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## **Internet Minimum Advertising Price Policies: Why Manufacturers Should Be Wary When Implementing**

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*“Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation.”*<sup>1</sup>

### I. INTRODUCTION

It has become common practice for manufacturers to implement policies to prevent retailers from advertising products at prices lower than those set by the manufacturers. What many manufacturers do not realize, however, is the potential for antitrust claims that may follow. Specifically, Internet Minimum Advertised Price (IMAP) policies can be a serious pitfall for the unwary and unadvised.

This area of antitrust law has recently undergone dramatic changes, though it has yet to become uniform across all fifty states. Consequently, manufacturers should evaluate, with due diligence, whether enforcing an IMAP policy on a retailer is acceptable in each individual state before acting.

This Article will provide a brief history of the origins and development of antitrust law, with a brief discussion of what constitutes a violation of the Sherman Act.<sup>2</sup> This Article will also provide an explanation of how the Supreme Court’s analysis of certain agreements has dramatically changed over the past half century.<sup>3</sup> It will then discuss several cases illustrative of agreements prohibited in this area of antitrust law, survey states that prohibit a particular type of agreement with which IMAP policies are often analogized, and provide examples of recent IMAP policy litigation.<sup>4</sup> This Article will conclude by explaining why IMAP policies are both beneficial and detrimental to consumers, suggesting strategies for implementing successful IMAP

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1. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972) (quoting Justice Thurgood Marshall).
2. *See infra* Parts II-III (discussing origin and brief history of antitrust law).
3. *See infra* Parts III-IV (analyzing Supreme Court precedent in antitrust development).
4. *See infra* Parts IV-V (evaluating states based upon antitrust policies).

policies, and proposing that the courts should discontinue analyzing IMAP policies as akin to another type of borderline-acceptable vertical agreement.<sup>5</sup>

## II. ORIGIN OF ANTITRUST LAW

Antitrust law originates from the United States' attempt to curb anticompetitive business practices and protect consumers.<sup>6</sup> In the late nineteenth century, the belief that certain large businesses posed a threat to liberty became increasingly widespread.<sup>7</sup> These businesses, referred to as "trusts," were large conglomerates that utilized anti-competitive tactics to reap artificially high profits.<sup>8</sup>

The common perception of major trusts was that, by cornering their respective markets, they were able to control the supply of their product as well as stipulate its price. Therefore, there could be no real competition, and consumers and small businesses were left with no choice but to purchase from the trust at the trust's price. Trusts would then set prices artificially high in order to receive the most profit they could, without any regard for the consumers.<sup>9</sup>

The public became frustrated with these perceived tactics and pushed legislators for regulations to reel in the trusts' behavior and protect consumer interests.<sup>10</sup> Legislators who supported restricting the trusts' behavior characterized that behavior as "extortion"<sup>11</sup> and the proceeds from their tactics as stolen wealth.<sup>12</sup> Eventually, the pro-consumer legislators were successful in enactment of legislation to break up these trusts, and regulate anticompetitive business behavior. This legislation, passed in 1890, was entitled the Sherman

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5. See *infra* Parts V-VI (describing case and policy precedent in antitrust law).

6. See John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008) (rejecting conventional wisdom saying antitrust laws passed promote economic efficiency).

7. See William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 222 (1956) ("No one denies that Congress passed the Sherman Act in response to real public feeling against the trusts . . . . [B]etween 1888 and 1890, there were few who doubted that the public hated the trusts fervently"); see also George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 1 (1985) (positing agricultural sector complained of monopolies in late 1800s).

8. See Michael A. Rabkin, *Tactical Interdependence and Institutionalized Trust: The Unrecognized Risks of Joint Ventures Among Competitors*, 7 DEPAUL BUS. & COM. L.J. 63, 71 (2008) (defining "trust" in regard to origins of "antitrust" legislation).

9. Letwin, *supra* note 7, at 222.

10. See Letwin, *supra* note 7, at 222 (asserting legislation passed in response to public frustration against trusts).

11. 21 CONG. REC. 2461 (1890) (statement of Sen. Sherman (quoting Sen. George)). 12. *Id.*; see also Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 94-95 (1982) (characterizing legislative debates of Sherman Act).

12. *Id.*; see also Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 94-95 (1982) (characterizing legislative debates of Sherman Act).

Act.<sup>13</sup>

The Sherman Act does not expressly articulate its purpose.<sup>14</sup> As a result, jurists and scholars have debated Congressional intent for enacting the Sherman Act.<sup>15</sup> Although the Sherman Act's text has not changed, policy derived from it and its interpretation has drastically differed over the years. Through reshaping of the Supreme Court and the economy in the wake of new appointments and major political events, such as war, the interpretation of the Sherman Act shifted to match the economy's changing needs.<sup>16</sup>

The most recent ideological shift, which is still the predominant view of the Sherman Act, began in the 1970s, led by several University of Chicago professors. Judge Robert Bork spearheaded this new movement. Bork believed the legislative intent was to promote economic efficiency.<sup>17</sup> He suggested that previous antitrust laws were a paradox to the intent of the legislature to promote consumer welfare, as some antitrust law protected inefficient competitors from competition, which subsequently drove up prices for consumers.<sup>18</sup> By no longer protecting inefficient competitors, antitrust laws, aimed at economic efficiency, improved consumer welfare in the long run. In Bork's view, consumer welfare improved, even if consumers in the relevant market were harmed, since the owners of potential monopolies were also consumers in the marketplace.<sup>19</sup>

Heavily influenced by Bork, contemporary critics express the view that Congress was motivated by economic objectives, but also by social, moral, and political ones, including a desire to create a more distributive economy.<sup>20</sup> Congress believed consumers were "entitled to the benefits of a competitive economic system," and made this the driving purpose behind the antitrust law.<sup>21</sup> The antitrust landscape has changed dramatically in the past half century as a consequence of this new understanding of the goals driving

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13. See Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (2006)); see also William Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 YALE L.J. 464, 464 (1959) (noting early criticism of Sherman Act).

14. See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966) (stating courts "never arrived at a definitive statement of the values or policies which control the law's application and evolution"); William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 35-37 (1991) ("Even supporters conceded that the courts would have to give meaning to the statute.").

15. See Kirkwood & Lande, *supra* note 6, at 192 (challenging conventional interpretation of Sherman Act's purpose).

16. See *id.* at 194-95 (noting shift).

17. See Bork, *supra* note 14, at 7 ("Congress intended the courts to implement . . . only that value we would today call consumer welfare.").

18. See *id.* at 25, 30-31 (discussing congressional intent directed toward consumer welfare).

19. See *id.*

20. See Lande, *supra* note 12, at 83 ("Judge Robert H. Bork, who has written one of the most thorough analyses of the legislative history of the Sherman Act, contends that the drafters of the Sherman Act were preoccupied with economic efficiency rather than with any nonefficiency considerations.").

21. *Id.* at 76-77.

competition laws in the United States.

### III. ANTITRUST LEGAL ANALYSIS

#### A. Section 1

The Sherman Act (“the Act”) consists of two main sections; Section 1 regulates agreements that restrict trade.<sup>22</sup> To prevail on a Section 1 claim, a plaintiff must establish the existence of a “contract, combination in the form of trust or otherwise, or conspiracy.”<sup>23</sup> To satisfy this element, a plaintiff must provide “evidence that tends to exclude the possibility of independent action” and illustrates a “conscious commitment to a common scheme.”<sup>24</sup>

The second element that must be established in order for there to be a Section 1 violation is even broader, as there is no simple formula for determining what unreasonably restrains competition or what constitutes an anti-competitive act.<sup>25</sup> This ambiguity has led to natural confusion as to how to interpret the second element of Section 1. A plain reading of the Act’s broad language could apply to simple actions by businesses, such as employment and sales contracts, which, by their nature, are a restraint on competition. Over time, however, the Court has reasoned that not every act that restrains competition can be a violation because, by its nature, “[e]very agreement concerning trade, every regulation of trade, restrains.”<sup>26</sup> Thus, the Court has been flexible with the Sherman Act and has constructed a liberal test to analyze the effects of agreements and business practices to determine their validity.<sup>27</sup>

While the Act does not expressly establish what types of contracts constitute a violation in regard to anticompetitive acts, courts have established several categories of conduct that are considered unreasonable restraints on trade even under the liberal test.<sup>28</sup> These suspect categories include price fixing, market allocations, and group boycotts.<sup>29</sup>

22. 15 U.S.C. § 1 (2004) (prohibiting contracts “in restraint of trade or commerce”).

23. *Id.*; see also *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (noting Act does not reach “wholly unilateral” conduct); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (stating “purpose of the Sherman Act is to prohibit monopolies, contracts and combinations”); *Albert H. Cayne Equip. Corp. v. Union Asbestos & Rubber Co.*, 220 F. Supp. 784, 786-87 (S.D.N.Y. 1963) (holding contract between seller, buyer satisfies Act’s joint conduct requirement).

24. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

25. See 15 U.S.C. § 1 (2004).

26. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (stating true test whether restraint “may suppress or even destroy competition”); see also *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996) (stating “[v]irtually all business agreements restrain trade to some extent”).

27. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 63-64 (1911) (stating Act requires analysis of acts or contracts on case-by-case basis).

28. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 439 (1978) (referencing exception to rule of reason for certain conduct producing “unquestionably anticompetitive effects”); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (stating certain agreement conclusively presumed unreasonable because of harmful effects, lack of virtue).

29. See *N. Pac. Ry. Co.*, 356 U.S. at 5 (noting per se illegality of price fixing, division of markets, group

## B. Price Fixing

Price fixing is an example of an anti-competitive business activity that triggers analysis under the Sherman Act.<sup>30</sup> Price fixing occurs when parties come to an agreement to fix, control, or otherwise stabilize the price for a good or service sold in the marketplace.<sup>31</sup> The activity is divided into two separate groupings for analysis: vertical and horizontal.<sup>32</sup> This distinction is important. Horizontal price fixing is illegal per se, whereas vertical price fixing is evaluated under the rule-of-reason analysis.<sup>33</sup> Under the rule-of-reason method, the Court considers the circumstances behind the agreement in determining whether the activity is illegal.<sup>34</sup>

### 1. Horizontal Price Fixing

Horizontal price fixing is a quintessential example of a per se violation of the Sherman Act.<sup>35</sup> It occurs when parties involved in an agreement are potential or direct competitors with one another.<sup>36</sup> If these parties agree that they will not sell a product or service above or below a specified amount, this constitutes horizontal price fixing.<sup>37</sup> Section 1 of the Sherman Act prohibits this method because there is no procompetitive justification for the practice.<sup>38</sup>

If the court defines an agreement as horizontal, then by a per se illegal

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boycotts, tying arrangements).

30. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (noting Court's consistent view price-fixing agreements unlawful per se); see also *United States v. Hui Hsiung*, 778 F.3d 738, 749 (9th Cir. 2014) ("For over a century, courts have treated horizontal price-fixing as a per se violation of the Sherman Act.").

31. See 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 70, Westlaw (database updated Aug. 2015) (defining price-fixing).

32. See 1 JULIAN O. VON KALINOWSKI ET AL., *ANTITRUST LAWS AND TRADE REGULATION* § 2.02 (2d ed. 2015) (distinguishing vertical, horizontal restraints).

33. See *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (holding not all incidents of vertical price fixing illegal); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (applying rule of reason analysis to vertical restraints); see also *supra* note 30 and accompanying text (citing cases stating horizontal price-fixing per se illegal).

34. See *State Oil Co.*, 522 U.S. at 7; *Sylvania*, 433 U.S. at 49 (stating circumstances considered under rule-of-reason analysis). In *State Oil Co.*, the Supreme Court overruled its prior holding, in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), that vertical maximum price fixing is a per se violation of the Sherman Act. See *State Oil Co.*, 522 U.S. at 7.

35. See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99-100 (1984) (characterizing horizontal price fixing as "perhaps the paradigm of an unreasonable restraint on trade"); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (characterizing horizontal agreement to fix prices as "archetypal" example of practice presumed illegal).

36. See *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("Price-fixing arrangements between two or more competitors . . . fall into the category of arrangements that are per se unlawful."); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 313 (1956) (stating crucial inquiry whether contracting parties compete with each other).

37. See *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) ("Horizontal price fixing is a per se violation regardless of whether the prices set are minimum or maximum.").

38. See *Sylvania*, 433 U.S. at 49-50 ("Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.").

analysis, the court requires only that the plaintiff establish that the alleged conduct in fact occurred.<sup>39</sup> After a horizontal agreement is proven to exist, there is no reason for the court to inquire further into the surrounding circumstances.

## 2. Vertical Price Fixing

Vertical price fixing occurs when non-competing parties at different levels of the market, such as a manufacturer and a retailer, enter into an agreement to impose price restraints.<sup>40</sup> Like its horizontal counterpart, vertical price fixing was once illegal per se.<sup>41</sup> The Supreme Court, however, changed the legal landscape concerning price fixing in two decisions: *State Oil Co. v. Khan*<sup>42</sup> and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>43</sup> After these decisions, vertical price fixing was no longer illegal per se; instead, such agreements were subjected to the rule-of-reason analysis.<sup>44</sup> Under the rule-of-reason analysis, the court conducts an in-depth inquiry into the contested behavior's impact on competition in the relevant market before determining whether the activity is prohibited.<sup>45</sup>

### C. Recent Developments in Antitrust Law: Ideological Shift from *Dr. Miles* to *Leegin*

Before the Supreme Court's decision in *Leegin*, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*<sup>46</sup> established that resale price maintenance (RPM) agreements were a per se violation of Section 1 of the Sherman Act.<sup>47</sup> RPM agreements exist when retailers and suppliers agree to set minimum retail prices.<sup>48</sup> This type of agreement is a classic example of a vertical agreement because of the parties involved.

In *Dr. Miles*, the plaintiff manufacturer sought to enjoin a wholesaler who

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39. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (“[P]er se rule . . . eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work . . . .”); *N. Pac. Ry. Co.*, 356 U.S. at 5 (noting certain practices conclusively presumed illegal without inquiry into harm caused or business excuse).

40. See *Bender v. Southland Corp.*, 749 F.2d 1205, 1211-12 (6th Cir. 1984) (stating elements of action for vertical price fixing).

41. See *id.* at 1211 (“The Supreme Court has long held that vertical price fixing is a per se violation of § 1 of the Sherman Act.”).

42. 522 U.S. 3 (1997).

43. 551 U.S. 877 (2007).

44. See *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (“[W]e find it difficult to maintain that vertically-imposed maximum prices could harm consumers or competition to the extent necessary to justify their per se invalidation.”); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) (overturning precedent, holding vertical price restraints judged according to rule of reason).

45. See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (noting under rule-of-reason analysis, fact-finding weighs all circumstances in determining whether restraint unreasonable).

46. 220 U.S. 373 (1911).

47. See *id.* at 409 (holding restrictions invalid).

48. See *id.* at 410-11 (Holmes, J., dissenting) (detailing RPM agreements and their effects).

was buying products from other wholesalers and retailers at prices below the resale price to which those wholesalers had contractually agreed.<sup>49</sup> The plaintiff claimed the defendant wholesaler was inducing other wholesalers to break the contracts establishing minimum resale prices.<sup>50</sup> The Court ultimately held such an agreement was a per se violation.<sup>51</sup> It became a well-established doctrine for nearly a century that all such vertical agreements were illegal per se.<sup>52</sup>

The Court acknowledged that the public has an interest in every person carrying on his or her trade freely.<sup>53</sup> It followed that any sort of restraint on trade is a restriction on individual liberty and, thus, against public policy, unless another positive effect outweighs the restriction of that trade freedom.<sup>54</sup> The Court believed this balancing test pointed in favor of restricting trade when that restriction was reasonable both in reference to the interest of the parties and the public.<sup>55</sup> The Court envisioned restrictions that adequately guarded the public, while at the same time were not injurious to that public.

The Court's economic analysis in *Dr. Miles* was rudimentary, and it ultimately concluded RPM agreements could never benefit the public.<sup>56</sup> At that point in time, there was no economic suggestion that the public might be better off if intrabrand restraint led to greater intrabrand competition, in other words, there was no notion of non-price consumer benefits. In modernity, however, the idea that intrabrand restraints can lead to consumer benefit is one of the principal reasons why vertical agreements are considered beneficial to consumers and justified under the rule of reason.<sup>57</sup>

The ideological shift from *Dr. Miles* to *Leegin* originated from several intervening cases. Over time, the Court began to favor the rule-of-reason analysis and only utilized the restrictive per se rule if the restraint "would always or almost always tend to restrict competition and decrease output."<sup>58</sup> The Court became very cautious in applying the per se analysis to a restraint, stating it should only be utilized "after courts have had considerable experience with the type of restraint at issue, and only if the courts can predict with

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49. *See id.* at 394.

50. *See Dr. Miles*, 220 U.S. at 394 (describing legal doctrine invoked by complainant).

51. *See id.* at 409 (holding agreements to set minimum retail price per se violation).

52. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (noting argument for retention as *Dr. Miles* decision "almost a century old").

53. *See Dr. Miles*, 220 U.S. at 403, 406 (describing public interest as main consideration in analysis of contracts restraining trade).

54. *See id.* at 403 (analyzing restriction on trade and public policy implications).

55. *See id.* at 406 (evaluating public interests in contracted restrictions).

56. *See id.* at 408 ("The complainant's plan falls within the principle which condemns contracts of this class.").

57. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889-92 (2007) (illustrating procompetitive effects of RPM agreements).

58. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289-90 (1985)).

confidence that it would be invalidated in all or almost all instances under the rule of reason.”<sup>59</sup>

The Court in *Leegin* specifically opined that, over time, the Court had moved away from rigid per se rules in antitrust, and the holding in *Dr. Miles* required new examination under this shift in ideology.<sup>60</sup> Specifically, the Court cited *Continental Television, Inc. v. GTE Sylvania Inc.*<sup>61</sup> to illustrate this shift.<sup>62</sup> In *Sylvania*, the Court analyzed whether all vertical restraints were not beneficial to consumers, and whether they should be classified as illegal per se.<sup>63</sup> The plaintiff challenged a franchise agreement between the manufacturer of television sets and retailers.<sup>64</sup> This contract barred retailers from selling the products in a location other than that specified in the agreement.<sup>65</sup> The Court determined the vertical restriction at issue was not illegal per se.<sup>66</sup> The Court reasoned that vertical restrictions can be adequately policed by the rule of reason rather than by categorical application of the per se rule.<sup>67</sup> This reasoning thus opened the door for the decision handed down subsequently in *Leegin*. Specifically, the *Sylvania* Court determined restricting the geographic location of retailers could be beneficial and, therefore, should not be considered illegal per se.<sup>68</sup>

After *Sylvania*, courts had new precedent to evaluate in considering whether vertical agreements should be treated as illegal per se or otherwise analyzed under the rule of reason. *Leegin* evaluated whether RPM agreements were illegal per se.<sup>69</sup> In *Leegin*, the Court overturned the long-standing opinion expressed in *Dr. Miles* that such a practice is always harmful, and instead utilized new economic theories to illustrate that RPM agreements could produce procompetitive benefits.<sup>70</sup> This ruling, however, could not have

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59. *Leegin*, 551 U.S. at 886-87 (citations and quotations omitted).

60. *See id.* at 887 (“The reasoning of the Court’s more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based.”).

61. 433 U.S. 36 (1977).

62. *See Leegin*, 551 U.S. at 890 (quoting *Sylvania* in asserting potential for underprovision of retail services absent vertical price restraints).

63. *See Sylvania*, 433 U.S. at 57-58 (noting “substantial scholarly and judicial authority” supporting economic utility of vertical restrictions).

64. *See id.* at 38-40 (outlining case facts).

65. *See id.* at 38 (summarizing agreement).

66. *See id.* at 58. In overruling the per se rule announced in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the *Sylvania* Court stated, “In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition . . . . But we do make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than as in *Schwinn* upon formalistic line drawing.” *Sylvania*, 433 U.S. at 58-59.

67. *See Sylvania*, 433 U.S. at 59 (“When anticompetitive effects are shown . . . they can be adequately policed under the rule of reason . . .”).

