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Resale Price Maintenance and Minimum Advertised Pricing: Structuring to Minimize Antitrust Scrutiny

State, Federal, and International Treatment of RPM Agreements and MAP Policies

THURSDAY, SEPTEMBER 10, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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U.S. Antitrust Rules for Unilateral Price Policies and Minimum Advertised Price Policies

Michael A. Lindsay

DORSEY & WHITNEY LLP

Some Terminology

- **“Resale Price Maintenance” (RPM) describes a range of practices by which a manufacturer tries to influence a reseller’s pricing of the manufacturer’s products**
 - Vertical relationship
 - “Vertical Price Fixing” is what you say if you don’t like it!
- **Two significant distinctions to bear in mind**
 - Distinction 1: Actual selling price vs. advertised price
 - Distinction 2: Agreement vs. unilateral policy

Terminology, cont'd

- **Minimum Advertised Price Policy (MAP)**
 - Applies *only* to advertised price, not to actual selling price
 - Gray area as to where advertising ends and selling price begins
 - In-store advertising in bricks & mortar stores
 - “Shopping cart” prices in online world
- **Unilateral Pricing Policy (UPP)**
 - Applies to *both* advertised price and actual selling price
 - Conceptual distinction between advertised price and actual selling price becomes irrelevant
 - Sometimes referred to as “RPM Policy” or as “*Colgate* Policy”

Terminology, cont'd

- **Both UPP and MAP policies are *unilateral* policies**
 - Reseller is free to disregard, but manufacturer can terminate or limit relationship
 - Inadvertence can convert a policy into an agreement
- **MAP *can* be implemented by agreement, rather than through unilateral policy**
 - Debatable whether a contractual right is valuable for manufacturer
 - More value to legal enforceability insofar as MAP applies to “coop” advertising



U.S. Federal Law



RPM Agreements

- **Under federal law, resale price agreements that are truly vertical agreements are judged under the rule of reason**
 - This was not the case when many of us went to law school!
 - You will still find counsel and business people who remember the old rules
 - And US law is an outlier on the global stage
- **The rule of reason approach results from the gradual removal of vertical agreements from the per se category**
 - 1997's *State Oil v. Khan* abandoned per se rule for *maximum* resale price agreements
 - *State Oil Co. v. Khan*, 522 U.S. 3 (1997)
 - 2007's *Leegin* abandoned per se rule for *minimum* resale price agreements
 - *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007)

Leegin Rationale

- **Economics does not justify a per se prohibition of minimum RPM agreements**
 - RPM is not “always or almost always” anticompetitive
 - RPM can
 - Promote inter-brand competition by reducing intra-brand competition
 - Encourage provision of services by reducing “free-rider” problem of “discounting” resellers
 - Facilitate market entry by new brands, products, or firms
- **Administrative convenience does not justify a per se prohibition**
- **But *Leegin* did *not* establish a rule of per se legality**
 - Rule of Reason applies

When RPM Agreements Might Be Illegal

- **Enforcement mechanism for manufacturer cartel**

- “An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer”

- *Leegin*, 551 U.S. at 892

- **Enforcement mechanism for retailer cartel**

- “A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance”

- *Leegin*, 551 U.S. at 893

- **Protecting a dominance of manufacturer or retailer**

- “A dominant retailer . . . might request resale price maintenance to forestall innovation in distribution that decreases costs”
- “A manufacturer with market power . . . might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants”

- *Leegin*, 551 U.S. at 893-94

MAP Policies and Agreements

- **Rationale in *Leegin* applies to MAP as well as RPM**
- **Even some pre-*Leegin* cases suggested rule of reason treatment**
 - *In re Nissan Antitrust Litig.*, 577 F.2d 910, 915–17 (5th Cir.1978)
 - FTC in *CD Music* found MAP programs illegal under rule of reason where programs adopted by music manufacturers with collective 85%+ market share, each of whom had must-carry recordings
 - *In Re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003) (citing lack of precedent for holding MAP policies or agreements illegal per se)



