ANTITRUST ISSUES: BACK IN VOGUE

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Appendix – Overview of State RPM
I. INTRODUCTION

Because franchising is the nation’s leading method of distributing goods and services for sale at retail, the franchising industry is extremely sensitive to the principles, nuances, and changes in antitrust law. For much of the last thirty years, the antitrust enforcement agencies and the courts have applied more lenient antitrust rules to vertical agreements such as those between franchisors and franchisees. In many ways, the pendulum has now begun to swing in the other direction. This increased emphasis on antitrust compliance is coming from different sources, some of which are quite unexpected. Franchisors must be sensitive to antitrust concerns in this climate.

A. DOJ and FTC Enforcement

There are significant differences between the antitrust enforcement policies of the Bush and Obama administrations.\(^1\) President Obama has installed new pro-enforcement leadership at the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”). These agencies are more vigilant, and more creative, than ever.

For example, the FTC has long believed that Section 5 of the FTC Act, under which the FTC Franchise Rule was promulgated, is broader than the Sherman Act and Clayton Act and serves to fill in the gaps left by other statutes. In recent years, however, the courts have repeatedly struck down the FTC’s attempts to pursue stand-alone Section 5 theories, and the FTC has resorted to appending its Section 5 claims to Sherman Act or Clayton Act claims. The new FTC leadership is seeking to reinvigorate the use of Section 5 by pursuing a number of “unfair competition” cases that may not technically violate any other laws.

 Earlier this year, the FTC obtained a settlement under Section 5 against Transitions Optical, Inc., the leading manufacturer of lens treatments, for entering into exclusive dealing arrangements that foreclosed its competitors from key distribution channels.\(^2\) The FTC also filed a complaint under Section 5 against Intel for conduct that allegedly abused Intel’s dominant position.\(^3\) The FTC claimed that Intel has illegally used its market power to smother its rivals and has waged a systematic campaign to limit access to the marketplace. Intel’s tactics allegedly

\(^1\) An excellent summary of the more aggressive enforcement posture of the Obama administration can be found in John D. Hark rider, Obama: The First Year, 24 Antitrust 3, 8 (Summer 2010).


include threats to cut off supply to uncooperative customers and offering rebates to encourage customer loyalty. On August 4, 2010, as this article went to press, Intel settled the complaint, consenting to cease paying customers to buy computer chips exclusively from it or paying them to reject competitors’ chips; to cease redesigning its chips purely to harm competitors; not to retaliate against computer makers if they do business with Intel’s competitors; to modify agreements with other chip makers to allow them to merge or engage in joint ventures without fear of patent infringement suits from Intel; to maintain for at least six years a feature that will not limit the performance of graphics processing chips made by others; to disclose that its computer compilers might discriminate between its chips and those of other companies, and therefore might not register all of the features of non-Intel chips; and to establish a $10 million fund to help business customers reformulate their software products if they were misled by Intel.4

This summer, reports were circulating that the FTC had opened a Section 5 investigation into how Apple deals with developers of iPhone “apps,” as well as the company’s other conduct in the mobile advertising market.5 By invoking Section 5, the FTC is able to circumvent potentially unfavorable judicial precedent that developed during the Bush years.

Although the DOJ does not have jurisdiction to enforce Section 5, the DOJ Antitrust Division has articulated a marked shift in policy. Assistant Attorney General Varney has condemned the “passive” antitrust enforcement policy of the Bush administration and has promised energetic enforcement in a number of sectors of the economy, including intellectual property. Moreover, the DOJ has expressly repudiated the Bush administration’s policy on Section 2 of the Sherman Act, which had taken a lenient approach to monopolization, attempted monopolization, and the conduct of dominant firms. Indeed, in one of her first speeches following confirmation,6 AAG Varney pledged to follow the approach taken in Aspen Skiing,7 in which the Supreme Court found a Section 2 violation when the operator of three ski areas in Aspen refused to continue to deal with a competitor — the operator of a fourth ski facility that previously had been included in a joint ticketing program with the other three ski areas. The


Supreme Court has described its *Aspen Skiing* decision as being “at or near the outer boundary of section 2 liability.”

Perhaps the clearest indication that the DOJ and FTC have moved in a new direction is their release of revisions to the Horizontal Merger Guidelines. The Guidelines are a paradigm for the agencies’ reviews of proposed mergers between competitors or potential competitors, and they last underwent a major revision in 1992. According to FTC Chairman Jon Leibowitz, the revisions reflect the DOJ’s and FTC’s current approach to analyzing proposed transactions. However, the language of the Guidelines suggests that the agencies will have more tools with which to challenge mergers, that they can issue broader requests for documents and data, and that they are poised to challenge a greater number of transactions than in the past. Among other things, the new Guidelines: focus on competitive effects of a merger, while de-emphasizing the importance of market definition to the agencies’ analysis; explain the analytical tools and methodologies that the agencies will use for merger analysis; identify the categories of evidence that may be considered as part of the analysis; and increase the extent to which economic analysis will be used as part of the process for assessing potential competitive effects.

B. Congressional Scrutiny

Ever since the Supreme Court’s 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, overturning case law that had held minimum resale price maintenance (“RPM”) agreements per se illegal, many members of Congress have been clamoring to enact legislation that would overturn *Leegin*. If passed, this “*Leegin* repealer” legislation would reinstate the per se illegality of RPM. Legislation to overturn *Leegin* also has the support of at least 38 state attorneys general.

In addition, bills are pending in Congress that would return the pleading standard for surviving motions to dismiss in antitrust and other cases to the less stringent standard that existed prior to the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*.

 Bills are also pending in Congress that would amend the FTC Act to give the FTC authority to initiate proceedings against any party that enters into a “pay-for-delay” arrangement, in which the filer of a generic drug application challenging the validity of a drug patent agrees to accept “anything of value” in exchange for forgoing or delaying research, development, manufacturing, marketing,

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or selling the new generic product.\textsuperscript{12} Members of Congress also have held hearings and made numerous pronouncements urging the enforcement agencies to pursue vigorous antitrust enforcement policies, and they have threatened greater regulation if there is insufficient antitrust enforcement.

\textbf{C. State Enforcement}

State antitrust enforcement often fills the vacuum created by lax antitrust enforcement at the federal level. This pattern has held true in recent years although, this time around, state officials have not backed off even as federal regulators have themselves become increasingly active. An overview of state resale price maintenance statutes and litigation concerning resale price maintenance is included in the Appendix to this paper.

For example, in 2009, Maryland enacted legislation declaring RPM agreements to be per se illegal under its state antitrust law. Maryland Commercial Law Code 11-204(b) amended the Maryland equivalent of Section 1 of the Sherman Act by declaring that any contract, combination, or conspiracy that sets minimum resale prices is an unreasonable restraint of trade. The Deputy Chief of the Antitrust Division of the Maryland Attorney General’s office has confirmed that Section 11-204(b) was intended to overturn \textit{Leegin} and preserve the per se rule for RPM agreements. In addition, there is existing legislation that could be interpreted as rendering RPM agreements per se illegal in at least the following fifteen states — California, Connecticut, Hawaii, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, South Carolina, Texas, Virginia, and West Virginia.\textsuperscript{13}

\textbf{D. Supreme Court Review}

Earlier this year, the Supreme Court issued its first pro-plaintiff antitrust decision in 25 years, after a string of fifteen decisions favoring defendants. While not involving franchising, the Court’s decision in \textit{American Needle, Inc. v. National Football League}\textsuperscript{14} — which held that the teams comprising the National Football League are “separate economic actors” for some purposes and therefore capable of conspiring unlawfully with one another — has implications for franchisors and franchisees. We discuss the decision in greater detail below.

\textsuperscript{12} Preserve Access to Affordable Generics Act, S. 369, 111th Cong. (2009-2010), available online at http://www.govtrack.us/congress/bill.xpd?bill=s111-369; Supplemental Appropriations Act, 2010, H.R. 4899, 111th Cong. (2009-2010). This bill was signed by the President on July 29, 2010 and is available online at http://www.govtrack.us/congress/bill.xpd?bill=h111-4899. Under current legal standards, challenges to such arrangements, which are also known as “reverse payments,” have met with mixed results.


\textsuperscript{14} 130 S.Ct. 2201 (2010).
II. NEW DEVELOPMENTS

A. Franchisors Do Not Have Carte Blanche to Implement Resale Price Maintenance Policies

1. The Leegin Decision

Until 2007, under federal antitrust law, a franchisor could suggest resale prices to, and attempt to persuade, its franchisees, but it was a per se violation for it to require (coerce) its franchisees to resell goods at a certain minimum price or price level, i.e., to refrain from discounting. But in Leegin, the Court held that vertical programs to stamp out discount resale price competition are no longer per se illegal — they will be governed by a Rule of Reason. Despite this new standard, many franchisors have been reluctant to embrace Leegin and implement RPM in their franchise systems.


16 Under a Rule of Reason, the fact-finder weighs all circumstances relating to the restraint—its origin, justification(s), history, context, purpose and—by far the most important—its effect on competition in the relevant market. Today, it is safe to say that, regardless of all other factors, if a restraint that is subject to the Rule of Reason does not substantially impair competition in a relevant geographic and product market in which it operates, it will be held lawful. See Cal. Dental Assoc. v. F.T.C., 526 U.S. 756 (1999); F.T.C. v. Ind. Fed’n. of Dentists, 476 U.S. 447 (1986), Continental TV, Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36, 49-51 (1977).

Thus, definition of the relevant geographic and product markets is usually the crucial step in any antitrust case not involving horizontal agreements.

The relevant geographic market is the area in which an “appreciable” number of customers will travel to obtain a product or service. While many geographic markets are small, the relevant geographic market for a restraint that operates nationally will be the entire nation. The internet increases that likelihood today.

The definition of a relevant product market is usually where plaintiffs’ vertical restraint cases founder. This is the market of interbrand competition — i.e., in which all competitive products and services “reasonably interchangeable” with each other compete (not just intrabrand competition, among one brand’s franchisees), and in which an “appreciable” number of customers might choose product A or B. Products or services in the same product market normally are price sensitive, in that if the price of one changes materially, consumers will shift allegiance. Product “cross-elasticity of demand” is the keystone. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); AD/SAT v. A/P, 181 F.3d 216 (2d Cir. 1999); Queen City Pizza, Inc. v. Domino’s, Inc., 124 F.3d 430, 438 (3d Cir. 1997).

Today, it is difficult indeed to establish a violation of the Rule of Reason under Section 1 by a franchisor that possesses less than a 30% market share. Assam Drug Co. v. Miller Brewing Co., 298 F.3d 311 (8th Cir. 1986). And such a share is hard to come by except in areas in which there are few companies competing. Thus, Subway and McDonald’s may have thousands of franchised locations, but they compete in a vastly fragmented market in which the reasonably interchangeable products are a wide variety of modestly priced foods (“fast” and otherwise). And Exxon may have the leading position in gasoline sales in the United States, but its market share is nothing like the share required for it to have “market power.” By contrast, in a non-franchise context, Microsoft operated in an environment in which there were almost no competitors and had enormous market power. Although it may have acquired such power lawfully, its perpetuation of that power by unreasonably restrictive means such as tying arrangements violated the Rule of Reason. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
The 5-4 decision overruled ninety-six years of precedent, and rejected the amicus brief of thirty-seven states supporting the per se rule. Important guidance for the Rule of Reason analysis was the holding that evidence of illegality might include (i) a market with suppliers all or nearly all of whom imposed such a price restraint on franchisees, or (ii) where the franchisor had market power, or (iii) where the restraint was agreed upon by franchisees themselves (horizontally) and in effect was foisted upon the franchisor by a franchisee cartel.


*Leegin* did not merely subject RPM to a traditional Rule of Reason analysis. It encouraged more experimentation with and development of Rule of Reason analysis. Thus, *Leegin* appears to be another step in the movement of the courts "to a more nuanced and case-specific inquiry,"17 which could have the effect of reducing the plaintiff’s burden of proof in antitrust cases brought against franchisors.18

The evolving standards used to apply Section 1 of the Sherman Act are reflected in three cases: *PolyGram*, decided two years before *Leegin*; *Leegin* itself; and the FTC decision in *In re Nine West Group Inc.*19 in which Nine West sought modification of a 2000 consent order forbidding it from engaging in RPM. The FTC in *Nine West*, like the D.C. Circuit in *PolyGram* and the Supreme Court in *Leegin*, did not adhere to the traditional Rule of Reason analysis.

In *PolyGram*, PolyGram and Warner agreed to distribute jointly the Three Tenors’ 1998 concert recording. Thereafter, they agreed to a 10-week moratorium on advertising and discounting two previous Three Tenors albums, one of which was distributed by each company. Although the legal departments of each company rejected this agreement, executives of the companies assured each other privately they would honor the agreement, and they largely did so.20 The FTC charged that by entering into the moratorium agreement the companies had engaged in unfair competition in violation of Section 5 of the FTC Act.21 Warner entered into a


20 416 F.3d at 32.

21 Id.
consent decree with the FTC barring it from making similar agreements in the future, but PolyGram challenged the charge. An administrative law judge held that PolyGram had violated Section 5 and ordered it to cease making similar agreements.\textsuperscript{22} The FTC affirmed the order of the administrative law judge.

On appeal, the D.C. Circuit agreed, holding “that, although not a per se violation of antitrust law, the [moratorium] agreement was presumptively unlawful and PolyGram failed to rebut that presumption.” While the case was brought under Section 5 of the FTC Act, the analysis is the same as it would have been under Section 1 of the Sherman Act.\textsuperscript{23}

Rejecting the normal full market analysis under the Rule of Reason, the D.C. Circuit adopted an intermediate inquiry, now called the “quick look,” to evaluate such restraints of trade.\textsuperscript{24} The court continued:

\begin{quote}
It would be somewhat misleading, however, to say the “quick look” is just a new category of analysis intermediate in complexity between “per se” condemnation and full-blown “Rule of Reason” treatment, for that would suggest the Court has moved from a dichotomy to a trichotomy, when in fact it has backed away from any reliance upon fixed categories and toward a continuum.\textsuperscript{25}
\end{quote}

In \textit{PolyGram}, the agreement was held unlawful neither under the per se rule nor under a comprehensive Rule of Reason analysis, but because the agreement gave rise to a presumption of illegality and the defendant failed to rebut it.

\textit{Leegin} held that minimum RPM no longer was subject to per se condemnation, but the Court did not declare RPM to be per se lawful. Neither did it appear to require plaintiffs in every future RPM case to sustain the burden and expense of a full-blown Rule of Reason inquiry. Rather, \textit{Leegin} invited the lower courts, in assessing RPM arrangements under the Rule of Reason, “to be diligent in eliminating their anticompetitive uses from the market.”\textsuperscript{26}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}  
\item \textit{Id.} at 32.  
\item \textit{Id.} at 34-35.  
\item \textit{Id.} at 35.  
\item 551 U.S. at 891. 
\end{enumerate}
\end{footnotesize}
To that end, as mentioned above, the Supreme Court identified three factors that “are relevant to the inquiry”:

1. The number of competing franchisors or manufacturers in a given industry that engage in RPM (the greater the number, the greater the danger to competition);

2. The source of the restraint (if the franchisees or other resellers are the source, the restraint may be designed to support a cartel and may in fact be a horizontal restraint, and, thus, per se illegal); and

3. Whether the franchisor or manufacturer has market power (if not, there is little or no danger to competition).\(^{27}\)

Trying to capitalize on *Leegin*, Nine West petitioned the FTC to set aside part of a 2000 consent order forbidding that footwear company from engaging in RPM, on the ground that the *Leegin* decision rendered the order inappropriate. On May 6, 2008, the FTC agreed and set the provision in the order aside, but cautioned that the mere fact that RPM is no longer per se illegal but is now analyzed under the Rule of Reason “did not itself dictate that [the FTC] vacate the minimum RPM prohibitions in the *Nine West* order.\(^{28}\) Rather, the “question is whether, post-*Leegin*, RPM can be considered in some circumstances as ‘inherently suspect,’ and thus a worthy object for the scrutiny under the presumption and phased inquiries that the D.C. Circuit approved in *PolyGram Holding* for certain horizontal restraints.\(^{29}\) A defendant employing an “inherently suspect” practice must “either identify some reason the restraint is unlikely to harm consumers, or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.”\(^{30}\)

The FTC then explained its view of the application of the *Leegin* analysis:

The Court’s elaboration of [the] relevant factors in *Leegin* [i.e., the source of the RPM program, its ubiquity in the industry, and the market share of the franchisor or manufacturer practicing it] provides an approach for identifying when RPM might be subjected to closer analytical scrutiny, such as that anticipated by *Polygram Holding* or other truncated rule of reason analyses…

\(^{27}\) *Id.*

\(^{28}\) Order at 11, available at http://www.ftc.gov/opa/2008/05/ninewest.shtm.

