Federal Trade Commission

Current Issues in Competition and Consumer Protection Enforcement in the Retail Sector

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at the

Retail Industry Leaders Association's Retail Law Conference

Tampa, Florida

November 10, 2010

I would like to begin with some highlights of what the agency's Bureau of Consumer Protection has been doing. In particular, I thought I would discuss our ongoing policy and guidance work as well as recent law enforcement efforts that are especially relevant in the retailer context.

Privacy, Data Security and Online Behavioral Advertising

One of the most timely policy topics is, of course, privacy and data security. In fact, immediately following my remarks, Stu Ingis is heading up an entire session devoted to this subject. As many of you may know, over the last year or so, the Commission has been

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[*] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisors, Darren Tucker and Beth Delaney, for their invaluable assistance in preparing this paper.

hosting a series of workshops and roundtables in order to further inform us about evolving privacy and data security issues.[1] One result of this work will be a "Privacy Report," issued by the Commission's Staff, that will discuss what the agency has learned through this process and which will offer some thoughts of the Staff on how things should proceed going forward.

At this point, the Report is still being drafted and fine tuned, and I can't get into the specifics of what the Staff will ultimately recommend in their Report. However, speaking only for myself, I would like to share a few of my own thoughts about how I view issues related to privacy and data security.

As we are all well aware, business is increasingly conducted via the Internet. To begin with, Internet-driven retail sales continue to increase exponentially. But even if a particular customer isn't purchasing online, he or she is viewing online advertising, doing online product research, communicating with friends about products online, comparison shopping online, or perusing the website of a retailer where he or she may later make an in-person purchase. Even more striking than consumers' use of the Internet is the other side of the equation – how businesses and advertisers utilize the Internet. Basic "advertising and sales," of course, are major components, but in addition, businesses perform many other core functions electronically, whether it be payment processing, payroll distribution, communications, inventory, employee training, just to name a few. The advertising angle is equally diverse – not only are ads being served to consumers online, but information about consumers' online (and offline) behavior is collected, aggregated and analyzed.

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[1] *See* FTC Privacy Roundtable Series, Exploring Privacy: A Roundtable Series, Dec. 7, 2009 *available at* http://www.ftc.gov/bcp/workshops/privacyroundtables/index.shtml. The second and third roundtable events took place on January 28 and March 17, 2010.

I think one of the most important issues to consider with respect to e-commerce is the framework chosen to protect consumers' privacy both online and offline. There is a concern that consumers won't avail themselves of benefits offered by the online world if they believe their personal information is being used in ways that they don't expect, or that make them uncomfortable. This also would include instances where unreasonable and inappropriate security practices result in flaws and vulnerabilities in data security systems.

In the consumer privacy protection arena, the so-called "notice" model has been one of the primary ways the FTC has examined the handling of consumer data. The notice requirement has historically been satisfied by providing information in a privacy policy. I see a couple problems with this. First, all indicators seem to point to the fact that such notices – as they are currently presented to consumers – are rarely read. They can be incomprehensible, difficult to find, and full of information that sets forth protections for the policy writer, rather than the consumer. Second, even if the policy is found, read and understood, does the consumer really have any choice? Certainly consumers can walk away from the transaction or the use of the service, but in most circumstances they probably will do that only if there is an available substitute.

Despite this failing, I think that the "notice" model is a good starting point. First, for competitive reasons, I believe that companies cannot afford to *not* make disclosures or provide notice to consumers.[2] As Commissioner Brill has pointed out, "consumers will punish" such companies. I would like to see companies take the initiative in making their

[2] Are companies competing on the basis of their privacy practices? I doubt it - if they were, instead of burying their practices in mouse print type, they would be blazoning them on the home page of their websites. So, if companies aren't, why not? Does it go back to the initial question of what really matters to consumers? Or is it that consumers have no alternatives?

practices much more transparent and accessible to consumers. For example, by reminding consumers how their information may be used contemporaneously with the collection of the information, when practicable.

Second, I like the idea of requiring companies to disclose their information collection, use and sharing practices in all circumstances. If companies are required to disclose their practices, the Commission can make sure that they are complying with those representations, and if they are not, we can and will pursue them under our Section 5 authority. For example, the way I view it, any notice that is presented to consumers, and is unconditional, is deceptive today if it does not adequately disclose the fact that the consumer's information will be shared or disclosed. Furthermore, to the extent that cases of "no notice" occur, I believe that they also should be pursued under a deception (duty to make an affirmative disclosure) analysis.

The "choice" prong has been pushed to the forefront with the evolution of the collection of information about consumers' activities online. Much of the recent discussion focuses on an "opt-in" model versus an 'opt-out' model. In my mind, I am more concerned about instances where the online tracking involves the collection of sensitive information like a social security number, a driver's license number, financial information, or other, very personal information (such as race or ethnicity, religious beliefs, or sexual preference) that is linked to a specific individual. I would therefore generally consider an "opt-in" policy appropriate for that kind of information. However, I view the collection of more general, nonsensitive information, such as preferences or surfing behavior that is linked to a specific individual, to be benign, even if a particular consumer might find such practices disturbing, invasive, or "profiling." I would therefore generally consider an "opt-out" policy appropriate for that kind of information.