State Law



State Antitrust Law

- **States can and do have their own antitrust laws**
- **Federal antitrust laws do not pre-empt state law**
 - *California v. ARC America Corp.*, 490 U.S. 93 (1989)
- **States are free to use antitrust laws to regulate markets somewhat differently than federal laws**
 - Some states have broad principles or requirements (in statutes or in case law) to construe state law consistent with federal law
- **States have not uniformly embraced *Leegin* for interpretation of state antitrust laws**

State Laws, cont'd

- **Resale pricing agreements (on actual reselling price)**
 - Are judged under the rule of reason in most states, but
 - May still be per se illegal in several states (notably California and Maryland)
- **50-state survey of state laws relating to RPM is available on *Antitrust Source***
 - https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf (last updated April 2017)
 - Send comments to lindsay.michael@dorsey.com

California Statute

- **A “trust” is a combination**
 - To “increase the price of merchandise or any commodity”
 - CAL. BUS. & PROF. CODE § 16720(b) (2009)
 - To “fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity”
 - CAL. BUS. & PROF. CODE § 16720(d)
 - To “agree in any manner to keep the price of such article . . . at a fixed or graduated figure”
 - CAL. BUS. & PROF. CODE § 16720(e)
 - To “establish . . . the price of any article . . . between them . . . and others, so as directly or indirectly to preclude a free and unrestricted competition . . .”)
 - CAL. BUS. & PROF. CODE § 16720(e)

California State Enforcement

- **California state AG filed a series of enforcement actions in early part of this decade, taking position that RPM agreements continue to be per se violations of state law**
- ***People v. DermaQuest (2010)***
 - “Distributor may not resell Product in a price structure that yields a Product price at ultimate retail sale below DermaQuest's Suggested Retail Price (DSRP)”
 - Consent order for injunction, \$70,000 in civil penalties, and \$50,000 in costs
 - *People v. DermaQuest, Inc.*, Case No. RG 10497526 (Cal. Super. Ct. Alameda Cnty., Feb. 23, 2010)
- ***People v. BioElements (2011)***
 - Consent order for injunction, \$15,000 in civil penalties, and \$36,000 in costs
 - Final Judgment Including Permanent Injunction, *People v. BioElements, Inc.*, Case No. 10011659 (Cal. Super. Ct. Riverside Cnty., Jan. 11, 2011)

California Private Litigation

- **State and federal decisions under California law suggest RPM agreements remain per se unlawful under Cartwright Act**
 - *Alsheikh v. Superior Court*, 2013 WL 5530508, at *3 (Cal. App. 2 Dist. Oct. 7, 2013) (dicta) (vertical price-fixing not adequately alleged, but “vertical price fixing is a per se violation of the Cartwright Act”)
 - *Darush MD APC v. Revision LP*, No. 12-cv-10296, 2013 WL 1749539 (C.D. Cal. Apr. 10, 2013) (granting 12(b)(6) motion but with leave to amend) (“Under current California Supreme Court precedent, vertical price restraints are per se unlawful under the Cartwright Act.”)
 - *But see In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, No. 3:12-cv-3515-B, 2014 U.S. Dist. LEXIS 152428, at *47 (N.D. Tex. Oct. 27, 2014) (“lower courts have diverged” on whether RPM agreements are per se unlawful in California post-*Leegin*, “leaving the law in California unclear”)
- **Sara Lee recently settled a vertical price-fixing class action for \$14.5M**
 - Plaintiffs’ claims survived motion to dismiss by alleging Sara Lee required distributors use a record-keeping system that did not allow them to change prices charged to retailers
 - Amended Order Granting Final Approval to Class Action Settlement, *Kaewsawang v. Sara Lee Fresh, Inc.*, No. BC360109 (Cal. Super. Ct. Los Angeles Cnty. Aug. 2, 2019); [Sara Lee's \\$14.5M Price-Fix Deal With Distributors Nears OK](#) (March 20, 2019).

