Resale Price Maintenance:
A Competitive Assessment

Federal Trade Commission Workshop on Resale Price Maintenance
Panel on Anticompetitive Effects

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If one sat in on a marketing class at any reputable business school, the business reason for imposing resale price maintenance (RPM)[1] would likely be described in straightforward fashion. A brand seller imposes RPM for one fundamental reason – it helps the seller win and retain retailers that will carry and promote the product. It does this by guaranteeing the retailer a high margin. That's it.

Of course, not all brand sellers will find it advantageous to impose RPM. An efficient, low cost producer can compete on favorable terms without RPM. If consumers widely recognize the superiority of a brand – an example might be Procter & Gamble's Tide -- that seller too will likely see no need to employ RPM – retailers will want to carry the strong brand to attract customers. Under these circumstances, the brand seller will probably resist retailer pressure to impose RPM because it will prefer to take advantage of the vigorous intrabrand competition among retailers, bringing down the end price to consumers and increasing overall sales.[2]

The brand seller most likely to find RPM attractive is one who is selling a mid to high-priced brand whose inherent superiority is not readily evident to consumers. For such a manufacturer, RPM can give retailers a needed incentive not only to stock the brand but to actively promote it. Still, a competitive assessment of RPM is not complete without recognizing that even the brand seller with a relatively weak and relatively high priced brand has alternatives to RPM for widening distribution and sales. Here are some of the alternatives:

(1) lowering the product's price;
(2) increasing advertising, or making ads more effective;
(3) offering contractual promotion incentives (promotion allowances) to retailers;
(4) sending manufacturer's representatives to retail stores to offer on-site demonstrations;
(5) agreeing to favorable terms for buying back a retailer's unsold inventory; and
(6) imposing distribution-limiting vertical restraints (such as exclusive territories or location clauses) that increase a retailer's incentive to invest in and sell the branded product.[3]

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[1] RPM, sometimes called vertical minimum price fixing, is the setting of minimum resale prices and should be distinguished from vertical maximum price fixing, the setting of maximum resale prices. This comment borrows heavily from Warren S. Grimes, *The Path Forward After* Leegin: *Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L. J. 467 (2008).

[2] Underlying these observations is Robert Steiner's powerful insight about the inverse relationship between the gross margins of retailers and manufacturers. If the brand image is strong, the manufacturer will sell at a high gross margin; the retailer at a low margin. If the brand image is weak, the manufacturer will sell at a low gross margin; the retailer at a high margin. Robert L. Steiner, *The Evolution and Applications of Dual-Stage Thinking*, 49 ANTITRUST BULL. 877, 890-92 (2004).

[3] According to a marketing professor at the Drucker Graduate School of Management, Claremont Graduate University, an increasing percentage of manufacturers' marketing budgets (60 to 70%) is spent on resellers while a dwindling percentage goes to promotion directed at consumers. Despite the growing importance of retailer promotion, the term resale price maintenance does not appear in many commonly used marketing text books. E-mail from Prof.

Are There Procompetitive Effects That Go Beyond Brand Promotion?

Beginning with economist Lester Telser,[4] it has been widely argued that RPM is a way of addressing the problem of dealers who free ride on other dealers' presale services. The point was picked up by the Supreme Court in *Continental TV Inc. v. GTE Sylvania, Inc*.,[5] and since has been rotely repeated as gospel in numerous subsequent Supreme Court cases dealing with vertical restraints, most recently in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*.[6] The Supreme Court's attention to the free riding issue is grossly out of proportion to any empirical evidence that free riding is a problem. RPM is imposed to give dealers an incentive to carry and promote a product, with or without presale services. As many theorists recognize, including some who urge that RPM should be tolerated, RPM is not an effective tool for preventing free riding on presale services.[7] Retailers who wish to free ride may continue to do so, regardless of whether the manufacturer has implemented RPM. There are a number of other tools in a manufacturer's arsenal for promoting presale services. Probably the most effective is the contractually based promotion allowance, which rewards only those retailers who actually provide the presale service. Another effective tool would be to limit competition among dealers through exclusive territories or dealer location clauses that foreclose or limit opportunities for free riding.

Two other points about free-riding are salient: The first is that for many products or services, presale services are not required (selling a box of chocolate or can of car wax usually requires no presale explanations or demonstrations).[8] So free riding is simply not an issue for many products subject to resale price maintenance. The second point is that when presale

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Jenny Darroch, Feb. 11, 2009. Prof. Darroch emphasizes that there are a variety of tools available for a manufacturer to provide a retailer with incentives for promotion.

