

# Antitrust Federalism in Action— State Challenges to Vertical Price Fixing In the Post-*Leegin* World

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*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>1</sup> replaced per se condemnation of vertical price fixing or resale price maintenance (RPM) agreements under federal antitrust law with rule of reason analysis. *Leegin* poses significant challenges to state attorneys general, who have aggressively prosecuted RPM, more so than their federal counterparts.<sup>2</sup> For more than twenty years, state attorneys general have combined resources through the Multistate Antitrust Task Force of the National Association of Attorneys General<sup>3</sup> to attack vertical price-fixing agreements. Their collective efforts have returned in excess of \$115 million in cash and \$75 million in products to consumers<sup>4</sup> through federal *parens patriae* cases<sup>5</sup> alleging RPM.

Despite the demands of *Leegin*, attorneys general will not end their pursuit of RPM cases because of a central truth—RPM means higher prices to consumers.<sup>6</sup> While the job has become more difficult, they will pursue RPM along several paths: (1) bringing federal antitrust *parens patriae* cases under the *Leegin* regime; (2) advocating legislative repeal of *Leegin* in the United States Congress; and (3) suing under state antitrust law to challenge RPM in state courts.

These state law challenges to RPM arise from our system of federalism, under which state and federal antitrust laws have co-existed for many years. Some state antitrust laws continue to regard RPM as per se unreasonable conduct. Other states, as Maryland has, may enact laws that make

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<sup>1</sup> 551 U.S. 877 (2007).

<sup>2</sup> Pamela Jones Harbour, Commissioner, Fed. Trade Comm'n, Vertical Restraints: Federal and State Enforcement of Vertical Issues, SJ075 ALI-ABA 185 (2004), <http://www.ftc.gov/speeches/harbour/0403vertical.pdf>.

<sup>3</sup> The Task Force is composed of assistant attorneys general from many states who coordinate and conduct multistate investigations and litigation. See 1 ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES 1-8 to 1-10 (2d ed. 1999) [hereinafter STATE ANTITRUST PRACTICE AND STATUTES].

<sup>4</sup> Brief for States of New York, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming as Amici Curiae Supporting Respondent, *Leegin Creative Leather Prods. v. PSKS*, 551 U.S. 877 (2007).

<sup>5</sup> These cases, brought pursuant to 15 U.S.C. §§ 15C, include, e.g., *New York v. Salton, Inc.*, 265 F. Supp. 2d 310 (S.D.N.Y. 2003); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003); *In re Nine West Shoes Antitrust Litig.*, 80 F. Supp. 2d 181 (S.D.N.Y. 2000); *New York v. Reebok Int'l, Ltd.*, 903 F. Supp. 532 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996); *Maryland v. Mitsubishi Elecs. Am., Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,743 (D. Md. 1992); *New York v. Nintendo of Am., Inc.*, 775 F. Supp. 676 (S.D.N.Y. 1991); and *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456 (D. Md. 1987).

<sup>6</sup> Robert F. Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1488 (1983) ("The one point that emerges clearly in any debate concerning the per se rule is that minimum vertical price agreements lead to higher, and usually uniform, resale prices."). See *Leegin*, 551 U.S. at 910–13 (Breyer, J., dissenting); 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶1604b, 40 (2d ed. 2004); *Bye Bye Bargain? Retail Price Fixing; The Leegin Decision, and its Impact on Consumer Prices before the Subcomm. on Courts, and Competition Policy*, 111th Cong. 13–14 (2009) (statement of Richard M. Brunell), available at [http://www.antitrustinstitute.org/archives/files/Brunell%20House%20Testimony\\_042820090740.pdf](http://www.antitrustinstitute.org/archives/files/Brunell%20House%20Testimony_042820090740.pdf).

RPM agreements per se unlawful. These state antitrust laws are well within the bounds of the Constitution and will be enforced against RPM to lower prices to consumers and to protect the autonomy of small retailers.

### Post-*Leegin* Federal Antitrust Litigation

The per se rule was a “conversation stopper”<sup>7</sup> that resulted in significant settlements in all of the pre-*Leegin* parens patriae RPM cases brought by the Task Force. Federal antitrust litigation under the rule of reason is a far more onerous matter for a plaintiff. In the absence of the per se rule, proof becomes more complex and already expensive litigation becomes even more expensive.<sup>8</sup>

The *Leegin* Court expressed the expectation that “over time,” as federal courts acquire experience dealing with vertical price-fixing cases, they will “devise rules” or even recognize presumptions to promote a “fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.”<sup>9</sup> As these “fair and efficient” rules develop over the years, plaintiffs will have to spend large sums to litigate rule of reason cases.