Maryland

- **Any agreement “that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service” is an unreasonable restraint of trade**
 - Md. Code Ann., Com. Law § 11-204(b)
- **In 2016, Maryland AG sued J&JVC for UPP that allegedly included terms negotiated with Costco**
 - For UPP to be legal in MD, policy “must result from the purely unilateral decision of a manufacturer, without negotiation as to its terms, and must be enforced unilaterally”
 - Complaint, State of Maryland v. Johnson & Johnson Vision Care, Inc., File No. 03C16002271 (Balt. Cty. Cir. Ct. Feb. 29, 2016), http://www.marylandattorneygeneral.gov/News%20Documents/JJVC_COMPLAINT.pdf
- **No substantive rulings, and case settled in 2017 with J&JVC Assurance of Discontinuance and payment of \$50,000**
 - [Attorney General Frosh Announces Settlement of Price-Fixing Lawsuit](#) (Mar. 30, 2017)

New York

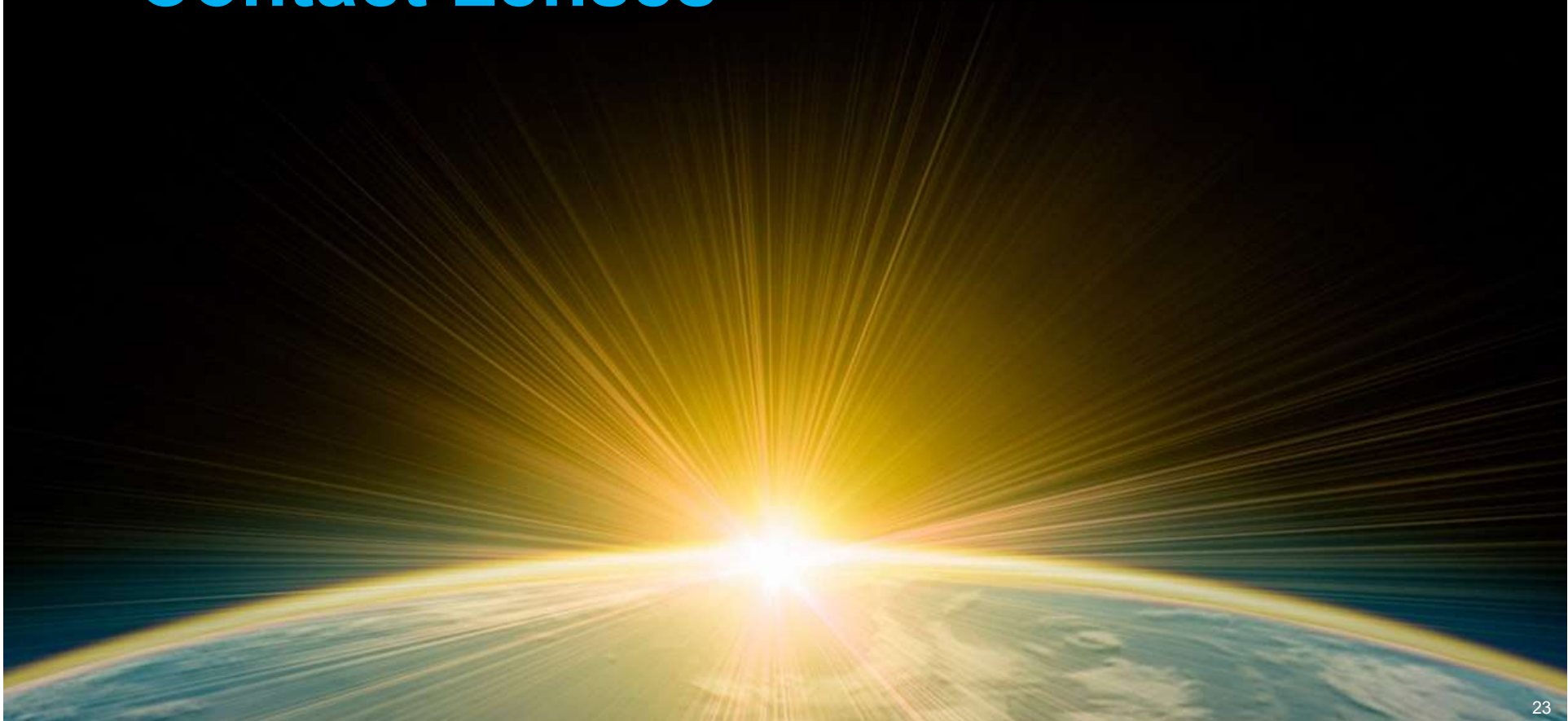
- **“Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable at law.”**
 - N.Y. Gen. Bus. – Art. 24-A - § 369-A Price-fixing Prohibited
- **NY law (369-a) makes resale pricing agreements *unenforceable* but not *actionable***
 - Decision, Order, and Final Judgment, *People v. Tempur-Pedic, Int'l, Inc.*, 400837/10 (N.Y. Sup. Ct. N.Y. County filed Jan. 14, 2011), *aff'd* 2012 NY Slip Op 3557, 95 A.D. 3d 539 (N.Y. App. Div. 2012)
- **MAP agreement “cannot be the subject of a vertical RPM claim, because they do not restrain resale prices, but merely restrict advertising”**
 - *Id.*

