ABA SECTION OF ANTITRUST LAW

THE PRICE POINT

NEWSLETTER OF THE
ABA SECTION OF ANTITRUST LAW PRICING CONDUCT COMMITTEE

VOLUME 9, ISSUE 1 **WINTER 2010**

We are pleased to bring you this issue of Pricing Conduct Committee's newsletter, which includes articles by Omar Wakil and Sue-Anne Fox on Canada's new approach to RPM and by Mark Katz on consumer rebates in Canada. In addition, Daniel Sasse and Chahira Solh provide an assessment of U.S. Deputy Attorney General Christine Varney's proposed RPM analysis.

If you have comments or questions about THE PRICE POINT, or if you are interested in submitting an article, please contact the Editor, Deborah Croyle, at dcroyle@orrick.com, or Committee Vice-Chair Scott Westrich at swestrich@orrick.com.

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NEW & NOTEWORTHY

***Feesers, Inc. v. Michael Foods, Inc.*,** 591 F.3d 191 (3d Cir. 2010). The Third Circuit has ruled that Michael Foods and Sodexo are entitled to judgment as a matter of law on Feesers' Robinson-Patman Act price discrimination claims. Feesers, a regional food distributor based in Pennsylvania, alleged that Michael Foods discriminated against it by offering lower prices for its egg and potato products to Sodexo, a multinational food service management company. At issue was a practice called "deviated pricing," in which, Feesers argued, large food management companies like Sodexo extract better pricing deals from suppliers, to the detriment of regional distributors which supply food directly to institutions. Feesers' suit only sought injunctive relief.

In 2007, the Third Circuit had reversed a grant of summary judgment against Feesers on the ground that the District Court had applied the wrong standard in concluding the parties were not competitors. *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 213 (3d Cir. 2007). On remand, the District Court entered judgment for Feesers, enjoining Michaels Foods from engaging in, and Sodexo from inducing, price discrimination. It subsequently issued a further order enjoining Michaels Foods from refusing to sell to Feesers on the same terms as it sold to Sodexo.

On appeal from this judgment, a unanimous panel rejected Feesers' claim. Distinguishing its earlier opinion as given before the factual record was fully developed, the Third Circuit found that, because any competition between Feesers and Sodexo occurred when an institution was deciding whether to self-operate or hire a food service management company, and any resulting sale of Michaels's products would have had to occur afterward, Feesers and Sodexo could not be competing purchasers of the products and there could be no competitive injury to Feesers.

***New Albany Tractor, Inc. v. Louisville Tractor, Inc.*,** No. 3:08-cv-664H, 2010 WL 59206 (W.D.Ky., Jan. 5, 2010). New Albany Tractor's claim for secondary line price discrimination under the Robinson-Patman Act claim has been dismissed. New Albany's action against Scag Power Equipment, a Wisconsin corporation mowing equipment manufacturer, and Louisville Tractor, Scag's exclusive distributor for the Louisville, Kentucky area, alleged that the defendants' distribution agreement allowed Louisville Tractor to sell Scag equipment to other retailers at a mark-up and thereby enabled Louisville Tractor to undercut competitors' prices on its own retail sales of Scag products. New Albany could not, however, allege that Scag actually controlled Louisville Tractor's prices, thus New Albany's purchases were ordinary resales not coming within the indirect purchaser doctrine of the Act.

CALL FOR ARTICLES. THE PRICE POINT is seeking submissions for its Spring 2010 issue. Consistent with the Pricing Conduct Committee's new broader focus, articles on resale price maintenance, predatory pricing, bundled pricing, price squeezes, or other pricing-related topics are welcome, as of course are articles on price discrimination and Robinson-Patman Act issues. Articles should be approximately 3,000 words in length, excluding notes. Submissions will be due April 30, 2010. If you are interested in writing for THE PRICE POINT, please email a short description of your proposed topic to Scott Westrich at swestrich@orrick.com and Deborah Croyle at dcroyle@orrick.com.

THE PRICE POINT is published three times a year by the American Bar Association Section of Antitrust Law Pricing Conduct Committee. Members of the Section of Antitrust Law may access past issues through the Pricing Conduct Committee's website. The views expressed in this publication are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law or the Pricing Conduct Committee. If you wish to comment on the contents of THE PRICE POINT, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654-7598.

FOLLOWING *LEEGIN*: PRICE MAINTENANCE NORTH OF THE BORDER

By Omar Wakil and Sue-Anne Fox*

Canada's *per se* price maintenance offense was repealed last year as part of a major overhaul of the *Competition Act* ("Act").[1] It was replaced with a more narrowly defined non-criminal resale price maintenance ("RPM") provision that includes a competitive-effects test. The amendment effectively allows suppliers to set resale prices in Canada unless and until prohibited by the specialized Competition Tribunal (the "Tribunal").

The substantive changes to the provision, coupled with procedural and remedial changes associated with the move from a criminal offense to a civil reviewable matter, are likely to lead to reduced enforcement by the Commissioner of Competition (the "Commissioner") and may eliminate private actions involving RPM claims, which were never common in Canada. The competitive-effects test has created a material hurdle for all applicants. Private parties will be deterred because they are unable to commence class actions or seek damage awards.

Although there continue to be some areas of risk—particular caution ought to be exercised where RPM could also violate Canada's prohibition on horizontal price-fixing—the amendments are likely to result over time in the widespread adoption of RPM in Canada, particularly for the sale of automobiles, electronics, luxury goods and other branded consumer products sold through non-vertically-integrated distribution channels.

History of Price Maintenance in Canada

RPM was made a *per se* criminal offense in 1951 following the recommendation of the MacQuarrie Report.[2] Although the committee received submissions with strong differences of opinion over whether RPM was anti-competitive or pro-competitive, it ultimately concluded that RPM was "a restrictive or monopolistic practice"[3] that did not promote general welfare.

In the years that followed, enforcement was sporadic and the section was periodically amended. In 1960, certain statutory defenses were added.[4] In 1976, further, more significant, amendments were made.[5] Notably, references to "reselling" were dropped, which had the effect of making it illegal to influence anyone's prices, including competitors' prices.[6] In other words, the amended offense also captured horizontal arrangements, including price-fixing that did not have any vertical element. This was sometimes referred to as "horizontal price maintenance." Since the 1976 amendments, there were about nine formal enforcement proceedings a year until 1990, when enforcement began to decline.[7] The Competition Bureau (the "Bureau") had by that time decided to assign a lower priority to RPM enforcement in order to pursue other matters believed to cause greater economic harm. Private enforcement was modest and "horizontal price maintenance" claims were sometimes made in conjunction with price-fixing allegations.

There was also growing debate about whether the offense ought to be decriminalized. In 1985, the Royal Commission on the Economic Union and Development Prospects for Canada suggested that RPM "could be made a matter for review by an administrative tribunal, just as exclusive dealing and tied selling are now reviewed by the [Tribunal]."[8] In 1999, the House of Commons Standing Committee on Industry, Science and Technology ("Industry Committee") undertook an in-depth review of the Act and the enforcement record of the Bureau. In anticipation of this review, the Commissioner engaged two professors to undertake an independent assessment of the pricing provisions of the Act.[9] This assessment, published as the VanDuzer Report, was critical of the criminal RPM offense because it ignored efficiency justifications and market power. It recommended that RPM be treated as a form of abuse of dominance: prohibited only if it prevented or lessened competition substantially.