Nonetheless, attorneys general will likely continue to bring select federal RPM cases, and the significant benefits to states that litigate together under the auspices of the Task Force will continue to provide a strong incentive to remain in a federal forum. Indeed, the States of New York, Illinois and Michigan filed, and settled, a federal minimum RPM case in March of 2008 against furniture maker, Herman Miller, Inc. The states alleged that this furniture manufacturer violated federal and state antitrust laws by preventing retailers from advertising discount prices that were below minimum prices set by the manufacturer.<sup>10</sup>

### Federal Legislation “Repealing” *Leegin*

On October 27, 2009, thirty-eight state attorneys general, joined by attorneys general from three territories, submitted to Congress letters strongly supporting the passage of S. 148 and H.R. 3190, the Discount Pricing Consumer Act (DPCA), which would repeal *Leegin*. In the letters, the attorneys general assert that passage of the DPCA will benefit consumers “from both cost efficiencies within the distribution chain as well as product qualities promoted by sellers and manufacturers of branded goods.”<sup>11</sup> Further, they state that “sufficient experience with ‘state fair trade laws’ during the middle of the last century evidenced that consumers paid significantly more for goods when manufacturers could maintain prices at the retail level.”<sup>12</sup> These letters reflect even greater support for Congressional repeal of *Leegin* than the letter submitted to the 110th Congress in support of S. 2261.<sup>13</sup>

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<sup>7</sup> United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1363 (5th Cir. 1980).

<sup>8</sup> See Robert F. Pitofsky, *Are Retailers Who Offer Discounts Really “Knaves”?: The Coming Challenge to the Dr. Miles Rule*, ANTITRUST, Spring 2007, at 61, 64.

<sup>9</sup> *Leegin*, 551 U.S. at 898–99.

<sup>10</sup> Complaint, *New York v. Herman Miller, Inc.*, No. 08-CV-2977 (S.D.N.Y. filed Mar. 21, 2008).

<sup>11</sup> Letter from Thirty-Eight State Attorneys General to Sen. Herb Kohl and Sen. Orrin G. Hatch (Oct. 27, 2009), available at [http://naag.org/assets/files/pdf/signons/20091027.S\\_148.pdf](http://naag.org/assets/files/pdf/signons/20091027.S_148.pdf); Letter from Thirty-Eight State Attorneys General to Rep. John Conyers and Rep. Lamar Smith (Oct. 27, 2009), available at [http://naag.org/assets/files/pdf/signons/20091027.HR\\_3190.pdf](http://naag.org/assets/files/pdf/signons/20091027.HR_3190.pdf). The two letters are identical.

<sup>12</sup> *Id.*

<sup>13</sup> Letter from Thirty-Five State Attorneys General to Sen. Patrick Leahy et al. (May 14, 2008), available at [http://www.naag.org/assets/files/pdf/signons/antitrust.AG\\_Letter\\_Supporting\\_S2261.pdf](http://www.naag.org/assets/files/pdf/signons/antitrust.AG_Letter_Supporting_S2261.pdf).

## Vertical Price-Fixing Enforcement Under Existing State Antitrust Laws

A number of attorneys general will prosecute RPM in their respective state courts under their existing antitrust laws despite the fact that litigation in state forums will create challenges to achieving the collective action that served the states so well before *Leegin*. The ability of individual attorneys general to sue under state law depends on whether their respective legislatures have expressly condemned RPM, whether their antitrust laws are intended to act independently of federal antitrust law or whether their antitrust laws are intended to defer to federal antitrust law.<sup>14</sup> In a recent compilation, Richard A. Duncan and Alison K. Guernsey identify thirteen states that appear to have state laws prohibiting RPM that are independent of federal antitrust law.<sup>15</sup>

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Our two most populous states, California and New York, are well positioned to sue vertical price fixers in their state courts. California's courts have consistently held that the Cartwright Act<sup>16</sup> prohibits resale price maintenance as per se unlawful conduct,<sup>17</sup> for a vertical price fixing scheme "destroys horizontal competition as effectively as would a horizontal agreement among distributors or retailers."<sup>18</sup> California's antitrust law was enacted in 1907 "in reaction to perceived ineffectiveness" of the Sherman Act<sup>19</sup> even though its prohibitions resemble federal antitrust law. Thus, California's Supreme Court has held that "judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters' intent."<sup>20</sup> It is unlikely that California's courts will permit RPM to "destroy" competition when they decide whether to retain the per se rule for vertical price fixing.

New York's Donnelly Act contains provisions that clearly resemble section 1 of the Sherman Act and New York's courts have followed federal antitrust precedent "unless there are differences in state and federal policy, statutory policy, statutory language, or legislative history."<sup>21</sup> New York policy parted company from federal law in 1974 with the legislative repeal of New York's Fair Trade Law.<sup>22</sup> In response to Governor Hugh Carey's plea "to insure that consumers are not victimized by

<sup>14</sup> Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?* 27 FRANCHISE L.J. 173 (2008). The authors provide a taxonomy of state antitrust laws' adherence to federal antitrust law.

<sup>15</sup> These states are California, Connecticut, Kansas, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, South Carolina, Tennessee, and West Virginia. *Id.* at 174; see also Michael A. Lindsay, *Resale Price Maintenance and the World After Leegin*, ANTITRUST, Fall 2007, at 32 (2007) [hereinafter *Resale Price Maintenance (2007)*]. Mr. Lindsay recently published an update to his 2007 article and chart. See Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, ANTITRUST SOURCE, Oct. 2009, <http://www.abanet.org/antitrust/at-source/09/10/Oct09-Lindsay10-23f.pdf>.

