Comparative perspectives on the “new law” of resale price maintenance

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Comparative Perspectives on the “New Law” of Resale Price Maintenance

Presentation by
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Outline of the Presentation

- Resale price maintenance (RPM) is transitioning to a more tolerant view, but ....
  - Three Years After *Leegin*
    - Less uniformity than one might imagine in the U.S.
  - Vertical Agreements Block Exemption
    - Still views RPM as “hard core”
    - But some increased attention to its potential virtues
  - *Are the U.S. and E.U. closer or farther away?*
After nearly 100 years, U.S. Supreme Court jettisoned’s per se rule against minimum resale price maintenance embraced in *Dr. Miles*. Why?

**The Court’s Rationale**

- Vertical price and non-price restraints are largely *indistinguishable* (extend *Sylvania* (1977))
- Vertical and horizontal price agreements are *distinguishable*
- Although RPM can be anticompetitive, it can also serve legitimate purposes
- *Per se rule can no longer be justified*
- Invites agencies and courts to develop “fair and effective” methods for applying rule of reason
Leegin’s Theory of Anticompetitive Effects for RPM

- Four Scenarios:
  - Facilitate Collusion
    - Manufacturer
    - Dealer
  - Facilitate Exclusion
    - Dominant manufacturer
    - Dominant retailer

- Three Relevant “Filters”:
  - Widely utilized? (necessary for either cartel theory)
  - Dealer initiated? (necessary for either dealer-related theory)
  - Market Power? (necessary for all theories)
So is the law of RPM settled in the U.S.?
Preliminary Note on Regime Change

- Bush Administration Amicus Brief in *Leegin*
  - DOJ/FTC Together: “Overrule Dr. Miles”
    - FTC Votes 3-2 to support
      - Leibowitz (now Chair) & Harbour (now gone) Dissent

- Do elections matter for antitrust policy in the U.S.?
  - Rhetoric > Reality?
    - True for “continuity” narrative (elections matter)
    - But also true for “change” narrative (not as much as some say)
  - ...but as to RPM, there has been a shifting of positions
Who has a voice in the post-\textit{Leegin} debate?

Public Sector

Federal
- Congress
- DOJ Antitrust Division
- FTC

State
- Legislature/Courts
- Antitrust Enforcers (OAG)
Congress; “Overruling Leegin”

- “The Discount Pricing Consumer Protection Act” (S. 148/H.R. 3190)
  - **Goal**: Restore per se rule of *Dr. Miles*
  - Amends Sherman Act, §1:
    - “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.”
  - Second attempt since 2007; depth of support not clear
  - Would abandon generality and flexibility of Section 1
DOJ/Antitrust Division: “Working Within Leegin” Speech by AAG Christine Varney (Oct. 7, 2009)

- **General Principles**
  - “Structured rule of reason”
    - Euphemism for something less than comprehensive rule of reason
  - Presumptions and burden shifting
  - “Sliding scale” as in mergers
  - *Preserves possibility of per se rule*

- **Specific Tests for Each *Leegin* Scenario**
  - Collusion Scenarios
  - Exclusion Scenarios
  - Role of three *Leegin* factors
FTC -- A More Complex Picture
“Overrule or Work Within Leegin?”

■ Chairman Leibowitz
  ■ January 2007
    ■ Then Commissioner, he dissents from *Leegin* Amicus
  ■ May 2008
    ■ Votes in favor of *Nine West* petition to permit RPM
  ■ Spring 2009
    ■ As Chairman, supports bill to overrule *Leegin* at ABA Spring Meeting

■ Commission Positions
  ■ Pre-*Leegin*
    ■ Amicus Brief (3-2 vote)
      ■ Kovacic & Rosch likely still support *Leegin* outcome
  ■ Post-*Leegin*
    ■ *Nine West* RPM Consent Decree Modified to permit RPM
  ■ Current FTC Position?
    ■ Up to the new Commissioners -- Edith Ramirez & Julie Brill
Basis for Federal Consensus?

If *Leegin* is not overruled by Congress…

**Common Ground:**
Look for structured/truncated ways to identify “bad” RPM.
The States

Courts & Legislation
- Most state antitrust laws expressly or by court decision follow federal law
  - So far, at least two state courts have decided to follow Leegin
- Some states have specific prohibitions of RPM (NY)
- Maryland amended law to reject Leegin
  - So far the only “Leegin repealer”

OAG Enforcement
- Amicus in Leegin supporting Dr. Miles (37 states)
- Opposed Nine West Petition (27 states)
- Per se Cases Filed Since Leegin
  - Herman Miller (NY, IL, MI)
  - Tempur Pedic (NY)
  - Derma-Quest (CA)
Concluding Thoughts on U.S.

