Counseling Clients on Vertical Price Restraints

BY FRANK M. HINMAN AND SUJAL J. SHAH

WHEN THE SUPREME COURT handed down its decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[1] many welcomed the Court's recognition that minimum resale price maintenance (RPM) agreements may have procompetitive benefits that must be weighed against any anticompetitive effects. Under *Leegin*, manufacturers may adopt minimum RPM agreements[2]—and related minimum advertised price (MAP) agreements—with greater freedom and flexibility. By overruling the per se rule of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[3] the Court found that while these restraints may result in higher prices, they may nevertheless enhance demand and consumer welfare by enabling the provision of valuable services.[4]

Leegin recognized, however, that some vertical price restraints do more harm than good. It invited courts to "consider[] the effects of these restraints by applying the rule of reason . . . to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[5] The Court noted circumstances where the anticompetitive effects of vertical price restraints would likely outweigh any procompetitive benefits. For example, the Court made clear that vertical price restraints are not legal if used to facilitate manufacturer or retailer cartels, and will face greater scrutiny if ubiquitous in the market, instituted by a supplier with market power, or forced upon it by a "dominant, inefficient" retailer.[6] Although the Court identified potential indicators of competitive harm, it will, as usual, be left to the lower courts to define the parameters of allowable conduct, writing on the largely blank jurisprudential slate of the past century.[7]

How U.S. enforcement agencies will approach *Leegin* also remains uncertain.[8] Not long after the Supreme Court's decision, the Federal Trade Commission vacated a consent decree prohibiting Nine West from entering into an RPM agreement with its retailers.[9] But the Commission also noted that enforcement agencies need to be "diligent" in evaluating RPM agreements and must "take careful account of possible anticompetitive harms in the treatment of RPM matters under a rule of reason framework."[10] From a policy perspective, three sitting Commissioners, including former Chairman Deborah Majoras, had urged the Supreme Court to overturn *Dr. Miles*,[11] but one of the two dissenting votes was cast by current FTC Chairman Jon Leibowitz.[12] The Commission is currently in the midst of its Resale Price Maintenance Workshop, of which the search for empirical evidence regarding the likely effects of RPM is a "major focus."[13] Meanwhile, Christine Varney, the new Deputy AAG at the Department of Justice Antitrust Division has indicated that she will support overturning *Leegin* if she feels it does not leave room for DOJ enforcement in appropriate cases.[14] Finally, some state attorneys general have taken the position that minimum RPM agreements are still per se illegal under their states' antitrust laws.[15]

Leegin also faces opposition from those who believe the decision weakens antitrust enforcement and that subjecting all vertical price restraints to the rule of reason will unambiguously lead to increased prices and reduced output, with little or no benefit to consumers.[16] Senator Herb Kohl, Chair of the Antitrust Subcommittee of the Senate Judiciary Committee, has introduced legislation to overturn *Leegin*.[17] A Democratic administration and Congress, along with populist sentiment brought on by the economic crisis and related bailouts, have perhaps increased the likelihood of such legislation's passage.[18]

Whether *Leegin* remains the law or firms are required (or choose) to revert to *Colgate*-style unilateral pricing policies, the post-*Leegin* focus on market facts, rather than theory alone, highlights the need for more careful scrutiny by counsel advising clients seeking greater control over their distribution networks.[19] Manufacturers seeking protection from investigation or challenge should be careful to (a) evaluate the competitive necessity of an RPM or MAP agreement or policy; (b) properly formulate the restraint to take advantage of its demand-enhancing benefits while minimizing antitrust risk in implementation and enforcement; and (c) monitor the restraint's effects after implementation, and adjust as necessary. This article identifies some of the practical considerations counsel should address in navigating the post-*Leegin* world of vertical price restraints.

