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A COMMENTARY ON CURRENT STATE ENFORCEMENT POLICY FOR RPM

On Life Support from *Leegin*aire's Disease: Can the States Resuscitate *Dr. Miles*?

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LED BY THE ATTORNEY GENERAL OF New York, thirty-seven states jointly submitted an amicus brief to the U.S. Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[1] opposing any relaxation of the per se rule against minimum resale price maintenance (RPM).[2] The Supreme Court nevertheless struck down the per se rule against RPM, leading many observers to describe the *Leegin* decision as a sea change in antitrust law; after all, the Court overruled a century of precedent reaching back to *Dr. Miles*.[3] For other observers, however, *Leegin* represents only a slight erosion of the Sherman Act's historical prohibition of RPM. Under this view, articulated most prominently by various state enforcement officials, *Leegin* calls for a truncated or "quick look" analysis of RPM under the rule of reason. This analysis assertedly would relieve the antitrust plaintiff of its burden to demonstrate the anticompetitive effect of RPM activities in question but would nevertheless require the defendant to establish a procompetitive justification for its use of RPM.

More dramatically, enforcement officials of several states have asserted that RPM remains per se unlawful under various state antitrust laws despite *Leegin*. Antitrust officials from the New York Attorney General's office, in particular, have vigorously argued that RPM constitutes a per se violation of New York's antitrust law, the Donnelly Act. During the Enforcers Roundtable at the recent ABA Antitrust Section Spring Meeting, Robert L. Hubbard, the Director of Litigation of the Antitrust Bureau of the New York Attorney General's office and Chair of the Multistate Antitrust Task Force for the National Association of Attorneys General, declared the states to be "unapologetic" for continuing efforts to protect consumer welfare against vertical price fixing. This article responds to the surprisingly muscular RPM enforcement agenda being exercised by the states in the wake of *Leegin*.

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States' Litigation Strategy Under the Sherman Act: *Polygram* Holding and Quick Look Review of RPM

In a recent issue of this magazine, Hubbard presented his view of *Leegin*'s impact on future vertical price-fixing litigation under the Sherman Act.[4] In the article, he argues that *Leegin* "mandated a '*fair and efficient*' rule" for application of the rule of reason citing the following passage:

> As courts gain experience considering the effects of [price] restraints by applying the rule of reason over the course of decisions, they . . . . can 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 procompetitive ones.[5]

Although Hubbard admits that "[d]iscerning what the Court means by a 'fair and efficient' rule is a challenge,"[6] he believes that it calls for application of the truncated or "quick look" rule of reason set forth in *PolyGram Holding, Inc. v. FTC*.[7]

Under *PolyGram*'s quick look analysis, the threshold question is whether harm to consumers is obvious as a result of a particular restraint, in which case the restraint is deemed "inherently suspect" and presumptively illegal.[8] Hubbard argues that because "consumers almost always pay more as a result of vertical price fixing, the 'inherently suspect' label should apply."[9] Thus, once a plaintiff has adequately alleged a vertical price-fixing conspiracy, quick look analysis would require the defendant to provide "a plausible competitive justification for the restraint."[10] Hubbard suggests that a defendant might meet this burden "by referring to theoretical benefits gleaned from the economic literature," but also argues that the plaintiff can overcome such a showing with evidence of "actual harm (i.e., price increases) in the specific case."[11] Finally, if the plaintiff has offered evidence of price increases, the defendant would be required to demonstrate that the procompetitive benefits of the restraint outweigh its anticompetitive harm. Acknowledging that carrying such a burden may be "a daunting task," Hubbard argues that the defendant could meet this burden by proving: "(1) the restraint caused retailers to provide actual enhanced value or services; (2) the enhanced value or services increased demand; and (3) the increased demand from that value or those services was greater than the decreased demand caused by the higher price."[12]

In October 2007, at about the time that Hubbard's article appeared in this magazine, Nine West Footwear Corp. (Nine West) filed a petition with the Federal Trade Commission to reopen and modify a Commission order which prohibited Nine West from establishing and enforcing RPM agreements. In the petition, Nine West argued that, follow-

ing *Leegin*, the Commission's order restricted lawful, procompetitive activity that would otherwise "enhanc[e] competition at the interbrand level," and therefore prevented Nine West from entering into commercial engagements "of the kind now available to its competitors."[13]

