Legal Backgrounder

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RESALE PRICE MAINTENANCE:
PER SE ANTITRUST TREATMENT ALIVE IN THE STATES

by
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It has been five years since the United States Supreme Court's controversial decision in *Leegin Creative Leather Prods. Inc. v. PSKS Inc.*, 551 U.S. 877 (2007), which reversed earlier case law holding resale price maintenance (RPM) agreements to be *per se* violations of the antitrust laws. Nonetheless, efforts to revive the *per se* rule under federal law are continuing in Congress, and the *per se* rule is alive and well in a number of states.

Background. Resale price maintenance is the practice by which a manufacturer of a product establishes a fixed or minimum price for resale of the product which retailers or other distributors can charge. For nearly 100 years, RPM agreements were held to be *per se* (or inherently) illegal under the U.S. Supreme Court decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). In 2007, the U.S. Supreme Court reversed that long-standing precedent in *Leegin Creative Leather Prods. Inc. v. PSKS Inc.*, 551 U.S. 877 (2007) ("*Leegin*"), which held that RPM agreements are subject to "rule of reason" analysis. Under that analysis, an RPM agreement is illegal only if it is found to be unreasonable because its anti-competitive impacts outweigh its pro-competitive benefits.

***Congressional Efforts to Repeal* Leegin**. In January 2009, Senator Herb Kohl introduced Senate Bill 148, the "Discount Pricing Consumer Protection Act," which sought to repeal *Leegin* and codify *per se* illegality of RPM. The bill, re-introduced as Senate Bill 75 in January 2011, was reported favorably by the Senate Judiciary Committee on November 3, 2011.

The bill still has many hoops to go through before it becomes law. However, legislation to overturn *Leegin* has been supported in the past by at least 35 state attorneys general.[1] In addition, the bill likely will get additional support should the nominee for the next head of the Justice Department's Antitrust Division, William Baer, be approved. Mr. Baer, speaking at a Senate Judiciary Committee nomination hearing on July 26, 2012, said he would support action by Congress to repeal *Leegin*. The Senate Judiciary Committee approved Mr. Baer's nomination on September 20, 2012. The nomination will now proceed to the full Senate.

[1] *See* Alan M. Barr, FTC Hearings on Resale Price Maintenance, "State Challenges to Vertical Price Fixing in the Post-Leegin World" (May 21, 2009), *available online at* http://www.ftc.gov/opp/workshops/rpm/may09/docs/abarr.pdf.

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Maryland. In April 2009, Maryland enacted legislation declaring RPM agreements to be *per se* illegal under its state antitrust law. Maryland Commercial Law Code 11-204(b) amended the Maryland equivalent of Section 1 of the Sherman Act by declaring that any contract, combination, or conspiracy that sets minimum prices is an unreasonable restraint of trade.

California. The California Attorney General has consistently taken the position that the U.S. Supreme Court's decision in *Leegin* did not affect California's strict state antitrust law. In February 2010, the California Attorney General filed suit in California state court, alleging that DermaQuest, which makes beauty-care products, committed a *per se* violation of California's antitrust statute by entering into agreements with sellers of its cosmetic products prohibiting them from reselling below DermaQuest's suggested retail price. *California v. DermaQuest Inc.*, No. RG10497526 (Cal. Super. Ct., Alameda Cty., February 23, 2010). Within 30 days of the filing of the complaint, DermaQuest entered into a Consent Decree, in which it agreed to disavow the challenged contracts, refrain from entering into RPM agreements in the future, and to pay $70,000 in civil penalties and $50,000 towards the state's legal costs.[2]

The following year, in January 2011, the California Attorney General's office obtained a settlement in the Superior Court for Riverside County that required a different cosmetics company, Biolements, Inc., to refrain permanently from fixing resale prices for its merchandise. *California v. Bioelements, Inc.*, No. 10011659 (Cal. Super. Ct., Riverside Cty., January 11, 2011). The settlement permanently enjoins Bioelements from fixing resale prices for its merchandise, requires the company to inform distributors and retailers with whom it executed RPM contracts that those contracts are void and will not be enforced, and imposes civil penalties and counsel fees of $51,000 to be paid to the Attorney General's office by Bioelements.[3]

