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I. INTRODUCTION

Restraints on electronic commerce have become a burning hot topic in Europe. The European Commission has opened a sector inquiry into barriers limiting e-commerce between countries, while national competition authorities, particularly Germany's Bundeskartellamt, have been combating restraints on discount pricing and the use of online marketplaces. Within the European Union, there is an overarching objective to eliminate barriers to commerce between Member States. There also is greater concern for intrabrand competition, greater attention to the distinction between passive order taking and active selling, and a different set of rules against minimum resale price maintenance.

In the United States, the application of the antitrust laws to electronic commerce has progressed incrementally over the years. At first, the conventional wisdom was that electronic commerce was too new a phenomenon to expect the antitrust laws to keep up, but electronic commerce has existed now for some three decades and that rationalization no longer rings true.

For the most part, the rules applicable to restraints limiting, or indirectly influencing, prices in electronic commerce reflect the rules that apply to such restraints in every type of commerce. To the extent there is still uncertainty, it usually reflects the difficulty of applying principles originally established in the bricks-and-mortar world to virtual resellers delivering a combination of tangible and intangible products.

Generally, resale restraints other than restraints on resale prices themselves have been found to be reasonable and lawful, even if they may inhibit discounting to some degree. To illustrate:

- U.S. antitrust law normally permits a manufacturer or other supplier to prohibit dealers from reselling through particular means—such as mail order, telephone, or electronic commerce.
- A supplier may enter into agreements with dealers limiting the territories into which retailers may deliver products, including products ordered through electronic commerce, and/or the territories in which retailers may advertise and promote to attract customers.
- A supplier may enter into agreements with dealers limiting the types of customers to which those dealers may resell through electronic commerce or otherwise, such as permitting sales to contractors but not to consumers, or permitting sales to consumers but not to other retailers or resellers of any kind.

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- A supplier may exercise control over the appearance of dealers' outlets and dealers' displays, including the appearance of dealers' websites.

Price restraints are trickier. Suppliers may suggest the minimum prices at which dealers may resell their products on the internet without violating the antitrust laws. Suppliers of most products also may announce unilaterally that they will stop doing business with dealers that resell for less than the prices that the supplier specifies, so long as the supplier does not enter into bilateral agreements with the dealers limiting the minimum price at which the dealer may resell.

But the law on bilateral agreements is in flux. Bilateral agreements setting minimum resale prices were considered *per se* illegal under federal antitrust law until 2007, when the Supreme Court made them subject to the rule of reason.[2] Nevertheless, such agreements have not been widely adopted because the Court indicated that they may continue to violate federal antitrust law in some circumstances, and because certain states continue to consider minimum resale pricing agreements *per se* unlawful under state antitrust law.

In contrast, bilateral agreements limiting the ***maximum*** price at which the dealer may resell generally are considered reasonable and lawful under both state and federal law, and—with one exception—suppliers' policies against dealing with dealers that resell for less than recommended prices do not violate state or federal law either, if they are genuinely unilateral. The exception is a new Utah contact lens statute, enacted in March 2015 and effective on May 12, 2015, that prohibits both agreements ***and*** unilateral policies restricting minimum resale prices for contact lenses. Similar legislation has been introduced in a number of other states, but the Utah statute almost immediately was challenged in federal court as unconstitutional and the outcome of that case is likely to control any comparable statutes from other states as well.

In this context, three significant questions have arisen in the United States with respect to restraining prices in electronic commerce generally:

1. May a supplier use agency or consignment arrangements, particularly for intangible products that are not inventoried, to set online prices?
2. May a supplier restrict the prices that resellers are permitted to display on their websites or otherwise offer in electronic commerce?
3. May a supplier prohibit resellers from engaging in electronic commerce altogether, or from selling through certain online platforms such as auction sites or marketplaces?

II. AGENCY

Consignment arrangements fell out of favor after the Supreme Court's 1964 decision in *Simpson v. Union Oil Co.*,[3] holding that a sham consignment amounts to resale price maintenance. However, even though minimum resale price maintenance agreements remain *per se* unlawful in some states today, in *genuine* consignment situations (under which the agent earns a commission for distributing the goods but does not take title to them) the consignor always has been permitted to set the price at which its product is sold by the consignee (which is acting as

[2] *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).
[3] *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

the consignor's agent) even where minimum resale price maintenance is considered to be *per se* unlawful.[4] Of course, where tangible products are involved, genuine consignment arrangements impose additional costs (for insurance, etc.) on the supplier, which retains title and risk of loss until a sale is made.

