Resale Price Maintenance Post-Leegin
Avoiding Anti-Competitive Conduct in an
Uncertain Legal Environment

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:
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Resale Price Maintenance Post-*Leegin*

Avoiding Anti-competitive Conduct in an Uncertain Legal Environment

Lynda K. Marshall

May 7, 2009
Resale Price Maintenance Defined

• Resale price maintenance refers to:
  – An agreement on price
    • May involve a specific price, a price floor (minimum resale price maintenance) or a price ceiling (maximum resale price maintenance)
  – Between entities at different levels of the market
    • Characterized as a vertical restraint
    • Generally between a manufacturer and its distributors
  – Regarding the resale price of a product or service

• Until 1997, both minimum resale price maintenance and maximum resale price maintenance were per se illegal
  – In 1997, the Supreme Court in State Oil Co. v. Kahn (1997) overturned the per se rule as it applied to maximum resale price maintenance, holding that such arrangements are subject to rule of reason analysis.
  – In 2007, the Supreme Court overturned the per se rule applicable to minimum resale price maintenance in Leegin Creative Leather Products, Inc. v. PSKS, Inc. (2007).
Leegin Creative Leather Products v. PSKS, Inc.

• The Facts

– Leegin Creative Leather Products designs, manufactures and distributes leather goods and accessories under the Brighton brand name.

– In 1997, Leegin instituted a policy under which it refused to sell to retailers that discounted Brighton goods below suggested prices.

– PSKS, Inc., a retailer that operated a women’s apparel store in Texas, carried Brighton goods, but refused to adhere to the suggested price.

– Leegin stopped selling to PSKS’ Texas store as a result of the store’s refusal to adhere to Leegin’s suggested pricing.

– PSKS sued Leegin alleging that Leegin’s policy was a violation of Section 1 of the Sherman Act.
Leegin Creative Leather Products v. PSKS, Inc.

- The Decision
  - Rule of reason analysis applies to minimum resale price maintenance agreements
  - The following factors play a role in the analysis:
    - The number of manufacturers that make use of the practice
      - When only a few manufacturers adopt the practice, there is little likelihood that the practice is facilitating a manufacturer cartel.
    - The source of the restraint
      - If retailers have pressured the manufacturer to adopt the restraint, it may be indicative of a retailer cartel.
    - The market power of the manufacturer and the distributors
      - The greater the market power of the parties, the greater the chance that the agreement is anticompetitive.
The Reasoning

- Per se rules should be limited to practices that always or almost always tend to restrict competition and decrease output – that maxim cannot be applied to minimum resale price maintenance

- Minimum resale price maintenance agreements can have the following pro-competitive effects:
  - Increasing interbrand competition by reducing intrabrand competition
  - Improving product quality, service and safety by fostering distributor investment
  - Facilitating entry by enabling distributors to recover initial market development costs
  - Increasing consumer options – consumers can choose between low-price and low service, high-price and high service or something in between
Federal Caselaw post-Leegin

- There are only a handful of cases out there considering the issue of resale price maintenance post-**Leegin**
  - The *Leegin* case itself was remanded after the Supreme Court decision and was dismissed last month
    - Failure to define a relevant market
  - The class action stemming from *Leegin* was dismissed in August 2008
    - No allegation of horizontal agreement deserving of per se treatment
    - Failure to define a relevant market
    - No allegation of anticompetitive effect
  - The few remaining cases offer little guidance
    - *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*
    - *Babyage.com, Inc. v. Toys “R” Us, Inc.*
    - State unfair trade/sales act cases
Resale Price Maintenance Post-\textit{Leegin}

Reactions from the States, Federal Antitrust Agencies, and Congress

May 7, 2009
Reactions from the States
The states have been vocal critics of the *Leegin* decision

- To say the states are skeptical of *Leegin* is an understatement
  - From the beginning, the states have been hostile to eliminating the per se rule against resale price maintenance agreements
  - 37 states filed an amicus brief with the Supreme Court urging continuation of the per se rule
States have promised continued enforcement of resale price maintenance cases

- Per se cases under state law
  - E.g., New York General Business Law section 369-a: “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 or actionable at law.”
  - “State law is wholly enforceable even if it diverges from federal antitrust jurisprudence on vertical price fixing. . . . The history of the [state] fair trade laws, the repeal of the fair trade laws, and the enactment of section 369-a illustrate precisely the differences that justify concluding that New York law prohibits vertical price fixing, despite Leegin.”