\(^{29}\) *Id.* at 13.

\(^{30}\) *Id.* at 12-13.
At this early stage of the application of the teaching of *Leegin* by the lower courts and the Commission, the *Leegin* factors can serve as helpful guides to begin an assessment of when RPM deserves closer scrutiny. We anticipate further refinements to this analysis, including the further specification of scenarios in which RPM poses potential hazards and in which it does not.\(^{31}\)

Given that Nine West “lacked market power and … itself is the source of the resale price maintenance,”\(^{32}\) the FTC found that “Nine West’s use of resale price maintenance is not likely to harm consumers” and on that basis granted Nine West’s petition for modification of the order.\(^{33}\) Finally, the FTC noted that circumstances could change. Therefore, it imposed reporting obligations designed to help it monitor any use of RPM by Nine West.\(^{34}\)

3. **The Judicial Response to *Leegin***

*Leegin* has not been a panacea for franchisors; franchisors and other upstream suppliers have had mixed results in defending their RPM policies.

In *Toledo Mack Truck Sales & Service v. Mack Trucks, Inc.*,\(^ {35}\) RPM claims were upheld, despite a complete Rule of Reason evaluation. The Third Circuit reversed the trial court’s judgment as a matter of law for the defendants and ruled the plaintiff dealer had presented sufficient evidence that Mack Truck dealers had colluded (horizontally) to enter into “gentlemen’s agreements” not to compete with each other, and Mack Trucks had agreed (vertically) to deny or delay sales assistance to any dealer selling outside its area of responsibility, thus preventing dealer competition. Mack’s Achilles’ heel was that its restraints resulted from a dealer cartel’s pressure, one of the factors *Leegin* articulated as evidence of illegality. In addition, the plaintiff introduced expert testimony on Mack’s power in two product markets.\(^ {36}\)

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\(^{31}\) *Id.* at 14.

\(^{32}\) *Id.* at 15.

\(^{33}\) *Id.* at 16.

\(^{34}\) *Id.* at 17-18.

\(^{35}\) 530 F.3d 204 (3d Cir. 2008).

Another of these factors, the “dominant retailer theory,” led to the court’s upholding a plaintiff’s Rule of Reason claim in a suit by retailers and consumers against Toys “R” Us, alleging the defendant used its very strong market position to coerce manufacturers to impose minimum RPM on their retailers who competed with Toys “R” Us.\(^{37}\)

Babies “R” Us (“BRU”), an affiliate of Toys “R” Us, is a large retailer of baby and juvenile products including strollers, high chairs, breast pumps, bedding, car seats, and infant carriers. It carries products manufactured by Britax, Peg Perego, Medela, Maclaren, Kids Line, Regal Lager, and Baby Bjorn (the “manufacturers”), among others. Smaller retailers like Baby Age and Baby Club (the “retailers”) competed with BRU by undercutting BRU’s prices. This undercutting ceased when the manufacturers began to require the retailers to sell their goods at or above a certain price. The retailers, and various consumers who allegedly paid more for baby products than they would have absent these pricing policies, complained that BRU orchestrated these arrangements in order to ward off competition.

To establish the claims, the plaintiffs had to allege enough facts to suggest plausibly (1) a market or markets in which competition had been harmed; (2) concerted action involving (a) BRU and each manufacturer, and (b) each manufacturer and various retailers; (3) the anticompetitive nature of the concerted action; and (4) a causal nexus between the concerted action and the plaintiffs’ particular injuries.

The court’s reasoning for refusing to dismiss the Section 1 claim is worth a long look:

Therefore, Plaintiffs have stated enough facts to suggest the existence of several relevant markets in which competition has been harmed. Plaintiffs’ allegations are not only consistent with the existence of “high-end baby and juvenile strollers,” “high-end high chairs,” “high-end breast pumps,” “high-end baby bedding,” “high-end car seats,” and “high-end infant carriers” markets, but they suggest the existence of those markets. They do this by asserting facts about interchangeability and cross-elasticity of demand that explain why the proffered markets are not larger than Plaintiffs allege them to be. Put another way, their allegation that, for each market, a hypothetical monopolist could profitably raise prices on all in-product markets for a short time, constitute enough heft to raise the satisfaction of the relevant-market element beyond a speculative level ….

Plaintiffs may allege concerted action by claiming parallel conduct coupled with circumstances that tend to negate the possibility that BRU and each manufacturer acted independently. Accepted “plus factors” include (a) that the parallel conduct at issue was

against each manufacturer’s independent economic self-interest; (b) that BRU wielded sufficient influence over each manufacturer to create a duress situation; and (c) that BRU threatened to retaliate against each manufacturer if each manufacturer did not implement minimum resale price maintenance (“RPM”) agreements with its retailers, and the manufacturers in turn acquiesced … Plaintiffs have alleged parallel conduct in the form of imposition of minimum RPM policies …. And Plaintiffs have alleged that the minimum RPM policies are contrary to each manufacturer’s economic self-interest, because each manufacturer’s goal was to increase sales volume, and the RPM agreements limited this volume because they resulted in the termination of certain retail outlets …. Plaintiffs have also alleged that BRU wields significant power over each manufacturer such that each manufacturer depends upon BRU’s orders to remain economically viable …. And Plaintiffs have also alleged that BRU threatened each manufacturer with severe repercussions in order to induce each manufacturer to impose minimum RPM policies on its retailers ….

Therefore, Plaintiffs have stated enough facts to suggest the existence of concerted action between BRU and each manufacturer ….

In addition to concerted action between BRU and each manufacturer, Plaintiffs must allege concerted action between each manufacturer and various retailers. Here, this has been adequately pleaded. Plaintiffs have alleged concerted action between each manufacturer and its retailers in the form of minimum RPM agreements ….

The third element of a Sherman § 1 claim is that the concerted action at issue was anticompetitive. That is, the concerted action at issue must have harmed the entire relevant market as a whole. Plaintiffs may allege the anticompetitive nature of the concerted action by alleging actual harm to competition …. Hallmarks of such actual harm include an increase in retail prices above and beyond what they would be under competitive conditions, a reduction in output below what it would be under competitive conditions, and a deterioration in quality and service …. [Moreover], the U.S. Supreme Court and the leading treatise in the field expressly recognize that [even] harm to intrabrand competition is cognizable when brought about by the demands of a “dominant” retailer, one that has market power in the retail sales market and one upon whom each manufacturer depends for a large portion of its sales. Leegin v. PSKS ….

Plaintiffs have alleged that the minimum RPM scheme caused prices for the manufacturers’ goods to increase beyond competitive levels…. Also, Plaintiffs have alleged that those RPM policies blocked certain sales that otherwise would have been made, and in some cases caused sales to be made less rapidly than they otherwise would have, resulting in reduced overall output …. Further, there is at least one allegation that quality has decreased in the form of a decrease in customer service ….
And Plaintiffs have alleged that BRU is precisely the dominant retailer that antitrust law condemns. They allege BRU’s control of a dominant … share of the relevant markets.  

In contrast, the court in Jacobs v. Tempur-Pedic Intl., Inc. dismissed a consumer class action in which plaintiffs alleged Tempur-Pedic’s minimum RPM agreements with distributors were not protected under Leegin. The court held plaintiffs failed to plead sufficient facts to show an anticompetitive effect in the relevant market. Leegin itself successfully defended the suits against it after the Supreme Court ruled.

FTC Commissioner J. Thomas Rosch observed in an address in 2009 that the book is definitely not closed on judicial evaluation of minimum RPM:

Apart from this low-hanging fruit so to speak, there are broader open issues that remain on the Court’s horizon and which I would not be surprised to see the regional federal appellate courts and Supreme Court grapple with in the upcoming years. One of those issues is how the courts should treat retail price maintenance claims in light of Leegin’s holding that resale price maintenance was not per se illegal and was instead subject to the rule of reason. The wild card here traces back to Justice Souter’s decision in California Dental Ass’n v. Federal Trade Comm’n, 526 U.S. 756 (1999), where Justice Souter acknowledged that conduct that was not illegal per se did not necessarily have to be judged under a full blown rule of reason to be considered illegal under Section 1. Justice Souter did not, however, address what that lesser standard should be or what kind of analysis would suffice in those circumstances. Justice Kennedy imported these ambiguities into Leegin when he hinted that a truncated rule of reason analysis might be acceptable, stating that standards could be developed based on the courts’ experience

38 58 F. Supp. 2d 25 at 581-84 (citations omitted). See also McDonough v. Toys “R” Us, Inc., 638 F. Supp. 2d 461, 491 (E.D. Pa. 2009) (granting class standing to plaintiffs on vertical price-fixing claims and noting that, inter alia, “the restraints offered evidence that BRU coerced manufacturers into using vertical price restraints — i.e., resale price maintenance — and other methods to prevent discounting by internet retailers”).


with the practice over time and that presumptions might be appropriate. These broad statements, however, have only muddied the waters....

Assistant Attorney General for Antitrust Christine Varney has suggested the following outline of a structured Rule of Reason evaluation:

(i) plaintiff preliminarily should show the existence of an agreement and its scope and the structural conditions under which it is likely to be anticompetitive; and, if it establishes a prima facie case,

(ii) burden shifts to defendant to show either that the policy is procompetitive or that plaintiff’s characterizations of marketplace were erroneous, and

(iii) court determines whether RPM was a reasonable method for accomplishing procompetitive purposes.

In a 2010 presentation to the American Bar Association Antitrust Section Spring Meeting, the author furnishes a useful schematic for Rule of Reason analysis of RPM cases.


44 I. Scher, Update: Vertical Intrabrand Pricing Restraints, ABA Antitrust Section Spring Meeting (April 15, 2010) at 7.
4. Federal Legislative Response to Leegin


Legislation to overturn Leegin also has the support of 38 state attorneys general. They sent a letter on October 27, 2009, to both the House and Senate Judiciary Committees supporting passage of S. 148 and H.R. 3190, and stating that “empirical studies show that agreements on minimum resale prices raise consumer prices, often significantly …. We are not aware of any empirical study that shows increased consumer welfare in the form of services or other customer benefits.” They also pointed out that both proponents and opponents of RPM acknowledge that the Rule of Reason test “will dramatically chill any challenge by individual [franchisees].” \footnote{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; Letter from Thirty Eight State Attorneys (Footnote continued on next page)}
5. **State Antitrust Statutes on RPM**

The *Leegin* decision did not directly affect the status of RPM under state law. While most states, either by statute or case law, provide that state antitrust law should be interpreted in accordance with, or should give deference to, federal antitrust decisions, there is strong authority that RPM prohibitions in state statutes are not preempted by Sherman Act decisions.\(^{47}\)

Fifteen states have legislation that pre-dates *Leegin* under which RPM agreements have been found per se unlawful. These 15 states are California, Connecticut, Hawaii, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, South Carolina, Texas, Virginia, and West Virginia. In most of these states, it is possible that state laws will be interpreted in a manner that is consistent with *Leegin*—that is, calling for a Rule of Reason analysis of RPM. However, that result is far from certain, and a number of state officials already have stated, or have taken actions demonstrating, that they continue to view RPM as per se unlawful.\(^{48}\)

In Maryland, the standard for evaluating RPM is not uncertain. In April 2009, Maryland enacted legislation declaring RPM agreements to be per se illegal under its state antitrust law. Maryland Commercial Law Code 11-204(b) amended the Maryland equivalent of Section 1 of the Sherman Act by declaring that any contract, combination, or conspiracy that sets minimum prices is an unreasonable restraint of trade. The Deputy Chief of the Antitrust Division of the Maryland Attorney General has confirmed that this statute was intended to overturn *Leegin* and preserve the per se rule for RPM agreements.\(^{49}\)

\(^{47}\) *California v. ARC America Corp.*, 490 U.S. 93 (1989).

\(^{48}\) See Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, The Antitrust Source (Oct. 2009) at 1. The Antitrust Source also publishes a chart (originally prepared by Mr. Lindsay) that provides relevant authorities for each of the states on antitrust, price fixing, federal harmonization, and *Illinois Brick* repealer statutes. See http://www.abanet.org/antitrust/at-source/09/10/Oct09-LindsayChart10-23f.pdf. This chart is included in the Appendix to this paper.

6. State Enforcement of RPM After Leegin

Antitrust enforcers in several states have publicly taken the position that RPM agreements remain subject to the per se rule under their states’ antitrust laws. More importantly, they are backing up those pronouncements with actions that seek to enforce the per se illegality of RPM agreements.

California, for example, is continuing to enforce the per se rule for RPM under state law. The California Cartwright Act has been interpreted as banning RPM agreements per se, and the California Supreme Court has held that the Cartwright Act goes beyond the Sherman Act. California’s Senior Assistant Attorney General for Antitrust has endorsed this view. In addition, in February of this year, the California Attorney General filed suit in California state court, alleging that DermaQuest, which makes beauty-care products, committed a per se violation of California’s antitrust statute by entering into agreements with sellers of its cosmetic products prohibiting them from reselling below DermaQuest’s suggested retail price. Within 30 days of the filing of the complaint, DermaQuest entered into a Consent Decree, in which it agreed to disavow the challenged contracts, not to enter into RPM agreements in the future, and to pay $70,000 in civil penalties and $50,000 towards the state’s legal costs.50

Similarly, the Attorney General of New York has been very vocal that RPM is a per se violation when it takes place in New York. New York is currently suing Tempur-Pedic International for engaging in RPM.51

Previously, in 2008, Illinois and Michigan joined New York in alleging that a furniture manufacturer’s RPM policy was unlawful price-fixing under state antitrust statutes. The complaint appears to have alleged that the challenged RPM agreements constituted a per se violation. That action was settled within days for $750,000.52 See the Appendix to this paper for an overview of state laws and enforcement concerning RPM.


B. Some Tying Arrangements Remain Per Se Unlawful

1. Is it a Kodak Moment?

Since the early days of franchising, franchisors have imposed sourcing and supply restrictions on franchisees, and franchisees have argued that those restrictions are unfair and illegal. Complaints about the legality of the restrictions often result in claims that the franchisor has engaged in illegal tying. The legal standards applicable to tying arrangements have evolved during the past decade so that franchisors are now able to defeat most claims of unlawful tying, allowing them to enforce the purchasing rules that have developed for their franchise system. However, the demise of tying claims has been greatly exaggerated, and sourcing restrictions continue to be a bone of contention in the franchise relationship.

A tie is an arrangement in which a firm conditions the sale of a product (the “tying product”) on a requirement that the purchaser also buy from the seller a second product (the “tied product”), which, but for the requirement, it would not buy from the seller. In franchise tying cases, the tying product is usually the franchise itself or the trademark license, and the tied product is whatever unwanted product, equipment, or ingredient the franchisor requires the franchisee to purchase. According to the Supreme Court, tying arrangements are per se illegal when the following four elements are satisfied:

1. the tying and tied products are separate and distinct,
2. the seller has market power in the tying product market,
3. the purchaser of the tying product has no choice but to also purchase the tied product, and
4. the tying arrangement forecloses a substantial volume of commerce in the tied market.\(^{53}\)

If the elements are satisfied, a tying violation is per se unlawful, although considerable economic analysis is necessary in order to determine whether the elements are satisfied. In recent years, most tying claims have hinged on whether the seller, or franchisor, has market power in the tying product market. In Jefferson Parish, the Supreme Court found that the seller’s market power could be established by either a market share of at least 30% or a unique

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product. In *Kodak*, however, the Court found that it was possible to establish the seller’s market share in a narrowly defined market consisting of a single brand if the buyer was “locked-in” to the seller. This lock-in could occur if the buyer is unaware of the tie at the outset or is unable to readily obtain “lifecycle pricing” information, or package costs generally, before making the initial purchase, and if there are high “switching costs” due to large initial “sunk costs.”

