of the business located on property it takes for goodwill. The court decision in *Bajwa v. Sunoco, Inc.* 320 F.Supp.2d 454 E.D.Va., 2004, states that "The PMPA does not entitle Bajwa to compensation. Sunoco complied with the PMPA; it properly terminated Bajwa's franchise." The PMPA only requires that "the franchisor shall fairly apportion between the

franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or goodwill...Virginia law does not compensate the property owners for loss of business opportunity or goodwill. The sale price received by Sunoco, therefore, could not have contained compensation for business opportunity or goodwill. Accordingly, the PMPA does not require that Sunoco share the sale price with Bajwa. No other provision of the PMPA provides for compensation to Bajwa."

### California law

Unlike Virginia, Article I section 19 of the California Constitution provides that private property may not be taken or damaged by the government unless it pays "just compensation." California Code of Civil Procedure section 1260.230 requires compensation for the loss of goodwill of a business. Therefore, the dealer will be entitled to compensation if he properly asserts his rights.

The items for which a property or business owner may generally attempt to seek just compensation are (1) real property, (2) improvements pertaining to realty (sometimes referred to as fixtures and equipment), and (3) business goodwill. Just compensation for these items is generally the "fair market value" of the item as determined by a jury. In addition, business owners may be entitled to relocation benefits which are generally determined separately from just compensation.

### What is Goodwill?

Business "goodwill" is defined in the Eminent Domain Law as:

"The benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in the probable retention of old or acquisition of new patronage."

Generally, goodwill is valued based on the sustainable income flow generated by the business. How that income translates into goodwill value is determined through experienced eminent domain business appraisers. Gen-

erally, value varies based upon factors such as length of time in the business, nature of the industry, customer base, economic conditions, reputation, security of occupancy, nature of the business' fixed assets, and risk associated with the business. Some businesses possess no goodwill value. Others may possess thousands or even millions of dollars of goodwill value.

### Recommended Procedures:

When a dealer's service station property is taken in whole or part, he has a very substantial economic interest in asserting his legal rights. We therefore recommend the following:

(1) Request notice: If you believe that the local government is considering taking part or all of the property station is located on, advise the appropriate agency (e.g., planning commission, city attorney's office, etc) that you wish to be notified when the proceedings are initiated. In appropriate cases, you may wish to intervene.

Keep in mind that the oil company may do little or nothing to see to it that the award reflects the full goodwill value of your business. You may wish to present expert testimony, information regarding offers you have received for your business in the past, data concerning what you paid for the business or other evidence.

(2) Do not sign a mutual termination agreement: Although an oil company has little chance of successfully depriving a dealer of his right to a reasonable share of a condemnation award in a lawsuit, it is another matter altogether if the dealer signs a mutual termination agreement. As we have emphasized in these pages, a valid mutual termination agreement can have the effect of destroying any legal rights the dealer may have.

(3) Increasing the award: Oil companies have not fought very hard to increase the value of the awards. Perhaps because they have little or no desire to have the goodwill value of a dealer's business recognized in formal court proceeding. Such a result might be used against them in other cases. The majors are likely to simply accept

whatever the court awards.

YOU MUST ACT TO MAXIMIZE  
YOUR AWARD

## ABOUT OUR ORGANIZATION

Attorneys Guy Gilbert, James Bachor, David Lantzer and Miguel del Rosario practice in the petroleum marketing and automotive service field, with an emphasis on California law and Federal PMPA advisement and litigation.

### Disclaimer

The statements and information provided in the CGB Releases, Legal Corner, or Law Letter, are for the information of the recipient only and are not intended to provide legal advice. No attorney-client relationship should be deemed to arise from receipt of this publication. Those having specific questions regarding the cases or issues addressed are urged to contact a qualified attorney.

### Subscription

Call Christine at 714-671-9963 or email to [Info@CGBLaw.com](mailto:Info@CGBLaw.com) to subscribe or cancel mailed, faxed or email version.

**We are on the Web**  
[www.CGBLaw.com](http://www.CGBLaw.com)

**CGB Cal Law Letter**  
**Issue No 250**



## CARROLL GILBERT & BACHOR

Guy J. Gilbert  
James E. Bachor  
David H. Lantzer  
Miguel G. del Rosario

Phone  
714-671-9963

Fax  
Office (714) 671-9399  
Guy Gilbert's (714) 242-1359

E-Mail  
Info@CGBLaw.com  
GuyGilbert@CGBLaw.com  
JamesBachor@CGBLaw.com  
DavidLantzer@CGBLaw.com  
MdelRosario@CGBLaw.com

### A Full Service Law Firm

Serving the needs of small and medium sized California businesses with an emphasis on:

- Federal PMPA Litigation
- Service Station franchise Purchase, Operation and Sale
- Automotive Service Facility Purchase, Operation and Sale
- Convenience Store Purchase, Operation and Sale
- Fast Food Franchise Purchase, Operation and Sale
- Franchise regulation, nonrenewals and terminations
- Franchise Litigation
- Bureau of Auto Repair Licensing & Discipline
- Department of Weights & Measures Violations & Hearings
- California Air Quality Management Districts
- Environmental Regulation and Litigation
- General Business Counseling and Litigation.
- Eminent Domain-Condemnation
- Real Estate Purchase & Sale, Escrow and Litigation
- Estate Planning & Probate

### Carroll Gilbert & Bachor

Attorneys and Counselors at Law  
711 South Brea Boulevard  
Brea, California 92821-5310

Newsletter