Utah Statute and Litigation

- **In 2015, Utah passes statute forbidding a lens manufacturer or distributor to “take any action, by agreement, unilaterally, or otherwise, that has the effect of fixing or otherwise controlling the price that a contact lens retailer charges or advertises for contact lenses.”**
 - UTAH CODE ANN. § 58-16a-905.1(1)
 - *Anti-Colgate*: Applies not just to “agreements” but also to a manufacturer’s unilateral actions
 - *Anti-MAP*: Applies not just to actual selling prices, but to advertised prices as well
 - *Anti-Khan*: Applies to both minimum and maximum prices (although the statute was prompted, presumably, by concerns about minimum prices)
- **A divided 10th Circuit panel upheld the statute against manufacturers’ Commerce Clause challenge**
 - “If retailers or eye-care professionals selling contact lenses outside of Utah can’t compete with the lower price available from retailers in Utah, that’s not Utah’s fault. [The law] doesn’t require retailers in other states to sell at higher prices—it doesn’t address retailers in other states at all. . . . [The law] treats all retailers in Utah the same.”
 - *Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 F. App’x 736, 743 (10th Cir. 2016)
 - The dissent found discrimination against out-of-state retailers because “Utah hosts a retailer, 1-800 CONTACTS, which sells roughly 99% of its contact lenses outside of Utah. The Utah statute allows 1-800 CONTACTS to always undersell retailers outside of Utah”
 - *Id.* at 751 (Bacharach, J. dissenting)



Example of Post-*Leegin* Litigation: Contact Lenses



Contact Lens Litigation: Background

- **Contact lenses are prescribed by Eye Care Professionals (ECPs) on brand-specific basis**
 - Shifting brands requires new prescription
- **Four leading manufacturers account for approximately 90% of contact lens sales**
- **Contact lenses sold through ECPs and through other channels, including mass merchandisers (e.g. Costco) and online (e.g. 800-Contacts)**
- **In 2013 and 2014, each of the four manufacturers announces its own “unilateral pricing policy”**
 - Defendants discontinue policies at various dates
- **Private class action cases were consolidated for pretrial purposes in Middle District of Florida MDL proceeding**
 - *In re Disposable Contact Lens Antitrust Litig.*, 109 F. Supp. 3d 1369 (J.P.M.L. 2015)

Horizontal Allegations Survive Rule 12

- **Knowledge**
 - Each manufacturer knew of ECP complaints
 - Number of persons (the ECPs) to be coordinated was very large
 - Opportunities to exchange information at trade shows
- **Market Structure**
 - Adoption of RPM policies represented a “fundamental” change in the industry
 - Significant portion of market affected
 - Price increases were dramatically large (40% to 112%)
 - No one lens manufacturer would be able to raise its prices significantly unless others went along
- **Timing**
 - Policies were all adopted within a relatively compressed time period (between 6 and 13 months)

In re Disposable Contact Lens Antitrust Litig., File No. 3:15-md-2626 (M.D. Fla. June 16, 2016)

Vertical Allegations Survive Rule 12

- **Vertical information flow**
 - “ECPs’ pressure on the Manufacturer Defendants to relieve ECPs of the price competition and thus the siphoning of sales of contact lenses to the Discount Retailers”
 - “Manufacturer Defendants’ dramatic response out of a concern for the ECPs’ ability to make a profit on selling contact lens which in turn would incentivize ECPs to prescribe their lenses”
- **Proximity of policy adoptions**
- **“[D]irect evidence of an actual negotiations and ‘agreement’”**