Franchisees have advanced tying claims against franchisors with some regularity based on the requirement that franchisees purchase goods for operation of the franchise from the franchisor or other approved suppliers. Since *Kodak*, franchisees typically argue that they are being coerced to purchase overpriced products and services, they did not know any details about the purchasing restrictions before investing in their franchise, and they therefore are locked-in to their franchise system once they purchased their franchise because of their large initial investment and high costs of getting out of their franchise agreement. Most courts, however, have rejected the lock-in theory of market power in franchising cases, reasoning that market power must be evaluated prior to a franchisee’s entry into a franchise agreement, not afterward, and that franchisees generally receive notice of any purchasing restrictions prior to signing the franchise agreement.

2. How Much Disclosure Is Enough?

How much pre-sale disclosure of purchasing restrictions must a franchisee receive to preclude application of the lock-in theory? That was the issue presented in *Burda v. Wendy’s International, Inc.*, where the court refused to grant Wendy’s motion to dismiss a tying claim based on a change in Wendy’s suppliers. The franchise agreements in question contained an approved supplier provision that required franchisees to buy food and other items only from suppliers meeting Wendy’s then current standards and specifications. The agreements stated:

Franchisee shall purchase all food items, ingredients, supplies, materials, and other products used or offered for sale at the Restaurant solely from suppliers (including manufacturers, distributors, and other sources) who demonstrate, to the continuing reasonable satisfaction of Franchisor, the ability to meet Franchisor’s then-current standards and specifications for such items; who

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54 466 U.S. at 13, 26.

55 504 U.S. at 472-77.

56 See Allan Hillman, *Franchise Tying Claims; Revolution or Just a ‘Kodak Moment’?,* 21 Franchise Law Journal 1 (Summer 2001).

possess adequate quality controls and capacity to supply Franchisee’s needs promptly and reliably; and who have been approved in writing by Franchisor prior to any purchases by Franchisee from any such supplier, and have not thereafter been disapproved. If Franchisee desires to purchase any products from an unapproved supplier, Franchisee shall submit to Franchisor a written request for such approval. Franchisee shall not purchase from any supplier until, and unless, such supplier has been approved in writing by Franchisor.

The franchisee claimed that when it became a franchisee, it was able to purchase buns from a certain bakery, but that Wendy’s subsequently required franchisees to buy buns from Wendy’s affiliate. The franchisee further claimed that when it became a franchisee, there were several approved food suppliers who competed for the franchisee’s business, but that Wendy’s subsequently granted exclusive rights to a single food supplier. The designation of a sole source food supplier allegedly was a change in policy that resulted in a 4% increase in food costs. The franchisee argued that the language of the franchise agreement did not provide a basis for Wendy’s to designate an exclusive supplier, and that a reasonable franchisee would not have foreseen that Wendy’s would require exclusive suppliers. Wendy’s position was that the franchisee knew, based on the franchise agreement language quoted above, that designation of sole source suppliers was a possibility, and that the franchisee’s claim was disingenuous.

The court concluded that the franchise agreement did not contain any language:

that would put a potential franchisee on notice that [Wendy’s] would be able to eliminate all competition by naming an exclusive supplier or that they could impose a surcharge on approved suppliers. Instead, the language suggests that supplier competition was welcome so long as prospective suppliers met [Wendy’s] “standards and specifications,” and “possess[ed] adequate quality controls and capacity to supply Franchisee’s needs.”

Accordingly, the franchisee sufficiently pled a tying claim under a lock-in theory of market power. The court distinguished Queen City Pizza v. Domino’s Pizza, Inc., where the Third Circuit held

58 Id. at 931.

59 Wendy’s allowed franchisees to purchase from other food suppliers, but Wendy’s imposed a surcharge on such purchases. Id. at 931.

60 659 F. Supp. 2d at 935-36. Interestingly, the court did not reference the disclosures that the franchisee would have received in the Uniform Franchise Offering Circular (the precursor to the current Franchise Disclosure Document).

61 124 F.3d 430 (3d Cir. 1997).
that market power must be assessed at the pre-contract stage, and that “allegations of wrongdoing in the post-contractual setting implicate principles of contract, and are not the concern of the antitrust laws.”\(^{62}\) Thus, according to the *Queen City* decision, *Kodak* was inapplicable to franchise tying claims as a matter of law. The court in *Burda*, perhaps begging the question, concluded that *Queen City* did not apply, and *Kodak* did apply, because the franchisee did not receive adequate notice that the franchisor could implement a sole source policy.\(^{63}\) Interestingly, the relevant franchise agreement provision in the Domino’s franchise agreement was quite similar to the relevant provision in the Wendy’s franchise agreement.\(^{64}\)

Franchise lawyers will want to consider, in light of *Burda*, what level of pre-sale disclosure must be provided to franchisees in order to defeat a tying claim. The FTC Franchise Rule requires detailed disclosures in Item 8 of the Franchise Disclosure Document regarding the franchisor’s purchasing restrictions. Are those disclosures sufficient? Will it become necessary to list in the franchise agreement and Franchise Disclosure Document every conceivable change in policy relating to suppliers, similar to the way in which many franchisors provide detailed reservation of rights language relating to customer and territorial restrictions? Query whether *Burda* and *Queen City* can be reconciled, in light of the similarity of the relevant franchise agreement provisions.

\(^{62}\) *Id.* at 443.

\(^{63}\) 659 F. Supp. 2d at 937.

\(^{64}\) The Domino’s franchise agreements stated:

*Pizza Ingredients, Supplies and Materials.* All pizza ingredients, beverage products, cooking materials, containers, packaging materials, other paper and plastic products, utensils, uniforms, menus, forms, cleaning and sanitation materials and other supplies and materials used in the operation of the Store must conform to the specifications established by us [Domino’s] from time to time. You [franchisee] must use in the operation of the Store boxes, containers and other paper products imprinted with the Marks as prescribed from time to time by us. We may in our sole discretion require that ingredients, supplies and materials used in the preparation, packaging, and delivery of pizza be purchased exclusively from us or from approved suppliers or distributors. Any ingredient, supply or material not previously approved by us as conforming to our specifications and quality standards must be submitted for examination and/or testing prior to use. We reserve the right from time to time to examine the facilities of any approved supplier or distributor, including the commissary, if any, operated by you, and to conduct reasonable testing and inspection of ingredients, materials or supplies to determine whether they meet our standards and specifications. We also reserve the right to charge fees for testing and evaluating proposed suppliers or distributors and examining or inspecting operations and to impose reasonable limitations on the number of approved suppliers of any product. Approval of a supplier or distributor may be conditioned on requirements relating to frequency of delivery, standards of service including prompt attention to complaints and the ability to service and supply Stores within areas designated by us.

Burda is consistent with a recent non-franchise case from the Ninth Circuit, NewCal Industries, Inc. v. IKON Office Solutions. In NewCal, the plaintiffs asserted a relevant market that was based on a contractually-created group of consumers. Relying on Queen City, the district court held that such a contractually-created group cannot constitute a relevant market for antitrust purposes, and it dismissed the antitrust claims. The Ninth Circuit reversed based on its conclusion that the case before it was governed by Kodak. The court articulated three principles for analyzing lock-in claims:

1. The law permits an antitrust claimant to restrict the relevant market to a single brand (as in Kodak).

2. The law prohibits an antitrust claimant from resting on market power that arises solely from contractual rights that consumers knowingly and voluntarily gave to the defendant (as in Queen City).

3. In determining whether the defendant’s market power falls in the Queen City category of contractually-created market power or in the Kodak category of economic market power, the law permits an inquiry into whether a consumer’s selection of a particular brand in the competitive market is the functional equivalent of a contractual commitment, giving that brand an agreed-upon right to monopolize its consumers in an aftermarket. The law permits an inquiry into whether consumers entered into such “contracts” knowing that they were agreeing to such a commitment.

In light of these recent decisions, franchisors and the attorneys who write franchise agreements and disclosure documents should re-evaluate whether more details about the sourcing intentions of franchisors should be provided to prospective franchisees. It may be prudent to draft this language with a more defensive point of view — language that would be able to overcome a good faith and fair dealing claim that alleged the franchisee was surprised by a change in supply policies or vendors.

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65 513 F.3d 1038 (9th Cir. 2008).

66 Id. at 1048-49. See also Packaging Supplies, Inc. v. Harley-Davidson, Inc., 2009 U.S. Dist. LEXIS 25732 (N.D. Ill. Mar. 30, 2009) (denying motion to dismiss tying claim where foreclosed vendor properly alleged that franchisor had sufficient market power in the tying market (Harley-Davidson motorcycles) to “appreciably restrain free competition in the market for the tied product” (plastic merchandise bags)).
C. Horizontal Agreements Remain Per Se Unlawful When They Involve Prices, Market Division, or Customer Allocation

A horizontal restraint is an agreement between or among competitors at the same market level.\(^{67}\) This may include joint action taken by franchisees, and in some cases, agreements between franchisors and franchisees.

An agreement among competitors that fixes prices is per se illegal under Section 1 of the Sherman Act regardless of whether the prices are reasonable.\(^ {68}\) An agreement may be illegal even if it does not set a specific price. It is enough if two or more competitors agree on a range, a price floor or ceiling within which prices will fall or rise, list prices, advertised prices, discounts, credit terms, business hours, uniform inputs, refraining from competitive bidding, or supply reductions.\(^ {69}\) Agreements among actual or potential competitors to divide territories or allocate customers are also per se unlawful under Section 1 because they have the same anticompetitive effects as price-fixing agreements. Courts have consistently held that horizontal customer or territorial allocations are per se illegal where the restraint is not ancillary to a legitimate economic integration such as a joint venture.\(^ {70}\) On the other hand, courts have generally treated market and customer allocations under the Rule of Reason where the allocations are ancillary to a procompetitive integration of the parties’ economic activities.\(^ {71}\)

1. **Is It Horizontal or Vertical?**

In many Section 1 cases, the key issue is whether the conduct in question is horizontal or vertical. For the most part, where a franchisor and franchisee agree on the territory, location, channel, or customers to be served, the arrangement is purely vertical, that is, between parties at different levels of the distribution chain. An arrangement may be deemed horizontal, however, if existing franchisees have actual or de facto veto power over the appointment of other franchisees to locate or sell in their territory. For example, in *American Motor Inns v. Holiday Inns*,\(^ {72}\) before the franchisor appointed a new motel franchisee, it solicited comments from three

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\(^{68}\) *United States v. Socony-Vacuum Oil Co.*, 340 U.S. 223-26 & n. 59 (1940).

\(^{69}\) *Id.*


\(^{71}\) *See, e.g.*, *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).

\(^{72}\) 521 F.2d 1230 (3d Cir. 1975).
franchisees with locations nearest to the new motel. The district court found that the franchisor
treated an objection by any one of the three as a veto of the new franchise. The Third Circuit
affirmed, holding that this constituted an agreement among the existing franchisees to control
who could compete with them. The opinion did not analyze whether the franchisor could have
made an independent judgment to accede to the incumbent franchisees’ concerns (or could
lawfully have contracted at the outset to give such veto power to a franchisee). Rather, it
appears the court viewed the franchisor’s routine acceptance of the veto as an abdication of the
exercise of independent judgment, making the conduct horizontal.\textsuperscript{73}

Similarly, in \textit{ES Development, Inc. v. RWM Enterprises},\textsuperscript{74} a developer sought to create
an “automall” where dealers could represent multiple automobile manufacturers in one location.
Existing dealers wrote identical letters to their manufacturers objecting to the creation of the mall.
The dealers, at least purportedly, were exercising rights in their contracts to lodge objections to
proposed encroaching dealers. The Eighth Circuit ruled that this was per se prohibited conduct
and enjoined it:

\begin{quote}
[B]y concertededly exercising their independent contract rights to block plaintiffs’
access to the manufacturers, the Alliance, in effect, exercised a sort of veto over
the entry of a new competitor to the market …. [N]o dealer would have been able
to bring about such a result acting alone. Furthermore, although the dealers
merely coordinated the simultaneous exercise of legitimate contract rights, their
motivations clearly exceeded the scope of concerns for which the protest
provisions of the franchise agreements were designed.\textsuperscript{75}
\end{quote}

2. \textbf{The Dual Distribution Dilemma}

The question of whether franchisor-franchisee interactions are horizontal or vertical also
arises in the context of dual distribution systems. Franchisors who engage in dual distribution
not only sell their products to franchisees (a vertical transaction), but they also compete with
their franchisees by selling directly to consumers (a horizontal relationship between franchisor

\textsuperscript{73} Id. at 1243; accord, \textit{Quality Mercury, Inc. v. Ford Motor Co.}, 542 F.2d 466, 470-71 (8th Cir. 1976).

\textsuperscript{74} 939 F.2d 547 (8th Cir. 1991).

\textsuperscript{75} Id. at 555. \textit{See also Alvord-Polk, Inc. v. F. Schumacher \& Co.}, 37 F.3d 996, 1010 (3d Cir. 1994) (prohibition on
dealing with 800-number dealers came about as result of horizontal conspiracy of full-service wallpaper dealers);
\textit{Arnold Pontiac-GMC, Inc. v. Gen. Motors Corp.}, 786 F.2d 564, 573-74 (3d Cir. 1986) (denial of new franchise
resulted from manufacturer’s meeting with existing franchisees); \textit{Midwestern Waffles v. Waffle House, Inc.}, 734
F.2d 705, 711 (11th Cir. 1984) (question of fact as to whether franchisor reached independent determination as to
how territory was assigned). In the 2008 decision in \textit{Toledo Mack Truck Sales & Service v. Mack Trucks, Inc.},
which is discussed in Section II.A.3 above, the Third Circuit concluded that dealers had entered into a horizontal
agreement not to compete with one another.
Challenges to nonprice restraints in dual distribution systems generally result in a finding that the restraint is vertical and, therefore, is subject to the Rule of Reason. The rationale for finding a vertical restraint varies: some courts find a vertical restraint only where the source of the restraint is the franchisor’s corporate office (rather than the company-owned store) or the restraint primarily benefits the overall franchisor enterprise, while other courts are less analytical and treat dual distribution restraints as vertical regardless of whether the restraints originate with the corporate office.

There is a paucity of recent case law and sound legal analysis on the treatment of dual distribution structures. The antitrust implications of this hybrid system are likely to provide more challenging to franchisors in the future.

One reason for caution is the simple fact that dual distribution is more pervasive now than ever before. While many franchisors have long had brick-and-mortar stores or have sold via catalogs, dual distribution is much more commonplace now that franchisors routinely sell via the Internet or other alternate channels of distribution. Moreover, even in franchise systems that assign territories to franchisees, the proliferation of franchisee and franchisor websites means that they are much more likely to be in competition with each other.

Another reason to expect dual distribution to become a hotbed of antitrust activity stems from the *Leegin* decision. Prior to *Leegin*, both horizontal and vertical minimum price agreements were per se unlawful, so litigants and courts had little incentive to invest a lot of time, energy, and money into determining whether agreements containing price restraints were horizontal or vertical. Now that vertical price restraints are analyzed under a Rule of Reason under federal law, and horizontal price restraints remain per se unlawful, whether an agreement containing a price restriction is vertical or horizontal has significant antitrust implications. A franchisor that sells in competition with its franchisees must consider the antitrust risks of establishing resale prices for the franchise system and the risks of participating in other price-related discussions with franchisees—conduct that would likely be illegal if deemed to be horizontal.

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77 E.g., *Elecs. Communications Corp. v. Toshiba America Consumer Products*, 129 F.3d 240 (2d Cir. 1997).

