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Questions for National Reporters of LIDC BORDEAUX 2010

Question A: Competition Law

Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships?

International Reporter: Elisabeth Legnerfält, Senior Associate
E-mail: Elisabeth.Legnerfalt@delphi.se

UNITED STATES OF AMERICA National Report

National Reporter: David P. Nemecek, Jr.

E-mail : dnemecek@longlevit.com

The purpose of, and idea behind, the captioned question is to assess what kind of practices that are considered illegal on a scale ranging from resale price fixing through recommended prices to vertical exchange of information about prices. These issues may be assessed under the same or different rules, they may also be subject to strict prohibitions or subject to a rule of reason analysis. However, not all the practices covered in the captioned question stem from formal agreements. Some may contain some sort of implied consent or may be unilateral, like price recommendations.

The various practices that we have in mind are the following:

- resale price maintenance;
- margin maintenance;
- minimum margin;
- guaranteed margin;
- suggested or recommended price;
- information exchanges about prices to consumers.

Please kindly revert to the international reporter and the general reporter without delay if you consider that other types of practices fall within the same question. This will allow the international reporter to communicate the other examples to the other national reporters.

All the above practices have intra-brand purposes. We are not considering consumer prices for the purpose of exchanges between competitors in this questionnaire. Now, it might be that under some legislations, information on prices is prohibited as a result of the risk that it leads to taming with inter-brand competition.

These practices may have intra-brand justifications, thus it is of interest to understand under what rationale they may be declared illegal. The rationale may vary depending on the practice considered.

Where these practices or some of them are considered illegal, it is of interest to understand whether they can be justified; for what reasons and to which extent. Are the

justifications the same for all the practices? Justifications may stem from different rationales depending on the situations.

1. Legal framework

1.1 **What is the legal framework in the national competition act applicable to vertical agreements, i.e. are these agreements in generally permissible or in part impermissible. Are vertical agreements or some of them illegal per se, presumed illegal or assessed on the basis of a type of rule of reason analysis? Does a block exemption apply to vertical agreements in your jurisdiction?**

Under United States federal law, vertical resale price agreements are analyzed under section 1 of the Sherman Act,[1] which provides that "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Three elements must be proven in order to prevail on a claim under section 1 of the Sherman Act: (1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate commerce. The Sherman Act is treated as a common-law statute, meaning that the United States courts may interpret the scope of the Sherman Act and adapt its scope to modern understanding and greater experience over time.[2]

Almost all types of vertical restraints have been analyzed under the rule of reason for over a decade. Agreements involving maximum resale price maintenance have been judged using the rule of reason for the past thirteen years, and do not present the potential anticompetitive effects as minimum resale price agreements.[3] Vertical non-price restraints are also evaluated under the rule of reason.[4]

The exception to the rule that vertical restraints are to be analyzed under the rule of reason concerned agreements pertaining to minimum resale price maintenance ("RPM"), which was *per se* illegal until 2007. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[5] the United States Supreme Court held that RPM agreements shall be evaluated under the rule of reason going forward.

In *Leegin,* the United States Supreme Court overturned nearly 100 years of precedent in the United States that minimum resale price maintenance ("RPM") is *per se* illegal.[6] The Supreme Court was persuaded by economic arguments that RPM does not always have anti-competitive effects. In following its trend of eliminating the application of the *per se* rule to vertical agreements,[7] the Court found that RPM may have pro-

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[1] 15 U.S.C. § 1
[2] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 900-902 (2007).
[3] *State Oil v. Kahn*, 522 U.S. 3 (1997).
[4] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).
[5] 551 U.S. 877 (2007).
[6] The *Leegin* decision overturned the longstanding case of *Dr. Miles Med. Co. v. John D. Park &* Sons, 220 U.S. 373 (1911)
[7] *See State Oil Co. v. Kahn,* 522 U.S. 3 (1997) (holding that maximum resale price fixing are not *per se* illegal and should be analyzed under rule of reason).

competitive benefits and thus should not be automatically illegal without consideration of whether the anti-competitive effects of the practice outweigh the pro-competitive effects.[8]

The competition authorities in the United States are the Antitrust Division of the United States Department of Justice and the Federal Trade Commission (FTC). The U.S. antitrust laws are enforced by both the Antitrust Division and the FTC's Bureau of Competition. The Antitrust Division handles all criminal antitrust enforcement and prosecutes both criminal and civil cases in the U.S. federal courts. The Antitrust Division does not prosecute rule of reason offenses criminally.

The Federal Trade Commission Act and the Clayton Act, both signed into law in 1914, give the FTC authority to enforce the antitrust laws, including RPM agreements in restraint of trade. The FTC typically brings actions pursuant to Section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices.[9]" The FTC's Bureau of Competition investigates potential violations of law and seeks legal remedies in federal court or before the FTC's administrative law judges.

There is no "block exemption" for vertical agreements in the United States. However, there may be immunity from the antitrust laws generally under certain circumstances. The general categories of antitrust immunities under federal law are briefly summarized below.

<u>The State Action Doctrine</u>

The U.S. Supreme Court has permitted state governments and certain private actors to show that a state regulatory scheme precludes antitrust liability in what is known as the "state action doctrine." The U.S. Supreme Court has held that the Sherman Act was not "intended to restrain state action or official action directed by a state.[10]" Generally, the state action doctrine provides immunity where states replace competition with a system of regulation. However, states cannot authorize private individuals to violate the federal antitrust laws.[11]

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[8] *Per se* condemnation is traditionally reserved for practices that "facially appear[] to be one[s] that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. CBS,* 441 U.S. 1, 19-20 (1979).

[9] 15 U.S.C. § 45. Only the FTC may bring an action for violations of the FTC Act. It is not available to other civil litigants.

[10] *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 91 (1980); *Parker v. Brown*, 317 U.S. 341 (1943).

[11] *See Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008) (holding that state regulation that required liquor distributors to "post and hold" prices for 30 days was *per se* illegal and preempted by the Sherman Act because it facilitated the exchange of price information and was highly likely to lead to horizontal price-fixing collusion among market participants).