Additionally, Hawaii has a strong argument that its antitrust law condemns vertical price fixing despite *Leegin*. The Hawaiian statute provides, "[N]o person, exclusive of members of a single business entity consisting of a sole proprietorship, partnership, trust, or corporation, shall agree, combine, or conspire with any other person or persons, or enter into, become a member of, or participate in, any understanding, arrangement, pool, or trust, to do, directly or indirectly, any of the following acts, in the State or any section of the State: (1) Fix, control, or maintain, the price of any commodity." HAW. REV. STAT. § 480-4(b)(1) (Repl. 2008). This provision is in addition to the general prohibition against contracts, combinations and conspiracies that restrain trade unreasonably found in section 480-4(a) of Hawaiian law. HAW. REV. STAT. § 480-4(a) (Repl. 2008).

<sup>16</sup> Cartwright Act, CAL. BUS. & PROF. CODE §§ 16700–70 (West 2006).

<sup>17</sup> See *Miland v. Burckle*, 572 P.2d 1142, 1147 (Cal. 1978); *Kunert v. Mission Fin. Servs. Corp.*, 1 Cal. Rptr. 3d 589, 605 (Cal. Ct. App. 2003).

<sup>18</sup> *Chavez v. Whirlpool Corp.*, 113 Cal. Rptr. 2d 175, 180 (Cal. Ct. App. 2001).

<sup>19</sup> STATE ANTITRUST PRACTICE AND STATUTES, *supra* note 3, at 6–1 (California).

<sup>20</sup> *California ex. rel. Van de Kamp v. Texaco, Inc.*, 762 P.2d 385, 395 (Cal. 1988), *superseded by statute on other grounds*, 1992 Cal. Stats., ch. 430, §§ 2 and 3, p. 1707; see also Duncan & Guernsey, *supra* note 14, at 177.

<sup>21</sup> Robert L. Hubbard, *Protecting Consumers Post-Leegin*, ANTITRUST, Fall 2007, at 41, 43, n.38 (2007) (citing cases).

<sup>22</sup> N.Y. GEN. BUS. LAW § 369-a (McKinney 2004).

price-fixing schemes,”<sup>23</sup> the New York legislature enacted a law providing that vertical price-fixing under federal trade laws “shall not be enforceable or actionable at law.”<sup>24</sup> The Governor’s Program Bill noted that RPM keeps prices “artificially higher” than those in a free market.<sup>25</sup> New York’s law was enacted a year prior to the Consumer Pricing Goods Act of 1975 that repealed the Federal Fair Trade laws, and has its own independent history. This history provides New York with strong arguments that *Leegin* should not be applied to the Donnelly Act.<sup>26</sup> Indeed, two pre-*Monsanto*<sup>27</sup> federal court decisions and one relatively recent New York state appellate decision appear to support per se treatment of vertical price fixing under the Donnelly Act.<sup>28</sup>

### Maryland’s *Leegin* Repealer

When the federal courts close their doors to antitrust plaintiffs, state law sometimes provides succor to excluded parties. The most dramatic example of this is many states’ response to *Illinois Brick Co. v. Illinois*,<sup>29</sup> where the Supreme Court construed section 4 of the Clayton Act<sup>30</sup> to preclude plaintiffs from recovering damages when they did not purchase directly from the antitrust wrongdoer. To date, at least thirty-six states<sup>31</sup> have acted, through legislation or court decisions, to permit these “indirect purchasers” to recover damages under state antitrust laws. The power of the states to enact this legislation, which contradicts the Court’s construction of federal antitrust law, was upheld in *California v. ARC America Corp.*<sup>32</sup> In April of 2009, Maryland’s General Assembly passed the first statute<sup>33</sup> in the country expressly rejecting the application of *Leegin*’s reasoning to the Maryland Antitrust Act (MATA).<sup>34</sup>

MATA prohibits combinations, conspiracies and agreements that restrain trade “unreasonably” and is very similar to section 1 of the Sherman Act.<sup>35</sup> Section 11-202(a)(2) of MATA bids Maryland’s

<sup>23</sup> Jay L. Himes, *New York’s Prohibition of Vertical Price-Fixing*, N.Y.L.J., Jan. 29, 2008, available at [http://lawprofessors.typepad.com/antitrustprof\\_blog/files/nylj\\_rpm\\_paper.pdf](http://lawprofessors.typepad.com/antitrustprof_blog/files/nylj_rpm_paper.pdf) (citing PUBLIC PAPERS OF HUGH L. CAREY, FIFTY-FIRST GOVERNOR OF THE STATE OF NEW YORK 77 (1992)).

<sup>24</sup> *Id.*

<sup>25</sup> Hubbard, *supra* note 21, at 43 (quoting N.Y. GEN. BUS. LAW § 369-a).

<sup>26</sup> *Id.* at 43. New Jersey also repealed fair trade laws before the Consumer Goods Pricing Act of 1975. See N.J. STAT. ANN. § 56:4-1.1 (West 2007). Duncan and Guernsey note, “The New Jersey courts have only referred to this statute once in a published decision, and then only in passing. However, the reference came in a case decided after *Leegin*, and the statute is cited as having continuing vitality. See *Exit A Plus Realty v. Zuniga*, 930 A.2d 491, 497 (N.J. Super. Ct. App. Div. 2007).” Duncan & Guernsey, *supra* note 14, at 175 n.53.

