NO RULE OF REASON HERE: STATE AG REMINDS MANUFACTURERS THAT MINIMUM RETAIL PRICE AGREEMENTS ARE ILLEGAL PER SE IN MARYLAND WITH LATEST SUIT

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Antitrust, Competition and Trade Regulation Alert

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RETAIL PRICE MAINTENANCE

In 2007, the Supreme Court overturned almost a century of precedent by ruling that vertical price restraints were no longer *per se* violations of the Sherman Antitrust Act (the "Sherman Act"), finding they would now be evaluated under a rule of reason analysis.[1] However, the Supreme Court's holding in *Leegin* does not preempt state antitrust law.[2] While states had traditionally adopted antitrust laws to parallel federal interpretation of the Sherman Act, this practice evolved in the wake of *Leegin*. Specifically, Maryland[3] amended the state's antitrust act by making any agreement establishing a minimum retail price to be a *per se* unreasonable restraint of trade, reverting back to a pre-*Leegin* regime.[4],

On February 29, 2016, the Maryland Attorney General filed a complaint against Johnson & Johnson Vision Care, Inc. ("J&JVC") in the Circuit Court for Baltimore County for allegedly violating this provision.[5] While this case is still in its infancy, it serves as a strong reminder for manufacturers that do business nationally that a rule of reason is not the default for determining the legality of vertical price restraints.

PRICE AGREEMENTS AND *PER SE* LIABILITY UNDER THE MARYLAND ANTITRUST ACT

Permissible Price Control

In *United States v. Colgate & Co.*, the Supreme Court recognized that manufacturers have the right to choose with whom they conduct business and their right to institute unilateral policies establishing the conditions under which they may refuse to sell.[6] Manufacturers may use so-called unilateral pricing policies ("UPP") to announce a minimum price and still remain permissible under all state antitrust laws, including Maryland, so long as the conduct remains unilateral and independent.[7]

Maryland Attorney General Lawsuit

In the Complaint, the Maryland Attorney General alleges that J&JVC instituted a UPP setting minimum resale and advertised prices for its retailers. One J&JVC club retailer objected, complaining that it had historically sold at prices less than those in the UPP.

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The Complaint alleges that opposed to simple "announcement" and "refusal to deal," (the tenets of UPP), J&JVC entered into negotiations with a club retailer to modify its UPP to suit the retailer's needs. Specifically, J&JVC issued a UPP amendment allowing for the retailer and other club retailers to offer in-store gift cards for their agreement to sell at or above the prices listed in the UPP.

The Maryland Attorney General alleges that because J&JVC's UPP was the result of a negotiated agreement, it was not unilateral and therefore violates the Maryland Antitrust Act.

MANUFACTURERS MUST COMPLY WITH STATE ANTITRUST LAWS

Due to the unique distribution structure for contact lenses, this case involves antitrust issues that have been heavily contested. There is federal legislation in the Fairness to Contact Lens Consumers Act[8] affording consumers added protections as well as a host of private lawsuits currently being litigated against manufacturers, including J&JVC. Although contact lens sales are a particularized antitrust topic, the Maryland Attorney General's case should serve as a warning for manufacturers to be cognizant of state antitrust laws that *Leegin* does not preempt.

On a broad level, manufacturers with national distribution structures cannot rely on Sherman Act compliance to avoid all antitrust exposure in the United States. National manufacturers should be aware of states whose antitrust laws differ from federal law. More specifically, in the case of retail price maintenance, manufacturers with national distribution structures may face *per se* liability with state antitrust laws where the Sherman Act calls for a rule of reason analysis. Accordingly, manufacturers would be wise to focus closely on retail pricing policies and ensure that UPPs remain truly unilateral decisions. By treating retailing pricing issues as though they are *per se* antitrust violations, manufacturers will reduce state and federal antitrust liability.

Notes:

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

[2] See *California v. ARC Am. Corp.*, 490 U.S. 93, 101, 109 (1989) ("When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States.") (citations omitted).

[3] California and New York still treat minimum retail price agreements as *per se* state antitrust violations.

[4] See Md. Code Ann., Com. Law § 11-204(b) ("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.").

[5] *State of Md. v. Johnson & Johnson Vision Care, Inc.*, Case No. 03C16002271 (the "Complaint").

[6] 250 U.S. 300, 307 (1919).

[7] Some states have industry-specific exceptions.

[8] 15 U.S.C. §§ 7601–10.

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