A group of states, led by New York's Attorney General, filed Comments with the FTC opposing Nine West's petition. These states relied upon Hubbard's *PolyGram* theory of post-*Leegin* RPM litigation, arguing that "Nine West's activities are 'inherently suspect' because they raise prices for consumers"—specifically, that "Nine West's activities [raised prices] to the tune of $45.7 million"—and violate the antitrust laws "because nothing . . . justifies those higher prices."[14]

In May 2008, the FTC granted Nine West's petition in part, lifting the restrictions on Nine West's ability to use RPM but requiring periodic reports concerning the effect of any RPM on Nine West's prices and outputs.[15] In its decision, the FTC suggested that *Leegin* may support some form of truncated analysis of RPM, such as the one applied in *PolyGram*, where the manufacturer instituting RPM possesses market power, where a distributor cartel provided the impetus for RPM, or where multiple competing manufacturers have adopted RPM policies.[16] The FTC found that Nine West did not raise any of these concerns, however, and thus determined that Nine West's "potential use of resale price maintenance is not likely to harm consumers at this time."[17]

Following *Leegin*, the states' argument for truncated review, to the extent it gains any traction in the agencies or courts, would seem to represent the states' (as well as private plaintiffs') clearest path to future success in RPM litigation under the Sherman Act. Indeed, as explained below, the traditional rule of reason imposes as "daunting" a burden on plaintiffs in an RPM case as quick look analysis would impose on defendants. Nevertheless, in light of *Leegin*, plaintiffs may face an uphill battle convincing courts to eschew the traditional rule of reason in favor of quick look analysis when reviewing RPM agreements under the Sherman Act.

As an initial matter, *Leegin* does not clearly establish a "fair and efficient" mandate favoring truncated review of RPM. To the contrary, the Court suggested in dicta that "over the course of decisions" lower courts "can, for example, devise rules . . . to make the rule of reason a fair and efficient" method of filtering anticompetitive restraints from the larger pool of arguably procompetitive ones.[18] This language appears to be permissive rather than mandatory, and indicates that courts should rely on their collective experience addressing RPM under the rule of reason to develop analytical shortcuts "*over time*."[19] *Leegin* does not sanction resort to shortcuts at *this time*, however, when courts do not possess any experience analyzing the competitive effects of RPM under the rule of reason.[20]

Furthermore, the Court's discussion of "fair and efficient" rules for analysis of RPM arguably represents, at most, an invitation to lower courts to devise such rules and presumptions only where certain factual indicators of potential anticompetitive effects are present (e.g., where a manufacturer has market power, or where retailers were the source of the restraint). The FTC recognized as much in *Nine West*, noting that "[t]he question is whether, post-*Leegin*, RPM can be considered *in some circumstances* as 'inherently suspect,' and thus a worthy object for the scrutiny . . . the D.C. Circuit approved in *PolyGram*."[21] To apply quick look analysis in all RPM cases, as Hubbard suggests, would be to abandon *Leegin*'s central point—that RPM is not automatically suspect because it often has procompetitive effects.

Indeed, if *PolyGram* illuminates any aspect of *Leegin*, it is the Court's guarded approach to abbreviated review under the rule of reason. In *PolyGram*, the D.C. Circuit explained that the decision to permit truncated review depends upon the extent of "economic learning and the experience of the market,"[22] and specifically "whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look."[23] *Leegin*'s discussion of "fair and efficient" application of the rule of reason, quoted above, invokes similar language and reflects similar considerations.

Both *Leegin* and *PolyGram* urge restraint in the exercise of truncated review for good reason. At bottom, quick look analysis is a burden-shifting paradigm that requires the defendant rather than the plaintiff to bear the initial and most onerous burden of proof. Such a paradigm inverts the customary structure of antitrust litigation and is warranted, if at all, only where experience has established that the principal tendency of a restriction is anticompetitive. *PolyGram*, for example, dealt with an agreement between parties to a joint venture to restrict discounting and advertising of products outside the joint venture, which the court viewed as suspiciously akin to "another practice that already stands convicted in the court of consumer welfare," i.e., a naked horizontal price restraint.[24] In *Leegin*, by contrast, the Court held that "agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed."[25] And the Court provided no indication that RPM bears a "close family resemblance" to any other condemned restriction. Accordingly, it would seem unwarranted, following *Leegin*, to impose the primary burden of proof in RPM litigation on the defendant.