[4] Lester G. Telser, *Why Should Manufacturers Want Fair Trade*, 3 J. L. & ECON. 86 (1960).

[5] 433 U.S. 36 (1977).

[6] 127 S. Ct. 2705 (2007).

[7] Benjamin Klein & Kevin Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J. L. & ECON. 265, 266 (1988) ("retailers may merely take the additional money created by the vertical restraint and continue to free ride"). As Klein explains in his workshop paper, *Competitive Resale Price Maintenance in the Absence of Free Riding*, a retailer bound to a minimum resale price may still free ride by offering free delivery or a free bonus (such as CDs). While acknowledging that RPM *alone* does not prevent free riding, Klein still believes that in combination with manufacturer enforcement efforts, RPM can address the free-riding problem.

[8] As Professor Klein states in his Workshop paper, attempts "to place all cases of resale price maintenance within the prevention of free riding framework has led to absurd, clearly pretextual explanations. . . . [M]any cases of resale price maintenance involve manufacturer attempts to prevent retailer price discounting even when discount retailers provide similar point of sale services as non discount retailers. Discount retailers are terminated in these cases not for failing to supply sufficient services, but solely because they are selling below suggested prices."

services help to sell a product, even discounting firms will have an incentive to provide them. In *Business Electronics v. Sharp Electronics Corp*., the record shows that the discounting smaller retailer was effective in providing presale product demonstrations of expensive electronic calculators.[9]

There has, in fact, been no case before the Supreme Court in which free riding was established as the motivation or justification for imposing RPM. As noted above, *Sharp* might have been such a case, but the record showed otherwise, and the jury was unreceptive to the defendants efforts to establish this defense. Some vertical restraints, such as carving out exclusive territories for retailers, may be very effective in addressing free-riding. RPM, however, is not one of them.

It has also been argued that RPM can play a role in certifying products as premium or superior in character.[10] Manufacturers recognize that a high priced brand, if it is carried in boutique stores, can provide an image boost for a manufacturer's brand. RPM can be *a part* of a distribution system that produces this result. For example, once a brand is in distribution and has achieved a degree of consumer recognition, discounting firms may have an incentive to obtain inventory of this product and resell it at prices below those offered by other retailers. If the boutique stores respond by refusing to continue carrying the product, the manufacturer risks losing the premium image for the brand. One way of dealing with this problem is for the manufacturer to impose RPM.

There are, however, other ways in which the manufacturer can establish and maintain the brand image. The most obvious way is to produce a superior product with consistent quality control. One of the procompetitive features of brand selling is precisely that it creates a strong incentive for a manufacturer to maintain the product's reputation. Another way a manufacturer can build brand image is to limit distribution to high image stores. Yet another way is to advertise the product and establish its premium image independent of which retailers carry it. Some premium brands are sold by discount stores, apparently without significantly undermining the image of the brand. Tide brand detergent is widely sold in retail outlets of all types, sometimes at discount prices.

Among the most ambitious and elegant efforts to find a comprehensive procompetitive explanation for RPM are those in the writings of Professor Benjamin Klein. In his workshop paper, Professor Klein offers a number of hypotheses to explain the potential procompetitive effects of RPM.[11] In the last analysis, these attempts to establish procompetitive benefits of

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[9] Details concerning the Sharp litigation are described in Warren S. Grimes, *The* Sylvania *Free Rider Justification for Downstream Power Vertical Restraints: Truth or Invitation to Pretext?*, in WHERE THE CHICAGO SCHOOL OVERSHOT THE MARK: EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed. 2008). For a comprehensive critique of the free rider justification, see Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance,* in *id.*

[10] Howard Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND. J. ECON. 346, 347-49 (1984). In his workshop paper, Professor Klein (correctly in my view) suggests that this rationale for RPM could, at best, apply in a narrow category of cases.

[11] In his paper, Professor Klein argues that RPM may be procompetitive because (1) per

RPM[12] offer little beyond the fundamental business reality – RPM provides retailers a larger margin, thereby giving them an incentive to carry and promote the producer's brand.

