Federal Trade Commission
FTC Hearings on Resale Price Maintenance
May 21, 2009

STATE CHALLENGES TO VERTICAL PRICE FIXING IN THE POST-*LEEGIN* WORLD

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Leegin Creative Products Inc. v. PSKS, Inc.[2] poses significant challenges to state attorneys general, who have aggressively prosecuted actions against vertical restraints, more so than their federal counterparts.[3] For more than twenty years, state attorneys general have combined resources through the Multistate Antitrust Task Force of the National Association of Attorneys General[4] to prosecute vertical price-fixing agreements, among other violations. Their collective efforts have returned in excess of $115 million in cash and $75 million in products to consumers[5] through federal *parens patriae* cases[6] alleging vertical price-fixing ("RPM").

Despite the demands of *Leegin*, attorneys general will not end their pursuit of RPM cases because of a central truth - RPM means higher prices to consumers.[7] While the job has become more difficult, they will pursue RPM along several paths: (1) bringing federal antitrust *parens*

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[2] 551 U.S. 877, 127 S. Ct. 2705 (2007).

[3] Pamela Jones Harbour, "Vertical Restraints: Federal and State Enforcement of Vertical Issues," SJ075 ALI-ABA 185 (2004).

[4] The Task Force is composed of assistant attorneys general from many states who coordinate and conduct multistate investigations and litigation. *See* ABA SECTION ON ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES, Introduction 1-8--1-10 (2d ed. 1999).

[5] Brief for States of New York, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming as Amici Curiae Supporting Respondent at 1, *Leegin Creative Leather Products v. PSKS*, 551 U.S.877, 127 S. Ct. 2705 (2007).

[6] These cases, brought pursuant to 15 U.S.C. §§15c0h, include, e.g., *New York v. Salton, Inc*., 265 F.Supp. 2d 310 (S.D.N.Y. 2003); *In re Compact Disc Minimum Advertised Price Antitrust Litig*., 216 F.R.D. 197 (D. Me. 2003); *In re Nine West Shoes Antitrust Litig*., 80 F.Supp. 2d 181 (S.D.N.Y.) 2000; *New York v. Reebok Int'l, Ltd*. 903 F. Supp. 532(S.D.N.Y. 1995), aff'd 96 F. 3d 44 (2d Cir. 1996); *Maryland v. Mitsubishi Elecs*. Am., 1992-1 Trade Cas. (CCH) 69, 743 (D. Md. 1992); *New York v. Nintendo of Am*., 775 F. Supp. 676 (S.D.N.Y. 1991); and *In re Minolta Camera Prods. Antitrust Litig*., 668 F. Supp. 456 (D. Md. 1987).

[7] Robert Pitofsky, "In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing," 71 Geo. L.J. 1487, 1488 (1983) ("The one point that emerges clearly in any debate concerning the per se rule is that minimum vertical price agreements lead to higher, and usually uniform, resale prices."); *See Leegin*, 127 S. Ct. At 2727-28 (Breyer, J., dissenting); 8 Areeda & Hovenkamp ¶1604b, at 40 (2003); Statement of Richard M. Brunell before the House Judiciary Committee Subcommittee on Courts and Competiton Policy, "Bye Bye Bargain? Retail Price Fixing; The *Leegin* Decision, and its Impact on Consumer Prices at page 13-14 (April 28, 2009) available at http://www.antitrustinstitute.org/archives/files/Brunell%20House%20Testimony_042820090740.pdf.

patriae cases under the *Leegin* regime; (2) advocating legislative repeal of *Leegin* in the United States Congress; and (3) suing under state antitrust law to challenge RPM in state courts.

A. Post-*Leegin* Federal Antitrust Litigation

The *per se* rule was a "conversation stopper"[8] that resulted in significant settlements in all of the pre-*Leegin parens patriae* RPM cases brought by members of the Task Force. Federal antitrust litigation under the rule of reason is a far more onerous matter for a plaintiff. In the absence of the *per se* rule, proof becomes more complex and already expensive litigation becomes even more expensive.[9]

The *Leegin* Court expressed the expectation that "over time," as federal courts acquire experience dealing with vertical price-fixing cases, they will "devise rules" or even recognize presumptions to promote a "fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones."[10] As these "fair and efficient" rules develop over the years, plaintiffs will have to spend large sums to litigate rule of reason cases.

