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New York's Prohibition of Vertical Price-Fixing

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In *Leegin Creative Leather Products Inc. v. PSKS Inc.*,[1] the U.S. Supreme Court rejected the per se rule against vertical price-fixing, first adopted in *Dr. Miles Medical Co. v. John D. Park & Sons Co*.[2] Thus, henceforth, vertical price-fixing, often referred to as resale price maintenance (RPM), will generally be judged under federal antitrust law's rule of reason.

Under state law, however, RPM arrangements will need to be analyzed on an individual state basis. Although many states defer to federal antitrust precedent in construing state law,[3] this general precept cannot obviate the need for inquiry when a competitive practice is challenged under an individual state's law.

New York's Donnelly Act,[4] for example, "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result."[5] As discussed below, these considerations do, indeed, dictate different state antitrust treatment for RPM than that adopted in *Leegin*. Legislation, enacted in 1975 when New York repealed its Fair Trade Law, establishes that RPM remains a per se Donnelly Act violation.

Vertical Price-Fixing

• ***Federal Authorization for State-Approved Vertical Price-Fixing.*** During the Great Depression, Congress enacted the Miller-Tydings Resale Price Maintenance Act of 1937, which authorized the states to permit RPM.[6] The thrust of the law was to protect small retailers against seemingly ruinous price competition by larger establishments.[7]

In 1952, Congress supplemented Miller-Tydings with the McGuire Resale Price Maintenance Act, which authorized states to make RPM provisions enforceable against nonsignatories to the agreement.[8]

Under this federal safe harbor, New York, like many other states, enacted a Fair Trade Law, which: (1) provided that resale at a "vendor-stipulated" price would not violate New York law, thus effectively adopting an antitrust exemption; and (2) made actionable willful sales or advertising below the stipulated resale price. Horizontal price-fixing was not afforded similar authorization.[9]

Experiment Fails as Consumer Prices Rise

During the inflationary period of the 1970s, there was widespread recognition that state Fair Trade Laws had a deleterious effect. Studies showed that consumer prices in Fair Trade States were higher than in "Free Trade" States, where RPM was not authorized.[10] The New York attorney general held a public hearing on the laws in 1971, and bills to amend the state's law were introduced.[11]

In his 1973 message to the New York Legislature, Governor Nelson Rockefeller called for repeal of the state's Fair Trade laws, which, he said, "are an affront to the American system of competitive free enterprise."[12] Although the New York attorney general, the Federal Trade Commission, and the state Legislature's Select Committee on Consumer Protection all supported repeal, no legislation was forthcoming.[13]

Nationally, in a message to Congress on Oct. 8, 1974, President Gerald Ford urged more law enforcement against price-fixing to combat inflation, and a reduction in price-inflating state regulatory activity.[14] Then-FTC Chair Lewis A. Engman similarly called for eliminating government restrictions that curtailed competition and increased prices.[15]

Evidence in ensuing congressional hearings suggested that Fair Trade Laws cost consumers from $1.5 billion to $3.0 billion per year.[16] As a House Report concluded, "[w]hatever the exact figure, it is beyond dispute that resale price maintenance increases the cost of products to consumers."[17] Not only consumer groups and discount retailers, but also President Ford, the DOJ, the FTC and the Council on Wage and Price Stability called for repeal."[18] In testimony before the Senate, Thomas E. Kauper, the Antitrust Division's head, said that repealing the Miller-Tydings and McGuire Acts "will allow the free hand of the law to fall once more upon those manufacturers and retailers who now, with State permission, are reaching into the pockets of consumers after dollars they could never hope to obtain under totally free market conditions."[19]

By early 1975, an active state level movement to repeal remaining Fair Trade laws was

under way.[20] It was in this environment that New York's Legislature repealed the state's law, and in its place prohibited vertical price-fixing.[21]

New York's Fair Trade Era Ends

In November 1974, Governor-elect Hugh L. Carey created, as part of his transition team, a Task Force on Consumer Protection, which made recommendations in a December 1974 report. Noting that the Fair Trade Laws "apparently keep prices high to the detriment of consumers,"[22] the task force called for repeal. Governor Carey endorsed the recommendation in a Jan. 8, 1975 message to the Legislature. Setting out his consumer protection program, Governor Carey noted that the Fair Trade Law's "unwanted barrier[] to competition . . . should be eliminated forthwith . . . ."[23]

The governor offered proposed legislation a month later, noting that:

> The bill would repeal vertical price-fixing (i.e., between supplier and seller) of certain commodities and prohibit "unfair competition" which is generally defined in terms of undermining the price fixed by any such vertical contract.
>
> It also would render unenforceable any contractual provision restraining a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer.[24]

