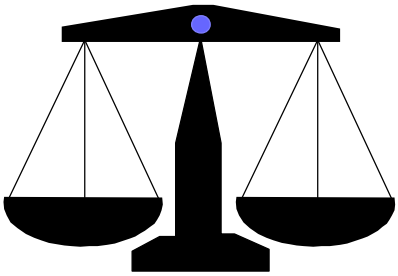

General Counsel Corner

By Peter H. Gunst, Esquire

A Bronx Cheer and a Hearty Cheer

Our Bronx cheer goes to the Federal Trade Commission, or at least to some of its personnel. The FTC, which along with the Justice Department is tasked to enforce the federal antitrust laws, recently has seen fit to lobby against state legislation in Virginia and New York State to outlaw below-cost pricing and other predatory practices. It has no justification for turning into a lobbyist, and its message is misleading.

It is ironic that an agency charged with combating deceptive trade practices is now guilty of pursuing deceptive lobbying practices itself. The 15-page letter that its two representatives directed to New York Governor George E. Pataki based its opposition to the New York legislation on two extremely dubious propositions: first, that protection against predatory pricing is unnecessary because it "merely duplicates existing protections" under federal antitrust law and, second, that "considerable economic research" shows that such laws "can result in significantly higher prices to consumers." To both we say balderdash.

The Supreme Court has interpreted federal antitrust law as requiring that predatory pricing have a substantial and prolonged effect on competition. As a result, those laws offer little or no protection to an independent service station dealer, whose business can quickly be irreparably injured or destroyed by unscrupulous pricing practices.

In its decision in *Brooke Group v. Brown & Williamson Tobacco,* the Supreme Court itself acknowledged that the federal antitrust laws are insufficient to protect injured dealers, saying "that below-cost pricing may impose painful losses on its targets is of no moment to the antitrust laws if [overall competition throughout a broad geographic market] is not injured."

Moreover, the FTC is living in a vacuum if it does not recognize that the cost of pursuing a case under the federal antitrust laws is so enormous that those laws provide little or no remedy to a targeted dealer. Attempting to fund such litigation is daunting under the best of circumstances. Attempting to pursue that "remedy" after a business has been crippled or destroyed is well-nigh impossible.

Surely the FTC must know that the federal antitrust laws were not intended to address every act of unfair economic oppression. Surely the FTC must know that it is the legislature's function, not the FTC's, to determine whether state laws should be passed to protect small dealers against the unscrupulous conduct of large rivals or suppliers.

That both federal and state legislatures have deemed the economic interest of dealers worthy of protection is demonstrated by Congress' passage of the Petroleum Marketing Practice Act and by the passage by state legislatures of numerous franchisee protection and dealer freedom acts. Indeed, while holding that certain pricing restraints imposed by a supplier on a gasoline dealer did not violate the federal antitrust laws, the Supreme Court was careful to note in *State Oil v. Kahn* that injured dealers were "of course

free to seek legislative protection from gasoline suppliers of the sort embodied in the Petroleum Marketing Practices Act."

The FTC's claim that the prohibition against predatory pricing "can result in significantly higher prices to consumers" is equally specious. Even the FTC must concede that there are no authoritative studies to support its bald assumption. Indeed, some studies have come to the opposite result. Saying something simply does not make it so.

If a state legislature has decided that the public's interest is best served by prohibiting below-cost selling and other predatory practices, representatives of the FTC have no legitimate basis or standing to second-guess the legislature's decision. Quite simply, the FTC or at least its representatives are interfering where they have no right or duty to interfere.

Our hearty cheer is for the recent decision of the federal appeals court in the case of *Mathis v. Exxon.* The Fifth Circuit Court of Appeals affirmed the award of $8,000,000 in damages and attorneys fees to a group of Texas dealers who contended that Exxon had set its wholesale prices at uncompetitive levels in an attempt to drive them out of business, and to convert their stations into company-operated locations.

The case is significant not only in its own right, but also because it cited with approval and adopted the reasoning of the federal district court's opinion in the Florida national class-action case, *Allapattah Services v. Exxon.* That case remains to be resolved on appeal, and it is hoped that the appeals court will find the Fifth Circuit's reasoning in *Mathis v. Exxon* to be persuasive in upholding that verdict.

Both the district court's decision in *Allapattah Services v. Exxon* and the Fifth Circuit's decision in *Mathis v. Exxon* strike a constructive balance between the supplier's freedom to determine its wholesale prices and the dealer's right to be protected against the abuse of pricing power to drive him or her out of business, and to replace the independent dealer with a company-operated location.

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