But more and more, popular products today are not tangible and intermediaries do not need to stock inventory or take title. Downloads of music, books, games, and programs (including programs for "printing" tangible products on 3D printers) are all examples of intangible products sold through electronic commerce. Although the rights to such products may be sold and resold, they also may be distributed through agency agreements, with title never passing to the intermediary, which serves as an agent and charges whatever price the principal sets. There can be no resale price maintenance because there is no resale.[5]

Nevertheless, the Justice Department's recent case against Apple over the pricing of e-books left many wondering whether agency agreements were dead.[6] That case involved some very unique arrangements in the context of allegations of a hub-and-spokes conspiracy among suppliers (*i.e.,* publishers), orchestrated by an intermediary (Apple). The Court's decision—which is being appealed by Apple—is instructive but does not mark the death of agency agreements.

The case concerned a so-called "price parity provision"—by which a supplier and an agent agree that whatever price the supplier sets, it will adjust that price to match the lowest price charged by any reseller that takes title and resells the same product in competition against the agent. Plainly, this was no ordinary arrangement, since it involved an intangible product that was being sold ***both*** by agents and through resellers.

The Court held that the defendant publishers all adopted agency agreements with Apple at the same time and then forced agency agreements on Amazon—the largest retailer of e-books—in order to raise retail prices collectively. However, the Court was careful to point out that agency agreements themselves are not inherently illegal. Agency agreements can be especially attractive for intangible products such as digital publications, because many of the obstacles that historically have discouraged agency—*e.g.,* retained risk of loss, cost of insurance, UCC filings, monitoring, etc.—simply don't exist. Under an agency model the principal is able to set the retail price, and so long as that price is not being set or raised pursuant to an agreement among competitors, the *Apple* decision does not weaken the legality of these arrangements.

The Court further held that the price parity provision—which the parties and the Court sometimes referred to as a most favored nation ("MFN") clause—provided the means to force the publishers to require Amazon to switch to agency agreements and charge the same higher retail prices as Apple, but the Court was quick to add that MFN clauses themselves are neither improper nor illegal.

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[4] *See, e.g., Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988) (genuine consignments are not resales).

[5] *Cf. LucasArts Entm't v. Humongous Entm't,* 870 F. Supp. 285 (N.D. Cal. 1993)(no resale in licensing and royalty sharing arrangement).

[6] *United States v. Apple Inc.,* 952 F. Supp. 2d 638 (S.D.N.Y. 2013), *appeal pending.*

At the same time, it is important to understand that Apple's "price parity provision" was markedly different from what MFN clauses usually are understood to be. Ordinarily, an MFN clause appears in a sales agreement, binds either the seller or the buyer, and provides either (a) "I promise to sell to you at the lowest price that I charge any customer," or (b) "I promise to buy from you at the highest price that I pay any supplier. "In contrast, the "MFN" clauses that the publishers entered into with Apple were part of agency agreements, not sales agreements. The publishers were not selling to Apple, although initially they were still selling to Amazon, which resold e-books to consumers at prices that Amazon set. Consequently, each publisher's "MFN" agreement with Apple essentially provided, "I promise to sell to ***consumers*** through Apple's electronic bookstore, which is acting as my agent, at the lowest retail price that any of my ***customers*** (*e.g.,* Amazon) charges consumers."

This meant that if Amazon resold e-books to consumers for less than the retail price at which the publishers were selling through the Apple bookstore, which allegedly is exactly what Amazon was doing, Apple, as the publisher's agent, automatically could reduce the retail price at the Apple store to the same amount in order to remain competitive and continue to earn commissions. Since the publishers were not eager for their prices to drop, the Court found that they were forcing Amazon to switch to the agency model and, as the publishers' agent, begin charging the same higher prices as Apple.

In short, there was nothing typical about the *Apple* case. Because the MFN was so unique, and was found to be part of a price-fixing conspiracy among the publishers, the Court's condemnation should not be expected to apply to ordinary MFN clauses, regardless of the outcome of Apple's appeal. Although the Justice Department has expressed hostility toward MFNs for years, and has attacked them in the health care industry, such clauses repeatedly have been upheld by courts in a variety of contexts. They must be approached with caution but they are not defunct. If an agency agreement or ordinary MFN clause is needed to serve a legitimate purpose, it should be possible to adopt it without violating the antitrust laws, notwithstanding the *Apple* decision.