In March 1975, the governor reiterated the bill's objective: "[t]o restore full competition to the marketplace and to insure that consumers are not victimized by price-fixing schemes,"[25] and he urged the Legislature "to act swiftly . . . to repeal the anachronistic fair-trade laws."[26] The Legislature responded. On May 8, 1975, the governor signed the repealer legislation.[27]

New York's own action catalyzed federal action later in 1975. Congress repealed the Miller-Tydings and McGuire Acts, thereby "declar[ing] the states' experiment with vertical minimum price fixing a failure."[28] Signing the federal measure into law, President Ford commented that "the best way to ensure that consumers are paying the most reasonable price for consumer products is to restore competition in the marketplace."[29]

N.Y. and Vertical Price-Fixing

The New York legislation went beyond mere repeal of the state's Fair Trade Law. In Gen. Bus. L. §369-a, entitled "Price-fixing prohibited," the Legislature also provided

that:

> Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.[30]

For purposes of the statute, "'[c]ommodity' means any subject of commerce."[31]

Section 369-a is a legislative directive that establishing a minimum resale price constitutes unlawful vertical price-fixing. Both the language of the statute and its legislative history make clear that an RPM provision is a per se violation of §340(1) of the Donnelly Act.

Legislative History

As Governor Carey's Consumer Protection Task Force recognized, by "Law allow[ing] manufacturers to set minimum retail prices . . . notwithstanding the ordinary antitrust prohibitions against price-fixing," the Fair Trade Law "lessen[ed] competition, resulting in increased costs to consumers."[32] Indeed, the Assembly debates on repeal estimated the cost to consumers nationwide to be $1.5 billion.[33] Repeal was designed to address this very mischief.

As Governor Carey himself stated, Fair Trade Laws "generally maintain prices at an artificially higher level than would prevail in a free market."[34] By ending the legal basis for RPM, the repealer bill "would permit the lowering of prices to the consumer as a result of the competitive processes operating in a free market place."[35]

The Assembly debate further demonstrates that the purpose of §369-a was to "outlaw" RPM:[36]

- "It would be illegal if we passed this bill."[37]
- "It is just illegal, period . . . .It says you cannot set price. That covenant or provision in a contract is illegal."[38]

The Department of Commerce memorandum on repeal noted that the "bill would make illegal the fixing of the reselling price of commodities by the vendor or producer . . . ."[39] The Budget Department similarly noted that "to promote lower consumer prices,"

the repealer would "specifically prohibit price-fixing by making any such contractual provisions unenforceable and unactionable at law."[40]

Although supporting repeal, the attorney also criticized the bill as too narrow, for it "appears to prohibit only minimum price-fixing and not maximum price-fixing which has also been held to be unlawful . . . ."[41] The New York City Bar Association supported the measure as "well- drafted" to "invalidat[e] contracts that would restrain sales at prices less than those stipulated by the producer of a commodity."[42] Thus, in approving the legislation Governor Carey said that:

> [H]enceforth contracts setting minimum prices for resale of commodities will be unenforceable . . . . This bill . . . would eliminate the legal basis for price maintenance agreements and would subject such agreements to the anti-trust laws . . . . [T]he removal of this unwanted barrier to competition will permit the lowering of prices to the consumer as a result of the competitive processes operating in a free marketplace.[43]

Section 369-a, Donnelly Act

The legislative intent is clear. By repealing the Fair Trade Law and enacting §369-a, the Legislature undertook to stamp out the higher prices that minimum vertical price-fixing caused. Making or enforcing an RPM provision that sets a minimum price is, therefore, prohibited by statute in New York.[44] The question remains to consider the relationship between §369-a and the Donnelly Act, which authorizes criminal and civil remedies, including treble damages, where an unlawful restraint produces injury.[45]

Although the Supreme Court's 1911 *Dr. Miles* decision held that vertical price-fixing was a per se federal antitrust violation,[46] the situation in New York under the Donnelly Act was different. In *John D. Park & Sons Co. v. National Wholesale Druggists Ass'n,*[47] a ruling before *Dr. Miles,* the New York Court of Appeals declined to apply the per se rule to a dealer-induced RPM arrangement. After *Dr. Miles,* state courts rejected per se treatment under the Donnelly Act for vertical price-fixing.[48] Section 369-a was enacted to assure that the case law rule rejecting per se illegality not re-emerge once the Fair Trade Laws were repealed.