Immunity for Petitioning the Government

The *Noerr* doctrine immunizes the petitioning of the government by private actors from liability under the antitrust laws, even if the result of such petitioning is anticompetitive.[12]

Interference By the Antitrust Laws With a Regulatory Regime

Where enforcement of the antitrust laws would interfere with a regulatory scheme, a court may determine that the challenged conduct is immune. For example, the U.S. Supreme Court recently decided a case in which the antitrust laws and the securities laws conflicted on the issue of resale price maintenance.[13] The Court held that the securities laws preclude the application of antitrust laws where: (1) the defendants' actions concerned an area of conduct squarely within the heartland of the securities regulations; (2) the Securities and Exchange Commission had clear and adequate authority to regulate the conduct at issue; (3) there was active and ongoing agency regulation for the conduct at issue; and (4) there was a serious conflict between the antitrust and regulatory regimes. In the *Credit Suisse* case, the U.S. Supreme Court found that an antitrust action would be accompanied by a substantial risk of injury to the securities markets.

Regulated Industries

In general, there are particular industries that under certain circumstances have either antitrust immunity or have other regulations that govern competition within the industry. Such industries include agriculture, communications, energy, financial institutions and markets, government contracts, health care, insurance, organized labor, sports, and transportation.

1.2 Do these principles vary depending on the type of vertical practice considered?

The application of the rule of reason is fact-specific. Under the rule of reason, the court examines the effect of the alleged restraint on competition, considering all circumstances, "including facts peculiar to the business and the history of, reasons for, and market impact of the restraint.[14]" The court balances the "anticompetitive evils of a restrictive practice … against any procompetitive benefits or justifications within the confines of the relevant market.[15]"

1.3 Is there a specific prohibition in the national competition act on all vertical practices pertaining to prices? If not, which ways of controlling the prices applied to end-users are permissible?

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[12] *E. R.R. Presidents Conference v. Noerr Motor Frieight*, 365 U.S.127 (1961).
[13] *Credit Suisse Sec. LLC v. Billing*, 551 U.S. 264 (2007).
[14] *Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1436 (5th Cir. 1984).
[15] *Doctor's Hosp., Inc. v. Se. Med. Alliance*, 123 F.3d 301, 307 (5th Cir. 1997).

Vertical resale price restrictions are analyzed under the rule of reason on a case by case basis under the Sherman Act. There is no type of vertical restraint that is currently *per se* illegal.

A manufacturer may attempt to control the resale price of its goods through the use of consignment agreements. A consignment agreement is one in which the manufacturer resells its goods through the use of a middleman or agent who does not take title to the goods.[16] If a manufacturer does not transfer title, but merely consigns its products to the consginee, the manufacturer may dictate the price at which the consignee sells its products.[17] Under those circumstances, the manufacturer cannot be said to have fixed the resale price because there is no resale, and a rule prohibiting the manufacturer from setting the price at which the product will be sold for the first time makes little sense. However, a manufacturer may expose itself to antitrust liability if it uses its agents as an instrument in to control resale prices.[18]

The distinction between a legitimate consignment agreement and a potentially illegal agency agreement used by a manufacturer to control resale prices is often difficult to discern. In *Morrison v. Murray Biscuit Co*.,[19] Judge Posner's analysis focused on the number of functions the agent provides. At one end of the spectrum is an agent who carries no inventory and acts as a mere conduit for the sale of the manufacturer's goods. At the other end of the spectrum is an agent that has substantial overhead, assumes the risk of price increases and decreases, and responsibility for transportation, delivery and insurance. In the latter case, it is more likely that the manufacturer is using the agent to control the resale price of its goods.[20]

Manufacturers may announce or suggest resale prices in advance and refuse to deal with distributors who refuse to comply, and distributors may independently decide to acquiesce to such prices to avoid termination.[21] The key issue in determining whether the restraint at issue may violate the Sherman Act is whether the manufacturer and the distributor entered into an agreement to set the resale price or whether the distributor acted independently. If there is no agreement between the manufacturer and the distributor, their actions are *per se* legal. This is discussed in more detail in section 2.2 below.

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[16] *See* Jeffrey L. Harrison, *Dr. Miles' Orphans: Vertical Conspiracy and Consignment in the Wake of Leegin* at 38 (working paper, available at: http: //papers.ssrns.com/sol3/papers.cfm?abstract_id=1556491).
[17] *United States v. General Electric Co.*, 272 U.S. 476 (1926); *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282 (4th Cir. 2009) (post-*Leegin* RPM decision; agency agreement did not create Sherman Act conspiracy).
[18] *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). This practice was once *per se* illegal but would now be judged under the rule of reason after *Leegin*.
[19] 797 F.2d 1430, 1436 (7th Cir. 1986).
[20] *Id.* at 1438.
[21] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

1.4 **<u>What is the de minimis / appreciability threshold, if any, applicable to vertical arrangements and practices?</u>**

There is no such threshold. However, as discussed in more detail in section 2.5 below, a plaintiff challenging an RPM agreement under the Sherman Act must show that the defendant has market power.

1.5 **<u>Has the competition authority in your jurisdiction issued guidelines regarding exchanges of information and/or vertical price agreements?</u>**

Christine Varney, the current Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice, proposed a "structured rule of reason" analysis for RPM agreements.[22] Ms. Varney's proposal is discussed in more detail in section 5.1 below.

The FTC recently held a series of workshops to study RPM agreements,[23] but has not issued any guidelines following the workshops.

RPM agreements are still *per se* illegal under the antitrust laws of certain states. Moreover, the great majority of state attorneys general believe that RPM agreements are anticompetitive and have advocated for the legislative repeal of the *Leegin* decision.[24] The general hostility of the majority of states to RPM agreements is discussed in more detail in section 5.1 below.

2. **<u>Criteria applicable to price related vertical agreements</u>**

2.1 **<u>Is the national competition act declaring these or some of these practices as illegal under a per se rule, presumption or rule of reason?</u>**

As noted in section 1.3 above, all vertical restraints are now analyzed under the rule of reason. In *Leegin*, Justice Kennedy invited the lower courts to develop a specific rule of reason analysis for RPM agreements:

> "As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions when justified, to make the rule of reason a

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[22] *See* Christine A. Varney, *A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason*, 24 ANTITRUST SOURCE 22 (2010).

[23] *See* http://ftc.gov/opp/workshops/rpm/

[24] Letter from 41 Attorneys General to Rep. John Conyers and Rep. Lamar Smith, dated Oct. 27, 2009 (available at http://naag.org/assets/files/pdf/signons/20091027.HR_3190.pdf); Letter from 35 Attorneys General to Sen. Patrick Leahy, et al. dated May 14, 2008, available at http://www.naag.org/assets/files/pdf/signons/antitrust.AG_Letter_Supporting_S2261.pdf).

> fair and efficient way to prohibit anticompetitive restraints and to promote precompetitive ones.[25]"

To date, very few courts have applied the rule of reason to RPM agreements following *Leegin*. The question of how the lower courts will apply the rule of reason to RPM agreements is therefore unclear at this time.

