UNILATERAL POLICIES ARE 99 YEARS OLD AND STILL THE SAFEST AND MOST EFFECTIVE FORM OF RESALE PRICE MAINTENANCE

Date: 3 June 2019

U.S. Antitrust, Competition & Trade Regulation Alert

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Over 99 years ago, on June 2, 1919, the United States Supreme Court held in *U.S. v. Colgate & Co.* [1] that the Sherman Act [2] does not prevent a manufacturer from: 1) unilaterally announcing prices at which goods may be advertised and/or sold; and 2) subsequently refusing to deal with retailers that choose not to acquiesce with the announcement. Before *Colgate*, a manufacturer's resale price maintenance ("RPM") policy was subject to *per se* scrutiny under the Sherman Act, where simple proof of the policy's existence was dispositive for finding of an illegal price fixing agreement. [3] In the wake of *Colgate*, manufacturers began to take advantage of the legal avenue created for implementation of unilateral pricing policies — then referred to as "Colgate policies." Now, these "Colgate policies" are known as unilateral pricing ("UP") policies and enable manufacturers to maintain some control over the price of their products without exposing themselves to legal liability.

Today, there is much confusion amongst product manufacturers in relation to pricing policies and their legality. Despite the common belief that the 2007 Supreme Court decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* [4] made all forms of RPM legal, many forms of RPM still carry great risk. That risk, however, can be greatly mitigated through the implementation of a UP. UP's continue to be the safest and most effective form of RPM, especially when a manufacturer's goal is to combat price erosion on the Internet.

WHAT IS A UNILATERAL POLICY AND WHY ISN'T IT PRICE FIXING?

Under a UP, a manufacturer announces resale or advertised prices at which it believes its products should be sold and/or advertised and then may refuse to continue to conduct business with any retailer who fails to acquiesce with the announced prices. In *Colgate*, the Supreme Court recognized the legality of this practice premised on two foundational principles. First, manufacturers are absolutely free to choose which retail partners they will do business with and under what terms they will continue to do business with those retail partners. Second, the retail partner has an absolute right to choose and set whatever prices it wants to advertise and sell products. Together, these two foundational principles establish the framework for the use of UP's.

Critically, a UP is not an *agreement* and therefore does not run afoul of federal laws against agreements to fix prices. Under a UP, a manufacturer instead *unilaterally* announces the terms and conditions under which it will sell its products to retailers, including minimum advertised and/or resale prices, and may stop providing products to retailers that choose to not acquiesce with the announced terms and conditions. [5] A primary benefit of a UP is that it affords a manufacturer wide discretion as to what amounts to acquiescence or non-acquiescence with the UP. In the event of non-acquiescence, it is entirely proper for a manufacturer to simply stop supplying products to the retailer. [6]

MAP POLICIES — A RISKIER, LESS EFFECTIVE ALTERNATIVE TO UNILATERAL POLICIES

While most product manufacturers call their pricing policy a Minimum Advertised Price ("MAP") Policy, they fail to recognize the legal distinction between a MAP Policy and a UP. In a UP, there is no agreement, whereas a MAP agreement is a bilateral agreement between a manufacturer and retailer. A MAP agreement conditions the availability of cooperative advertising funds to the reseller in exchange for the retailer's compliance with the manufacture's advertising guidelines. While these guidelines could relate to any aspect of advertising, most often they relate to a minimum advertised price, which is set by the manufacturer. Ultimately, the retailer retains its right to advertise at any price it desires but may forfeit the conditioned cooperative advertising funds for failing to comply with the manufacturer's set minimum advertised price. If the retailer advertises below the minimum advertised price, a MAP agreement allows the manufacturer the remedy of withholding the cooperative advertising funds from the retailer. Importantly, a manufacturer cannot stop-ship products or terminate a retailer due to a retailer's advertisement below the manufacturer's minimum advertised price. [7]

Despite being an agreement related to advertised price, a properly implemented MAP agreement is legally defensible because:

a. The manufacturer is free to place reasonable guidelines and conditions on the availability of cooperative advertising funds available to retailers [8];
b. The retailer remains completely free to advertise at any price it chooses; and
c. A MAP can never impact the price at which a retailer sells the products.

