Consumer Benefits and Harms from Resale Price Maintenance: Sorting the Beneficial Sheep from the Antitrust Goats?[1]

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Opening Remarks
Resale Price Maintenance Workshop
February 17, 2009

I. INTRODUCTION

Good morning. It is my great pleasure to welcome you to the first session of the Federal Trade Commission's Workshop on Resale Price Maintenance.

As most of you know, the Supreme Court's 2007 opinion in the *Leegin* case reversed the Court's 1911 *Dr. Miles* decision,[2] overruling almost a century of *per se* illegality for resale price maintenance. We are here today because, to be frank, the *Leegin* decision set the ship of antitrust law adrift on a sea of uncertainty. No one really knows how to apply the rule of reason to resale price maintenance, which is a form of price-fixing. Courts and enforcement agencies – including this agency – have no experience in assessing the antitrust "reasonableness" of retail prices that are established by manufacturers, rather than being set unilaterally by retailers themselves.

A principal purpose of this workshop series, therefore, is to explore the legal, economic, and business significance of resale price maintenance ("RPM") under a variety of market circumstances, so that we can better understand how those different circumstances might affect an analysis of RPM under the rule of reason. The workshop will bring together some of the best and brightest minds in

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[1] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2729 (2007) (Breyer, J., dissenting) ("How easy is it to separate the beneficial sheep from the antitrust goats?").

[2] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

this field, and I am hopeful that together the participants can begin to craft an appropriate framework for the analysis of RPM. I am excited to be part of this process, and I am grateful that you have all taken the time to attend, either in person or via webcast.

We are privileged to begin our workshop with today's distinguished panel of economic and antitrust scholars. They will examine various theories of how the use of resale price maintenance might enhance competition and benefit consumers. I will let our moderator, Dan O'Brien from the FTC's Bureau of Economics, provide introductions of the speakers. But before we begin today's session, I would like to take a few minutes to set the stage by describing the scope and focus of the workshop series, and by providing some insights into what the Commission hopes to accomplish by holding these sessions.

II. OUTLINE OF WORKSHOP PANELS

We are currently planning at least six panels addressing various aspects of resale price maintenance. The second panel is scheduled for this Thursday, February 19th; that panel will explore various theories of how the use of resale price maintenance can harm competition and consumers. A panel will be scheduled later this spring to explore the body of empirical evidence regarding the economic effects of resale price maintenance. We are also planning a panel, comprised mostly of businesspeople, to gather real-world industry perspectives on the use of RPM.

We anticipate holding three panels covering the legal treatment of resale price maintenance. One panel will focus on the history and evolution of the law of resale price maintenance in the United States prior to *Leegin*. In effect, this panel will survey American antitrust law on RPM, from the 1911 *Dr. Miles* decision up through the 1997 *Khan* decision,[3] which eliminated *per se* liability

[3] State Oil Co. v. Khan, 522 U.S. 3 (1997).

for vertical maximum price fixing. I expect that this panel also will assess the U.S. experience with resale price maintenance beginning in 1937 under the so-called Fair Trade Laws,[4] and the effect on consumers when, in 1975, the Congress repealed the antitrust exemptions for the Fair Trade Laws and made resale price maintenance unlawful again.[5]

Another panel will look at the antitrust treatment of resale price maintenance in other jurisdictions around the world. In our highly globalized economy – characterized, in part, by the growth of multi-national manufacturers and retailers – it is critical that we gain an international perspective. Details are being finalized, but we expect that panel to take place in Europe.

A final panel will closely examine the Supreme Court's decision in *Leegin*, and its impact thus far.

- What lessons have we learned from the lower courts' application of *Leegin*?
- Should the legal treatment of vertical price restraints under the rule of reason be the same as that for vertical non-price restraints?
- Under what circumstances might it be appropriate to apply legal presumptions regarding the use of resale price maintenance?
- Does the likelihood of Type-I or Type-II errors vary with the stringency of the rule of reason analysis applied – for example, quick-look vs. full-blown rule of reason?
- To what extent should the rule of reason account for the elimination of intrabrand competition?

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[4] The Fair Trade Laws refer to state statutes permitting resale price maintenance agreements. These agreements were only enforceable because Congress created federal antitrust exemptions for them by enacting the Miller-Tydings Resale Price Maintenance Act (Act of Aug. 17, 1937, Pub. L. 314, ch. 690, Title III, 50 Stat. 693) and the McGuire-Keogh Fair Trade Enabling Act (Act of July 14, 1952, Pub. L. 543, ch. 745, 66 Stat. 631).

[5] The Consumer Goods Pricing Act of 1975, Pub. L. 94-145, 89 Stat. 80.

