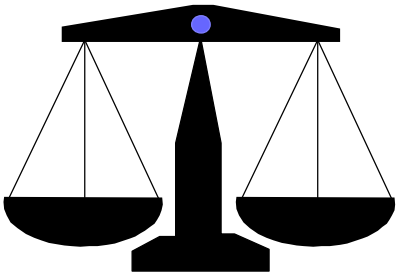

General Counsel Corner

By Peter H. Gunst, Esquire

A Condemnation Quagmire

When a state takes a service station site for public purposes, how if at all is the condemnation award split between the oil company landlord and the dealer tenant?

Answering that question often requires a complex examination of constitutional and state condemnation law, as well as the terms of the franchise and lease agreement existing between oil company and dealer. The results of such analyses may not always appear to be consistent.

Consider two recent cases that reached what appear to be opposite conclusions concerning the effect of a standard condemnation provision contained within Sunoco's dealer agreement. The provision reads:

> Dealer shall have no claim to any portion of a condemnation award payable to Company arising from any such taking or from damages to Premises resulting therefrom. However, Dealer may be entitled to any separate award payable to Dealer for taking of Dealer's leasehold interest, loss of business opportunity, or goodwill.

In *Bajwa v. Sunoco, Inc*., 320 F. Supp.2d 454 (E.D. Va. 2004), when Sunoco learned of the Commonwealth of Virginia's intention to condemn a service station property as part of its plan to widen the Woodrow Wilson Bridge, it terminated the dealer's franchise agreement pursuant to its terms and in accordance with §2802(c)(5) of the PMPA, which permits termination upon "condemnation or other taking ... pursuant to the power of eminent domain."

Thereafter, Sunoco entered into an agreement to sell the service station property to the Commonwealth for $1,750,000, which it refused to share with its terminated dealer. The dealer, who received only a $50,000 reallocation allowance from the Commonwealth, sued Sunoco in state court.

Following removal of the case to federal court, Judge Cacheris entered summary judgment for Sunoco in May 2004, holding that the dealer had no entitlement to share in the money paid by the Commonwealth, despite the complete destruction of his leasehold interest.

After rejecting the dealer's contentions that he had independent rights to compensation under the Constitutions of the United States and Virginia and the PMPA, Judge Cacheris considered the dealer's argument that he had a right to share in the condemnation award as a matter of Virginia law.

Rejecting the dealer's argument, Judge Cacheris emphasized that the parties' franchise agreement permitted Sunoco to terminate when it received

notice of the Commonwealth's intention to condemn the property. As a result, Judge Cacheris held, the dealer had no independent right to recover under Virginia condemnation law, and was left only with whatever rights, if any, he possessed under the terms of the parties' franchise agreement.

Judge Cacheris' conclusion that termination resulted from "the agreement between the parties, not the forced sale to the Commonwealth," appears strained. Under the PMPA, specific cause must exist to justify termination, and the cause relied upon by Sunoco was that set forth in §2802(c)(5), "condemnation or other taking ... pursuant to the power of eminent domain." To separate out the termination from the condemnation, as the court did, would appear to exalt form over substance.

Restricting the dealer's rights to what was provided for under the contract, Judge Cacheris held that the dealer had "waived his right to recover any portion of the general condemnation award from the state," and could only seek to recover from the Commonwealth "a separate award for the value of his leasehold," a claim that could not be pursued against Sunoco. In sum, the dealer was out of luck and out of court.

Now consider the decision reached later that year, in December 2004, by a Connecticut state appellate court in *LMK Enterprises, Inc. v. Sun Oil Co.*, 86 Conn.App. 302, 860 A.2d. 1229 (2004).

There the dealer sued under a virtually identical provision contained within his lease and franchise agreement after Sunoco refused to share any portion of the State's $805,000 compensation award. The trial court had entered judgment for Sunoco finding, as a matter of law, that the dealer had no right to share in the condemnation award under the express language of the contract provision.

Reversing in a unanimous three-judge opinion, the court held that the contract provision did *not* eliminate the dealer's right to recover for the destruction of his leasehold interest because it merely provided that he would have no right to claim "any portion of a condemnation award *payable to Sunoco*."

Because the condemnation award was intended to compensate for the loss of the *entire* property, and not merely the Sunoco's ownership interest, the dealer retained his right to demand that portion of the overall award that represented the loss of his leasehold interest.

To this reader, there does not appear to be any persuasive way to square the results reached in the two decisions.

In *Bajwa*, Judge Cacheris did emphasize Sunoco's contractual right of termination as an event separate from the condemnation proceeding, but the issue still remained as to what rights the dealer enjoyed under the terms of his franchise agreement. In *LMK Enterprises*, the court held that, under those contract terms, the dealer had a right to share in the condemnation award to the extent of the value of his leasehold interest.

Of interest, the appeal pursued by the losing dealer in *Bajwa* was dismissed by agreement of the parties in late December 2004, approximately three weeks after the Connecticut appellate

court had provided its interpretation of the form contract provision at issue. The apparent conflict between *Bajwa* and *LMK Enterprises* remains unresolved, at least for the present.

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