In re Disposable Contact Lens Antitrust Litig., File No. 3:15-md-2626 (M.D. Fla. June 16, 2016)

Current Status

- **Class certification granted in December 2018**
 - Horizontal class certified against all defendants (with subclasses for California and Maryland)
 - Vertical classes certified against Johnson & Johnson, Alcon, and B&L
 - *In re Disposable Contact Lens Antitrust Litig.*, 329 F.R.D. 336, 433-34 (M.D. Fla. 2018)
- **Defendants' summary judgment motion denied in November 2019**
 - “There is evidence that the UPPs were instituted pursuant to coordinated pressure . . . , the manufacturers sought agreement regarding the UPPs and the Defendants jointly policed the pricing policies.”
 - “[A]mple evidence of potential or actual anticompetitive market effects, demonstrated the alleged conspiracy was economically reasonable and substantiated their allegation that the UPPs imposed an unreasonable restraint on competition with no pro-competitive benefit.”
 - *In re Disposable Contact Lens Antitrust Litig.*, No. 3:15-md-2626-J-20JRK, 2019 U.S. Dist. LEXIS 209400, at *109-10 (M.D. Fla. Nov. 27, 2019)
- **A \$10M settlement with Bausch & Lomb and a \$3M settlement with CooperVision were approved in March 2020**
 - Final Approval Order and Final Judgment and Order of Dismissal with Prejudice as to Bausch & Lomb, Inc. and CooperVision, Inc., *In re Disposable Contact Lens Antitrust Litig.*, 3:15-md-2626-HES-JRK, ECF No. 1164, (M.D. Fla. Mar. 4, 2020)
- **Trial date for the remaining defendants (ABB, Alcon, and Johnson & Johnson) is not yet set, due to COVID-19 issues**
 - Joint Notice., *In re Disposable Contact Lens Antitrust Litig.*, 3:15-md-2626-HES-JRK, ECF No. 1201, (M.D. Fla. July 17, 2020)

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Resale Price Maintenance and Minimum Advertised Pricing – International Approaches

**William L. Monts III
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Resale Price Maintenance Under European Competition Law

- **The EU treats *minimum* resale price maintenance a restriction of competition “by object”**
 - Presumed anticompetitive; no effects need be shown
 - Includes both direct and “indirect” agreements on resale prices
 - Margins
 - Penalties for practices related to resale prices
 - Conditioning promotional support on maintaining resale prices
 - Prohibiting rebates or setting maximum rebates
- **Rationale**
 - restricts retail price competition;
 - collusion at supplier level; or
 - collusion at the distribution level

Resale Price Maintenance Under European Competition Law

- **Usually Sanctioned by Fine**
 - Private damages claims now permitted in some member states and in the United Kingdom
- **2010 Vertical Guidelines Permit Efficiency Defenses**
 - Limited-time practice accompanying manufacturer's introduction of a new product
 - Coordinated short-term low-price campaign in a franchise or similar distribution system
 - Prevent free riding when retailers may not have incentives to provide adequate pre-sale/point-sale services
 - Any other justification establishing the efficiency of the practice
- ***BUT* no significant cases in which an exception carried the day**
- **Competition laws of most EU member states generally follow EU rules**

Resale Price Maintenance Under European Competition Law

- **EU and Member State competition law generally allow for:**
 - Maximum resale prices
 - Minimum discounts
 - Suggested resale prices

But these practices must not be disguised forms of minimum resale price maintenance

Resale Price Maintenance Under European Competition Law

- **Traditional Enforcement Remains a Priority**
 - Four consumer electronics companies (Asus, Denon & Marantz, Philips, and Pioneer) fined €111 million, collectively
 - Guess fined €40 million for a host of restrictions, including limitations on the setting of independent retail prices by distributors
 - UK competition authority fined musical instrument companies Korg and Roland a total of £5.5 for restricting online discounting
- **Some Takeaways**
 - Resale price maintenance and indirect programs to control or influence resale prices in Europe remain high risk
 - Should be implemented only with the advice of experienced European competition counsel
 - Rise of private damages actions complicates the considerations
 - Some reconsideration of the Vertical Guidelines may lead to an economic approach in the future, but, until then, risks remain