Robert Hubbard, Director of Litigation, Antitrust Bureau, New York Attorney General’s office
States have promised continued enforcement of resale price maintenance cases

- Rule-of-reason cases under the Sherman Act
- States advocating a *PolyGram Holding* analysis
  - RPM as inherently suspect
  - Burden shifting to defendant to demonstrate benefits
States are continuing to enforce . . .


- The complaint alleged that Herman Miller, “[r]esponding to complaints and urging by HMH’s retailers,” put in place a minimum price policy which “establish[ed] a resale price maintenance scheme that restricted independent retailer pricing of Aeron chairs and that deprived consumers of the benefits of an unrestrained competitive market.”

- In March of 2008, after *Leegin*, the parties settled the matter, with Herman Miller agreeing to pay $750,000 and refrain from a variety of conduct relating to the advertising and pricing of its products by retailers.
... and advocate ...

- 27 states filed comments with the FTC on Nine West’s motion to modify its 2000 consent order

- Advocated a *PolyGram Holding* analysis in the wake of *Leegin*:

  “[O]n the record presented, the Commission should conclude without hesitation that the acts enjoined by the Order continue to violate the antitrust laws after *Leegin*. In addition to overlooking the overcharge to consumers, Nine West does not present evidence supporting a procompetitive justification or other beneficial impact on consumers from its vertical price fixing. No finding of market power or other litigation screen is warranted in these circumstances.”
... and legislate

- Maryland just passed a law banning resale price maintenance agreements, allowing Maryland consumers to bring RPM cases notwithstanding *Leegin*

- Maryland’s statute applies to Internet transactions, even when the seller is based out of state

- May see more of this, to the extent states believe their current antitrust statutes require them to follow federal Sherman Act precedents
Reactions from the Federal Antitrust Agencies
Some Commissioners, like the states, are skeptical that resale price maintenance can ever benefit consumers.

“But at the end of the day, I naturally lean toward the outcome that encourages lower prices for consumers. Therefore, absent empirical evidence to the contrary, I believe the antitrust laws should prioritize retailers’ role as purchasing agents for consumers. According to this view, we should cast a skeptical eye upon minimum resale price maintenance, because it tends to suppress discounting.”

Pamela Jones Harbour, Commissioner, Federal Trade Commission
In light of *Leegin*, the FTC modified a 2000 consent decree “to allow Nine West to engage in resale price maintenance agreements.”

Three key factual findings:
- Manufacturer, *not* retailers, the impetus for the RPM agreement
- RPM programs not ubiquitous in the industry
- Neither manufacturer nor retailer possess market power

Suggested that a *PolyGram Holding* analysis might be appropriate
NAMM

- § 5 case
- Horizontal, with RPM elements
- Complaint alleged that “NAMM organized various meetings and programs at which competing retailers of musical instruments were permitted and encouraged to discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices.”
- Demonstrates the dangers when RPM efforts originate with competing retailers, rather than the manufacturer
Federal Trade Commission

- FTC is conducting a series of workshops on RPM “to examine, for the purposes of enforcing Section 1 of the Sherman Act and Section 5 of the FTC Act, how to best distinguish between uses of RPM that benefit consumers and those that do not. The Commission expects the workshops to focus on legal doctrines and jurisprudence related to RPM, theoretical and empirical economic research, and business and consumer experiences.”

- Creating a record for future enforcement actions
AAG Varney, in her confirmation hearings, was explicit about her intent to bring RPM cases:

Question: Do you agree on the principle that manufacturers setting retail prices should be banned? Can we expect your Justice Department to support our legislation [repealing Leegin] in the event that you are confirmed?

