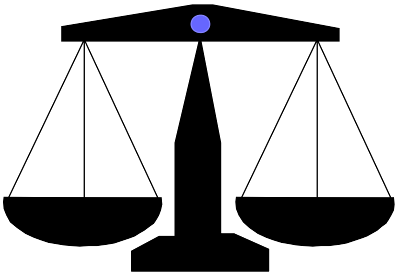

General Counsel Corner

By Peter H. Gunst, Esquire

The Long Arm of the Law

Two recent and very different cases illustrate that the law can have a long and heavy reach, even as applied to major oil companies.

Abrahim & Sons Enterprises v. Equilon Enterprises, LLC., an unpublished opinion decided by the Ninth Circuit Court of Appeals on April 4, 2002, concerned the complaint of numerous California lessee dealers that Shell and Texaco had violated California law by transferring their stations to Equilon, a limited liability company controlled by the two oil companies, without affording the dealers bona fide offers to purchase their leased stations.

The California statute that the dealers contended gave them a right to receive bona fide offers of sale, California Business & Professions Code §20999.25(a), is straight forward. It provides:

> In the case of leased marketing premises as to which the franchisor owns a fee interest, the franchisor shall not sell, transfer, or assign to another person the franchisor's interest in the premises unless the franchisor has first . . . made a bona fide offer to sell, transfer, or assign to the franchisee the franchisor's interest in the premises.

The facts pertaining to the station transfers were also straight forward. Shell and Texaco deeded their stations to a new legal entity controlled by both of them, Equilon, without making any offer of sale to any of their franchise dealers.

Nevertheless, the district court found for the oil companies and dismissed the case, accepting the oil companies' argument that their "contribution of assets" to Equilon did not amount to a sale, transfer or assignment to another party.

The Ninth Circuit Court of Appeals reversed. First considering the statutory requirement that there be a transfer to another "person", the appeals court concluded that Equilon was a separate and distinct entity, even though it was owned and controlled by Shell and Texaco.

The court emphasized that a core purpose of establishing an LLC, or limited liability company, is to insulate its members from direct liability for the activities conducted by the LLC. This insulation from liability can only occur because the LLC is, under law, a separate entity from its members. To argue that it was not a separate "person", as the oil companies attempted, would undercut the very justification for an LLC.

Moreover, the court concluded as a practical matter that Equilon simply was not the same entity as Shell or Texaco. Equilon consolidated the assets of the two oil companies so that "gas stations, which previously were owned by only one oil company, now will be controlled and influenced by both companies." Therefore, Equilon was "another person" than either Shell or Texaco.

The appellate court next considered whether there had been a "transfer" within the meaning of the statute. It had little difficulty in concluding that a "transfer" had, in fact, occurred.

A corporate grant deed had been produced that showed that Shell had transferred title of its properties to Equilon. It appeared that Texaco likewise had executed a similar grant deed. Both companies' SEC filings showed that neither company retained complete control over its former properties.

As a matter of California corporate law, Shell and Texaco possessed no legal interest in the assets, once they had been contributed to the LLC.

It is puzzling that the situation arose in the first place. The California statute at issue had been on the books since 1981. Its constitutionality had been upheld in a published California state court appeals decision, *Forty-Niner Truck Plaza, Inc. v. Union Oil Co.*, 58 Cal. App. 4th 1261, 68 Cal. Rptr. 2d 532 (Ct. of App., 3rd Dist. 1997). Yet Shell and Texaco apparently proceeded without appreciating the law's impact.

We will wait to see what happens next. The Ninth Circuit's underlying conclusion appears to be final. What remains, however, is the issue of what remedy will be afforded to impacted lessee dealers.

The second case is a jury verdict entered in far away Guam on May 15, 2002 in *Park v. Mobil Oil Guam, Inc.*

Mobil dealer Michael Park discovered that he was being systematically cheated by his supplier's drivers, who parked their tanker trucks on a slope so that motor fuel inside the tankers would not fully empty into his underground storage tanks, even though he was being charged for full loads.

The jury found that the drivers were using some of the fuel paid for by Mr. Park for their own use and were also pouring some back into the Mobil storage facility, all with the knowledge of the terminal manager.

The jury found that Mr. Park's actual damages were $50,000, a not inconsiderable sum. Of far greater significance, however, the jury found that the actions of Mobil's employees constituted intentional fraud, and imposed punitive damages against Mobil of $2,800,000. Mobil, it is said, plans to appeal.

Obviously, the two cases are very different. They share, however, the common lesson that even large corporations are not immune from the law's reach.

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