Anticompetitive Effects of RPM - Harm to Efficient Retailing

There are a number of anticompetitive effects of RPM, but they, like the procompetitive effects, can be simplified. The most telling of RPM's anticompetitive effects is that it takes retail price competition out of the picture for all brands subject to the restraint. Retailing is a vital segment of our distribution system that adds substantial value. Innovation and efficiency in retailing has a long history that encompasses the department store, the specialty store, the drive-in store, the warehouse store, and, most recently, the on line store. Over the years, these retailing innovations have brought increased choice and lower prices to consumers. With RPM in place, efficient, low-margin retailers are denied the opportunity to pass their efficiencies on to consumers. Although Professors Marvel and McCafferty have offered a hypothesis to explain how RPM could lower prices to consumers (essentially, that RPM may be an efficient method of promoting a premium brand product),[13] empirical evidence and the loss of the efficient retailer's ability to pass efficiencies on to consumers lead inexorably to the conclusion that RPM forces higher prices on consumers.[14]

To the extent that RPM becomes widespread in a particular product category, the harm to efficient retailers and consumers is more pervasive. Indeed, economists recognize that RPM

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unit payment for dealer services may be an efficient way of rewarding dealers for promotion services; (2) the manufacturer's marginal revenues from incremental sales may be greater than the dealer's marginal revenues from incremental sales, and RPM may be a method of bringing the dealer's incentives more in line with the manufacturer's incentives; and (3) impulse sales will be increased when more dealers carry a brand as a result of RPM. Some of these points seem intuitively correct, but none are supported with empirical evidence. For purposes of the discussion in this workshop, I'm willing to concede the correctness of each of these contentions. A significant problem with the Klein analysis is that it fails to address the primary anticompetitive effects of RPM (as discussed below): (1) precluding efficient retailers from their most efficient marketing tool (the ability to pass efficiencies on to consumers in the form of lower prices); and (2) the elimination of intrabrand price competition when it may be the consumer's only meaningful discipline on the high prices (and high margins) that strong brands bring to manufacturers. Another shortcoming is Klein's failure to address whether alternative methods of achieving some of the manufacturer's promotion objectives, even if somewhat less efficient than RPM, would be substantially less anticompetitive.

[12] Yet another theory offered to establish procompetitive benefits of RPM is that its imposition motivates retailers to stock sufficient inventories of the product in the face of uncertain consumer demand. Raymond Deneckere et al., *Demand Uncertainty, Inventories, and Resale Price Maintenance*, 111 Q. J. ECON. 885 (1996). This was one of the theories of procompetitive effects cited by the majority in *Leegin*, 127 S. Ct. at 2716.

[13] Marvel & McCafferty, supra note 10, at 371.

[14] Indeed, RPM may give a retailer an incentive to raise prices on non-RPM products that compete with the RPM brand. See the research of Prof. Greg Shaffer presented at this Workshop.

applied across a product category can raise prices and limit output for the entire category.[15] *Prices and consumer choice* may be affected as efficient retailers lose a valuable marketing tool.[16] For some categories, the large inventories of Internet sellers give consumers more selections. For example, an on-line book seller may have a large inventory that offers an out-of-print book that might be unavailable at most bookstores. Pervasive RPM will deny the efficient retailer its most potent marketing tool (low prices) and undercut the commercial viability of this retailing form.

The Special Importance of Intrabrand Retail Competition in Brand Selling

The Supreme Court in *Sylvania* included a footnote that suggests that intrabrand competition is of secondary importance in antitrust.[17] The language misses the boat badly. Brand selling is an effort by a seller to distinguish its brand from others – *to limit the extent of interbrand competition.* In the face of limited interbrand competition, retail intrabrand competition takes on a special importance for consumers in offering competitive buying opportunities. Consider a Harry Potter novel for which many readers would not find a satisfactory substitute: without retail intrabrand competition, consumers would have no competitive buying choices. For other branded consumer products, a consumer's willingness to switch brands may be greater than for the lover of J.K. Rowling's works, but the principle remains: as the strength of the brand increases, the disciplining effect of retail intrabrand competition becomes more vital.

Robert Steiner has offered insights into the inverse relationships between retailer and manufacturer gross selling margins.[18] When brands are strong, gross selling margins of manufacturers tend to be quite large, but margins of retailers tend to be small. The explanation for this inverse relationship is that consumers, once they focus on a particular brand, will look around to find the best price for the brand. Retailers, in turn, will have an incentive to price that brand attractively to bring consumers into the store. In a 1978 article, Steiner describes the women's outerwear industry with more than 9000 producers.[19] The margins of manufacturers were small, but even with what would appear to be very intensive interbrand competition, the average retail gross margin was 50%, so consumers paid roughly twice the factory price. Steiner compares the women's outerwear industry with the toy industry, where increasing concentration led to high profits for manufacturers and more intensive retail intrabrand competition (as consumers recognized advertised brands and would shop among retailers for the best price). One

[15] Frederic M. Scherer & David Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 558 (3d ed. 1990); F.M. Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687, 702-04 (1983).