2.2 Are only agreements pertaining to prices considered illegal? Which conditions have to be fulfilled in order to render "agreements" to be considered illegal?

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. The first step in the analysis of whether an RPM agreement violates the Sherman Act is therefore whether there is an "agreement" between the manufacturer and the distributor to fix prices that would be prohibited by section 1.[26] If the plaintiff in a case involving an alleged violation of section 1 through the use of an anticompetitive vertical distribution practice cannot establish the existence of an "agreement," there is no violation of section 1.

Section 5 of the FTC Act does not require proof of an "agreement." Thus, certain acts may expose a defendant to liability even if the FTC cannot prove the existence of an agreement to fix prices.[27]

2.3 What about the situations which are in-between, such as recommendations / suggestions and exchange of information?

A manufacturer may "announce its resale prices and refuse to deal" with distributors who fail to comply with distributors who refuse to comply. The manufacturer may also announce that dealers are "free to acquiesce [by selling the manufacturer's products at the suggested resale prices] in order to avoid termination." In

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[25] *Leegin*, 551 U.S. at 898-99. Justice Kennedy's holding is not without precedent, as the rule of reason does not represent a single standard and there may be varying degrees of proof depending upon the nature of the restraint at issue. *See California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

[26] Commentators have noted that the issue of whether the defendant reached an "agreement" is of less importance in light of *Leegin*. Before *Leegin*, the plaintiff's entire case typically turned on whether the defendants reached an agreement to fix prices because RPM was *per se* illegal and the defendant was not permitted to offer any precompetitive justifications for its conduct. Today. manufacturers and suppliers will likely make their RPM agreements more explicit because they have the ability to offer precompetitive justifications for them. *See* Herbert Hovenkamp, *Leegin, the Rule of Reason, and Vertical Agreement* (Sep. 2010) at p. 13 (available at http://ssrn.com/abstract=1673519); Frank M. Hinman and Sujal J. Shah, *Counseling Clients on Vertical Restraints*, 23 ANTITRUST 60, 62 (2009).

[27] *See, e.g.*, *Valassis Communications, Inc.* FTC File No. 051 0008 (Apr. 19, 2006) (FTC alleged that minimum advertised price provisions in cooperative advertising programs of several competitors had substantial anticompetitive effects notwithstanding that "the Commission has concluded that compliance by retailers with these programs did not constitute *per se* unlawful minimum resale price maintenance agreements."); Analysis to Aid Public Comment, CD MAP FTC File No. 971-0070 (May 10, 2000), available at http://www.ftc.gov/os/2000/05/mapanalysis.htm

such cases, there is no "agreement" between the manufacturer and the distributor.[28] A distributor's acceptance of minimum suggested resale prices is also insufficient to establish an "agreement" under the Sherman Act.[29]

The plaintiff must show more than mere acquiescence by the distributor with the manufacturer's announcement that the distributor must follow its suggested prices or be terminated.[30] There must be some evidence that a distributor "communicated its acquiescence or agreement … sought by the manufacturer,[31]" which requires evidence of and motive for the manufacturer's agreement with a third party.[32]

2.4 What is the assessment of vertical unilateral practices in relation to prices?

As noted in section 2.2, unilateral practices are *per se* legal under the Sherman Act. There is no liability under the Sherman Act unless the plaintiff proves the existence of a contract, combination or conspiracy.

2.5 Are some of these practices not considered illegal merely as a result of a de minimis/appreciability rule?

There is no rule in this regard. However, the *Leegin* court held that "anticompetitive uses of RPM do not create concern unless the relevant entity has market power.[33]" Market power is defined as the power to raise prices above a competitive level without a corresponding decrease in sales for a sustained period of time.[34] Thus, unless a party to an RPM agreement has market power, an increase in prices will result in nothing more than a loss in sales to competitors.[35]

The requirement that a plaintiff allege and prove that a defendant has market power in RPM cases requires the plaintiff to define the relevant market, which may present a significant obstacle to prevailing on claims involving RPM. In *Leegin*, the Supreme Court vacated the judgment against the defendant and remanded the case to the district court. The plaintiff, Kay's Closet, amended its complaint to allege that independent retailers were involved in a conspiracy with Leegin to enforce its RPM

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[28] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

[29] *Monsanto*, 465 U.S. at 760.

[30] *Id.* at 764.

[31] *Id.*

[32] *See Viazis v. Am. Assn. of Orthodontists*, 314 F.3d 758 (5th Cir. 2002), *cert. denied*, 538 U.S. 1033 (2003) (no conspiracy among orthodontists' association and manufacturer of plaintiff's orthodontic invention could be inferred from the fact that individual orthodontists - acting individually - sent complaints to the manufacturer, which then stopped making the invention); *Imaging Center, Inc. v. Western Maryland Health Sys., Inc.,* 158 Fed. Appx. 413, 2005 WL 3403627 (4th Cir. 2005) (plaintiff radiologist could not prove conspiracy among hospitals and their physicians to deny referrals to plaintiff, as there was no evidence that hospitals insisted that doctors not make such referrals and many physicians individually expressed concerns about plaintiff's practice).)

[33] *Leegin*, 551 U.S. at 898; *See Digital Equip. Corp. v. Uniq Digital Techs. Inc.,* 73 F.3d 756, 761 (7th Cir. 1996) (noting that "[S]ubstantial market power is an indispensable ingredient of every claim under the rule of reason."); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981) (observing that "if a firm lacks market power, it cannot affect the price of its product, and thus any vertical restraint could not be anticompetitive at the interbrand level").

[34] *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

[35] *PSKS, Inc. v. Leegin Creative Leather Products*, 615 F.3d 412 (5th Cir. 2010).

policy. The plaintiff also alleged that Leegin and its retailers were involved in a "hub and spoke" conspiracy because it would intervene to resolve disputes among its competing retailers. The plaintiff also alleged that Leegin used its dual distribution system[36] to facilitate its hub and spoke conspiracy. The plaintiffs alleged that the relevant market was the market for the women's accessories that Leegin manufactured, as well as the "wholesale sale of brand-name women's accessories to independent retailers." The district court dismissed the case. On appeal, the Fifth Circuit held that the plaintiffs' market definition was implausible, as it did not encompass all interchangeable substitute products. The court also rejected the plaintiffs' claim that Leegin's dual distribution system was *per se* illegal.[37]

3. Anti-competitive effects

3.1 Are the anti-competitive effects considered by the national competition act different for each of these practices, or is it always the same kind of anti-competitive effect which is considered and found more or less serious?

