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Posted at 1:10 PM on November 10, 2009 by Sheppard Mullin

Debate on Resale Price Maintenance Heats Up

1. **DOJ Antitrust Division Head Christine Varney Offers Guidance on *Leegin* and Proposes "Structured Rule of Reason Test" For Evaluating RPM Under State Laws**

When the Supreme Court modified the prohibition against resale price maintenance agreements ("RPM") more than two years ago in *Leegin Creative Leather Products v. PSKS, Inc.*, it was not immediately clear how state enforcers and state courts would apply state laws to RPM. 127 S. Ct. 2705 (2007). Thirty-seven State Attorneys General (AGs) had asked the Court in a joint amicus brief to uphold the per se rule which makes all RPM illegal. Since *Leegin*, some AGs have taken the position that RPM remains per se illegal under some state laws and other states have passed or may pass "*Leegin* repealer" bills.

In an address delivered on October 7, 2009, the Assistant Attorney General for Antitrust, Christine Varney, offered guidance to state enforcers considering how to apply state laws to RPM in light of *Leegin*. The speech, entitled "Antitrust Federalism: Enhancing the Federal/State Relationship," was presented at a conference sponsored by the National Association of Attorneys General (NAAG) and Columbia Law School. The conference highlighted revived cooperation between federal and state antitrust enforcers.

Ms. Varney began her speech by discussing the Department of Justice Antitrust Division's interest in strengthening the relationship between it and the AGs. She then asked for help from state enforcers to monitor competition in increasingly concentrated and often local agricultural markets. But Ms. Varney reserved the majority of her time for encouraging convergence of state RPM laws with federal law on RPM. She described this as "one of the most important legal challenges facing State Attorneys General." It is clear, she opined, that under federal law, *Leegin* calls for a rule of reason inquiry and permits the courts to determine the exact form of that inquiry. On the other hand, she pointed out, when it comes to state laws, some state enforcers and courts are considering whether state laws can be interpreted or applied so that RPM remains per se unlawful.

Without asserting a direct answer to this question herself, Ms. Varney reviewed and offered guidance on the *Leegin* decision. She recalled the four structural circumstances the Supreme Court identified where RPM is likely to be anticompetitive. These are when RPM is used:

1. by a manufacturer cartel to identify members that are cheating on a price fixing agreement (manufacturer collusion);
2. to organize a retailer cartel by coercing manufacturers to eliminate price cutting (retailer collusion);
3. by a dominant retailer to protect it from retailers with better distribution systems and lower cost structures, forestalling innovation in distribution (retailer exclusion); and
4. by a manufacturer with market power to give retailers an incentive not to sell products of smaller rivals or new entrants (manufacturer exclusion).

Ms. Varney recalled as well that the Court in *Leegin* identified five potential procompetitive effects of RPM. RPM can:

1. increase interbrand competition;
2. prevent freeriding;
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 went on to explain that in *Leegin*, the Court invited lower courts to devise rules or even presumptions to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones. Recognizing that *Leegin* left questions unanswered, she offered guidance on how the courts might apply a "structured rule of reason analysis" for RPM. Under a structured rule of reason analysis, if a plaintiff establishes the existence of an RPM agreement, the scope of its operation and one of the above likely anticompetitive structural conditions, this might be sufficient, Ms. Varney suggested, to establish a prima facie case that the RPM is illegal. The burden would then shift to the defendant to demonstrate either that the RPM is actually and not just theoretically procompetitive or that the plaintiff's characterization of the market was erroneous.

In rebutting a presumption of illegality, the defendant would have to show, at a minimum, that it adopted RPM to enhance its success in competing with rivals and that RPM was a reasonable means for accomplishing this.

Having proposed an approach to make the rule of reason a "fair and efficient way to prohibit anticompetitive restraints and promote procompetitive ones" as the Supreme Court encouraged, Ms. Varney admitted that she is not ruling out the possibility that a new analytical framework for RPM will not succeed or that the actual uses of RPM could be shown to be almost always harmful. The Division, she said, "looks forward to analyses of any data that becomes available as a result of RPM practices implemented in the wake of *Leegin* and appreciates that the states will serve as important laboratories for obtaining this data." Urging state enforcers and courts to "keep an open mind," Ms. Varney concluded her appeal for convergence between federal and state law on RPM.

2. **41 State Attorneys General Press Congress to Repeal *Leegin* and Reinstate Per Se Rule to Prohibit RPM Categorically**

Ms. Varney's appeal for convergence on RPM evidently failed to impress most AGs. Three weeks after Ms. Varney's address, on October 27, 2009, 41 AGs, including the AGs of California, New York and Florida, sent Congress a letter urging the passage of *Leegin*-repealer legislation that would reinstate the per se rule for RPM under federal law. The legislation, "The Discount Consumer Protection Act," S. 148, states "a very clear rule that '[a]any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler or distributor shall violate this Act.'"

The AGs allege in the letter that "empirical studies show that agreements on minimum resale prices raise consumer prices, often significantly." They state as well that "despite economic theories cited by the Supreme Court about how those agreements *could* enhance consumer welfare, we are not aware of any empirical study that shows enhanced consumer welfare in the form of services or other customer benefits." The AGs next point to prior experience with authorizing RPM and the impact this had on consumers. Consumers paid significantly more for goods, the AGs recall, during the years of the "fair trade laws" (Miller-Tydings Act of 1937 and the McGuire Act of 1952). Those laws were intended to to protect independent retailers from the price-cutting competition of large chain stores.

Further, the AGs challenge assertions that RPM can have procompetitive effects. They observe in their letter that two years after *Leegin*, "there remains no evidence that consumers are provided any tangible benefits, let alone benefits that outweigh the higher prices that result from minimum resale price fixing." The AGs urge Congress to take action "to overcome the [Supreme] Court's view that Congress has been silent on and does not care about this issue." In any event, the AGs state, "Congress, not the Court, is better positioned to evaluate the detrimental impact of resale price fixing on consumers and the underlying public policy of the nation's antitrust laws." Finally, the letter concludes, rule of reason treatment of RPM will dramatically chill any private legal challenge. Since *Leegin*, the letter states, lower courts have dismissed on the pleadings various challenges to RPM.

With forty-one AGs pressing Congress to repeal *Leegin* on the one hand, and federal enforcers, the Court, and many antitrust practitioners and economists supporting the decision on the other hand, the debate on RPM has heated up. All eyes will be on Congress to see whether, when and how it takes action on the federal law of RPM. In the meantime, the AG's letter gives good reason to believe that, in the eyes of these enforcers, RPM remains illegal per se under many state laws.

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2. 41 State Attorneys General Press Congress to Repeal *Leegin* and Reinstate Per Se Rule to Prohibit RPM Categorically