78 Cf. *National Association of College Bookstores v. Cambridge Univ. Press*, 990 F. Supp. 245 (S.D.N.Y. 1997) (Amazon.com is “an omnipresent competitor” that may be assumed to be selling in every geographic area of the United States; Robinson-Patman Act claim).
3. Exceptions to the Rule

In many cases, putative competitors have been able to avoid per se condemnation of their activities by forming “joint ventures,” in which there is a degree of integration between their economic activities. In general, the courts have been willing to apply a truncated Rule of Reason analysis, also called a “quick look” analysis, when the restraint on competition is ancillary to a legitimate economic integration, when the restraint is essential if the product is to be available at all, or if the restraint is not “one that would always or almost always tend to restrict competition and decrease output.”79 The “quick look” concept is well established in a line of Supreme Court decisions.80

Going beyond the “joint venture exception” to per se horizontal restraints, many courts have recognized a “single entity” exemption from Section 1. This line of case stems from Copperweld Corp. v. Independence Tube Corp.,81 where the Supreme Court held that a parent corporation and its wholly owned subsidiary constituted a single entity as a matter of law because they have a complete unity of economic interest, and they are therefore incapable of forming an unlawful agreement for the purpose of Section 1. The so-called “Copperweld doctrine” operated without regard to whether the parent actually exercises control over the subsidiary, and without regard to whether the two entities hold themselves out as competitors. A number of lower courts have extended the Copperweld doctrine to sister entities and to situations where the percentage of ownership is less than 100%. However, the analysis and outcomes in these cases have been inconsistent.82

There are probably hundreds of Section 1 cases involving agreements and restraints commonplace in the franchisor/franchisee relationship. There is some authority, however, mostly in the Ninth Circuit, for the proposition that a franchisor and franchisee cannot be found


80 See, e.g., Texaco, Inc. v. Dagher, 547 U.S. 1 (2006) (holding that a joint venture by oil companies to consolidate operations in the western United States and sell separately branded gasoline to service station owners at prices established by the joint venture was not a per se illegal horizontal price fixing agreement); FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) (quick look analysis applied to find unlawful restraint on output among competing dentists that lacked valid justification); NCAA v. Board of Regents, 486 U.S. 85 (1984) (university member of NCAA could bring antitrust claim against NCAA to challenge restrictions on commercial television appearances; claim analyzed under Rule of Reason because, without limits on competition, athletic league could not function).


to have conspired unlawfully because they are part of a common enterprise, based on the *Copperweld* holding. For example, in *Williams v. I.B. Fischer Nevada*,\(^8^3\) the Ninth Circuit held that a franchisor and franchisee were a common enterprise incapable of conspiring to violate Section 1. The facts relied upon by the Ninth Circuit in reaching its conclusion, as recited in the district court opinion, were as follows:

In a fast-food franchise the franchisor does everything to promote a uniform, non-competitive environment between the franchises: Each franchise serves substantially the same products; the products are served to the public in the same manner; the franchisor develops products and services for all franchises; the employees dress alike; the décor of each franchise is similar; the franchises are advertised as a single enterprise with a single logo; and the franchisor contracts with each franchise for exclusivity within a certain geographic area to minimize competition between the franchises.\(^8^4\)

This description of the franchise relationship is typical of many franchise relationships. More recently, in *Alaska Rent-A-Car, Inc. v. Cendant Corp.*,\(^8^5\) the trial court relied on *Copperweld* and *Williams* to conclude that Avis and its franchisees, and Budget and its franchisees, were all part of a common enterprise and were all in the same “franchise family.”\(^8^6\)

\(^{8^3}\) 999 F.2d 445 (9th Cir. 1993) (per curiam). The plaintiff alleged that the franchisor of Jack-in-the-Box restaurants required its franchisees to consent to a “no-switching” agreement, whereby franchisees agreed not to offer employment to the manager of another Jack-in-the-Box within six months of that manager’s termination from employment, unless that manager obtained a release from the franchisee of the Jack-in-the-Box he or she was leaving. The plaintiff alleged this restraint violated Sections 1 and 2 of the Sherman Act.


\(^{8^5}\) 2007 WL 2206784 (D. Ala. July 27, 2007). An Avis franchisee sued Avis’s parent, Cendant, alleging that Cendant’s acquisition of Budget Rent-A-Car, and the continued operation of the Budget system by Cendant in competition with the plaintiff, violated common law and various statutes, including Section 1 of the Sherman Act and its Alaskan antitrust law counterpart, by reducing competition in the rental car market between Avis and Budget.

\(^{8^6}\) See also Abbouds’ *McDonald’s LLC v. McDonald’s Corporation*, 2005 WL 2656591 (W.D. Wash. Oct. 14, 2005), aff’d, Bus. Franchise Guide (CCH) ¶ 13,370 (9th Cir. 2006); *Search Int’l v. Snelling & Snelling, Inc.*, 168 F. Supp. 2d 621, 625 (N.D. Tex.) (franchisor of personnel staffing businesses and its franchisees “constitute a ‘single economic unit’ incapable of conspiring under Section 1”), aff’d mem., 31 F. App’x 151 (5th Cir. 2001); *Hall v. Burger King Corp.*, 912 F. Supp. 1509, 1548 (S.D. Fla. 1995) (Burger King Corporation and its franchisees “are incapable of conspiring with each other,” aff’d, 999 F.2d 445 (9th Cir. 1993). See generally Suzanne E. Wachsstock & Erika L. Amarante, *Antitrust and Franchising: Conspiracies Between Franchisors and Franchisees Under Section 1*, 23 Franchise Law Journal 7 (2003).
4. **American Needle v. NFL: The Supreme Court Calls a Time-Out**

Against this background, on May 24, 2010, the Supreme Court, in *American Needle, Inc. v. National Football League*,\(^87\) broke a long string of victories for antitrust defendants when it unanimously held that National Football League teams that formed a joint venture to license their trademarks and logos to product manufacturers should not automatically be treated as a single entity, incapable of conspiring with one another, for purposes of antitrust liability under Section 1 of the Sherman Act. Instead, the teams were capable of unlawfully conspiring with one another because they compete for apparel sales, ticket sales, players, and other talent. The Court held that individual teams were acting in those spheres as “separate economic actors pursuing separate economic interests,” and that a joint venture agreement among them “deprives the marketplace of independent centers of decision-making ... [and thus] of actual or potential competition.”\(^88\)

The case challenged a joint venture, National Football League Properties (NFLP), formed by the National Football League and its member teams to develop, license, and market their intellectual property. In 2000, the NFLP decided to award a 10-year exclusive license to Reebok International, and it declined to renew its previous licenses with its non-exclusive licensees, including American Needle. American Needle sued the NFLP, NFL, the 32 NFL teams, and Reebok, alleging that the defendants’ collective licensing agreement violated Section 1 because it prevented individual teams from having their own licensing agreements with manufacturers such as American Needle. Both the district court and Seventh Circuit disagreed with this argument and found the NFL, its members, and the NFLP were a single entity under *Copperweld*.\(^89\)

The Supreme Court’s reversal articulated a new functional test for identifying concerted conduct: whether the conduct “joins together separate decision-makers” pursuing “separate economic interests,” such that the agreement “deprives the marketplace of independent centers of decision making.”\(^90\) Applying this standard, the Court held that because each of the member teams of the NFL are independently-owned and operated businesses that would otherwise compete in the market for intellectual property, their joint licensing program constituted concerted action under Section 1.\(^91\) The Court concluded that the NFLP was also subject to

\(^{87}\) 130 S.Ct. 2201 (2010).

\(^{88}\) Id. at 2213.

\(^{89}\) Id. at 2207-08.

\(^{90}\) Id. at 2213-14.

\(^{91}\) Id. at 2213-15.
Section 1 scrutiny because it was merely an instrumentality of the teams and not a separate decision-making entity.\textsuperscript{92}

\textit{The American Needle} decision is of special interest to franchisors that may claim that they and their franchisees are a single entity or part of a common enterprise. The Court’s new standard for concerted conduct, “separate economic actors,” means that franchisors will be less likely to prevail on a single entity argument; and the franchisor/franchisee cases based on \textit{Copperweld}, such as \textit{Williams v. I.B. Fischer Nevada},\textsuperscript{93} have been severely undermined by \textit{American Needle}. It also is likely that joint action by franchisees will come under greater scrutiny. More theoretically, the Court’s analysis may be viewed as a sign that it values intrabrand competition: football teams compete against one another in the entertainment market, and that “intrabrand competition” of sorts merits protection even though the NFL’s focus is on “interbrand competition” from other sport leagues and other forms of entertainment. By analogy, franchisees compete against one another, and that intrabrand competition arguably merits protection even through the franchisor’s focus is on interbrand competition from other brands. Whether \textit{American Needle} portends renewed respect for intrabrand competition remains to be seen.

\textbf{D. Group Boycotts (Concerted Refusals to Deal)}

The Supreme Court has stated that there “is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine.” \textit{Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.}\textsuperscript{94} In \textit{Northwest} (in which the per se rule was held not to apply), the Court explained:

Cases to which this Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by “either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.” In these cases, the boycott often cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firm possessed a dominant position in the relevant market. In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive.\textsuperscript{95}

\textsuperscript{92} \textit{Id.} at 2215-16.


\textsuperscript{94} 472 U.S. 284, 294 (1985).

\textsuperscript{95} \textit{Id.} at 294-95.
Absent an agreement between competitors not to deal with a third party, there is almost no chance that the per se rule will be applied to boycotts.\(^\text{96}\)

A very recent case of note is *Integrated Systems and Power, Inc. v. Honeywell, Int’l., Inc.*\(^\text{97}\) In *Integrated Systems*, the court dismissed plaintiff ISPI’s complaint pursuant to Rule 12(b)(6), for failure to state a claim for which relief could be granted. Through its “NOTIFIER” division, Honeywell manufactures commercial fire alarm systems, as well as related technology, peripheral devices and accessories. ISPI was a non-exclusive authorized distributor of NOTIFIER fire-detection alarm systems, required to sell only NOTIFIER systems. But, as a pre-existing distributor of Simplex fire-detection alarm systems, a competitor of NOTIFIER, ISPI was permitted to continue to provide service to its Simplex customers.\(^\text{98}\)

From time to time, ISPI submitted bids to obtain NOTIFIER service contract renewals where another authorized NOTIFIER distributor had been the servicing company, and ISPI sometimes submitted the lower bids, with the result that the customer transferred its business to ISPI. Various authorized NOTIFIER distributors complained to Honeywell about ISPI’s price-cutting, and Honeywell advised ISPI to cease bidding for NOTIFIER service contracts against other authorized NOTIFIER distributors. Later, shortly after ISPI was the winning bidder for thirteen United States Postal Service locations, other NOTIFIER distributors pressured Honeywell to terminate ISPI’s Distributor Agreement, and Honeywell promptly did so, referencing ISPI’s competition with other distributors, complaints by them, and Honeywell’s warnings to ISPI.\(^\text{99}\)

ISPI sued, alleging that NOTIFIER distributors allocated customers among themselves, agreed not to compete for customers, agreed to submit non-competitive bids, and agreed to complain to Honeywell about ISPI’s competition, all with the purpose and effect of reducing price competition among ISPI distributors. It alleged that Honeywell was an active participant in the conspiracy, and had terminated ISPI in furtherance of it. ISPI alleged a per se or, in the alternative, a Rule of Reason violation. It identified the relevant product market as “the sale,

\(^{96}\) *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); *Toys “R” Us, Inc. v. F.T.C.*, 221 F.3d 928, 936-37 (7th Cir. 2000) (*per se* violation where toy retailer organized boycott of discounting competitors by major suppliers).

\(^{97}\) 2010 U.S. Dist. LEXIS 47203 (S.D.N.Y. May 13, 2010).

\(^{98}\) *ld. at 1-2.*

\(^{99}\) *ld. at 2.*
installation and servicing of NOTIFIER fire detection and alarm system products,” and the relevant geographic market as New York City.\textsuperscript{100}

The court declined to classify the alleged conspiracy as illegal per se. Instead, it characterized the restraint that allegedly harmed competition—the termination—as vertical, regardless of the distributor complaints that were the impetus.\textsuperscript{101} It held further that the complaint did not allege a horizontal conspiracy that would have been per se illegal, because it did not in reality allege a dealer conspiracy to rig bids. The court distinguished \textit{United States v. General Motors Corp.},\textsuperscript{102} on two bases.\textsuperscript{103} First, in \textit{GM}, the dealers’ association actually investigated and policed the horizontal agreement to eliminate discounters. But the only “enforcement” here was the termination. Second, in \textit{GM}, the conspiring dealers agreed to refuse to do business with the discounting dealers. In \textit{Integrated Systems}, all the dealer did was complain to Honeywell, which was not sufficient to establish a per se violation.

The court also distinguished various circuit court decisions, and it noted that the complaint did not allege plausibly that the other NOTIFIER distributors “agreed with each other” not to submit competitive bids, despite the express allegation that they had “agreed.” Rather, the court found the facts alleged to suggest only that other NOTIFIER distributors \textit{tended} not to bid on service contract renewals for one another’s customers. This practice was viewed as more akin to “conscious parallelism,” which, alone, is insufficient to violate the law, and does not “tend to exclude the possibility of independent action” under \textit{Monsanto Co. v. Spray Rite Service Corp.}\textsuperscript{104} The plaintiff, even at the pleading stage, “must state enough facts to \textit{plausibly} suggest agreement, and factual allegations that \textit{possibly} suggest agreement or are merely \textit{consistent with} the agreement are insufficient.”\textsuperscript{105}

Evaluating the economic impact of the restraint in the context of the alleged “horizontal” conduct, the court held that a restraint operating only in the service portion of the distribution of

\textsuperscript{100} \textit{Id.} at 1-2.

\textsuperscript{101} \textit{Id.} at 3-8.

\textsuperscript{102} 384 U.S. 127 (1966).

\textsuperscript{103} \textit{Integrated Systems and Power, Inc.}, 2010 U.S. Dist. LEXIS 47203, at 4-5.


the product, within a single brand, and where there was no indication that there was a lack of substitutes, was not so “manifestly anticompetitive” as to be a per se violation.\textsuperscript{106} This analysis is odd because horizontal restraints are per se illegal, and if, in fact, the court found the horizontal agreement had been properly pled, it would have been difficult to have denied per se status, notwithstanding the court’s mental gymnastics. It is also odd because “service only” restraints have been a major area of modern tying jurisprudence, including in \textit{Kodak} itself.

In any event, the Rule of Reason case failed also because a relevant market consisting of a single brand was improper in the absence of market power, which had not been pled.\textsuperscript{107} Finally, ISPI failed to allege sufficient injury to competition as a whole, i.e., overall interbrand market for fire-detection systems, as opposed to injury merely to ISPI itself, i.e., to intrabrand competition.\textsuperscript{108}

It is fair to say that \textit{Integrated Systems} is a good example of the subtle but sometimes determinative change in antitrust pleading requirements wrought by \textit{Twombly}, a case that, for better or worse, gives courts license to dismiss antitrust (and other) cases that, in the past, they would have had to allow to proceed.

\textbf{E. Supplier Refusals to Deal}

Refusals to deal (too often commingled with boycotts) refer to the decision of a franchisor to terminate or fail to renew or not to commence dealings with a franchisee. Absent monopoly power, a refusal to deal that is unilateral does not violate the antitrust laws, \textit{see Monsanto} (plaintiff must also present evidence that tends to exclude the possibility of independent action by the supplier). Nor is it even illegal for a franchisor to agree with company A that it will cease doing business with B and will appoint A or expand A’s territory, unless the franchisor’s agreement to do so is made to enforce or further a policy which is otherwise independently illegal under the antitrust laws. \textit{Business Electronics Corp. v. Sharp Electronics Corp.}\textsuperscript{109} Since such refusals to deal are vertical, they are governed by the Rule of Reason in all contexts now; thus, the underlying policy the franchisor seeks to advance by refusing to deal with a franchisee must itself be a Rule of Reason violation in order for the refusal to be unlawful.

\textsuperscript{106} \textit{Id.} at 7.

\textsuperscript{107} \textit{Id.} at 8

\textsuperscript{108} \textit{Id.} at 8-9.

