

Federal Trade Commission Resale Price Maintenance Workshop
Discussion Topics for Post-*Leegin* Rule of Reason Panel
May 21, 2009

- I. Structuring the Rule of Reason Inquiry
- A. Is the appropriate inquiry always a full rule of reason analysis? If not, what facts are likely to justify more abbreviated analysis?
 - B. In *Polygram Holding* (Three Tenors), the Commission adopted an analysis of horizontal restraints that begins with an assessment of whether a particular restraint is sufficiently analogous to a restraint that is already summarily condemned to warrant abbreviated analysis. Are there particular factors regarding the use of RPM that might lead to a comparable conclusion for RPM, either in general or on a case-by-case basis?
 - C. Is there any continuing vitality to the *GTE Sylvania* distinction between price and non-price vertical restraints? If so, what effect should it have with respect to the analysis of RPM?
 - D. Who has the initial burden with respect to the competitive effect of RPM? Would the burdens, and subsequent burdens, be satisfied by facts sufficient to raise the likelihood of competitive harm or benefit, or must actual harm or benefit be shown?
 - E. If the plaintiff has satisfied its initial burden of showing actual or likely harm to competition, should that be sufficient to shift the burden of proof (as opposed to the ultimate burden of persuasion) to the defendant?
 - F. How should procompetitive and anticompetitive effects be balanced? If the balance is not entirely quantitative, should either small potential benefits cancel substantial harms or should small potential harms cancel large benefits?
 - G. What if the legality of a particular usage of RPM is being determined at an early stage in its usage. The party with the initial burden has sufficiently shown actual or likely harm to competition, but some of the claimed benefits (or harms) have not yet occurred; who should get the benefit of the doubt?
- II. Market Power for RPM Analyses
- A. What is the appropriate role of manufacturer market power in the analysis of RPM?
 - i. Manufacturer market concentration? In each relevant geographic market?

- ii. Is product differentiation relevant? Is it ever likely to be sufficient? If so, under what circumstances?
 - iii. Should the requirements for establishing market power vary depending on other factors, such as, the nature of the restraint (RPM vs. MAP vs. Colgate Program), the source of the restraint (manufacturer vs. retailer(s)), the ubiquitousness of the usage of RPM by competing manufacturers, etc?
 - iv. Should market power on the part of the manufacturer be a sufficient condition for a prima facie case? Why or why not? If not, what further facts should be shown?
 - v. Absent evidence of collusion or a unitary exercise of market power by the manufacturer, should a manufacturer's ability to profitably raise its RPM prices by more than a SSNIP be a sufficient condition for a prima facie case? Why or why not? If not, what further facts should be shown?
- B. What is the appropriate role of retailer market power in the analysis of RPM?
- i. Retailer market concentration for the products at issue?
 - ii. Retailer market concentration with respect to a particular manufacturer using RPM, e.g., importance of the dealer to the manufacturer?
 - iii. Is the existence of retailer market power, relevant to the determination of the source of the restraint? Can the existence of retailer market power be a proxy for the source of the restraint?
 - iv. Should retailer market power be a sufficient condition for a prima facie case? Why or why not? If not, what further facts should be shown?

III. State Law Treatment of RPM

- A. The Supreme Court's decision in *ARC America* found no preemption of contrary state antitrust law where the state law applied different remedies to conduct that was otherwise unlawful under both state and federal antitrust laws? Is that decision controlling precedent regarding whether the *Leegin* decision can preempt contrary state antitrust statutes that declare RPM to be *per se* unlawful? What about preemption of state contract statutes declaring RPM contracts to be unenforceable (NJ or NY), or the use those states' consumer protection statutes that permit the victims of unconscionable contracts to recover treble damages?
- B. In light of substantial sales of consumer goods over the Internet, does the action of a single state, or a limited number of states, declaring RPM to be *per se* illegal effectively negate federal antitrust policy regarding RPM? Should the dormant

Commerce Clause play any role in the analysis of conflicting federal and state law policies with respect to RPM?