Second, although I have no reservation about an opt-out policy where the information collected from consumers is then shared with third parties for a benign use (such as sharing search data that is then used to market athletic shoes to a particular consumer), I do have reservations about an opt-out policy when consumer information is shared with a third party that then uses that information for a purpose that the consumer would not ordinarily expect, or that would be unusually invasive. Imagine, for example, if information about consumers' interest in dieting, or internet research on diabetes, was then used to influence how their insurance premiums were calculated.

Third, I also have real reservations about the use of an opt-in policy by an entrenched incumbent seeking to use opt-in when that standard is being used to erect barriers to entry by a rival who will be disadvantaged in competing effectively because of the incumbents' opt-in policy.

Environmental Marketing

As all of you have probably noticed, "green" marketing claims seem to have become ubiquitous – running the gamut from "luxury vodka that's good for the environment"[3] to the purported ability to offset greenhouse gas emissions from hotel stays[4] to "carbon-neutral" Super Bowl games[5] and "green" Academy Awards ceremonies.[6] One news organization

[3] Stuart Elliott, *Green Grows the Vodka*, New York Times, Mar. 17, 2008, *available at* www.nytimes.com/2008/03/17/business/media/17adnewsletter1.html?.

[4] Michael S. Rosenwald, *A Tactical Turn to Green for Marriott*, The Washington Post, Apr. 8, 2008, *available at* www.washingtonpost.com/wp-dyn/content/article/2008/04/07/AR2008040702630.html.

[5] Scott Edward Anderson, "*Greening the Gridiron: Environmental Responsibility at the Superbowl and Beyond*," Feb. 6, 2006, *available at* www.climatebiz.com/feature/2006/02/06/greening-gridiron-environmental-responsibility-super-bowl-and-beyond.

reported that by one count, manufacturers launched 328 "environmentally friendly" products in 2008, up from only 5 such products in 2002.[7] Activity at the U.S. Patent and Trademark Office reflects this trend as well – applications with the word "green" more than doubled from 2006 to 2007, while applications with the words "clean," "eco," "environment," "earth," "planet," and "organic" also jumped.[8]

In light of this scale of activity, it comes as no surprise that the FTC decided to accelerate its periodic regulatory review of the Green Guides. Back in November 2007, the Commission began soliciting comments on the Green Guides,[9] focusing, in part, on general issues: the continuing need for the Guides; their effect on the accuracy of various environmental claims; and their interaction with other environmental marketing regulations. At the same time, the Commission recognized that science and technology in the environmental area are constantly changing. As a result, consumer perception of environmental claims may have evolved since the initial issuance of the Guides in 1992,[10] and subsequent reviews of the Guides.[11] Accordingly, the Commission also asked for submission of any relevant consumer survey evidence and consumer perception data that addressed

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[6] Press Release, *Natural Resources Defense Council 'Greens' the Academy Awards*, Feb. 25, 2007, *available at* www.nrdc.org/media/2007/070225.asp.

[7] CBS Evening News, *A Closer Look at 'Green' Products*, May 18, 2008, *available at* www.cbsnews.com/stories/2008/05/18/eveningnews/main4105507.shtml.

[8] GreenBiz Staff, *Eco Trademarks Made Big Gains in 2007*, Apr. 28, 2008, *available at* www.greenbiz.com/news/2008/04/28/eco-trademarks-made-big-gains-2007.

[9] Guides for the Use of Environmental Marketing Claims, 72 Fed. Reg. 66,091 (Nov. 27, 2007).

[10] Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (Aug. 13, 1992) (publication of final guides).

[11] Guides for the Use of Environmental Marketing Claims, 61 Fed. Reg. 53,311 (Oct. 11, 1996) (publication of revised guides); Guides for the Use of Environmental Marketing Claims, 63 Fed. Reg. 24,240 (May 1, 1998) (final revised guides).

environmental claims – including claims not currently covered by the Guides. The FTC also held a series of public workshops to explore developments in environmental and "green-energy related" marketing – including carbon offsets, "green" packaging claims, and "green" claims in the building and textiles markets.[12]

After digesting and analyzing all of the information collected through these efforts, the Commission published its proposed revisions to the Green Guides last month.[13] The proposed changes are designed to update the Guides and make them easier for companies to understand and use. They haven't been finalized yet, and additional comment is being sought until December 10th. I will just mention a few of the noteworthy proposals that are being put forth.

One of the most far-reaching proposed revisions to the Guides relates to general, environmental claims – claims that we see commonly touted. The proposed revised Guides caution marketers not to make blanket, general claims that a product is "environmentally friendly" or "eco-friendly" because a consumer perception study we conducted confirms that such claims are likely to suggest that the product has specific and far-reaching environmental benefits.[14] Very few products, if any, have all the attributes consumers seem to perceive from such claims, making these claims nearly impossible to substantiate.

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[12] *See* Guides for the Use of Environmental Marketing Claims; Carbon Offsets and Renewable Energy Certificates; Public Workshop, 72 Fed. Reg. 66,094 (Nov. 27, 2007)(workshop held on January 8, 2008); Guides for the Use of Environmental Marketing Claims; The Green Guides and Packaging; Public Workshop, 73 Fed. Reg. 11371 (Mar. 3, 2008)(workshop held on April 30, 2008); and Press Release, "*FTC Announces Workshop on 'Green Guides' and Environmental Claims for Buildings and Textiles,*" June 3, 2008, *available at* www.ftc.gov/opa/2008/06/greenguides.shtm.

