Managing Resale – New Questions About an Old Issue

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A minimum resale price maintenance (MRPM) agreement is one in which a manufacturer and a downstream reseller (wholesaler or retailer) agree to fix the minimum price at which the manufacturer's products will be sold. For many years, all MRPM agreements were conclusively presumed to impose an "unreasonable" restraint on competition among the affected dealers. As a result, the formation of an MRPM agreement was, by itself, deemed to be a violation of Section 1 of the Sherman Antitrust Act.

In a controversial 2007 decision, *Leegin Creative Leather Products v. PSKS*, the Supreme Court of the United States directed lower courts to stop presuming that MRPM agreements are *per se* illegal and to begin evaluating them under a more lenient "rule of reason" standard. Under this new standard, courts must determine whether an MRPM agreement will actually have an adverse effect on competition and whether that effect is "unreasonable."

The Supreme Court's decision to abandon the rule that had made MRPM agreements *per se* illegal has generated a lively antitrust policy debate among enforcement officials and legislators at both the state and federal level. The scope and intensity of this debate reflects a lack of consensus regarding the actual competitive effects of MRPM agreements. Until a greater consensus is achieved, manufacturers will face continuing uncertainty about what they lawfully can do to implement a resale pricing policy.

The Old Rule: Avoid an Express Agreement

Even under prior Supreme Court precedent, a manufacturer has the right to *unilaterally* refuse to deal with (*i.e.*, terminate) a discounting dealer – and the manufacturer's exercise of that right will not, by itself, support an inference that the manufacturer and its dealers have formed an MRPM agreement. That means that a manufacturer can lawfully announce a minimum resale price, declare its intent to refuse to deal with price cutters, and then unilaterally terminate those who sell below the minimum price. To avoid entering into a forbidden MRPM agreement, however, the manufacturer must not threaten, intimidate, or warn the dealer or take any enforcement action other than unilaterally refusing to deal with a non-compliant dealer.

The New Rule: Proceed with Caution

Under the new rule-of-reason analysis, a manufacturer who communicates with a dealer about discount pricing still runs the risk of forming an MRPM agreement, but the existence of such an agreement is no longer automatically illegal. Does this mean that a company can freely discuss dealer discounts in an effort to avoid termination? Should companies that have eschewed resale pricing policies altogether now feel free to demand that their dealers enter into formal MRPM agreements? At least for now, the answer to both of these questions is "no" – because MRPM agreements are not *per se* legal. There are at least three reasons why firms should continue to approach MRPM agreements with extreme caution.

- ***Liability Exposure Under the Rule of Reason:*** It is not yet clear how the courts will apply the rule-of-reason to determine whether MRPM agreements violate the antitrust law. A "full blown"

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rule-of-reason analysis would require the identification of a relevant market and an evaluation of the competitive effects of the MRPM agreement within that market. In the *Leegin* decision, the Supreme Court suggested that, in appropriate MRPM cases, the lower courts could use evidentiary presumptions and proof burdens to produce a more workable "litigation structure" for the rule-of-reason analysis. Lower courts have been reluctant to act on this suggestion. In a 2008 ruling, however, the Federal Trade Commission signaled its willingness to consider a truncated rule-of-reason analysis under which the anticompetitive effects of an MRPM agreement can be found to be "unreasonable" without the elaborate economic proof needed to perform a full blown rule of reason analysis. There is good reason to believe that the recently appointed leadership of federal antitrust enforcement agencies (the Antitrust Division and the FTC) will urge courts, on a case-by-case basis, to apply an abbreviated rule-of-reason. Such an approach would be consistent with the Obama administration's charge to "reinvigorate antitrust enforcement."

- ***Potential Federal Override Legislation:*** Congress may enact legislation that restores *per se* illegality for MRPM agreements. In January 2009, Wisconsin Senator Herb Kohl, chairman of the Senate Judiciary Committee's subcommittee on antitrust, reintroduced the Discount Pricing Consumer Protection Act (S. 148), which would make MRPM agreements *per se* illegal again. This bill is attracting considerably more attention than had earlier versions. In February, the FTC began conducting a series of workshops to gather information about how MRPM agreements really work – which should provide grist for the legislative mill. FTC Commissioner Pamela Jones Harbour recently told Congress that abandoning *per se* illegality for MRPM agreements will not be good for consumers. In May, online retail giant eBay came out strongly in favor of Senator Kohl's bill, arguing that MRPM agreements adversely affect small and independent internet retailers. The possible enactment of S. 148 or other federal override legislation cannot be ignored.

- ***State Antitrust Laws:*** MRPM agreements may still be *per se* illegal under various state antitrust laws – which are allowed to co-exist with the federal law. Some states' laws are required to be interpreted in accordance with the prevailing interpretation of federal law. In April of this year, one of those states (Maryland) became the first to enact legislation to restore *per se* illegality for MRPM agreements. The Maryland law only affects retailers doing business in Maryland, but it includes transactions in which Maryland consumers make internet purchases from out-of-state retailers. If upheld, this feature of the Maryland law (and other potential state laws) could restore *per se* illegality for MRPM agreements between manufacturers and retailers across the country.

The Supreme Court took an important step when it held that MRPM agreements should no longer be deemed *per se* illegal. At least under federal antitrust law, judicial decisions about the legality of MRPM agreements must now be based on their actual competitive pros and cons. MRPM agreements, however, continue to be the object of suspicion and concern on the part of many judges, enforcement officials, and legislators. Their concerns may be resolved as the policy debate plays out. Until then, caution remains the key note when implementing a resale pricing policy.

If you are considering minimum resale price maintenance arrangements with wholesalers or retailers – or if you have been forced to accept such an arrangement – you should contact your attorney at Moss & Barnett to discuss the antitrust ramifications.

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