68. *See id.* at 55 (identifying potential benefits of vertical restrictions).

69. *Leegin*, 551 U.S. at 890 (“The few recent studies documenting the competitive effects of resale price maintenance . . . cast doubt on the conclusion that the practice meets the criteria for a per se rule.”).

70. *See id.* at 890-92 (discussing recent studies of theoretical benefits of resale price maintenance policies).



occurred without the *Sylvania* Court's prior holding that not all vertical agreements should be considered illegal per se.<sup>71</sup>

In *Leegin*, the defendant, a manufacturer of women's accessories, implemented a policy wherein it would refuse to sell its products to distributors who intended to sell them below a set retail price.<sup>72</sup> The defendant eventually learned that one of its retailers, Kay's Kloset, was in violation of this policy.<sup>73</sup> As a result, the defendant refused to sell them any more of its products.<sup>74</sup> The plaintiff, the parent company of Kay's Kloset, then filed an action against *Leegin* alleging that its policy violated antitrust law.<sup>75</sup> Specifically, the plaintiff alleged that the defendant and its retailers had agreed to sell its products at a fixed price.<sup>76</sup> The plaintiff argued that this was a vertical price restraint agreement, specifically an RPM agreement, and thus was illegal per se under *Dr. Miles*.<sup>77</sup>

In a surprising turn of events, the Court determined *Dr. Miles* should be overturned as a result of a new understanding of consumer economics.<sup>78</sup> Writing for the majority in *Leegin*, Justice Anthony Kennedy stated that in order for a RPM agreement to be illegal per se, it must have a "manifestly anticompetitive' effect[]." <sup>79</sup>

Upon hearing argument as to how RPM agreements could be beneficial, the Court determined that it should overturn *Dr. Miles*.<sup>80</sup> Specifically, Justice Kennedy indicated RPM agreements might indeed have a number of potentially procompetitive effects. For instance, Justice Kennedy explained, RPMs could: "eliminate intrabrand price competition" and encourage retailers to invest in a brand; increase consumer choice among brands along a price and quality continuum; curtail free riding; encourage dealers to offer more product-specific services to support a brand; and facilitate market entry for new firms and brands.<sup>81</sup>

The Court identified three factors that may indicate an anticompetitive agreement: first, the percentage of manufacturers in a relevant market using RPM; second, whether dealers or manufacturers instigate the restraint; and

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71. See *Sylvania*, 433 U.S. at 59 (holding anticompetitive restrictions properly evaluated under rule-of-reason analysis).

72. See *Leegin*, 551 U.S. at 882-83 (outlining facts of case).

73. See *id.* at 884.

74. See *id.*

75. See *Leegin*, 551 U.S. at 882-83.

76. See *id.*

77. See *id.* at 905 (noting *Leegin*'s arguments for reaffirming *Dr. Miles* based on stare decisis).

78. See *id.* at 900 ("[T]here is now widespread agreement that resale price maintenance can have procompetitive effects.").

79. *Leegin*, 551 U.S. at 886 (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977)).

80. See *supra* note 69 and accompanying text (noting Court's recognition of doubts cast by recent studies of RPM agreements).

81. *Leegin*, 551 U.S. at 890; see also *id.* at 890-91 (discussing benefits of RPMs).

third, whether the party imposing the restraint possesses market power.<sup>82</sup>

#### IV. VERTICAL AGREEMENT RESTRAINTS AFTER LEEGIN

##### A. Federal Level

In *Leegin*, the Court provided several examples of potentially illegal price-fixing activities.<sup>83</sup> Specifically, the Court identified ways in which restraints could be anticompetitive and therefore illegal even under the rule-of-reason analysis. For instance, restraints could be illegal if they facilitated a manufacturer or retailer cartel, or advanced anticompetitive interests of a dominant or powerful manufacturer or retailer.<sup>84</sup> To identify such scenarios, the Court suggested factors, as previously listed, to look for in a vertical agreement.<sup>85</sup> Since *Leegin*, retailers have successfully brought actions against manufacturers due to restrictive vertical agreements.

##### 1. Toledo Mack Sales & Service

In *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*,<sup>86</sup> the Third Circuit concluded, on a motion for summary judgment, that the plaintiff presented sufficient evidence of an illegal vertical price-fixing agreement between a manufacturer and its dealers.<sup>87</sup> The Third Circuit based its holding on the presence of two of the *Leegin* “plus” factors mentioned above.<sup>88</sup> Principally, the court concluded that the agreement at issue may be illegal because Mack Trucks possessed market power in different product markets, and because the vertical agreement—between the manufacturer and its dealers—was being used to support a horizontal agreement among the dealers to control prices.<sup>89</sup>

##### 2. *In re Nat'l Assoc. of Music Merchants, Inc.*

*In re National Association of Music Merchants, Musical Instruments and Equipment Antitrust Litigation*<sup>90</sup> examines an enforcement action brought by the Federal Trade Commission (FTC) concerning an agreement made by manufacturers, downstream dealers, and retailers. The FTC determined that this agreement violated antitrust law, as it was both a vertical and a horizontal

82. *See id.* at 897-98 (discussing economic dangers of RPMs).

83. *See id.* at 892-94 (describing beneficial price-fixing situations).

84. *See id.*

85. *See supra* note 82 and accompanying text (describing factors of anticompetitive agreements to establish vertical price fixing).

86. 530 F.3d 204 (3d Cir. 2008).

87. *See id.* at 226 (stating evidence sufficient for jury to find illegal agreement).

88. *See id.* at 225 (stating two issues identified in *Leegin* relevant to present case); *see also supra* note 82 and accompanying text.

89. *See Toledo*, 530 F.3d at 226 (applying factors to case).

90. No. 09-CV-2002, 2011 WL 3702453 (S.D. Cal. Aug. 22, 2011).

price-fixing agreement and facilitated the practice of a cartel.<sup>91</sup> As a result, the FTC brought an antitrust suit against the organization under the Sherman Act.<sup>92</sup>

Here, the trade organization had manufacturers suggest and coordinate the pricing of musical instruments distributed by their retailers.<sup>93</sup> This alone is not a violation; however, the manufacturers were also conspiring with one another to set the prices at which they would require their downstream retailers to sell their instruments.<sup>94</sup> Thus, this conspiracy and the agreement between the competing manufacturers constituted a horizontal agreement and therefore was a violation of the Sherman Act.

### 3. *Superseding Leegin*

Congress has made several attempts to pass bills that would supersede the Court's decision in *Leegin*, which overruled *Dr. Miles*, and reinstate an automatic ban of all RPM agreements.<sup>95</sup> In effect, these bills were introduced to restore the rule that vertical agreements between manufacturers and downstream retailers could not be made to set prices below a threshold level.<sup>96</sup> Despite the frequent introduction of these bills, none have made it past a committee vote.<sup>97</sup>

#### B. *State Antitrust Laws and Federal Preemption*

The Supremacy Clause of the U.S. Constitution dictates that whenever federal law conflicts with state law, federal law is prevalent on the issue.<sup>98</sup> This can occur in three ways: an express statement that federal law should override state law, federal occupation of a given field of law, or a conflict between federal and state law which “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>99</sup>

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91. *See id.* at \*1-2.

92. *See id.*

93. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 200 (D. Me. 2003).

94. *See id.*

95. *See, e.g.*, Discount Pricing Consumer Protection Act, S. 75, 112th Cong. (2011); Discount Pricing Consumer Protection Act, S. 148, 111th Cong. (2009); Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (2007).

96. *See, e.g.*, Discount Pricing Consumer Protection Act, S. 75, 112th Cong. (2011); Discount Pricing Consumer Protection Act, S. 148, 111th Cong. (2009); Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (2007) (stating purpose “to correct the Supreme Court’s mistaken interpretation of the Sherman Act in the *Leegin* decision”).

97. *See S.75 (112th) Discount Pricing Consumer Protection Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/s75> (last visited July 7, 2015), archived at <https://perma.cc/D4NU-H3J2> (noting recent bill died in committee).

98. U.S. CONST. art. VI, cl. 2 (“[T]he Laws of the United States . . . shall be the supreme law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

99. *California v. ARC Am. Corp.*, 490 U.S. 93, 100-01 (1989) (stating three ways for finding preemption).

The drafters of the Sherman Act did not intend for the Act to be the only source of antitrust law in the United States. They purposefully drafted the Act to supplement rather than supersede existing state antitrust regulations.<sup>100</sup> As a result, nearly all U.S. states have promulgated their own state antitrust acts.<sup>101</sup>

The *Leegin* decision did not address whether state statutes making minimum RPM agreements illegal per se are impermissible, and it is well settled that states, rather than the federal government, traditionally make antitrust law.<sup>102</sup> As such, *Leegin* does not preempt states from declaring that RPM agreements are still illegal per se. Consequently, state antitrust law in regard to RPMs is a patchwork of law that presents significant problems for nationwide companies. Currently, forty-eight states and the District of Columbia have enacted antitrust laws.<sup>103</sup>

Determining whether a state follows *Leegin* is difficult, even where the relevant state statute appears to make RPMs illegal. This is because numerous states have drafted their respective state antitrust acts to include a harmony clause, whereby the state judiciary is required to interpret state antitrust law to harmonize with comparable federal judiciary decisions. Thus, confusion arose after *Leegin* in states with a per se illegal statute. Below is a listing of each state indicating: whether they have prohibited RPM agreements; whether they have likely prohibited them by statute and there is no harmony clause in their state antitrust act; and whether they are likely to follow *Leegin*, or do follow *Leegin*.

### 1. States That Have Prohibited Vertical Agreements After *Leegin*<sup>104</sup>

California<sup>105</sup>

Maryland<sup>106</sup>

100. See Katherine M. Brockmeyer, Note, *State Regulation of Resale Price Maintenance on the Internet: The Constitutional Problems with the 2009 Amendment to the Maryland Antitrust Act*, 67 WASH. & LEE L. REV. 1111, 1127 n.121 (2010) (citing 21 CONG. REC. 2457 (1890)) (quoting Senator Sherman's assertion that Act enables cooperation between federal, state courts).

