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I. INTRODUCTION

In 2007, the United States Supreme Court jettisoned 96 years of precedent[2] and held that minimum resale price maintenance ("RPM") agreements were not *per se* illegal under Section 1 of the Sherman Act, but rather should be subject to "rule of reason" review, a far more lenient process.[3] The reaction to *Leegin* among many state legislators and attorneys general was swift and dramatic. They vowed to reverse the rule through legislation or to continue prosecuting RPM agreements as *per se* illegal under their existing state laws.

Now, nearly seven years later, has that outrage amounted to anything? Have the states successfully repealed *Leegin* or outlawed RPM agreements under their own laws?

Only one state—Maryland—has enacted a repealer statute, but two others—California and Kansas—have successfully prosecuted RPM claims under a *per se* rule, and this year the Kansas state legislature enacted amendments to the state's statute that require a rule of reason analysis for RPM agreements. That may not sound like much, but these developments have presented companies selling products nationwide with a difficult choice: adopt different distribution practices for the country's largest state or let that state drive their entire distribution strategy.

II. "LEEGIN-REPEALER" STATUTES

The repealer movement has largely fizzled. Maryland became the first to attempt to "repeal" *Leegin* by declaring RPM agreements *per se* illegal in 2009,[4] but the Maryland courts have yet to review the constitutionality of the statute.

No other state has enacted a repealer statute, although Pennsylvania is trying. Pennsylvania senators recently introduced a bill that includes *Leegin*-repealer language similar to that in the Maryland statute. Senate Bill 848 defines a "Prohibited Act" to include "contact[ing], combin[ing] or conspir[ing] to establish a minimum price below which a retailer, wholesaler or distributor may not sell a commodity or service."[5] The bill was originally introduced in 2012, but stalled in committee and was reintroduced on March 14, 2013. The revived bill was referred to the state Senate Judiciary Committee in April, where it remains today.[6]

III. RPM PROSECUTIONS UNDER EXISTING STATE LAWS

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[2] *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

[3] *Leegin Creative Leather Prods. Inc. v. PSKS Inc.*, 551 U.S. 887 (2007).

[4] MD. CODE ANN., Com. Law §§ 11-201 *et seq.*

[5] *See* S.B. 1565, 2012 Reg. Sess. (Pa. 2012).

[6] S.B. 848, 2013 Reg. Sess. (Pa. 2013).

A larger issue is the continuing prosecution of RPM agreements as *per se* illegal under existing law in a few states. There has been one major prosecution of an RPM agreement as *per se* illegal under state law. In 2008, New York, Illinois, and Michigan prosecuted Herman Miller, Inc., under the laws of those states without any allegation of market power, suggesting that the basis for the prosecution was the *per se* illegality of RPM agreements.[7] That case settled within four days by consent decree, and Herman Miller agreed to refrain from future RPM agreements.[8]

Since then, courts in some states have specifically noted that *Leegin* calls into question whether RPM agreements can be treated as *per se* illegal.[9] Only three states have prosecuted RPM agreements—New York, California, and Kansas—and only the latter two have directly addressed the rule.

A. New York

Although the New York Attorney General has prosecuted RPM agreements as *per se* illegal under state law, the courts have reached an opposite conclusion. In March 2010, the state filed suit against Tempur-Pedic International alleging that the company had entered into illegal RPM agreements with its resellers.[10] The complaint specifically alleged that the agreements were *per se* illegal because they were violations of New York General Business Law § 369-a, which prohibits contracts requiring vendors from reselling a product "at less than the price stipulated by the vendor or producer."

The trial court ruled that the effect of § 369-a was only to make the agreements unenforceable, not illegal.[11] The following year, the Appellate Division of the state Supreme Court affirmed the trial court's ruling, holding that §369-a does not make RPM agreements illegal in New York.[12] Whether or not RPM agreements might be deemed *per se* illegal under the Donnelly Act (the New York antitrust law) was not reached by either court. However, it is telling that although the AG's subpoenas were issued under the authority of *both* § 369-a *and* the Donnelly Act, no charges under the Donnelly Act were ever brought against Tempur-Pedic.

B. California

[7] *State of New York, et al. v. Herman Miller, Inc.*, No. 08-cv-2977 (S.D.N.Y. Mar. 21, 2008 (filed)). Prior to *Herman Miller* and shortly after *Leegin* issued, the New Jersey intermediate appellate court suggested in dicta and without analysis that RPM agreements remained *per se* illegal under New Jersey state law, but that analysis has not been adopted or addressed by other courts in the state. *Exit A Plus Realty v. Zuniga*, 930 A.2d 491, 497 (N.J. Super. Ct. App. Div. 2007).

[8] *Herman Miller, Inc.*, No. 08-cv-297, Dkt. No. 2, Stipulated Judgment and Consent Decree (Mar. 25, 2008).

[9] *See, e.g.*, *Manuel v. State, Office of Alcohol & Tobacco Control*, 982 So. 2d 316, 335 (La. App. 3 Cir. 2008), *writ denied sub nom. Manuel v. State, Off. of Alcohol & Tobacco Control*, 989 So. 2d 107, (La. 2008) (noting that state court decisions relying on U.S. Supreme Court precedent predating *Leegin* should be reconsidered in light of that decision).