Evaluating Alternatives to Vertical Price Restraints

As the Supreme Court noted in *Leegin*, minimum RPM agreements can "stimulate interbrand competition," encourage "retailers to invest in tangible or intangible services or promotional efforts that" increase competition, eliminate free riding, and have "the potential to give consumers more options."[20] Many consumers rely on brick-and-mortar stores to display and demonstrate complex and expensive products and provide knowledgeable salespeople to answer questions.[21]

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By protecting retail margins, vertical price restraints enable retailers to provide quality displays, product demonstrations, well-trained staff, as well as less tangible "quality certification," without fear of being undercut by a free-riding intrabrand competitor.[22] Thus, such restraints can allow a manufacturer not only to maintain demand but, in many cases, enhance it. By protecting dealer investment in "promotional services and sales efforts," a manufacturer can "increase the attractiveness of [its] product."[23] Thus, "the use of RPM generally [is] consistent with demand-increasing activities by retailers."[24] This is especially true for innovative and untested products, which often require "missionary work" by retailers.[25] Vertical price restraints can increase competition by "facilitating market entry for new firms and brands," which is "essential to a dynamic economy."[26]

Often, a vertical price restraint is the most efficient way for a manufacturer to reduce intrabrand competition and induce retailers to invest in services and promotion. However, courts and enforcement agencies may look to see whether a manufacturer can achieve these goals in other ways. While a rational manufacturer's decisions how best to manage its distribution system should be afforded some deference, the potential for second-guessing should be anticipated and potential alternatives carefully considered.

Some alternatives are easily dismissed as inefficient or ineffective. For example, a manufacturer could vertically integrate by opening its own retail outlets and acting as its own distributor. But vertical integration is costly, can push a manufacturer beyond its core competencies, and would most likely reduce demand by limiting the ability of a firm to reach many of its customers. Under these market conditions, it would be difficult to argue that vertical integration would lead to lower prices and greater output compared to a world where the manufacturer adopts RPM or MAP.[27]

Nor is it obvious that non-price restraints are necessarily preferable to price restraints in terms of their competitive impact or practical feasibility. Both types of restraints may achieve similar goals. For example, assigning exclusive territories reduces intrabrand competition and may allow designated retailers to earn sufficient margin to provide demand-enhancing services. But prohibiting or limiting Internet sales, necessary to protect exclusivity, might not be feasible, and itself would reduce customer choice. While both price and non-price restraints are likely to have some (intrabrand) price effect—that is, after all, the point—price restraints are arguably less restrictive of intrabrand competition, since retailers in the same geographic area may still compete on all non-price dimensions. As a result, the risk-benefit balance may, depending upon the facts, tip more favorably toward price restraints after *Leegin*.

Finally, enforcement agencies and courts might examine the extent to which a manufacturer could step into the shoes of a retailer and offer some of the same procompetitive services as an alternative to adopting a vertical price restraint. Proponents may argue that manufacturers and retailers are sometimes more like substitutes than complements.[28] For example, in some cases a manufacturer might be able to take over all promotional activity, "push" point of purchase displays or other services through the retail location, or provide post-sale services independently; in other cases, however, these activities may be as impractical or inefficient for a manufacturer as vertically integrating its chain of distribution. Moreover, retailers may be unwilling to cede control over such activities. A manufacturer could also pay retailers directly to provide demand-enhancing services, but if (as one would expect) such payments are financed by higher wholesale prices, it may be difficult to argue that consumers are worse off with RPM or MAP.

Considering the Competitive Environment. Even if a manufacturer has procompetitive reasons to adopt a vertical price restraint, it must proceed carefully. Drawing on the Court's analysis in *Leegin*, the FTC in *Nine West* identified "conditions in which RPM posed greater anticompetitive potential."[29] This includes situations when RPM is "ubiquitous in an industry," when many "retailers were the impetus for the adoption of RPM" (perhaps signaling the existence of a retailer cartel), or when "the practice is likely to increase prices because a manufacturer or retailer is a dominant player in the market in which it competes."[30] Counselors facing indicia of any of these conditions should carefully evaluate the potential for actual or perceived anticompetitive effects.