[16] The importance of consumer choice in protecting consumer welfare is described in Neil W. Averitt & Robert H. Lande, *Using the 'Consumer Choice' Approach to Antitrust Law*, 74 ANTITRUST L. J. 175 (2007).

[17] Sylvania, 433 U.S. at 52 n.19 ("Interbrand competition . . . is the primary concern of antitrust law").

[18] Steiner, supra note 2.

[19] Robert L. Steiner, *Marketing Productivity in Consumer Goods Industries – A Vertical Perspective*, 42 JOURNAL OF MARKETING, No. 1 (1978).

of the lessons from Steiner's work is that interbrand and intrabrand competition, for many product categories, vary inversely.

Because RPM operates to stifle intrabrand competition in the sale of branded products (where interbrand competition is already limited), it has substantial potential to raise prices and harm consumers.

Can Greater Output of an RPM Product Be Equated With Procompetitive Effect?

Robert Bork and other theorists who have defended the use of RPM argue that the seller's greater returns on RPM products is not an indicator of anticompetitive effects. Even if the total sales of the product are reduced, Bork argues that this could still be consistent with greater output of the overall services (for example, pre and post sale services) that are provided with the product.[20] The argument is fundamentally flawed. To begin with, many retailers who sell a product subject to RPM do not provide presale or post sale services that would not have been provided in the absence of RPM. To take but one of many examples, some high profile brands of golf clubs are subject to RPM.[21] Although some of these manufacturers advertise demonstrations and sizing services available at retail outlets, many retailers (including Internet sellers) of the RPM clubs do not offer these services. As Professor William Comanor points out, all consumers, even those who do not desire the presale services (the inframarginal consumer that would have purchased the club without any additional hype or demonstration), end up paying more for the club.[22] So the greater output or greater revenues received by the RPM-imposing manufacturer do not necessarily reflect increased consumer welfare.

A perhaps even more fundamental flaw in Bork's thesis is the failure to recognize the nature of brand selling of relatively expensive products. Not all brands sold at high prices are superior to brands sold at lower prices. Consumer Reports Magazine contains independent ratings of consumer products. Examine any of these ratings and you will see only a weak correlation between the retail price of an item and the overall assessment of its quality. In many cases, cheaper is better. A manufacturer who decides to market its brand as a premium product may well succeed despite the inherent superiority of lower priced brands. Image advertising may give a brand a panache appealing to status-conscious consumers that is unrelated to its quality. It is not unlawful for a manufacturer to seek a premium marketing niche. Some forms of marketing

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[20] Robert H. Bork, THE ANTITRUST PARADOX 295-96 (1978); Richard Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI L. REV. 1, 18-19 (1977); Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L. J. 135, 136 (1984).

[21] For an assessment of the use of RPM among high profile brands of golf clubs, see Grimes, supra note 1, at 499-503.

[22] William Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 Harv. L. Rev. 983, 990-1000 (1985). The injury to the inframarginal consumer may not distinguish RPM from other methods of promoting a premium brand. A prom,otion allowance, for example, could also raise prices to the inframarginal consumer. But the increased price paid by a consumer who neither wants or needs presale services undercuts Bork's contention that higher returns are consistent with increased consumer welfare.

of premium products, however, involve exploitation of consumer information gaps, misinformation or even outright deception.

Recognizing these realities does not necessarily support more aggressive regulation of promotion for would-be premium products. It does, however, demonstrate the error in assuming that higher revenues brought by RPM necessarily indicate heightened consumer welfare.

RPM's Association With Exploitation of Consumer Information Gaps

An anticompetitive effect of RPM that has thus far escaped mention by the Supreme Court is its association with promotion that exploits consumer information gaps and, not infrequently, is misleading or fraudulent.[23] This occurs because RPM moves the promotion from the manufacturer or brand seller to the retailer, where promotion excesses are more difficult to monitor and control. If a manufacturer launches an advertising campaign for its product, it can expect scrutiny from national and state consumer protection agencies. Misleading ads may be attacked not only by government enforcers but also by rivals in suits under common law, state unfair competition statutes, or the federal Lanham Trademark Act. When promotional incentives are moved to the retail level, as will occur with RPM, the hype and selling pitch of individual salesmen (who may be given a "spiff" or financial incentive to sell the retailer's high margin products) are far more difficult to monitor and control. If a consumer has been "duped" by a salesman's pitch, neither the consumer nor any enforcement agency is likely to attack the transaction. The misleading pitch is most likely an unrecorded oral statement by the sales person, difficult or impossible to prove in court. Indeed, the consumer may never realize the misleading content of the pitch. Had the same inaccuracies been offered in a published ad, the odds of an effective and deterring legal action are far greater.