As noted in above, the analysis of vertical restraints is a fact-intensive inquiry, and it remains to be seen how courts will analyze various RPM arrangements under the rule of reason following *Leegin*.

The *Leegin* court identified four circumstances in which the use of RPM might be anticompetitive: (1) when RPM is used by a manufacturer cartel to police a price-fixing agreement; (2) when RPM is used to create a retailer cartel in which retailers coerce manufacturers to eliminate price cutting by competing retailers; (3) when RPM is used by a dominant retailer to protect it from retailers with better distribution systems and lower cost structures; and (4) when RPM is used by a manufacturer with market power to give retailers an incentive not to sell the products of smaller rivals or new entrants.[38]

3.2 To which extent is the national competition act considering only inter-brand effects or does it consider intra-brand effects?

The U.S. Supreme Court has held that the primary purpose of the antitrust laws is to protect interbrand competition.[39] In *Leegin*, the Court observed that RPM agreements may increase interbrand competition because they increase intrabrand competition among retailers selling the brand by assuring retailers that they will not face discount price competition from other resellers of the same brand, which encourages them to invest in services or promotional efforts to sell that brand against competing brands.[40] The Court also observed that by eliminating the risk that one reseller might "free ride" on another reseller's provision of services, RPM agreements may give consumers a choice between low price/low service brands and high price/high service brands, or something in-

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[36] A dual distribution system is one in which a manufacturer sells its products through retailers and simultaneously competes with those retailers by selling directly to its customers. *PSKS, Inc. v. Leegin Creative Leather Products*, 615 F.3d 412 (5th Cir. 2010).
[37] *Id.*
[38] *Leegin*, 551 U.S. at 892-894.
[39] *State Oil v. Kahn*, 522 U.S. 3 (1997).
[40] *Leegin*, 551 U.S. at 891.

between.[41] The Court also observed that RPM may help new brands enter the market by enabling resellers to provide the pre-sale services necessary to compete with entrenched brands.[42]

The plaintiff in a civil antitrust case must demonstrate "antitrust injury" in order to have standing to bring a claim for damages for violation of the antitrust laws.[43] "Antitrust injury" requires a showing of injury to competition rather than injury to a single party. This requires a demonstration of the anticompetitive effects of the restraint in question.[44]

In cases involving RPM, a showing of injury to intra-brand competition may satisfy this requirement, such as situations where a dominant retailer uses threats to manufacturers to cajole them to keep discount retailers from cutting prices. In *Babyage.com, Inc. v. Toys "R" Us, Inc.*,[45] a group of retailers of baby products filed suit against a dominant retailer of baby products. The plaintiffs alleged that the defendant used its dominant market position to coerce manufacturers to enter into RPM agreements with it to sell the manufacturer's goods at or above a certain price. The court granted the plaintiffs' motion to for class certification, and in doing so ruled that plaintiffs had sufficiently alleged the existence of concerted action between the defendant and each manufacturer, and between each manufacturer and various retailers in the form of RPM. The court cited *Leegin* for the proposition that an RPM agreement instigated at the request of a dominant retailer should be treated as suspect.[46]

3.3 Is also the anti-competitive intent of the vertical agreement considered?

The reasons for adopting the RPM arrangement are a relevant factor in assessing the reasonableness of the restraint, "not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[47]" Claims that practices were intended to protect the value of a business or increase its profitability are not legitimate justifications.[48]

Under the *per se* rule, intent is irrelevant. With the elimination of the *per se* rule of illegality for RPM, either the government or a plaintiff in private antitrust litigation must establish that the restraint in question had an anti-competitive effect on competition,

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[41] *Id.*
[42] *Id.*
[43] The standing requirement to bring a claim for damages for violation of section 1 of the Sherman Act is contained in section 4 of the Clayton Act, which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.
[44] *NYNEX Corp. v. Discon, Inc.,* 525 U.S. 128, 139 (1998).
[45] *Babyage.com v. Toys "R" Us, Inc.,* 638 F. Supp. 2d 461 (E.D. Pa 2008).
[46] *Id.* at 481.
[47] *Chicago Bd. Of Trade v. United States,* 246 U.S. 231, 238 (1918).
[48] *Polygram Holding v. FTC,* 416 F.3d 29, 35 (D.C. Cir. 2005).

as well as the defendant's general intent to violate the Sherman Act. Under the rule of reason analysis, anti-competitive effects must be weighed against pro-competitive effects to assess the overall reasonableness of the restraint in the market at issue.

3.4 Do the courts take into account the actual acts performed by the supplier, e.g. if the supplier, in practise encourages a recommended price to constitute a fixed price through punishments or remunerations? Please give examples from case law and/or legal doctrine.

As noted above, the rule of reason approach is a fact intensive balancing test, and the maintenance of vigorous interbrand competition is of primary importance in U.S. antitrust law. The extent to which RPM encourages retailers to compete against interbrand competitors rather than balkanize intra-brand trade is an important consideration in determining whether a particular RPM arrangement in a particular market should be deemed illegal.

The rule of reason analysis with respect to RPM takes many factors into account, including geographic and product market definition, market power, effects on intrabrand competition, effects on interbrand competition, and any business justifications or offsetting efficiencies. The U.S. Supreme Court offered some factors to consider when assessing resale price maintenance agreements under the rule of reason: (1) the number of manufacturers engaged in the practice in the market; (2) whether the restraint comes at the behest of retailers or the manufacturer; and (3) whether the manufacturer or retailer(s) driving the practice possesses market power.[49]

The application of the rule of reason test does not mean that the practice will be found to be *per se* legal. For example, in *Toledo Mack Sales & Service v. Mack Trucks,*[50] the Third Circuit Court of Appeals reversed judgment as a matter of law for a manufacturer where a distributor was able to establish that a minimum RPM arrangement involving an agreement among Mack Trucks and its other distributors was anticompetitive. The retailers were found to be the source of complaints regarding the plaintiff's practice of discounting sales, and the likelihood that RPM was used to facilitate a conspiracy among the retailers was enhanced.

4. Pro-competitive effects

The economic arguments in favor of more lenient treatment of RPM are in large part derived from the premise that consumer welfare and competitive process is not just determined by delivery of the lowest prices. Competition may be driven and consumers may benefit from a myriad of other considerations, such as quality, design features and innovation, personalized service, retailer quality certification, product selection assistance, store locations and hours of business, displays, inventory on hand, live demonstrations, repair rates and services, and the like. Moreover, RPM may be largely limited to differentiated products and the manufacturer must still deliver a competitive package or consumers will turn to inter-brand competitive products or services.