Furthermore, *PolyGram*'s quick look analysis is warranted only where a particular restraint causes obvious harm to consumers. Yet such harm is rarely obvious in the vertical context generally or in the RPM context specifically.[26] For example, the states' position before the FTC is that "Nine West's activities are 'inherently suspect' because they raise prices for consumers."[27] But this argument—that a vertical restraint which causes price increases for consumers thereby causes obvious harm—dispenses with an essential part of the inquiry: the restraint raises prices *for what*, precisely?

The answer, according to the states' Comments to the FTC opposing Nine West's petition, is that Nine West's RPM policy raises prices for Nine West products.[28] This may be true, of course, but it says little about the policy's effect on market competition.[29] The states' argument that price increases for Nine West products alone is sufficient to demonstrate an adverse effect on competition is, in effect, an argument that Nine West constitutes a product market unto itself. Courts consistently have rejected the notion of a single-brand market,[30] just as the FTC rejected the states' notion of such a market in *Nine West*, noting that "Nine West has only a modest market share in any putative relevant product market in which it competes."[31]

In *Leegin*, moreover, the Court went to some length to make clear that evidence of intrabrand price increases alone is not sufficient to demonstrate anticompetitive effect. *Leegin* held that it is inappropriate to "rely[] on pricing effects absent a further showing of anticompetitive conduct . . . [because] the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result."[32] In other words, Nine West's RPM policy, despite raising prices for its own products, may actually benefit consumers by fueling a procompetitive dynamic that results in increased choices and reduced prices throughout the relevant market.[33] Under the first step of *Polygram*'s truncated analysis, therefore, RPM should not be viewed as causing obvious harm to consumers unless its "principal tendency" is to affect interbrand, rather than intrabrand, prices.

As a practical matter, it would be very difficult for an antitrust plaintiff to prove that a particular RPM policy causes interbrand price increases or has other adverse competitive effects on interbrand competition without meeting the requirements of the traditional rule of reason, which generally requires the definition of a relevant market and a showing that the defendant has market power within the defined market.[34] Indeed, aside from manufacturer and/or distributor cartels, which are horizontal conspiracies, *Leegin* describes only two forms of potentially illegal RPM agreements, both of which involve a manufacturer or distributor with market power. The reason for this conclusion is clear enough. In most cases, a manufacturer or distributor lacking market power cannot cause interbrand price increases by setting a price floor only for its own products.[35] In addition, as the Court explained, a manufacturer lacking market power cannot "keep competitors away from distribution outlets," while a distributor without such power cannot prevent manufacturers from "sell[ing] their goods through rival retailers."[36]

Finally, as Nine West argued in its petition to the FTC, the selective enforcement of the antitrust laws to prohibit RPM would itself be anticompetitive.[37] *Leegin* has provided market participants a new freedom to experiment with innovative forms of distribution. The Court concluded that such freedom will, in the main, foster competition and benefit consumers,[38] which is the ultimate object to federal antitrust laws.[39]

The Per Se Rule May Be Alive and Well In Some States

In addition to attacking RPM under the Sherman Act by arguing for a truncated rule of reason analysis, various state antitrust officials and other authorities have indicated that they will continue to attack RPM as a per se violation of applicable state antitrust laws, which *Leegin* did not have occasion to address.[40] Thus far, among attorneys general nationwide, the New York Attorney General's office appears to have taken the lead in this approach.[41] In recent months, New York's top two antitrust officials, Jay L. Himes, Chief of the Antitrust Bureau of the Office of the New York Attorney General, and Robert Hubbard, each have published articles arguing, among other things, that RPM constitutes a per se violation of New York's antitrust law, the Donnelly Act.[42]

New York's Donnelly Act is modeled after the federal Sherman Act and states in relevant part:

> Every contract, agreement, arrangement, or combination whereby . . . Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained . . . is hereby declared to be against public policy, illegal and void.[43]

The New York Court of Appeals has held that the Donnelly Act "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result."[44] Despite this stated policy of deference to federal precedent, the New York Attorney General's office has indicated that N.Y. General Business Law section 369-a, which is entitled "Price-Fixing Prohibited," but is not part of the Donnelly Act, indicates an intent on the part of the New York legislature to subject RPM to per se treatment under the Donnelly Act. Section 369-a provides that "[a]ny 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." Other states have similar or arguably comparable statutes.[45]