101. See Michael A. Lindsay, *Overview of State RPM*, THE ANTITRUST SOURCE (Apr. 2011), [http://www.americanbar.org/content/dam/aba/publications/antitrust\\_law/source\\_lindsay\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/antitrust_law/source_lindsay_chart.authcheckdam.pdf), archived at <http://perma.cc/D4Q7-ZCG7> (listing state statutes).

102. See *ARC Am. Corp.*, 490 U.S. at 101 (noting "long history of state common-law and statutory remedies against monopolies and unfair business practices").

103. See Lindsay, *supra* note 101 (providing state RPM overview).

104. See *id.* (providing comprehensive survey of state RPM antitrust laws, court decisions).

105. See CAL. BUS. & PROF. CODE § 16720(b) (Deering 2015) (describing trust as "limit[ing] or reduc[ing] the production, or increas[ing] the price . . . of any commodity"); see also Jeffrey A. LeVee & Margaret A. Ward, *Antitrust Alert: California Challenges Minimum Resale Price Maintenance as Per Se Illegal*, JONES DAY (Mar. 2010), <http://www.jonesday.com/antitrust-alert--california-challenges-maximum-resale-price-maintenance-as-per-se-illegal-03-19-2010/>, archived at <http://perma.cc/6JLV-EBS3>.

106. See MD. CODE ANN., COM. LAW § 11-204 (LexisNexis 2015) (prohibiting vertical agreements). The statute provides, "a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce." *Id.*

Wyoming<sup>107</sup>

*2. States That Possess Statutes Suggesting RPM Agreements Are Illegal and Do Not Have Statutes That Mandate the Courts To Follow Federal Antitrust Law for Guidance*

Connecticut<sup>108</sup>

Hawaii<sup>109</sup>

Indiana<sup>110</sup>

Minnesota<sup>111</sup>

Missouri<sup>112</sup>

Montana<sup>113</sup>

Nevada<sup>114</sup>

New Hampshire<sup>115</sup>

New Jersey<sup>116</sup>

Ohio<sup>117</sup>

South Carolina<sup>118</sup>

107. See WYO. STAT. ANN. § 40-4-101(a)(i) (2015) (prohibiting “any plan, contract, agreement . . . to prevent competition or to control or influence production or prices thereof”); see also *Bulova Watch Co. v. Zales Jewelry Co. of Cheyenne*, 371 P.2d 409, 420-21 (Wyo. 1962) (holding state antitrust law pertaining to RPM violates state constitution).

108. See CONN. GEN. STAT. ANN. § 35-28 (West 2014) (“[E]very contract, combination, or conspiracy is unlawful when the same are for the purpose, or have the effect, of . . . fixing, controlling, or maintaining prices, rates, quotations, or fees in any part of trade or commerce.”).

109. See HAW. REV. STAT. ANN. § 480-4(a) (LexisNexis 2015) (declaring all forms restraining trade unlawful); *Id.* § 480-3 (requiring federal antitrust laws as guidance); see also Lindsay, *supra* note 101 (listing state statutes explaining antitrust laws).

110. See IND. CODE ANN. § 24-1-1-1 (West 2015) (prohibiting “all arrangements, contracts . . . made with a view to lessen or which tend to lessen, full and free competition”).

111. See MICH. COMP. LAWS § 445.772 (2015) (declaring all “contracts, combinations, or conspiracies in restraint of or to monopolize trade or commerce” illegal); see also *id.* § 445.784(2) (allowing federal interpretation of antitrust statutes as guide); Lindsay, *supra* note 101 (listing state statutes explaining antitrust laws).

112. See MO. REV. STAT. § 416.031 (2015) (declaring unlawful agreements restricting trade or creating monopolies); *Id.* § 416.141 (attributing state antitrust law interpretations to federal guidance); see also Lindsay, *supra* note 101 (listing state statutes explaining antitrust laws).

113. See MONT. CODE ANN. § 30-14-205 (2015) (making it illegal to “fix a standard or figure whereby the price of an article of commerce intended for sale, use, or consumption will be in any way controlled”).

114. See NEV. REV. STAT. ANN. § 598A.060(10) (LexisNexis 2014) (prohibiting “agreements not to advertise prices”).

115. See N.H. REV. STAT. ANN. § 356:2(II)(a) (LexisNexis 2015) (prohibiting any “[f]ixing, controlling or maintaining prices, rates, quotations or fees in any part of trade or commerce”).

116. See N.J. STAT. ANN. § 56:4-1.1 (West 2015) (rendering unenforceable contracts restrain vendee’s ability to set price below price stipulated by vendor).

117. See OHIO REV. CODE ANN. § 1331.01 (West 2014) (“to create or carry out restrictions in trade or commerce . . . to fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established”); State *ex rel.* *Brown v. Palzes, Inc.*, 39 Ohio Misc. 155, 160 (Ct. Com. Pl. 1973) (“Price-fixing is a *per se* violation under the antitrust statutes of this state.”) (emphasis added).

118. See S.C. CODE ANN. § 39-3-10 (2014) (“All arrangements . . . designed or which tend to advance, reduce or control the price . . . are declared to be against public policy, unlawful and void.”).

Tennessee<sup>119</sup>  
West Virginia<sup>120</sup>

### 3. States That Likely Follow Leegin

Arizona<sup>121</sup>  
Iowa<sup>122</sup>  
Kentucky<sup>123</sup>  
Mississippi<sup>124</sup>  
North Carolina<sup>125</sup>  
Oregon<sup>126</sup>  
South Dakota<sup>127</sup>  
Vermont<sup>128</sup>  
Wisconsin<sup>129</sup>

119. See TENN. CODE ANN. § 47-25-101 (2014) (“[A]ll arrangements . . . which tend, to advance, reduce, or control the price . . . of any such product or article, are declared to be against public policy, unlawful, and void.”).

120. See W. VA. CODE ANN. § 47-18-3 (LexisNexis 2015) (“Every contract . . . or conspiracy in restraint of trade or commerce in this State shall be unlawful . . . [including the actions of] . . . [f]ixing, controlling, maintaining . . . for the purpose or with the effect of fixing, controlling or maintaining the market price, rate or fee of the commodity or service.”).

121. See ARIZ. REV. STAT. § 44-1402 (LexisNexis 2015) (prohibiting “[a] contract, combination or conspiracy between two or more persons in restraint of, or to monopolize trade or commerce”); *Id.* § 44-1412 (“courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes”).

122. See IOWA CODE ANN. § 553.4 (West 2014) (stating “[a] contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market”); *Id.* § 553.2 (requiring Iowa courts to interpret chapter in harmony with federal statutes).

123. See KY. REV. STAT. ANN. § 367.175 (LexisNexis 2015) (declaring unlawful “[e]very contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce”); see also *Mendell v. Golden-Farley of Hopkinsville, Inc.*, 573 S.W.2d 346, 349 (Ky. Ct. App. 1978) (“Although not bound by the federal decisions, we shall examine the restrictive covenant in this case in light of the cases construing sections 1 and 2 of the Sherman Anti-Trust Act.”).

124. See MISS. CODE ANN. § 75-21-1(b) (2014) (prohibiting any contract or agreement “to limit, increase or reduce the price of a commodity”); *Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1070 n.5 (5th Cir. 1984) (treating Mississippi, federal antitrust claims as “analytically identical”).

125. See N.C. GEN. STAT. § 75-1 (2014) (prohibiting “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce”); see also *Madison Cablevision, Inc. v. Morganton*, 386 S.E.2d 200, 213 (N.C. 1989) (holding Sherman Act instructive, not binding, for interpreting state antitrust statute).

126. See OR. REV. STAT. ANN. § 646.725 (West 2015) (prohibiting “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce”); see also *Willamette Dental Grp., P.C. v. Or. Dental Serv. Corp.*, 882 P.2d 637, 640 (Or. Ct. App. 1994) (“[W]e look to federal decisions interpreting . . . the Sherman Act for persuasive, albeit not binding, guidance.”).

127. See S.D. CODIFIED LAWS § 37-1-3.1 (2015) (prohibiting any “contract, combination, or conspiracy between two or more persons in restraint of trade or commerce”); *Id.* § 37-1-22 (“[I]n construing this chapter, the courts may use as a guide interpretations given by the federal or state courts to comparable antitrust statutes.”).

128. See VT. STAT. ANN. tit. 9, § 2453(a) (West 2014) (prohibiting “[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce”); *Id.* § 2453(b) (stating, “the courts of this state will be guided by the construction of similar terms contained in Section 5(a)(1) of the Federal Trade Commission Act”).

129. See WIS. STAT. § 133.03(1) (2014) (prohibiting “[e]very contract, combination . . . or conspiracy, in

#### 4. States That Follow Leegin

Alabama<sup>130</sup>  
Alaska<sup>131</sup>  
Arkansas<sup>132</sup>  
Colorado<sup>133</sup>  
Delaware<sup>134</sup>  
Florida<sup>135</sup>  
Hawaii<sup>136</sup>  
Idaho<sup>137</sup>  
Kansas<sup>138</sup>  
Louisiana<sup>139</sup>  
Massachusetts<sup>140</sup>

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restraint of trade or commerce”); *see also* *Emergency One, Inc. v. Waterous Co.*, 23 F. Supp. 2d 959, 970 (E.D. Wis. 1998) (“Wisconsin case law makes clear that federal court decisions construing the Sherman Act control application of Wisconsin antitrust law.”).

130. *See* ALA. CODE § 8-10-1 (LexisNexis 2015) (providing civil penalty for attempt to fix price by agreement); *Id.* § 8-10-3 (providing criminal penalty for attempts to restrain “the freedom of trade or production”); *Ex parte Rice*, 67 So. 2d 825, 829 (Ala. 1953) (“We have applied the common law, which is substantially as set out in the Sherman and Clayton Acts.”).

131. *See* ALASKA STAT. § 45.50.562 (2015) (declaring unlawful “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce”); *see also* *West v. Whitney-Fidalgo Seafoods, Inc.*, 628 P.2d 10, 14 (Alaska 1981) (“The legislature intended that Alaska courts would look to Sherman Act cases in construing [Alaska Anti-Trust Act].”).

132. *See* ARK. CODE ANN. § 4-75-309 (2014) (prohibiting price fixing).