[13] Press Release, Federal Trade Commission Proposes Revised "Green Guides," Oct. 6, 2010, *available at* http://www.ftc.gov/opa/2010/10/greenguide.shtm.

[14] The consumer perception study can be found online at: http://www.ftc.gov/bcp/edu/microsites/energy/green-consumer-perception-study.shtml.

Along the same lines, the proposed Guides also caution marketers not to use unqualified certifications or seals of approval – for example, certifications or seals that do not specify the basis for the certification. As the Guides point out, "unqualified" product certifications and seals of approval likely confer general environmental benefit claims, and accordingly, marketers should take care to clearly, prominently and specifically clarify the basis upon which a certification or seal is granted.

The proposed revised Guides also provide new advice about "carbon offset" claims. Carbon offsets fund projects that reduce greenhouse gas emissions in one place in order to counterbalance or "offset" emissions that occur elsewhere. The Guides advise marketers to disclose if the emission reductions that are being offset by a consumer's purchase will not occur within two years. Marketers are also advised to avoid advertising an offset if the activity that produces the offset is already required by law.

Endorsements and Testimonials

First issued in 1975 and 1980,[15] the Guides Concerning the Use of Endorsements and Testimonials in Advertising generally require that endorsements reflect the honest opinion of the endorser and not contain representations that would be deceptive if made by the

[15] In December 1972, the Commission published for public comment proposed Guides Concerning the Use of Endorsements and Testimonials in Advertising, 37 Fed. Reg. 25548 (1972). Extensive comment was received from interested parties. On May 21, 1975, the Commission promulgated three sections of the 1972 proposal as final guidelines (16 C.F.R. §§ 255.0, 255.3, and 255.4) and republished three others, in modified form, for additional public comment. 40 Fed. Reg. 22127 (1975); 40 Fed. Reg. 22146 (1975). Public comment was received on the three re-proposed guidelines, as well as on one of the final guidelines. On January 18, 1980, the Commission promulgated three new sections as final guidelines (16 C.F.R. §§ 255.1, 255.2, and 255.5) and modified one example to one of the final guidelines adopted in May 1975 (16 C.F.R. § 255.0 Example 4). 45 Fed. Reg. 3870 (1980).

advertiser.[16] Ongoing scrutiny of the Commission's Guides helps ensure that consumers will be protected in a changing marketplace. At the same time, it also offers industry an opportunity to help shape this guidance, and once made final, provides industry with certainty for its advertising endeavors. To that end, the Commission sought public comment on the Endorsement Guides in January 2007 as part of its ongoing regulatory review process,[17] and in November 2008, the Commission proposed various amendments to Guides and again sought public comment.[18] In October 2009, the Commission published the Final Guides.[19]

The revision to the Endorsement Guides that is probably most relevant to those operating in the retailer context is the addition of new examples to illustrate the long standing principle that "material connections" between advertisers and endorsers – connections that consumers would not expect – must be disclosed. These examples address what constitutes an endorsement when the message is conveyed by bloggers or other "word-of-mouth" marketers. The revised Guides specify that while decisions will be reached on a case-by-case basis, the post of a blogger who receives cash or in-kind payment to review a product is considered an endorsement. Thus, bloggers who make an endorsement must disclose the material connections they share with the seller of the product or service. Likewise, if a company refers in an advertisement to the findings of a research organization that conducted

[16] 16 C.F.R. § 255.0. Industry guides, such as the Endorsement Guides, are administrative interpretations of the law. As such, they do not have the force and effect of law and are not independently enforceable. The Commission can take action under the FTC Act, however, if a particular use of a testimonial or endorsement is inconsistent with the Guides. In such an enforcement action, the Commission has to prove that the challenged act or practice at issue was unfair or deceptive.

[17] 72 Fed. Reg. 2214 (Jan. 18, 2007).

[18] 73 Fed. Reg. 72374 (Nov. 28, 2008). The most recent comment period closed on March 2, 2009.

[19] Press Release, FTC Publishes Final Guides Governing Endorsements, Testimonials, Oct. 5, 2009 *available at* http://www.ftc.gov/opa/2009/10/endortest.shtm.

research sponsored by the company, the advertisement must disclose the connection between the advertiser and the research organization. And a paid endorsement – like any other advertisement – is deceptive if it makes false or misleading claims.

In the retailer context, one thing that you want to be careful to do is make sure that you follow the Guides with respect to product reviews. The FTC recently settled a case involving a public relations agency hired by video game developers to market its games. In its complaint, the Commission alleged that the company had engaged in deceptive advertising by having its own employees pose as ordinary consumers posting game reviews at the online iTunes store, and by not disclosing that the reviews came from paid employees working on behalf of the developers.[20] To the extent that retailers are involved in offering product reviews and feedback, you want to make sure that material connections are properly disclosed.

Law Enforcement Efforts

In addition to the policy and guidance work I just mentioned, the Commission has also been active on the law enforcement front. I will highlight some of our activities that particularly relate to retailers.