In 2002, the Industry Committee released its report, which endorsed decriminalization. The Industry Committee noted that all witnesses—except, somewhat surprisingly, representatives of the Bureau—believed that vertical price maintenance should be decriminalized in the manner recommended by the VanDuzer Report.[10]

Despite growing support for decriminalization, proposed but not enacted amendments to the Act introduced in 2004 would have left the criminal price maintenance provision unchanged.[11]

In 2008, the government-appointed Competition Policy Review Panel (the "Panel") made a number of recommendations to modernize Canada's competition laws. The Panel noted that Canadian price maintenance laws were more restrictive than comparable U.S. laws,[12] citing the decision of the U.S. Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[13] The Panel recommended that price maintenance be decriminalized and treated as a civil reviewable matter, in the same way that vertical non-price restraints are dealt with in the Act (*e.g.*, refusal to deal, tied selling and exclusive dealing). Unlike prior recommendations, the Panel recommended that the criminal price maintenance provision be repealed and replaced with a new civil provision and not treated as a form of abuse of dominance. It also recommended that private parties be able to enforce the provision, which they are not able to do in Canada in connection with abuse of dominance.[14]

The recommendations of the Panel were included in Bill C-10, which was enacted in March 2009.[15]

Elements of Price Maintenance

The new RPM provision is considered a civil "reviewable matter." A reviewable matter is not an offense; rather, it is a prohibition on certain conduct that may be subject to an order by the Tribunal.[16] Reviewable matters are not considered to be prohibited business practices. They are legitimate business activities and may legally be carried out until a Tribunal order specifically prohibits the person named in the order from engaging in the practice. With the exception of deceptive marketing practices and abuse of dominance, for which administrative monetary penalties may be imposed, the Tribunal is empowered only to make remedial orders in connection with reviewable matters.

The statutory elements of the new price maintenance provision are set out in section 76 of the Act. They are similar to the former criminal offense,[17] with two notable refinements. First, the new provision only restricts RPM that has an "adverse effect on competition"; the former criminal offense made price maintenance *per se* illegal. Second, the new provision only restricts vertical price maintenance; the former criminal provision, as noted, also prohibited horizontal price maintenance.[18]

To establish a contravention of the new RPM provision, the Commissioner or a private party must establish the following two essential elements:

- First, that the respondent (a) by agreement or specified unilateral actions (i.e., a threat, promise or like means), influenced upward, or discouraged the reduction of, the price at which products are sold for resale or advertised for sale; (b) refused to supply a product or otherwise discriminated against a person because of that person's low pricing policy; or (c) pressured a supplier by making it a condition of doing business with the supplier that the supplier refuse to supply a third party because of the third party's low pricing policy.
- Second, the conduct has had, is having or is likely to have an "adverse effect on competition" in a market. (This is described in more detail below.)

The new provision includes a limited number of statutory defenses that prohibit the Tribunal from making an order where a downstream distributor is refused supply if the supplier's products are being used as loss-leaders or for bait-and-switch selling, or if the reseller is engaging in misleading advertising or is not providing a reasonable level of service for the products. Only the last of these (insufficient service) goes to the heart of the traditional pro-competitive economic theory that explains why an upstream supplier would want to impose RPM on a downstream distributor. The limited range of these exemptions means that certain pro-competitive justifications may not be available to suppliers, although the Tribunal may consider other pro-competitive rationales as part of its assessment of adverse effects.[19]

If the elements of the practice are established and none of the defenses or exceptions apply,[20] the Tribunal "may" make an order prohibiting the respondent from engaging in price maintenance or require the respondent to accept the applicant as a customer on usual trade terms.[21] The word "may" in section 76 makes it clear that the Tribunal has residual discretion to decline to issue an order. The Tribunal has considered the discretionary nature of relief in the context of vertical non-price restraints and, in those cases, has assessed the reasonableness of the supplier's business justifications for engaging in the conduct. It is unclear what the Tribunal would consider in a price maintenance case in assessing whether to decline to issue an order. Although it may limit exercising its discretion to circumstances in which issuing an order would be unfair—for example, where there was a refusal to supply a discounter engaged in fraud or other illegal activity—it is possible that the Tribunal would consider pro-competitive justifications for engaging in RPM at this stage rather than as part of the adverse effects test as suggested above.

Increased Burden of Proof

The most significant element of the new RPM provision is the inclusion of a competitive-effects test, which is likely to dramatically reduce the circumstances in which RPM will be found to contravene the Act. The only other provision in the Act that includes an adverse-effects test is section 75, which prohibits refusal to deal in certain circumstances. To date, only two refusal to deal cases have considered the meaning of the term "adverse effect," but they provide a useful starting point for determining how the test will be applied to price maintenance.

In *B-Filer Inc. v. Bank of Nova Scotia*[22] and *Nadeau Poultry Farm Limited v. Groupe Westco Inc.,*[23] the Tribunal assessed adverse effects using a methodology similar to the approach used to determine whether there is a substantial lessening of competition. The Tribunal concluded that the difference between the adverse effect and substantial lessening tests is in the degree of the anti-competitive effect. "Adverse" requires more than a trivial or *de minimis* lessening of competition but less than a substantial lessening of competition. In *B-Filer*, the Tribunal concluded that for a refusal to deal to have an adverse effect on competition, the practice must create, enhance or preserve the market power of the remaining market participants.[24] This analysis requires that relevant markets be defined using "the conventional hypothetical monopolist approach to market definition."[25]

The new price maintenance provision requires that adverse effects be assessed with reference to "a market" but does not specify the level in the distribution chain in which effects are to be measured. Where resellers, such as

automobile or consumer electronics dealers, have invested heavily in a particular brand, with the result that their investment in the brand acts as a disincentive to switching, the product market at the upstream supplier/downstream reseller level could in theory be limited to the brand and exclude functionally interchangeable products to which buyers are unlikely to switch. However, it will be the rare case in which price maintenance has an adverse effect on competition at that level in the distribution chain. A supplier in a single-brand market will always have market power but will also generally be free to control the wholesale supply of its own products; although RPM may have an adverse effect on the *business* of a reseller, such as a discounter, it is not clear how RPM could have an adverse effect on *competition* for the supply or purchase of the single-brand product. Thus, the competitive-effects assessment is likely to occur downstream, at the end-consumer level, which is where the effect of price maintenance is felt. Downstream, a single supplier's products will usually compete with other suppliers' products and, in most cases, RPM is unlikely to enhance or preserve market power.

Under the hypothetical monopolist test, it would be unusual for the Tribunal to define a market around a single supplier's product or products. As the U.S. District Court considering *Leegin* on remand noted, U.S. "courts have regularly held that a single brand, no matter how distinctive or unique, cannot be its own market."[26] In *Green Country Food Market, Inc. v. Bottling Group, LLC*, the Tenth Circuit noted, "[e]ven where brand loyalty is intense, courts reject the argument that a single branded product constitutes a relevant market."[27] Similarly, the Fifth Circuit has held that "absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market."[28] The Tribunal and Canadian courts will adopt and have adopted similar reasoning to arrive at similar conclusions.[29]

Therefore, although price maintenance diminishes, and may eliminate, intra-brand price competition—competition between retailers in connection with the sale of a single supplier's products—this will rarely have an "adverse effect on competition" because the market in which competitive effects will be measured will almost always be much larger than the single brand affected by the practice. The actions of a single supplier are therefore unlikely to have adverse competitive effects, as long as the broader relevant market is competitive and adverse effect is accorded a reasonably significant meaning.[30] In broadly defined product markets, and assuming a meaningful adverse-effect standard, price maintenance is only likely capable of producing adverse effects where it is engaged in by a dominant supplier or retailer and even then only in relatively rare circumstances.[31] (RPM that is used to support a cartel would in most cases likely be prosecuted under the criminal price-fixing provisions of the Act.)

