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# Top Three Traps for the Unwary: Antitrust Distribution Issues

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# Three Traps

- Resale Price Maintenance (RPM)
- Price Discrimination
- Communicating with Competitors

# RPM Basics

- Antitrust 101
  - Agreement
  - Unreasonable restraint of trade
  - *Per se* unlawful v. rule of reason
  - Vertical versus horizontal
  - Vertical resale price maintenance – minimum and maximum – held *per se* unlawful
  - *Dr. Miles* (1911): Minimum resale price maintenance *per se* unlawful

# RPM Basics: Trying to Evade the Trap

- Cooperative Advertising Programs
  - Provides full or partial reimbursement for resellers' advertising, but only if ads mention prices at or above MSRP — or no price at all
  - *In re Nissan Antitrust Litig.*, 577 F.2d 910, 917 (5<sup>th</sup> Cir. 1978) (coop advertising program subject to rule of reason)
  - Federal Trade Commission statement, 6 Trade Reg. Rep. (CCH) ¶ 39,057
  - Not all coop programs pass muster

# RPM Basics: Trying to Evade the Trap

- *Colgate* Policies – No “Agreement”
  - Manufacturer acting independently is not subject to Sherman Act liability for declining to sell products to those known or suspected to be unwilling to resell at manufacturer’s price
  - *United States v. Colgate & Co.*, 250 U.S. 300 (1919)
  - Difficulty in administration

# RPM: Did *Leegin* Disarm the Trap?

- *Leegin Creative Leather Products, Inc. v. PSKS, Inc. dba Kay's Kloset . . . Kay's Shoes*, 551 U.S. 877 (2007)
- *Leegin* Background
  - Leegin marketed Brighton line of clothing and accessories to retailers
  - Required retailers to agree not to sell its products at a discount under *Colgate* plan; claim that minimum prices mean better customer support, prevent “free riding”
  - Learned its retailer PSKS was violating plan by discounting all Brighton clothing
  - Leegin suspended all shipments to PSKS
- PSKS sued claiming antitrust violation and won \$1.2 million jury verdict (trebled)

# RPM: *Leegin* Decision

- June 28, 2007
- 5-4 decision
- Court overturns *Dr. Miles*
- Agreements between manufacturers and dealers or distributors to fix minimum resale prices are no longer per se illegal but subject to the rule of reason

# RPM: *Leegin* Decision

- Court identified at least two procompetitive justifications for allowing companies to set minimum resale price:
  - (a) ensuring retailers provide services that enhance interbrand competition;
  - (b) enabling new companies and brands to enter the market

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# RPM: So Why Can't I Fix Prices After *Leegin*?

- Even under *Leegin*, RPM must be justified under the rule of reason

# RPM: So Why Can't I Fix Prices After *Leegin*?

- State Law Prohibitions Continue
  - Washington: No cases on resale price maintenance since enactment of CPA
  - California: Per se rule still applies under Cartwright Act
    - *Mailand v. Burckle*, 572 P.2d 1142 (Cal. 1978)
    - *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709 (1982)
  - New York: Contracts void
    - Feld-Crawford Act, N.Y. Gen. Bus. Law § 369-a (voids contract that “purports to restrain vendee of commodity from reselling ... at less than price stipulated by vendor or producer”)

# RPM: So Why Can't I Fix Prices After *Leegin*?

- Potential Legislation
  - Possible federal or state backlash to overturning *Dr. Miles*
  - H.R. 3190; S. 148

# RPM: So What Can I Do?

- Adopt a *Colgate* Policy
- Adopt a Cooperative Advertising Program

# Price Discrimination: A Trap Without Teeth?

- Robinson-Patman Act (RPA)<sup>1</sup>
  - Originally designed during the Great Depression to bar price discrimination against mom and pop grocery stores against emerging chains
  - Traditionally difficult to prevail
    - Few enforcement actions by FTC or DOJ
    - Private litigants face difficult hurdle in proving antitrust injury

<sup>1</sup> 15 U.S.C. §§13, 13a, 13b, 13c, 21a

# Price Discrimination: New Teeth?

- *Feesers, Inc. v. Michael Foods, Inc. and Sodexho, Inc.*, 632 F. Supp. 2d 414 (M.D. Pa. 2009) appears to breath new life into RPA actions

# Price Discrimination Basics

- Section 2
  - (a) prohibits price discrimination and states defenses of cost justification/changing conditions
  - (b) states defense of meeting competition
  - (c) outlaws payment/receipt of brokerage fees except for services actually rendered
  - (d) prohibits discriminatory payments for services/facilities provided by customer on behalf of seller
  - (e) prohibits discriminatory provision of services/facilities by seller to customer
  - (f) makes knowing recipient of discriminatory price liable