A plaintiff recently won a victory in *Champagne Metals v. Ken-Mac Metals*, \(^{110}\) in which the plaintiff claimed the defendants, aluminum distributors, conspired to prevent the plaintiff, a new aggressive seller, from entering the market, by threatening to move their business from any mills that agreed to sell to the plaintiff. Finding sufficient evidence of a conspiracy to admit co-conspirators’ statements under Fed. Rule of Evidence 801(d)(2)(E), the district court held under *Monsanto* that the defendants had the required “conscious commitment to a common scheme designed to achieve an unlawful objective”; that there was sufficient evidence to demonstrate the defendants were not acting independently; and that the plaintiff had presented the required evidence that “tends to exclude the possibility that the alleged conspirators acted independently.”\(^{111}\)

### F. Discrimination in Prices, Services and Allowances, and Rebates

The Robinson-Patman Act continues to be an area of concern for franchisors and other suppliers.

In *Feeser’s, Inc. v. Michael Foods, Inc.*, \(^{112}\) for example, a federal district court awarded a regional food distributor a significant victory before the decision was overturned by the Third Circuit. In that case, Feeser’s, alleged that a manufacturer of food products, Michael, and a major food services management company, Sodexho, violated the price discrimination provisions of the Robinson-Patman Act. Feeser’s claimed that Sodexho was able to purchase certain food products from the manufacturer at discounted prices not available to it. After the district court originally dismissed the case on the ground that Feeser’s could not show it was in competition with the favored buyer, the Third Circuit reversed and remanded, holding that the plaintiff might be able to show functional competition with Sodexho.\(^{113}\) After a bench trial, the district court did indeed find for the plaintiff, holding that Feeser’s had shown all of the elements of a Robinson-Patman claim, i.e., two sales to two purchasers in interstate commerce, products of the same grade and quality, a discrimination in price, and sufficient competitive injury, defined


\(^{111}\) *Id.* at *5, 7. See also Bearing Distributors, Inc. v. Rockwell Automation, Inc.*, 2006 U.S. Dist LEXIS 67327 (N.D. Ohio Sept. 20, 2006) (plaintiff alleged its supplier and plaintiff’s competitive distributor conspired to eliminate it, a price-cutting distributor, from the market; this was held insufficient to state a *per se* claim under *Business Electronics*, as there was no supplier price-fixing program in effect, but it could be a Rule of Reason violation where the plaintiff adequately described a relevant market adversely affected by its elimination). *But see Nicsand, Inc. v. 3M Company*, 507 F.3d 442 (6th Cir. 2009) (defendant's aggressive price-cutting was not below-cost “predatory” pricing, and its offer of long exclusive contracts to retailers, both of which acts helped drive plaintiff out of business, did not violate Section 2 of the Sherman Act because the acts were pro-competitive; plaintiff did not suffer “antitrust injury,” because the conduct adversely affected a competitor, but not competition, and benefited consumers).

\(^{112}\) 591 F.3d 191 (3d Cir. 2010).

\(^{113}\) 498 F.3d 206 (3d Cir. 2007).
as either loss of specific customers or (in this case) proof of substantial price discrimination over time. The district court enjoined Michael from further illegal price discrimination, and when Michael responded by terminating all supply to Feeser’s, the district court (perhaps controversially) held Michael in contempt and ordered it to resume sales as long as Feeser’s otherwise qualified as a customer.\footnote{632 F. Supp. 414 (M.D. Pa. 2009).} The Third Circuit reversed the judgment, holding that Feeser’s could not satisfy the “competitive injury” requirement of a Robinson-Patman claim.\footnote{591 F. 3d 191, 203-05 (3d Cir. 2010).} The court focused on the multi-tier nature of the food service industry: manufacturers sell products to distributors, who resell those products to self-operators and to food services management companies. Self-operators perform their own dining services internally, but food service management companies operate an institution’s dining services on an outsourced basis, including procurement and distribution of food. Feeser’s sold food to self-operator institutions although Sodexho’s business involved converting those self-operator institutions to Sodexho’s own food management services.

The court framed the question as whether the parties were selling at the same level of distribution and thus were competing for the buyer, i.e., whether the parties were in economic reality competing at the same distributional level.\footnote{Id. at 196.} The court applied \textit{Volvo Trucks NA, Inc. v. Reeder-Simco GMC, Inc.}\footnote{546 U.S. 164 (2006).} and \textit{Toledo Mack Sales & Services, Inc. v. Mack Trucks, Inc.}\footnote{530 F.3d 204 (3d Cir. 2008).} It held that the plaintiff and Sodexho were not competing purchasers, because the only competition between these entities occurred before the food purchases from defendant manufacturer that were the subject of the Robinson-Patman claim, i.e., usually during an RFP process when the institutional customer was deciding whether to be a self-operator or to contract for Sodexho’s food management services. In other words, any competition occurred at the bid stage, but the product that was the subject of the alleged Robinson-Patman violation was not supplied until one party or the other had won the bid. Because the plaintiff and Sodexho were not competing purchasers at the time of the sale of the subject product, the plaintiff could not establish competitive injury for purposes of a Robinson-Patman claim, and the appellate court reversed the verdict in the plaintiff’s favor.\footnote{See also Data Capture Solutions, Inc. v. Symbol Technologies, Bus. Franchise Guide (CCH) ¶ 13,737 (D. Conn. 2009) (there are not “two sales” in a bidding situation.); Camarda v. Snapple Dist., Inc., Bus. Franchise Guide (CCH) ¶ 13,720 (S.D.N.Y. 2007) (Robinson-Patman claim dismissed where plaintiff and favored purchaser were not competitors for same customer).}
In so holding, the court observed that in *Toledo Mack* it had held “we will narrowly interpret the RPA [Robinson-Patman Act] even if doing so will result in elevating form over substance.”\(^{120}\) The court concluded:

> The RPA places the federal courts in an inescapable Catch-22. We are asked to apply RPA, a statute that is “fundamentally inconsistent with the antitrust law,” *Antitrust Modernization Commission Report and Recommendation*, 312 (2009), in a fashion that is “consistent with the broader purpose of the antitrust law.”\(^{121}\)

A district court dismissed a Robinson-Patman claim on the ground that there were not “two or more sales by the same seller,” in *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*\(^{122}\) There, the plaintiff claimed its tractor supplier violated the Act by providing pricing preferences to a competing buyer that were not made available to the plaintiff-dealer. The first element of the claim required two or more contemporaneous sales by the same seller. The plaintiff alleged that the manufacturer sold equipment directly to the competing purchaser and that the competing purchaser sold equipment to the plaintiff. The manufacturer argued that because the plaintiff alleged one sale by the manufacturer and one sale by the allegedly favored purchaser, the plaintiff could not meet the requirement of two or more contemporaneous sales by the same seller.

The plaintiff argued, however, that the manufacturer controlled the prices and sales terms offered by the favored purchaser, so the manufacturer was the de facto seller. If that were the case, the court observed that the plaintiff might be able to state a claim. The court initially denied defendants’ motion to dismiss, but on defendants’ motion for reconsideration the court determined that the information in the plaintiff’s affidavit concerning the manufacturer’s alleged “control” actually established that the pricing information came from the competing buyer, not the manufacturer. Hence, there was no evidence that the manufacturer set or controlled prices or sales terms of the competing buyer. Therefore, the court granted the motion to dismiss for failure to allege two or more sales by the same seller.

On the other hand, plaintiffs have had some success. In two recent cases, courts have refused to dismiss Robinson-Patman claims. In *Stephenson Oil Co. v. CITGO Petroleum,*\(^{123}\) the

\(^{120}\) 591 F.3d at 199, citing *Toledo Mack*, 530 F.3d at 228 n.11.

\(^{121}\) 591 F. 3d at 206, n. 17, quoting *Volvo*, 546 U.S. at 181.


plaintiffs were gasoline distributors who alleged CITGO had breached its duty of good faith under the open price term provision of the Uniform Commercial Code, 2-305, and had violated Section 2(a) of the Robinson-Patman Act by charging them arbitrarily a higher price for the same gasoline than similarly situated competing purchasers. They alleged CITGO did so to increase its sales volume without lowering its publicly-posted wholesale price, which was the price the plaintiffs paid. CITGO argued that the failure of the plaintiffs to allege the specific locations of retail outlets supplied by their alleged favored competitors doomed the claim, but the court rejected the argument, holding such details could await discovery.\footnote{124}

In \textit{Freightliner's of Knoxville, Inc. v. Dodge Chrysler Vans, LLC},\footnote{125} the Sixth Circuit reinstated a dismissed Robinson-Patman claim by a terminated dealer of Freightliner medium and heavy trucks. The dealer alleged a violation of Section 2(d) of the Act, in that the supplier had failed to provide it with its proper proportionate amount of promotional services based upon its purchases. Freightliner vans were “dual branded,” i.e., sold both to Freightliner dealers and to Dodge dealers, but the Dodge dealers allegedly received higher allocations of vans and benefited from a promotional program that gave their end-user customers “service privileges.”\footnote{126} The court affirmed dismissal of the allocation claim as not being within Section 2(d), but reversed and ordered reinstatement of the promotional service claim for discovery into the manner in which it had been conducted.\footnote{127}

Finally, franchisees have had modest success claiming that Section 2(c) of the Robinson-Patman Act bars franchisors from receiving rebates or other payments from vendors based on purchases by franchisees. Franchisee claims that have survived motions to dismiss include \textit{Substantial Investments, Inc. v. D'Angelo Franchising Corp.}\footnote{128} and \textit{In Town Hotels Ltd. Partnership v. Marriott Int'l, Inc.}\footnote{129} However, in the most recent iteration of a franchise claim based on Section 2(c), \textit{Massey v. Moe's Southwestern Grill, LLC},\footnote{130} the court dismissed a

\begin{footnotesize}
\footnote{124} Id.\footnote{125} 484 F.3d 865 (6th Cir. 2007).\footnote{126} Id. at 868.\footnote{127} Id. at 874.\footnote{128} Bus. Franchise Guide (CCH) ¶ 12,897 (D. Mass. 2004).\footnote{129} 246 F. Supp. 2d 469 (S.D. W.Va. 2003).\footnote{130} 2008 U.S. Dist. LEXIS 106897 (N.D. Ga. Oct. 24, 2008).}
\end{footnotesize}
Section 2(c) claim of “commercial bribery,” where the franchisee plaintiff alleged the franchisor obtained “kickbacks” from suppliers. The court held the franchisee failed to show competitive injury, holding that inflated prices paid to vendors, without more, did not establish Robinson-Patman injury, unless the vendors exhibited unlawful intent or engaged in improper conduct in making payments to the franchisor. The court held further that competitive vendors and the plaintiff’s customers were more direct victims, and that the plaintiffs lacked antitrust standing.\textsuperscript{131} However, the court allowed a breach of contract claim to proceed.

G. Mergers and Acquisitions

In the merger arena, there is evidence of increased enforcement at both the FTC and DOJ. This is not a surprising development, since President (then candidate) Obama gave a speech in May 2008 in which he criticized the Bush administration for weak antitrust enforcement against major mergers. He stated: “We’re going to have an antitrust division in the Justice Department that actually believes in antitrust law. We haven’t had that for the last seven, eight years.”\textsuperscript{132}

During fiscal year 2009, the FTC challenged 19 mergers. In nine of those cases, the parties agreed to a consent order, in three they abandoned the deal, and in a record seven cases the FTC filed a complaint in federal district court or in an administrative proceeding. Additionally, through the first half of fiscal year 2010, the FTC brought 11 merger enforcement actions. The challenges covered a wide range of markets, including pharmaceuticals, fertilizer, the funeral services industry, and the chemical industry.\textsuperscript{133}

\textsuperscript{131} For a comprehensive analysis of Section 2(c) claims by franchisees, see Steven B. Feirman, The Legality of Rebates from Suppliers, 23 Franchise Law Journal 71 (Fall 2003). See also Steven B. Feirman, Another Look at Rebates, 24 Franchise Law Journal 169 (Winter 2005).


\textsuperscript{133} Prepared Statement of Federal Trade Commission, How the Federal Trade Commission Works to Promote Competition and Benefit Consumers in a Dynamic Economy, before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights (June 9, 2010). Among the FTC’s recent merger activity are the following actions:

- FTC authorized suit to stop CSL’s proposed $3.1 billion acquisition of Talecris Biotherapeutics.
- FTC challenged Thoratec’s proposed acquisition of HeartWare International.
- FTC obtained consent order under which Carilion agreed to divest two outpatient medical clinics acquired during previous year.
- FTC announced settlement resolving investigation of Pfizer’s acquisition of Wyeth with divestitures.
- FTC announced proposed consent order requiring the sale of assets related to drugs used to treat Parkinson’s and the side effects of chemotherapy as a condition for Watson Pharmaceuticals, Inc.’s acquisition of Robin Hood Holdings Limited.

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The level of merger enforcement activity is an excellent barometer of the overall commitment of the antitrust enforcement agencies. Franchisors should be interested in the merger enforcement numbers and enforcement rhetoric to gauge the antitrust environment. But franchisors who are active in the mergers and acquisitions market also need to assess the likelihood of a challenge to their own deals or to the transactions of competitors. For example, as this paper was being written in Summer 2010, Hertz Global Holdings Inc. and Avis Budget Group Inc. were engaging in a bidding war to acquire Dollar Thrifty Automotive Group, and both bids present significant antitrust issues. Avis is the auto rental industry’s second largest company, Hertz is the third largest, and Dollar Thrifty is the fourth largest. (Enterprise, a non-franchised company, is the largest.) The offers by Hertz and Avis have both received “second requests” (requests for additional information) from the FTC.

An unusual aspect of the competing offers is that both companies are conducting a public relations campaign that is based, in part, on obtaining antitrust clearance. Hertz has argued in securities filings that its bid carries less regulatory risk because it operates in the premium or business segment of the rental industry, whereas Dollar Thrifty’s niche is the budget or leisure traveler. Thus, the argument goes, its acquisition of Dollar Thrifty is complementary and would preserve competition, whereas Budget and Dollar Thrifty directly compete in the value segment. Avis, which had not yet presented its formal offer when this paper was submitted, can be expected to argue that Hertz’s segmentation argument is not supported by the facts because Hertz aggressively targets budget travelers with discount offers on travel websites such as priceline.com. The antitrust issues presented by either combination are significant enough that Dollar Thrifty reportedly has negotiated carve out clauses in both merger agreements. In the Hertz agreement, if there is an antitrust challenge, Hertz would be willing to divest its Advantage Rent A Car brand (a value brand); and in the upcoming Avis bid, Avis reportedly would be willing to divest specific rental-car locations to gain antitrust clearance. And there is a further sub-plot to this tale of corporate intrigue: the losing bidder will be in a position to acquire whatever assets will have to be divested by the winning bidder to obtain antitrust

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- FTC issued proposed consent order requiring Service Corporation International, the nation’s largest cemetery operator, to sell a cemetery and funeral home in Las Vegas to complete its proposed acquisition of Palm Mortuary, Inc.
- FTC issued proposed consent order detailing Panasonic’s and Sanyo’s agreement to sell assets related to Sanyo’s portable nickel metal hydride battery business as part of the conditions for Panasonic’s acquisition of Sanyo.
- FTC announced divestitures regarding Agrium’s acquisition of CF Industries.

Breakfast briefing with the Federal Trade Commission Bureau Directors, ABA Section of Antitrust Law Spring Meeting (April 23, 2010).

approval; and assets that must be divested within a brief timeframe pursuant to a consent order are often sold at "fire sale" prices. So, even the loser may be a winner.

The remedial measures imposed by the FTC to resolve merger investigations traditionally have been more robust than those from DOJ. In particular, FTC policy is more amenable to "crown jewel provisions" in consent orders. Of interest, therefore, is the DOJ's negotiated settlement following its review of Sapa Holding AB's ("Sapa") acquisition of the assets of Indalex Holdings Finance, Inc. (hereafter "Sapa/Indalex"). Although a relatively small transaction ($150 million), and one that was not in a high-profile industry (aluminum sheathing), the settlement has caught commentators' attention because of the DOJ's inclusion of a crown jewel provision in the Final Judgment.