Nonetheless, attorneys general will likely continue to bring select federal RPM cases, and the significant benefits to states that litigate together under the auspices of the Task Force will continue to provide a strong incentive to remain in a federal forum. Indeed, the States of New York, Illinois and Michigan filed, and settled, a federal minimum RPM case in March of 2008 against furniture maker, Herman Miller, Inc. The states alleged that this furniture manufacturer violated federal and state antitrust laws by preventing retailers from advertising discount prices that were below minimum prices set by the manufacturer.[11]

B. Federal Legislation "Repealing" *Leegin*

On May 14, 2008, thirty-five state attorneys general submitted to Congress a letter strongly supporting the passage of S. 2261, Discount Pricing Consumer Protection Act, introduced by Senator Kohl in the 110th Congress. In the letter, the attorneys general assert that consumers have been "well served" by *per se* treatment of RPM and the lower prices it promotes. They warn: "The practical result of [*Leegin*] will be to encourage manufacturers, distributors and retailers to act together to charge higher prices that will be borne by consumers." The attorneys general urge "immediate consideration and approval of this important legislation." Senator Kohl has re-introduced the "Discount Pricing Consumer Protection Act" in the current session of Congress with S. 148.[12] State attorneys general will continue to support congressional efforts to reverse the *Leegin* decision in the 111th Congress.

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[8] *United States v. Realty Multi-List, Inc*., 629 F.2d 1351, 1363 (5th Cir. 1980).
[9] *See* Pitofsky, "Are Retailers Who Offer Discounts Really 'Knaves'? The Coming Challenge to the Dr. Miles Rule," 21-SPG Antitrust 61, 64 (2007).
[10] *Leegin*, 127 S. Ct. at 2720.
[11] *New York v. Herman Miller, Inc*., No. 08 Civ. 2977 (S.D.N.Y. 2008).
[12] S. 148, 111th Cong., 1st Sess., 155 CONG. REC. s133-35 (2009).

C. Vertical Price-Fixing Enforcement Under Existing State Antitrust Laws

A number of attorneys general will prosecute RPM in their respective state courts under their existing antitrust laws despite the fact that litigation in state forums will create challenges to achieving the collective action that served the states so well before *Leegin*. The ability of individual attorneys general to sue under state law depends on whether their respective legislatures have expressly condemned RPM, whether their antitrust laws are intended to act independent of federal antitrust law or whether their antitrust laws are intended to defer to federal antitrust law.[13] In a recent compilation, Richard A. Duncan and Alison K. Guernsey identify thirteen states that appear to have state laws prohibiting RPM, independent of federal antitrust law.[14]

Our two largest states, California and New York, are well positioned to sue vertical price-fixers in their state courts. California's courts have consistently held that the Cartwright Act[15] prohibits resale price maintenance as *per se* unlawful conduct,[16] for a vertical price fixing scheme "destroys horizontal competition as effectively as would a horizontal agreement among distributors or retailers."[17] California's antitrust law was enacted in 1907 "in reaction to perceived ineffectiveness" of the Sherman Act,[18] even though its prohibitions resemble federal antitrust law. Thus, California's Supreme Court has held that "judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters' intent."[19] It is unlikely that California's courts will permit RPM to "destroy" competition when they decide whether to retain the *per se* rule for vertical price fixing.

New York's Donnelly Act contains provisions that clearly resemble section 1 of the Sherman Act and New York's courts have followed federal antitrust precedent "unless there are differences in state and federal policy, statutory policy, statutory language, or legislative

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[13] Richard A. Duncan and Alison K. Guernsey "Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?" 27 Franchise L.J. 173 (WTR. 2008) (hereinafter "Duncan & Guernsey") provide a taxonomy of state antitrust laws' adherence to federal antitrust law.

[14] California, Connecticut, Kansas, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, South Carolina, Tennessee and West Virginia. Duncan & Guernsey at 174.

Additionally, Hawaii has a strong argument that its antitrust law condemns vertical price fixing despite *Leegin*. HAW REV. STAT. §480-4(b)(1) provides "no person, exclusive of members of a single business entity consisting of a sole proprietorship, partnership, trust, or corporation, shall agree, combine, or conspire with any other person or persons, or enter into, become a member of, or participate in, any understanding, arrangement, pool, or trust, to do, directly or indirectly, any of the following acts, in the State or any section of the State: (1) Fix, control, or maintain, the price of any commodity." This provision is in addition to the general prohibition against contracts, combinations and conspiracies that restrain trade unreasonably found in HAW REV. STAT. §480-4(a).

[15] Cartwright Act, Cal. Bus. & Prof. Code §§ 16700-70 (West 2006).

[16] *See Maitland v. Burckle*, 572 P. 2d 1142, 1147 (Cal. 1979); *Kunert v. Mission Financial Services Corp*., 110 Cal. App. 4th 242, 263 (2003).

[17] *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175 (2001).

[18] ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES (2d. ed. 1999) California 6-1.