- If *Leegin* is not overruled...
  - DOJ/FTC will focus on *refining test for effects*
  - *Few cases are likely* (never been a high priority)
    - FTC more likely to pursue than DOJ?
  - *Will courts be receptive to abbreviated analysis?*

- Regardless of *Leegin*...
  - Some states will continue to prosecute
  - Firms will embrace RPM only cautiously
  - *Will these cases trigger private damages actions?*
RPM in the E.U.

- Never been per se, as in U.S., but little difference in practice
  - Long history of scepticism
  - Strong legal presumptions against
- Theoretically possible to justify under 101(3) TFEU – noted under new Vertical Guidelines
  - Few cases to guide the analysis
- Will firms try to test the new Guidelines?
Competitive Effects: U.S. and E.U.

- **Leegin**
  - Facilitate Collusion
    - Manufacturer
    - Dealer
  - Facilitate Exclusion
    - Dominant manufacturer
    - Dominant retailer
  - **Three Relevant “Filters”:**
    - Widely utilized? (necessary for either cartel theory)
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- **Vertical Guidelines (§ 2.10)**
  - Facilitate Collusion
    - Manufacturer
    - Dealer
  - Facilitate Exclusion
    - Dominant manufacturer
    - Dominant retailer (with broader language)
  - But also...
    - “Soften Competition”
    - “Price Increase”
    - Diminish Pressure on Manufacturer’s Margins
      - “Commitment problem”
Efficiencies: U.S. and E.U.

- **Leegin**
  - *Facilitate entry* by attracting dealers willing to invest in service and promotion
  - *Induce retailers* to promote, service, and repair existing products
  - Defeat *free riding*
  - Promote *consumer choice*

- Vertical Guidelines, §§ 1.2 & 2.10
  - **Section 1.2**
    - Nine “positive effects” of vertical restraints generally
  - **Section 2.10 - RPM**
    - Facilitate entry
    - Promote services
      - Franchise system
    - Prevent free riding
U.S. and E.U. on RPM Today

- U.S. after *Leegin*
  - Plaintiff must prove RPM agreement
    - *Colgate* still law
    - *Monsanto & Business Electronics* still relevant?
  - Plaintiff must also prove anticompetitive effect
    - Limited to four *Leegin* scenarios?
    - Will burden-shifting devices work?
  - THEN burden would shift to defendants to show efficiencies

- E.U. under 2010 Block Exemption and Guidelines
  - (¶ 47) Exclusion of hardcore =
    - Presumption that RPM falls within 101(1)
    - Presumption that RPM is unlikely to satisfy 101(3)
  - If Plaintiff proves agreement (*Bayer*, not *Colgate*) ...
  - **Defendant must prove efficiencies**
    - Will defendants be able to meet this burden?
    - Will they take the risk?
OFT Tobacco Case (April 2010)

1. Mfrs had “individual arrangements with each retailer”
2. Key? “the retail price of a tobacco brand was linked to that of a competing manufacturer’s brand”
3. RPM used to facilitate cartel?
4. Statement of Objections in 2008; Finding of violation and imposition of £225 million fine in 2010

Note: retailer invoked leniency programme to report
Concluding Thoughts: E.U. & U.S.

- Common movement towards greater tolerance of RPM?
  - Yes, but more pronounced in U.S. at the federal level
  - *U.S. Federal & E.U. closer than U.S. Federal and States?*

- But...legal presumptions now reveal different economic ones –
  - E.U. & UK
    - More confident of harms and suspicious of benefits
  - U.S.
    - *Leegin* and most federal enforcers reflect inverse assumptions
  - Natural experiments? Maybe, but...
    - Firms in U.S. still need to worry about state enforcement of per se rule
    - Firms in E.U. must be willing to prove efficiencies
What’s at stake in the debate?

- The rules for competition in the 21st century:
  - Integrating Internet and Brick & Mortar retailing
    - Reduced transaction costs have benefits for all
    - Two-way free rider possibilities?
  - And more generally:
    - Evaluating the value to suppliers and consumers of intrabrand competition
    - Evaluating the value to consumers and suppliers of “brands”
Two Options/Two Sets of Priors

- **Option 1: Permit Restraints**
  - Restrict Intrabrand to Enhance Interbrand
    - Use RPM to protect dealer margin/prevent brand dilution
    - Dealer will use margin to promote product
    - Interbrand competition will discipline price
    - Mfr and consumer interests are aligned
      - Lowest dealer margin consistent with product promotion
  - *Protects supplier autonomy*
  - Core theory of *Leegin*

- **Option 2: Market Forces**
  - *Market Establishes Competitive Dealer Margin*
    - “Noise” from dealers provides incentive for supplier to become more efficient and lower price
    - Dealer is responding to consumer choice and communicating it to supplier
    - Suppliers compete to provide best margin/volume combination
    - Supplier can use non-price restraints and performance-based discounts to secure promotion
  - *Limits supplier autonomy*
  - Alternative to *Leegin*?
Thank you for your attention.