# Price Discrimination Basics

- Section 3: Criminal Liability
  - Participating in “sale of goods of like grade, quality, and quantity” while also providing purchaser with discount, rebate, allowance, or advertising service charge not provided to purchaser’s competitors
  - Charging different prices in different geographic areas with “the purpose of destroying competition, or eliminating a competitor,” in area where lower price is charged
  - Selling “goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor

Hardly ever enforced

# Price Discrimination Basics

- Elements of a Violation
  - Two completed sales to two different purchasers
  - Reasonably contemporaneous with each other
  - By the same seller
  - Engaged in commerce
  - Of commodities
  - Of like grade and quality
  - For use, consumption or resale within the U.S. or any territory
  - At different/discriminatory prices
  - With injurious effect on competition or on a competitor of either seller or purchaser

# Price Discrimination Basics

- Defenses to *Prima Facie* Case
  - Cost justification
  - Changing conditions
  - Meeting competition

# Price Discrimination: *Feesers* Case

- *Feesers, Inc. v. Michael Foods, Inc.*, 632 F. Supp. 2d 414 (2009)
  - Michael Foods sold eggs/potatoes both to Feesers (regional food service distributor) and Sodexho, Inc. (multinational food service management company)
  - Sodexho obtained favorable pricing from Michael that allegedly gave it unfair advantage competing to serve food service providers
  - Feesers sued Michael and Sodexho
  - Feesers sought/obtained injunction barring Sodexho from inducing/receiving discriminatory pricing from Michael, and Michael from unlawfully discriminating in price in favor of Sodexho and against Feesers

# Price Discrimination: *Feesers* Case

- Michael halted sales of its products to Feesers
- Michael also offered that if Feesers would agree to stay injunction, it would sell products to Feesers at historic prices
- Motion for contempt
- Trial court held Michael in contempt
- Entered permanent injunction prohibiting Michael from refusing to sell products to Feesers on the same terms as sold to Sodexho
- On appeal

# Price Discrimination: *Feesers* Case

- Interesting Points
  - Food service distributor deemed in competition with food service management company despite fact that food service distributor sold individual food items to institutional clients and food service management company sold meals to those clients
  - Cannot use intermediate distributor to avoid liability
  - Defense of meeting competition failed
  - Proof of Sodexho's inducement included most favored nations clause

# Communicating with Competitors: The Third Trap

- Why You Should Care: Antitrust Violations May Be Prosecuted As Crimes
  - Archer Daniel Midlands case from 1990s
    - Executives set prices, output, markets with competitors resulting in \$200 to \$250 million additional profits
    - \$100 million fine
    - Three ADM executives convicted, sent to jail for total of 99 months
    - ADM executive cooperated with FBI and caught conspiracy on tape
  - *The Informant* starring Matt Damon released Sept. 2009
  - Reviews: “Teeters precariously between being a great movie and an awful one”



# Communicating with Competitors: Section 1

- Sherman Act Section 1
  - “Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade of commerce among the several states, or with foreign nations, is declared to be illegal ... .”
  - Elements:
    - Contract, combination, or conspiracy (“Agreement”);
    - Unreasonable restraint of trade;
    - In/or affects interstate commerce

# Communicating with Competitors

- DO:
  - Exercise independent judgment and avoid even appearance of collusion
  - Make all pricing decisions independently
  - Conduct meetings with competitors per a written agenda (e.g. trade associations)
  - Consider consulting legal counsel before meeting about proper limits of discussion

# Communicating with Competitors

- DO:
  - Limit discussion to agenda items
  - Protest any discussions/activities (formal or informal) that appear to violate antitrust laws, disassociate yourself from them, and leave any meeting in which they continue; tell everyone why you're leaving
  - Document source of any sensitive info to rebut later claim you obtained it improperly
  - Consult with counsel about any violation

# Communicating with Competitors

- **DON'T:**
  - Enter into any agreement, understanding, or discussion with competitors about pricing, market/customer allocation, refusal to deal, limiting competitor's freedom
  - Exchange data with a competitor concerning fees, prices, production, sales, bids, costs, customer credit, or other business practices unless the exchange is pursuant to a plan approved by legal counsel

# Communicating with Competitors

- DON'T:
  - Discuss your customers with competitors
  - Use one product as lever to force a customer to purchase another product
  - Discuss any proscribed topics in “informal” or “off-the-record” meetings, whether face-to-face, by telephone, or email
  - Do not stay at any meeting where proscribed topics are discussed
  - Do not cover up wrongdoing – promptly report it to legal counsel

# DO

- Pick Up the Phone



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