Thus, in 1975 the Legislature chose *Dr. Miles* over *National Wholesale Druggists* as a matter of state law, and by statute over-ruled earlier state law court decisions.[49] Case law after New York's repeal of the Fair Trade Laws does, indeed, hold vertical price-fixing to be a per se Donnelly Act violation, albeit by construing state antitrust law to follow federal law, and not by referring to §369-a itself.[50]

In view of §369-a, courts applying New York law should continue to treat vertical price fixing as a per se Donnelly Act violation, regardless of *Leegin's* change in federal antitrust law. The Donnelly Act invalidates "[e]very contract, agreement, arrangement or combination whereby . . . [c]ompetition or the free exercise of . . . activity in the conduct of . . . business . . . is or may be restrained . . . ."[51] A minimum RPM provision indisputably "restrain[s]" price competition by purporting to prevent sales below the fixed price. Section 369-a, however, in its very title, directs that such price-fixing is "prohibited," and, by the statutory text, precludes businesses from lawfully securing any economic benefit from an RPM provision. As the Assembly debates and other parts of the legislative history confirm, the law makes minimum vertical price-fixing "illegal."[52] A business using such a provision, therefore, seeks to restrain trade through an unlawful means.

A business that resorts to RPM cannot be heard to argue that the rule of reason, now applicable under federal antitrust law, applies the Donnelly Act as well. For a court to analyze the arrangement that way could, depending on the facts, result in permitting the RPM provision to operate. That would amount to a court enforcing the RPM agreement, or allowing it to be enforced, exactly what §369-a precludes.[53]

Nor would it be persuasive to argue that, although unenforceable, an RPM clause should be permitted to exist because §369-a does not state expressly that such clauses are "illegal." The statute's title itself declares "price-fixing prohibited," and the law's purpose is to "outlaw" RPM. No legitimate state policy would be served by permitting suppliers to include RPM provisions in their supply arrangements. The only purpose for doing so would be to secure voluntary customer adherence to a contract restraint that the Legislature has denied to the supplier. The way to promote the Legislature's policy of rejection is to subject any supplier who uses an RPM provision to the consequences and remedies available under the Donnelly Act against those restraining trade.

Finally, there is no traction here to an argument that antitrust law generally favors the benefits of interbrand competition at the expense of intrabrand competition. When it comes to minimum RPM, the Legislature has already done the balancing. And it has come down on the side of promoting intrabrand competition. That is not a judgment that the courts may second-guess, either generally or in a specific fact setting: "[t]he wisdom or unwisdom of permitting vertical price-fixing arrangements . . . is for the Legislature and not the Judiciary to determine."[54]

Conclusion

Accordingly, under New York law, minimum vertical price-fixing is a per se antitrust violation that violates the Donnelly Act in and of itself, without any need for inquiry into market conditions or other circumstances. Where use of an RPM provision causes purchasers to be overcharged, the injury should be recoverable under the Donnelly Act's treble damage provision. Subjecting those who use an RPM provision to treble

damages accords with the Legislature's intent to eradicate the increased prices that the Legislature determined vertical price-fixing brings about.

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Endnotes:

1. U.S., 127 S.Ct. 2705 (2007).

2. 220 U. S. 373 (1911).

3. See ABA Section of Antitrust Law, State Antitrust Enforcement Handbook 15-16 (2003).

4. N.Y. Gen. Bus. L. §§340-347.

5. *Anheuser Busch Inc. v. Abrams,* 71 N.Y.2d 327, 335 (1988).

6. 50 Stat. 693 (1937).

7. See generally 1 Earl W. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 461 (1978) ("Antitrust History"); Richard A. Givens, Practice Commentaries, in 19 McKinney's Consol. Laws of N.Y. §369-a, at 519 ("Givens Commentary").

8. 66 Stat. 631 (1952). See generally 1 Antitrust History 551; *Schwegmann v. Calvert Distillers Corp.,* 341 U.S. 384 (1951) (rejecting enforcement against non-signors).

9. L.1935, ch. 976, codified as Gen. Bus. L. §§369-a, b, and d.

10. See, e.g,, Report of the House Committee on the Judiciary, H.R. Rep. No. 341, 94th Cong., 1st Sess., at 3 (1975) ("House Report"); 121 Cong. Rec. S20872-73 (Dec. 2, 1975) (remarks of Sen. Brooke); 120 Cong. Rec. S20362 (Dec. 3, 1974) (remarks of Sen. Brooke), in 1 Antitrust History at 958, 977-78, 949-50.