The parties agreed to divest either Sapa's Catawba, North Carolina, aluminum sheathing facility or the Indalex aluminum sheathing assets located at its Burlington, North Carolina, extruded aluminum fabrication facility. Because Indalex's Burlington aluminum sheathing assets had not previously operated as a profitable standalone business, DOJ required the parties to include a second aluminum sheathing press in the divestiture package. If the parties had been unable to divest these assets within 90 days, however, they would have had to sell Indalex's


entire Burlington plant.\textsuperscript{141} The Burlington plant produced fabricated aluminum products, such as conduit and aluminum shapes, in addition to the aluminum sheathing that concerned DOJ.\textsuperscript{142}

The Sapa/Indalex settlement is noteworthy because of its departure from normal DOJ practice, where crown jewels are few and far between.\textsuperscript{143} More generally, it reflects the more aggressive merger enforcement posture of the Obama DOJ. Several other actions confirm that merger enforcement is a top priority for DOJ.

A consent decree resolving competitive concerns involving Bemis’s $1.2 billion acquisition of the Alcan Packaging Food Americas business from Rio Tinto is viewed as unusually tough.\textsuperscript{144} To resolve alleged anticompetitive effects in the markets for flexible-packaging rollstock and flexible packaging shrink bags, Bemis agreed to divest all of Alcan’s contracts and intellectual property, as well as two of Alcan’s four flexible packaging plants. Bemis promised that it “will not manufacture any Alcan Relevant Product after the date the Divestiture Assets are divested until the expiration of this Final Judgment;” and that it “shall not solicit business for any Relevant Product that is subject to an unexpired Alcan customer contract transferred to the Acquirer for a period of one (1) year from the date of divestiture of such contract or the remaining term of the contract, whichever is shorter.”\textsuperscript{145} Given the DOJ’s policy of disfavoring conduct remedies,\textsuperscript{146} these requirements are unusually aggressive. DOJ appears to have imposed a covenant not to compete on the post-merger Bemis.


\textsuperscript{142} See Sapa/Indalex Press Release (July 30, 2009). The DOJ did not have to trigger the crown jewel provision because Sapa divested its Catawba facility to a DOJ-approved buyer. See Motion and Memorandum of the United States in Support of Entry of Final Judgment (Jan. 7, 2010).


\textsuperscript{145} Id. at § IV(J).

\textsuperscript{146} See Department of Justice Antitrust Division Policy Guide to Merger Remedies (2004), available at http://www.justice.gov/atr/public/guidelines/205108.htm, at 17 (“conduct remedies generally are not favored in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies can avoid”).
Another comprehensive settlement resolved competitive concerns with Ticketmaster’s acquisition of Live Nation. In that settlement, the DOJ required Ticketmaster, the world’s largest ticketing company, to license its ticketing software, divest ticketing assets, and subject itself to anti-retaliation provisions in order to proceed with its proposed merger. The remedy will give concert venues more choice for their ticketing needs and will promote incentives for competitors to innovate and discount. The proposed relief in the Ticketmaster matter is both structural and behavioral. The settlement requires Ticketmaster to divest more ticketing than it will gain through its acquisition of Live Nation. Simultaneously, the licensing solves a second competitive issue by giving AEG, an integrated competitor, the ability and incentive to compete with the combination of Ticketmaster and Live Nation for concert promotion, venue management, and ticketing. Under the settlement, Ticketmaster will be required to license its ticketing software to AEG, which had been Ticketmaster’s single largest customer, giving AEG the opportunity and incentive to compete in primary ticketing, both in its own venues and third-party venues, thereby opening the door for AEG to become a vertically integrated competitor with competitive incentives similar to those of the merged company. In addition, Ticketmaster was required to divest Paciolan, an established ticketing business that sells tens of millions of tickets annually. Finally, the settlement provides stringent anti-retaliation provisions that prohibit anticompetitive bundling and is intended to keep the merged company in check.147

One additional area of notable merger enforcement is that of FTC and DOJ challenges to small, non-reportable transactions. Most challenges to mergers and acquisitions on competition grounds occur during the Hart-Scott-Rodino pre-merger notification process, either by a negotiated settlement or via an action to enjoin the proposed transaction. However, the FTC and DOJ recently have been on the lookout for anticompetitive transactions that fall below the HSR-reporting thresholds (such as transactions valued below $63.4 million) or are otherwise exempt from HSR, even where the transactions have already been consummated.148 The FTC and DOJ have challenged 18 transactions falling below HSR thresholds between 2001 and 2010, with nine of those challenges occurring between 2008 and 2010.149

147 Prepared Statement of Christine A. Varney, Assistant Attorney General, Antitrust Division, Oversight of the Enforcement of the Antitrust Laws, before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights (June 9, 2010).


- **FTC v. Dun & Bradstreet** (complaint filed on May 7, 2010 challenging Dun & Bradstreet’s February 2009 acquisition of Quality Education Data from Scholastic, Inc. for $29 million, alleging purchase resulted in 90% market share in K-12 educational marketing data market).


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Thus, it appears that no transaction is too small to escape scrutiny, and the fact that a merger has taken place and the “eggs have been scrambled” will not preclude the enforcement agencies from pursuing anticompetitive transactions.

III. CONCLUSION

The reach of antitrust in franchising is less today than it was twenty-five years ago, but antitrust enforcement has made a big comeback during the past few years. Franchisees who believe that they have been treated unfairly are still asserting antitrust claims, and courts and regulators are still inclined to dispense justice to reflect their view of an equitable resolution to disputes. Perhaps antitrust is shifting to address not only unreasonable restraints on competition, but also unfair competition — a view consistent with the rejuvenation of the FTC’s unfairness jurisdiction under Section 5 of the FTC Act. In 2010, antitrust is back in vogue, and the franchising industry must take notice and adjust to this new reality.

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- **FTC v. Carillion Clinic** (divestiture of two outpatient imaging and surgical centers after FTC commenced administrative litigation).
- **United States v. Election Systems & Software, Inc.** (DOJ divestiture order following consummation of $5 million transaction between producers of voting equipment, combination of assets, and dismantling of some pre-combination operating divisions).
- Blue Cross-Blue Shield of Michigan’s proposed acquisition of Physicians Health Plan of Mid-Michigan (non-reportable transaction abandoned after DOJ announced opposition).
## Overview of State RPM*

**Michael A. Lindsay**

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<td><strong>AT:</strong> <a href="http://www.atauto.com">Ala. Code § 8-10-1</a> (2009) (providing civil penalty where a person or corporation &quot;engages or agrees with other persons or corporations or enters, directly or indirectly, into any combination, pool, trust, or confederation to regulate or fix the price of any article or commodity&quot;); <strong>IB:</strong> <a href="http://www.atauto.com">Ala. Code § 6-5-60(a)</a> (2009) (providing for the recovery of damages caused by &quot;an unlawful trust, combine, or monopoly, or its effect, direct or indirect&quot;).*</td>
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<td><strong>H:</strong> <em>City of Tuscaloosa v. Harcros Chems.,</em> 158 F.3d 548, 555 n.8 (11th Cir. 1998) (finding that federal antitrust law &quot;prescribes the terms of unlawful monopolies and restraints of trade&quot; under Alabama law (citing <em>Ex parte Rice</em>, 67 So. 2d 825, 829 (Ala. 1953)).</td>
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<td><strong>AK</strong></td>
<td><strong>AT:</strong> <a href="http://www.atauto.com">Alaska Stat. § 45.50.562</a> (2009) (declaring unlawful &quot;[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce&quot;).</td>
<td><strong>H:</strong> <em>Alakayak v. B.C. Packers, Ltd.</em>, 48 P.3d 432, 448 (Alaska 2002) (holding that federal cases construing the Sherman Act § 1 &quot;will be used as a guide&quot; for Alaska antitrust claims); see also <em>West v. Whitney-Fidalgo Seafoods, Inc.</em>, 628 P.2d 10, 14 (Alaska 1981) (finding that Alaska legislature intended Alaska courts to look to Sherman Act for guidance).</td>
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<td><strong>IB:</strong> <a href="http://www.atauto.com">Alaska Stat. § 45.50.577</a> (2009) (authorizing attorney general, as <em>parens patriae</em>, to secure monetary relief &quot;for injuries directly or indirectly sustained by persons by reason of any violation of state antitrust laws&quot;).</td>
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<td><strong>H:</strong> <em>Ariz. Rev. Stat. § 44-1412</em> (providing legislative intent that &quot;courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes&quot; and that &quot;[t]his article shall be applied and construed to effectuate its general purpose to make uniform the [antitrust] law&quot; among the states).</td>
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<td><strong>AR</strong></td>
<td><strong>AT:</strong> <a href="http://www.atauto.com">Ark. Code, Ann. § 4-75-309</a> (2009) (declaring it illegal &quot;to regulate or fix, either in this state or elsewhere, the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever&quot;).</td>
<td><strong>H:</strong> <em>Mt. Smith Light &amp; Traction Co. v. Kelley</em>, 127 S.W. 975, 982 (Ark. 1910) (finding the state antitrust law did not apply to a contract with maximum resale restraint on natural gas because the law &quot;was to prevent a combination among producing competitors to fix the prices to the detriment of consumers&quot; and the contract would not be to the detriment of competitors).</td>
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<td><strong>IB:</strong> <a href="http://www.atauto.com">Ark. Code, Ann. § 4-75-315(B)</a> (2009) (authorizing attorney general, as <em>parens patriae</em>, to secure monetary relief &quot;for injury, directly or indirectly sustained&quot; because of violations of state antitrust laws).</td>
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* This chart accompanies the article by Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin, ANTITRUST SOURCE*, Oct. 2009, available at [http://www.abanet.org/antitrust/at-source/09/10/Oct09-Lindsay10-23f.pdf](http://www.abanet.org/antitrust/at-source/09/10/Oct09-Lindsay10-23f.pdf). The Antitrust Source would like to continue to publish timely updates to this chart. If you become aware of a case or statute that should be added, please contact The Source at antitrust@att.net.