In *Leegin*, the Supreme Court noted that "[r]esale price maintenance should be subject to more careful scrutiny . . . if many competing manufacturers adopt the practice."[31] That scrutiny might suggest improper coordination, or might instead reveal that when firms have to compete for dealers' attention, the common presence of vertical price restraints represents healthy competition.[32] Manufacturers that share the same retailers may each hear separately from individual dealers that their products do not provide enough margin to warrant continuing investment in inventory, service, and promotion. Under these conditions, each manufacturer may find that adopting a vertical price restraint is a "dominant strategy": Each is better off implementing a MAP or RPM agreement, regardless of its competitors' decisions.[33]

Still, because it may be difficult for an enforcement agency or court to distinguish between independent parallel behavior and cartel behavior, a manufacturer should tread carefully when adopting RPM or MAP where several of its competitors have done so. Discussing specific policies with competitors would likely be viewed as evidence of a price-fixing conspiracy and even general discussions about pricing policies in the context of a trade association will likely draw scrutiny.[34] While there is nothing improper in evaluating legitimate competitive intelligence, including a competitor's policy, a supplier would be well-advised to tailor its policy to meet its own unique competitive needs. Finally, a manufacturer's ability to demonstrate the competitive rationale for an RPM or MAP policy—because it will lose dealers if it fails to act—can be helpful.

Responding to dealer complaints about low margins can also be risky because a supplier might be seen as joining a price-fixing conspiracy among its retailers. The facts may or may not bear that out, but they should be considered. A manufacturer faced with dealer complaints about margins should carefully evaluate the source. Complaints raised by a group of dealers, or one purporting to speak for others, are problematic. On the other hand, multiple, similar complaints may be completely innocent, as each dealer may conclude individually that free-riding is causing it to lose margin, and threaten to switch to different products that are more profitable. Similar considerations arise in enforcement decisions; dealer complaints about a competitor's pricing can give rise to claims that the manufacturer is acting as the "cat's paw" to punish deviations from a retailer cartel.[35] Enforcing a policy unilaterally, having an independent policing mechanism,[36] and refusing to accept complaints about offending dealers add a layer of protection.

If a supplier implementing an RPM or MAP agreement has fielded margin complaints from an arguably "dominant, inefficient" retailer, it might face the argument that the restraint may "forestall innovation in distribution that decreases costs."[37] The concern is that a large retailer may be so important to a manufacturer's distribution that it is able to coerce the manufacturer into adopting a vertical price restraint and thus prevent other dealers from undercutting its prices.[38] The distinction between competing for dealers and bowing to retailer pressure to improve margins is somewhat artificial and often blurry.[39] If a dealer complains to a supplier about low margins, a manufacturer may fear that the dealer will switch to higher-margin products. Outsiders may interpret the dealer's complaints as a "coercive threat," but it is hard, if not impossible, to distinguish that discussion from the everyday back-and-forth, or even hard bargaining, between business partners. Counselors should be sure to understand the existing record of communications and competing inferences that might be drawn from it.

It is also important to note that offering lower prices is not necessarily the sign of a more efficient distributor. Consumers may value lower prices, but they may also value greater service, such as knowledgeable sales staff or the ability to test new products, that low-price retailers may be unable or unwilling to provide. An analysis of "efficient" distribution should take into account all dimensions of competition.[40] This is especially important in considering the effect of Internet sales. While clearly changing distribution forever, Internet retailing may not be able to provide important "hands on" services that consumers value for some types of products. On the other hand, in some industries such shortcomings might be matched by considerations of convenience and availability. Again, the facts matter.

Finally, there is concern when a dominant manufacturer adopts vertical price restraints because it "might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants."[41] This raises important questions of product substitutability at the dealer level. Even when a manufacturer has few competitors at the consumer level, it may still find a vertical price restraint necessary if a dealer can transfer its attention and support to other types of products that provide better margins. For example, televisions and home stereos are not direct substitutes for end users, but a consumer electronics store can choose to re-allocate its investments in inventory, floor space, and promotional spending between them if relative margins favor one over the other. This sort of analysis will vary according to the product at issue, the nature of the distribution channel, and other industry and market conditions.