On the environmental marketing front, for example, the Commission announced in June 2009 administrative actions against three retailers, charging them with making false and unsubstantiated claims that their paper products were "biodegradable."[21] Since 1992, the "Green Guides" have advised marketers that unqualified biodegradable claims are acceptable

[20] Press Release, Federal Trade Commission, Public Relations Firm to Settle FTC Charges that It Advertised Clients' Gaming Apps Through Misleading Online Endorsements, Aug. 26, 2010, *available at* http://www.ftc.gov/opa/2010/08/reverb.shtm.

[21] Press Release, Federal Trade Commission, FTC Announces Actions Against Kmart, Tender and Dyna-E Alleging Deceptive 'Biodegradable' Claims, June 9, 2009, *available at* http://www.ftc.gov/opa/2009/06/kmart.shtm.

only if they have scientific evidence that their product will completely decompose within a reasonably short period of time under customary methods of disposal. In these three cases, the Commission alleged that the defendants' products typically are disposed of in landfills, incinerators, or recycling facilities, where it is impossible for waste to biodegrade within a reasonably short time. All of the retailers settled with the Commission, agreeing to administrative orders that require them to have competent and reliable evidence to support any such environmental product claims.[22]

In February of this year, we sent warning letters to 78 retailers warning them to stop labeling as "bamboo," products which are actually made of manufactured rayon fiber.[23] Rayon is a man-made fiber created from the cellulose found in plants and trees and processed with harsh chemicals that release hazardous air pollution. Any plant or tree – including bamboo – could be used as the cellulose source, but the fiber that is created is rayon. Along with the warning letters, the Commission sent each company a synopsis of FTC decisions finding that the failure to use proper fiber names in textile labeling and advertising was deceptive and violated the FTC Act. Under the Act, the FTC can seek civil penalties of up to $16,000 per violation against any company that receives this information but fails to correct its advertising and labeling.

These warning letters came on the heels of four enforcement actions brought against companies selling rayon products that were misleadingly labeled and advertised as "bamboo." In August 2009, the Commission filed four administrative complaints alleging that these

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[22] *Id.* *See also* Press Release, Federal Trade Commission, FTC Settlement Bars Seller's Deceptive 'Biodegradable' Claims, Aug. 26, 2009, *available at* http://www.ftc.gov/opa/2009/08/dyna.shtm.

[23] Press Release, Federal Trade Commission, FTC Warns 78 Retailers, Including Wal-Mart, Target, and Kmart, to Stop Labeling and Advertising Rayon Textile Products as "Bamboo," Feb. 3, 2010, *available at* http://www.ftc.gov/opa/2010/02/bamboo.shtm.

companies were falsely claiming that their rayon clothing and other textile products were "bamboo fiber," marketing them using names such as "ecoKashmere," "Pure Bamboo," "Bamboo Comfort," and "BambooBaby." The complaints also challenged a number of other deceptive "green" claims, including that the products retained the bamboo plant's antimicrobial properties, were made using environmentally friendly manufacturing processes, and are biodegradable.[24]

More recently, at the beginning of this month, the Commission announced three settlements with online retailers that failed to post EnergyGuide information for appliances.[25] Using our authority under the Energy Policy and Conservation Act (EPCA) to assess civil penalties for knowing violations of the Appliance Labeling Rule, we settled with these three retailers for a total of $400,000. The Commission also notified two other online sellers that we will seek a total of $640,000 in fines from them. These actions came after Staff conducted "Internet surfs" to determine whether online retailers were posting EnergyGuide labels as required by the Appliance Labeling Rule. Companies that were in violation of the Rule were sent warning letters, and those that failed to come into compliance then became the focus of more stringent law enforcement activity.

Finally, with cold and flu season approaching, it is probably timely to discuss a series of cases that the Commission has brought regarding the marketing of cold and flu remedies. In March 2010, a major retailer agreed to pay $6 million to settle to settle FTC charges that it deceptively advertised a line of dietary supplements similar to the Airborne cold-and-flu treatment – using the same kind of unsubstantiated claims that the supplements could prevent

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[24] *Id.*

[25] Press Release, Federal Trade Commission, FTC Fines Online Retailers for Failing to Post EnergyGuide Information for Appliances, Nov. 1, 2010, *available at* http://www.ftc.gov/opa/2010/11/appliancelabel.shtm.

colds, fight germs, and boost the immune system.[26] Under the proposed settlement, the defendant is prohibited from claiming that its products prevent or treat cold or flu symptoms, or protect against cold and flu viruses by boosting the immune system, unless there is scientific evidence to back up these claims. In July and September 2009, two other major drug stores settled a similar matters with the FTC, paying $500,000 and $2.8 million in consumer refunds, respectively, relating to unsubstantiated claims that their dietary supplements could prevent colds, fight germs, and boost immune systems.[27] I expect the Commission will be eyeing other "copycat" claims by retailers in the months ahead.

Resale Price Maintenance

I'd like to turn next to the FTC's competition enforcement priorities in the retail sector. In particular, I'd like to focus on resale price maintenance, or RPM. An RPM arrangement is an express or implied agreement between firms at different levels of the supply chain that establishes the resale price of a product. RPM arrangements can be for specific price, or can establish a price floor or price ceiling. Until recently, resale price maintenance agreements were deemed per se unlawful by the Supreme Court. As a result, defendants were not permitted to defend RPM arrangements by, for example, offering evidence that consumers benefited from their use in a particular case.

