In early 1978, I wrote an Op-ed piece for the New York Times describing the 1977 landmark “Chevymobile” settlement by forty-four state attorneys general with General Motors in which it was alleged that GM had failed to disclose the substitution of Chevy engines in 1977 Oldsmobiles, Buicks and Pontiacs. In my Op-ed, I had predicted that the Chevymobile matter, in which I participated as a young Connecticut assistant attorney general less than five years out of law school, would spawn a movement toward coordinated multi-state enforcement to protect consumers.1

In the 1980’s and 90’s, the National Association of Attorneys General (“NAAG”) Multistate Antitrust Task Force focused on coordinating the states’ collective antitrust enforcement efforts.2 The NAAG Task Force ful-

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2 See, e.g., 60 Minutes with Robert M. Langer, Chair, NAAG Multistate Antitrust Task Force, 60 Antitrust L.J. 197, 201 (1991) (“The Task Force has already altered, to some extent, the way in which states traditionally function. While states, of course, remain sovereign, this loose confederation of participating states, in effect, cedes a portion of that sovereignty through the Task Force for the benefit of the greater good. . . . Perhaps the Task Force’s most noteworthy attribute is the benefit it confers upon those states that are without the resources
filled my prediction made a decade earlier. It became the institutional third prong in an antitrust triad that included the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice.3

One of the primary areas of concern for the states has traditionally been resale price maintenance ("RPM"), in which a supplier sets the "downstream" price at which distributors must resell their products to consumers.4 Since at least 1911, RPM agreements had been considered a "per se" violation under federal antitrust law.5 This meant that such conduct would never be deemed justifiable. The states, both individually and collectively, aggressively pursued RPM violations while I served as NAAG Task Force Chair in the early 90's.6

I left government service in 1994. As a former state antitrust enforcer, I continue to advocate for vigorous enforcement of the antitrust laws by state attorneys general and other state enforcers.7 However, the more deeply I came to understand the operations and competitive business models of the companies I advised as a private practitioner, the more I came to realize that the states' incessant attacks, including my own,8 on RPM agreements were misbegotten. RPM can be, and often is, a procompetitive mechanism that benefits consumers and should be evaluated on a case-by-case basis, not treated as per se unlawful.

or the experience to investigate or litigate certain types of antitrust cases on their own.9)

In 2007, the U.S. Supreme Court in Leegin Creative Leather Products, Inc. v. PSKS, Inc.,9 addressed this very issue. In an opinion incorporating contemporary economic learning, and over the vigorous objection of state attorneys general,10 the Court ruled that RPM agreements are not per se unlawful under federal antitrust law and instead must be governed by the more nuanced analysis known as the Rule of Reason.11 This was a sea change. It meant that a manufacturer or supplier facing substantial competition at its own level (i.e., interbrand competition) could, in some circumstances, require its own retailers to resell its product to consumers at a set price (i.e., an intrabrand agreement). RPM would no longer necessarily be verboten.

The Court's reasoning was tied to the common sense principle that, as long as consumers are given a meaningful choice of products and brands in a competitive marketplace, federal antitrust policy will generally not interfere.12 Indeed, over the past forty years, the U.S. Supreme Court has stated on several occasions that the primary goal of antitrust law is to foster interbrand competition. Intrabrand restrictions are often used as a means of enhancing interbrand competition.13

Subsequent to Leegin, however, several states have continued to treat resale price maintenance agreements as inherently illegal.14 The effect has been profound, because multistate companies are, as a matter of both prudence and risk assessment, constrained to follow the most restrictive states' laws. That, in turn, has pre-

11 Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. at 907; see also id. at 885-86 ("The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1 . . . . Under this rule the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. . . . Appropriate factors to take into account include 'specific information about the relevant business' and 'the restraint's history, nature and effect. . . . Whether the businesses involved have market power is a further, significant consideration. . . . In its design and function the rule distinguishes between restraints with anti-competitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.' (internal citations omitted)).
12 Id. at 900-04.
vented a meaningful exploration of the contours of the Rule of Reason as it applies to RPM. In other words, as a practical matter, states whose laws declare RPM to be per se unlawful, such as California\textsuperscript{15} and Maryland,\textsuperscript{16} dictate the RPM rules throughout the country.\textsuperscript{17}