New York. New York has also aggressively pursued *per se* treatment of RPM—but with less success than California. New York authorities filed an action in March 2010 against Tempur-Pedic International, a manufacturer of pillows and mattresses, similar to those filed by California against Biolements and DermaQuest. New York alleged that Tempur-Pedic had illegally entered into RPM agreements that required resellers of its products to charge prices dictated by Tempur-Pedic. *See New York v. Tempur-Pedic Intl., Inc.*, 30 Misc. 3d 986, 987-90 (N.Y. Sup. Ct. 2011) ("*Tempur-Pedic I*"). Alleging that Tempur-Pedic's advertising and pricing policies violated New York General Business Law §369-a,[4] and that those violations constituted illegal and fraudulent conduct in violation of New York Executive Law §63(12),[5] New York sought an injunction against Tempur-Pedic and disgorgement of its profits. *Tempur-Pedic I*, 30 Misc. 3d at 987-88.

The trial court ruled against New York and found that Section 369-a did not make RPM contracts illegal, but only unenforceable. *Id.* at 991. Moreover, the court decided that Tempur-Pedic had committed no fraudulent act because its retailers were not misled into thinking they had entered into RPM contracts. *Id.* at 992-93. Finally, the court found that no contracts existed which contained RPM provisions preventing Tempur-Pedic's retailers from selling at whatever price they wanted. Tempur-Pedic's pricing restraints were contained only in a unilateral policy to which the retailers never agreed, and New York could not prove that Tempur-Pedic had coerced adherence to that policy. The advertising policies which Tempur-Pedic required its retailers to sign, while admitted to be contracts,

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[2] *See* 98 ANTITRUST & TRADE REG. REP. (BNA) 316 (3/12/10).

[3] *See* 100 ANTITRUST & TRADE REG. REP. (BNA) 54 (1/21/11) (with links to complaint and consent decree).

[4] Section 369-a prohibits "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."

[5] Under Executive Law § 63(12), the Attorney General may apply to the courts for an order enjoining any person from engaging in "repeated fraudulent or illegal acts" or otherwise demonstrating "persistent fraud or illegality" in transacting business.

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restrained only advertising activities, not pricing practices. *Id.* at 993-96.

On May 8, 2012, the Supreme Court of New York, Appellate Division, affirmed the lower court's ruling. *New York v. Tempur-Pedic Intl., Inc.*, 95 A.D.3d 539 (N.Y. App. Div. 1st Dep't 2012) ("*Tempur-Pedic II*"). The appellate court agreed with the trial court that, while Section 369-a makes it clear that such contractual provisions cannot be enforced, it does not declare them to be illegal or unlawful. *Id.* at 540. The court further held that, even if the statute did render such contractual provisions unlawful or illegal, the two types of evidence New York tendered were insufficient to come within the statute. The first, an agreement signed by Tempur-Pedic and its retailers entitled "Retail Partner Obligations and Advertising Policies," was insufficient because it contained restrictions only on retailer advertising, not pricing. The second, Tempur-Pedic's minimum price policy, was insufficient because it was not contained in any agreement between Tempur-Pedic and its retailers or otherwise agreed to by the retailers. In essence, the court found that an agreement could not be inferred from a manufacturer's enforcement of its unilateral pricing policy.

Kansas. Just five days before the New York appellate court's decision in *Tempur-Pedic II,* the Kansas Supreme Court issued a contrasting decision in *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318 (2012) ("*O'Brien*"), which applied a *per se* rule to invalidate an RPM agreement under two Kansas statutes.

The Kansas statutes at issue in *O'Brien* were K.S.A. 50-101 and K.S.A. 50-112. The former statute makes illegal any trust which exists for any of a number of different purposes, including: (1) "to increase or reduce the price of merchandise, produce, or commodities;" and (2) "to fix any standard or figure, whereby such person's price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state." K.S.A. 50-101. The latter statute provides that "all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles . . . are hereby declared to be against public policy, unlawful and void." K.S.A. 50-112.