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[49] *Id.*

[50] 530 F. 3d 204, 225-226 (3d Cir. 2008).

4.1 Does the national competition act recognise justifications in relation to these vertical practices regarding prices? Has the relevant case law taken into account practical justifications for the need of price agreements and/or pro competitive aspects in relation to the exchange of information regarding price?

4.2 What are the types of pro-competitive effects recognised in relation to vertical practices on prices?

4.3 Are the following types of justifications taken into consideration and if yes, in relation to which sort of practices and to which extent?

- **competitive oversight inside the distribution network**
- **price-level positioning of the products by a supplier**
- **consumers benefits in relation to a resale price cap**
- **consumers' interest in general (please specify)**
- **launching of a new product**
- **market positioning of a product**
- **promotional organisation**
- **after sale services**
- **coordination with consumers' information**
- **short term promotional campaigns.**

Please give examples from case-law and/or legal doctrine.

4.4 Does the national competition act and case law take into consideration other justifications?

4.5 Are pro-competitive effects automatically taken into consideration by the authorities / the courts or ought they be invoked by the interested parties?

The Court in *Leegin* identified five potential procompetitive effects of RPM: (1) increasing interbrand competition by reducing intrabrand competition and, as a result, inducing retailers to provide customer services; (2) preventing free-riding by distributors that do not provide customer services; (3) promoting competition among retailers to provide customer services; (4) facilitating market entry for new firms and brands by guaranteeing favourable margins to "retailers to induce … the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer; and (5) encouraging retailer services that would not normally be provided, even absent free riding.[51] Other related pro-competitive effects include:

Manufacturer Benefits

1. Protection of brand image from substantial discounting or loss leader sales;
2. Aligning manufacturers with highest quality retailers;
3. Better planning for innovation;
4. Reduction of wholesale pricing pressure risk;
5. Protection of reputation for quality of product or services.

[51] *Leegin*, 551 U.S. at 890-92.

Retailer Benefits

1. Protecting fair margin on products based on value of services to consumers;
2. Creation of competition based on non-price elements;
3. Avoiding channel conflict and free riding to protect availability of consumer services; and
4. Protection of inventory from devaluation due to discounting.

Consumer Benefits

1. Receive benefit of retailer focus on non-price related inter-brand differentiation points;
2. Provides basis for innovation which discounting spiral may threaten; and
3. Reduction of shopping costs and uncertainty or price confusion over availability of discounts.

4.6 Might any of these justifications have anti-competitive effects and are they considered in the national competition act and case law?

The potential anticompetitive effects of RPM include the following: (1) Retailer or manufacturer level risk of collusion may increase; (2) Inefficient allocation of services and production; (3) Sellers are able to take advantage of imperfect information available to consumers; (4) Higher consumer prices always result; (5) Reduced innovation at the retail level; (6) Lower-cost retailers barred from gaining share through price competition.

4.7 Have these justifications led to the conclusions that the agreement is not covered by a prohibition on anti-competitive agreements or to an exemption from the competition rules?

The *Credit Suisse*[52] case discussed in section 1.1 above is the only published case that discussed an outright exemption from liability in this context. The RPM cases that have been decided post-*Leegin* have not arisen in a situation that would trigger an exemption to the antitrust laws.

4.8 In your opinion do the antitrust authorities sufficiently take into consideration the pro-competitive effects of some of these practices?

As is discussed in section 5.1 below, it appears that the Department of Justice is willing to consider the precompetitive justifications offered in support of an RPM agreement. The FTC considered the precompetitive justifications offered by Nine West in support of its RPM program and modified a consent decree to allow Nine West to employ its RPM program with certain conditions attached, although the FTC still believes that RPM agreements are "inherently suspect."

The majority of the state attorneys general are hostile to RPM agreements and believe they should be *per se* illegal. As such, it seems highly unlikely that they would consider the precompetitive justifications offered for an RPM arrangement.

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[52] *Credit Suisse Sec. LLC v. Billing*, 551 U.S. 264 (2007).

5. Sanctions

The Antitrust Division of the Department of Justice is currently taking a "wait and see" approach and is monitoring the developments to determine how RPM agreements are evaluated by the lower courts and by state regulators following the Supreme Court's ruling in *Leegin*.[53] Thus far, it has declined to bring any civil enforcement cases involving RPM. However, state attorneys general have brought cases against defendants employing RPM practices for violations of their state antitrust laws, many of which provide that RPM is still *per se* illegal.

5.1 Is the national competition legislation sanctioning vertical practices in general and if yes through which forms of sanctions; administrative and/or criminal or other?

Federal Enforcement

On October 7, 2009, Christine Varney, the Assistant Attorney General for the Antitrust Division of the Department of Justice ("DOJ"), offered guidance on the DOJ's views on resale price maintenance after *Leegin.* Her remarks encouraged convergence of state laws and federal law on RPM, as well as convergence of RPM principles internationally. With regard to potential anti-competitive effects of RPM, tracking the Supreme Court's opinion in *Leegin*, she noted that RPM may:

1. Facilitate manufacturer cartels by providing a means to identify members that are cheating on a price fixing arrangement (manufacturer collusion);[54]

2. Facilitate organization of a retailer cartel to coerce manufacturers to eliminate discounters (retailer collusion);

3. Insulate a dominant retailer from retailers with better distribution systems or lower cost structures, blocking distribution innovation (retailer exclusion); and

4. Enable a dominant manufacturer with market power to provide retailer incentives not to sell to or buy from smaller rivals or new entrants (manufacturer exclusion).

With regard to potential pro-competitive effects of RPM, Ms. Varney noted that RPM may:

1. Increase inter-brand competition;

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[53] *See* Christine A. Varney, *A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason*, 24 ANTITRUST SOURCE 22 (2010).

[54] Ms. Varney warned that any manufacturers using RPM to facilitate a price-fixing arrangement will likely be prosecuted criminally by the Department of Justice. Christine A. Varney, *A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason*, 24 ANTITRUST SOURCE at 26, n. 33.

2. Prevent free-riding;

3. Promote competition on customer service;

4. Permit a cost-effective alternative to service contracts; and

5. Facilitate market entry for new firms and brands by guaranteeing favorable margins to retailers.

Ms. Varney suggested that RPM agreements be evaluated under a "structured rule of reason" analysis. In cases involving potential manufacturer collusion through the use of RPM agreements, Ms. Varney stated that a *prima facie* showing of a violation of the Sherman Act would consist of: (1) the use of RPM in a majority of sales in the relevant market; (2) structural conditions in the relevant market that are conducive to price coordination; and (3) the use of RPM plausibly helps manufacturers identify cheating. Ms. Varney noted that in order for a manufacturer-driven cartel to be effective, the manufacturers accounting for the majority of sales would need to adopt RPM, and the market would need to be concentrated at the manufacturer level.