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## Overview of State RPM

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<td><strong>CA</strong></td>
<td><strong>AT:</strong> Cal. Bus. &amp; Prof. Code § 16726 (2009) (providing that &quot;every trust is unlawful, against public policy and void&quot;); Cal. Bus. &amp; Prof. Code § 16720(A) (defining a trust as a combination &quot;to create or carry out restrictions in trade or commerce&quot;).</td>
<td><strong>H:</strong> State of California ex rel. Van de Kamp v. Texaco, Inc., 46 Cal.3d 1147, 1164 (1988), overruled in part on other grounds by statute (&quot;Our Supreme Court has noted that “judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters' intent&quot;); Marin County Bd. of Realtors, Inc. v. Paission, 549 P.2d 833, 835 (Cal. 1976) (recognizing that a &quot;long line of California cases&quot; has recognized that federal cases interpreting the Sherman Act are applicable to state antitrust cases because “both statutes have their roots in the common law&quot;); Clayworth v. Pfizer, Inc., 83 Cal. Rptr. 3d 45 (Cal. Ct. App. 2008), review granted and opinion vacated, 85 Cal. Rptr. 3d 694 (Cal. Nov 19, 2008); Freeman v. San Diego Assn. of Realtors, 77 Cal.App.4th 171, 183, fn. 9 (1999) (federal precedent should be used “with caution”).</td>
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<td><strong>CO</strong></td>
<td><strong>AT:</strong> Colo. Rev. Stat. § 6-4-104 (2002) (declaring illegal &quot;[e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce&quot;).</td>
<td><strong>H:</strong> See Pomerantz v. Microsoft Corp., 50 P.3d 929, 933 (Colo. App. 2002) (applying Colgate doctrine to hold that supplier’s unilateral exclusion of distributor did not violate Cartwright Act); see also Mailand v. Burckle, 572 P.2d 1142, 1147-48 (Cal. 1978) (finding resale price maintenance to be per se violation of state antitrust statute because it is a per se violation under the Sherman Act and “federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act”); Harris v. Capitol Records Distrib. Corp., 413 P.2d 139, 145 (Cal. 1966) (finding that vendor’s resale price maintenance scheme violated the Cartwright Act and the Sherman Act).</td>
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<td><strong>DE</strong></td>
<td><strong>AT:</strong> Del. Code Ann. Tit. 6, § 2103 (2009) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</td>
<td><strong>H:</strong> Hammermill Paper Co. v. Palese, No. 7128, 1983 Del. Ch. LEXIS 400, at *12 (Del. Ch. June 14, 1983) (declaring it “manifestly evident” that state antitrust laws should be construed in harmony with federal antitrust law).</td>
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<td><strong>FL</strong></td>
<td><strong>AT:</strong> Fla. Stat. § 542.18 (2009) (declaring unlawful “[a]ny contract, combination, or conspiracy in restraint of trade or commerce”).</td>
<td><strong>H:</strong> Duck Tours Seafari, Inc. v. Key West, 875 So. 2d 650, 653 (Fla. Dist. Cl. App. 2004) (“Under Florida law, ‘Any activity or conduct . . . exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter’ [542]”; see also Parts Depot Co., L.P. by &amp; Through Parts Depot Co. v. Fla. Auto Supply, 669 So. 2d 321, 324 (Fla. Dist. Cl. App. 1996) (recognizing that state courts “rely on comparable federal antitrust statutes” to construe state statute and recognizing Florida statute to cover horizontal and vertical restraints).</td>
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<td><strong>H:</strong> <em>Idaho Code Ann. § 48-102(3) (2000)</em> (providing the statute “shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes”).</td>
<td><strong>PF:</strong> <em>K. Helmer v. Caremark, Inc.</em>, 918 P.2d 595, 599 (Idaho 1996) (requiring vertical price fixing restraint to fix prices for unrelated third parties in order for a per se rule to apply).</td>
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<td><strong>IB:</strong> <em>Idaho Code Ann. § 48-108(2) (2000)</em> (authorizing the attorney general, as parents patriae, to bring a cause of action “for injury directly or indirectly sustained” because of any violation of state antitrust laws).</td>
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<td><strong>IL</strong></td>
<td><strong>AT:</strong> <a href="http://www.antitrustsource.com">Illinois Comp. Stat. 10/3(2) (2009)</a> (declaring unlawful any “contract, combination, or conspiracy with one or more other persons [to] unreasonably restrain trade or commerce”).</td>
<td><strong>H:</strong> <em>People v. Crawford Distrib. Co.</em>, 291 N.E.2d 648, 652-53 (Ill. 1972) (declaring that federal antitrust precedent is a “useful guide to our court”).</td>
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<td><strong>PF:</strong> <a href="http://www.antitrustsource.com">Illinois Comp. Stat. 10/3(1)(a) (2009)</a> (declaring unlawful “any combination or conspiracy with . . . a competitor . . . for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto”).</td>
<td><strong>PF:</strong> <em>People v. Keystone Auto. Plating Corp.</em>, 423 N.E.2d 1246, 1251-52 (Ill. App. Ct. 1981) (reciting legislative intent of 3(1)(a) to conclude that statute does not proscribe vertical price fixing agreements between buyers and sellers); <em>Gilbert's Elhan Allen Gallery v. Elhan Allen, Inc.</em>, 620 N.E.2d 1349, 1350, 1354 (Ill. App. Ct. 1993) (ruling that vertical price-fixing agreements are to be tested under rule of reason because “‘per se’ violations are normally agreements between competitors or agreements that would restrict competition and decrease output” and also recognizing that federal case law is instructive but not binding), aff'd. 642 N.E.2d 470 (Ill. 1994); <em>see New York v. Herman Miller, Inc.</em>, No. 08-2977, S.D.N.Y. filed Mar. 21, 2008 (Stipulated Final Judgment and Consent Decree) (post-<em>Leegin</em> challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).</td>
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<td><strong>IN</strong></td>
<td><strong>AT:</strong> <a href="http://www.antitrustsource.com">Ind. Code § 24-1-2-1 (2006)</a> (declaring illegal “[e]very scheme, contract, or combination in restraint of trade or commerce, or to create or carry out restrictions in trade or commerce”).</td>
<td><strong>H:</strong> <em>Deich-Keibler v. Bank One</em>, No. 06-3802, 2007 U.S. App. LEXIS 15419, at *10 (7th Cir. 2007) (noting practice of construing <em>Ind. Code § 24-1-2-1</em> in light of federal antitrust case law); <em>Rumpel v. Bloomington Hosp.</em>, 422 N.E.2d 1309, 1315 (Ind. Ct. App. 1981) (recognizing that Indiana antitrust law is modeled after section 1 of the Sherman Antitrust Act and has been interpreted consistent with federal law interpreting it).</td>
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<td><strong>PF:</strong> <a href="http://www.antitrustsource.com">Ind. Code § 24-1-2-1 (2006)</a> (declaring illegal “[e]very scheme, contract, or combination . . . to deny or refuse to any person participation . . . or to limit or reduce the production, or increase or reduce the price of merchandise or any commodity”).</td>
<td><strong>PF:</strong> <em>Ft. Wayne Cleaners &amp; Dyers Ass'n v. Price</em>, 137 N.E.2d 738 (Ind. Ct. App. 1956) (affirming judgment against defendant dry cleaner association for vertical minimum price fixing).</td>
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<td><strong>IA</strong></td>
<td><strong>AT:</strong> <a href="http://www.antitrustsource.com">Iowa Code § 553.4 (1997)</a> (providing that “[a] contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market”).</td>
<td><strong>H:</strong> <em>Max 100 L.C. v. Iowa Realty Co.</em>, 621 N.W.2d 178, 181-182 (Iowa 2001) (recognizing that Iowa Competition law is “patterned” after federal Sherman Act and that <em>Iowa Code § 553.2</em> “explicitly requires” state courts to consider federal case law and construe state law “uniformly with the Sherman Act”). <em>But cf. Comes v. Microsoft Corp.</em>, 646 N.W.2d 440, 446 (Iowa 2002) (finding that “Congress intended federal antitrust laws to supplement, not displace, state antitrust remedies” and that <em>Iowa Code § 553.2</em> does not require “Iowa courts to interpret the Iowa Competition Law the same way federal courts have interpreted federal law,” thus rejecting <em>Illinois Brick</em>).</td>
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<td><strong>H:</strong> <a href="http://www.antitrustsource.com">Iowa Code § 553.2 (1997)</a> (requiring courts to construe Iowa statute “to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter” but not “in such a way as to constitute a delegation of state authority” to the federal courts).</td>
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<td><strong>PF:</strong> <strong>Kan. Stat. Ann. § 50-112 (2009)</strong> (declaring unlawful “all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles”).</td>
<td><strong>PF:</strong> Joslin v. Stetten Ice &amp; Ice Cream Co., 54 P.2d 941, 943 (Kan. 1936) (holding that resale price maintenance scheme by ice cream wholesaler violated <strong>Kan. Stat. Ann. § 50-112</strong>); O’Brien v. Leegin Creative Leather Prods. Inc., No. 04 CV 1688, slip op. at 14 (8th Judicial Dist., Sedgwick County Kan. July 9, 2008), appeal pending (applying rule of reason to vertical minimum RPM claim) (“Whether competition is regulated by a contract dictating who can provide a service in a given territory (as in Okerberg v. Crable, 341 P.2d 966 (1959)) or by all agreement to set retail prices for manufactured goods (as is claimed in this case), the impact to the consumer is not sufficiently dissimilar to justify differing legal analyses.”).</td>
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<td><strong>IB:</strong> <strong>Kan. Stat. Ann. § 50-161(8) (2009)</strong> (providing that a cause of action “may be brought by any person who is injured in such person’s business or property by reason of” an antitrust violation, “regardless of whether such injured person dealt directly or indirectly with the defendant”).</td>
<td><strong>H:</strong> Mendell v. Golden-Farley of Hopkinsville, Inc., 573 S.W.2d 346, 349 (Ky. Ct. App. 1978) (applying federal antitrust case law to interpret Kentucky statute but noting that federal law is not binding).</td>
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<td>LA</td>
<td><strong>AT:</strong> <strong>La. Rev. Stat. Ann. § 51:122 (2009)</strong> (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</td>
<td><strong>H:</strong> Davric Maine Corp. v. Rancourt, 216 F.3d 143, 149 (1st Cir. 2000) (noting that the Maine antitrust statutes parallel the Sherman Act, and analyzing state claims according to federal law’ (quoting <em>Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.,</em> 998 F.2d 1073, 1081 (1st Cir. 1993))).</td>
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<td><strong>H:</strong> Md. Code Ann., Com. Law §11-202(a)(2) (West 2009) (declaring legislative intent that courts “be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters”).</td>
<td><strong>IB:</strong> Md. Code Ann., Com. Law § 11-209(b)(ii) (West 2009) (providing that the State or any political subdivision thereof may maintain an action for damages stemming from an antitrust violation “regardless of whether it dealt directly or indirectly” with the defendant).</td>
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<td><strong>IB:</strong> Md. Code Ann., Com. Law § 11-209(b)(ii) (West 2009) (providing that the State or any political subdivision thereof may maintain an action for damages stemming from an antitrust violation “regardless of whether it dealt directly or indirectly” with the defendant).</td>
<td><strong>AT:</strong> Mass. Gen. Laws Ch. 93, § 4 (2009) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</td>
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<td><strong>AT:</strong> Mich. Comp. Laws § 445.772 (2009) (declaring unlawful any “contract, combination, or conspiracy” that is “in restraint of, or to monopolize, trade or commerce in a relevant market”).</td>
<td><strong>H:</strong> Little Caesar Enters. v. Smith, 895 F. Supp. 884, 898 (O. Mich. 1995) (finding no practical difference between federal and state vertical price fixing claims because “Michigan antitrust law is identical to federal law and follows the federal precedents”).</td>
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<td><strong>H:</strong> Mich. Comp. Laws § 445.784(2) (2009) (declaring intent of legislature that “in 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”).</td>
<td><strong>PF:</strong> New York v. Herman Miller, Inc., No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (Stipulated Final Judgment and Consent Decree) (post-Leegin challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).</td>
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<td><strong>IB:</strong> Mich. Comp. Laws § 445.778 (2009) (providing that the state, any political subdivision, or any other person “threatened with injury or injured directly or indirectly” by an antitrust violation may bring an action for damages and injunctive relief).</td>
<td><strong>IB:</strong> Mich. Comp. Laws § 445.778 (2009) (providing that the state, any political subdivision, or any other person “threatened with injury or injured directly or indirectly” by an antitrust violation may bring an action for damages and injunctive relief).</td>
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<td>MN</td>
<td><strong>AT:</strong> MN. STAT. § 325D.51 (2009) (declaring unlawful every “contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce”).&lt;br&gt;&lt;br&gt;<strong>PF:</strong> MN. STAT. § 325D.53, SUBDIV. 1(1)(a) (2009) (declaring unlawful any “contract, combination, or conspiracy...for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price, rate, or fee of any commodity or service”).&lt;br&gt;&lt;br&gt;<strong>IB:</strong> MN. STAT. § 325D.57 (2009) (providing a cause of action and treble damage remedy for any person or governmental body that is “injured directly or indirectly” by an antitrust violation).</td>
<td><strong>H:</strong> Lorix v. Crompton Corp., 736 N.W.2d 619, 627–29 (Minn. 2007) (Minnesota generally follows federal law but rejects Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519 (1983)); see also State by Humphrey v. Road Constructors, 1996 Minn. App. LEXIS 597 at *5 (Minn. Ct. App. 1996) (recognizing that “Minnesota antitrust law is to be interpreted consistently with the federal courts’ construction of federal antitrust law”’” (quoting State v. Alpine Air Prods., 490 N.W.2d 888, 894 (Minn. Ct. App. 1992) aff’d, 500 N.W.2d 788 (Minn. 1993)).&lt;br&gt;&lt;br&gt;<strong>PF:</strong> State v. Alpine Air Prods., Inc., 490 N.W.2d 888, 894 (Minn. Ct. App. 1992) (holding vertical minimum price fixing agreement a per se violation and recognizing that Minnesota courts consistently interpret state law in harmony with the federal courts’ construction of federal antitrust law) (citing Keating v. Philip Morris, Inc., 417 N.W.2d 132, 136 (Minn. App. 1987) and State v. Duluth Board of Trade, 121 N.W. 395, 399 (Minn. 1909)), aff’d, 500 N.W.2d 788 (Minn. 1993).</td>
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<td>MS</td>
<td><strong>AT:</strong> MISS. CODE ANN. § 75-21-1(a) (2009) (declaring unlawful any trust and defining trusts as a “combination, contract, understanding or agreement” that would be “inimical to public welfare and the effect of which would be...to restrain trade”).&lt;br&gt;&lt;br&gt;<strong>PF:</strong> MISS. CODE ANN. § 75-21-1(c) (2009) (defining a trust as a combination, contract, understanding or agreement that would, among other things, “limit, increase or reduce the price of a commodity”).&lt;br&gt;&lt;br&gt;<strong>IB:</strong> MISS. CODE ANN. § 75-21-9 (2009) (providing a right of action for any person injured by a trust or combine, “or by its effects direct or indirect”).</td>
<td><strong>H:</strong> Futurevision Cable Sys., Inc. v. Multivision Cable TV Corp., 789 F. Supp. 760, 780 (D. Miss. 1992) (dismissing state law violations because the federal law violations failed) (citing Walker v. U-Haul of Mississippi, 734 F.2d 1068, 1070 n.5 (5th Cir. 1984) (treating Mississippi and federal antitrust claims as “analytically identical”), aff’d, 986 F.2d 1418 (5th Cir. 1993)).&lt;br&gt;&lt;br&gt;<strong>H:</strong> Hamilton v. Spencer, 929 S.W.2d 762, 767 n.3 (Mo. Ct. App. 1996) (recognizing that Mo. REV. STAT. § 416.141 requires Missouri antitrust laws to be harmonized with federal law and therefore citing federal precedent to limit indirect purchasers’ standing to sue); see also Stensto v. Sunset Memorial Park, Inc., 759 S.W.2d 261, 266 (Mo. App. 1988) (state antitrust laws should be harmonized with federal antitrust laws).</td>
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<td>MO</td>
<td><strong>AT:</strong> MO. REV. STAT. § 416.031 (2009) (declaring unlawful “[e]very contract, combination or conspiracy in restraint of trade or commerce” and defining a trust as lease or sale “of any commodity...for use, consumption, or resale within this state, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in this state”).&lt;br&gt;&lt;br&gt;<strong>H:</strong> Mo. REV. STAT. § 416.141 (2009) (requiring that state antitrust statute “shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</td>
<td><strong>H:</strong> Hamilton v. Spencer, 929 S.W.2d 762, 767 n.3 (Mo. Ct. App. 1996) (recognizing that Mo. REV. STAT. § 416.141 requires Missouri antitrust laws to be harmonized with federal law and therefore citing federal precedent to limit indirect purchasers’ standing to sue); see also Stensto v. Sunset Memorial Park, Inc., 759 S.W.2d 261, 266 (Mo. App. 1988) (state antitrust laws should be harmonized with federal antitrust laws).</td>
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<td><strong>MT</strong></td>
<td><strong>PF:</strong> MONT. CODE ANN. § 30-14-205 (2007) (declaring it unlawful for a person or persons to enter into “an agreement for the purpose of fixing the price or regulating the production of an article of commerce” or 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”).</td>
<td><strong>H:</strong> Smith v. Video Lottery Consultants, 858 P.2d 11, 12-13 (Mont. 1993) (recognizing that MONT. CODE ANN. § 30-14-205 is “modeled after § 1 of the Sherman Act,” but broader and therefore prohibits unilateral horizontal referrals to deal).</td>
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<td><strong>NE</strong></td>
<td><strong>AT:</strong> NEB. REV. STAT. § 59-801 (2009) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”). <strong>H:</strong> NEB. REV. STAT. § 59-829 (2009) (mandating that courts “shall follow the construction given to the federal law by the federal courts” when any provision is the same as or similar to the language of a federal antitrust law). <strong>IB:</strong> NEB. REV. STAT. § 59-821 (2009) (providing a right of action for any person injured due to an antitrust violation, “whether such injured person dealt directly or indirectly with the defendant”).</td>
<td><strong>H:</strong> Heath Consultants, Inc. v. Precision Instruments, Inc., 527 N.W.2d 596, 601 (Neb. 1995) (explaining that the “legal reality” is that “federal cases interpreting federal legislation which is nearly identical to the Nebraska act constitute persuasive authority”); see also Arthur v. Microsoft Corp., 676 N.W.2d 29, 35 (Neb. 2004) (interpreting NEB. REV. STAT. § 59-829 to require courts to look to federal law unless federal interpretation would not support the state’s statutory purpose). <strong>PF:</strong> State ex rel. Douglas v. Associated Grocers of Nebraska Coop., Inc., 332 N.W.2d 690, 693 (Neb. 1983) (citing federal precedent as authority that “[b]oth horizontal price-fixing among wholesalers and vertical price-fixing between wholesalers and retailers are presumed to be in restraint of trade and are per se violations” of state antitrust laws).</td>
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<tr>
<td><strong>NV</strong></td>
<td><strong>AT:</strong> NEV. REV. STAT. ANN. § 598A.060 (West 2009) (declaring unlawful several categories of activities that constitute a “contract, combination or conspiracy in restraint of trade”). <strong>PF:</strong> NEV. REV. STAT. ANN. § 598A.060 (West 2009) (enumerating unlawful activities including “price fixing, which consists of raising, depressing, fixing, pegging or stabilizing the price of any commodity or service”). <strong>H:</strong> NEV. REV. STAT. ANN. § 598A.050 (West 2009) (declaring provisions “shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes”). <strong>IB:</strong> NEV. REV. STAT. ANN. § 598A.210 (West 2009) (providing a right of action and treble damage remedy for “any person injured or damaged directly or indirectly” by an antitrust violation).</td>
<td><strong>H:</strong> Boulware v. Nev. Dep’t of Human Res., 960 F.2d 793, 800–01 (9th Cir. 1992) (finding Nevada statute adopts by reference applicable federal antitrust case law).</td>
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<td><strong>NJ</strong></td>
<td><strong>AT:</strong> N.J. Stat. Ann. § 56:9-3 (West 2009) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</td>
<td><strong>H:</strong> State v. Lawn King, Inc., 417 A.2d 1025, 1032-33 (N.J. 1980) (relying on “persuasive” interpretations of federal antitrust laws to hold that vertical price restraints are per se violations but that nonprice vertical restraints are subject to the rule of reason); see also Glassofer Motors v. Osterlund, Inc., 433 A.2d 780, 787 (N.J. Super. Ct. App. Div. 1981) (New Jersey’s statute “to be construed in harmony with ruling judicial interpretations of federal antitrust statutes.”).</td>
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<td><strong>IB:</strong> N.M. Stat. Ann. § 57-1-3 (West 2009) (providing a right of action and treble damage remedy for “any person threatened with injury or injured in his business or property, directly or indirectly,” by an antitrust violation).</td>
<td><strong>H:</strong> Sperry v. Crompton Corp., 863 N.E.2d 1012, 1018 (N.Y. 2007) (noting that courts generally construe Donnelly Act in light of federal antitrust case law, but that it is “well settled” that New York courts will interpret Donnelly Act differently “where State policy, differences in the statutory language or the legislative history justify such a result.” (quoting Anheuser-Busch, Inc. v. Abrams, 520 N.E.2d 535, 539 (N.Y. 1988)); see also Aimce Wholesale Corp. v. Tomar Prod., Inc., 237 N.E.2d 223, 225 (N. Y. 1968) (recognizing that New York antitrust law was modeled on Sherman Act).</td>
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<td><strong>NY</strong></td>
<td><strong>AT:</strong> N.Y. Gen. Bus. Law § 340 (2009) (declaring unlawful “[e]very contract, agreement, arrangement or combination . . . whereby [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained”).</td>
<td><strong>PF:</strong> Anheuser-Busch, Inc. v. Abrams, 520 N.E.2d 535, 536–37 (N.Y. 1988) (recognizing that vertical restraints are not per se illegal under New York law but may be illegal if they unreasonably restrain trade); Dawn to Dusk, Ltd. v. Frank Brunckhorst Co., 23 A.D.2d 780, 781 (N.Y. App. Div. 1965) (applying rule of reason to vertical price restraints); New York v. Herman Miller, Inc., No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (Stipulated Final Judgment and Consent Decree) (post-Leegin challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).</td>
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<td><strong>PF:</strong> N.Y. Gen. Bus. Law § 369-a (2009) (“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”).</td>
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<td><strong>IB:</strong> N.Y. Gen. Bus. Law § 340 (2009) (providing that a person who sustains damages as a result of an antitrust violation shall not have their recovery limited due to the fact that that person “has not dealt directly with the defendant”).</td>
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<td>ND</td>
<td><strong>AT:</strong> N.D. Cent. Code § 51-08.1-02 (2009) (making unlawful a “contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market”).</td>
<td>No cases on point—statute only.</td>
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<td>OH</td>
<td><strong>AT:</strong> Ohio Rev. Code Ann. § 1331.01(B)(1) (West 2009) (declaring unlawful any trust that is “[t]o create or carry out restrictions in trade or commerce”).</td>
<td><strong>H:</strong> Johnson v. Microsoft Corp., 834 N.E.2d 791, 794–795 (Ohio 2005) (recognizing that “Ohio has long followed federal law in interpreting the Valentine Act” because the state statute is patterned after the Sherman Act).</td>
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<td><strong>PF:</strong> Ohio Rev. Code Ann. § 1331.01(B)(4) (West 2009) (declaring unlawful any trust that is “[t]o fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use or consumption”); Ohio Rev. Code Ann. § 1331.02.</td>
<td><strong>PF:</strong> McCall Co. v. O’Neil, 1914 WL 1669, *4 (Ohio Com. Pl. Nov. 12, 1914) (interpreting statute to prohibit scheme to fix prices at which goods may be resold by the reseller); see also Ohio ex. rel. Brown v. Andrew Palzes, Inc., 317 N.E.2d 262, 266 (Ohio Com. Pl. 1973) (interprets Ohio Rev. Code Ann. § 1331.01(B) as a per se bar to maximum resale price agreements).</td>
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<td>OK</td>
<td><strong>AT:</strong> Okla. Stat. Tit. 79 § 203 (2002) (declaring unlawful “[e]very act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce”).</td>
<td><strong>H:</strong> Star Fuel Marts, LLC v. Sam’s E., Inc., 362 F.3d 639, 648 n.3 (10th Cir. 2004) (Oklahoma’s antitrust act is required by statute to be interpreted in accordance with federal antitrust case law).</td>
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<td><strong>H:</strong> Okla. Stat. Tit. 79 § 212 (2002) (requiring that act “shall be interpreted in a manner consistent with Federal Antitrust Law” and applicable case law).</td>
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<td><strong>OR</strong></td>
<td><strong>AT:</strong> OR. REV. STAT. § 646.725 (2009) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</td>
<td><strong>H:</strong> Jones v. City of McMinnville, No. 05-35523, 2007 U.S. App. LEXIS 11235 at *8 (9th Cir. 2007) (finding that Oregon and federal antitrust statutes are “almost identical” and that Oregon courts look to federal decisions as “persuasive”) (quoting OR. REV. STAT. § 646.715; Or. Laborers-Employers Health &amp; Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 963 n.4 (9th Cir. 1999)), cert. denied 528 U.S. 1075 (2000); see also Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp., 882 P.2d 637, 540 (Or. Ct. App. 1994) (with no reported Oregon decisions on point, “we look to federal decisions interpreting Section 2 of the Sherman Act for persuasive, albeit not binding, guidance”).</td>
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<td><strong>PA</strong></td>
<td>No statute—common law remedies only.</td>
<td><strong>PF:</strong> Shuman v. Bernie’s Drug Concessions, Inc., 187 A.2d 660, 662 (Pa. 1963) (finding horizontal price-fixing agreements to be unlawful at common law and holding that vertical restraints that are the “incidents or fruits of an unlawful [horizontal] conspiracy . . . are infected with the illegality of the horizontal conspiracy and are hence unenforceable”).</td>
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<td><strong>RI</strong></td>
<td><strong>AT:</strong> R.I. GEN. LAWS § 6-36-4 (2009) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of, or to monopolize, trade or commerce”).</td>
<td><strong>H:</strong> Collins v. Main Lind Bd. of Realtors, 304 A.2d 493, 496 (Pa. 1973) (court looks to United States Supreme Court case for guidance in determining whether an agreement unreasonably restrains trade).</td>
</tr>
<tr>
<td><strong>SC</strong></td>
<td><strong>AT:</strong> S.C. CODE ANN. § 39-3-10 (2008) (declaring unlawful arrangements, contracts, agreements, trusts or combinations which “lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State or in the manufacture or sale of articles of domestic growth or of domestic raw material”).</td>
<td><strong>H:</strong> UXB Sand &amp; Gravel, Inc. v. Rosenfeld Concrete Corp., 599 A.2d 1033, 1035 (R.I. 1991) (statute requires court to interpret state antitrust statute in harmony with federal antitrust statutes).</td>
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<td>SD</td>
<td><strong>AT:</strong> S.D. CODED LAWS § 37-1-3.1 (2009) (making unlawful any &quot;contract, combination, or conspiracy between two or more persons in restraint of trade or commerce&quot;).</td>
<td><strong>H:</strong> Byre v. City of Chamberlain, 362 N.W.2d 69, 74 (S.D. 1985) (because of the similarity of language between federal and state antitrust statutes and because of the legislative suggestion for interpretation found in S.D. CODED LAWS § 37-1-22, “great weight should be given to the federal cases interpreting the federal statute”); see also In re S.D. Microsoft Antitrust Litig., 707 N.W.2d 85, 99 (S.D. 2005) (reaffirming that “great weight should be given to the federal cases interpreting the federal statute” and citing Byre for the proposition that, when state courts lack precedent on an issue, they look to federal case law for guidance).</td>
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<td><strong>H:</strong> S.D. CODED LAWS § 37-1-22 (2009) (allowing courts to “use as a guide interpretations given by the federal or state courts to comparable antitrust statutes”).</td>
<td><strong>IB:</strong> S.D. CODED LAWS § 37-1-33 (2009) (providing that “[n]o provision of this chapter may deny any person who is injured directly or indirectly in his business or property” by an antitrust violation).</td>
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<td><strong>IB:</strong> S.D. CODED LAWS § 37-1-33 (2009) (providing that “[n]o provision of this chapter may deny any person who is injured directly or indirectly in his business or property” by an antitrust violation).</td>
<td><strong>PF:</strong> Assam Drug Co. v. Miller Brewing Co., 624 F. Supp. 411, 412–13 (D.S.D. 1985) (applying rule of reason to vertical territorial restraint and suggesting rule of reason is appropriate for all vertical restraints), aff’d, 798 F.2d 311 (8th Cir. 1986).</td>
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<td>TN</td>
<td><strong>AT:</strong> TENN. CODE ANN. § 47-25-101 (2009) (declaring unlawful “[a]ll arrangements, contracts, agreements, trusts, or combinations . . . to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material”).</td>
<td><strong>H:</strong> Spahr v. Leegin Creative Leather Products, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), appeal dismissed, File No. No. 08-6165 (6th Cir. Nov. 20, 2008) (recognizing argument that every Tennessee case decided under the Tennessee Trade Practice Act has relied heavily on federal precedent, but noting at least one circumstance where Tennessee Supreme Court has extended the reach of the TTPA beyond that permitted by the Supreme Court’s interpretation of the Sherman Act), Freeman Indus. LLC v. Eastman Chem. Co., 172 S.W.3d 512, 519 (Tenn. 2005) (declining to follow Illinois Brick when interpreting state statute and noting that Tennessee does not have a statutory “harmony clause” requiring courts to interpret the state antitrust laws consistently with federal law).</td>
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<td><strong>PF:</strong> TENN. CODE ANN. § 47-25-101 (2009) (declaring unlawful “all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article”).</td>
<td><strong>PF:</strong> Spahr v. Leegin Creative Leather Products, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), appeal dismissed, File No. No. 08-6165 (6th Cir. Nov. 20, 2008) (applying rule of reason to antitrust challenge of minimum RPM agreement under Tennessee state law).</td>
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<td>TX</td>
<td><strong>AT:</strong> TEX. BUS. &amp; COM. CODE ANN. § 15.05(A) (2002) (making unlawful “[e]very contract, combination, or conspiracy in restraint of trade or commerce”).</td>
<td><strong>H:</strong> Star Tobacco, Inc. v. Darilek, 298 F. Supp. 2d 436, 440 (E.D. Tex. 2003) (finding that the Texas antitrust statute is intended to be construed in accordance with federal antitrust statutes (citing Abbot Labs., Inc. v. Segura, 907 S.W.2d 503, 511 (Tex. 1995) (Gonzalez, J., concurring)); see also Gonzalez v. San Jacinto Methodist Hosp., 880 S.W.2d 436, 441 (Tex. App. 1994) (Texas Antitrust Act “should be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes”); Puentes v. Spohn Health Network, No. 13 08 00100, 2009 Tex. App. LEXIS 4131, at *15 (Tex. App. June 11, 2009) (cites Leegin for principle that a per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason).</td>
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<td><strong>H:</strong> TEX. BUS. &amp; COM. CODE ANN. § 15.04 (2002) (declaring that the statute “shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose”).</td>
<td><strong>H:</strong> Spahr v. Leegin Creative Leather Products, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), appeal dismissed, File No. No. 08-6165 (6th Cir. Nov. 20, 2008) (applying rule of reason to antitrust challenge of minimum RPM agreement under Tennessee state law).</td>
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<td>H: UTAH CODE ANN. § 76-10-926 (2009) (declaring legislative intent that “the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts to comparable state antitrust statutes”).</td>
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<td>VT</td>
<td>AT: VT. STAT. ANN. TIT. 9, § 2453(a) (2009) (declaring unlawful “[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce”).</td>
<td>H: Elkins v. Microsoft Corp., 817 A.2d 9, 15–17 (Vt. 2002) (holding that “harmonization provision” requiring courts to look to regulations and decisions of the Federal Trade Commission and federal court decisions of the FTC Act does not require courts to look to other federal antitrust statutes or corresponding decisions, thus rejecting Illinois Brick); see also State v. Heritage Realty, 407 A.2d 509, 511 (Vt. 1979) (interpreting VT. STAT. ANN. TIT. 9, § 2453(a) in light of federal case law to find that horizontal price fixing is per se unlawful).</td>
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<td>H: VT. STAT. ANN. TIT. 9, § 453(b) (2009) (declaring that in construing the statute, “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”).</td>
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<td>IB: VT. STAT. ANN. TIT. 9, § 2465(b) (2009) (providing that the fact that a person “has not dealt directly with a defendant shall not bar or otherwise limit recovery” for an antitrust action).</td>
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<td>WA</td>
<td>AT: WASH. REV. CODE § 19.86.030 (2009) (declaring unlawful “[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</td>
<td>H: Blewett v. Abbott Labs., 938 P.2d 842, 846 (Wash. Cl. App. 1997) (recognizing that although federal antitrust precedent is only a “guide,” in practice Washington courts have uniformly followed federal precedent in matters described under the Washington antitrust laws and any departure from federal law “must be for a reason rooted in our own statutes or case law and not in the general policy arguments that this court would weigh if the issue came before us as a matter of first impression”).</td>
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<td>H: WASH. REV. CODE § 19.86.920 (2009) (declaring legislative intent that construction of act “be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters” but that the act “shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se”).</td>
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<td>PF: W. VA. CODE § 47-18-3(b)(1) (2009) (deeming unlawful certain contracts, combinations or conspiracies including those with “the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service” or “[f]ixing, controlling, maintaining, limiting or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of fixing, controlling or maintaining the market price, rate or fee of the commodity or service”).</td>
<td>H: W. VA. CODE § 47-18-16 (2009) (declaring legislative intent that statute “shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</td>
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<td>H: W. VA. CODE § 47-18-16 (2009) (declaring legislative intent that statute “shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</td>
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<td>WI</td>
<td>AT: WIS. STAT. § 133.03 (2009) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</td>
<td>H: Emergency One v. Waterous Co., 23 F. Supp. 2d 959, 962, 970 (D. Wis. 1998) (noting that Wisconsin courts have “repeatedly” stated that federal antitrust law guides the interpretation of WIS. STAT. § 133.03) (citing Grams v. Boss, 294 N.W.2d 473, 480 (Wis. 1980)); but cf. Olstad v. Microsoft Corp., 700 N.W.2d 139, 144, 154–55 (Wis. 2005) (finding that one of the major objectives of revisions made to the state’s antitrust law in 1980 was to reverse the holding in Illinois Brick, and that Wisconsin’s antitrust laws are to be interpreted “in a manner which gives the most liberal construction to achieve the aim of competition”).</td>
</tr>
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<td>WY</td>
<td>AT: WY. STAT. ANN. § 40-4-101(a)(i) (2009) (prohibiting “any plan, agreement, consolidation or combination of any kind whatsoever to prevent competition or to control or influence production or prices thereof”).</td>
<td>PF: Bulova Watch Co. v. Zale Jewelry Co., 371 P.2d 409, 420 (Wyo. 1962) (declining to hold that Fair Trade Law’s authorization for resale price maintenance violates the state constitution but noting that it is “certainly out of harmony with its spirit”).</td>
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Steven B. Feirman