The Court held that neither of these statutes is subject to any rule of reason limitation, so a plaintiff is not required to show that any agreement, combination, or arrangement which falls within the terms of either is unreasonable in order to prevail. To the contrary, the Court held that these statutes prohibit *all* arrangements, contracts, agreements, trusts, or combinations which fall within their terms, whether or not they are reasonable or unreasonable. In effect, the Court applied a *per se* rule to these statutes. *O'Brien,* 294 Kan. at 341-42.

Moreover, the Kansas Supreme Court held that the statutes did not distinguish in any way between horizontal and vertical price-fixing or allow for any exceptions to the *per se* rule for dual-distribution arrangements. The court instead concluded that the Kansas antitrust statute means exactly what it says and permits no competitive effects analysis for conduct literally covered by its language. *Id.* at 350-51.

In the wake of *O'Brien*, any joint conduct that is "designed … to … advance, reduce or control" (K.S.A. 50-112) a producer's or consumer's price or cost is *per se* illegal under Kansas law. Although *O'Brien* involved minimum RPM claims, the decision appears to apply equally to maximum resale price restraints (even though such restraints arguably reduce the price to the consumer). In addition, a creative plaintiff might now try to use the Kansas antitrust statute to attack a variety of other pro-competitive retail practices, including manufacturer-to-retailer discounting, a common practice in the distribution of consumer goods where manufacturers offer discounts on the condition that they be passed along to consumers. Such discounts arguably are "designed … to … reduce the price … to the consumer."

The Kansas Supreme Court further found that neither Kansas statute requires an actual agreement to show a violation, as all that is required is a "combination" or an "arrangement." There was ample evidence of a combination and an arrangement between Leegin and its retail distributors for the plaintiff to avoid summary judgment, including that Leegin's pricing policy was distributed to all of its retailers and that, for at least a year, Leegin required its retailers to acknowledge in writing that violation of its pricing policy was grounds for dismissal. *Id.* at 355-358.

Finally, the Court held that neither of the Kansas statutes at issue requires a showing that prices were actually increased, but only that the agreement, combination, or arrangement was for the purpose of or designed to fix prices, as judged by a subjective standard. Once again, the Court found that there was ample evidence of Leegin's intent to fix the prices that retailers charged for its products, including Leegin's enforcement practices of keeping files on retailer pricing and investigating retailers suspected of discounting. *Id.* at 335-338.

Michigan and Illinois. It appears that Illinois and Michigan also consider RPM agreements to be *per se* illegal, having joined New York in a 2008 lawsuit alleging that a furniture manufacturer's RPM policy was *per se* unlawful price-fixing under state antitrust statutes. *New York v. Herman Miller Inc.*, No.08 CV-02977, 2008-2 Trade Cases (CCH) ¶76,454 (S.D.N.Y., filed Mar. 21, 2008). That action was settled within days for $750,000. *See New York v. Herman Miller Inc.*, No.08 CV-02977 (S.D.N.Y. Mar. 25, 2008) (Stipulated Final Judgment and Consent Decree), *available online at* http://www.oag.state.ny.us/bureaus/antitrust/pdfs/Signed_FJ.pdf.

Conclusion. Despite the clear holding in *Leegin* applying rule of reason analysis to RPM, the ultimate impact of that decision at both the federal and state level remains uncertain. The most prudent conclusion for any company with national distribution would be that RPM agreements are at risk of being successfully challenged as *per se* violations in one or more states, either by the state itself or in a private damage action.

Thus, the safest course of action for businesses that distribute their products nationally is to treat resale price maintenance as was usually done prior to the *Leegin* decision—*i.e.*, by unilaterally announcing suggested minimum resale prices, without requesting or allowing any agreement by distributors to adhere to those prices, with the option of terminating distributors that ignore them. Another option is to implement a minimum advertised price (MAP) program where the distributor gets advertising funds back from the supplier if it advertises prices only above a certain level. While there is some risk associated with this option since courts and agencies might see a MAP program as an effort to implement RPM, such a program should pass muster, especially if it merely determines the distributor's eligibility for the supplier's coop advertising funds and allows the distributor to advertise prices below those specified in the MAP program at its own expense.