Deciding Between a Unilateral Policy or Agreement. Once a manufacturer decides to adopt a RPM or MAP, it must choose between a unilaterally announced and enforced policy or an express agreement. Under *United States v. Colgate & Co.*, unilateral vertical price restraints are per se legal under Section 1 since they do not trigger the "combination, contract or conspiracy" requirement.[42] In reality, *Colgate*'s response to *Dr. Miles* was somewhat artificial, not to mention nearly impossible to explain to business people who are used to resolving differences through negotiation. Between the Court's decisions in *Colgate* and *Leegin*, the legality of RPM frequently focused on the gray area between a "unilateral" policy and an actual or coerced "agreement," and whether the parties' actions transformed the former into the latter.[43]

Under *Leegin*, the distinction between unilateral policies and agreements is of less importance, at least under the Sherman Act. Where vertical price restraints are judged under the rule of reason, firms can enter into RPM or MAP agreements and benefit from the greater flexibility to negotiate and enforce their terms. Instead of having to choose between terminating a dealer upon its first violation or entering discussions that risk a finding of a "coerced" agreement, a manufacturer can communicate its desires, answer questions, and negotiate disagreements, all of which lead to better communication and greater efficiency. It also gains the certainty of contract law to enforce the agreement's terms and, assuming proper drafting, retains the option to terminate if necessary.

Unilateral policies, while designed to avoid the reach of Section 1, are typically harder to control and less efficient. Maintaining a strictly unilateral policy in the face of a violation requires either ignoring it—which can undercut the policy's effectiveness and even lead to a snowball effect within the dealer network—or terminating the offending dealer, which might be a sub-optimal outcome for everyone, including consumers. Moreover, because of the need to walk the *Colgate* line, monitoring and enforcing a unilateral policy can impose significant legal costs on a manufacturer that it would not incur under a legally more straightforward agreement.[44]

Nevertheless vertical price agreements might still be challenged as per se illegal today under state law and, in the future, under federal law if *Leegin* is legislatively repealed, and there may be situations where the judgment is that substantial risk exists even under a rule of reason analysis.[45] Unilateral

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policies avoid those risks and thus provide greater certainty both geographically and temporally.

Choosing Between RPM and MAP. A supplier must also determine whether RPM or MAP better suits the competitive conditions and balances the risks of antitrust scrutiny. Each has its pros and cons. RPM affords the most control. By guaranteeing a certain margin, a manufacturer can best convince its retailers to invest in inventory, promotion, and services. But with RPM agreements, the price effects are much clearer—the policies raise prices for all consumers (at least in the short term).[46] Low-price retailers or channels may be impaired. Moreover, in industries where RPM is common, courts and enforcement agencies are more likely to view those policies as facilitating a manufacturer cartel since "[a]n unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices."[47]

MAP agreements or policies allow more pricing flexibility, and create a somewhat different balance of competitive effects. First, MAP is not technically a price restraint. Prior to *Leegin*, some courts viewed these types of advertising restraints as "non-price restrictions"[48] and not "proof of a vertical agreement to fix prices."[49] Because *Leegin* eliminated the distinction between price and non-price vertical restraints, the focus going forward, at least under federal law, will be on the actual effect of MAP on retail prices, balanced against procompetitive effects. In some industries, where negotiating from an advertised price is common or the norm, MAP will have less effect on prices.[50] Allowing Internet retailers to invite customers to "email-for-price" or "call-for-price" weakens the argument that MAP effectively sets sales prices.[51] Finally, it would be difficult to prove that MAP facilitates a manufacturer cartel if any buyer can negotiate a lower price and thus move market share among the supposed cartel members.