New York's Legislature enacted the current version of section 369-a in 1975 to repeal sections of the General Business Law known as the "Fair Trade Law," which explicitly declared that certain RPM agreements were enforceable as a matter of law.[46] The repealed provisions of the Fair Trade Law permitted vertical price fixing between the supplier and the seller of certain commodities and prohibited "unfair competition," defined generally as activity that undermined the price fixed by vertical contracts. The legislative history of the 1975 amendment to section 369-a suggests that the State's Fair Trade Law was first enacted in response to the deflationary economic conditions of the Great Depression.[47] By creating an exception to the Donnelly Act, the Legislature sought to protect marginal businesses (e.g., "mom and pop" stores) against price competition from larger conglomerates or retail chains. The Fair Trade Law was repealed when the inflation-

ary economy of the 1970s appeared to eliminate many of the original economic justifications for the statute.

Against this backdrop, Himes and Hubbard have argued in their recent publications that New York antitrust law should no longer mirror federal antitrust precedent regarding RPM. Himes's article, in particular, offers a spirited defense of this position. Himes asserts that in "repealing the Fair Trade Law and enacting § 369-a, the Legislature undertook to stamp out the higher prices that minimum vertical price-fixing caused."[48] While recognizing that the Donnelly Act does not contain any explicit restriction against RPM, he argues that section 369-a expresses a state policy against "[m]aking or enforcing an RPM provision that sets a minimum price," that the statute's legislative history indicates an intent to "make[] minimum vertical price-fixing 'illegal,'" and therefore that RPM should be treated as a per se violation of the Donnelly Act despite divergent federal precedent.[49]

This argument rests on the questionable assumption that section 369-a (and statutes like it) silently establish state policy on a matter of antitrust liability even though, on its face, the statute speaks only on a matter of contract law. Section 369-a states unequivocally that a contract provision regarding RPM "shall not be enforceable or actionable at law." It does not state, by contrast, that RPM is positively "illegal," which is the language used in the Donnelly Act to describe anticompetitive restraints.[50] Accordingly, section 369-a renders RPM contract provisions "negatively invalid," i.e., unenforceable or voidable as a matter of law, but it arguably does not deem RPM "positively unlawful," i.e., actionable. In doing so, 369-a arguably bespeaks state policy on the enforceability of RPM, not on its illegality.

A brief illustration underscores this distinction. A manufacturer who terminates a distributor for violations of an RPM policy may face a breach of contract action brought by the affected distributor. In that circumstance, section 369-a would bar the manufacturer from raising, as an affirmative defense, that the distributor's violation of the RPM policy provided just cause for termination. Such a result is clearly supported by the plain language of 369-a, which reflects a legislative determination that RPM provisions are void and unenforceable as a matter of contract law. Section 369-a, however, does not appear to subject the same manufacturer to liability under the Donnelly Act on a per se basis. Section 369-a applies to any contract provision establishing RPM, while the Donnelly Act applies only to RPM that has adverse effects on competition. As Himes notes in his article, no case since New York's repeal of the Fair Trade Laws has held RPM per se unlawful by referring to 369-a.[51]

Himes recognizes this distinction—he explains that 369-a establishes state policy against "[m]aking or enforcing an RPM provision that sets a minimum price," a policy which addresses the validity and enforceability of RPM provisions,[52] while he looks to the statute's legislative history to support his corollary argument for the per se illegality of RPM agreements. But nothing in 369-a's legislative history reflects a clear state policy favoring per se illegality of RPM. Indeed, the legislative history of 369-a does not provide a basis for extending potential liability for RPM beyond the "negative invalidity" provided by Section 369-a itself.

Himes's argument for per se illegality of RPM rests on the arguably faulty premise that New York's Legislature, in passing 369-a, announced that RPM is always anticompetitive. Neither the language of the statute nor its legislative history fully supports this assumption. And as the Court explained in *Leegin*, substantial economic evidence indicates that RPM can have a variety of procompetitive benefits.[53]

Furthermore, neither the language of 369-a, nor its legislative history, nor the reported case law construing RPM under the Donnelly Act offers clear guidance as to whether the remedies available for violation of section 369-a should be limited to injunctive relief (as Section 369-a on its face arguably would suggest) or, pursuant to the Donnelly Act, also should involve criminal and civil remedies, including treble damages.[54] And even if a court were to construe Section 369-a to justify a departure from federal precedent in analyzing RPM under the Donnelly Act, it is uncertain whether a court would apply Section 369-a to prohibit: (i) non-written agreements, arrangements, or combinations where, on its face, Section 369-a applies only to a "contract provision" which purports to restrain the resale price of a commodity; or (ii) non-price vertical restraints, such as a minimum advertised price (MAP) policy, where the literal language of Section 369-a prohibits only "restrain[ts]" on "reselling," not on advertising.