There are other methods by which a brand seller can shift promotion incentives to the retailer. These methods, too, may spark difficult-to-control hype by the retailer and its sales staff. But none are quite as likely to produce the same distortion in consumer buying choices as RPM. For example, if the brand seller offers a promotion allowance to retailers who carry and promote the brand, this incentive too could invite misleading sales pitches to consumers. But the discipline of intrabrand competition will limit margins among retailers selling this brand, so the retailer's incentive for exaggeration and hyperbole is reduced. With RPM in place, the higher margin is assured, and the retailer's incentive to sell the product, by whatever means, is at its zenith.[24]

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[23] Although the Court has yet to acknowledge RPM's association with exploitation of consumer information gaps, the matter has been documented in the literature. Warren S. Grimes, *Spiff, Polish, and Consumer Demand Quality, Vertical Price Restraints Revisited*, 80 CAL. L. REV. 815, 834-36 (1992); Lawrence A. Sullivan & Warren S. Grimes, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK, section 6.3c2 (2d ed. 2005). See 8 Areeda & Hovenkamp, ANTITRUST LAW, ¶ 1614a-d at 165-171 (2d ed. 2004) (dealer good will is not a justification for RPM because multibrand dealer's promotion leads to deception).

[24] Another method of shifting promotion incentives to the retailer is vertical restraints that limit distribution, such as exclusive territories or dealer location clauses. These methods may guarantee the same high margin as RPM provides. But the risk of deception is reduced to the

Professor Klein is a harsh critic of the concern with RPM's exploitation of consumer information gaps, calling it an "unsupported view."[25] Yet Klein has acknowledged that RPM creates an incentive in retailers to switch the consumer from a preferred brand.[26] And Klein does not challenge the fundamental point that switching promotion incentives from the manufacturer to the retailer creates opportunities and incentives for promotion that are difficult to monitor and control. Klein's major point is that such consumer issues are not properly a part of an antitrust analysis. This narrow view of antitrust is aspirational and not consistent with the case law.[27] Given the Federal Trade Commission's express statutory mandate to address consumer (unfair) as well as antitrust (anticompetitive) issues, it is ironic that Professor Klein has chosen an FTC workshop as the forum for pressing his view.

Cartel Conduct or Widespread Use of RPM in a Product Category

As the Supreme Court recognized in *Leegin*, RPM can facilitate cartel conduct at either the retailer or upstream supplier level.[28] Higher margins for retailers mean less pressure on the supplier to reduce its prices, so a segment-wide use of RPM may be an indication of an agreement at the retail level, at the supplier level, or at both levels. But cartel conduct, in addition to being subject to severe criminal and civil sanctions, is unnecessary for either the suppliers or retailers to benefit from the higher margins at both levels that RPM may bring. Follow-the-leader conduct that spreads RPM throughout a category is a far more pervasive threat than outright cartel conduct.[29] The Supreme Court in *Leegin*, although not as clearly as one might hope, appears to

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extent that the consumer knows that a particular dealer (for example, a new car dealer) is pushing a brand in which the dealer itself is invested. In contrast, consumers may be more vulnerable to misleading hype when it stems from a multi-brand retailer whom the consumer does not identify with a particular brand.

[25] Klein, *Competitive Resale Price Maintenance in the Absence of Free Riding*, FTC Workshop.. Klein states that I believe consumer exploitation to be "the primary anticompetitive effect of resale price maintenance." That is not now and has never been my belief. The increased potential for exploitation of consumers is a salient issue that should be considered in designing antitrust policy toward RPM. But it is not RPM's primary anticompetitive effect: that would be the suppression of retail intrabrand competition with concomitant higher prices to consumers and lost competitive opportunities for efficient retailers.

[26] Klein and Lerner concede that with RPM in place, dealers have an incentive to switch consumers from a preferred brand "if the dealer earns a greater margin on the alternative product"). Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding, How Exclusive Dealing Prevents free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L. J. 473, 482 (2007).