However, providing dealers the ability to sell below MAP levels also weakens the agreement's effectiveness at eliminating intrabrand price competition and providing sufficient margin to encourage dealers to invest in services and promotion. Although MAP agreements may raise the transaction costs of finding a lower price, they do not eliminate discounting. In some cases, transaction costs—particularly Internet vendors utilizing a "click-for-price" or "e-mail-for-price" strategy—can be quite low.[52] Traditional retailers who provide important product display and demonstration may feel they need to match a discounter's price, thus losing margin (and the incentive to invest in the product). The free-riding problem, though reduced, is not eliminated.

Nevertheless, for many suppliers MAP might provide the optimal balance of risk and reward. When deciding whether to institute a vertical price restraint, a manufacturer considers at least two groups of marginal consumers. One primarily values access to products and associated services; the other mainly wants a low price. If a firm institutes RPM, it might capture service-valuing customers but lose price-sensitive customers. If the manufacturer does nothing and retailers reduce services for low margin products, the manufacturer may capture bargain hunters but lose service-oriented customers. MAP, however, allows consumers to self-select intrabrand. Those who value service more than a low price may be unwilling to incur the transaction costs MAP imposes. By eliminating ubiquitous low-price ads that customers can easily brandish and force high-service retailers to match, MAP allows those retailers to capture a margin to finance their consumer welfare-enhancing activities. At the same time, those customers who do not particularly value traditional services such as floor displays and demonstration opportunities, but do seek ample inventory and quick, convenient delivery, may choose to buy products from an Internet dealer or discounter who is willing to pass on its lower costs to its customers. These price-sensitive consumers, if they are willing to incur some transaction costs, may be able to negotiate a better price.

Thus, MAP may allow a manufacturer to maximize demand by reaching both groups of marginal consumers. Consumers are able to shop based on their preferred combination of service, convenience, support, and price; to negotiate sales prices with dealers; and to choose among both intra- and interbrand options. At the same time, antitrust risk may be reduced because MAP is not viewed as a price restraint, its balance of competitive effects tips more toward the consumer than RPM, or both.

Monitoring the Effects. Finally, after adopting a vertical price restraint, a manufacturer should analyze and document its competitive effects. Higher prices only tell one side of the story, and any consideration of consumer welfare must account for other, more subtle non-price effects as well. An increase in sales after the restraint is in place may show the effectiveness of dealer services in increasing demand. Similarly, market adoption of new products or technology demonstrates the importance of vertical price restraints to create demand, particularly when that adoption is contingent on knowledgeable sales staff or product displays that allow consumers to test new products. But increased consumer demand is not the only procompetitive benefit. Many dealer services—including a more knowledgeable sales staff, product support, and demonstration displays—may increase consumer welfare by increasing brand awareness, brand loyalty, and the satisfaction of customers who are able to get more performance out of complex products. These effects might be illustrated through customer surveys or other polling techniques that can help counteract claims that RPM or MAP has increased prices.

On the other hand, a sales decrease following the imposition of a price restraint might signal a decrease in consumer welfare, although other potential causes such as a new competitive product should also be evaluated. Because the purpose of a vertical price restraint is to reduce intrabrand competition and induce services by protecting retail margins, it should not, at least in theory, affect wholesale margins. An increase in wholesale margins after the adoption of RPM or MAP, absent any other factors, may signal an exercise of market power by a dominant manufacturer or a manufacturer cartel.

Conclusion

Leegin has opened up opportunities for suppliers to control the distribution of their products more effectively, but it also highlights the importance of moving beyond theory to consider likely and actual effects of vertical price restraints. A client's product characteristics, competitive circumstances, and risk tolerance must all be evaluated to reach the best result. Counsel that carefully consider the relevant facts, and apply the law and theory to them, will be in the best position to advise their clients and defend their decisions. ■

[1] 127 S. Ct. 2705 (2007).

[2] Maximum vertical price restraints, which are relatively uncommon, have been evaluated under the rule of reason since 1997. *See* State Oil Co. v. Khan, 522 U.S. 3 (1997).