Ultimately, as both Himes and Hubbard explain, the language and legislative history of 369-a does support the conclusion that the Legislature intended to repeal New York's Fair Trade Law, which made RPM contracts per se legal irrespective of their effect on competition. In doing so, the Legislature clearly sought to prevent situations where the Fair Trade Law permitted anticompetitive RPM. Applying the rule of reason to RPM under the Donnelly Act would promote the same objective by prohibiting truly anticompetitive RPM arrangements, while also permitting RPM arrangements that have procompetitive effects.[55]

Litigating RPM Under the Rule of Reason After *Leegin*

This year's ABA Antitrust Section Spring Meeting program included a mock rule of reason trial in an RPM case. The mock trial arguably illustrated some of the problems that may arise for defendants if courts adopt the states' novel approach to RPM enforcement after *Leegin*, which would permit plaintiffs to forgo requirements of the traditional rule of reason, such as defining a relevant market and showing that a defendant has market power within the defined market. The case was tried as a state enforcement action by seasoned antitrust trial lawyers to a mock District of Columbia jury assembled from a pool of real-life D.C. residents.

The results of the trial, a unanimous verdict in favor of the plaintiff state, was an eye-opener. Even more enlightening

than just the result were the responses of the mock jurors to post-verdict questions put to them by members of the audience. Among the lessons learned:

- Once defendant's expert acknowledged the widely accepted principle that "harm to competition" is properly understood in the context of "consumer welfare," the jury viewed everything thereafter from the lens of whether the challenged practices were positive or negative as to them—i.e., the jurors focused on consumer impact to the exclusion of almost all other market effects (such as the effects on other retailers) and viewed themselves as proxies for all consumers.
- A consequence of the above is that evidence about "reasonable business justifications" (such as branding strategies) became irrelevant unless they were tied directly to consumer benefits.
- In difficult economic times, consumer welfare is most closely understood as lower prices. While jurors acknowledged they would willingly pay higher prices for better product quality, they rejected proffered justifications about "full service" vs. "free riding." In the mock trial's stipulated facts, 35 percent of consumers valued point of sales service but 65 percent did not. Lesson: juries may be skeptical about claims of non-price proconsumer benefits and may require a convincing degree of proof to be persuaded the benefits are real.
- Juries may be suspect of firms with high market shares that handcuff downstream market rivalry, especially if that market share is enhanced as a result of the RPM agreement. In other words, unless the rising tide of the dominant manufacturer's prices raises all boats (i.e., everyone's output), juries may be suspicious.
- Defense Practice Point: A common deficiency of the defense running through each of the above lessons learned is the total absence of defense arguments about the relevant market and competitive effects within that market. This deficiency is readily understandable within the artificial constraints of the mock trial because the trial materials included a stipulation of market definition and that the defendant's share of the market was over 63 percent. As discussed in this article, however, real life RPM defendants tend to lack market power. Accordingly, in the real world, most post-*Leegin* RPM cases should be weeded out by summary judgment, if not a motion to dismiss based on a market power screen. In those cases that proceed to trial, defense counsel must emphasize the notion of competitive harm within a more broadly defined market.

Leegin's Implications for Companies Considering RPM

Despite the substantial obstacles that *Leegin* has created for plaintiffs in RPM litigation, *Leegin* did not hold that RPM is per se legal. Indeed, as discussed above, state antitrust enforcers have indicated their intent to continue enforcing federal and state antitrust laws against vertical price fixing despite *Leegin*. Thus, any company currently considering a new RPM policy, or considering changes to its current *Colgate*-compliant policy, should examine several issues before implementing such changes.

First, in certain jurisdictions, RPM may continue to be treated as illegal vertical price fixing. As explained above, state antitrust enforcers are likely to argue that RPM constitutes a per se violation of pre-existing state antitrust laws, and they may be trolling for test cases in which to make those arguments. Likewise, state legislatures may pass affirmative legislation proscribing RPM as per se illegal, just as many states did following *Illinois Brick*.[56] In addition, antitrust laws in both Canada and Europe may be more restrictive than the Sherman Act (post-*Leegin*) in their treatment of RPM. A multinational corporation doing business in foreign nations should pay careful attention to the antitrust laws of those jurisdictions.