In cases involving the use of RPM by a manufacturer to exclude or foreclose other manufacturers by guaranteeing large margins to retailers and thereby causing them not to carry the products of competitors, Ms. Varney stated that a *prima facie* case of a violation of the Sherman Act would require a showing that: (1) the manufacturer has a "dominant position" in the market; (2) the manufacturer's RPM agreements cover "sufficient distribution outlets" to result in "material foreclosure"; and (3) RPM plausibly has a significant foreclosure effect. Ms. Varney noted that in the absence of the first two elements, RPM is likely not capable of having a material foreclosure effect. Ms. Varney also noted that the manufacturer in this situation must possess substantial market power, which would enable it to have substantial power over retailers. She also noted that at least 30 percent of distribution outlets must be subject to the restraint in order for RPM to significantly undermine the success of the competitor's distribution efforts. In such situations, the plaintiff must identify at least one particular foreclosed rival or the foreclosure concern will be too theoretical to merit significant antitrust concern.

In a situation where retailers use RPM to exclude competition, Ms. Varney said that a *prima facie* case would require a showing that: (1) the retailer or group of retailers had "sufficient market power" to coerce manufacturers; (2) coercion by the retailer (or group of retailers) resulted in RPM covering much of the relevant market; and (3) RPM plausibly has a significant exclusionary effect. Ms. Varney noted that coerced adoption of RPM must include manufacturers accounting for at least 30 percent of sales in the relevant market. The plaintiff must identify a specific retailer that is foreclosed.

Finally, Ms. Varney noted that retailers might also use RPM as a means to facilitate collusion by coercing manufacturers to use RPM to help implement and police a retailer cartel. She suggested that a *prima facie* case could be made through a showing that: (1) RPM is used pervasively in the relevant market; (2) RPM was implemented as a

result of coercion; and (3) retailer collusion plausibly could not be thwarted by manufacturers. In order for retailer collusion to be substantially facilitated, the retailers subject to the restraint should account for at least 50% of the sales in the relevant market. Also, the RPM must result from retailer coercion, not merely retailer persuasion.

The most that can be said with confidence on federal enforcement policy is that pro-competitive effects will be taken into account and the rule of reason will be applied. However, it should be noted that Assistant Attorney General Varney stated during her confirmation hearing that she will support overturning *Leegin* if she feels it impedes enforcement by DOJ of anticompetitive RPM arrangements.[55]

The Federal Trade Commission conducted hearings on RPM beginning on February 17, 2009, but has not published any study based on those hearings.[56] The FTC has not brought a significant vertical restraint case in several years.

After the *Leegin* case was decided, shoemaker Nine West petitioned the FTC to amend a consent decree that was entered in 2000 that prohibited it from using RPM.[57] The FTC employed a truncated method of review reserved for agreements it considers to be "inherently suspect.[58]" If a practice is "inherently suspect," a defendant using it must "either identify some reason the restraint is unlikely to harm consumers, or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.[59]"

The FTC concluded that Nine West's use of RPM was not "inherently suspect" because none of the market conditions identified by the court in *Leegin* that could lead to anticompetitive effects were present.[60] Specifically, the FTC concluded that Nine West had a modest market share in the relevant product market and Nine West had not implemented its RPM program at the request of retailers.

The FTC also began applying the rule of reason to cooperative advertising programs with price restrictions in 2001.[61]

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[55] Edward Schwartz & Danielle Fitzpatrick, *Varney Confirmation Hearing: Expect More Aggressive Antitrust Enforcement*, DLA Piper Antitrust Alert (Mar. 18, 2009) , available at http://www.dlapiper.com/varney-confirmation-hearing-expect-more-aggressive-antitrust-enforcement/

[56] FTC Commissioner Pamela Jones Harbour, "Consumer Benefits and Harms from Resale Price Maintenance: Sorting the Beneficial Sheep from the Antitrust Goats?" Opening Remarks, FTC Resale Price Maintenance Workshop, February 17, 2009.

[57] *Nine West Group Inc*., FTC No. C-3937, 2008 WL 2061410, *6-7, *12-13 (2008).

[58] *See Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005). The court held that a practice is "inherently suspect" where there is a "close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare."

[59] *Id.*

[60] Notably, twenty-seven states submitted comments in opposition to Nine West's petition. See Amended States' Comments Urging Denial of Nine West's Petition, In the Matter of Nine West Group, Inc., FTC Docket No. C-3937 (Jan. 17, 2008), http://www.ag.ny.gov/bureaus/antitrust/pdfs/Amended_State_comments_0011708-9west.pdf

[61] *Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs—Rescission,* 6 Trade Reg. Rep. (CCH) ¶ 39,057, at 41,722 (2001) (minimum advertised price programs evaluated under rule or reason). The FTC previously took the position that minimum advertised price programs were *per se* illegal.

In the wake of *Leegin*, both houses of the U.S. Congress took up proposed legislation to repeal the result in the case. The principal bill was sponsored by Senator Kohl on January 6, 2009.[62] The Kohl bill and its counterpart from the House of Representatives remains in Committee and has not been called for a vote. If the bill is passed, it is believed that President Obama would sign it into law. However, it seems unlikely that the bill will be passed at any time in the immediate future as the members of Congress focus on the upcoming midterm elections.

State Enforcement

On October 27, 2009, the attorneys general for forty-one states wrote a letter to the United States Congress urging passage of Senator Kohl's proposed legislation to repeal *Leegin* and restore the *per se* rule of illegality for RPM arrangements. The state AG's referred to empirical studies that they believed demonstrated that RPM raises prices, and they noted the lack of empirical economic evidence supporting any pro-competitive benefits or enhanced consumer welfare resulting from RPM.

The *Leegin* decision will likely impact some states' antitrust laws. Some state antitrust statutes provide that courts are to follow federal precedent in applying the state's antitrust law. Other states provide that federal precedent is not binding but persuasive authority that should be considered. Other state antitrust laws are silent on the effect of federal precedent and generally federal precedent is not considered binding in those jurisdictions.