[3] 220 U.S. 373 (1911).

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

[5] *Id.* at 2720.

[6] *Id.* at 2716–17. These market conditions describe circumstances when the Chicago school's presumption that vertical price restraints lead to distributive efficiency may not apply. The FTC made a similar observation in its first post-*Leegin* Order relating to RPM. *See Nine West Group Inc.*, No. C-3936, Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, at 10–11 (May 6, 2008) [hereinafter Nine West Order], *available at* http://www.ftc.gov/os/caselist/9810386/080506order.pdf.

[7] Although the courts were not required to reach the merits of RPM agreements under Dr. Miles, one body of available empirical work results from studies by FTC staff lawyers and economists related to the Fair Trade Laws, passed in 1937 and repealed in 1975, which legislatively overruled *Dr. Miles* during that time. *See* Thomas Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Bureau of Economics Staff Report to the Federal Trade Commission 63 (1983), *available at* http://www.ftc.gov/be/econrpt/233105.pdf.

[8] A manufacturer with international distribution must of course consider all relevant jurisdictions, although that analysis is beyond the scope of this article.

[9] *See* Nine West Order, *supra* note 6, at 17.

[10] *Id.* at 10. The FTC even suggested a "truncated rule of reason analysis" as adopted in *PolyGram Holdings, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). Nine West Order, *supra* note 6, at 11–12.

[11] Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) [hereinafter *Leegin* Amicus Brief], *available at* http://www.ftc.gov/os/2007/01/070122Leegin06-480amicusPDC.pdf.

[12] *See* Donald M. Barnes & David T. Fischer, Dr. Miles*: Will the Supreme Court Find a Cure?*, ANTITRUST SOURCE, Feb. 2007, at n.38, http://www.abanet.org/antitrust/at-source/07/02/Feb07-Fischer2=23f.pdf. In addition, Commissioner Harbour's views on minimum RPM and *Leegin* are well known. *See* An Open Letter to the Supreme Court of the United States from Commissioner Pamela Jones Harbour, *The Illegality of Vertical Minimum Price Fixing* (Feb. 26, 2007) [hereinafter Harbour Letter], *available at* http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf.

[13] Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, Opening Remarks, Resale Price Maintenance Workshop: Consumer Benefits and Harms from Resale Price Maintenance: Sorting the Beneficial Sheep from the Antitrust Goats 6 (Feb.17, 2009), *available at* http://www.ftc.gov/speeches/harbour/090217rpmwksp.pdf.

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

[15] Joel M. Mitnick et al., *A Commentary on Current State Enforcement Policy for RPM: On Life Support from Leeginaire's Disease: Can the States Resuscitate* Dr. Miles?, ANTITRUST, Summer 2008, at 63, 65–66. Maryland, for example, recently passed a law confirming that vertical price fixing remains per se illegal under Maryland antitrust law. Joseph Pereira, *State Law Targets "Minimum Pricing*,*"* WALL ST. J., Apr. 28, 2009, at D1. *See also* Michael A. Lindsay, *Resale Price Maintenance and the World After* Leegin, ANTITRUST, Fall 2007, at 32, 34.

[16] Pamela Jones Harbour, *A Tale of Two Marks, and Other Antitrust Concerns*, 20 LOY. CONS. L. REV. 32, 43–44 (2007).

[17] Discount Pricing Consumer Protection Act, S. 148, 111th Cong. (1st Sess. 2009).

[18] At the time of publication, the bill has been referred to the Senate Judiciary Committee. *See* http://www.opencongress.org/bill/111-s148/show.

[19] Importantly, the dichotomy between agreements and unilateral acts is not recognized under Section 5 of the FTC Act. *See, e.g.*, Complaint at 10–11, Valassis Commc'ns, Inc. FTC File No. 051 0008 (Apr. 19, 2006), *available at* http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf; 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 (FTC alleged that MAP 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."). It is also unsettled whether a MAP agreement would be considered a price or non-price restraint, so that a firm seeking the greater certainty of a contractual arrangement might choose that route (albeit with greater risk) even under a *Leegin* repealer statute. *See infra* notes 49 & 50.