[26] Press Release, Walgreens Will Pay Nearly $6 Million to Settle FTC Deceptive Advertising Charges, Mar. 23, 2010, *available at* http://www.ftc.gov/opa/2010/03/walgreens.shtm.

[27] Press Release, Rite Aid to Pay $500,000 in Consumer Refunds to Settle FTC Charges of False and Deceptive Advertising, July 13, 2009, *available at* http://www.ftc.gov/opa/2009/07/riteaide.shtm; Press Release, CVS to Pay Nearly $2.8 Million in Consumer Refunds to Settle FTC Charges of Unsubstantiated Advertising of AirShield 'Immune Boosting' Supplement, Sept. 8, 2009, *available at* http://www.ftc.gov/opa/2009/09/cvs.shtm.

On the other hand, courts did permit manufacturers to announce *suggested* resale prices and to refuse to do business with dealers that failed to adhere to their unilateral policies under the so-called *Colgate* doctrine.[28] The reason was that a unilateral policy did not involve a "contract, combination . . . or conspiracy," as required by the Sherman Act. Manufacturers were permitted to engage in "exposition, persuasion and argument" to encourage retailers to adhere to suggested prices and still fall within the *Colgate* exception.[29] However, conduct that compelled dealer adherence to the manufacturer's prices was deemed an implied agreement and thus a violation of the Sherman Act. A considerable amount of antitrust litigation and counseling used to focus on precisely where to draw the line between unilateral and concerted action in these contexts. The stakes were high: if a court found that a course of dealing between a manufacturer and retailer implied concerted action, there was the potential for treble damages.

Two Supreme Court decisions – *Khan* and *Leegin* – dramatically changed things. In 1997, in *State Oil Co. v. Khan*,[30] the Supreme Court held that RPM agreements that established a ceiling on resale prices would no longer be deemed per se illegal. The Court explained that resale price ceilings could benefit consumers by lowering prices. The Court did not, however, declare maximum price constraints to be immune from antitrust scrutiny. Rather, they would be reviewed under the rule of reason, which is intended to assess whether the restraint in question "is one that promotes competition or one that suppresses

[28] *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). There were some other exceptions to the per se rule such as in a consignment relationship.

[29] *Gray v. Shell Oil Co.*, 469 F.2d 742, 748 (9th Cir. 1972).

[30] 522 U.S. 3 (1997).

competition."[31] In a rule of reason analysis, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its conditions before and after the restraint was imposed, and the restraint's history, nature, and effect."[32]

The next big development was in 2007, when the Supreme Court held in the *Leegin* case that minimum resale price maintenance agreements should also be analyzed under the rule of reason.[33] This was a landmark and closely divided decision that overturned Supreme Court precedent dating back to 1911.[34] The majority in *Leegin* explained that antitrust law is primarily concerned with interbrand competition (*i.e.*, competition between sellers of different brands), and that minimum RPM could further interbrand competition by, for example, encouraging dealers to provide promotional efforts that enhance the supplier's brand. Without RPM, dealers might not have the incentive to provide these services because of the concern that a discounter might "free ride" on the increased demand those promotional services generate without incurring comparable costs. As a result of the *Khan* and *Leegin* decisions, all RPM arrangements are now reviewed under the Sherman Act using the rule of reason standard.

Notwithstanding the Supreme Court's *Khan* and *Leegin* decisions, there are several open questions about the law relating to RPM arrangements. First, how should the courts actually go about applying the rule of reason to an RPM arrangement? Because of the somewhat amorphous nature of the rule of reason, courts have devised a number of more

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[31] *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978).

[32] *Khan*, 522 U.S. at 10.

[33] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U.S. 877 (2007).

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

structured approaches to evaluating the evidence in a rule of reason analysis.[35] The *Leegin* decision suggests that a truncated analysis might be suitable for analyzing some minimum resale price maintenance agreements. The *Leegin* Court observed that as "courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones."[36] Nevertheless, the Court in *Leegin* did not identify what type of truncated rule of reason analysis should be applied to RPM.

The courts, the FTC, and the Department of Justice – with whom we share jurisdiction to enforce the antitrust laws – have been grappling with this question. Last year, the FTC held a series of hearings on how to evaluate PRM arrangements in a post-*Leegin* world. Around the same time, the head of the antitrust division at the DOJ gave a speech in which she outlined a series of frameworks that could be applied to analyze an RPM agreement based on the presence of certain conditions that would make the agreement likely to be anticompetitive.[37] The FTC suggested its own simplified RPM test in a recent consent order

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[35] As the Supreme Court explained in *California Dental*, there should be an "enquiry meet for the case, looking to the circumstances, details and logic of a restraint." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999).

[36] *Leegin*, 551 U.S. at 898-99.