133. *See* COLO. REV. STAT. ANN. § 6-4-119 (West 2015) (instructing courts to use comparable federal court decisions as guidance in interpreting antitrust law); *see also* *People ex rel. Woodard v. Colo. Springs Bd. of Realtors, Inc.*, 692 P.2d 1055, 1061 (Colo. 1984) (stating federal court decisions construing Sherman, Clayton Acts “entitled to careful scrutiny”).

134. *See* DEL. CODE ANN. tit. 6, § 2103 (West 2015) (prohibiting “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce”); *Id.* § 2113 (“This chapter shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes.”); *see also* *Hammermill Paper Co. v. Palese*, No. 7128, 1983 WL 19786, at \*12 (Del. Ch. June 14, 1983) (stating legislative intent to adopt “not only the language but the judicial interpretation and application of the Sherman Act”).

135. *See* FLA. STAT. ANN. § 542.32 (LexisNexis 2015) (stating interpretations of comparable federal antitrust statutes should receive “due consideration and great weight”).

136. *See* HAW. REV. STAT. ANN. § 480-3 (LexisNexis 2015) (“This chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes . . .”).

137. *See* IDAHO CODE ANN. § 48-102 (West 2015) (stating state antitrust law “shall be construed in harmony with federal interpretations of comparable federal antitrust statutes”).

138. *See* KAN. STAT. ANN. § 50-112 (West 2014) (prohibits “all arrangements . . . designed . . . to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles”); *see also* S.B. 124, 85th Leg., 2013 Reg. Sess. (Kan. 2013) (amending Kansas restraint of trade act). As a result of this bill’s enactment, Kansas courts shall, with limited exceptions, harmonize state antitrust law with rulings of the United States Supreme Court. *See* S.B. 124, 85th Leg., 2013 Reg. Sess. (Kan. 2013).

139. *See* LA. REV. STAT. ANN. § 51:122 (2014) (prohibiting “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce”); *see also* *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1003, 1005 (5th Cir. 1981) (stating “same principles of law apply” under both federal, state antitrust statutes).

140. *See* MASS. ANN. LAWS ch. 93, § 4 (LexisNexis 2015) (prohibiting “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce”); *Id.* § 1 (“This chapter shall be construed in harmony with

Michigan<sup>141</sup>  
 Minnesota<sup>142</sup>  
 Missouri<sup>143</sup>  
 Nebraska<sup>144</sup>  
 Nevada<sup>145</sup>  
 New Mexico<sup>146</sup>  
 New York<sup>147</sup>  
 Oklahoma<sup>148</sup>  
 Pennsylvania<sup>149</sup>  
 Rhode Island<sup>150</sup>  
 South Carolina<sup>151</sup>

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judicial interpretations of comparable federal antitrust statutes insofar as practicable.”).

141. See MICH. COMP. LAWS SERV. § 445.772 (LexisNexis 2015) (prohibiting any “contract, combination, or conspiracy . . . in restraint of, or to monopolize, trade or commerce in a relevant market”); *Id.* § 445.784(2) (“[I]n construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason.”); see also *Little Caesar Enters. v. Smith*, 895 F. Supp. 884, 898 (E.D. Mich. 1995) (“Michigan antitrust law is identical to federal law and follows the federal precedents.”).

142. See MINN. STAT. ANN. § 325.51 (West 2015) (prohibiting every “contract, combination, or conspiracy . . . in unreasonable restraint of trade or commerce”); *Id.* §§ 325D.53, 1(1)(a) (declaring unlawful any “contract, combination, or conspiracy . . . affecting, fixing, controlling or maintaining the market price, rate, or fee of any commodity or service”); see also *Minnesota v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 893-94 (Minn. Ct. App. 1992) (“Minnesota antitrust law should be interpreted consistently with federal court interpretations of the Sherman Act unless state law is clearly in conflict with federal law.”).

143. See MO. ANN. STAT. § 416.141 (West 2014) (stating antitrust law sections “shall be construed in harmony with judicial ruling interpretations of comparable federal antitrust statutes”); *Hamilton v. Spencer*, 929 S.W.2d 762, 767 n.3 (Mo. Ct. App. 1996) (noting statute).

144. See NEB. REV. STAT. ANN. § 59-801 (LexisNexis 2015) (prohibiting “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce”); *Id.* § 59-829 (providing courts construing state statutes shall follow federal court construction of similar federal law); see also *State ex rel. Douglas v. Associated Grocers of Neb. Coop., Inc.*, 332 N.W.2d 690, 693 (Neb. 1983) (citing federal precedent as authority concerning both vertical and horizontal price-fixing).

145. See NEV. REV. STAT. ANN. § 598A.060 (LexisNexis 2014) (prohibiting contracts in restraint of trade); *Id.* § 598A.050 (“The provisions of this chapter shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes.”).

146. See N.M. STAT. ANN. § 57-1-15 (LexisNexis 2015) (providing New Mexico statute shall be harmonized with judicial interpretations of federal antitrust laws).

147. See N.Y. GEN. BUS. LAW § 340 (Consol. 2015) (prohibiting agreements restraining competition or free exercise of business activity); *Id.* § 369-a (“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.”); see also *People v. Tempur-Pedic Int’l., Inc.*, 944 N.Y.S.2d 518 (N.Y. App. Div. 2012) (holding RPM agreements lawful under New York law).

148. See OKLA. STAT. ANN. tit. 79, § 212 (West 2014) (“The provisions of this act shall be interpreted in a manner consistent with Federal Antitrust Law.”); *Id.* § 203 (prohibiting “[e]very act, agreement, contract, or combination . . . or conspiracy in restraint of trade or commerce”); see also *Star Fuel Marts, LLC v. Sam’s E., Inc.*, 362 F.3d 639, 648 n.3 (10th Cir. 2004) (stating Oklahoma’s antitrust act interpreted in accordance with federal antitrust law).

149. See *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1014 (3d Cir. 1994) (holding state antitrust common law follows federal antitrust law embodied in Sherman Act).

150. See R.I. GEN. LAWS § 6-36-2(b) (2014) (stating statute, with exceptions, “construed in harmony with judicial interpretations of comparable federal antitrust statutes”).



Texas<sup>152</sup>  
Utah<sup>153</sup>  
Virginia<sup>154</sup>  
Washington<sup>155</sup>

##### 5. *Unknown States*

Maine<sup>156</sup>  
North Dakota<sup>157</sup>

#### V. MINIMUM ADVERTISED PRICE (MAP) POLICIES

MAP policies arise when a manufacturer and a retailer enter into a distributorship agreement providing that the manufacturer may unilaterally terminate the agreement if the retailer advertises a product at a price lower than the minimum price set by the manufacturer.<sup>158</sup> So far, courts and the FTC have considered these MAP policies to be acceptable under antitrust law.<sup>159</sup> A

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151. See S.C. CODE ANN. § 39-3-10 (2014) (prohibiting contracts which lessen free competition or control price); see also *Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co.*, 55 S.E. 973, 975-76 (S.C. 1906) (holding intent to affect competition, price “to a reasonable extent” not prohibited by statute).

152. See TEX. BUS. & COM. CODE ANN. § 15.05(a) (West 2015) (“Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful”); *Id.* § 15.04 (stating Act construed “in harmony with federal judicial interpretations of comparable federal antitrust statutes”); see also *Abbott Labs., Inc. v. Segura*, 907 S.W.2d 503, 505 (Tex. 1995) (noting “Legislature’s mandate that Texas antitrust law be harmonized with federal antitrust law”).

153. See UTAH CODE ANN. § 76-10-3104(1) (LexisNexis 2015) (prohibiting “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce”); *Id.* § 76-10-926 (providing courts construing act “will be guided” by other courts’ interpretations of comparable statutes); see also *Evans v. Utah*, 963 P.2d 177, 181 (Utah 1998) (following harmonization statute for guidance in construing Utah federal antitrust statute).

154. See VA. CODE ANN. § 59.1-9.5 (2015) (prohibiting contracts in restraint of trade or commerce); *Id.* § 59.1-9.17 (stating chapter construed “in harmony with judicial interpretation of comparable federal statutory provisions.”); see also *Williams v. First Fed. Sav. & Loan Ass’n of Arlington*, 651 F.2d 910, 930 (4th Cir. 1981) (recognizing statutory mandate).

155. See WASH. REV. CODE ANN. § 19.86.030 (LexisNexis 2015) (prohibiting “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce”); *Id.* § 19.86.920 (declaring intent, federal courts’ interpretations of similar federal statutes guide state courts in construing act); see also *Blewett v. Abbott Labs.*, 938 P.2d 842, 846 (Wash. Ct. App. 1997) (stating departure from federal law “must be for a reason rooted in our own statutes or case law”).

156. See ME. REV. STAT. ANN. tit. 10, § 1101 (2013) (prohibiting “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce”); see also *Davric Me. Corp. v. Rancourt*, 216 F.3d 143, 149 (1st Cir. 2000) (noting Maine courts construe state antitrust statute according to doctrines related to federal law).

157. See N.D. CENT. CODE ANN. § 51-08.1-02 (West 2015) (prohibiting “contract, combination, or conspiracy . . . in restraint of, or to monopolize, trade or commerce”).

158. See Julie Beth Albert, Note, *Adding Uncertainty to the Virtual Shopping Cart: Antitrust Regulation of Internet Minimum Advertised Price Policies*, 80 *FORDHAM L. REV.* 1679, 1694 (2012) (“MAP policies set a price floor below which dealers cannot advertise . . .”). Albert writes, “[s]hould the reseller sell the product at a price below that required by the manufacturer, the manufacturer may terminate the program or choose not to continue with distribution.” *Id.* at 1694-95.

159. See Fed. Trade Comm’n, *Manufacturer-imposed Requirements*, FTC.GOV, [http://www.ftc.gov/bc/antitrust/manufacturer\\_requirements.shtm](http://www.ftc.gov/bc/antitrust/manufacturer_requirements.shtm) (last visited July 7, 2015), archived at <http://perma.cc/6NW5->

review of how the courts handle MAP policy litigation provides some insight into how courts will address IMAP issues, as they are extremely similar practices.