Unfortunately, many manufacturers have grafted UP principles onto MAP programs in a knee-jerk response to the rise of online price erosion. Because most hybrid UP/MAP agreements are just that — agreements — they face heightened scrutiny as an illegal agreement on resale price. Accordingly, attempts to combine a bilateral MAP Policy (advertising policy) agreement with a unilaterally announced UP often enhances legal risk as the concepts underpinning the two policies cannot be legally reconciled and often, in practice, end in an illegal agreement on resale price.

Lastly, the increased antitrust liability is not even worthwhile, as a MAP agreement is not an effective strategy for curbing online price erosion. MAP agreements arguably can only apply to the advertised price and do not apply to resale price or in-store advertising. For example, while it would be a violation of a MAP agreement if a retailer advertises a product below the minimum advertised price in a newspaper, it is not a violation for that same retailer to price below the minimum advertised priced inside its store. Instead prices inside the store are not legally considered advertising and are instead considered to be the resale price (which is beyond the reach of a MAP agreement). [9] Given this legal interpretation, a MAP agreement has limited enforceability on the Internet. Large online retailers take the position that their webpage is "in-store," meaning a MAP agreement could not apply to prices on their webpage or "in cart," as those instances would be in-store and therefore RPM. Certainly, the distinction between advertised price and resale price when goods are sold online is unclear, but large online retailers and marketplaces are leveraging the interpretation that once a customer is on a website, or in-store, it is no longer advertising and therefore is in compliance with the MAP agreement. Further, if the manufacturer's sole recourse is to withhold the cooperative advertising funds for non-compliance, how can it do so to a large retailer who refuses to accept this interpretation of the policy?

MAP agreements, initially designed for traditional print-media advertising, are no longer the most effective form of RPM as retail continues to change with the growth of e-commerce retailers and websites. Because many disruptive Internet resellers do not receive cooperative advertising funds and significant questions surround the application of MAP Agreements on the Internet, UP's remain the safest and most efficient RPM policy. While UP's pre-date MAP agreements and have existed for nearly 100 years, their underlying principles are better suited than MAP agreements for curbing price erosion in e-commerce. Manufacturers can best prepare themselves to combat online resale pricing issues by coordinating with counsel to implement a well-designed UP and train sales staff to safely enforce the pricing strategy.

LEEGIN CREATIVE LEATHER PRODUCTS V. PSKS — A NEW ERA FOR RPM AGREEMENTS?

In 2007, the discussion around RPM changed in the United States when the Supreme Court abolished application of the *per se* rule altogether in *Leegin* and held that RPM agreements should be analyzed by applying the rule of reason. Under the *per se* rule, mere proof of an agreement was dispositive for finding an unreasonable restraint on trade. However, under the rule of reason, courts grant deference to the competitive effects of the agreement rather than the form of the agreement and examine all circumstances surrounding the parties and the agreement, including a restraint's "history, nature and effect." [10] In essence, the rule of reason requires an economic analysis that evaluates both the pro- and anti-competitive effects of the agreement. In most instances, for an RPM agreement to be found to unreasonably restrain trade, the agreement has to be overt and there must be a demonstrable "conscious commitment to a common scheme designed to achieve an unlawful objective." [11]

Proponents of *Leegin* and the use of the "rule of reason" argue that, at least with regard to luxury goods, "RPM should be an acceptable means of preserving intrinsic brand value built up by manufacturers investing considerable sums on advertising, promotions, marketing and real estate, and that consumers in turn value (or they wouldn't pay for it; indeed, studies may show that demand for luxury goods increases as prices rise)." [12]

While on its face, *Leegin* appeared to pave the way for greater acceptance of RPM agreements, *Leegin's* displacement of the *per se* standard and its ruling that RPM agreements be evaluated according to the rule of reason under federal law has been controversial and spurred confusion in the business community. The *Leegin* Court itself acknowledged that "empirical evidence on the topic [of RPM] is limited." [13] Ultimately, some manufacturers have misinterpreted *Leegin* to the extent that they wrongly deemed it acceptable to enter into any sort of pricing agreement with retailers. *Leegin* cannot be taken so far — *Leegin* did not make all RPM agreements automatically lawful, and it did not directly address the status of RPM agreements under state law.