<sup>27</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (setting evidentiary rules for establishing an agreement under 15 U.S.C. § 1 as opposed to unilateral action that is not subject to this provision).

<sup>28</sup> *Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762, 773 (S.D.N.Y. 1980); *Uniroyal, Inc. v. Jetco Auto Serv., Inc.*, 461 F. Supp. 350, 357 (S.D.N.Y. 1978); *George C. Miller Brick Co., Inc. v. Stark Ceramics, Inc.*, 770 N.Y.S.2d 235, 236 (N.Y. App. Div. 2003).

<sup>29</sup> 431 U.S. 720 (1977).

<sup>30</sup> 15 U.S.C. § 15.

<sup>31</sup> *Roundtable Discussion, The Report of the Antitrust Modernization Commission*, ANTITRUST, Summer 2007, at 9, 16 (Comment of Roxane Busey).

<sup>32</sup> 490 U.S. 93 (1989).

<sup>33</sup> 2009 Md. Laws 169–171.

<sup>34</sup> MD. CODE ANN., COM. LAW §§ 11-201–213 (LexisNexis 2005).

<sup>35</sup> 15 U.S.C. § 1. Unlike section 1 of the federal law, Section 11-204(a)(1) of the Maryland law expressly limits its prohibition on combinations that restrain trade “unreasonably.” MD. CODE ANN., COM. LAW § 11-204(a)(1) (LexisNexis 2005). The addition of this term reflects early federal jurisprudence that limited that reach of section 1 of the Sherman Act to unreasonable restraints. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58 (1911).

courts to be “guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters . . . .”<sup>36</sup> In its first decision under MATA, Maryland’s Court of Appeals construed this section to say that it was to be “guided (but not bound) by the opinions of the federal courts under the federal antitrust laws . . . .”<sup>37</sup> Despite reserving the possibility of reaching results inconsistent with federal antitrust law, Maryland’s courts have consistently cited “almost exclusively to federal case law” and have reached “results consistent with federal precedent.”<sup>38</sup>

The Court of Appeals last heard a case involving allegations of vertical price fixing in *Natural Design, Inc. v. Rouse Co.*<sup>39</sup> The court reversed a grant of summary judgment to a shopping center that allegedly conspired with one of its tenants to terminate the lease of a discounting tenant and held that RPM is per se illegal under MATA. The Court of Appeals declined an invitation to analyze the alleged vertical price-fixing under the rule of reason concluding, “the per se rule...still retains its vitality.”<sup>40</sup>

**Significantly, the**

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Concerned that the Court of Appeals might apply *Leegin* to cases arising under MATA, Maryland’s General Assembly enacted two identical bills intended to preserve the authority of *Natural Design*.<sup>41</sup> The General Assembly amended section 11-204(a)(1) of MATA by adding the following provision (the “*Leegin* Repealer”): “For purposes of subsection (a)(1) of this section, 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.”<sup>42</sup> Legislative history makes it clear that the bills preserve the per se rule.<sup>43</sup>

Significantly, the *Leegin* Repealer was supported by both Maryland consumer and retailer groups. The Maryland Consumer Rights Coalition urged the General Assembly to enact the *Leegin* Repealer, permitting the free market to work to “keep prices as low as possible.”<sup>44</sup> In oral testimony before Maryland’s House Economic Matters Committee, a representative of the Maryland Association of Retailers explained that, just as retailers seek to be as free as possible from governmental constraints, they also seek to be free of constraints imposed by manufacturers.<sup>45</sup>

**Issues in the Application of Maryland’s Leegin Repealer.** With the enactment of its *Leegin* Repealer, Maryland has parted company with federal antitrust law on RPM. This raises doubt whether, as to RPM, Maryland’s courts will be “guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters . . . .”<sup>46</sup> The *Leegin*

<sup>36</sup> MD. CODE ANN., COM. LAW § 11-202(a)(2) (LexisNexis 2005).

<sup>37</sup> *Quality Discount Tires, Inc. v. Firestone Tire & Rubber Co.*, 382 A.2d 867, 870 (Md. 1978).

<sup>38</sup> Ellen S. Cooper & Alan M. Barr, *Attacking the Odious: One Hundred Years of Antitrust Law in Maryland*, Md. B.J., Jan. 2000, at 44, 48.

<sup>39</sup> 485 A.2d 663 (Md. 1984).

<sup>40</sup> *Natural Design*, 485 A.2d at 669.

<sup>41</sup> S.B. 239, 426th Gen. Assem., Reg. Sess. (Md. 2009); H.B. 657, 426th Gen. Assem., Reg. Sess. (Md. 2009).

<sup>42</sup> *Id.* § 11-204(b).

<sup>43</sup> Fiscal and Policy Note, S.B. 239, 426th Gen. Assem., Reg. Sess. at 2 (Md. 2009) (S.B. 239 became Maryland’s *Leegin* Repealer. The Note states that Maryland’s law is similar to S. 2261, which is “intended to overturn the Supreme Court’s decision in *Leegin* . . .”), available at [http://mlis.state.md.us/2009rs/fnotes/bil\\_0009/sb0239.pdf](http://mlis.state.md.us/2009rs/fnotes/bil_0009/sb0239.pdf).