- C. What options are available to manufacturers who wish to use RPM only in states where rule of reason treatment will be accorded to their conduct? Can they prohibit the shipment of their products to state with a rule of *per se* illegality for RPM? Is a choice of law provision in the sales contract between the Internet distributor and the consumer located in a state where RPM is *per se* unlawful likely to be an effective remedy?

IV. Evidence of RPM's Effect on Competition

- A. What is the evidentiary effect of price, given that higher prices may be consistent with theories of both anticompetitive or procompetitive uses of RPM? Would the answer change if it could be shown that both inter- and intrabrand prices went up?
- B. In light of *Twombly*, with what degree of detail must the allegations of adverse effect on competition be pled? Must an RPM plaintiff plead a specific theory of competitive harm?
- C. Should the elasticity of demand for a product subject to RPM be relevant to an inquiry into RPM's competitive effect? Would the answer to this question vary depending on how few or many competing manufacturers exist or how widespread the use of RPM was by other manufacturers?
- D. Should a prima facie showing of an adverse effect on competition include evidence that output went down? For the manufacturer using RPM? For the category of goods at issue? In some other market?

V. Effect of Distribution Structure on RPM Analyses

- A. Should the degree of retailer investment in the brand have an impact on RPM analysis? (E.g., single brand franchisee vs. arms-length buyer of goods by a multibrand retailer.) Is there a point at which the investment in the brand by the retailer is sufficient to treat RPM as either an ancillary restraint or an agreement between joint venturers? If so, at what point does that occur?
- B. Should the fact that most retailers carry the brands of many different competing manufacturers have an impact on RPM analysis? Would the answer to this question vary depending on how few or many competing manufacturers exist or how many of them also use RPM?
- C. Should dual distribution have an impact on RPM analysis? If so, how should it be reflected in the analysis?

VI. Alternatives to RPM

- A. Can the procompetitive reasons for using RPM, e.g., elimination of free-riding, provision of additional services, meeting stocking and inventory requirements, promotion of entry, or protection of brand image, be satisfied through the use of alternative vertical restraints? Are these restraints more or less restrictive than RPM?
- B. Should the availability of less restrictive alternatives be relevant to the legality of a particular usage of RPM? If so, in what manner should this be reflected in the analysis?
- C. Is the *Colgate* doctrine still necessary for the analysis of RPM under federal law? Under contrary state laws?
- D. Are MAP policies less restrictive than RPM? If so, should the posted sale prices of goods offered for sale on Internet sites be treated as “advertised” prices for MAP purposes?

VII. Screens/Danger Zones for RPM

- A. Are there screens (danger zones) that can be quickly or easily applied that identify circumstances where RPM is unlikely to be harmful (or particularly likely to be harmful) to competition? If so, what are they?
- B. In *Nine West* the Commission considered whether there was manufacturer market power. Is market power an effective screen?
- C. If market power is used as a screen, is market power derived from asymmetric information (*Kodak*) sufficient to pass the screen to justify an enforcement action?
- D. Are there other, or additional, market factors that can be used as screens or to identify danger zones?

VIII. Procompetitive Justifications

- A. What justifications for RPM usage should be considered? Free-Riding on pre-sale services? Provision of additional services, including manufacturer-specific services? Ensuring sufficient inventory and stocking requirements are met? Promotion of market entry? Brand image?
- B. In order to assert a justification defense to RPM, should the defendant be required to plead facts sufficient to demonstrate (1) the existence of business problems (2) for which the use of RPM could be a plausible, as opposed to a merely potential, remedy?

- C. Should the availability of less restrictive alternatives be relevant to the analysis of procompetitive justifications?
- D. Should consumers be advised they are being offered goods at RPM prices, including authorized sale prices or discounts?

IX. Market Definition for RPM Analyses

- A. How should the product market be defined? (Functional Substitutes vs. Constraining Products [Theoretical Monopolist Test])
- B. Should product differentiation have an impact on product market definition?
- C. Should the Internet be reflected in geographic market definition?