



General Counsel Corner

By Peter H. Gunst, Esquire

“New Federalism” and the FTC

In this era of “new federalism”, where a slim conservative majority of the United States Supreme Court has vowed to protect state governments from unwarranted federal interference, it is disconcerting to observe the activities of the Federal Trade Commission.

In the past, we have protested the FTC’s unwarranted efforts to block state legislation in New York and Virginia aimed at combating predatory pricing in the petroleum industry. Now, the FTC apparently has expanded its activities to attack state divorcement legislation enacted by the Hawaii legislature.

According to *Oil Express*, the FTC has weighed in with Hawaii lawmakers to urge repeal of a recently enacted statute capping the price of unleaded gasoline based upon West Coast prices, as well as the repeal of Hawaii statutes capping station rents and barring refiners and jobbers from opening company-operated service stations near existing dealer-operated stations.

The FTC’s methodology continues to be to make sweeping pronouncements concerning “consumer welfare” based upon its own ideological predilections. In attacking proposed New York legislation and enacted Hawaii legislation, for example, the FTC relied heavily on its own skewed interpretation of the impact of Maryland’s divorcement statute.

In so doing, the FTC refused to accept input from Maryland officials and others with direct knowledge of the Maryland experience. Instead, it elected to rely on a dated and “unbiased” study that just happened to be commissioned and paid for by one of the major refiners that had opposed enactment of the Maryland statute.

This writer has been a proud resident of the Free State of Maryland for over forty years. Never have I heard any fellow citizen suggest that any evil has befallen Maryland consumers by reason of the Maryland divorcement statute.

Indeed, I have heard the most knowledgeable Maryland official on the subject testify that the law has had no adverse effect. Yet the FTC apparently had no interest in hearing what he had to say.

Nor does there exist any argument that divorcement statutes run afoul of the protections provided by the United States Constitution to screen out discriminatory economic regulation, the Commerce and Due-Process Clauses.

Nine refiners attempted unsuccessfully to attack the Maryland divorcement statute under both clauses in litigation which reached the Supreme Court of the United States in 1978. Like the FTC, which now appears to represent their interests, the refiners sought to argue “the economic wisdom of the statute.”

Rejecting that argument, the Supreme Court emphasized Maryland's independent authority to make its own economic evaluations, and "to legislate against what are found to be injurious practices in [its] internal commercial and business affairs."

That lesson should have been learned by the FTC. It likewise has no justification for foisting its own agenda on state governments, particularly where it relies on biased "economic evidence," and seems unwilling to consider real-world experience.

It was heartening to see, however, that one arm of state government – the Supreme Court of Virginia – still sees its role as enforcing the law, rather than trying to rewrite it.

In *Frank Shop, Inc. v. Crown Central Petroleum Corp.*, 264 Va. 1, 564 S.E.2d 134 (2002), the Supreme Court of Virginia confronted a refiner that had continued to operate a service station within a prohibited distance of an independent dealer, even after the court had found that the refiner's operation violated the state divorce act.

Holding that the trial court had abused its discretion by staying enforcement of the law while the refiner allegedly sought to find a replacement operator, but continued to profit through illicit station operation, the Supreme Court of Virginia pronounced:

This is a situation where a party, held by this Court to be in violation of the law, seeks judicial permission to continue violating the law

until it works itself out of this supposed hardship in which it finds itself... [I]t was a clear abuse of discretion for the trial court to grant such permission. The trial court should have made the injunction effective immediately.

Not only did the Supreme Court of Virginia order immediate enforcement of the divorce statute, but it also required the refiner to turn over all of its station profits to the independent dealer for the period in which it had ignored the court's earlier ruling.

Through its decision, the Supreme Court of Virginia enforced the legitimate judgment made by that state's legislature in passing a valid piece of economic regulation. That process, according to the United States Supreme Court, remains the legitimate province of state government, and should not be meddled with by the FTC.

pgunst@agtalawyers.com

astrachan gunst thomas

attorneys at law
a professional corporation