- What should be the relationship between federal and state law? In states whose laws still condemn RPM as a *per se* violation, should *Leegin* preempt state law?

These are some of the questions that will be tackled during the final panel.

III. *LEEGIN* AND ITS AFTERMATH

In my mind, one of the most interesting things about *Leegin* is that the case provoked both strong disagreement *and* a surprising amount of agreement. The majority and dissent disagreed on many fundamental points – for example:

- whether to retain the *per se* rule for minimum resale price maintenance;[6]
- the role of *stare decisis* in antitrust analysis;[7]
- the extent to which investors have relied on the *Dr. Miles* rule, and the extent to which this reliance should be accommodated;[8]
- the extent and frequency of free riding, as well as its economic and legal significance;[9]
- the lessons to be drawn from this country's experiment with resale price maintenance from 1937 to 1975;[10] and

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[6] *Compare Leegin*, 127 S. Ct. at 2725 (Kennedy, J.) *with id.* at 2734 (Breyer, J., dissenting).

[7] *Compare id*. at 2723 (Kennedy, J.) *with id*. at 2734 (Breyer, J., dissenting).

[8] *Compare id.* at 2724 (Kennedy, J.) *with id*. at 2735 (Breyer, J., dissenting).

[9] *Compare id*. at 2716 (Kennedy, J.) *with id*. at 2730 (Breyer, J., dissenting).

[10] *Compare id*. at 2724 (Kennedy, J.) *with id*. at 2731-32 (Breyer, J., dissenting).

- the equally important lessons to be drawn to be drawn from our experience since the 1975 repeal of the fair trade antitrust exemptions – including lower consumer prices and the rapid expansion of discount retailing.[11]

That is a significant list of disagreements, which will continue to fuel a great deal of discussion and debate. But I was even more impressed by the number of points on which the majority and dissent agreed.

It appears that both sides would have modified the *per se* rule to some extent. The dissent seemed willing to consider relaxation of the *per se* rule, at least temporarily, to facilitate "new entry."[12]

Both the majority and the dissent agreed that minimum resale price maintenance can be harmful to competition and consumers.[13] Indeed, the majority's explicitly recognized this harm, and therefore expressly disclaimed any suggestion that rule of reason analysis should become a *de facto* rule of *per se* legality.[14] The majority further directed that courts applying the rule of reason "would have to be diligent in eliminating . . . anticompetitive uses [of resale price maintenance] from the market,"[15] and predicted that courts might "devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote competitive ones."[16]

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[11] *Compare id*. at 2725 (Kennedy, J.) *with id*. at 2735-36 (Breyer, J., dissenting).

[12] *Id*. at 2731 (Breyer, J., dissenting).

[13] *Id*. at 2717 (Kennedy, J.), 2724 (Breyer, J., dissenting).

[14] *Id*. at 2724 (Kennedy, J.).

[15] *Id*. at 2719 (Kennedy, J.).

[16] *Id*. at 2720 (Kennedy, J.).

Finally, both the majority and the dissent conceded a lack of rigorous empirical support, on either side of the debate.[17] Economists frequently put forth theories to predict the likelihood of competitive harm, or benefit, when minimum resale price maintenance is used in retail markets. But as I see it, both of the *Leegin* opinions took these economists to task and called their bluff. The truth is, there is very little empirical evidence to support any of these conflicting economic theories of benefit or harm.

IV. MORE EMPIRICAL WORK IS NEEDED

This lack of empirical support is a major focus of the FTC's workshop. In antitrust circles these days, it has become axiomatic that economics should inform antitrust enforcement. I support that statement in principle. But facts, not theories, are supposed to be the grist for the law enforcement mill. What happens when economists do not agree on a theoretical basis for an antitrust rule – AND cannot offer evidence to support their conflicting theories? Under those circumstances, economics is not helpful to law enforcers, legal counselors, or antitrust tribunals, because it cannot serve as a meaningful basis for the development of real-world antitrust rules or sound enforcement policy. My good friend, and former Director of the Commission's Bureau of Economics, Michael Baye, once likened the resale price maintenance debate to discussions of religion. There are many fervently held beliefs, both for and against the use of resale price maintenance in the market. But there are few, if any, objective facts to provide policy guidance.

I am one of many public officials charged with a duty to make law enforcement decisions that benefit consumers. I, for one, am discomforted (to say the least) by the absence of an objective basis for making law enforcement decisions about resale price maintenance. Faced with too few economic

[17] *Id*. at 2717 (Kennedy, J.), 2729-30 (Breyer, J., dissenting).

facts, decisions must be based on what we believe to be true regarding resale price maintenance, based on our reconciliation of conflicting theories, all shaped by our reading of antitrust law and policy as reflected by case law and Congressional intent.