A. *Holabird Sports Discounters v. Tennis Tutor, Inc.*

In *Holabird Sports Discounters v. Tennis Tutor, Inc.*,<sup>160</sup> the Fourth Circuit determined the implementation of a MAP policy by a wholesaler was an acceptable practice under federal antitrust law.<sup>161</sup> Here, Tennis Tutor, a manufacturer of tennis ball practice machines, implemented a policy stating it “will not sell, or will discontinue selling, Tennis Tutor ball machines to dealers who . . . advertise the Tennis Tutor in any general circulation regional or national publication for less than suggested retail price, including call for price advertisements.”<sup>162</sup> The purpose of this MAP policy, according to the court, was to “maintain a healthy national distribution system” by preventing “free-riding” by national mail order discount houses.<sup>163</sup>

Tennis Tutor ended its business relationship with Holabird upon discovering that Holabird had placed a magazine advertisement requesting that readers call for the price of Tennis Tutors.<sup>164</sup> The Fourth Circuit ultimately affirmed summary judgment for Tennis Tutor, concluding Holabird failed to present sufficient evidence showing Tennis Tutor did not act independently when it terminated its relationship with Holabird.<sup>165</sup>

B. *Commodore Business Machines, Inc. v. Montgomery Grant, Inc.*

In *Commodore Business Machines, Inc. v. Montgomery Grant, Inc.*,<sup>166</sup> the Southern District of New York held that Commodore Business Machines, Inc. (Commodore), a computer and data processing equipment manufacturer, legally implemented a MAP policy on its retailers. The court, however, decided it could not rule on the antitrust claim since the parties failed to

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FAXS. The FTC states:

If a manufacturer, on its own, adopts a policy regarding a desired level of prices, the law allows the manufacturer to deal only with retailers who agree to that policy. A manufacturer also may stop dealing with a retailer that does not follow its resale price policy. That is, a manufacturer can implement a dealer policy on a “take it or leave it” basis.

*Id.*

160. No. 92-2504, 1993 U.S. App. LEXIS 10918 (4th Cir. May 7, 1993), *aff'd*, 993 F.2d 228 (1993).

161. *See id.* at \*5-6 (affirming summary judgment for defendant on Sherman Act claim).

162. *Id.* at \*2.

163. *Id.* at \*3.

164. *See Holabird Sports Discounters v. Tennis Tutor, Inc.*, No. 92-2504, 1993 U.S. App. LEXIS 10918, at \*4 (4th Cir. May 7, 1993), *aff'd*, 993 F.2d 228 (1993) (stating facts of case).

165. *See id.* at \*5-6 (finding no error in trial court’s opinion).

166. No. 90 Civ. 7498 (LMM), 1993 U.S. Dist. LEXIS 262 (S.D.N.Y. Jan. 13, 1993).

adequately define the relevant market.<sup>167</sup> Here, Commodore created a policy where authorized dealers of their products were restrained from advertising Commodore's products at a discounted price.<sup>168</sup> If the retailers refused to comply, the policy stated that Commodore would, and could, refuse to do business with the retailers anymore.<sup>169</sup>

Quoting *Monsanto Co. v. Spray-Rite Service Corp.*,<sup>170</sup> the *Commodore* court stated that a manufacturer has "a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."<sup>171</sup> The Court noted that a company may implement a pricing policy and terminate distributors who refuse to comply with it, so long as it does not go beyond this and in effect create coercive agreements with respect to resale prices.<sup>172</sup> In this instance, however, Commodore simply created a policy to restrict its wholesalers from advertising its products at discounted prices, and the court determined this type of policy was not a violation of the Sherman Act.<sup>173</sup>

### C. *In re* Compact Disc Minimum Advertised Price Antitrust Litigation

In contrast to the prior MAP litigation cases, in 2003 a group of CD manufacturers settled a case with numerous states concerning antitrust litigation over CD pricing for \$143 million.<sup>174</sup> In *In re Compact Disc Minimum Advertised Price Antitrust Litigation*,<sup>175</sup> it was alleged that CD manufacturers had entered into a horizontal agreement with one another, and then separately entered into a vertical agreement with their retail outlets to offer CDs at a certain price point in exchange for promotional funds.<sup>176</sup> The manufacturer threatened to refuse to provide promotional aid to retailers that did not adhere to the advertised price point as suggested.<sup>177</sup> Ultimately, the FTC concluded it had reason to believe the practices violated the Federal Trade Commission Act, although Sony was not required to admit fault by the consent decree.<sup>178</sup>

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167. See *id.* at \*4 ("The counterclaims, fairly read, raise questions of fact as to whether Commodore was acting independently and whether Commodore coerced its dealers to comply with its restrictions on advertising discount prices.").

168. See *id.* at \*1.

169. *Id.*

170. 465 U.S. 752 (1984).

171. *Montgomery Grant, Inc.*, 1993 U.S. Dist. LEXIS 262, at \*4 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)).

172. See *id.*

173. *Id.*

174. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 199-200 (D. Me. 2003) (approving settlement).

175. 216 F.R.D. 197 (D. Me. 2003).

176. See *id.* at 200-01; see also *In re Sony Music Entm't, Inc.*, No. C-3971, 2000 F.T.C. LEXIS 95, at \*1-6 (2000) (stating FTC allegations).

177. See *In re Compact Disc*, 216 F.R.D. at 200 (explaining manufacturer threats for violations of price point particulars).

178. See *In re Sony Music Entm't, Inc.*, 2000 F.T.C. LEXIS 95, at \*1.

## VI. IMAP POLICIES

IMAP policies are nearly identical to MAP policies, except the advertising price restriction extends only to online retailers of the product.<sup>179</sup> IMAP policies are imposed upon distributors by wholesalers or manufacturers, forbidding distributors from advertising products below a set minimum threshold price.<sup>180</sup> If the distributor sells the item below this set price, generally the manufacturer will retaliate by terminating its agreement with the vendor and refusing to supply them with more products.

For example, if a television set company were to implement a policy establishing the minimum price at which its online retailers could advertise a television set, this would constitute an IMAP. An online retailer subject to this policy might still be permitted to list the television set on its web page, advertise its features and qualities, and even spotlight the product as being on sale; it could not, however, advertise the price if that price was below the retailer's set threshold for online advertising prices. If the retailer were to advertise a price below the threshold level, then Sony could unilaterally terminate its relationship with the retailer.

The extent of IMAP restrictions with respect to various products vary according to each individual company's internal policies. Generally, manufacturers will implement IMAP policies that permit retailers to advertise a product as "on sale" or direct customers to call the retailer or place the product in an online "shopping cart" in order to discover the price. On the other hand, some manufacturers impose other restrictions, such as a restriction prohibiting the act of bundling products together and advertising their joint sale price.<sup>181</sup>

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179. See generally Erika L. Amarante & Fallon DePina Banks, *A Roadmap to Minimum Advertised Price Policies*, A.B.A. (2013), [http://www.americanbar.org/publications/franchise\\_lawyer/2013/fall\\_2013/roadmap\\_to\\_minimum\\_advertise\\_price\\_policies.html](http://www.americanbar.org/publications/franchise_lawyer/2013/fall_2013/roadmap_to_minimum_advertise_price_policies.html), archived at <http://perma.cc/YF4L-QKXB> (describing MAP policies involving internet companies).

180. See *id.* (attributing advertised prices to MAP policies).

181. See *Otterbox.com Policies*, OTTERBOX (2015), <http://www.otterbox.com/en-us/policies.html>, archived at <http://perma.cc/543F-L2L3> (describing OtterBox MAP policy). The OtterBox website states:

Advertising two or more Covered Products (i.e. two OtterBox products that are covered by this MAP Policy) for sale together ("OtterBox Product Bundle") at a price less than the combined MAPs for each Covered Product is a violation of this MAP Policy. OtterBox reserves the right to issue MAP Policy modifications that apply specifically to OtterBox Product Bundles . . . . Advertisements featuring a Covered Product, and either (a) another brand of product or (b) an OtterBox product that is not a Covered Product will comply with this MAP Policy so long as the price in the advertisement is not lower than the Covered Product's MAP. In determining whether the advertisement contains a price in compliance with this MAP Policy, OtterBox will assess whether a reasonable viewer of the ad will, looking within the four corners of the advertisement, conclude that the ad is stating a price for the Covered Product below the MAP.

*Id.*

### A. *Difficult Litigation of IMAP Policies*

Despite the prevalence of online retailers—including large retailers such as Amazon—most of the claims filed involving IMAP disputes have been by small retailers. In response to such claims, retailers have argued that IMAP policies should be reviewed under the rule of reason as if they were a minimum RPM policy.<sup>182</sup> Courts, however, disagree with this argument because an IMAP policy is distinguishable from a minimum RPM policy, as the distributor is not setting a minimum price of sale, but instead is only setting a minimum advertised price.<sup>183</sup> Even when courts analyze an IMAP policy as if it were an RPM, plaintiffs struggle in bringing valid claims.

#### 1. *Colgate Doctrine*

Plaintiffs face a significant hurdle in successfully alleging the existence of an agreement. The Sherman Act prohibits only concerted actions; it does not prohibit purely unilateral conduct.<sup>184</sup> In other words, a manufacturer has the right to choose with whom he wishes to do business.<sup>185</sup> This principle is often referred to as the “Colgate doctrine,” as it was articulated by the Supreme Court in *United States v. Colgate Co.*<sup>186</sup> Under this principle, online retailers often state that they are suggesting a minimum price, but will unilaterally cease doing business with retailers who do not follow it.<sup>187</sup> Invoking this principle, online retailers facing allegations of Sherman Act violations have argued that they acted independently in terminating their relationship with the retailer, and thus the Sherman Act does not apply to the circumstance.<sup>188</sup>

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182. See *Worldhomecenter.com, Inc. v. L.D. Kichler Co.*, No. 08-CV-020, 2009 WL 936675, at \*1-2 (E.D.N.Y. Mar. 31, 2009) (alleging defendant’s IMAP policy actually vertical price fixing).

183. See *Campbell v. Austin Air Sys., Ltd.*, 423 F. Supp. 2d 61, 68 n.6 (2005) (finding no unreasonable restrictions under rule-of-reason analysis).