All of that said, the first price maintenance case in Canada under the new provision will be closely observed. Given that price maintenance was *per se* illegal in Canada and the United States until very recently—and remains so in other jurisdictions—the competitive impact of the practice has been rarely considered by courts and administrative tribunals. As the debate about the competitive effects of price maintenance shifts from academic literature to administrative tribunals and courts, Canada may well be at the analytical forefront.

Decreased Likelihood of Enforcement

The move from a criminal offense to a reviewable practice also has a number of significant procedural ramifications. Private parties now need to obtain leave from the Tribunal to bring an application, and class actions are not possible. Moreover, the Tribunal is not authorized to impose fines or other penal sanctions, or to award damages[32] in connection with reviewable matters.[33] In addition, as noted above, the scope of the provision has in substance been narrowed: it applies only to vertical price maintenance, not horizontal behavior, and there is also a requirement to prove an adverse effect, so a much narrower range of conduct is caught compared with the criminal offense. The collective impact of these changes is that the ability and incentives for the Commissioner and private parties to initiate and win proceedings have been significantly reduced.

Applications by the Commissioner will likely be infrequent. Under the criminal price maintenance offense there was, on average, one case a year over the past decade: see Table 1 at the end of this article. (That also overstates recent enforcement levels because, as shown in Table 1, no prosecutions have occurred since 2007.) However, many of the most recent cases would likely have been challenging for the Commissioner under an adverse-effect standard. Some notable and high profile cases in the early 2000s involved Toyota automobiles, John Deere lawn tractors, Stroh's beer and Labatt beer.[34] It is difficult to imagine that the Tribunal would have concluded that the RPM alleged in those cases would have adversely affected competition in markets for the relevant products. The difficulty of developing a strong case that RPM has had an adverse effect on competition will therefore likely deter the Commissioner from acting in all but the most egregious circumstances. Although no doubt there will be cases over time, public enforcement under the Act's specific RPM provision is almost certain to be even more constrained than it was prior to the amendments.[35]

Private enforcement is also likely to decline. Civil actions for damages in connection with the criminal price maintenance offense were rare. As noted in Table 2, there was, on average, slightly more than one case a year over the past decade. However, more than half of the cases initiated since 2000 involved class actions, and several alleged horizontal price maintenance, a procedural option and substantive allegation that is no longer possible. This suggests that even the prior low level of private enforcement is unlikely to continue.[36]

To initiate proceedings, a private applicant will need to obtain leave by establishing that it has been "directly affected" by the practice.[37] This is different from the leave requirement for other reviewable practices, which imposes an additional requirement that the Tribunal find that the applicant has been "substantially affected" in its business.[38] The difference may have been intended to permit consumers as well as businesses to commence proceedings. However, without the prospect of class proceedings or damage awards, it is difficult to imagine situations in which a consumer affected by RPM would be willing to initiate an RPM proceeding, which would almost certainly involve a complex and protracted (and therefore expensive) consideration of competitive effects. Therefore, although the leave standard is relatively low, it is unlikely to encourage a large number of consumer applicants.[39] Applications by distributors, retailers and other resellers are more likely, because these market participants may have a strong economic interest in preventing RPM (*e.g.*, discounters that want to compete downstream on price). But, as noted above, these applicants, even if granted leave, may have a difficult time establishing an adverse effect in an upstream or downstream market, other than in relatively unusual circumstances.

Conclusion

Canada's new price maintenance provision should enable businesses to implement a wide range of RPM practices that until recently would have been highly risky or clearly illegal. This is not to suggest that challenges or uncertainties do not lie ahead. The precise meaning of the test of adverse effect on competition has yet to be established and the extent to which the Tribunal will consider pro-competitive efficiency-enhancing justifications for RPM is uncertain. Moreover, RPM engaged in by dominant suppliers or retailers is likely to draw the attention of the Commissioner and could result in enforcement action. RPM involving horizontal competitors (*e.g.*, in dual distribution systems) could run afoul of a new and stringent criminal price-fixing offense. Nevertheless, the significance of the recent amendments should not be understated. In place of a broad *per se* criminal offense punishable by unlimited fines and up to five years of imprisonment, Canada has a civil regime that permits RPM except where it has an adverse effect on competition, with contraventions addressed through remedial orders.[40] For the vast majority of suppliers seeking to engage in RPM, Canada now provides a welcome home.

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* Omar Wakil is a partner and Sue-Anne Fox is an associate in the Competition and Antitrust Group of Torys LLP. We are indebted to Lilla Csorgo, Vice President, Charles River Associates, for her comments on an earlier draft of this article.

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[1] R.S.C. 1985, c. C-34, as amended [the "Act"].

[2] JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON COMBINES LEGISLATION, RESALE PRICE MAINTENANCE, AN INTERIM REPORT OF THE COMMITTEE TO STUDY COMBINES LEGISLATION (1951) [the "MacQuarrie Report"].

[3] *Id.* at 71.

[4] S.C. 1960, c. 34, s. 14. The statutory defenses in the Act protect suppliers who refuse to supply to discounters where the Tribunal is satisfied that the customer was using the supplier's products as loss-leaders or for bait-and-switch selling, was engaging in misleading advertising or was not providing a reasonable level of service for such products.

[5] S.C. 1974-75-76, c. 76. Other amendments included broadening the offense to cover the sale of services (not only articles) and to apply to attempted price maintenance. Although reselling of services may still technically be caught by s. 76 of the Act, it is difficult to imagine practical circumstances in which this could occur.

[6] Prior to the 1976 amendments, the offense of price maintenance under the Act (formerly the Combines Investigation Act) was worded as follows:

> 37A. (1) In this section 'dealer' means a person engaged in the business of manufacturing or supplying or selling any article or commodity.
>
> (2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatsoever, require or induce or attempt to require or induce any other person to resell an article or commodity
> (a) at a price specified by the dealer or established by agreement,
> (b) at a price not less than a minimum price specified by the dealer or established by agreement,
> (c) at a markup or discount specified by the dealer or established by agreement,
> (d) at a markup not less than a minimum markup specified by the dealer or established by a agreement, or
> (e) at a discount not greater than a maximum discount specified by the dealer or established by agreement, whether such markup or discount or minimum markup or maximum discount is expressed as a percentage or otherwise.
>
> (3) No dealer shall refuse to sell or supply an article or commodity to any other person for the reason that such other person
> (a) has refused to resell or to offer for resale the article or commodity
> (i) at a price specified by the dealer or established by agreement,
> (ii) at a price no less than a minimum price specified by the dealer or established by agreement,
> (iii) at a markup or discount specified by the dealer or established by agreement,
> (iv) at a markup not less than a minimum markup specified by the dealer or established by agreement, or

(v) at a discount not greater than a maximum discount specified by the dealer or established by agreement,

(b) has resold or offered to resell the article or commodity

(i) at a price less than a price specified by the dealer or established by agreement,

(ii) at a markup less than a markup or minimum markup specified by the dealer or established by agreement, or

(iii) at a discount greater than a discount or maximum discount specified by the dealer or established by agreement.

After the 1976 amendments, the offense was worded as follows:

38.(1) No person who is engaged in the business of producing or supplying a product, or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade mark, copyright or registered industrial design shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

[7] Formal enforcement proceedings include all convictions, acquittals, stays of proceedings or dropped charges in a given year. See Lilla Csorgo, *Review of Recent Developments in Canadian Price Maintenance Policy and Enforcement*, 21 CAN. COMPETITION REC. 22, 23 (2004).