The Commission wrestled with this dilemma last year, when Nine West asked the Commission to reopen and modify a 2000 order that prohibited Nine West from engaging in resale price maintenance. The Commission granted this request, in part.[18] As the Commission recognized, Nine West could not provide the Commission with any factual basis for believing that its prospective use of resale price maintenance would benefit consumers more than it would harm them. Instead, the Commission looked closely at the factors, identified by the *Leegin* majority, that might warrant more stringent scrutiny of RPM, including:

- whether the manufacturer or retailers were the impetus for the use of resale price maintenance;
- whether either the manufacturer or the retailers possessed market power in a relevant antitrust market; and
- Whether Nine West's use of resale price maintenance was part of, or likely to facilitate, a horizontal cartel at any level of the distribution chain.

Id. at 14-15.

The Commission found nothing in the record to warrant either more stringent scrutiny of Nine West's actions, or the use of a highly structured version of the rule of reason. Therefore, the Commission granted in part Nine West's request for relief from the order, subject to a periodic

[18] Nine West Group, Docket No. C-3937, Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000 (May 6, 2008), *available at* http://www.ftc.gov/os/caselist/9810386/080506order.pdf.

reporting requirement. These reports should provide the Commission with market details regarding the effects of Nine West's future use of resale price maintenance. *Id*. at 17.

In the meantime, this RPM workshop series will help the Commission explore the various theories of competitive harm and benefit from resale price maintenance, including the assumptions upon which the theories rely. Ideally, our panelists will help us identify testable propositions regarding these theories – the kinds of propositions that might be well-suited to empirical study. Additionally, we hope to gather evidence from the marketplace about the expectations of businesspeople regarding the use of RPM in retail markets, and whether the actual effects of RPM are consistent with those expectations. This process will not only provide the Commission with valuable insights to shape its law enforcement decisions, but also, hopefully, will inform business counseling and decisionmaking.

V. RETAILING: COMPLEMENT OR SUBSTITUTE?

Going back to Mike Baye's religion analogy, and given that I have this nice spot at the pulpit for a few more minutes, I cannot resist the opportunity to preach about a few of my own beliefs on RPM.

The following general principle is well-accepted in antitrust law: combining substitutes is bad, and combining complements is good, absent evidence to the contrary.[19] But I am not sure how helpful this theorem is when we assess vertical relationships in general, and resale price maintenance

[19] Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 80 (Konkurrensverket, Swedish Competition Authority, 2008), *available at* http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rap_pros_and_cons_vertical_restraints.pdf (last visited Feb. 18,2009).

in particular. I am concerned that its use is likely to overgeneralize on the one hand, and undervalue on the other.

The problem is this: retailers and retailing may be categorized as either a complement or a substitute, especially in this age of Internet merchandising. From the viewpoint of the manufacturer, retailing is a complementary service – one that is useful and necessary to bring consumer goods to market. In agency terms, manufacturers tend to view retailers as their sales agents. But from the viewpoint of a consumer, retailing may be seen as providing alternative sources for competitively-priced goods. In other words, consumers tend to view retailers as their purchasing agents.

Both the sales and purchasing functions provide consumer benefits, and the antitrust treatment of resale price maintenance should recognize this. But at the end of the day, I naturally lean toward the outcome that encourages lower prices for consumers. Therefore, absent empirical evidence to the contrary, I believe the antitrust laws should prioritize retailers' role as purchasing agents for consumers. According to this view, we should cast a skeptical eye upon minimum resale price maintenance, because it tends to suppress discounting.

My current view is based, in part, on Adam Smith's admonitions: first, that consumers are generally better off when the goods they need are cheaper;[20] and second, that promoting consumption, not production, should be the primary object of our mercantile system and is in the best interest of consumers.[21] My current view is bolstered by my enduring belief that the primary purpose of the antitrust laws is to prohibit the transfer of consumer surplus to persons with market power.[22]

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[20] Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 461 (Edwin Cannan ed., The Modern Library 1937) (1776).

[21] *Id*. at 625.

[22] Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631 (1989).

And of course, it is based on my own experience as a shopper who knows and appreciates the value of a discount.

As I have tried to make clear, however, these are only my beliefs. I am not an economist. I cannot predict what the empirical evidence might actually show, were it to be systematically gathered and evaluated. I am actually somewhat agnostic regarding the outcome of the ongoing RPM debate among economists. Rather, my primary goal is to see the debate expand upon a more rigorous empirical foundation. Over the course of this workshop, I keenly anticipate an exchange of competing viewpoints, and I expect to gain a richer appreciation for all of these perspectives.

VI. CONCLUSION

Again, thank you all for being here today, and for taking this journey with me.

At this time, I will turn the microphone over to Dan, our moderator, who will introduce the participants in today's program.