[19] *California ex. Rel. Van De Kamp v. Texaco*, 762 P.2d 385, 395, 46 Cal. 3d 1147, 1164 (Cal. 1988) (superseded by statute on other grounds by *Stop Youth Addiction, Inc. v. LuckyStores, Inc.* 17 Cal.4th 553, 570 (1998); *Biljac Associates v. First Interstate Bank*, 218 Cal. App. 3d 1410, 1420-1421 (1990)). *See SC Manufactured Homes, Inc. v. Liebert*, 162 Cal. App. 4th 68, 84, n. 9, 76 Cal. Rptr. 3d 73, 86 (Cal. Ct. Ap. 2008). *See also* Duncan & Guernsey at 177.

history."[20] New York policy parted company from federal law in 1974 with the legislative repeal of New York's Fair Trade Law.[21] In response to Governor Hugh Carey's plea "to insure that consumers are not victimized by price-fixing schemes,"[22] the New York legislature enacted a law providing that vertical price-fixing under federal trade laws "shall not be enforceable or actionable at law."[23] The Governor's Program Bill noted that RPM keeps prices "artificially higher" than those in a free market.[24] New York's law was enacted a year prior to the Consumer Pricing Goods Act of 1975 that repealed the Federal Fair Trade laws, *infra* nn.107-09, and has its own independent history. This history provides New York with strong arguments that *Leegin* should not be applied to the Donnelly Act.[25] Indeed, two pre-*Monsanto* federal court decisions and one relatively recent New York state appellate decision appear to support *per se* treatment of vertical price fixing under the Donnelly Act.[26]

D. Maryland's *Leegin* Repealer

When the federal courts close their doors to antitrust plaintiffs, state law has sometimes provided succor to excluded parties. The most dramatic example of this is the states' response to *Illinois Brick Co. v. Illinois*,[27] where the Supreme Court construed section 4 of the Clayton Act[28] to preclude plaintiffs that did not purchase directly from the antitrust wrongdoer from recovering damages. To date, at least thirty-six states[29] have acted, through legislation or court decisions, to permit these "indirect purchasers" to recover damages under state antitrust laws. The power of the states to enact this legislation, which contradicts the Court's construction of federal antitrust law, was upheld in *California v. ARC America Corporation*.[30] In April of 2009, Maryland's General Assembly passed the first statute[31] in the country expressly rejecting the application of *Leegin's* reasoning to the Maryland Antitrust Act.[32]

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[20] Robert L. Hubbard, "Protecting Consumers Post-*Leegin*," 22 Antitrust 41, 43 (2007) (and cases cited in footnote 38 thereof).
[21] New York General Business Law §369-a.
[22] Jay L. Himes, "New York's Prohibition of Vertical Price-Fixing," 1/29/2008 N.Y.L.J. 4, also available at http://www.oag.state.ny.us/bureaus/antitrust/pdfs/ver_price_fixing.pdf (Citing "Public Papers of Hugh L. Carey" 77).
[23] Id.
[24] Hubbard at 43 (quoting from New York General Business Law §369-a).
[25] Hubbard at 43. New Jersey also repealed fair trade laws before the Consumer Goods Pricing Act of 1975. *See* N.J. STAT. ANN. § 56:4-1.1 (West 2007). Duncan & Guernsey note "The New Jersey courts have only referred to this statute once in a published decision, and then only in passing. However, the reference came in a case decided after *Leegin*, and the statute is cited as having continuing vitality. *See Exit A Plus Realty v. Zuniga*, 930 A.2d 491, 497 (N.J. Super. Ct. App. Div. 2007)." Duncan & Guernsey at 174 n. 20.
[26] *Carl Wagner & Sons v. Appendagez, Inc*., 485 F. Supp. 762, 773 (S.D.N.Y. 1980); *Uniroyal, Inc. v. Jetco Auto Serv*., 461 F. Supp. 350, 357(S.D.N.Y. 1978); *George C. Miller Brick Co., Inc. v. Stark Ceramics, Inc*., 2 A.D. 3d 1341, 770 N.Y.S. 2d 235 (N.Y. App. Div. 2003).
[27] 431 U.S. 720 (1977).
[28] 15 U.S.C. §15.
[29] Roundtable Discussion, "Report of the Antitrust Modernization Commission: Antitrust in Modern Times" 21-SUM Antitrust 9, 16 (2007).
[30] 490 U.S. 93 (1989).
[31] S.B. 239 (Md. 2009); H.B. 657 (Md. 2009) available at http://mlis.state.md.us/2009rs/bills/sb/sb0239t.pdf and http://mlis.state.md.us/2009rs/bills/hb/hb0657t.pdf. The bills are identical and were both signed into law by Governor Martin O'Malley on April 14, 2009. S.B. 239, signed second, superseded H.B. 657, and will be effective October 1. 2009.
[32] Md. Com. Law Code Ann. §§11-201—213(2005).