<sup>44</sup> Letter from Charles Shafer, President, Maryland Consumer Rights Coalition, to Senator Brian E. Frosh, Chairman, Senate Judicial Proceedings Committee (Feb. 4, 2009) (on file with the Maryland Senate Judicial Proceedings Committee).

<sup>45</sup> Telephone interview with Jeff Zellmer, Legislative Dir., Md. Ass’n of Retailers (Oct. 6, 2009) (on file at the Antitrust Div., Office of the Attorney General of Md.).

<sup>46</sup> MD. CODE ANN., COM. LAW § 11-202(a)(2) (LexisNexis 2005).

Repealer could be exempt from this provision of MATA, since the General Assembly took a deliberate step away from federal law on RPM when it enacted the *Leegin* Repealer. However, Maryland courts will likely look to *Natural Design*, the last occasion the Court of Appeals had to consider RPM under MATA.

In *Natural Design*, the Court of Appeals found that plaintiff had alleged sufficient evidence of vertical price-fixing to meet the standard set out in the Supreme Court's then-recent decision in *Monsanto Co. v. Spray-Rite Service Corp.*, in that plaintiff's evidence tended "to exclude the possibility that [defendants] were acting independently."<sup>47</sup> The Court stated that *Monsanto* would take precedence over prior Maryland decisions that may have applied a different rule.<sup>48</sup> The rules set forth in *Monsanto* will likely continue to guide Maryland's courts.

Maryland's *Leegin* Repealer retains the same requirement of an agreement that governs section 11-201(a)(1) of the Maryland Antitrust Act.<sup>49</sup> Known as the "Colgate Doctrine," this requirement permits action by a manufacturer unilaterally to suggest prices or unilaterally to announce that it will not deal with retailers who sell below its suggested price.<sup>50</sup> *Natural Design* also recognized the *Colgate* Doctrine.<sup>51</sup> However, it is unclear to what extent, if any, the law will be read to expand the *Colgate* doctrine, as some courts have done,<sup>52</sup> to permit the manufacturer to exhort, cajole, argue or pressure a retailer into compliance with its pricing scheme. In *Natural Design*, the Court of Appeals stated, "When the manufacturer's actions . . . 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."<sup>53</sup>

Maryland's *Leegin* Repealer makes unlawful agreements that that establish "a minimum price below which a retailer . . . may not sell a commodity or service."<sup>54</sup> The statute would not seem to apply to agreements among advertisers and retailers as to the minimum price at which a product may be advertised, as long as the retailer is free to set its own selling price. As a result, minimum advertised price (MAP) programs, where the manufacturer pays a portion of the retailer's advertising costs if the retailer advertises the product at or above an advertising price set by the manufacturer<sup>55</sup> will likely be held lawful. However, MAP programs that are enforced by the manufacturer in a manner that goes beyond supporting advertising and effectively set the minimum selling price<sup>56</sup> will violate Maryland's *Leegin* Repealer.

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<sup>47</sup> *Natural Design*, 485 A. 2d at 670 (quoting *Monsanto*, 465 U.S. at 764).

<sup>48</sup> *Id.* at 670 n.9.

<sup>49</sup> 2009 Md. Laws 169–171.

<sup>50</sup> See *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

<sup>51</sup> *Natural Design*, 485 A.2d at 670.

<sup>52</sup> See, e.g., *Acquaire v. Canada Dry Bottling Co. of N.Y., Inc.*, 24 F.3d 401, 410 (2d Cir. 1994); see also ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 130–40 (6th ed. 2007) [hereinafter DEVELOPMENTS].

<sup>53</sup> *Natural Design*, 485 A.2d at 670 (quoting *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960)).

<sup>54</sup> 2009 Md. Laws 169–171.

<sup>55</sup> MAP programs are also referred to as "cooperative advertising programs." See, e.g., DEVELOPMENTS, *supra* note 52, at 144–45.

<sup>56</sup> See Complaint, *New York v. Herman Miller, Inc.*, No. 08-CV-2977 (S.D.N.Y. filed Mar. 21, 2008).

## State Antitrust Laws that Condemn Resale Price Fixing Under a Per Se Analysis Do Not Offend the United States Constitution

Following *Leegin*, at least one commentator has suggested that defendants may challenge state laws adjudging RPM under the per se rule by claiming that they are preempted by federal antitrust law under the Supremacy Clause of the Constitution<sup>57</sup> or that they violate the Dormant Commerce Clause of the Constitution.<sup>58</sup> Another has asserted that state laws that employ the per se rule in RPM cases actually do offend the Constitution.<sup>59</sup> However, as argued below, these state antitrust laws, exercising traditional state police power, do not offend the Constitution and will survive challenge.