Second, the origins and justifications for a particular RPM policy may play a significant role in determining the ultimate legality of that policy. For example, an RPM policy that was initiated by a manufacturer and intended to enhance brand image may be more likely to pass muster under the Sherman Act than the same policy initiated by a dominant retailer or a group of distributors seeking to increase their profit margins.[57]

Third, if a significant number of competitors in a particular industry or market make consistent use of RPM policies, interbrand competition may be adversely affected, and the procompetitive justification for any individual company's policy could be compromised. Moreover, pervasive use of RPM policies in a particular market increases the possibility that such policies will facilitate an illegal horizontal cartel (or at least a level of conscious parallelism that could lead to a lawsuit, justified or not).

Finally, as evidenced by the result of the Spring Meeting mock trial, a manufacturer or distributor possessing market power which engages in RPM may impact interbrand competition, and in doing so, will be at greater antitrust risk.

In light of the foregoing, any company considering implementation or alteration of an RPM policy in the wake of *Leegin* should proceed knowingly and cautiously. ■

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[1] Brief for the States of New York et al. as Amici Curiae Supporting Respondent, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

[2] While the Supreme Court has never decided the issue, state enforcement officials have asserted that minimum advertised price policies (MAP) constitute vertical price restraints and therefore should be treated as commensurate with RPM. *See, e.g.*, New York v. Herman Miller, Inc., 08 CV 2977 (S.D.N.Y. 2008); *In re* Compact Disc Minimum Advertised Price Antitrust Litig., MDL No. 1361 (D. Me. 2003). However, it is far from clear whether a MAP should be characterized as a vertical price restraint because, under such a policy, the distributor is arguably free to sell below the manufacturer's suggested advertised price. *See, e.g.*, Blind Doctor, Inc. v. Hunter

Douglas, Inc., 2004 U.S. Dist. LEXIS 18480, at *6 (N.D. Cal. Sept. 7, 2004) (manufacturer's MAP policies prohibiting, inter alia, the printing of discounts for products that exceeded maximum discount allowed did not constitute per se violation of Sherman Act because "they do not dictate the actual prices retailers charge for [the manufacturer's] products"). *But see* Worldhomecenter.com, Inc. v. L.D. Kichler Co., 2007 U.S. Dist. LEXIS 22496 (E.D.N.Y. Mar. 28, 2007) (holding, without discussion or citation, that internet MAP policy constituted per se violation of Sherman Act).

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

[4] Robert L. Hubbard, *Protecting Consumers Post-*Leegin, ANTITRUST, Fall 2007, at 44.

[5] *Id.* at 42 (quoting *Leegin*, 127 S. Ct. at 2720).

[6] *Id.*

[7] 416 F.3d 29 (D.C. Cir. 2005).

[8] *PolyGram*, 416 F.3d at 32.

[9] Hubbard, *supra* note 4, at 42.

[10] PolyGram, 416 F.3d at 33.

[11] Hubbard, *supra*, at 42.

[12] *Id.*

[13] *In re* Nine West Group Inc., No. C-3937, Petition to Reopen and Modify Order, at *2 (FTC Oct. 30, 2007) [hereinafter Nine West Petition], *available at* http://www.ftc.gov/os/caselist/c3937.shtm.

[14] *Id.*, Amended States' Comments Urging Denial of Nine West's Petition, at *2, *6 (Jan. 18, 2008) [hereinafter States' Comments], *available at* http://www.ftc.gov/os/comments/ninewestgrp/index.shtm. On March 26, 2008, counsel for Nine West submitted a letter to the FTC in response to an email dated March 7, 2008, requesting that Nine West provide information relating to, inter alia, its market share within the relevant market; entry barriers faced by potential competitors in the relevant market, and procompetitive benefits associated with its previous RPM conduct, e.g., any facts indicating whether greater or fewer shoes were sold by the retailers that were subject to the alleged RPM agreements during the time of those agreements. *Id.*, March 26, 2008 Letter from Ronald S. Rolfe to Eric D. Rohlck of the FTC, *available at* http://www.ftc.gov/os/caselist/c3937.shtm.

[15] *In re* Nine West Group Inc., FTC No. C-3937, Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, at *17–*18 (May 6, 2008) [hereinafter Nine West Order].