184. See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). In *Colgate*, the Supreme Court stated:

In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

*Id.*

185. See *id.*

186. See *id.*; see also David J. Saylor, *Programming Access and Other Competition Regulations of the New Cable Television Law and the Primestar Decrees: A Guided Tour Through the Maze*, 12 CARDOZO ARTS & ENT. L.J. 321, 327 (1994) (stating cardinal principle of antitrust law that supplier free to formulate policy regarding customers).

187. *Id.* But see *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960) (stating “[w]hen the manufacturer’s actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act.”).

188. See Michael A. Lindsay, *A Tale of Two Coasts: Recent RPM Enforcement in New York and California*, THE ANTITRUST SOURCE (Apr. 2011), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/apr11-lindsay\\_4-20f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr11-lindsay_4-20f.authcheckdam.pdf), archived at <http://perma.cc/E6RR-82NR> (discussing

There are limits to the Colgate doctrine; a manufacturer cannot overtly coerce a retailer into following a pricing policy.<sup>189</sup> Courts, however, have narrowed even this limitation by stating that a manufacturer's threat to terminate a business relationship with a downstream dealer who does not comply with a suggested resale price is not a coercive threat.<sup>190</sup>

It is well recognized that an agreement between a manufacturer or wholesaler and its distributor to set an advertised price is not illegal per se. Therefore, even if there is an agreement with respect to a set minimum advertised price, this agreement is permissible in the current antitrust framework. As IMAP policies do not prevent distributors from selling products below the suggested prices, but only restrict the minimum price at which items are advertised, such policies do not violate antitrust law.

## 2. *Difficulty in Pleading Required Definitions*

An additional reason for the difficulty in litigating IMAP policies is the increased burden on plaintiffs in pleading violations with sufficient specificity. The pleading requirements for alleging an agreement by conspiracy tightened significantly after the 2007 decision *Bell Atlantic Corp. v. Twombly*.<sup>191</sup> Before this decision, a plaintiff's complaint could survive a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>192</sup> After *Twombly*, plaintiffs must state allegations that plausibly suggest a conspiracy.<sup>193</sup> As a result, even if there is a potentially valid claim, sufficiently pleading all of the elements of illegal vertical price fixing is extremely difficult in the case of IMAP antitrust litigation.<sup>194</sup>

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independent act assessment for Sherman Act applicability).

189. See *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43 (1960). In *Parke*, the Court stated:

[A] simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. In other words, an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

*Id.*

190. See *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1159 (9th Cir. 1988) (characterizing manufacturer's advising dealer of MAP policy as "legitimate pressure"); *Isaksen v. Vt. Castings, Inc.*, 825 F.2d 1158, 1163 (7th Cir. 1987) (stating involuntary participant plaintiff must prove defendant induced participation by conduct beyond merely announcing policy).

191. 550 U.S. 544 (2007).

192. *Twombly*, 550 U.S. at 561 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

193. See *id.* at 556 (stating need at pleading stage for allegations "plausibly suggesting (not merely consistent with) agreement").

194. See *Albert*, *supra* note 158, at 1703 (discussing pleading standards make vertical price fixing complaints difficult to achieve). *Albert* notes:

As consumers flock to the internet in search of low prices, IMAP policies have become increasingly

For example, to sufficiently plead an antitrust claim, a plaintiff must define the relevant product and geographic market in which the price fixing occurred.<sup>195</sup> This proposed geographic product market must include “commodities reasonably interchangeable by consumers for the same purposes.”<sup>196</sup> In essence, the geographic market is the area of “effective competition.”<sup>197</sup> The geographic market must be able to “correspond to the commercial realities’ of the industry and be economically significant.”<sup>198</sup> Consequently, a geographic market can be the United States, or it may instead be a narrower “single metropolitan area.”<sup>199</sup> If a plaintiff fails to define this geographic product market, then the claim is insufficient.<sup>200</sup>

The Fifth Circuit’s decision in *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*<sup>201</sup> illustrates the difficulty of pleading an antitrust case. In *Apani*, the court dismissed the plaintiff’s antitrust claim for failure to sufficiently describe the relevant geographic market.<sup>202</sup> The plaintiff alleged that the defendant entered into a contractual agreement with a city for the exclusive sale of beverages.<sup>203</sup> This contract precluded the city from entering into contracts with other beverage companies that would permit the sale of other beverages at city facilities.<sup>204</sup> The plaintiff alleged in its complaint that

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prevalent among manufacturers. IMAP policies are currently being examined through the lens of resale price maintenance. Given the significant uncertainty surrounding RPM in the antitrust world after *Leegin*, the unique characteristics of IMAP policies, and the burden of a heightened pleading standard introduced by *Bell Atlantic Corp. v. Twombly*, plaintiffs have numerous barriers to a successful IMAP claim.

*Id.*

195. See, e.g., *Skyline Travel, Inc. v. Emirates*, 476 F. App’x 480, 481 (2d Cir. 2012) (“Skyline . . . fails to state a valid antitrust claim because it failed to adequately identify the relevant market.”); *Agnew v. NCAA*, 683 F.3d 328, 337 (7th Cir. 2012) (“It is the existence of a commercial market that implicates the Sherman Act in the first instance.”); *Queen City Pizza v. Domino’s Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997) (“Plaintiffs have the burden of defining the relevant market.”).

196. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (discussing definition of market for purpose of antitrust claim).

197. See *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966) (stating relevant market “reflects the reality of the way in which [defendants] built and conduct their business”); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 227 (1961) (“The area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which buyers can practicably turn for supplies.”).

198. *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962).

199. *Id.* at 336-37.

200. See *Flash Elecs., Inc. v. Universal Music & Video Distribution Corp.*, 312 F. Supp. 2d 379, 392-93 (E.D.N.Y. 2004) (examining relevant market requirement pleading standard); *Jadali v. Alamance Reg’l Med. Ctr.*, 225 F.R.D. 181, 185 (M.D.N.C. 2004) (assessing plaintiffs proposed market insufficient to sustain monopoly accusation); *Cupp v. Alberto-Culver USA, Inc.*, 310 F. Supp. 2d 963, 970 (W.D. Tenn. 2004) (holding plaintiffs claim fails for not identifying relevant market).

201. 300 F.3d 620 (5th Cir. 2002).

202. See *id.* at 632-33 (dismissing antitrust claim); see also *PSKS, Inc. v. Leegin Creative Leather Prods. Inc.*, 615 F.3d 412, 417-19 (5th Cir. 2010) (deeming proposed market definition legally insufficient).

203. See *Apani*, 300 F.3d at 623.

204. See *id.*

the agreement applied to a narrow geographic market consisting of the twenty-seven city-operated facilities.<sup>205</sup> The court disagreed, reasoning that the city itself—not just the twenty-seven facilities—constituted the geographic market.<sup>206</sup> Consequently, the court dismissed the claim.<sup>207</sup>

### 3. Federal Level IMAP Litigation

Considering the pervasive use of IMAP policies, it is surprising that this issue is not litigated more frequently. It is similarly surprising that, when these claims are brought, smaller-scale players in the online retail market initiate them. Moreover, these antitrust claims have been unsuccessful, as no violation has been found yet.<sup>208</sup>

#### a. Worldhomecenter.com Series

Worldhomecenter.com, Inc., an online retailer of home improvement products, filed a series of claims alleging their wholesalers were in violation of antitrust law for implementing an IMAP policy in their distributorship contracts.<sup>209</sup> It appears that none of the claims brought by Worldhomecenter.com were successful.<sup>210</sup> In fact, many of the claims were dismissed for failure to state a claim.<sup>211</sup>

For example, in *Worldhomecenter.com, Inc. v. L.D. Kichler Co.*,<sup>212</sup> Worldhomecenter.com filed its claim in the Eastern District of New York against Kichler, a lighting products company.<sup>213</sup> Worldhomecenter.com alleged the IMAP policy created by Kichler violated the Sherman Act because it was an anticompetitive practice to the detriment of consumers.<sup>214</sup>

Specifically, Worldhomecenter.com claimed the IMAP policy implemented

205. See *id.* at 628 (characterizing Apani's position).

206. See *id.* (noting trial court's finding).

207. See *Apani*, 300 F.3d at 633 (affirming claim dismissal).

208. See generally Albert, *supra* note 158 (discussing failed use of antitrust claims).

209. See *Worldhomecenter.com, Inc. v. KWC Am., Inc.*, No. 10 Civ. 7781(NRB), 2011 U.S. Dist. LEXIS 104496 (S.D.N.Y. Sept. 15, 2011); *Worldhomecenter.com v. PLC Lighting, Inc.*, 851 F. Supp. 2d 494 (S.D.N.Y. 2011); *Worldhomecenter.com, Inc. v. Franke Consumer Prods.*, No. 10 Civ. 3205(BSJ), 2011 U.S. Dist. LEXIS 67798 (S.D.N.Y. June 22, 2011); *Worldhomecenter.com, Inc. v. L.D. Kichler Co.*, No. 05-CV-3297(DRH)(ARL), 2007 U.S. Dist. LEXIS 22496 (E.D.N.Y. Mar. 28, 2007); *Worldhomecenter.com, Inc. v. Thermasol, Ltd.*, No. 05 Civ. 3298(DRH)(ETB), 2006 U.S. Dist. LEXIS 46323 (E.D.N.Y. July 10, 2006).

210. See *KWC Am., Inc.*, 2011 U.S. Dist. LEXIS 104496, at \*26 (dismissing complaint); *PLC Lighting, Inc.*, 851 F. Supp. 2d at 502-03 (granting motion to dismiss antitrust claims); *Franke Consumer Prods.*, 2011 U.S. Dist. LEXIS 67798, at \*23 (dismissing complaint); *Worldhomecenter.com, Inc. v. L.D. Kichler Co.*, No. 08-CV-020(DRH)(ETB), 2009 U.S. Dist. LEXIS 28123, \*13 (E.D.N.Y. March 31, 2009) (dismissing complaint). But see *Thermasol, Ltd.*, 2006 U.S. Dist. LEXIS 46323, at \*14 (denying motion to dismiss antitrust claim).

