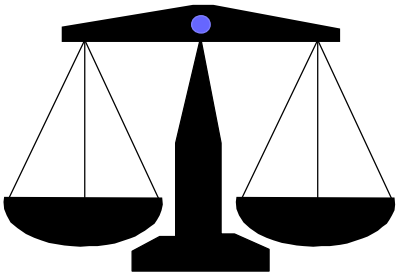

General Counsel Corner

By Peter H. Gunst, Esquire

A Modest Proposal

Professor Warren Grimes is the rare antitrust scholar who retains sympathy for the small business person who has to cope with a powerful supplier or franchisor. He was of great assistance to SSDA in developing its arguments in its effort to protect dealers against the imposition of retail price ceilings by their suppliers.

In a well thought out article in the most recent issue of the *Antitrust Law Journal*, Professor Grimes recognizes how the federal Sherman Act — enacted to protect the powerless against the powerful — has been twisted to an opposite effect. He raises a modest proposal to level the playing field.

The problem he sees is that small businesses acting together run the risk of being branded an illegal conspiracy in restraint or trade, even if they are merely responding to the aggressive actions of a far larger, unitary supplier. Even though the supplier is far more powerful, it has greater license under the antitrust laws because it acts alone and, as a matter of law, cannot conspire with itself.

The resultant imbalance, says Professor Grimes, "leads to economic consequences that are the very antithesis of competition and to well-founded cynicism about the antitrust laws."

One of the areas that Professor Grimes views as most vulnerable to abuse is the franchise relationship. He emphasizes that the franchisor holds power over the franchisee because the franchisee has "sunk costs" — investments in the franchise — "that bind a franchisee to a franchisor and permit the franchisor to exert power" over the parties' relationship.

Professor Grimes argues persuasively that joint franchisee action should not be branded as illegal conspiracy where it is undertaken solely to offset the superior market power that the franchisor exercises over its franchisees. Indeed, he argues that joint franchisee action "will likely be procompetitive" when franchisees "bargain collectively to pressure the franchisor to abandon tie-ins that force the franchisees to purchase inadequate and overpriced" products or services.

After carefully balancing the potential dangers of permitting some level of "conspiratorial" conduct among small business people against their need to unite their interests in order to bargain effectively with their supplier, Professor Grimes proposes a balanced compromise. He suggests a "safe harbor" against antitrust liability for small players with a collective market share of 20% or less and also for "similarly situated small players that sell or buy exclusively" from a common powerful entity. Additionally, he proposes "a near-miss fallback rule" to protect small players whose collective action is unlikely to have anticompetitive effects.

His proposal would protect narrowly-targeted collective action by franchisees reacting against the imposition of onerous terms by their suppliers. For example, dealers having a common brand would be free to take joint

action against a supplier who sought to require them to use a specific product, or in order to oppose a supplier's oppressive pricing policies. He stresses, however, that "the collective action should be narrowly crafted to address the market power abuse."

What Professor Grimes proposes is, of course, at bottom only an academic exercise. But it is based upon the important recognition that the purpose of antitrust law is perverted when it favors the powerful against the small.

The Sherman Act, it should be remembered, was enacted in 1890 as a populist response to the evils of the trusts. One of its first major applications was to break up the concentration of economic power that was then Standard Oil.

Now, ironically, not only are the federal antitrust laws being interpreted to permit the reconcentration of the petroleum industry, but the antitrust laws may possibly be used by the leviathans against small business people. Professor Grime's proposal would restore much needed balance to the antitrust laws.

pgunst@aggt.com

astrachan gunst thomas
attorneys at law
a professional corporation