[16] *Id.* at *10. The FTC did not indicate that similar concerns would arise where multiple distributors independently request RPM from a manufacturer.

[17] *Id.* at *17.

[18] *Leegin*, 127 S. Ct. at 2720.

[19] *Id.* (emphasis added). While *Leegin* arguably could be interpreted to suggest that over time, courts may apply a truncated rule of reason analysis in reviewing RPM, there are no reported cases of which we are aware suggesting that the application of a truncated rule of reason analysis is appropriate in the context of non-price vertical restraints. *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726 (1988) (holding that rule of reason applies to non-price vertical restraints because, inter alia, "there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect").

[20] *Cf. In re* RealComp II Ltd., FTC No. 9320, Initial Decision, at *85–*90 (Dec. 10, 2007) (refusing to follow quick look approach of *PolyGram* when applying full rule of reason test to multiple list service's policies); *but see* North Texas Specialty Physicians v. FTC, 2008 WL 2043040 (5th Cir. May 14, 2008) (upholding FTC's "somewhat abbreviated" *PolyGram* analysis of physician membership organization that primarily serves as a negotiator of contract proposal on behalf of its members).

[21] Nine West Order, at *13 (emphasis added).

[22] *PolyGram*, 416 F.3d at 36.

[23] *Id.* at 35 (quoting California Dental Ass'n. v. FTC, 526 U.S. 756, 781 (1999)).

[24] *PolyGram*, 416 F.3d at 37.

[25] *Leegin*, 127 S. Ct. at 2717. A group of leading economists endorsed this view in an amicus brief submitted to the Court. *Id.* at 2721, Brief for Amici Curiae Economists in Support of Petitioner.

[26] *Id.* at 2720 ("[T]hat a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power.")

[27] States' Comments at 2. *See also* Hubbard, *supra* note 4, at 42 (arguing that RPM engenders obvious harm because "consumers almost always pay more as a result").

[28] States' Comments, Ex. A, ¶ 6 ("Nine West's pricing policies and enforcement actions had the effect of increasing the retail prices of *its* protected or off-limits shoes") (emphasis added).

[29] As Justice Scalia noted during oral argument in *Leegin*, the object of the Sherman Act is not to produce low prices. Indeed, "the mere fact that [RPM] would increase prices doesn't prove anything. It doesn't prove that it's serving consumer welfare. If, in fact, [RPM is] giving the consumer a choice of more service at a somewhat higher price, that would enhance consumer welfare, so long as there are competitive products at a lower price . . ." Transcript of Oral Argument at 14:25–15:17, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

[30] *See* ABA ANTITRUST SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 588 n.210 (6th ed. 2007) (collecting nearly 40 cases). On August 9, 2007, a follow-on class action captioned Spahr v. Leegin, 2:07-cv-187 (E.D. Tenn. 2007), was filed against Leegin in the Eastern District of Tennessee. In their amended complaint, the plaintiffs assert, inter alia, that notwithstanding the Court's holding in *Leegin*, Leegin's RPM policy constitutes a violation of Section 1 the Sherman Act under the rule of reason. In support of its claims, plaintiffs have defined the relevant market to include only Leegin's Brighton branded products, i.e., arguing that Leegin possesses market power with respect to its own brand. *Id.*, First Amended Complaint, ¶ 23. Plaintiffs' amended complaint also contains allegations of a per se "hub and spoke" horizontal conspiracy based upon *Leegin*'s position as both a manufacturer and distributor of Brighton products. *Id.*, ¶¶ 2, 24. On October 22, 2007, Leegin filed a motion to dismiss. The parties have fully briefed the motion and are awaiting a decision from the court.

[31] Nine West Order, at *15.

[32] *Leegin*, 127 S. Ct. at 2718.

[33] *See id.* at 2714–16.

[34] *Id.* at 2712 (explaining that "[w]hether the businesses involved have market power is a . . . significant consideration" under the rule of reason).