**State Antitrust Laws Holding RPM Per Se Unlawful Are Not Preempted by Federal Antitrust Law.** The Supremacy Clause of the United States Constitution provides that laws made by Congress are the supreme law of the land and are binding upon the States.<sup>60</sup> If there is an “irreconcilable conflict between the federal and state regulatory schemes,” the state law is preempted.<sup>61</sup> This conflict may be “direct” where Congress expressly states its intent to preempt a field or where Congress sets out such a comprehensive scheme of regulation that one may reasonably conclude that it has left no room for state legislation.<sup>62</sup> Preemption may also be “implied” where “it is impossible to comply with both state and federal law or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.”<sup>63</sup> No irreconcilable conflict exists, however, between federal and state antitrust laws.

*California v. ARC America*<sup>64</sup> controls the analysis of whether state antitrust laws are preempted by federal antitrust law. In *ARC America* the Supreme Court held that state antitrust laws permitting indirect purchasers to recover damages were not preempted by its earlier decision in *Illinois Brick Co. v. Illinois*,<sup>65</sup> which construed section 4 of the Clayton Act, with few exceptions, to restrict money damages to direct purchasers. Some argue that *ARC America* should be limited to analysis of state remedies that differ from federal law and does not reach substantive differences.<sup>66</sup> However, the analysis in *ARC America* provides a primer to analyze all aspects of our federal system of antitrust enforcement. *ARC America* retains its authority even twenty years after having been issued.<sup>67</sup>

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<sup>57</sup> Lindsay, *Resale Price Maintenance* (2007), *supra* note 15, at 33.

<sup>58</sup> *Id.*

<sup>59</sup> Robert M. Langer, Submission to the Federal Trade Commission Resale Price Maintenance Workshop (Dec. 12, 2008), available at <http://www.ftc.gov/os/comments/resalepricemaintenance/00001.pdf>. Langer attempts to extend the analysis used in *Flood v. Kuhn*, 407 U.S. 285 (1972), to affirm antitrust law’s baseball exemption to reach state antitrust law. However, in *Major League Baseball v. Crist*, 331 F.3d 1177, 1188 (11th Cir. 2003), upon which Langer relies, the court states, “The exemption was founded upon a dubious premise, and it has been upheld in subsequent cases because of an equally dubious premise.” Even the Court in *Flood* called the baseball exemption an “aberration.” *Flood*, 407 U.S. at 282. Thus, courts reconcile the baseball exemption with preemption analysis saying, “[a]ntitrust law, for example, with an isolation [sic] exception, *Flood v. Kuhn* . . . is a field in which Congress has not sought to replace state with federal law.” *Crist*, 331 F.3d at 1185 n.19 (quoting *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 611 (7th Cir. 1997) (emphasis in *Crist*)).

<sup>60</sup> U.S. CONST. art. VI.

<sup>61</sup> *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

<sup>62</sup> See *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238, 248 (1984).

<sup>63</sup> *Id.* (citations omitted).

<sup>64</sup> 490 U.S. 93 (1989).

<sup>65</sup> 431 U.S. 720 (1977).

<sup>66</sup> See Langer, *supra* note 59, at 10; see also Lindsay, *Resale Price Maintenance* (2007), *supra* note 15, at 33.

<sup>67</sup> See *Wyeth v. Levine*, 129 S. Ct. 1189, 1195 n.3 (2009).

*ARC America* follows the “path” set out in the Supreme Court’s prior preemption cases.<sup>68</sup> This analysis begins by asking whether Congress expressly preempted the field of antitrust law. As the parties conceded, Congress has never done this.<sup>69</sup> In the absence of express preemption, two other questions are considered. First, did Congress intend to preempt the field of antitrust law?<sup>70</sup> Second, does state antitrust law “actually conflict[] with federal law?”<sup>71</sup>

CONGRESS DID NOT INTEND TO PREEMPT STATE ANTITRUST LAW. Preemption questions focus on the intent of Congress, not on the Court’s construction of the antitrust laws Congress enacted.<sup>72</sup> Moreover, the questions must be considered in light of a presumption against finding preemption of state law in areas traditionally regulated by the States, including antitrust.<sup>73</sup> The party asserting preemption must demonstrate the “clear and manifest” purpose of Congress to supersede “the historic police powers of the States.”<sup>74</sup> Congress has never expressed a “clear and manifest” purpose to preempt state antitrust law. In fact, “Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.”<sup>75</sup> Prior to *ARC America*, the Court “recognized that the federal antitrust laws do not pre-empt state law.”<sup>76</sup> Congress has taken no action since *ARC America* that suggests that its intent has changed.

STATE ANTITRUST LAW DOES NOT CONFLICT WITH FEDERAL LAW. “Actual conflict” exists when it is impossible to comply with federal law or when “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>77</sup> “Conflict” is construed very narrowly in preemption analysis to mean that compliance with state antitrust law prevents compliance with federal law and compels a violation of federal law.<sup>78</sup> For example, in *Exxon Corp. v. Governor of Maryland*,<sup>79</sup> the Supreme Court rejected a preemption challenge to Maryland’s statute forbidding petroleum producers and refiners from selectively offering discounts, even to meet competition as permitted by section 2(b) of the Robinson-Patman Act.<sup>80</sup>

State laws applying the per se rule to RPM do not conflict with federal law. *Leegin* does not grant a right to commit RPM; it merely prohibits RPM in certain circumstances. Thus, a person could comply with both state and federal law by abstaining from RPM. A person enjoined from committing RPM under state law is not required to commit conduct in violation of federal law.