To avoid violation of these state RPM laws, some companies employ an extremely expensive, cumbersome and highly risky system, called the \textit{Colgate Doctrine}, named after another century-old U.S. Supreme Court decision.\textsuperscript{18} A manufacturer, for example, can "announce" the terms under which it chooses to do business with its customers, "unilaterally" monitor the customer's pricing practices and terminate a customer that does not comply.\textsuperscript{19} No warning. Just cut the customer off. If the manufacturer, however, attempts to convince the customer to "get with the program," there is often an unacceptable risk that any such communication will be used as evidence of an illegal RPM agreement.\textsuperscript{20} I can personally attest to the Leibnizian complexity of a properly administered \textit{Colgate} program. Indeed, the U.S. Supreme Court in \textit{Leegin} stated that the risk that "a jury might conclude [that a manufacturer's] unilateral policy was really a vertical agreement, sub-

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tative Leather Products, Inc. v. PSKS, Inc.
An often cited example of a state statute that withstood a challenge on preemption grounds is *Exxon Corp. v. Governor of Maryland.* The U.S. Supreme Court upheld a Maryland statute that required producers or refiners to extend temporary price reductions (voluntary allowances) uniformly to all stations they supply. The argument that the statute compelled a violation of the Robinson-Patman Act, and was thus preempted, proved unavailing because the meeting competition defense found in Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, permits, but does not require, the supplier to charge a lower price to meet in good faith a competitor’s equally low price. In other words, under *Exxon*, Section 2(b) is merely an exception to the prohibition against discriminatory pricing and thus does not create any new federal right. Rather, Section 2(b) creates a limited defense.

Thus, as with *Rice v. Williams*, *Exxon v. Governor of Maryland* does not provide particularly useful guidance regarding how to address the continued per se treatment of RPM under state antitrust law.

*California v. ARC America Corp.*, which is also often cited as support for permitting differences between state and federal antitrust laws, held that a state *Illinois Brick* repealer was not preempted under the Supremacy Clause. Importantly, however, the case only addressed differences between federal and state remedies imposed for conduct admittedly violative of both federal and state law, citing both *California v. Zook* and *Silkwood v. Kerr-McGee Corp.* Thus, *California v. ARC America Corp.* is also not instructive in addressing the precise question posed herein.

State antitrust laws have been invalidated under either the Commerce Clause or the Supremacy Clause when they have been found to frustrate competing national policies. In *Flood v. Kuhn*, the Second Circuit stated:

> [W]here the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce . . . . Hence, as the burden on interstate commerce outweighs the states’ interest in regulating automatic Sherman Act preemption of [state] liquor price posting provisions that facilitate resale price maintenance.”

*A reed and Hovenkamp, Antitrust Law, ¶ 216 at 371 (4th ed. 2013).*

*Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).*


*California v. ARC America Corp., 490 U.S. 105 (1989).*

*California v. ARC America Corp., 490 U.S. 93 (1989).*


*See Hines v. Davidowitz, 312 U.S. 52, 67 (1941).*

*Obstacle preemption is, of course, separate and distinct from occupation of the field preemption. “Congress has authority to express the least willingness to limit state antitrust by making the federal antitrust ‘occupy the field,’ thus preempting state law.” Areeda and Hovenkamp, Antitrust Law, ¶ 216 at 371 (4th ed. 2013) (citing R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 660, 112 Cal. Rptr. 585, 589 (1974) (“No showing has been made, nor has there been any attempt to demonstrate, that the enforcement of the Cartwright Act would obstruct the full purposes and objectives of the federal antitrust legislation.” R.E. Spriggs Co., 37 Cal. App. 3d at 665, 112 Cal. Rptr. at 593) (citing Hines v. Davidowitz)).

*Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. at 887-88 (factors identified in Leegin relevant to a Rule of Reason analysis include (a) the number of manufacturers that make use of the practice in a given industry; (b) evidence that retailers are the impetus for imposition of the restraint; and (c) whether a dominant manufacturer or retailer has market power; “As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.”)."

*Id. at 904.*