[37] Christine A. Varney, Assistant Att'y Gen., Antitrust Div. U.S. Dep't of Justice, Antitrust Federalism : Enhancing Federal/State Cooperation, Remarks as Prepared for the National Association of Attorneys General Columbia Law School State Attorneys General Program 7-14 (Oct. 7, 2009), *available at* http://www.justice.gov/atr/public/speeches/250635.pdf

proceeding, pointing to two factors as particularly relevant: whether the defendant has market power and the origin of the RPM policy (whether it originated with the retailers or the manufacturer).[38]

Another possible approach to evaluating RPM agreements is through use of the "inherently suspect" mode of analysis, which is a type of truncated rule of reason analysis. Under the "inherently suspect" paradigm, if the challenged practice appears dubious under antitrust precedent, the burden shifts to the defendant to demonstrate that there is a legitimate justification for it based on its efficiencies. If such a justification is shown, the burden shifts back to the party challenging the restraint to show that, even so, it is on balance anticompetitive in effect. In this type of analysis, a key consideration is likely to be whether the RPM policy led to a decrease in output, which suggests that consumer choice has been diminished.

An important preliminary question, however, is whether, post-*Leegin*, RPM should be considered to be "inherently suspect," and thus a worthy object for scrutiny under this analytical method. On the one hand, the Court in *Leegin* stated that "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated."[39] But at the same time, the *Leegin* Court stated that RPM can serve benign or competitive purposes. The Court also noted that evidence of price effects may only be the beginning point for further analysis of competitive harm. This seems to indicate that the Court viewed that RPM agreements are ordinarily less intrinsically dangerous than horizontal

[38] *See* Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, In the Matter of Nine West Group Inc., FTC Docket No. C-3937 (May 6, 2008), *available at* http://www2.ftc.gov/os/caselist/9810386/080506order.pdf.

[39] *Leegin*, 551 U.S. at 894.

agreements among competitors. In any event, I expect that in time, both the courts and agencies will better clarify how to analyze an RPM agreement under the rule of reason.

The second question after *Leegin* is the extent to which RPM arrangements may be vulnerable under state antitrust statutes. As you know, under our system of federalism, the states have the ability to regulate *intra*state commerce (within certain limits), while the federal government regulates *inter*state commerce. Nearly all states have their own antitrust statutes regulating in-state commercial activity. In most cases, state antitrust laws mirror federal antitrust law, with the result that the *Leegin* decision should apply with equal force at the state level as the federal level.

Some states, however, do not follow federal antitrust law in all respects and some even single out RPM as a per se offense. At least a dozen states have legislation that appears to treat RPM as per se illegal, including California and New York.[40] The *Leegin* decision has no bearing on these statutes. And in the wake of the *Leegin* decision, some state attorneys general have stepped up their enforcement of RPM arrangements in their states.

For example, in the *New York v. Herman Miller* case, Illinois, Michigan, and New York filed a complaint in federal court in 2008 alleging that the maker of the popular Aeron chair instituted an RPM policy in violation of state antitrust statutes.[41] The complaint alleged that the Herman Miller company introduced its RPM policy after some retailers complained about discounting on the Internet and in newspaper advertising. Herman Miller entered into a consent decree under which it agreed not to enter into RPM agreements in the future, to

[40] Michael A. Lindsay, *State Resale Price Maintenance Laws After* Leegin, Antitrust Source, Oct. 2009, http://www.abanet.org/antitrust/at-source/09/10/Oct09-Lindsay10-23f.pdf; Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow* Leegin*?*, 27 Franchise L.J. 173 (2008).

[41] *New York v. Herman Miller Inc.*, 1:08-CV-2977-RMB (S.D.N.Y., filed March 21, 2008).

accept certain limitations on its ability to terminate its dealers, and to pay $750,000 to the states.

In *California v. DermaQuest,* California's attorney general filed a complaint and stipulated final judgment in state court in February 2010 to resolve an RPM case against DermaQuest, a California-based manufacturer of skin care products.[42] The AG alleged a per se violation of the Cartwright Act, as well as an unfair competition claim under California's unfair competition law.

In March 2010, New York's AG filed a complaint against mattress maker Tempur-Pedic in state court seeking injunctive relief, restitution, and disgorgement in connection with Tempur-Pedic's alleged RPM policy.[43] Unlike the other cases, Tempur-Pedic is fighting the charges and the case is pending.

In the wake of the *Leegin* decision, some states whose state antitrust laws mirror federal law (and therefore the *Leegin* decision), have considered enacting legislation that would declare RPM per se illegal under state law. To my knowledge, the only state that has actually gone ahead and enacted such legislation is Maryland. In April 2009, Maryland enacted legislation declaring RPM agreements to be per se illegal. The law went into effect on October 1, 2009. Under the new law, retailers doing business in Maryland, as well as state officials, can sue manufacturers that impose RPM policies. The Deputy Chief of the Antitrust

[42] *California v. DermaQuest Inc.*, No. RG10497526 (Superior Court for the County of Alameda, filed Feb. 23, 2010).

[43] *New York v. Tempur-Pedic Int'l, Inc.*, No. 0400837 (N.Y. Sup. Ct., N.Y.C., filed Mar. 29, 2010).

Division of the Maryland Attorney General's Office confirmed that the law was intended to overturn *Leegin* and restore the per se rule for RPM agreements.[44]

The combined effect of state antitrust statutes treating RPM as a per se offence, aggressive state AG enforcement efforts, and the potential for additional *Leegin* state repealers has meant that manufacturers that distribute on a national scale have far less freedom to institute RPM policies than the *Leegin* decision would suggest. It may also explain why we have not seen the explosion of new RPM policies that some expected in the wake of the *Leegin* decision.