Of course, it is not certain that state and federal law will reach different results in particular RPM cases. *Leegin* did not hold RPM per se lawful; it decided that legality would be decided under the

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<sup>68</sup> *ARC America*, 490 U.S. at 100; see *Rice*, 458 U.S. at 659 (“In determining whether the Sherman Act pre-empts a state statute, we apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause.”).

<sup>69</sup> *ARC America*, 490 U.S. at 101–02.

<sup>70</sup> *Id.* at 100 (citations omitted).

<sup>71</sup> *Id.* (citations omitted).

<sup>72</sup> See *Id.* at 103 (“It is one thing to consider the congressional policies identified in [the Court’s cases] . . . it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law.”).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 101; see *Wyeth*, 129 S. Ct. at 1194–95.

<sup>75</sup> *ARC America*, 490 U.S. at 101 (citation omitted).

<sup>76</sup> See *id.*

<sup>77</sup> *Id.* at 100–01 (citations omitted).

<sup>78</sup> See *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238, 248 (1984).

<sup>79</sup> 437 U.S. 117 (1978).

<sup>80</sup> *Id.* at 129–34.

rule of reason.<sup>81</sup> In *Rice v. Norman Williams Co.*,<sup>82</sup> the Supreme Court held that California's "designation" statute<sup>83</sup> did not violate the Dormant Commerce Clause even though the appellant claimed that compliance with the law would compel violation of federal antitrust law. The Court determined that the alleged violation of federal law would be adjudged under the rule of reason<sup>84</sup> so that the challenged state statute might require a violation of the antitrust laws under some circumstances but would not require a violation in many cases. Writing for the Court, the late Chief Justice Rehnquist stated that the Court's decisions teach that a statute may be condemned only if it "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases."<sup>85</sup> If the conduct required by the state statute is governed by the rule of reason, it "cannot be condemned in the abstract."<sup>86</sup>

STATE ANTITRUST LAW DOES NOT STAND AS AN OBSTACLE TO THE ACCOMPLISHMENT OF THE FULL PURPOSES AND OBJECTIVES OF CONGRESS IN ENACTING FEDERAL ANTITRUST LAWS. State antitrust laws that regard RPM as per se unlawful are faithful to purposes of Congress' federal antitrust laws "detering anticompetitive conduct and ensuring the compensation of victims of that conduct."<sup>87</sup> The deterrence of anticompetitive conduct is achieved by prosecuting RPM under a per se rule. Federal antitrust law employed this view for nearly a century<sup>88</sup> and the Supreme Court modified its rule only two years ago by its 5–4 vote in *Leegin*. The new majority in *Leegin* evidenced the Court's current economic<sup>89</sup> orientation and not a new expression of policy or law from Congress. States' decisions to retain the longstanding repudiation of RPM continue in concert with Congressional policy.

***State Antitrust Laws Treating RPM Under the Per Se Rule Are Not Preempted Under the Dormant Commerce Clause of the United States Constitution.*** The Dormant Commerce Clause supercedes state laws that discriminate against interstate commerce or impose a burden on interstate commerce "clearly excessive in relation to the putative local benefits."<sup>90</sup> State laws "frequently survive this . . . scrutiny,"<sup>91</sup> however, and "the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."<sup>92</sup>

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<sup>81</sup> *Leegin*, 551 U.S. at 907–08.

<sup>82</sup> *Rice*, 458 U.S. at 662.

<sup>83</sup> *Id.* at 657. Under California law, alcoholic beverages may only be brought into California for sale in the state by a licensed importer. The challenged law limited the ability of licensed importers to import particular brands to those importers designated as an authorized importer of that brand. *Id.* at 656–57.

<sup>84</sup> *Id.* at 661–62.

<sup>85</sup> *Id.* at 661.

<sup>86</sup> *Id.*; see also *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130 (1978). ("The 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal law where none clearly exists.'")

<sup>87</sup> *California v. ARC America*, 490 U.S. 93, 102 (1989).

<sup>88</sup> See *Dr. Miles Med. Co. v. John D. Park & Sons, Co.*, 220 U.S. 373 (1911).

<sup>89</sup> See, e.g., Alan Devlin, *The Ramifications of Leegin Creative Leather Products, Inc. v. PSKS, Inc.: Are Tie-Ins Next?*, 56 CLEV. ST. L. REV. 387, 390 (2008) (asserting that *Leegin* furthers the Chicago School's "hegemony" in the Court's antitrust analysis).

<sup>90</sup> *Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. 1801, 1808 (2008) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)); see also *Brown v. Hovatter*, 561 F.3d 357 (4th Cir. 2009).

<sup>91</sup> *Davis*, 128 S. Ct. at 1808–09 (citations omitted).