[8] ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA, REPORT, vol. 2, 224 (1985).

[9] CANADA COMPETITION BUREAU, ANTICOMPETITIVE PRICING PRACTICES AND THE COMPETITION ACT: THEORY, LAW AND PRACTICE (1999) [the "VanDuzer Report"].

[10] CANADA, STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY, A PLAN TO MODERNIZE CANADA'S COMPETITION REGIME, 73FF (2002) (Chair: Walt Lastewka).

[11] Canada, Bill C-19, *An Act To Amend the Competition Act and To Make Consequential Amendments to Other Acts*, 1st Sess., 38th Parl., 2004. Bill C-19 ultimately died on the ordered paper in November 2005 when the government was dissolved and a new election called.

[12] CANADA, COMPETITION POLICY REVIEW PANEL, COMPETE TO WIN: FINAL REPORT – JUNE 2008, 58 (2008) (Chair: L.R. Wilson).

[13] 551 U.S. 877 (2007) [*Leegin*].

[14] *Supra* note 12 at 61.

[15] Canada, Bill C-10, *An Act To Implement Certain Provisions of the Budget Tabled in Parliament on January 27, 2009 and Related Fiscal Measures*, 2nd Sess., 40th Parl., 2009 (assented to 12 March 2009), S.C. 2009, c. 2.

[16] The Tribunal, a quasi-judicial administrative body, has exclusive jurisdiction to hear applications brought by the Commissioner and, in some cases, private applicants with leave, in respect of reviewable practices, which include deceptive marketing practices; abuse of dominance; mergers; and non-price vertical restraints such as refusal to deal, tied selling and exclusive dealing.

[17] Under the criminal offense, attempts to influence price were also prohibited.

[18] Horizontal RPM is assessed under the conspiracy offense (s. 45) and, effective as of March 12, 2010, may also be assessed under the new civil reviewable matter addressing collaboration between competitors (s. 90.1).

[19] Moreover, the exemptions apply only if a downstream distributor has been refused supply because of its low pricing. If a downstream distributor has induced a supplier to adopt an RPM program and is still being supplied, an upstream supplier cannot rely on the statutory exemptions.

[20] The Act permits a supplier to make a suggestion of a minimum resale price, provided that it is clear to the recipient that he is under no obligation to accept the suggestion and will in no way suffer in his business relations with the person making the suggestion or with any other person if he fails to accept the suggestion. See Act, *supra* note 1, subs. 76(5). The Act also permits product suppliers (other than retailers) to publish advertisements that indicate resale prices for their products, provided that the advertisement is clear that the product may be sold at a lower price. See Act, *supra* note 1, subs. 76(6).

[21] Act, *supra* note 1, subs. 76(2).

[22] (2006), 2006 Comp. Trib. 42 (Competition Trib.) [*B-Filer*].

[23] (2009), 2009 Comp. Trib. 6 (Competition Trib.) [*Nadeau*]. A notice of appeal was filed on September 9, 2009; the appeal is still pending.

[24] *B-Filer*, *supra* note 22, at para. 208. The adverse-effects test is likely to be applied differently in RPM cases given that the impact on competition in an RPM case may be different from the impact on competition in a refusal case. This is because RPM may, but will not necessarily, result in a supplier or reseller potentially exiting the market, which was the case in the two refusal to deal cases in which the Tribunal considered the scope of the adverse-effects test. Higher (retail) prices alone would almost certainly not be sufficient to establish an adverse effect.

[25] *Nadeau*, *supra* note 23, at para. 310.

[26] *PSKS, INC. v. Leegin Creative Leather Prods., Inc.*, No. CV 2:03 CV 107 (TJW), 2009 WL 938561 (E.D. Tex. Apr. 6, 2009).

[27] *Green Country Food Market, Inc. v. Bottling Gp., LLC*, 371 F.3d 1275, 1282 (10th Cir. 2004).

[28] *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984).

[29] Neither the Tribunal nor Canadian courts have used the hypothetical monopolist test to define a relevant product market around a single brand of consumer product. In 1989 and 1990,

the Tribunal did adopt single-brand markets in two refusal to deal cases involving the after-market sales of proprietary parts, although neither case involved a rigorous assessment of market definition. In *Canada (Director of Investigation & Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Competition Trib.), the Tribunal ordered Chrysler Canada to continue supplying Chrysler parts to Mr. Ralph Brunet, an auto parts exporter, on the basis that Mr. Brunet's business had been substantially affected by the refusal because of his inability to obtain adequate supplies of Chrysler parts in Canada. In *Canada (Director of Investigation & Research) v. Xerox Canada Inc.*, (1990), 33 C.P.R. (3d) 83 (Competition Trib.), the Tribunal ordered Xerox Canada to continue supplying Xerox parts to Exdos Corporation, an independent service organization involved in the business of refurbishing and servicing Xerox copiers, on the basis that Exdos was unable to obtain adequate supplies of Xerox parts because of insufficient competition among suppliers of Xerox parts in Canada. In both cases, the Tribunal based the relevant market on demand from the customers of the person refused supplies, and whether substitutes were acceptable to those customers. However, these cases are of limited precedential value and should not be regarded as a signal that the Tribunal is predisposed to defining a market around a brand. In *B-Filer* and *Nadeau*, the Tribunal clarified that such an approach would not be followed when defining the relevant market in respect of the "adverse effect on competition" element of that provision.

[30] See *B-Filer*, *supra* note 22 at 196ff; *Nadeau*, *supra* note 23 at 365ff.

[31] The U.S. Supreme Court in *Leegin* "identified four circumstances in which the use of RPM might be anticompetitive: (1) when used by a manufacturer cartel to detect cheating on a price-fixing agreement; (2) when used to organize a retailer cartel by coercing manufacturers to eliminate price cutting; (3) when used by a dominant retailer to protect it from retailers with better distribution systems and lower cost structures, thereby forestalling innovation in distribution; and (4) when used by a manufacturer with market power to give retailers an incentive not to sell the products of smaller rivals or new entrants." See Christine A. Varney, *A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason*, 24 ANTITRUST 22, 24 (2009).

Even in circumstances involving cartel or dominance-related concerns, it is not clear when or why the Commissioner would commence a proceeding under s. 76 as opposed to other provisions of the Act. Where RPM is used to support manufacturer or retailer cartels, the Commissioner should be expected to proceed under the criminal price-fixing provision of the Act (s. 45). That said, there may be limited circumstances in which s. 76 would permit enforcement in cartel-like circumstances where s. 45 would not be applicable. Section 76 may not necessarily require the Commissioner to establish an agreement between the horizontal competitors; an agreement between marketplace recipients with only vertical relationships may be sufficient. Where RPM is engaged in by a dominant retailer or manufacturer, the Commissioner may proceed under the Act's specific abuse of dominance provision (s. 79), although in that case an incentive to proceeding under the specific RPM provision (s. 76) would be the lower competitive-effects standard. The competitive effects standard in s. 76 is "adverse," a lower standard that "substantial lessening", as noted in the text.

Concurrent proceedings under the pricing-fixing provision or abuse of dominance provision are prohibited pursuant to subs. 76(11). Private enforcement of s. 45 is possible pursuant to s. 36 of the Act but private enforcement of s. 79 is not. A private party interested in commencing a RPM claim against a dominant manufacturer or retailer would therefore be limited to a s. 76 proceeding.