[20] *Leegin*, 127 S. Ct. at 2715.

[21] *See* Holabird Sports Discounters v. Tennis Tutor, Inc., 1993 U.S. App. LEXIS 10918 at *3, n.1 (4th Cir. May 7, 1993) (unpublished) (complexity of tennis ball machine and need for explanation, demonstration, and trial use presented free-riding concern that justified MAP policy); Kenneth Elzinga & David Mills, *The Economics of Resale Price Maintenance*, *in* 3 ISSUES IN COMPETITION LAW AND POLICY 1841, 1842 (ABA Section of Antitrust Law, 2008) ("The iconic free riding example in the RPM literature is the high-tech, information-intensive consumer durable good . . . where pre-sale assistance by a knowledgeable salesperson at a retail establishment is required to inform and persuade a consumer of the product's merits.").

[22] *Leegin*, 127 S. Ct. at 2715–16.

[23] *Leegin* Amicus Brief, *supra* note 11, at 11.

[24] James Cooper et al., *Vertical Restrictions and Antitrust Policy: What About the Evidence?*, COMPETITION POL'Y INT'L, Autumn 2005, at 45, 55–58.

[25] Robert L. Steiner, *How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, 65 ANTITRUST L.J. 407, 415 (1997).

[26] *Leegin*, 127 S. Ct. at 2716.

27 If a manufacturer could more efficiently increase demand and provide services through vertical integration, it would choose that option. *See* Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 288–291 (2d ed. 1993) (noting that the because the gains from higher prices from RPM would go to retailers rather than manufacturers, the goal of RPM cannot be to reduce output but must rather be the most efficient way to increase demand).

28 *See* Harbour, *supra* note 13, at 8–10.

29 Nine West Order, *supra* note 6, at 9–10.

30 *Id.* at 10–11.

31 *Leegin*, 127 S. Ct. at 2719.

32 When services and promotion are key to creating or maintaining consumer demand, a product's success usually depends on collaboration between manufacturer and dealer. In multi-brand dealer networks, retailers have limited funds to spend on their manufacturers' products and limited floor space to allocate among them. Thus, competition among manufacturers requires providing a sufficient profit margin to encourage dealers to carry and invest in their products. Use of vertical price restraints allows firms to address a "common agent" problem. *See* B. Douglas Bernheim & Michael D. Whinston, *Common Agency*, 54 Econometrica 923, 925 (1986) (it is procompetitive to take steps to address "common agent" problem); Daniel P. O'Brien & Greg Shaffer, *Nonlinear Supply Contracts, Exclusive Dealing, and Equilibrium Market Foreclosure*, 6 J. Econ. & Mgmt. Strategy 755 (1997).

33 If one views the decision-making process as a two-player classic prisoner's dilemma, the optimal strategy for either player is to impose vertical price restraints regardless of what the other player does. Indeed, the only way for the players to choose not to impose vertical price restraints is to collude.

34 See Complaint at 5, National Association of Music Merchants, Inc., FTC File No. 001 0203 (Apr. 8, 2009), *available at* http://www.ftc.gov/os/caselist/0010203/090410nammcmpt.pdf.

35 *See* R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690, 697 (7th Cir. 2006).

36 *See* Joseph Pereira, *Discounters, Monitors Face Battle on Minimum Pricing*, Wall St. J., Dec. 4, 2008, at A1.

37 *Leegin*, 127 S. Ct. at 2717.

38 *See* Toys "R" Us, Inc. v. FTC, 221 F. 3d 928, 937-38 (7th Cir. 2000); Babyage.com, Inc. v. Toys "R" Us, Inc., 558 F. Supp. 2d 575, 583 (E.D. Pa. 2008) (holding post-*Leegin* that "harm to intrabrand competition is cognizable when brought about by the demands of a 'dominant' retailer").