[35] Recent history of RPM litigation suggests that firms pursuing a minimum vertical pricing strategy tend to be firms that compete in markets with a broad array of competitors. See New York v. Herman Miller, Inc., 08 CV 2977 (S.D.N.Y. 2008) (manufacturer of home office furniture); North Carolina v. McLeod Oil Co., OS CVS 13975 (N.C. Sup. Ct. 2007) (distributor of fuel); Leegin Creative Leather Prods., Inc. v. PSK, Inc., 127 S. Ct. 2705 (2007) (manufacturer of women's leather fashion accessories); New York v. Salton, Inc., 02 CV 7096 (S.D.N.Y. 2003) (manufacturer of BBQ grills); Nine West Group, Inc., FTC File No. 981-0386 (2002), *available at* http://www.ftc.gov/os/caselist/c3937.shtm (manufacturer and distributor of women's footwear); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (manufacturer of chemical products). One potential exception is the defendant retailers subject to the state enforcement action resulting in a consent decree captioned *In re* Compact Disc Minimum Advertised Price Policy Antitrust Litig., MDL No. 1361 (D. Me. 2003). But, as the complaint filed by the states makes clear, that action involved allegations of a horizontal conspiracy on the part of music retailers to coerce its distributors into imposing MAP policies.

[36] *Leegin*, 127 S. Ct. at 2720.

[37] Nine West Petition, at 2.

[38] *Leegin*, 127 S. Ct. at 2715 ("Resale price maintenance . . . has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.").

[39] *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.").

[40] Although *Leegin* did not address the issue of RPM under state law, the decision arguably preempts state laws that prohibit RPM as per se unlawful. *See* Michael A. Lindsay, *Resale Price Maintenance and the World After* Leegin, ANTITRUST, Fall 2007, at 33.

[41] While no state statute expressly prohibits RPM agreements, a number of states prohibit agreements to "maintain" or "regulate" prices. Conversely, at least one state (Illinois) analyzes RPM agreements under the rule of reason and a second state (Michigan) has a statute which provides that "the courts shall give due deference to interpretations given by the federal courts to comparable antitrust, including, without limitation, the doctrine of per se violations and the rule of reason." *See* People v. Keystone Automotive Plating Corp., 423 N.E.2d 1246, 1251–52 (Ill. 1981); MICH. COMP. LAWS § 445.784 (2007).

[42] Hubbard, *supra* note 4, at 41; Jay L. Himes, *New York's Prohibition of Vertical Price Fixing*, 239 N.Y.L.J., Jan. 29, 2008, at 4.

[43] N.Y. GEN. BUS. LAW § 340(1).

[44] Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 335 (N.Y. 1988).

[45] For a general discussion of the relevant statutes of all fifty states, see Lindsay, *supra* note 40, at 32.

[46] *See* Sony Corp. v. Joseph J. Jones & Sons, Inc., 50 A.D.2d 513, 513, 376 N.Y.S.2d 907, 907 (1st Dep't 1975) (upon effective date of Chapter 65 of the Laws of 1975, former Section 369-a of General Business Law "was effectively repealed and replaced with a prohibition of any contract restraint against the vendee from selling a product at a price less than that stipulated by the vendor").

[47] Governor's Program Bill 1975 Memorandum Re: An Act to amend the general business law, in relation to price fixing and repealing certain sections of such law relating thereto.

[48] Himes, *supra* note 42, at 4.

[49] *Id.*

[50] *Compare, e.g.*, GEN. BUS. LAW § 369-a with the Donnelly Act, N.Y. GEN. BUS. LAW § 340 (declaring agreements in restraint of trade to be "against public policy, *illegal and void*") (emphasis added). It is also worth mentioning that the New York Attorney General apparently has not relied on Section 369-a—either as a matter of New York law or "policy"—until after the Court's decision in *Leegin*.

[51] Himes, *supra* note 42, at 4.

[52] *Id.*

[53] *Leegin*, 127 S. Ct. at 2717.

[54] *See* N.Y. GEN. BUS. LAW §§ 340(1), 340(5), 340(6), 341, 342, 342-a.

[55] *Leegin*, 127 S. Ct. at 2724.

[56] In addition, on October 30, 2007, U.S. Senators Kohl, Biden, and Clinton introduced a bill to overrule *Leegin*. S. 2261, 110th Congress, § 3 (2007). The bill adds a new second sentence to section 1 of the Sherman Act, providing: "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." *Id.*

[57] *See Leegin*, 127 S. Ct. at 2715–17; Babyage.com, Inc. v. Toys "R" Us, Inc., 2008 WL 2120493 (E.D. Pa. May 20, 2008) (allegation that dominant retailer orchestrated a market-wide RPM conspiracy involving multiple manufacturers survived motion to dismiss the complaint).

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