

May 29, 2018

United States Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
CompReg3@usdoj.gov

Re: Department of Justice Roundtable Discussion Series on Regulation and Antitrust Law

Dear Sir or Madam:

I am pleased to provide comments in advance of the May 31, 2018 United States Department of Justice (DOJ) Antitrust Division Roundtable on Anticompetitive Regulations.¹

During my forty-five years as a practicing antitrust attorney, first with the Connecticut Office of the Attorney General from 1973-1994,² and then with the firm of Wiggin and Dana LLP from 1994 to present, combined with my almost forty years as an adjunct law professor, I have had extensive experience analyzing the antitrust aspects of vertical pricing policies. As a result, I have serious concerns regarding the current state of the laws in this area, including advising clients seeking to compete through the implementation of vertical pricing arrangements. This concern arose in part out of my representation of clients over the past twenty-four years. After leaving government, I quickly came to the realization that the states' incessant attacks, including my own,³ on resale price maintenance agreements, were misbegotten. Resale price maintenance can be, and often is, a procompetitive mechanism that benefits consumers and should be evaluated uniformly on a case-by-case basis.⁴

¹ The opinions expressed herein are my own and do not necessarily reflect the views of Wiggin and Dana LLP, nor any client of Wiggin and Dana LLP.

² I served as the Chair of the National Association of Attorneys General ("NAAG") Multistate Antitrust Task Force from 1990 to 1992, and as Connecticut's Assistant Attorney General in charge of both Antitrust and Consumer Protection from 1980 to 1994.

³ During my tenure as a state assistant attorney general, I often used the phrase "RPM Central" in both speeches and articles to describe the key role states played in the "vertical distribution antitrust universe." See Robert M. Langer, *A Cautionary Tale: State Enforcer's Perspective on Vertical Restraints*, 8 ANTITRUST 9 (ABA Section of Antitrust Law, Spring 1994).

⁴ See note 13, *infra*.

United States Department of Justice
Antitrust Division
May 29, 2018
Page -2-

As you are well aware, in 2007, the U.S. Supreme Court in *Leegin*⁵ held that vertical price fixing or resale price maintenance (“RPM”) under Section 1 of the Sherman Act should be governed by the Rule of Reason. *Leegin* overruled the *Dr. Miles*⁶ decision that had held RPM to be per se unlawful under federal antitrust law.⁷ Since 2007, a few states, including California and Maryland, continue to treat RPM as per se unlawful under their respective state antitrust statutes.⁸

While, at first blush, it may seem counterintuitive from an antitrust perspective, the fact is that these states’ antitrust laws have had a decidedly anticompetitive impact on vertical pricing arrangements.

Assuming that they receive competent antitrust advice, companies that face significant interbrand competition at the manufacturer or wholesaler level are simply unable to enter into vertical pricing agreements with their wholesalers or retailers for fear that such agreements would result in enforcement actions by states attorneys general or private litigants as per se violations of state antitrust law.

Companies that have a compelling procompetitive reason to require retailers to sell products at or above a minimum price, are only able to do so utilizing the extremely cumbersome, expensive and risky procedures permitted under *U.S. v. Colgate*.⁹ The *Colgate* doctrine permits a manufacturer or supplier to unilaterally announce the terms under which it will do business with a customer. Any communication beyond the initial announcement runs the risk that such communication may be construed as concerted behavior triggering application of the state’s analogue to Section 1 of the Sherman Act. Regrettably, adherence to the *Colgate* doctrine often requires the termination of long-standing customers that have failed to maintain the minimum resale price. Such terminations are often accomplished with no prior notice to the customer because of the quite reasonable risk that

⁵ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁶ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

⁷ I had served as co-counsel for PING, Inc. in *Leegin*. PING filed an amicus brief urging the Supreme Court to overrule *Dr. Miles*. See Brief of PING, Inc. as Amicus Curiae in Support of Petitioner, 2007 WL 173680.

⁸ See Michael A. Lindsay, *Overview of State RPM*, THE ANTITRUST SOURCE (April 2017), found at: https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf

⁹ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

United States Department of Justice
Antitrust Division
May 29, 2018
Page -3-

any explanation or communication by sales personnel may trigger a Section 1 claim. Needless to say, this often leads to significant damage to relationships with both its retailers and its consumers. It also creates significant costs and inefficiencies.