39 It is hard to distinguish between a manufacturer's consideration of dealer feedback and a decision "coerced" by the dealer. *See* Harbour Letter, *supra* note 12, at 19 n.91; *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 765 (1984); Overstreet, *supra* note 7, at 53:

> It is important to emphasize, however, that evidence of influence by retailer organizations on a manufacturer's decision to employ vertical restraints does not automatically translate into proof of a retailers' cartel. Retailers individually or through their trade groups may initially discover a legitimate free-rider problem and bring it to the attention of the manufacturer. The manufacturer could then impose RPM (or other vertical restraints) to avert the free-rider problem. The manufacturer would not necessarily be conceding to cartel coercion but could be acting in its own self interest.

40 "Consumers, for their part, generally want to maximize goods and services obtained, spend the fewest possible dollars, and buy from the most conveniently situated sources." Pamela Jones Harbour, *Vertical Restraints: Federal and State Enforcement of Vertical Issues*, written materials prepared for ALI-ABA Course of Study, Product Distribution and Marketing 8 (Mar. 8–10, 2007), *available at* http://www.ftc.gov/speeches/harbour/0403vertical.pdf. One should not focus only on the second of those desires to the exclusion of the other two. Greater service and convenience often comes at higher price.

41 *Leegin*, 127 S. Ct. at 2717.

42 250 U.S. 300, 307 (1919). This safe harbor likely exists under most or all state antitrust laws modeled on Section 1, although not necessarily under the FTC Act. *See supra* note 19.

43 *See* ABA Section of Antitrust Law, Antitrust Law Developments 134 (6th ed. 2007).

44 *See* Brief of PING, Inc. as *Amicus Curiae* in Support of Petitioner, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), at 9–15 (noting PING, Inc.'s significant costs in operating a unilateral RPM policy), *available at* http://www.abanet.org/antitrust/at-conversation/pdf/Leegin_PING_Amicus.pdf.

45 *See* Mitnick et al., *supra* note 15, at 66–67.

46 It is important to recognize that the counterfactual is not simply the actual world with lower prices. If a manufacturer faces the choice between a vertical price restraint and the loss of dealers' willingness to stock or support its products, the but-for world may be one in which over time the manufacturer would lose competitive significance and its products would be less readily available to consumers.

47 *Leegin*, 127 S. Ct. at 2716.

48 Blind Doctor Inc. v. Hunter Douglas, Inc., 2004 U.S. Dist. LEXIS 18480, *18–*19 (N.D. Cal. Sept. 7, 2004).

49 Campbell v. Austin Air Sys., Ltd., 423 F. Supp. 2d 61, 69 n.6 (W.D.N.Y. 2005). *See also* U.S. Pioneer Elecs. Corp., 115 F.T.C. 446, 466 (1992) ("Unilaterally terminating a dealer for advertising below suggested prices is less competitively threatening to interbrand competition than unilaterally terminating a dealer for failing to follow a suggested resale price."); *but see* Worldhomecenter.com, Inc. v. L.D. Kichler Co., 2007 U.S. Dist. LEXIS 22496, *13–*14 (E.D.N.Y. Mar. 28, 2007) (MAP agreement had the "concomitant effect of restricting retail prices").

50 The less common are price negotiations, the closer MAP is to RPM. This may also be true for some Internet sales, if the opportunity for price negotiations is limited by the format of the dealer's website or the manufacturer's rules. *See* Worldhomecenter.com, 2007 U.S. Dist. LEXIS 22496, *13–*14.

51 *See* Pereira, *supra* note 36.

52 The transaction costs depend on the policy's terms. For example, if the policy allows Internet dealers to use automated emails in response to a price inquiry, the transaction costs are extremely low—just an Internet search and an email. If the policy allows only "live" price negotiations by phone or email, analogous to in-store conversations, the search costs may be somewhat greater. Nevertheless, the transaction costs, in most cases, would be small relative to the products' price.