211. See *supra* note 210 and accompanying text.

212. No. 05-CV-3297(DRH)(ARL), 2007 U.S. Dist. LEXIS 22496 (E.D.N.Y. March 28, 2007).

213. See *id.* at \*2 (summarizing complaint's allegations).

214. See *id.* at \*12-13 ("Plaintiff alleges that the IMAP policy . . . constitutes an illegal price-fixing scheme . . . to maintain artificially high prices").



by Kichler restricted it from being able to sell Kichler's products at a discount.<sup>215</sup> Consequently, because of a restraint on trade, the products' consumer was not receiving the benefit of a more efficient distribution chain.<sup>216</sup> Ultimately, Kichler was able to persuade the court that its practice was not illegal, as the court granted its motion to dismiss the complaint.<sup>217</sup>

*b. Campbell v. Austin Air Systems*

In *Campbell v. Austin Air Systems, Ltd.*,<sup>218</sup> the plaintiff alleged that the defendant had engaged in price fixing by terminating its distributorship agreement with the plaintiff when the plaintiff advertised a product at a price lower than what the defendant had suggested.<sup>219</sup> Here, the defendant, a manufacturer of portable air cleaners and filters, sold these products to dealers.<sup>220</sup> The plaintiff was an authorized dealer of the defendant's products and entered into such an agreement with the defendant; this agreement stipulated that either party may terminate the agreement at any time, with or without cause.<sup>221</sup> Also included in this agreement was a stipulation requiring the plaintiff to submit to the defendant any proposed changes to its internet page; the agreement also required the plaintiff to show the price of the defendant's products at a price that was the same or higher than the defendant's scheduled pricing.<sup>222</sup> Over time, the plaintiff began advertising the defendant's products below the defendant's set pricing.<sup>223</sup> As a result of the plaintiff's conduct, the defendant unilaterally terminated its agreement with the plaintiff and stopped shipping its product to them.<sup>224</sup>

Campbell alleged that this termination of the agreement was a violation of 15 U.S.C. § 1 because Austin Air Systems was engaging in price-fixing and this conduct should be considered illegal under antitrust law as a restraint on trade or commerce.<sup>225</sup> The court recognized the possibility that the defendant had acted unilaterally in terminating its agreement with the defendant, stating, "[t]he law is clear that independent action on the part of a manufacturer is not proscribed under the Sherman Act."<sup>226</sup> The court ultimately concluded that the defendant may have acted independently by setting its minimum advertised price schedule and terminating its agreement with the plaintiff, although it

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215. *Id.* at \*5.

216. *See L.D. Kichler Co.*, 2007 U.S. Dist. LEXIS 22496, at \*5 (quoting complaint).

217. *See id.*

218. 423 F. Supp. 2d 61 (W.D.N.Y. 2005).

219. *See Campbell*, 423 F. Supp. 2d at 65.

220. *See id.* at 64 (summarizing undisputed facts for purposes of summary judgment motion).

221. *See id.*

222. *See Campbell*, 423 F. Supp. 2d at 64.

223. *Id.*

224. *Id.* at 65.

225. *Id.* at 66-67.

226. *Campbell*, 423 F. Supp. 2d at 69.

could not grant summary judgment on the matter.<sup>227</sup> Thus, the plaintiff's allegations were insufficient to render a violation, and the court dismissed this claim.<sup>228</sup>

### C. Considering IMAP Policies Unreasonable

IMAP policies have the potential to be detrimental to our society for several reasons. First, IMAP policies are similar to price-fixing. Price-fixing is a tactic companies use to manipulate the marketplace to maximize profits. Thus, the reason for implementing an IMAP policy seems to be self-serving.

Second, while IMAP policies are legal, they may be utilized as a pretext in order to support a price-fixing conspiracy between manufacturers, as illustrated in *In re Compact Disc*.<sup>229</sup> Companies have utilized this legal gray-area of MAP and IMAP policies in order to establish a product cartel. Yet, the danger of abuse of these types of policies is minimized as a result of analysis under the rule-of-reason. As evidenced by the result of *In re National Ass'n. of Music Merchants*,<sup>230</sup> courts and the FTC can still determine whether the abuse of these policies is a violation of the Sherman Act as a result of an impermissible restraint on trade or the creation of a cartel.

### D. Benefits and Reasonability of IMAP Policies

It may be argued, however, that IMAP policies are indeed beneficial in ways similar to RPM policies, and therefore, they should not be perceived as unreasonable restraints. One argument is that, in the long run, IMAP policies are beneficial to consumers because they ensure full-service retailers have an incentive to continue to provide their services to customers. In theory, such a policy will prevent consumers from free-riding on retailers that provide full services. This argument originates from RPMs, as RPMs were established because large full-service retailers were being undercut by smaller retailers who provided no services.<sup>231</sup> If this had continued, the large full-service retailer would have no incentive to continue to provide services and would have discontinued them, leaving the consumer with fewer options.

For example, Amazon is often able to provide products at a lower cost than brick and mortar stores for several reasons. One such reason is that it does not invest as heavily in sales, customer relations, or advertising. Often a consumer goes into a full service store to learn about a product from a sales

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227. *Id.*

228. *Id.*

229. 216 F.R.D. 197, 199-200 (D. Me. 2003).

230. No. MDL 2121, 2011 WL 3702453 (S.D. Cal. Aug. 22, 2011).

231. See Paul Gift, *Price Fixing and Minimum Resale Price Restrictions Are Two Different Animals*, GRAZIADIO BUS. REV. (2009), <http://gbr.pepperdine.edu/2010/08/price-fixing-and-minimum-resale-price-restrictions-are-two-different-animals/>, archived at <http://perma.cc/LWD4-36RP> (discussing RPM establishment and benefits).

representative, to try it out, or to see the product demonstrated. The consumer benefits from these services. The consumer, however, understands there may be more competitive prices elsewhere, and will thus search for a more competitive price from a company like Amazon. Eventually, full service retailers will have no reason to offer full services to customers if they continue to lose their business to other retailers who are able to undercut their prices as a result of not providing these services to the consumer.

Lastly, IMAP policies, when analyzed under the rule-of-reason, do not touch upon any of the factors the Court articulates in *Leegin*. IMAP policies do not facilitate a manufacturer cartel nor do they facilitate a retailer cartel. In fact IMAP policies do the opposite by inevitably creating a more level playing field for brick and mortar stores to compete with online retailers, and this in turn provides more options for consumers. Further, IMAP policies do not advance the interests of a dominant retailer; rather, IMAP policies can promote the interests of disadvantaged retailers, preventing online retailers from becoming too dominant in the marketplace.

#### *E. Suggestions for Implementing IMAP Policies*

First, and most importantly, a business may circumvent antitrust law if it acts unilaterally under the Colgate doctrine. To do so, a business should incorporate in its policy an express provision that the business may unilaterally terminate its relationship with a vendor at its independent discretion. This statement will substantially reduce the risk of having a successful antitrust claim brought against it. Also, a business should avoid including in its policy statement any threat to take action above and beyond termination to coerce businesses to adhere to the IMAP policy. If a business chooses not to do so, it will be at risk of losing its antitrust immunity under the *Colgate* Doctrine.

Next, it is extremely important for a business not to coordinate its minimum advertising prices with competitors. Most MAP and RPM policies are considered violations under the Sherman Act when analyzed under the rule of reason; this is because they are quasi-horizontal agreements. Regardless of whether the vertical agreement is considered legal, if it is coupled with a horizontal agreement, then a business will face liability under the Sherman Act, as horizontal agreements are illegal per se.

Lastly, it is important for a business to analyze whether its IMAP policy is legal in every U.S. state. There are some states that do not follow *Leegin* and may prohibit RPM agreements which are akin to IMAP and MAP policies. Thus, these policies may be considered a violation of that state's antitrust law. Therefore, a manufacturer should be cognizant of this, and should implement its IMAP policy on a state-by-state basis instead of implementing a uniform national policy.

## VII. CONCLUSION

Federal and state courts should refrain from analyzing IMAP policies as if they are RPMs. The two practices are acutely distinct from one another. By definition, RPMs are a more restrictive anti-competitive practice as they prohibit a retailer from selling a product below a threshold price set by the manufacturer. Despite the fact that such agreements can be anti-competitive, the Court in *Leegin* determined that these agreements can, in some contexts, be procompetitive and beneficial to consumers for a myriad of reasons, including the elimination of the threat of consumer free-riding.<sup>232</sup>

IMAP policies are a less restrictive practice than RPMs because IMAP policies do not prohibit a retailer from selling a product for less than a set price. Consequently, retailers still possess the discretion to sell a product at a price point they personally set. Retailers are free to undercut competitors and provide consumers the benefit of price competition. Therefore, the practice should be considered legal unless it appears that one of the factors elucidated in *Leegin* is present. More often than not, if a court analyzes an IMAP policy under *Leegin*, the policy will be considered legal because its procompetitive justifications dwarf its anti-competitive traits, especially because RPMs are considered legal under this analysis.

Courts should stop comparing IMAP policies with RPMs, as these practices are distinct. Courts understand that RPMs are on the borderline of an acceptable agreement under the Sherman Act. By identifying IMAP policies as distinct from RPMs in their rule-of-reason analysis, courts may carve out a concrete area of law that might still apply even if *Leegin* is eventually overturned. Courts should not risk prohibiting IMAP policies simply because they often analogize them to RPM agreements. The rationale for this approach is that IMAP policies, unlike RPM agreements, are often implemented by manufacturers to benefit consumers under the listed *Leegin* procompetitive justifications. Notably, IMAP policies are most often implemented as a way of circumventing consumer free-riding on full-service retailer brick and mortar stores. If online retailers went totally unrestricted, they easily could force brick and mortar stores to cut back their services dramatically, which would inevitably be detrimental to consumers.

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232. See Gregory T. Gundlach et al., *Free Riding and Resale Price Maintenance: Insights from Marketing Research and Practice*, 55 ANTI-TRUST BULL. 381 (2010), <http://www.unf.edu/~ggundlac/pdfs/FreeRidingPriceMaintenance.pdf>, archived at <http://perma.cc/8A49-SSGJ> (assessing Court's determination in *Leegin*).