Resale Price Maintenance Under Other Competition Law Regimes Around the World

- **China**

- Resale price maintenance expressly prohibited under the Antimonopoly Law
 - Rule of Reason analysis but burden basically on agreeing parties
 - Viewed skeptically by the State Administration for Market Regulation
- Technology Contracts
 - Unreasonable price restrictions on technology recipients illegal under the Contract Law

- **Korean and Canadian authorities have also imposed significant fines for minimum resale price maintenance agreements**

Practical Advice for Risk Reduction

The Bottom Line Outside the US and Canada Is . . .

- **Outside the United States and Canada, minimum resale price maintenance is almost always illegal**
- **Risk of substantial fines is high**
- **The few exceptions are:**
 - Limited in scope
 - Fact-specific
 - Place the burden on the parties to the agreement
 - Have not been tested in practice
- **The safest course: *Don't do it***
- **If there a compelling business need:**
 - Retain experienced local competition counsel
 - Document the business rationale under counsel's guidance
 - Consider less restrictive alternatives

Inside the United States

- **State laws – or at least a state’s or private plaintiff’s relative chances of success in challenging RPM agreements – vary significantly by state**
- **Maximum RPM challenges are still “mostly dead”**
- **The *Colgate* doctrine is alive and well (but with significant real-world complications)**
- **No simple way to eliminate all legal risk**
- **Uniformity may be achievable only with the lowest common denominator**
- **Manufacturers should continue to weigh the incremental risks and benefits of RPM agreements**
 - Caution in concentrated industries and segmented industries
 - Caution where policy introduction may be followed by large price increases for consumers on frequent-purchase products

Lawful Program Options in the U.S.

- **Express or tacit agreements on resale prices (as in *Leegin*)**
 - Must be vertical
 - Must satisfy the rule of reason
 - Guaranteed Rule of Reason analysis only under federal law and in a few states (e.g., Kansas)
 - Not available in states where per se rule applies
- **Agency or Consignment Relationships**
 - Must be *bona fide* agency relationship or consignment arrangement
 - Details of arrangements are subject to challenge
 - Varying state-law definitions of agency and consignment
 - Non-antitrust liabilities with agency relationships

Lawful Program Options in the U.S., cont'd

- **Wholesale Price Level Adjustments**
- **MAP Programs**
 - Applies (at least in theory) only to advertised prices
 - “Clever evasions”
 - Violations difficult to detect
 - Application to Internet sales is unclear
- **Colgate Programs**
 - Easy to understand in theory, but rarely easy to implement or monitor in practice
 - Often entail substantial burdens on the manufacturer (see Amicus Brief filed by Ping in the *Leegin* case)
 - Handling violations and discriminatory enforcement
- **Vertical Integration**

MAP Programs – Benefits and Challenges

- **MAP programs historically treated more leniently than resale price maintenance agreements when:**
 - Program is voluntary and imposed unilaterally by the manufacturer (and not as a result of prompting from a group of dealers)
 - Program tethered to advertising paid for by manufacturer with co-operative advertising funds
 - Dealer free to depart from the MAP in advertising for which he or she pays
- **MAP programs exist without all of these elements, but courts and enforcement agencies have sometimes given more stringent programs closer scrutiny**

MAP Programs – Benefits and Challenges, cont'd

- **MAPs subject to the “Clever Evader”**
 - “See Dealer for Price”
 - “Call Store for Price and Other Details”
 - “Prices So Low that We Can’t Tell You”
- **Internet Sales are Particularly Challenging**
 - Free riding
 - **BUT** advertised price/sales price distinction is less clear
 - Internet advertised price restrictions may be somewhat more likely to affect actual resale prices