III. MAP PROGRAMS

The next issue that has been attracting attention in the United States is how to recognize a bilateral minimum resale price maintenance agreement in electronic commerce. Although minimum RPM is no longer *per se* illegal under federal law after the Supreme Court's decision in *Leegin,*[7] it has been understood to remain *per se* illegal under the laws of California and Maryland.[8]

Do restrictions on the display of discount prices on websites merely amount to the restriction of price *advertising*—which has long been considered reasonable and lawful in

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

[8] *See* Maryland Code Ann., Comm. Law § 11-204(b) (eff. Oct. 1, 2009) ("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."); *Mailand v. Burckle,* 20 Cal.3d 367 (1978); *Alan Darush MD APC v. Revision LP,* 2013 WL 1749539 (C.D. Cal. 2013); *Alsheikh v. Superior Court of Los Angeles County,* No. B249822, 2013 BL 275295 (Cal. App. 2d Dist.) (unpublished opinion).

virtually every case—or the restriction of resale prices themselves, *i.e.,* minimum resale price maintenance. In 2011, the District Court for the Southern District of New York held—contrary to indications in some earlier cases—that enforcement of a minimum *advertised price* ("MAP") agreement against internet retailers does not amount to minimum resale price maintenance, notwithstanding the contention often made by such retailers that prices appearing on websites really amount to selling prices rather than advertised prices.[9] The Court in that case also reaffirmed that minimum resale price maintenance is not *per se* illegal under New York's antitrust law, in accord with an earlier holding of a New York state court.

Franke, a manufacturer of sinks and faucets, had instituted a MAP policy applicable to all of its dealers, including internet retailers. It provided that (a) retailers were not permitted to publish prices below a specified range anywhere on any website; (b) Franke could cease doing business temporarily or permanently with violators; (c) internet retailers could, however, advertise that consumers could call or email to obtain the retailer's lowest price; and (d) internet retailers also could advertise the availability of coupons for lower sales prices at checkout.

WorldHomecenter.com, an internet retailer, violated the policy and thereafter signed a bilateral reinstatement agreement, promising to adhere to the MAP policy. The agreement provided that further violation would result in permanent termination. After Worldhomecenter.com violated the policy again, Franke allegedly stopped shipping, demanded that its wholesalers stop shipping, and posted a "warranty disclaimer" on its own website announcing that it would not honor warranties for Worldhomecenter.com customers.

Worldhomecenter sued, claiming that because it was being prevented from displaying lower prices anywhere on its website, the MAP policy amounted to minimum resale price maintenance in violation of New York's antitrust law.

Franke moved to dismiss and the judge granted the motion. First, she held that New York law merely renders minimum resale price maintenance agreements unenforceable, not illegal. Next, she held:

> Unlike the prior cases cited by Plaintiff where an advertising policy was held to restrain prices, the [MAP] policy here provides internet retailers with more than one way to communicate lower prices to clients, either by allowing customers to call or email for a price quote or by offering a coupon to be applied at checkout.

These methods afford internet retailers "viable strategies to provide online customers with reduced prices." On this basis, the Court concluded that Franke's restriction was "regulating advertised prices, not the resale prices themselves," and therefore could not be subject to *per se* illegality even if the *per se* standard continued to apply to minimum resale price maintenance in New York.

Would the Court have ruled the same way if Franke had not allowed internet retailers to invite consumers to call or email for a lower price quote, or had not allowed internet retailers to advertise the availability of coupons providing lower prices at checkout? Arguably, even without these exceptions, the supplier still would have been "regulating advertised prices, not the resale

[9] *Worldhomecenter.com, Inc. v. Franke Consumer Products, Inc.,* No. 10 Civ. 3205 (S.D.N.Y. June 22, 2011), *accord, Worldhomecenter v. KWC America, Inc.,* No. 10 Civ. 7781 (S.D.N.Y. 2011) (adopting same reasoning).

prices themselves," although it might have been more difficult for the Court to distinguish certain earlier *Worldhomecenter.com* cases. At the same time, distinguishing those earlier decisions was not essential, because they were only denials of motions to dismiss, not determinations of liability, and there already were other cases pointing the opposite way.[10] Further clarification must await further developments in the case law.

In any event, this decision, in combination with such cases as *Campbell* and *Blind Doctor,* provides a significant marker for any supplier applying MAP policies to dealers that market their products on the internet. This may prove to be particularly important to makers of contact lenses and any other products that might become subject to statutes of the type adopted in Utah, prohibiting both bilateral minimum resale price agreements ***and*** unilateral minimum resale price policies—assuming that such statutes survive constitutional challenge.

IV. RESTRICTING SALES THROUGH SPECIFIED CHANNELS

A third issue that has been recurring with some frequency is the right of a supplier to restrict customers from reselling their products through online marketplaces or auction sites. In contrast to the rules that have been developing in Europe, U.S. antitrust law has afforded suppliers greater discretion to limit where and how resellers may distribute products online.

In the United States, suppliers have been allowed to prohibit customers from reselling their products through electronic commerce, either reserving electronic commerce to the supplier itself or eliminating electronic commerce for its products altogether.[11] This is consistent with earlier cases permitting suppliers to refuse to permit dealers to resell products by mail order or telephone.[12]

Even where a supplier permits dealers to resell through electronic commerce, an issue still can arise as to whether the supplier may prohibit dealers from reselling through a third-party marketplace or auction site. There is a dearth of case law directly addressing the right to sell through an online marketplace or auction site. Nevertheless, if a supplier may prohibit a dealer from reselling its products through e-commerce entirely, it presumably may prohibit reselling through specified means of e-commerce, such as a marketplace—just as it may prohibit reselling through flea markets in the bricks-and-mortar world.