[10] *See New York v. Tempur-Pedic Int'l, Inc.*, 30 Misc. 3d 986, 987-90 (N.Y. Sup. Ct. 2011).

[11] *Id.* at 993-96.

[12] *New York v. Tempur-Pedic Int'l, Inc.*, 95 A.D.3d 539, 540 (N.Y. App. Div. 1st Dep't 2012) ("[T]here is nothing in the [statutory] text to declare those contract provisions to be illegal or unlawful; rather the statute provides that such provisions are simply unenforceable in the courts of this state.").

The Cartwright Act—California's antitrust statute—outlaws RPM agreements as *per se* illegal.[13] In two recent cases, the state branded RPM agreements as *per se* violations and in both cases achieved settlements that imposed civil penalties, voided the existing contracts, and required the companies to refrain from such agreements in future.[14]

However, one California state court suggested recently that the cases sustaining *per se* treatment of RPM agreements must be reexamined. In sustaining a demurrer on the illegality of an alleged RPM agreement, the court wrote that the post-*Leegin* California cases finding RPM agreements to be *per se* unlawful rely on *Dr. Miles Medical Co. v. Park & Sons Co.*, the case *Leegin* overturned.[15] While the court acknowledged that RPM agreements are *per se* unlawful under California law, its opinion argued that *Leegin* should instigate a rethinking of the constitutional underpinnings of that law.[16]

C. Kansas

Kansas' antitrust statutes long have prohibited agreements to control or fix any price to the public of any merchandise, and declared that any such agreements were "against public policy, unlawful, and void."[17] Although the language is similar to that contained in the New York statute, the Kansas courts interpret it quite differently, holding that the statutes create a *per se* rule under the plain meaning of the text. Moreover, it is sufficient that the goal of the agreement, combination, or arrangement was intended to fix prices, without regard to whether the prices actually increased.[18] In April of this year, however, the governor of Kansas signed into law a bill that harmonizes Kansas's statutory regime with Supreme Court precedent and requires a rule of reason analysis for RPM agreements.[19] The bill became law on April 18, 2013, and contains a retroactivity provision that makes it applicable to any case not currently pending.

IV. LOOKING FORWARD

Thus far, *Leegin*'s holding is the rule for the majority of the United States, with little indication that the status quo is likely to change. Any true shift back to the *per se* rule is likely to come—if it comes at all—at the federal level. During his July 26, 2012 confirmation hearing, Bill

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[13] *Mailand v. Burckle*, 572 P.2d 1142, 1147 (Cal.1978); *see also Alan Darush MD APC v. Revision LP*, No. CV 12-10296 GAF AGRX, 2013 WL 1749539, at *6 (C.D. Cal. Apr. 10, 2013) ("[S]imply because the Supreme Court has changed course regarding the Sherman Act does not mean the California Supreme Court will regarding the Cartwright Act. . . . [T]the Court will apply California Supreme Court precedent, which currently holds that vertical minimum price restraints are per se unlawful under the Cartwright Act.").

[14] *See California v. DermaQuest Inc.*, No. RG10497526 (Cal. Super. Ct., Alameda Cty., February 23, 2010) *and California v. Bioelements, Inc.*, No. 10011659 (Cal. Super. Ct., Riverside Cty., January 11, 2011).

[15] *Kaewsawang v. Sara Lee Fresh, Inc.*, No. BC360109, 2013 WL 3214439, at *5, (Cal. Super. Ct., Los Angeles Cty., May 6, 2013).

[16] *Id.* On appeal, however, the intermediate reviewing court stated that RPM agreements "would, under *Mailand* . . . be a per se violation under the Cartwright Act, notwithstanding a change of law under the Sherman Antitrust Act . . . (see *Leegin* . . .). We are bound to follow the law set forth by our Supreme Court applying state law." *Alsheikh v. Superior Court*, Case No. B249822, 2013 WL 5530508, at *3 (Cal. Ct. App. Oct. 7, 2013).

[17] Kan. Stat. Ann. §§ 50-101, 50-112 (West 2011).

[18] *See generally O'Brien v. Leegin Creative Leather Products, Inc.* 294 Kan. 318 (2012).

[19] Amending the Kansas Restraint of Trade Act, S.B. 2013-2014 Reg. Sess. (Kan. 2013) (amending, *inter alia*, Kan. Stat. Ann. §§ 50-101, 50-112).

Baer, the current Assistant Attorney General for Antitrust, gave his support to Congressional efforts to repeal *Leegin* through legislative action.

The "Discount Pricing Consumer Protection Act" was introduced in January 2009 by Senator Herb Kohl and would have codified RPM agreements as per se illegal.[20] The bill was re-introduced in January 2011 as Senate Bill 75 and was reported out of committee without amendment on November 3, 2011, but died on the floor.[21] A companion bill in the House, H.R. 3406, was introduced on November 14, 2011 and died in subcommittee.[22] At present, no such legislation is pending in Congress, and it is difficult to see how a divided Congress could agree on such a dramatic change in the law. For all but two states, then, *Leegin* is likely to remain the law of the land for the foreseeable future.

[20] Discount Pricing Consumer Protection Act, S.B. 148, 11th Cong. (2009).
[21] Discount Pricing Consumer Protection Act, S.B. 75, 112th Cong. (2011).
[22] Discount Pricing Consumer Protection Act, H.R. 3406, 112th Cong. (2011).