INCONSISTENT STATE REACTIONS:

MARYLAND, CALIFORNIA, AND NEW YORK'S AGGRESSIVE STANCES AGAINST LEEGIN

While *Leegin* offered some clarity regarding RPM agreements on the federal level, state acceptance of the Supreme Court decision has been mixed. In general, state antitrust rules that relate to RPM are stricter than federal law. After the *Leegin* decision, Maryland was the first state to expressly reject the application of *Leegin* to state law and to enact a "*Leegin* repealer" in 2009. [14] The Maryland state legislature created a new statute that amended the Maryland Antitrust Act to state that "a contract, combination or conspiracy that establishes a minimum price below which a retailer, wholesaler or retailer may not sell a commodity or service is an unreasonable restraint of trade or commerce." [15] Despite the bill's clear departure from federal law on the issue of RPM, the new law does not prevent a manufacturer's enactment of a UP, as UP's do not involve an agreement. [16]

As other states attempt to grapple with the Supreme Court's *Leegin* decision, their approaches have been somewhat muddled. In California, conflicting state and federal court analyses and decisions have left "the law in California unclear." [17] Nevertheless, federal courts in California applying the Cartwright Act, the state's antirust statute, maintain that although federal law states otherwise, the standard of *per se* illegality for RPM agreements continues to rule for any supplier or manufacturer who sells in to California. [18] Like California, New York has faced conflicting stances with regard to *Leegin* and applying the rule of reason to RPM agreements. Although the New York attorney general has aggressively policed RPM agreements since *Leegin* as *per se* violations of the state's antitrust laws, courts applying New York's antitrust laws have generally adopted a stance consistent with *Leegin*. [19] Moreover, although the caption of New York's antitrust statute, the Donnelly Act, reads "Price-fixing prohibited" and appears far stricter than its federal counterpart with regard to RPM, the actual language of Section 369-a does not go so far, merely stating: "any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be *enforceable* or actionable at law." [20] Rather than outlawing RPM agreements, the statute makes RPM unenforceable, not illegal.

Despite several states' continued application of *per se* liability to RPM agreements generally, courts in these states continue to acknowledge that UP's do not face the same fate. For example, in California, the court in *Darush v. Revision LP* emphasized that if a seller does no more than announce a policy, no illegal combination is established. [21] Therefore, where questions of legality exist in certain states with regard to agreements related to price, UP's are considered legal in all 50 states.

UP: THE OLDEST AND SAFEST FORM OF RPM

UP's — and their bedrock principles — were blessed nearly 100 years ago by the Supreme Court in *Colgate*. In light of the confusion and debate caused by *Leegin* regarding the enforceability of RPM agreements in general, UP's have proven to be the oldest and safest form of RPM. Even as states enact anti-*Leegin* state laws, UP's have prevailed as a lawful means of RPM.

Manufacturers generally employ UP's in major part because they lessen the chances of free-riding by discount retailers or unauthorized retailers who provide few or no services or expertise. According to the American Antitrust Institute, "setting a retail price floor high enough to compensate retailers for their efforts encourages retailers to invest and participate in the presale services desired by a manufacturer." [22] Second, UP's stabilize a manufacturer's online brand presence. A manufacturer must have control over pricing in order to ensure protection of their brand image. Without a UP, Internet and brick and mortar retailers have the ability to discount products at will, which often leads to value erosion and a decrease in consumer appreciation of the product. Finally, UP's work to secure healthy product margins, limit price erosion, and bestow upon a manufacturer the benefit of resale price stabilization in the form of retailer loyalty. Because retailers do not have the ability to undercut each other on price, UP's guarantee that every retailer benefits from a profitable sale and is forced to compete on other qualities like customer service.

Ultimately, the key to successful prevention of online price erosion is not merely the UP itself; it is the *implementation and execution* of the UP to ensure that it is kept unilateral and legal under the law. While UP's are surely legal, manufacturers must be sure that the policies remain unilateral in nature, in that communications or conduct by the manufacturer or its employees must not skirt the line of becoming an agreement or coerce the acquiescence of its retailers with the policy.

In the wake of *Leegin*, it is apparent that manufacturers must continue to tread carefully with regard to their use of RPM agreements. Fortunately, the enactment of a UP by a manufacturer is a tool that, if implemented and executed correctly, is the safest and most effective form of a pricing policy to achieve a company's pricing objectives on the Internet.

NOTES

[1] *U.S. v. Colgate & Co.*, 250 U.S. 300, 306 (1919) (declaring that a manufacturer had an "undoubted right to specify resale prices" and refuse to deal with any party that refused to observe that price and that, on the other hand, dealers had a right to establish their own advertised and retail prices).