Ms. Varney: Senator, I too was quite surprised by the Supreme Court decision in Leegin. As you mentioned, it was a 5-4 decision. And while the court held that the retail price maintenance was no longer per se illegal, it certainly left the division a lot of room to continue to prosecute retail price maintenance where it results in anticompetitive consequence, and I intend to continue that prosecution. I will work closely with the department, again, in determining what we can do to help your legislation. But even before your legislation makes its way into law, I think there still is a fair amount of room that we can use to aggressively prosecute anticompetitive behavior.
AAG Varney has also appointed Gene Kimmelman as Chief Counsel for Competition Policy and Intergovernmental Relations

Formerly at Consumers Union, Mr. Kimmelman filed an amicus brief in *Leegin* urging the Supreme Court to uphold the per se rule. Following the Court’s ruling he stated, “Justice Breyer's estimate that today's decision will likely raise the price of all goods and cost the American family of four $1,000 annually is only the tip of the iceberg. The long run effect will be to undermine innovation in the distribution and marketing of goods in America.”
Reactions from Congress
Efforts to Repeal *Leegin*

- As early as October 2007, Senator Kohl, Chairman of the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights, introduced a bill to repeal *Leegin*, and the Subcommittee held a hearing on RPM.

- In the current Congress, Senator Kohl has introduced a bill (S. 148) that would amend Section 1 of the Sherman Act by adding an additional sentence:
  - “Any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act.”
Efforts to Repeal *Leegin*

When the Subcommittee released its agenda in March, Item Number One on that agenda was Senator Kohl’s bill:

- “Discount Pricing of Consumer Goods – The Subcommittee will continue its examination of the elimination of the nearly century-old ban against manufacturers setting a minimum retail price as a result of the 2007 Supreme Court decision in the Leegin case. Allowing retail price maintenance has the potential to seriously harm discount pricing and retail competition. Senator Kohl intends to seek passage of the Discount Pricing Consumer Protection Act (S. 148), his bill to restore the ban on vertical price fixing.”
Efforts to Repeal *Leegin*

- The House Subcommittee on Courts and Competition Policy held a hearing on April 28, 2009: “Bye Bye Bargains? Retail Price Fixing, the *Leegin* Decision, and Its Impact on Consumer Prices”
Resale Price Maintenance: Navigating Scylla and Charybdis

Robert A. Lipstein
Crowell & Moring LLP
May 7, 2009
• Pre-Leegin:
  – Two paths:
    • Suggesting prices (MSRP)
    • Colgate policies
  – Challenge was to keep manufacturer conduct “unilateral”
    • “Coerced” agreements still “agreements”
    • Parke, Davis and Albrecht left little but “pure Colgate”
      “The combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination; the combination with wholesalers arose because they cooperated in terminating price-cutting retailers.” (Albrecht, describing Parke, Davis)
• *Twombly, Trinko* and *Linkline* revitalize *Colgate*:
  – Wider scope for non-dominant, single firm conduct
  – Higher threshold to show “agreement”

• *Colgate* pros
  – Rule of reason analysis not required (not within Section 1 scope)
  – Disciplines fractured distribution networks
  – Relatively simple to design and articulate (in theory)
The Limits of Colgate

- What to do with “big box” customers?
- Trusting the sales force to get it right
- “Unauthorized” sellers (especially on the Internet)
- Monitoring & enforcement resources
Scenario:

- Large, multi-product consumer products manufacturer
- Diverse distribution
  - Direct via the manufacturer’s website
  - Direct to retailers (with and without web sales)
  - Indirect to smaller retailers

Issues Raised:

- Dual distribution
- Two layer distribution
• Dual Distribution Scenario:
Dual Distribution

• Separating horizontal and vertical
  – Channel separation (vertical agreements)
  – Information barriers

• Keeping relationship vertical
  – NB: Both price, and non-price horizontal agreements are still *per se* illegal
Outside the US

- Lower thresholds on “single firm” conduct
  - Especially EU
- Less nuance on unilateral v. agreement (*Twombly*)
- No parallel to *Leegin* rule of reason analysis
  - Minimum resale price maintenance agreements covered under Vertical Restraints Block Exemption as a hardcore restriction
Avoiding the Antitrust Traps

• Forget *Leegin*
• Understand the limits of *Colgate*
• Eliminate risky communications
• Train, Train, Train