In a competitive interbrand market, in which consumers have a meaningful choice of products, as well as for the many reasons articulated in *Leegin*, I suggest that all vertical pricing restrictions should be judged in a manner comparable to non-price vertical restrictions.¹⁰

The question for DOJ, and frankly for Congress, is what, if anything, can be done about this totally untenable situation?¹¹

Although I freely acknowledge that principles of federalism preclude an easy fix to the dilemma created by the continued use of the per se rule under some state antitrust laws to police RPM, I strongly urge the Antitrust Division to consider proactive advocacy in order to fulfill the position that it and the Federal Trade Commission asserted in the *Leegin* case in its amicus brief.¹²

The overly aggressive enforcement priorities of states such as California and Maryland have a useful historical analogue, particularly in light of the overwhelming economic learning that vertical pricing restrictions should not be condemned as per se illegal because they are most often procompetitive.¹³

¹⁰ See *Leegin*, 551 U.S. at 885 (citing *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).

¹¹ Whether the states continued use of the per se rule raises constitutional issues under either the Commerce Clause or the Supremacy Clause is beyond the scope of this submission. See Robert M. Langer, *State Antitrust Law and The Constitution*, 109 ATRR 595 (11/6/15), found at: http://www.wiggin.com/files/33278_LangerRPMFinal.pdf

¹² See Brief for the United States as Amicus Curiae Supporting Petitioner, 2007 WL 173650.

¹³ As noted in *Leegin*, 551 U.S. at 889-890: "Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance. See, e.g., Brief for Economists as *Amici Curiae* 16 ('In the theoretical literature, it is essentially undisputed that minimum [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects'); Brief for United States as *Amicus Curiae* 9 ('[T]here is a widespread consensus that permitting a manufacturer to control the price at which its goods are sold may promote interbrand competition and consumer welfare in a variety of ways'); ABA Section of Antitrust Law, *Antitrust Law and Economics of Product Distribution* 76 (2006) ('[T]he bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes'); see also H. Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 184-191 (2005) (hereinafter Hovenkamp); R. Bork, *The Antitrust Paradox* 288-291 (1978) (hereinafter Bork). Even those more skeptical of

United States Department of Justice
Antitrust Division
May 29, 2018
Page -4-

The historical reference is to the period in our antitrust history between 1967 and 1977 when *Schwinn*¹⁴ was the law of the land. *Schwinn* condemned as per se unlawful vertical non-price restraints, thus effectively impeding innumerable procompetitive vertical distribution arrangements. After only ten years of this failed experiment, the Supreme Court overruled *Schwinn* in *Continental T. V., Inc. v. GTE Sylvania Inc.*,¹⁵ and in so doing, reaffirmed the Rule of Reason jurisprudence established in *White Motor Co. v. United States*.¹⁶

I respectfully urge the Antitrust Division, in coordination with its sister antitrust agency, the Federal Trade Commission, to consider working toward passage of federal legislation that would require RPM agreements to be evaluated under the Rule of Reason under both state and federal law. Such legislation could be modelled after 15 U.S.C. § 4302,¹⁷ in which Congress declared that, under both federal and state antitrust law, the Rule of Reason shall govern joint ventures and standards development organizations while engaged in a standards development activity.

I appreciate the opportunity to share my concerns with the Antitrust Division, and commend the Antitrust Division for its sponsorship of the Roundtable Discussion Series.

resale price maintenance acknowledge it can have procompetitive effects. See, e.g., Brief for William S. Comanor et al. as *Amici Curiae* 3 ('[G]iven [the] diversity of effects [of resale price maintenance], one could reasonably take the position that a *rule of reason* rather than a *per se* approach is warranted'); F. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 558 (3d ed. 1990) (hereinafter Scherer & Ross) ('The overall balance between benefits and costs [of resale price maintenance] is probably close')."

¹⁴ *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

¹⁵ *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

¹⁶ *White Motor Co. v. United States*, 372 U.S. 253 (1963).

¹⁷ 15 U.S.C. § 4302 states:

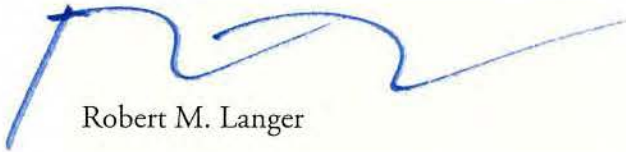
"In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of –

- (1) any person in making or performing a contract to carry out a joint venture, or
- (2) a standards development organization while engaged in a standards development activity,

shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets. For purposes of determining a properly defined, relevant market, worldwide capacity shall be considered to the extent that it may be appropriate in the circumstances."

United States Department of Justice
Antitrust Division
May 29, 2018
Page -5-

Sincerely,

A handwritten signature in blue ink, appearing to read "R. M. Langer", is written over a light yellow rectangular background.

Robert M. Langer