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[10] *Campbell v. Austin Air Systems, Ltd.,* 423 F. Supp.2d 61, 69-70 n. 6 (W.D.N.Y. 2005) (agreement on minimum price advertised on the internet); *Blind Doctor, Inc. v. Hunter Douglas, Inc.,* 2004 U.S. Dist. Lexis 18480 (N.D. Cal. 2004)(unilateral policy; restraint on posting prices on a website is not price-fixing).

[11] *MD Products, Inc. v. Callaway Golf Sales Co.,* 459 F. Supp. 2d 434 (W.D.N.C. 2006) (no concerted action found where defendant unilaterally instituted policy); *Blind Doctor, Inc. v. Hunter Douglas, Inc.,* 2004 U.S. Dist. Lexis 18480 (N.D. Cal. 2004)(prohibition on internet or toll-free telephone sales); *Credit Chequers Information Servs. v. CBA, Inc.,* 1999 WL 253600 (S.D.N.Y. 1999), *aff'd,* 205 F.3d 1322 (2d Cir. 2000).

[12] *See H.L. Hayden Co. of New York, Inc., v. Siemens Med. Sys.,* 879 F.2d 1005, 1014 (2d Cir. 1989); *O.S.C. Corp. v. Apple Computer, Inc.,* 792 F.2d 1464, 1468 (9th Cir. 1986); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.,* 878 F.2d 801, 802 (4th Cir. 1989) ("prohibit[ing] dealers from soliciting or selling its furniture by mail or telephones order to consumers residing outside specified sales areas"); *National Marine Elec. Distribs., Inc. v. Raytheon Co.,* 778 F.2d 190 (4th Cir. 1985) (prohibiting dealers from engaging in mail order sales).

Likewise, a supplier may prohibit dealers from supplying other resellers that offer products through online marketplaces and auction sites, just as a supplier ordinarily may prohibit dealers from selling to any transshipper or other third-party reseller. Such restrictions may impact the prices that consumers ultimately pay online but fall within the rule generally permitting suppliers to limit intrabrand competition in order to strengthen interbrand competition.

Of course, if sellers that do participate in an online marketplace conspire with one another to fix the prices they offer, this would amount to horizontal price-fixing. Lest this seem unlikely, the U.S. Department of Justice recently obtained a guilty plea from an online seller to a felony charge for conspiring with competing online sellers to adopt pricing algorithms that surreptitiously coordinated changes in the prices that each of them charged through an online marketplace. Even an online marketplace can become an axis for collusion, and price-fixing by means of software is still price-fixing.

V. EUROPE

As noted at the outset, the rules are different in Europe. Suppliers in the European Union may not prevent consumers in one Member State from buying online at lower prices from dealers operating in other Member States. Once a supplier authorizes a dealer, it must allow the dealer to have a website and sell its products online. Restraints designed to divide the market geographically, such as an obligation to re-route consumers to another dealer's website, or to reject transactions if the credit card address is in another dealer's area, are prohibited. In an exclusive distribution network, the supplier may prohibit a dealer from actively targeting customers in another dealer's area but the dealer must be permitted to sell to customers from another dealer's area that make contact on their own (called "passive" sales).

Also, minimum resale price maintenance is a "hardcore" restraint under EU law. EU law broadly prohibits vertical agreements that, directly or indirectly, in isolation or in combination with other factors, have as their objective restricting a dealer's ability to determine its minimum resale price. Thus, unlike the United States, forbidding dealers from displaying discount prices in Europe is more likely to be treated as tantamount to minimum resale price maintenance.

In short, suppliers should not attempt to restrict pricing in electronic commerce in Europe without first consulting long and hard with European counsel.

VI. CONCLUSION

Restraints on prices in electronic commerce in the United States are just like price restraints in the bricks-and-mortar world—except when they're not. Agency arrangements can succeed online, but require special attention if both agency sales and conventional resales of the same product exist side-by-side. Restraints on the display of resale prices by dealers online require close attention to avoid slipping into bilateral minimum resale price maintenance agreements. Restraints on resales through online marketplaces and auction sites are generally permissible, although they can be hard to police.

Electronic commerce is becoming the predominant form of commerce in many sectors of the economy today, and it is important that the law on pricing keep pace. Inevitably, there will be more disputes in the future, and with them will come more issues and, hopefully, more guidance.

Whether this will result in eventual harmonization between the rules in the United States and the rules in Europe or a widening of the gap between the two, only time will tell.