Fourteen states have some form of direct bar to RPM: **California, Connecticut, Kansas, Mississippi, Maryland,**[63] **Montana, Nevada, New Hampshire, New York, New Jersey, Ohio, South Carolina, Tennessee, and West Virginia.**[64] It is clear that in these states, it is very unlikely that courts will follow *Leegin.*

Twenty-seven states' antitrust statutes direct adherence to federal precedent: **Alabama, Alaska. Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, Minnesota, Nebraska, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wisconsin.** These states have no specific bar to RPM and their courts will likely follow *Leegin.* However, a number of these states joined in *amicus* briefing in the Supreme Court calling for maintenance of the *per se* rule.[65]

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[62] 111th Cong., 1st Session S. 148.

[63] In 2009, Maryland enacted a "*Leegin* repealer" statute that provides that RPM agreements are *per se* illegal. 2009 Md. Laws 169-71, codified as Md. Code Ann., Com. Law 11-204(a)(1) (2009). Thus far, Maryland is the only state that has enacted a *Leegin* repealer statute.

[64] A concise summary of the states' RPM provisions may be found in an excellent article by Michael Lindsay. Michael Lindsay, *State Retail Price Maintenance Laws After Leegin*, 22 ANTITRUST 32 (2009), available at *http://www.abanet.org/antitrust/at-source/09/10/Oct09-Lindsay10-23f.pdf.).*

[65] The states of Alaska, Delaware, Florida, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, Minnesota, New Mexico, Oklahoma, Oregon, Pennsylvania and Utah all submitted an amicus brief urging that the U.S. Supreme Court decline to overturn *Dr. Miles*.

Four states allow but do not require their state courts to follow federal case law and have no specific bar to minimum RPM: **Arizona, North Carolina, South Dakota, and the District of Columbia.** North Carolina and South Dakota joined in *amicus* briefs opposing the result in *Leegin.*

Six states provide no guidance on the effect of federal antitrust precedent and have no state law bar to minimum RPM: **Arkansas, Georgia, Maine, North Dakota, Vermont, and Wyoming.** Arkansas, Maine, Vermont and Wyoming joined in the briefs opposing reversal of the *per se* rule.

Finally, one state, **Illinois**, previously used the rule of reason rather than the *per se* rule to evaluate minimum RPM, thus presaging the *Leegin* rationale.

The attorneys general of some states have been very active in pursuing enforcement actions to enjoin RPM arrangements. For example, on March 29, 2010 New York Attorney General Andrew M. Cuomo filed an aggressive RPM case against Tempur-Pedic International, Inc., a mattress manufacturer.[66] New York sought to enjoin Tempur-Pedic from preventing its resellers from offering discounts. Notably, New York also sought relief under expanded theories of liability beyond antitrust—consumer fraud. One effect of this tactic is to eliminate the necessity of proving any anti-competitive effects. Tempur-Pedic's primary defenses are that it did nothing more than merely announce its unilateral policy not to sell its products to retailers who choose not to follow its suggested retail prices, and that RPM is not *per se* illegal under New York law.[67]

In March 2008, New York, with the cooperation of Illinois and Michigan, filed an RPM case against a division of Herman Miller, charging RPM violations through restrictions on retailers preventing them from advertising discount or sale prices below the manufacturer's minimum set price for specialty office chairs.[68] The complaint alleged that Herman Miller implemented its RPM program in response to retailers' complaints regarding discounting by competing Internet distributors.

On February 5, 2010, the California Attorney General brought a civil action against DermaQuest, a manufacturer of beauty-care products, for violating California's Cartwright Act and its Unfair Competition Law through the use of RPM.[69]

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[66] *New York v. Tempur-Pedic International, Inc.*, Supreme Court of New York, County of New York Index No. 400837/10.

[67] *See Memorandum of Law in Support of Respondent's Motion to Dismiss* in *New York v. Tempur-Pedic International, Inc.*, Supreme Court of New York, County of New York Case No. 400837/10 (available at http://www.abanet.org/antitrust/at-committees/at-pdiscr/pdf/discussion-list/10/Tempur_Support_MTD.pdf).

[68] *See New York v. Herman Miller Inc., No.08 CV-02977* (S.D.N.Y. March 21, 2008). A copy of the complaint is available at http://www.ag.ny.gov/bureaus/antitrust/pdfs/08_cv_02977_Complaint.pdf.

[69] California's Cartwright Act is similar to section 1 of the Sherman Act. California's Unfair Competition Law is similar to section 5 of the FTC Act. Neither statute specifically addresses RPM, but courts interpreting the Cartwright Act have held that RPM is *per se* illegal. *Harris v. Capitol Records Distrib. Corp.*, 64 Cal.2d 454 (1966); *Mailand v. Burckle*, 20 Cal.3d 367 (1978); *Chavez v. Whirlpool Corp.*, 93 Cal.App.4th 363; *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal.App.4th 242 (2003).

DermaQuest's contracts with its distributors prohibited them from selling below its suggested retail price.[70]

5.2 Are the above practices subject to sanctions as well?

See section 5.4 below.

5.3 Is the specificity of vertical relationships, for instance the lesser harm in relation to intra-brand restrictions, taken into consideration in the application of sanctions?

In the cases described above, the attorneys general did not take any precompetitive justifications into account for the conduct at issue. As noted previously, RPM is *per se* illegal in California. It is unclear whether RPM is *per se* illegal under New York law.

5.4 What are the major fines in your jurisdictions (in EUR) for vertical restraints? In which context have they been imposed? What is the major criminal or other sanction imposed?

On March 21, 2008, Herman Miller entered into a consent decree with the attorney general for New York that prohibits the company from using RPM until December 31, 2010. The company also agreed to pay a $750,000 fine.[71]

In the DermaQuest matter, the California Attorney General imposed and DermaQuest agreed to pay a fine of $120,000.[72] DermaQuest also stipulated to the entry of a permanent injunction prohibiting it from entering into RPM agreements with its distributors in California in the future.[73]

6. Assessment

6.1 Is the national competition act sufficiently taking into consideration the specificity of vertical agreements when dealing with price-related practices?

6.2 Is the case law evolving? Towards which tendency? On which points are an evolution of the situation advisable?

At the federal level, *Leegin* completes the progression of a series of cases that reversed another line of cases holding that several types of vertical distribution practices were *per se* illegal. All pure vertical distribution practices are now evaluated under the rule of reason. However, Justice Kennedy in *Leegin* invited the lower courts to tailor a specific rule of reason analysis for RPM agreements. It is unclear how they will do so.