As a technical matter, it is not clear that the price maintenance provision would apply to situations in which the independent conduct of multiple suppliers would give rise to a potential concern about adverse effects. Section 76 refers to circumstances in which "a person" engages in price maintenance. In contrast, the abuse of dominance provision specifically refers to circumstances involving "one or more persons" (para. 79(1)(a)) and the tied selling and exclusive dealing provisions refer to circumstances in which the impugned conduct is "engaged in by a major supplier […] or because it is widespread in a market" (subs. 77(2)). Subsections 33(2) and 3(1) of the Interpretation Act state, "Words in the singular include the plural" and vice-versa unless a contrary intention appears, but it is not clear whether these provisions would or would not effectively allow for the application of s. 76 to circumstances in which "a person or persons" engaged in RPM.

[32] There is a limited right of action under the Act for damages resulting from a failure to comply with an order of a court or the Tribunal, including an order of the Tribunal prohibiting a reviewable practice. As a result, if suppliers or producers are ordered to terminate their price maintenance practice and they do not comply, a reseller would have a right to bring an action for damages in these circumstances. See Act, *supra* note 1, s. 36(1)(b).

[33] Under the Act, anyone who has suffered loss or damage as a result of a breach of one of the criminal provisions is entitled to bring a civil action for damages equal to the actual loss suffered, plus the costs of investigating the misconduct and of bringing the proceeding. When price maintenance was a criminal offense, at least 14 reported civil actions since 2000 were commenced by claimants seeking to recover damages, none of which were successful. A majority of the actions for damages in respect of price maintenance have been initiated by individuals seeking to obtain certification as a class proceeding (see Table 2 above). In these cases, however, the hurdles to certification are largely the reason why damages have not been awarded in recent history.

[34] See Press Release, *Competition Bureau Settles Price Maintenance and Misleading Advertising Case Regarding the Access Toyota Program* (Mar. 28, 2003), http://www.bureaudelaconcurrence.gc.ca /eic/site/cb-bc.nsf/eng/00300.html; Press Release, *Consumers to be Reimbursed by John Deere Limited* (Oct. 19, 2004), http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/00248.html; Press Release, *Competition Bureau Investigation Leads to a $250,000 Fine in a Price Maintenance Case* (Oct. 10, 2002), http://www.bureaudelaconcurrence.gc.ca/ eic/site/cb-bc.nsf/eng/00454.html; and Press Release, *Labatt Pleads Guilty and Pays $250,000 Fine following a Competition Bureau*

Investigation (Nov. 23, 2005), http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02003.html.

[35] The Commissioner may not initiate proceedings under the price maintenance provision if she has initiated proceedings on the basis of substantially similar facts under the abuse of dominance provision. See subs. 76(11). However, the Commissioner could initiate a price maintenance proceeding under the abuse of dominance provision because the Act does not exhaustively define anti-competitive acts for the purposes of abuse of dominance.

[36] Some caution should be exercised when predicting future litigation trends on the basis of historic patterns. The strict *per se* nature of the criminal offense coupled with severe sanctions would have undoubtedly reduced the overall level of RPM in the Canadian economy. The financial and reputational risks associated with a civil s. 76 proceeding/adverse Tribunal decision have been diminished, making it more likely that suppliers will engage in the conduct. In other words, there may have been few cases because there was relatively little RPM. That is very likely to change over time, meaning that the pool of potential candidate cases post-2009 is likely to be much larger than pre-2009. Nevertheless, the prospects of increased litigation are low, for reasons discussed in the text of the article.

[37] Act, *supra* note 1, subs. 103.1(7.1).

[38] *Id.*, subs. 103.1(7).

[39] To date, there have been 20 applications for leave, none of which have been for price maintenance. The Tribunal has denied leave in more than a majority of applications because of the applicant's failure, in most instances, to establish that the conduct had a substantial effect on its business. Five applications for refusal to deal were granted leave, but only two have proceeded to a hearing on the merits (i.e., *B-Filer* and *Nadeau*). Two proceedings were dismissed on consent: see *Quinlan's of Huntsville Inc. v. Fred Deely Imports Ltd.* (2004), 2004 Comp. Trib. 15 (Competition Trib.) and *Robinson Motorcycle Ltd. v. Fred Deeley Imports Ltd.* (2005), 44 C.P.R. (4th) 146 (Competition Trib.). Another proceeding was discontinued by the applicant: see *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.* (2004), 2004 Comp. Trib. 4 (Competition Trib.).

[40] At the present time, there are no conflicting provincial or federal laws or proposals for further legislative change.

Table 1: RPM Court Proceedings, Judgments and Court Orders (Since 2000)			
Date	**Parties**	**Outcome**	**Product**
2000	*R. v. Irving Oil*	Dismissed following preliminary inquiry.	Gasoline
2001	A supplier of assessment tests *(The Bureau did not reveal the names of the companies involved)*	Prohibition order.	Assessment tests
2002	*R. v. Sherwood Co-operative Association Limited*	Dismissed following preliminary inquiry.	Gasoline
2002	*R. v. The Stroh Brewery Company (Quebec) Ltd.*	Conviction.	Beer
2003	*R. v. Re/Max Ontario Atlantic Canada Inc., Re/Max of Western Canada, and Re/Max International Inc.*	Consent prohibition order.	Real estate agency services
2003	*R. v. Toyota Canada Inc.*	Consent prohibition order.	Automobiles
2003	*R. v. Toyo Tanso USA Inc.*	Conviction.	Isostatic graphite
2004	*R. v. Royal Group Technologies (Quebec) Inc.*	Conviction.	Polyvinyl chloride window coverings
2005	*R. v. Labatt Brewing Company Limited*	Conviction.	Beer
2007	*R. v. Shamrock Maintenance & Hotshot Services Ltd., Pete's Custom Coachwork, Birchwood Auto Body, Alberta Motor Products Ltd., Noral Motors, and Lane's Auto Shop*	Consent prohibition order.	Auto body repairs

* This table does not include circumstances in which a company was not charged with the criminal RPM offense. For example, in 2004 the Competition Bureau investigated allegations into a practice by John Deere Limited, but Deere was not charged with an offense and did not admit liability, although it did agree to voluntary rebates to address the Commissioner's concerns.

Table 2: Civil Actions for RPM (Since 2000)					
Date	**Parties**	**Outcome**	**Product**	**Vertical / Horizontal**	**Class Action**
2001	*Wong v. Sony of Canada Ltd.*	Motion denied. Plaintiffs statement of claim disclosed reasonable cause of action.	Consumer electronics	Vertical	Yes
2002	*585080 Ontario Ltd. v. Toshiba Canada Ltd.*	Motion to strike pleading was allowed in part.	Consumer electronics	Vertical	No
2002	*Ford v. F. Hoffman-La Roche Ltd.*	Motion dismissed.	Vitamins	Horizontal	Yes
2002	*Price v. Panasonic Canada Inc.*	Not certified as a class action.	Audio-visual equipment	Vertical	Yes
2004	*351694 Ontario Ltd. v. Paccar of Canada Ltd.*	Motion was denied in respect of para. 61(1)(b) as there was evidence of refusal to supply.	Trucks and parts	Vertical	No
2006	*Skybridge Investments Ltd. v. Metro Motors Ltd.*	Dismissed.	Automobiles	Vertical	No
2007	*Harmegnies v. Toyota Canada Inc.*	Not certified as a class action.	Automobiles	Vertical	Yes
2007	*Axiom Plastics Inc. v. E.I. Dupont Canada Co.*	Certified as a class action (in part).	Engineering resins	Vertical and horizontal	Yes
2008	*Steele v. Toyota Canada Inc.*	Not certified as a class action.	Automobiles	Vertical	Yes
2008	*Leone's Music World v. Jam Industries*	Motion allowed. Plaintiff's statement of claim was struck.	Musical equipment and accessories	Vertical	No
2008/ 2009	*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*	Certified as a class action.	Food supplies	Vertical and horizontal	Yes
2009	*Robinson Motorcycle Ltd. v. Fred Deeley Imports Ltd.*	Dismissed.	Motorcycles	Vertical	No