The Maryland Antitrust Act prohibits combinations, conspiracies and agreements that restrain trade "unreasonably." Md. Com. Law Code Ann. §11-204(a)(1). This provision is very similar to section 1 of the Sherman Act.[33] Section 11-202(a)(2) of the Maryland Antitrust Act bids Maryland's courts to be "guided by the interpretations given by the federal courts to the various federal statutes dealing with the same or similar matters…."[34] In its first decision under the Maryland Antitrust Act, the Court of Appeals construed this section to say that it was to be "guided (but not bound) by the opinions of the federal courts under the federal antitrust laws…."[35] Despite reserving the possibility of reaching results inconsistent with federal antitrust law, Maryland's courts have consistently cited "almost exclusively to federal case law" and have reached "results consistent with federal precedent."[36]

Maryland's Court of Appeals last heard a case involving allegations of vertical price fixing in *Natural Design, Inc. v. Rouse Co*.[37] The Court reversed a grant of summary judgment to a shopping center that allegedly conspired with one of its tenants to terminate the lease of a discounting tenant. Relying on federal antitrust decisions, the Court of Appeals found that plaintiff had alleged sufficient evidence of vertical price-fixing to survive summary judgment. Plaintiff's evidence met the federal standard set out in the Supreme Court's then-recent decision in *Monsanto v. Spray-Rite*, in that it tended "to exclude the possibility that [defendants] were acting independently."[38] The Court of Appeals declined an invitation to analyze the alleged vertical price-fixing under the rule of reason. Citing *Dr. Miles* and *Monsanto,* the Court concluded that "the *per se* rule still retains its vitality."[39]

Concerned that the Court of Appeals might apply *Leegin* to cases arising under the Maryland Antitrust Act, Maryland's General Assembly enacted two identical bills intended to preserve the authority of *Natural Design*.[40] The General Assembly amended section 11-204(a)(1) of the Maryland Antitrust Act by adding the following provision: "For purposes of subsection (a)(1) of this section, a contract, combination, or conspiracy 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 or commerce."[41] Legislative history makes it clear that the bills preserve the *per se* rule.

Significantly, the bills were supported by both Maryland consumer and retailer groups. The Maryland Consumer Rights Coalition urged the General Assembly to enact this legislation

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[33] 15 U.S.C. §1. "Unlike section 1, section 11-204(a)(1) expressly limits its prohibition on combinations that restrain trade "unreasonably." Md. Com. Law Code Ann. §11-204(a)(1) (2005). The addition of this term reflects early federal jurisprudence that limited that reach of section 1 to the Sherman Act to unreasonable restraints. *See Standard Oil Co. v. 221 U.S.* 1, 58 (1911).
[34] Md. Com. Law Code Ann. § 11-202(a)(2) (2005).
[35] *Quality Discount Tires, Inc. v. Firestone Tire & Rubber Co*., 282 Md. 7, 12 (1970).
[36] Ellen S. Cooper and Alan M. Barr "Attacking the Odius: One Hundred Years of Antitrust Law in Maryland" Md. Bar Journal, 44, 48 (2000).
[37] 302 Md. 47, 485 A. 2d 663(1984).
[38] 465 U.S. 752 (1983).
[39] 302 Md. at 61-62, 485 A. 2d at 670..
[40] S.B. 239 (Md. 2009); H.B. 657 (Md. 2009).
[41] *Id.*

to permit the free market to work to "keep prices as low as possible."[42] In verbal testimony before Maryland's House Economic Matters Committee, a representative of the Maryland Association of Retailers explained that, just as retailers seek to be as free as possible from governmental constraints, they also seek to be free of constraints imposed by manufacturers.

E. Conclusion

Leegin poses significant challenges to state attorneys general. However, the decision is better understood as a speed bump instead of a barrier. State antitrust enforcers will continue to prosecute vertical price fixing. Although fewer prosecutions will be brought under federal antitrust law, prosecutions will likely increase under state antitrust laws. Where possible, attorneys general will look to their existing state laws to find authority to prosecute this conduct and to protect consumers from the inevitable price increases that result from vertical price fixing policies. Where existing state law does not provide redress, state legislatures will act to protect their consumers and retailers as Maryland has already done. Manufacturers considering implementing vertical price fixing policies will be well advised to consider state antitrust laws and likely state legislative responses before they act.

[42] Letter from Charles Shafer, President, Maryland Consumer Rights Coalition, to Senator Brian E. Frosh, Chairman, Senate Judicial Proceedings Committee (February 4, 2009)(on file with the Senate Judicial Proceedings Committee under S.B. 239).