[2] 15 U.S.C. §1. Section 1 of the Sherman Act prohibits contracts that restrain trade, creating the general prohibition against price fixing agreements.

[3] Gregory T. Gundlach, *Antitrust Analysis of Resale Price Maintenance After* Leegin, 55(2) ANTITRUST BULLETIN 271, 271 (2010). ("RPM involves agreements between or other practices among marketers at different levels in a distribution channel establishing the resale price at which a product or service must be sold.")

[4] *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877, 639 (2007).

[5] *Colgate*, 250 US at 307 ("In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.").

[6] *Isaksen v. Vt. Castings*, 825 F.2d 1158, 1164 (7th Cir. 1987) ("Only if [the retailer] agrees to adhere (having been asked to) [is] there an agreement.").

[7] Withheld cooperative advertising funds cannot be too large or withheld for too long. Where a manufacturer's MAP threatens the loss of a large percentage of a retailer's promotional funds or loss of funds for the long term, courts have found those scenarios to be coercive and in violation of antitrust laws, as the retailer has little choice but to advertise the manufacturer's product at a certain price. Id. (finding that the severity of suspending cooperative advertising funds for 60 to 90 days "ensured that even the most aggressive retail competitors would stop advertising prices below MAP").

[8] *In the Matter of Sony Music Entertainment, Inc.*, No. 971-0070, Analysis to Aid Public Comment on the Proposed Consent Order, available at https://www.ftc.gov/system/files/documents/cases/000510minimumadprice-analysis.htm (acknowledging that "compliance by retailers with these programs did not constitute per se unlawful minimum resale price maintenance agreements").

[9] *Id.* (finding that "[t]he MAP provisions were implemented with the anticompetitive intent to limit retail price competition and to stabilize the retail prices in this industry" in part because "by defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers").

[10] *Leegin*, 551 U.S. at 639.

[11] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

[12] *The Latest on Leegin*, LAW 360 (May 14, 2010, 10:56 AM), http://www.law360.com/articles/167662/the-latest-on-leegin.

[13] *Leegin*, at 639.

[14] Michael A. Lindsay, *State Resale Price Maintenance After Leegin*, The Antitrust Source 1, 2 (2009).

[15] *Id.* at 2.

[16] Jason Hicks, *Maryland's Leegin Repealer*, Antitrust and Distribution Law Blog (May 26, 2009, 3:38 P.M.), http://wombledistributionlaw.blogspot.com/2009/05/marylands-leegin-repealer.html.

[17] *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, C.A. No. 3:12-cv-3515-B, 2014 WL 5460450, at *10 (N.D. Tex. Oct. 27, 2014) (citing *Alan Darush MD APC v. Revision LP*, C.A. No. 12-10296 GAF (AGRx), 2013 WL 1749539 (C.D. Cal. Apr. 10, 2013); Kaewsawang v. Sara Lee Fresh, Inc., C.A. No. No. BC360109, 2013 WL 3214439 (Cal. Super., May 6, 2013).

[18] *Darush v. Revision LP*, 2013 WL 1749539, at *6 ("Leegin involved an interpretation of a federal statute, not the Cartwright Act. Under current California Supreme Court precedent, vertical price restraints are per se unlawful under the Cartwright Act.").

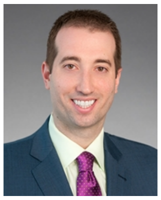
[19] *People v. Tempur-Pedic International Inc.*, 2012 WL 1583575, at *1 (N.Y.A.D. May 8, 2012); *WorldHomeCenter.com, Inc. v. PLC Lighting, Inc.*, 851 F. Supp. 2d 494 (S.D.N.Y 2011).
N.Y. Gen. Bus. Law § 369-a (emphasis added).

[20] N.Y. Gen. Bus. Law § 369-a (emphasis added).

[21] *Darush*, 2013 WL 1749539, at *7 ("[I]f a seller does no more than announce a policy designed to restrain trade and declines to sell to those who fail to adhere to that policy, no illegal combination is established." (citing *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709 (Cal. App. 1st Dist. 1982)).

[22] Gregory T. Gundlach & Riley T. Krotz, Resale Price Maintenance after Leegin: The Curious Case of Contact Lenses 52 (American Antitrust Institute, Working Paper No. 15-04, 2015).

KEY CONTACTS



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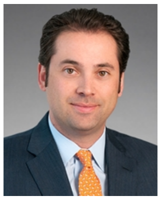

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