The third open issue is whether *Leegin* will be overturned by Congress. In other words, will Congress follow in Maryland's footsteps and declare that RPM is per se illegal? A bill to overrule *Leegin* has been introduced in every Congress since the decision. Senator Herb Kohl (D-Wisc.), chairman of the Senate Judiciary Committee's subcommittee on antitrust and consumer rights has been a key driver of this legislation. We are witnessing a classic battle between the legislature and the judiciary on the meaning of federal legislation that in this case dates back to 1890.

The states have also been supporters of federal legislation to repeal *Leegin*. Last year, 41 state attorneys general wrote to Congress asking them to overrule *Leegin*. (It is also worth noting that 37 state attorneys general jointly filed an amicus curiae brief to the Supreme Court in *Leegin* supporting per se illegality.) The legislation (S. 148, H.R. 3190) made it out of committee in both houses this year and was intended to be attached to the financial reform package, but this did not happen. Given the Republican's success in last week's mid-term

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[44] Alan M. Barr, *Antitrust Federalism in Action—State Challenges to Vertical Price Fixing In the Post-*Leegin *World*, Antitrust Source, Dec. 2009, at 4-6, http://www.abanet.org/antitrust/at-source/09/12/Dec09-Barr12-17f.pdf. Note, however, that Mr. Barr was expressing his personal views in this article.

elections, I expect that the prospects for similar legislation will be greatly diminished going forward.

A fourth issue raised by the *Leegin* decision is the treatment of cooperative advertising programs, particularly in the context of Internet sales. Under a cooperative advertising program, a manufacturer subsidizes the cost of a dealer's advertising or other promotional material and, in return, requires that the promotional materials not identify a price below the manufacturer's recommended price. Antitrust lawyers often refer to these as MAP programs, or minimum advertised price programs. Even prior to *Leegin*, the federal courts usually reviewed cooperative advertising programs under the rule of reason.[45] These programs were not considered to be RPM because dealers retained the freedom to price their products however they wished and to advertise their products at any price so long as they funded those adds themselves. Some cases had gone even further and held that even in the absence of promotional funding, restrictions on price advertising should be reviewed under the rule of reason.[46] *Leegin* removes any doubt that the rule of reason is the appropriate means of evaluating these cooperative advertising, or MAP, programs under federal antitrust law.

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[45] *See, e.g.*, *Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc.*, 246 F.3d 752, 754, 757 (5th Cir. 2001); *In re Nissan Antitrust Litig.*, 577 F.2d 910, 915-17 (5th Cir. 1978); *Blind Doctor Inc. v. Hunter Douglas, Inc.*, 59 Fed. R. Serv. 3d (Callaghan) 635, 645 (N.D. Cal. 2004); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 212 (D. Me. 2003) ("[P]laintiffs have no direct precedent for their argument that the case can proceed on a theory of per se illegality . . . . [B]y their terms the MAP policies at best were agreements on what prices could be *advertised*, not what prices could be charged.").

[46] *Blind Doctor*, 59 Fed. R. Serv. 3d at 643, 637-38, 645-46 (advertising policy restricting certain price advertising subject to rule of reason); *Cranfill v. Scott & Fetzer Co.*, 773 F. Supp. 943, 950-53 (E.D. Tex. 1991) (absent agreement on resale prices, blanket restrictions on dealer's price advertising of vacuums evaluated under rule of reason). *But see Ill. Corporate Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751, 752 (7th Cir. 1989) (dicta) (Easterbrook, J.) ("a ban on price advertising is a form of resale price maintenance").

But the states may have a different view. The National Association for Attorneys General has stated that the "states have been extremely concerned about RPM agreements embedded in cooperative advertising programs and transfer price-rebate programs. . . . [W]e will take a lead role in investigating and challenging such practices where warranted."[47] The states are particularly concerned when a dealer enters into an agreement with a manufacturer restricting advertised prices on the condition or knowledge that other dealers will enter into a similar agreement.[48] The *Herman Miller* case I previously mentioned was based in part on the allegation that the company's MAP agreements with retailers were in reality RPM arrangements because they effectively prevented retailers from selling the chairs at less than the advertised price.

Given the growth of on-line retail sales, an interesting question arises as to how to evaluate a MAP policy that applies to the Internet. Put simply, how do you distinguish between a sales price and an advertised price on the Internet? Some websites try to make this distinction by providing the list price with each product's description but explaining that by moving the item to the consumer's shopping cart, the actual sale price will be revealed. This appears to be a fairly well-accepted practice by Internet retailers, but the courts have yet to provide definitive guidance.[49] I suspect that as the Internet – and Internet retailing –

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[47] National Association of Attorneys General, Revisions to the National Association of Attorneys General Vertical Restraints Guidelines, Summary of Comments re: NAAG Vertical Restraints § 2.1 (March 26-28, 1995), *available at* http://www.naag.org/assets/files/pdf/at-vrest_guidelines.pdf.

[48] 1995 Vertical Restraints Guidelines of the National Association of Attorneys General § 2.2.