11. See George C. Mantzoros, Anti-Monopolies Bureau 1-2, in Department of Law, Annual Report (1971).

12. Public Papers of Nelson A. Rockefeller 32 (1973).

13. See Joint Hearing of the Select Committee on Consumer Protection and the Assembly Commerce Committee (Oct. 2, 1973), at 33-34, 37 (testimony of Joseph Fristachi on behalf of Attorney General Lefkowitz: "[S]uch legalized monopolistic price fixing has cost the consumers of this State millions of dollars . . . . [The Fair Trade

statute] has become simply a giveaway of consumer monies to private interests"); 116 (testimony of Meyer S. Tulkoff, FTC assistant regional director); Ninth Annual Report of the Select Committee on Consumer Protection 8-10, 26-27, 36 (1973-74), in V New York State Leg. Doc., No. 22 (1974).

14. Address before a Joint Session of Congress, in 10 Weekly Comp. Pres. Doc. 1239, 1241, 1242 (Oct. 8, 1974).

15. Lewis A. Engman, Address Before the 1974 Fall Conference of the Financial Analysts Federation (Oct. 7, 1974), in 121 Cong. Rec. 1656 (Jan. 28, 1975). See "F.T.C. Chief Calls Role of Agencies Inflationary," N.Y. Times, Oct. 8, 1974, at 1, col. 6.

16. 1 Antitrust History 940.

17. House Report 3, in 1 Antitrust History 958.

18. Report of the Senate Committee on the Judiciary, S. Rep. No. 466, 94th Cong., 1st Sess., at 3 (1975), in 1 Antitrust History 971, 972. See also 121 Cong. Rec. S20873 (Dec. 2, 1975) (remarks of Sen. Roman L. Hruska, R-Neb.: "The Council of Economic Advisors and many other economic, legal and Government experts also have urged the enactment of this bill"), in 1 Antitrust History 979.

19. Hearings before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary on S.408, Part 1, 94th Cong., 1st Sess., at 17 (Feb. 18, 1975). See also id. at 11 (testimony of FTC Chair Lewis A. Engman: repeal "will encourage market innovation, it will reduce prices and it will increase consumer choice in the marketplace"); id. at 43 (Feb. 20, 1975) (testimony of Albert Rees, director of the Council on Wage and Price Stability: "the effect and the intent of these laws is to prevent price competition and to raise gross margins in retailing").

20. See Gerald R. Ford, Remarks at the Conference on Domestic and Economic Affairs, in 11 Weekly Comp. Pres. Doc. 403, 405 (April 18, 1975) ("The state legislative repeal movement, which is underway, is encouraging"); Task Force on Consumer Protection, Report of the Transition Council of the Governor-Elect Hugh Carey 14 (Dec. 17, 1974) (noting that all but 16 States had repealed their Fair Trade Laws, and recommending that New York "follow the modern trend") ("Task Force Report").

21. L.1975, ch. 65.

22. Task Force Report at 13, 14.

23. Public Papers of Hugh L. Carey 36 ("Carey Papers").

24. New York State Legis. Ann. 80 (1975). See also Carey Papers 1292 (Feb. 18, 1975) (announcing Governor's recommendation to abolish "the law permitting price-fixing

between a supplier and his sellers").

25. Carey Papers at 77.

26. Id.

27. L.1975, ch. 65.

28. Pamela Jones Harbour, An Open Letter to the Supreme Court of the United States 12 (Feb. 26, 2007), at http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf. See Consumer Pricing Goods Act of 1975, 89 Stat. 801 (1975); Givens Commentary at 520, 521.

29. 11 Weekly Comp. Pres. Doc. 1367 (Dec. 12, 1975), in 1 Antitrust History 981.

30. L.1975, ch. 65.

31. N.Y. Gen. Bus. L. §369-c.

32. Task Force Report at 13, 14.

33. Assembly Debate on A.3916, at 2071 (Mar. 19, 1975), ("A-Debate"). See id. (remarks of Assemblyman Cooperman: "We have anachronism and it is not a genuine reflection of competition"). See also Senate Debate on S.3716, at 3039-40 (April 17, 1975) (remarks of State Senator John R. Dunne, R-Garden City: "the intended goal and hopefully the effect of this legislation . . . simply would declare to be legally unenforceable any legislation which we know generally as the Fair Trade Law," quoting §369-a's language); id. at 3041 (remarks of Senator Dunne: "this legislation is directed at the goal of reducing prices, to really provide a market place in which the forces of competition may freely act and react to one another").