CONSUMER REBATES IN CANADA: GUIDANCE FROM THE COMPETITION BUREAU

By Mark Katz*

With the repeal in March 2009 of the Competition Act's various pricing offences, the focus in Canada is shifting to pricing as a consumer protection issue rather than as a matter of traditional competition law enforcement.[1]

As part of that trend, the Competition Bureau released several publications in 2009 setting out its approach to consumer rebate promotions. In September 2009, the Bureau published enforcement guidelines on consumer rebate promotions (the "Consumer Rebate Guidelines").[2] This was followed in December 2009 with a pamphlet for consumers timed to coincide with the Christmas shopping season: *Rebates*: *The Real Deal*.[3]

The key aspects of the Bureau's enforcement approach are set out in the Consumer Rebate Guidelines, which make the following points of note:

Definition of "Consumer Rebate"

According to the Bureau, "consumer rebates" include any type of promotion that involves a manufacturer or retailer offering a partial refund or discount to consumers upon the purchase of a product. "Consumer rebates" do not include gift cards or other forms of credit on future purchases.

There are two types of consumer rebates: "instant" rebates and "mail-in" rebates. "Instant" rebates are received at the time of purchase and are generally available to anyone who purchases the product, without further condition. "Mail-in" rebates refer to any rebate that consumers have to apply for (e.g., by mail or online) and that involve some sort of delay in payment.

Relevant Provisions

The most important legal provisions governing rebate promotions are the sections of the Competition Act dealing with misleading representations:

- Section 52 of the Competition Act makes it a criminal offence to knowingly or recklessly make a materially false or misleading representation to the public to promote the supply or use of a product or business. Persons who commit the offence are liable to fines and/or imprisonment.[4]
- Section 74.01(1)(a) of the Competition Act applies to materially false or misleading representations where the "knowingly or recklessly" element is lacking. In those circumstances, the Competition Bureau can apply to the Competition Tribunal or a court for relief. Possible remedies include a cease and desist order prohibiting further misrepresentations; the requirement to publish a corrective notice; payment of an "administrative monetary penalty"; or payment of restitution to parties to whom the product was sold.[5]

To be "material" for the purposes of sections 52 and 74, a representation must influence a consumer's buying decision,[6] although the authorities do not have to prove that any consumers were actually misled.[7] The Consumer Rebate Guidelines state that the Bureau will generally consider representations about prices and rebates to be material to a consumer's buying decision because they induce consumers to buy products that might not otherwise be purchased. When evaluating whether a representation is "false or misleading," consideration must be given to the "general impression" conveyed by the representation as well as its literal meaning.[8]

Other potentially relevant legislative provisions include:

- sections 74.01(2) and (3) of the Competition Act, which govern comparisons between a purported "sale price" and the "ordinary price" at which a product was sold;
- section 7 of the Consumer Packaging and Labelling Act, which prohibits making false or misleading representations on pre-packaged products;[9] and
- section 5 of the Textile Labelling Act, which prohibits the making of false or misleading representations relating to consumer textile articles.[10]

Scope of Potential Liability

Depending on the circumstances, liability for making false or misleading representations relating to consumer rebates can be attributed to manufacturers, importers, retailers or even fulfillment houses.

- Potential liability for violating any of the relevant Competition Act provisions will generally be an issue for the manufacturer of the product in question because manufacturers usually design the rebates for their products and set the conditions. However, if the manufacturer is located outside of Canada, the misleading representation is deemed to have been made by the "person who imports" the product into Canada.[11] This could be an importer or even a retailer if importing directly. Retailers also may be liable if they make their own misleading representations about a rebate (for example, in a flyer or on a website or in-store display). Similarly, fulfillment houses that manage rebate programs may be held responsible if they make

their own misleading representations relating to a rebate.

- Potential liability under both the Consumer Packaging and Labelling Act and the Textile Labelling Act is more expansive than under the Competition Act. Pursuant to these statutes, both the manufacturer and the retailer are liable for misleading representations unless the manufacturer is located outside of Canada, in which case the importer and the retailer may be liable.[12]

Typical False or Misleading Representations Relating to Consumer Rebates

According to the Bureau, issues with consumer rebate promotions generally arise in the following ways:

- inadequate disclosure of conditions, limitations and exclusions;
- creating the impression that the product is "on sale" or that the rebate will be credited at the time of purchase, when, in fact, consumers will have to apply for a price reduction which they will only receive later;
- creating the impression that any applicable sales taxes are calculated on the rebate price rather than on the regular price (for example, federal policy requires that federal sales taxes be calculated on the before-rebate price);
- misleading consumers into believing that they will receive a rebate on a product when they will actually receive a gift card or a credit that can be used towards a future purchase; and
- failure to fulfill mail-in rebates.

Best Practices

The Consumer Rebate Guidelines set out suggested "best practices" on how businesses may avoid misleading consumers with their rebate promotions.[13] These suggestions include:

- Clearly and prominently disclosing all applicable conditions, limitations or exclusions. Examples of material conditions include: the information to be provided by the consumer (e.g., if more than a receipt is necessary); the deadlines for submitting a claim; any requirement to purchase another product; any geographic restrictions or restrictions on eligible retailers; and any limits on the number of rebates that can be claimed.
- Clearly showing the price consumers will have to pay at the time of purchase (including applicable taxes).
- Clearly indicating the amount of the rebate that may apply.
- Refraining from using the term "sale" in conjunction with a consumer rebate.
- Clearly identifying if the rebate is instant or mail-in.
- Not referring to gift cards or future discounts on purchases as "rebates."
- Ensuring that rebate payments are made within a reasonable time frame and in such a way that the consumer can easily identify them as rebate payments. This may entail appropriate supervision of fulfillment houses and other third-party service providers.

As the Bureau notes in its various publications, consumer rebates provide businesses with a flexible tool to help increase their volume of sales. The Bureau's concern, however, is that rebates be promoted and administered fairly so that consumers are not misled into paying more than intended and "honest" competitors are not disadvantaged.

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[1] The amending legislation ("Bill C-10") is available at http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=40&Ses=2&Mode=1&Pub=Bill&Doc=C-10_4&File=9 . Pursuant to the amendments, the Competition Act's price discrimination, predatory pricing, geographic price discrimination, promotional allowances and price maintenance offences were repealed. A new civil "reviewable practice" was created to replace the repealed price maintenance offence. Unlike the old offence, however, which contained a *per se* prohibition against price maintenance, the new civil provision requires proof that the conduct in question have an "adverse effect on competition in a market." See section 76 of the Competition Act, R.S.C. 1985, c. C-34, as amended.

[2] See http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Rebates-e.pdf/$file/Rebates-e.pdf.

[3] See http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/20091015_PamphletWeb_Rebates-e.pdf/$FILE/20091015_PamphletWeb_Rebates-e.pdf.

[4] Section 52(5) of the Competition Act. The maximum prison term for the misleading representation offence was increased in March 2009 from five to 14 years. See Bill C-10, *supra* note 1. The maximum fine is in the discretion of the court.