<sup>92</sup> *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342–43 (2007) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

Obviously, a significant quantity of the goods that are affected by state laws holding RPM per se unlawful are sold across state lines in transactions that involve interstate commerce<sup>93</sup> and potentially subject to challenge under the Dormant Commerce Clause. State antitrust laws, however, do not offend the rule against discrimination that prohibits “economic protectionism” of local businesses under state and local laws.<sup>94</sup> Further, the states’ antitrust laws apply evenhandedly, with equal force to local and out-of-state businesses and goods.<sup>95</sup>

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State antitrust laws condemning RPM under the per se rule are designed to prevent the inevitable price increases that result from RPM<sup>96</sup> and to preserve the autonomy of small businesses to serve their customers as they think best.<sup>97</sup> The state is entitled to protect its citizens from “economic damage.”<sup>98</sup> State antitrust laws, used for many years to achieve these ends, are unlikely to be held “clearly excessive”<sup>99</sup> to the benefits they seek to achieve.

But what of the internet, which subjects sellers who may never have set foot in a state to that state’s antitrust laws when they sell goods to people in that state? These sellers may argue that application of state antitrust law to RPM in this environment places intolerable burdens on them. Indeed, conduct that has no contact with a particular state is probably beyond the reach of the state’s antitrust law.<sup>100</sup> However, “although the internet is a mighty powerful tool, it is not so potent as to demolish every state’s regulatory schemes as they apply to the sale of goods and services.”<sup>101</sup> In this vein, courts throughout the country have held that internet commerce is not immune from state laws intended to protect consumers from such evils as deceptive mass emails (“spam”).<sup>102</sup>

The essence of RPM enforcement under state law involves goods sold to the internet vendor for resale that are subject to an agreement regarding resale price. As a result, goods subject to RPM are sold to consumers in that state, who likely placed their order in the state and received

<sup>93</sup> See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141 (1970).

<sup>94</sup> *Davis*, 128 S. Ct. at 1808.

<sup>95</sup> See *Washington v. Heckel*, 24 P.3d 404, 409 (Wash. 2001); *MaryCLE, LLC v. First Choice Internet, Inc.*, 890 A.2d 818, 841 (Md. Ct. Spec. App. 2006).

<sup>96</sup> See *Pitofsky*, *supra* note 6, at 1488; *Hovenkamp*, *supra* note 6, at 40.

<sup>97</sup> Telephone interview with Jeff Zellmer, *supra* note 45.

<sup>98</sup> *MaryCLE*, 890 A.2d at 838–39; *Ferguson v. Friendfinders, Inc.*, 94 Cal. App. 4th 1255, 1268 (Cal. Ct. App. 2002) (quoting *Heckel*, 24 P.3d at 409–11) (asserting that laws making unlawful deceptive email spam messages are supported by substantial state interest).

<sup>99</sup> *Pike*, 397 U.S. at 142.

<sup>100</sup> See *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion).

<sup>101</sup> *Ford Motor Co. v. Tex. Dep’t of Transp.*, 106 F. Supp. 2d 905, 909 (W.D. Tex. 2000) (upholding Texas law forbidding Internet sales of vehicles from manufacturer rather than local dealers from Dormant Commerce Clause challenge).

<sup>102</sup> See *Heckel*, 24 P.3d at 409–11; *MaryCLE, LLC*, 890 A.2d at 838–39; *Ferguson*, 94 Cal. App. 4th at 1268. However, while state statutes prohibiting spam may not offend the Supremacy or Commerce Clauses of the Constitution, the state must be able to assert jurisdiction over a particular Internet company under its long-arm statute, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Long-arm statutes define the sorts of conduct and contacts with the state needed to invoke personal jurisdiction over an out-of-state company. See, e.g., MD. ANN. CODE, CTS & JUD. PRO. § 6-103 (2002 Repl. & Supp. 2005). Moreover, would-be defendants’ contacts with the state must ensure that “individuals have ‘fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.’” *Mackey v. Compass Marketing, Inc.*, 892 A.2d 479, 488 (Md. 2005) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (Defendant’s contacts with the state must be “such that he should reasonably anticipate being haled into courts there.”). Maryland’s long-arm statute is intended to “expand the boundaries of permissible in personam jurisdiction to the limits permitted by the Federal Constitution.” *Mackey*, 892 A.2d at 492 (citations omitted).

the ordered goods in that state—providing substantial connection to that state.<sup>103</sup> Thus, to the extent that the state's antitrust law does not purport to regulate the internet vendor's sales to other states, the Dormant Commerce Clause does not prevent enforcement of the state's antitrust law.<sup>104</sup>

### Conclusion

*Leegin* poses significant challenges to state attorneys general. However, state antitrust laws may turn this case into a speed bump instead of a barrier. State antitrust enforcers will continue to prosecute vertical price fixing. Although fewer prosecutions will be brought under federal antitrust law, prosecutions will likely increase under state antitrust laws. Where possible, attorneys general will look to their existing state laws to find authority to prosecute this conduct and to protect consumers from the inevitable price increases that result from vertical price fixing policies. While, to date, only Maryland has provided statutory redress, it is likely that state legislatures will act to protect their consumers and retailers from the *Leegin* rule. There is a strong likelihood that these state laws mandating per se treatment for vertical price fixing will pass constitutional muster. Manufacturers considering implementing vertical price fixing policies will be well advised to consider state antitrust laws and likely state legislative responses before they act. ●

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<sup>103</sup> See *Ferguson*, 94 Cal. App. 4th at 1264.

<sup>104</sup> See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987).