34. Governor's Program Bill Memorandum 1.

35. New York State Legis. Ann. 80 (1975) (Governor's Memorandum). See also Bill Jacket, L.1975, ch. 65 ("Bill Jacket"), Attorney General Lefkowitz's Memorandum for the Governor 1 (April 29, 1975) ("Any public purpose in the continuation of this exemption to the Anti-trust law has long since wholly evaporated . . . . [S]uch legalized monopolistic price-fixing has cost the consumers in this state millions of dollars") ("Lefkowitz Mem."); Bill Jacket, Department of Commerce Memorandum 1 (April 28, 1975) (The bill "would allow all salable commodities to sell at competitive market prices, free from artificial or contractual restrictions. Its effect would be to lower prices to the consumer for those presently price-fixed items") ("DOC Mem."); City of New York Letter 2 (April 21, 1975) ("fair trade keeps the price of retail products high"); New York Public Interest Group Research 1 (undated) (detailing evidence that "fair trade laws have made products more expensive").

36. A- Debate at 2106, 2112 (remarks of Assemblyman Harvey L. Strelzin, D-Brooklyn).

37. Id. at 2112 (remarks of Assemblyman Strelzin).

38. Id. at 2117, 2118 (remarks of Assemblyman Jonas).

39. DOC Mem. 1.

40. Bill Jacket, Budget Report on Bills 1, 2 (April 23, 1975).

41. Lefkowitz Mem. 2.

42. Bill Jacket, Enclosure to letter from George L. Graff (April 21, 1975).

43. McKinney's 1975 Sess. Laws 1736 (May 5, 1975).

44. See *Carl Wagner & Sons v. Appendagez Inc.,* 485 F.Supp. 762, 772 (S.D.N.Y. 1980) (seller's failure to fill orders because its customer refused to sell at suggested price was actionable; the seller "could not legally implement that policy, in view of . . . §369-a").

45. N.Y. Gen.Bus.L. §§340(1), 340(5), 340(6), 341, 342, 342-a.

46. *Dr. Miles,* 220 U.S. 373 (1911).

47. 175 NY 1 (1903). See also *Walsh v. Dwight,* 40 AD 513 (1st Dept. 1899) (affirming dismissal of complaint).

48. *Dawn to Dusk, Ltd. v. Frank Brunckhorst Co.,* 23 AD2d 780 (2nd Dept. 1965); *Marsich v. Eastman Kodak Co.,* 244 AD 295, 297 (2nd Dept. 1935) ("Federal cases interpreting Federal statutes . . . are not controlling when there are State decisions relating to the State statute invoked which may . . . place upon a State statute an interpretation different from that placed by the Federal courts upon a different though somewhat similar Federal statute"), aff'd without opinion, 269 N.Y. 621 (1936). See also *Bourjois Sales Corp. v. Dorfman*, 273 NY 167, 170-71 (1937) (New York's Fair Trade Law "was nothing new as such contracts were legal under court decisions"); *Port Chester Wine & Liquor Shop, Inc. v. Miller Bros. Fruiterers, Inc.,* 253 AD 188, 191 (2nd Dept. 1938) (New York's Law "made no change in the common law as declared in this State in cases which concerned vertical price-fixing in respect of commodities in intrastate commerce having a brand name or name evidencing good will"), aff'd, 281 N.Y. 101 (1939).

49. See Richard A. Givens, Practice Commentaries to Gen.Bus.L. §340 in 19 McKinney's Consol. Laws of N.Y. 510, 516 (1988) ("The approach of the courts in this area may

properly take into account the action of the Legislature in L.1975, ch. 65, §1, repealing the former New York fair trade law").

50. George C. Miller Brick, 2 AD3d 1341, 1343 (4th Dept. 2003) (the per se standard "applie[s] where . . . price-fixing is alleged"), on remand, 9 Misc.3d at 155, 167-70 (rejecting arguments to apply the rule of reason); *Worldhomecenter.com Inc. v. L.D. Kichler Co.,* 2007 WL 963206 (E.D.N.Y. March 28, 2007); *Carl Wagner,* 485 F. Supp. 762.

51. N.Y.Gen.Bus.L. §340(1).

52. See text accompanying nn. 32-43. See also *Sony Corp. of America v. Joseph J. Jones & Sons Inc.,* 44 AD2d 517 (1st Dept. 1974) (enjoining supplier under the Fair Trade Law), modified, 36 NY2d 917 (1975) (remitting in view of §369-a's enactment), on remand, 50 AD2d 513 (1st Dept. 1975) (vacating injunction, and describing §369-a as "a prohibition of any contract restraint against the vendee from selling a product at a price less than that stipulated by the vendor").

53. See *Carl Wagner,* 485 F.Supp. at 772.

54. *Port Chester Wine,* 253 A.D. at 191.