Steven Feirman is a partner in the Washington, D.C. office of Nixon Peabody LLP, where he serves as co-chair of the firm’s Franchise and Distribution Practice Group. He was previously a partner with DLA Piper LLP and a trial attorney with the Federal Trade Commission’s Bureau of Competition.

Steve focuses his practice on all aspects of franchise and distribution law, and he has extensive experience structuring and preparing franchise, license, supply, and distribution agreements for domestic and international transactions. He also counsels franchise companies on antitrust and trade regulation matters such as pricing programs, supply restrictions, mergers and acquisitions (including Hart-Scott-Rodino), and other competition issues. Steve conducts franchise and antitrust compliance programs for his clients, and he represents companies before federal and state government agencies on both franchising and antitrust matters. Many franchisors call upon Steve to address their most difficult issues, and he serves as both their legal advisor and strategic business advisor.

Steve is a frequent lecturer and contributor to legal publications on antitrust and franchise law topics. He has served as an editor of some of the leading publications in the field, including Franchise Law Journal and Franchise Legal Digest, and as a contributor to Global Competition Review, Franchising World, The Franchise Lawyer, and The International Journal of Franchising and Distribution Law. He has been selected for inclusion in The Best Lawyers in America®, has been recognized by Franchise Times as a “Legal Eagle,” is a recipient of the Federal Trade Commission’s Meritorious Service Award, and was awarded the Burton Award for Legal Achievement.

Steve received his undergraduate degree (A.B., magna cum laude) from Colgate University and his law degree from Washington University School of Law, where he served as an editor of the law review.
Allan P. Hillman

Allan P. Hillman is a partner with Kern & Hillman LLC in Hamden, CT. A graduate of Columbia and Columbia Law School, he has been a frequent writer and speaker at ABA Forums on Franchising and at the IFA Legal Symposia, and was an Associate Editor of the ABA Franchise Law Journal. He was Fourth Circuit editor for Klarfeld (ed.), Covenants Not to Compete in Franchising, 2d (ABA 2003) and has written the Maryland chapter for The Franchise Deskbook (first and second editions and forthcoming supplement; W.M. Garner, ed.). Allan is Chair of the Connecticut Bar Association Franchise Committee, is an officer of the Connecticut Bar Association Antitrust Law section, is former Chair and co-founder of Maryland Bar Association Franchise and Distribution Committee, and is former Chair of the Maryland Bar Association Business Law Section. He has also taught courses to judges, lawyers and businesspersons in the areas of franchise, antitrust, trademarks, copyrights, trade secrets, non-competition agreements and unfair competition. Allan was awarded one Section’s inaugural “Hillman Award for the Funniest Lawyer in Maryland,” and won it a second time before leaving the state (but not his Maryland practice) in 2006.