Designing MAP Programs – Best Practices

- **Written policy promulgated unilaterally by the manufacturer**
 - Not included in dealer agreement
 - No assent sought
 - Clearly states the policy and the products to which it applies
 - Clearly and simply states the business rationale (e.g., premium product, protect reputation and brand image)
 - Clearly establishes the minimum advertised price
 - Explains the consequences of a violation
 - Risks of “progressive discipline”
 - Explains that manufacturer alone will enforce the policy
 - States that manufacturer does not solicit or desire complaints
 - But complaints will come
 - Have a central location for receipt of inquiries/complaints about the policy or violations

Colgate Programs – Benefits and Challenges

- **Easy to Understand in Theory**
 - Concept as articulated in *Colgate* is simple
 - But explaining to business clients why something that looks like an “agreement” really isn’t that simple
 - Manufacturer announces unilaterally determined minimum resale price
 - Manufacturer announces that it will not do business with any dealer selling below the announced minimum resale price
 - Terminates any dealer who does not comply

Colgate Programs – Benefits and Challenges

- **Real-World and Theory Almost Never Match**
 - Compliance
 - Natural inclination is to seek to compel compliance
 - Efforts to enforce compliance, however, risk becoming an “agreement”
 - “Coerced” compliance = agreement
 - Concept seems irrational to business personnel
 - The *Colgate Paradox*
 - Program is “safe” when all dealers on board (implies agreement)
 - Program is risky when mavericks emerge (implies lack of agreement)
 - Violation by big customers – the fingernail or the head?

Colgate Programs – Benefits and Challenges

- **Ubiquity of Dealer Complaints/Inquiries**
 - Manufacturer will say it does not want complaints
 - Dealers will complain
 - Often complaints are about violations by other dealers
- **Dealer complaints followed by manufacturer action alone is not enough to infer agreements on resale prices**
 - *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)
- **Complaints and action can be coupled with other evidence to show agreement**
 - “Coerced” compliance might create an inference that the manufacturer and “coerced” dealer agreed on a resale price
 - “Coercion” might create an inference that the manufacturer and complaining dealer agreed on resale prices

Colgate Programs – Benefits and Challenges

- **The “Helpful” Sales Representative**
 - Two Rules of Thumb
 - What makes a good sales representative makes an antitrust risk
 - Always check the sales files first
 - Sales representatives often receive dealer complaints first
 - Good sales personnel are “problem solvers”
 - Resolve complaints about non-compliance
 - Get everyone to “follow the rules” and “on board” with the program
 - Often sales staff will “helpfully” document their activities
 - All of these activities and documents become evidence of agreement on resale prices

Colgate Programs – Benefits and Challenges

- **Discriminatory/variable enforcement can be evidence of agreement**
 - Increases risk of dealer litigation
- **“Progressive” discipline followed by compliance**
 - May raise an inference of express agreement on resale prices or of “coerced” agreement on resale prices
 - A finding of agreement may be dispositive in states where resale price maintenance is per se illegal
- **Safest course of action**
 - Prompt and indefinite termination
 - Palatable from a business perspective? The fingernail or the head?

Reducing Risk: Developing a UPP/MAP Policy

- **Have a pro-competitive reason for your policy**
 - UPP and MAP are not panaceas for low prices or low reseller margins
- **Put policy in writing**
 - Imposes a discipline on manufacturer to think through business issues
- **Make the policy your own**
 - Do not adopt verbatim a competitor's policy
- **Get senior management buy-in before launching program**
 - Approval for consequences of noncompliance (including big customer)
 - Budget for lost unit sales
- **Do not negotiate a UPP policy with resellers**
 - Creates risk of vertical “agreement” illegal under state laws or horizontal hub-and-spoke agreement among retailers
- **Do not discuss UPP or MAP policy with competitors!**

Reducing Risk: Implementation

- **Pre-plan your enforcement program**
 - Know how you will detect noncompliance, and what consequences you will implement
 - Plan for consistent enforcement
- **Have a separate communications channel for questions about policy**
 - “MAP_Policy_Administrator@manufacturer.com”
- **Have clear decision-making process**
 - Decisions should have been made in advance, but still difficult to implement
- **Avoid discussing Reseller A with Reseller B**
 - Creates risk of hub-and-spoke agreement
- **Avoid inadvertent RPM “agreement”**
 - No contractual requirement to comply with “all” policies

Thank you

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