CPI COMPETITION POLICY INTERNATIONAL

The CPI Antitrust Journal
January 2010 (2)

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Over the past three years, certain state attorneys general have spoken out strongly against Resale Price Maintenance ("RPM") practices, upset with the Supreme Court decision in *Leegin*.[2] Citing their own state laws, these state enforcers have insisted that the per se prohibitions on RPM that existed prior to *Leegin* still exist within their respective states. Officials from the Antitrust Bureau for the New York Attorney General have also asserted that under federal law, courts should apply a "quick look" or otherwise truncated rule of reason.[3] The recent settlement of an RPM claim against Herman Miller furniture underlines that the state attorneys general are not just saber rattling. Federal officials from the new administration have indicated varying levels of approval of these efforts, with Assistant Attorney General Christine Varney setting forth suggested guidance to state enforcement efforts regarding how to challenge RPM under the rule of reason regime.[4]

This leads one to the question of the purpose for these efforts. That is, what is the policy rationale for focusing on bringing cases that would push the boundaries of antitrust law on RPM? Are there genuine policy concerns about RPM that would justify, say, a diversion of even a fraction of the efforts needed to monitor and prevent potential bid rigging among local service providers?

Detecting or preventing RPM should not be a priority of either state or federal enforcement. Their limited resources, already strained by the deep recession, are best spent elsewhere. It has taken nearly a century, but the Supreme Court finally reached a conclusion that would seem a matter of common sense to a layman: A manufacturer's good faith attempts to control the prices at which its products are sold to consumers should not generally engender scrutiny under the antitrust laws. It is only when that RPM is accompanied by more problematic behavior, such as horizontal price-fixing or monopolistic conduct, that it should raise concerns.

Perhaps the most important insight from *Leegin* is that a regime that outlaws RPM creates remarkable inefficiencies and perverse incentives, yet this insight has so far received short shrift from the enforcement agencies. For decades, manufacturers have had to engage in a careful pirouette when pricing their output to the end consumer, setting forth policies of "suggested retail prices" and then working with attorneys to cancel those distributors that do not adopt such prices (often resulting in protracted litigation). The only other option available, as the Court pointed out, is for the manufacturers to take the costly and frequently inefficient step of becoming vertically

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[2] Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007).

[3] *See* Robert L. Hubbard, *Protecting Customers Post-Leegin*, ANTITRUST, Fall 2007, at 42-43 ("Hubbard").

[4] *See* Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Antitrust Federalism: Enhancing Federal/State Cooperation*, Remarks as Prepared for the National Association of Attorneys General, Columbia Law School State Attorneys General Program, available at http://www.justice.gov/atr/public/speeches/250635.htm.

integrated. Such costs and inefficiencies are passed on to the consumer in the form of higher prices, and lower service levels.

By contrast, the most efficient pricing mechanism in many cases—the very outcome prohibited under an anti-RPM regime—would be for the manufacturer and retailer to discuss and bargain over the prices to be charged by the retailer to the end consumer. Virtually every other term is on the table, and manufacturers are in essence dictating the end price through their "suggested retail prices" in any event. When manufacturers and retailers can discuss and agree on the pricing to consumers, manufacturers can more effectively tailor their output and pricing to particular retail and distribution networks.

The prevailing fear has been that manufacturers will be able to unilaterally dictate resale pricing terms to retailers or, vice versa, retailers will unilaterally dictate resale pricing terms to manufacturers. Given that most manufacturers and retailers presumably do not have the market power to unilaterally dictate pricing terms, this concern seems misplaced. In the absence of market power, manufacturers and retailers will be constrained by competitors' prices.

The state antitrust enforcement agencies seeking to continue RPM prohibitions have asserted that RPM increases prices to consumers.[5] After all, RPM prohibits discounters from selling below the price agreed on with the manufacturer. But there are many flaws in this rationale: permitting discounters to dash manufacturer's expectations about retail pricing (and demand) creates inefficiencies that may reduce output overall. Further, the alternative to individually negotiated resale prices (*e.g.*, the manufacturer's publication of a "suggested retail price" applicable to all retailers) may have much more negative effects on pricing if the alternatives do not permit the manufacturer to distinguish between different retailers or consumers. In any event, as the Court pointed out in *Leegin*, higher prices in and of themselves are not anticompetitive absent a further showing of anticompetitive conduct. Higher prices may be accompanied by higher service levels that result in a more desirable offering.

The potential anticompetitive effects from RPM identified in *Leegin* (and cited by AAG Varney and the state enforcement agencies) hardly have anything to do with the nature of RPM as a restraint on commerce, but rather concern the residual effect of some other anticompetitive practice. The hypothetical evil uses of RPM identified by the Court—*i.e.*, to facilitate a manufacturer or retailer cartel[6] or to extend a manufacturer's market power in an industry—have little to do with the merits of RPM in and of itself. Rather, the undesirable conduct has to do either with an underlying horizontal issue (such as a cartel) or an underlying monopolization issue (such as using a vertical restraint to extend or maintain monopoly power). Other practices that also facilitate such behavior (*e.g.*, publishing price lists or attending trade association meetings) are not in and of themselves actionable.

Moreover, the proposals by AAG Varney (and the *Leegin* Court) of identifying supposedly anticompetitive RPM raise substantial concerns about overdeterrence. For example, the *Leegin* Court stated that one of the potential factors to determine whether RPM passes the rule of reason is whether RPM is common within the industry. RPM, however, may be most common within

[5] *See, e.g.*, Hubbard at 42.

[6] Announcing a "suggested retail price," applicable to and known by all retailers, is much more likely to facilitate a cartel than negotiated, confidential pricing between a manufacturer and a retailer. In the former, retailers are able to monitor whether a retailer is cheating on the agreement, whereas in the latter example they are not able to identify whether another retailer has joined.

industries that have differentiated products, such as luxury goods, which require that retailers spend substantial sums to promote the manufacturer's product. That RPM may be an industry-accepted practice might have little to nothing to do with collusion among manufacturers in that industry—to the extent that collusion is possible among the manufacturers of specialized products—and much more to do with the cost structure of a particular industry.

Regardless, the announcement by the state attorneys general that they intend to pursue claims for RPM—and the tacit endorsement of such an initiative by the DOJ—means that the *Leegin* decision may have done little to eliminate the inefficiencies identified by the Supreme Court. In fact, with the renewed enforcement effort by state officials, manufacturers and retailers must be doubly concerned about the patchwork of different antitrust regimes that these state attorneys general represent. Many of those who counsel clients concerning *Leegin* are proceeding with caution, given the aggressive posture by the agencies. But there is little principle behind the government effort. The agencies should refrain from pursuing such cases, just as they typically refrain from bringing price discrimination claims under the Robinson-Patman Act.