[27] Grimes, *The Path Forward After Leegin,* supra note 1 at 486 n.80.

[28] 127 S. Ct. at 2716-17.

[29] There is literature that suggests cartel conduct is not an explanation for most litigated cases involving RPM. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & ECON. 263, 292–93 (1991)(based upon a litigation sample, concluding that collusion theories do not explain most uses of resale price maintenance). For reasons stated in the text, this

acknowledge that widespread use of RPM in a category warrants closer scrutiny, whether or not a cartel underlies this result.[30]

The harmful consequences of widespread use of RPM exacerbate the anticompetitive effects of RPM,[31] and these consequences are no different whether a cartel or simple follow-the-leader conduct underlies the conduct. Still, the widespread use of RPM in a product category (or the lack of widespread use) is not a fruitful basis for establishing RPM policy. A rule that determined antitrust liability based on the widespread category use of RPM would discriminate in favor of the first firm in the category to employ RPM – and unjustly discriminate against follow on firms. Such a rule would also present potentially difficult problems in determining how much RPM is too much, and in presenting evidence of rival's conduct in a court of law.

Future Antitrust Policy Toward RPM

Leegin is highly controversial. By a 5-4 majority, the Court removed a longstanding per se rule and replaced it with uncertainty. To the extent that the decision is read as embracing open-ended tolerance for RPM, it moves US antitrust policy in a direction that lacks consensus support among theorists, among state antitrust enforcers, and among other enforcement agencies outside the US. *Leegin*, however, affords the federal agencies an opportunity to reconsider RPM and vertical restraints in general. Agency leadership will be vital in establishing order out of potential chaos and implementing an enduring and rational policy towards vertical restraints.

A rule of reason approach can be a sound platform for establishing a sound policy. That policy, however, should recognize the rather striking differences in the competitive risks posed by differing vertical restraints. The policy should deter the most pernicious vertical restraints while preserving freedom of action for manufacturers and retailers to use vertical restraints that pose lesser threats and have strong procompetitive benefits.

Below I list some of the key elements of a sound vertical restraints policy, which, in a general way, tracks the vertical restraints policy of the European Union.

> **The policy should create strong presumptions against use of vertical restraints most threatening to innovative and efficient retailing.** By far, the most pervasive threats to efficient retailers are restraints that operate in wide-open distribution systems, primarily RPM and limitations on minimum advertised prices (MAPs).

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conclusion seems unsurprising. Justice Breyer's dissent, however, makes the salient point that the survey was taken at a time when RPM was a per se unlawful vertical restraint – plaintiffs bringing these cases had no incentive to undertake an additional and difficult showing of a conspiracy at either the retailer or supplier level.

[30] 1276 S. Ct. at 2119 (RPM "should be subject to more careful scrutiny . . . if many competing manufacturers adopt the practice").

[31] There is an exception to this generalization. Widespread use of RPM in a product category probably reduces the risk of exploitation of consumer information gaps. As more and more brands are subject to RPM, the retailer receives a high margin in selling each of them, and no longer has a heightened incentive to promote one brand over another.

The policy should recognize the importance of retail intrabrand competition in categories dominated by brand selling. Retail intrabrand competition becomes more important as interbrand competition is limited by strong brand selling.

The policy should be widely tolerant of distribution narrowing restraints that encourage potentially efficient vertical integration and investment by retailers (and can also effectively prevent free-riding on presale services). These restraints include exclusive dealer territories or dealer location clauses. RPM employed as a part of a distribution system that encourages dealer investment in the branded product (usually associated with a limited distribution system) may be less threatening to competition than RPM employed in an open-ended distribution system.

The policy should eliminate the free-riding defense for RPM. RPM is not particularly effective in deterring free riding. Other methods of addressing free riding problems are more effective and less anticompetitive. RPM is, in any event, frequently employed in product categories in which free-riding is not an issue.

The policy should make no distinctions based on whether RPM is or is not widely used in a product category. To do otherwise would discriminate in favor of a brand seller who is the first in its product category to employ RPM and against follow-on rivals.

The policy should eliminate the unilateral conduct (*Colgate*) defense for vertical restraints. All restraints should be assessed on their competitive merits, not on superficial (and frequently artificially contrived) circumstances that tend to show or not show a conspiracy.[32]

[32] There is widespread theoretical support for eliminating the *Colgate* defense from scholars taking various positions on RPM. See Grimes, supra note 1, at 491, n.96.