[49] *Compare Campbell v. Austin Air Sys., Ltd.*, 423 F. Supp. 2d 61, 68 n.6 (W.D.N.Y. 2005) ("By its plain language, Austin's Internet MAP policy restricts only the minimum price for which a dealer could advertise on the Internet. With respect to actual sales pricing, the Agreement explicitly states that a dealer may sell Austin Air Cleaners for any price."), *with* Worldhomecenter.com, Inc. v. L.D. Kichler Co., 2007-1 Trade Cas. (CCH) ¶ 75,658

continues to evolve, the distinction between advertised prices and sale prices will continue to evolve as well and be highly case specific.

Section 5 and Invitations to Collude

The second topic I'd like to discuss is invitations to collude. I'd like to think that all business people – and certainly all in-house counsel – are aware that agreements with competitors on prices, output, or other competitive terms may violate the antitrust laws and result in criminal sanctions. What is sometimes overlooked is that an invitation to collude – even if not accepted – may also be a violation, albeit a civil one.[50] Specifically, the FTC takes the position that an invitation to collude violates Section 5 of the FTC Act, which is a statute that prohibits "unfair methods of competition" but does not permit follow-on private actions under the Sherman Act. As two other commissioners and I pointed out in connection with our recent U-Haul consent decree, "[i]nvitations to collude are the quintessential example of the kind of conduct that should be – and has been – challenged as a violation of Section 5 of the Federal Trade Commission Act, which may limit follow-on private treble damage litigation from Commission action while still stopping inappropriate conduct."[51]

(E.D.N.Y. Mar. 28, 2007) (internet MAP policy constituted per se violation of Sherman Act). *See also* David Bender et al., *Antitrust Online – Bottlenecks, Exchanges and Other Issues*, 732 PLI/Pat 409, 412 (2003) ("There is no easy distinction between advertised prices and actual prices on Web sites, so that minimum-advertised-price programs arguably are equivalent to an explicit price requirement.").

[50] *Valassis Commc'ns*, 71 Fed Reg. 13,976, at 13,978 (FTC Mar. 20, 2006) (proposed consent and aid to public comment) (describing the FTC's rationale for imposing liability for unaccepted invitations to collude).

[51] Statement of Chairman Leibowitz, Commissioner Kovacic, and Commissioner Rosch, In the Matter of U-Haul Int'l, Inc. and AMERCO, FTC File No. 081-0157 (June 9, 2010), *available at* http://www.ftc.gov/os/caselist/0810157/100609uhaulstatement.pdf.

The FTC has entered into consent agreements in several recent cases alleging an invitation to collude. There has also been some private litigation in this area.[52] In some cases, the communications occurred in private between two competitors.[53] In other cases, the communications were made publicly in, for example, an investor analyst or earnings call.[54]

The FTC's Valassis case is a good example. Valassis is a publicly traded company that is one of just two suppliers of free-standing newspaper inserts, which are those multi-page coupon booklets stuck in the folds of newspapers. Like other public companies, Valassis holds quarterly conference calls with securities analysts that are open to the public and can be heard live on the Internet. The FTC alleged that during one of these calls in July 2004, Valassis invited its only direct competitor, News America, to join in a scheme to allocate customers and fix prices. Specifically, during a July 2004 call, Valassis' president and CEO indicated that Valassis would stop competing for News America's customers if News America similarly stopped competing for Valassis customers. If News America did not adhere to this plan, Valassis said that it would aggressively cut prices.

Valassis entered into a consent order to resolve the FTC's concerns. The FTC did not charge News America with a violation because it did not accept Valassis' invitation to

[52] *United States v. Am. Airlines*, 743 F.2d 1114 (5th Cir. 1984) (finding invitations to collude as unlawful under Section 2 of the Sherman Act as acts of attempted monopolization).

[53] *Precision Moulding Co*., 61 Fed. Reg. 32,824 (FTC June 25, 1996) (proposed consent and aid to public comment), 122 F.T.C. 104 (1997) (decision and order); *YKK (U.S.A.) Inc*., 58 Fed. Reg. 19,454 (FTC Apr. 14, 1993) (proposed consent and aid to public comment), 116 F.T.C. 628 (1993) (decision and order).

[54] *Valassis Commc'ns*, 71 Fed Reg. 13,976 (FTC Mar. 20, 2006) (proposed consent and aid to public comment), 2006 FTC LEXIS 26 (2006) (decision and order). The Commission has also challenged invitations to collude involving both public and private communications. *See, e.g.*, *U-Haul Int'l, Inc*., 75 Fed. Reg. 35,033 (FTC June 21, 2010) (proposed consent and aid to public comment), 2010 FTC LEXIS 61 (2010) (decision and order).

collude. Obviously, this case did not involve retailers, but this is an area where all companies, including retailers, need to be careful.

Finally, let me mention in passing that retailers that are the dominant providers of particular products or services should be careful not to violate Section 5 of the FTC Act in other ways. If the aggregated effect of a dominant retailer's exclusionary conduct has the effect of maintaining its dominance, the company may violate Section 5, even if each of the company's challenged practices, taken alone, would not violate the antitrust laws. For example, a dominant retailer's use of exclusive dealing arrangements, loyalty discounts, and bundled pricing could violate Section 5 if the combined effect of these practices is to foreclose competitors from a substantial portion of the market.