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[70] *See Complaint for Violation of Cartwright Act and Unfair Competition Law* in *People v. DermaQuest, Inc.*, Superior Court for the State of California, County of Alameda Case No. RG 10497526 (available at http://www.jonesday.com/files/Publication/116696e5-2e7d-4812-98c0-8dfaeb827189/Presentation/PublicationAttachment/e7ecc996-0f0e-43ae-82e1-4bdeaac1b19d/DermaQuest%20Complaint.pdf).

[71] *See New York v. Herman Miller Inc.*, No.08 CV-02977 (S.D.N.Y. March 25, 2008). A copy of the consent decree is available at http://www.oag.state.ny.us/bureaus/antitrust/pdfs/Signed_FJ.pdf.

[72] *People v. DermaQuest, Inc.*, Alameda County Superior Court Case No. RG 10497526, Final Judgment Including Permanent Injunction (Feb. 23, 2010).

[73] A copy of the permanent injunction is available at http://www.jonesday.com/files/Publication/116696e5-2e7d-4812-98c0-8dfaeb827189/Presentation/PublicationAttachment/0b313137-0ea2-456d-9926-569f3d7e7bb8/DermaQuest%20Judgment.pdf.

As previously noted, the great majority of the state attorneys general do not agree with the outcome of *Leegin*. Any sales practice involving the use of RPM must be evaluated in light of the possible intervention of the state antitrust authorities. Moreover, there is still the potential for the U.S. Congress to pass and President Obama to sign a federal statute repealing *Leegin*, although this seems unlikely to happen in the immediate future. Legal advisors therefore need to proceed with caution in advising clients on implementation of an RPM program or other strategies to influence or attempt to control resale prices.

For now, Christine Varney has recommended the implementation of a "structured rule of reason analysis" for RPM. Once an RPM arrangement is established, the burden would shift to the defendant to demonstrate either that the RPM program is actually (not theoretically) pro-competitive, or that the claimant's definition of the market is erroneous. Minimally, a defendant would have to show that RPM was used to enhance its success in competing with rivals and was a reasonable means to accomplish such inter-brand competition.

A company employing an RPM program must also be cognizant of the fact that the FTC currently views RPM agreements as "inherently suspect." As such, the company will be required to identify some reason the restraint is unlikely to harm consumers, or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.

ABOUT THE AUTHORS

David Nemecek (National Reporter)

dnemecek@longlevit.com

David Nemecek is Senior Counsel at Long & Levit LLP in San Francisco. He has significant experience in litigating antitrust and unfair competition matters, as well as class actions, shareholder disputes and general commercial cases. He provides compliance counseling to clients concerning the antitrust, securities, and unfair competition laws. David was a member of the trial team for two of the largest antitrust cases in California and Minnesota history (*Lingo v. Microsoft Corp.* and *Gordon v. Microsoft Corp.*, respectively). He has also litigated cases involving allegations of horizontal price-fixing and violations of California's unfair competition law (Business & Professions Code § 17200). He also represents institutional clients in the financial services industry in securities fraud, employment, trade secret and broker-dealer matters. He obtained his Juris Doctor with great distinction from the University of the Pacific, McGeorge School of Law in 1997, and his Bachelor of Science in Business Administration from San Diego State University in 1993.

Glenn Davis

gedavis@gjn.com

Glenn Davis is an equity member of Gallop Johnson & Neuman LC. For over 28 years, he has engaged in complex litigation and counseling issues in a broad range of antitrust contexts: joint venture and mergers analyses, including HSR compliance; vertical distribution and exclusive dealing arrangements; pricing issues; monopolization and predatory conduct allegations; responses to DOJ Antitrust Division, FTC, and state AG investigations; intellectual property-antitrust issues; trade association activities; antitrust class actions; criminal antitrust and other white collar crime matters; disclosure issues and internal investigations; and corporate compliance programs. He is a member of the Missouri and Illinois bars and admitted to practice in numerous federal district courts and circuit courts of

appeal, as well as the US Supreme Court. Mr. Davis is AV Peer Review Rated by Martindale-Hubbell, listed by *Best Lawyers in America* in Antitrust Law, Commercial Litigation and Franchise Law, a Missouri-Kansas Superlawyer in Business Litigation, and a Charter fellow in the *Litigation Counsel of America.* He obtained his Juris Doctor from Washington University School of Law in 1982 and his Bachelor of Arts in Political Science with honors from DePauw University in 1979.

Angira J. Patel

angira323@yahoo.com

Angira J. Patel received her Bachelors degree from the University of Illinois in Chicago in 2007, where she majored in Political Science. Angira graduated from Whittier Law School in May 2010, where she completed a certificate in intellectual property and was a member of the Moot Court Honors Board. She is currently awaiting her bar results from the July 2010 New York and New Jersey bar examinations and plans on sitting for the California bar in February 2011. In addition, Angira is working on an article discussing the free movement of goods and the establishment of business from South Asia to the United States. She is fluent in English, Gujarati, Hindi and Italian.

Jeffrey Pollock

JMPollock@FoxRothschild.com

Jeffrey M. Pollock is a partner at Fox Rothschild, LLP, and has offices at 100 Park Ave., New York and in Princeton, New Jersey. Jeff graduated from New York University School of Law in 1987 and then served as a judicial law clerk for the Hon. Chief Judge Donald P. Lay, Eighth Circuit United States Court of Appeals. In addition to representing companies under the Sherman, Clayton, and Lanham Acts, Jeff has

extensive experience in representing policyholders pursuing insurance rights arising out of claims against policyholders for alleged unfair trade practices. He has been involved in numerous unfair trade practice claims in New York and New Jersey, and is currently trying related disputes in London, Bermuda, as well as in the Second and Third Judicial Circuits.

Rebecca Thai

http://www.IntlCorpCompliance.com

Rebecca Thai was admitted to the practice of law in 1992. Ms. Thai is licensed in five U.S. states: California, Texas, Ohio, Colorado, and Alabama. She started her career as a prosecutor for the United States Department of Justice in the Antitrust Division. During her tenure at the Antitrust Division, Ms. Thai prosecuted horizontal conspiracies and reviewed Hart Scott Rodino filings. After leaving government service, Ms. Thai worked with the law firms of Bradley Arant Boult & Cummings, LLP and at Locke Lord Bissell & Liddell LLP where she counseled clients on pricing policies, vertical relationships, single firm conduct, antitrust compliance, tying, bundling, refusal to deal, territory and market restrictions, competitor collaborations, and merger control and conducted internal investigations. Ms. Thai is now the principal at Rebecca Thai & Co. LLC. Her practice focuses on legal representation and compliance in the areas of Antitrust and Foreign Corrupt Practices.