[5] Section 74.1(1) of the Competition Act. The maximum "administrative monetary penalty" was increased in March 2009 to CDN$750,000 for individuals (CDN$1 million for each subsequent violation) and CDN$10 million for a corporation (CDN$15 million for each subsequent violation). See Bill C-10, *supra* note 1.

[6] *Maritime Travel Inc.* v. *Go Travel Direct.com Inc.* (2008), 66 C.P.R. (4th) 61 (N.S.S.C.), aff'd (2009), 276 N.S.R. (2d) 327 (N.S.C.A.).

[7] Sections 52(1.1) and 74.03(4) of the Competition Act.

[8] Sections 52(4) and 74.03(5) of the Competition Act.

[9] R.S. 1985, c. C-38.

[10] R.S.1985, c.T-10.

[11] Sections 52(2.1) and 74.03(2) of the Competition Act.

[12] See the broad definition of "dealer" in section 2 of the Consumer Packaging and Labelling Act and section 2 of the Textile Labelling Act.

[13] A few helpful examples, complete with illustrations, are also provided.

PRACTICAL ADVICE TODAY: HAS RESALE PRICE MAINTENANCE COUNSELING CHANGED POST-*LEEGIN*?

By Daniel A. Sasse and Chahira Solh*

Some time has passed since the United States Supreme Court's 2007 decision in *Leegin Creative Leather Products v. PSKS, Inc.*[1] overruled nearly a century of precedent by declaring that under federal law, minimum resale price maintenance (RPM) agreements would no longer be deemed *per se* illegal under Section 1 of the Sherman Act, but would instead be subject to a rule of reason analysis. The question remains, however, as to whether this shift to a rule of reason analysis in the federal courts has made a difference in how companies and their counsel now approach RPM.

At first blush, one may think that *Leegin* allowed for more aggressive unilateral RPM policies or even RPM agreements between manufacturers and retailers. And, in fact, many retailers say that since *Leegin*, manufacturers have become increasingly aggressive in forbidding retailers from violating manufacturers' unilateral RPM or Minimum Advertised Pricing (MAP) policies.[2] Of course, manufacturers have always been free to unilaterally implement RPM or MAP policies. But manufacturers seem not to be consulting with retailers or entering into express agreements regarding minimum advertised prices. Accordingly, it appears that *Leegin* may have led to more manufacturers adopting unilateral RPM policies and more aggressively enforcing those unilateral policies, but manufacturers are still only adopting unilateral policies that would have met with pre-*Leegin* approval.

Practical advice, however, has been complicated by several factors. Among others, the patchwork of state antitrust laws on RPM, including Maryland's *Leegin*-repealer statute, has limited the effect of the Supreme Court's decision.[3] In addition, Congress has proposed legislation that would reinstate *per se* analysis by the courts.[4] Companies and practitioners must consider these legislative initiatives when crafting RPM policies.

Even setting aside these very important state and legislative considerations, the courts have given little indication as to how the rule of reason should be applied in RPM cases. The Supreme Court largely left the question to the lower courts, suggesting that they could "establish the litigation structure to ensure the rule [of reason] operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[5] However, there have been relatively few RPM decisions in the intervening years. Christine Varney, Assistant Attorney General for the Antitrust Division at the U.S. Department of Justice recently provided insight into how antitrust enforcers are likely to evaluate RPM the under rule of reason.[6] In the absence of more guidance from courts, Varney's recent speech and article may offer the best insight for counselors.

I. Rule of Reason Guidance and Framework Provided by the Supreme Court

The Supreme Court provided some limited guidance in *Leegin* to help the lower courts apply the rule of reason to RPM cases. It set out three important factors to be considered in applying the rule of reason. First, it is important to consider the extent to which manufacturers use RPM in a relevant market because more careful inquiry is necessary if RPM has widespread use. In addition, the source of the restraint is important because there is a greater likelihood that the restraint is anticompetitive if retailers were the impetus of the restraint. Also, the degree of market power held by the manufacturer or retailer is an important consideration.[7]

The Court also identified four circumstances in which the use of RPM might be anticompetitive: (1) when RPM is used by a manufacturer cartel to police a price-fixing agreement; (2) when RPM is used to create a retailer cartel, with retailers coercing manufacturers to eliminate price cutting; (3) when RPM is used by a dominant retailer to protect it from retailers with better distribution systems and lower cost structures; and (4) when RPM is used by a manufacturer with market power to give retailers an incentive not to sell the products of smaller rivals or new entrants.[8]

Finally, the Court identified five potential procompetitive effects of RPM: (1) increasing interbrand competition by reducing intrabrand competition and, as a result, inducing retailers to provide customer services; (2) preventing free-riding by distributors that do not provide customer services; (3) promoting competition among retailers to provide customer services;[9] (4) facilitating market entry for new firms and brands by guaranteeing favorable margins to "retailers to induce … the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer";[10] and (5) encouraging retailer services that would not normally be provided, even absent free riding.[11]

II. Guidance From the Department of Justice on Rule of Reason Analysis

Notwithstanding the relative lack of post-*Leegin* case law applying the rule of reason to RPM claims, Assistant Attorney General Varney has provided insight into how antitrust enforcers are likely to evaluate RPM agreements

under the rule of reason. Through a speech and an article, Varney has "outline[d] an enquiry that could provide a fair and efficient way to prohibit anticompetitive RPM and also promote a procompetitive RPM."[12]

The proposed enquiry is a structured rule of reason analysis based on a burden-shifting approach under which a plaintiff would be required to make a *prima facie* showing that an RPM agreement exists, describe its scope of operation, and demonstrate the presence of conditions under which RPM is likely to be anticompetitive. Once a plaintiff makes this showing, the burden would shift to the defendant to demonstrate either that its RPM agreements are actually, not merely theoretically, procompetitive or that the plaintiff's characterizations of the marketplace were erroneous.[13] Varney explains that "the defendant would have to establish, at a minimum, that it adopted RPM to enhance its success in competing with rival manufacturers and that RPM was a reasonable method for accomplishing its procompetitive purposes."[14] Varney proposes that the defendant's burden should be proportionate to the strength of the showing made by the plaintiff.

Varney argues that this structured analysis should be employed to determine whether RPM has a procompetitive or anticompetitive effect on the market.[15] She notes that market structure may allow for RPM to be misused or to facilitate four anticompetitive types of behavior: manufacturer collusion, manufacturer exclusion, retailer collusion, and retailer exclusion. Accordingly, businesses and their counsel must consider and understand market structure when providing RPM advice.

A. Manufacturer Collusion

Varney explains that manufacturers might use RPM to facilitate manufacturer collusion because manufacturers can use RPM to help police any pricing agreement. Under her structured rule of reason analysis, a *prima facie* showing would consist of three elements: (1) RPM is used in a majority of sales in the relevant market; (2) structural conditions in the relevant market are conducive to price coordination; and (3) RPM plausibly significantly helps identify cheating.[16]

Varney further proposes how lower courts should apply these three elements. The manufacturers accounting for a majority of sales in the relevant market would need to adopt RPM for it to be an effective tool to police a cartel. Otherwise, it is unlikely that the use of RPM by only some manufacturers would make it possible to detect cheating or pricing below RPM.[17] In addition, price coordination is unlikely in a market that is not concentrated at the manufacturer level. In a transparent wholesale pricing situation, it is unlikely that RPM could make coordination more successful. The lack of transparency in wholesale price, however, may facilitate manufacturer collusion if manufacturers were to adopt uniform RPM.[18]

Under this variant of the structured analysis, the considerations for making a *prima facie* case seem to be vague. It is unclear what the courts might consider sufficient to prove "structural conditions in the relevant market [that] are conducive to price coordination." For example, it may be possible to satisfy this element by showing that a market is sufficiently concentrated so that manufacturers are able to anticipate each other's pricing.

Prior to the *Leegin* decision, manufacturers had been encouraged to document the rationale for implementing an RPM policy. Under the structured rule of reason analysis, manufacturers should follow a similar approach. Therefore, a manufacturer in a concentrated market where RPM is prevalent should document its procompetitive motivation for implementing an RPM policy. Any benefits actually achieved as a result of the policy should also be documented. This information will be necessary and helpful in defending the RPM policy in a government investigation or litigation.

B. Manufacturer Exclusion

Varney explains that manufacturers might use RPM to exclude or "foreclose" certain manufacturers by guaranteeing large margins to retailers and thereby causing them not to carry the products of competitors. A *prima facie* case would require a showing that: (1) the manufacturer has a "dominant position" in the market; (2) the manufacturer's RPM agreements cover "sufficient distribution outlets" to result in "material foreclosure"; and (3) RPM plausibly has a significant foreclosure effect.[19] Varney suggests that absent either of the first two elements, RPM is likely not capable of having a material foreclosure effect; however, Varney provides no further guidance as to what constitutes "material foreclosure."

Varney further proposes that it is not sufficient for a manufacturer to merely have market power. Instead, the manufacturer must possess *substantial* market power and, as a result, substantial power over retailers. Also, at least 30 percent of distribution outlets must be subject to the restraint for RPM to significantly undermine the success of the competitor's distribution efforts. Few companies have this level of market share and distribution dominance, so as to be in a position to foreclose competitors. Furthermore, Varney notes that the plaintiff needs to identify at least one particular foreclosed rival or the foreclosure concern will be too theoretical to merit significant antirust concern.[20]

C. Retailer Exclusion

Varney also discusses a situation in which retailers might seek to use RPM to exclude competition. A *prima facie* case would require a showing of three elements: (1) the retailer (or group of retailers) had "sufficient market power" to coerce manufacturers; (2) coercion by the retailer (or group of retailers) resulted in RPM covering

much of the relevant market; and (3) RPM plausibly has a significant exclusionary effect.[21]

The existence of both market power and retailer coercion is critical in the rule of reason analysis because these elements show that RPM has the potential to exclude. However, manufacturer response to complaints about discounters is insufficient on its own. Varney also noted that the coerced adoption of RPM must include manufacturers accounting for at least 30 percent of sales in the relevant market. The plaintiff is required to identify a specific retailer that is foreclosed. This helps in ensuring that the exclusion potential is not merely theoretical. [22]

Even with the change in the analysis of vertical agreements because of *Leegin*, it is clear that retailers should be careful about encouraging manufacturers to adopt RPM policies. At this time, the line separating what courts may consider "persuasion" instead of "coercion" is unclear. As with most RPM related discussions, a retailer should document its motivation for encouraging a manufacturer to implement an RPM policy.

D. Retailer Collusion

Varney notes that retailers might also use RPM as a means to facilitate collusion by coercing manufacturers to use RPM to help implement and police a retailer cartel. Varney suggested three elements to make a *prima facie* case: (1) RPM is used pervasively; (2) RPM was implemented as a result of coercion; and (3) retailer collusion plausibly could not be thwarted by manufacturers. [23]

In order for retailer collusion to be substantially facilitated, the retailers subject to the restraint should account for at least 50% of the sales in the relevant market. Also, the RPM must result from retailer coercion, not merely retailer persuasion. However, it is unclear where courts may draw the line between coercion and persuasion. There must also be some explanation as to why the manufacturer could not have prevented dealer collusion by integrating into retailing or by sponsoring new dealers. Extensive reliance on well-established retailers carrying the products of many manufacturers should suffice for the third element.[24] Even with the new standards set forth in *Leegin,* retailers and manufacturers still need to be wary of the appearance of retailer collusion.

III. Conclusion

In light of the limited guidance from the Supreme Court and the DOJ's likely approach to RPM as indicated by Assistant Attorney General Varney, sophisticated RPM counseling requires careful consideration of structural factors. While clients prefer bright lines, the rule of reason analysis entails a sliding scale of risk. Counselors must consider (1) whether RPM is prevalent in the industry, (2) the manufacturer's market share and whether the manufacturer has "substantial" market power over retailers, (3) whether the retailer participating in the agreement has market power, and (4) whether the agreement forecloses manufacturers or retailers from competing in the market place. One rule is clear—RPM remains an area that requires careful case-by-case consideration.

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[1] 551 U.S. 877 (2007).

[2] Brad Stone, *The Fight Over Who Sets Prices at the Online Mall*, N.Y. TIMES, February 8, 2010, *available at* http://www.nytimes.com/2010/02/08/technology/internet/08price.html?pagewanted=all.

[3] *See*, *e.g.*, MD. Code. Ann., Com. Law § 11-204(a)(1) (2009). Additionally, it appears that thirteen states have state laws that may prohibit RPM agreements, independent of federal antitrust law. Richard A. Duncan and Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow* Leegin*?*, 27 FRANCHISE L.J. 173 (WTR 2008). Therefore, when counseling on RPM issues, it is necessary to take consider potential enforcement of state antitrust laws, in addition to the enforcement under federal antitrust laws.

[4] There have been several efforts attempting to repeal *Leegin* through legislation. Senators have proposed a bill which would repeal some of the *Leegin* decision. Recently, companies with large online sales like eBay and Amazon have asked Congress to override certain aspects of the *Leegin* ruling. In addition, in October 2009, 41 state attorneys general wrote a letter to Congress arguing that the *Leegin* decision had resulted in higher prices for consumers. *See* Stone, *supra* note 2.

[5] *Leegin*, 551 U.S. at 898.

[6] Christine A. Varney, *A Post*-Leegin *Approach to Resale Price Maintenance Using a Structured Rule of Reason*, 24 ANTITRUST 22 (2009).

[7] *Leegin*, 551 U.S. at 897-898.

[8] *Id.* at 892-894

[9] *Id.* at 890-892.

[10] *Id.* at 891.

[11] *Id.* at 892.

[12] Varney*, supra* note 6, at 22.

[13] Varney suggests that the recent *Babies "R" Us (BRU)* decision, *McDonough v. Toys "R" Us, Inc.*, 638 F. Supp. 2d 461 (E.D. Pa. 2009), provides an example of how a court might employ a structured rule of reason analysis. See Varney, *supra* note 6, at 23. In that case, the plaintiffs alleged that BRU, a dominant retailer of high-end baby products, threatened not to carry products from certain manufacturers unless those manufacturers adopted and enforced policies that prevented discounting by Internet retailers. The BRU court reviewed the *Leegin* factors and determined that the plaintiffs had offered sufficient evidence that BRU was in fact a dominant retailer and that BRU had coerced manufacturers into adopting vertical price restraints to prevent Internet discounting. 638 F. Supp. 2d at 482. The BRU

court used a burden-shifting analysis, requiring the plaintiff initially to produce evidence of anticompetitive effects and, if that burden was met, the burden would then shift to the defendant to show that the challenged conduct promoted a "sufficiently procompetitive" objective. *Id.* (citing *United States v. Brown Univ.*, 5 F.3d 658, 668-69 (3d Cir. 1993)).

[14] Varney, *supra* note 6, at 22.

[15] *Id.* at 24.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 25.

[22] *Id.*

[23] *Id.*

[24] *Id.*