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STATE LAW

Resale Price Maintenance

State Antitrust Law and The Constitution

BY ROBERT M. LANGER

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 multistate 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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[1] Robert M. Langer, *Possible State Aid For Buyers*, NEW YORK TIMES (Jan. 30, 1978, p. A21) (''The G.M. settlement signals an era in which effective nationwide non-Federal consumer-protection enforcement by state attorneys general may become commonplace.'').

[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

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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.

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-

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

[3] *See, e.g., 60 Minutes with Robert M. Langer, Chairman of the National Association of Attorneys General Multistate Antitrust Task Force*, 61 ANTITRUST L.J. 211, 212 (1992) (''In the past year the states have achieved significant victories in a wide array of matters, and in so doing have reaffirmed their place as the third prong in the antitrust triad.'').

[4] *Id.* at 215 (''In the area of vertical restraints, the states continue to bring RPM cases. I discussed at some length last year *Mitsubishi* [*Maryland v. Mitsubishi Elecs. Am., Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,743 (D. Md. 1992)] and *Nintendo* [*New York and Maryland v. Nintendo of Am., Inc.*, 1991-2 Trade Cas. (CCH) ¶ 69,614 (S.D.N.Y. 1991)]. *Nintendo* is quite historic because of the simultaneous resolution of a national antitrust matter by the states and the FTC, and it does evidence, in my view, the dawn of the new era of FTC-state cooperation.'').

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

[6] *See, e.g.*, Robert M. Langer, *A Cautionary Tale: State Enforcer's Perspective on Vertical Restraints*, 8 ANTITRUST 9 (ABA Section of Antitrust Law, Spring 1994) (''As businesses go speeding down the 'distribution superhighway,' I would hope they stop long enough (or at least look in the rear-view mirror) to keep an eye out for the state antitrust police cruiser. If not, the architects of the brave new world of innovative distribution arrangements may end up posting bail at the state antitrust police barracks. . . . If there has been one constant in the vertical distribution antitrust universe during the past decade, it has been the presence of the states. . . . During this time the states have served as 'RPM Central.' '').

[7] *See* Robert M. Langer, *Should the Antitrust Division, the FTC, and State Attorneys General Formally Allocate the Market for Antitrust Enforcement?* ANTITRUST REPORT (Matthew Bender, October 1998, pp. 2-6) (''It is, I suggest, now time for the Antitrust Division, the FTC, and NAAG to develop a new protocol, not limited to either mergers or criminal enforcement, but rather inclusive of all antitrust enforcement, that will allocate in the most efficient manner possible, the limited human resources available to enforce the Magna Charta of free enterprise.'').

[8] *See* notes 4 and 6, *supra*.

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

[10] *See Brief for the States of New York, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming as Amici Curiae Supporting Respondent*, 2007 WL 621851 (2007).

[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 anticompetitive 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.

[13] *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 (1977).

[14] *See* Michael A. Lindsay, *Overview of State RPM*, THE ANTITRUST SOURCE (October 2014, pp. i-xvii), *found at* [http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf]; *see also* Robert M. Langer, Erika L. Amarante & Erik H. Zwicker, *So You Still Think You're Safe Under the Antitrust Laws? Another Word Of Advice To Those Who Would Ignore The States*, ANTITRUST REPORT (Matthew Bender, Issue 4, 2010, pp. 52-81), *reprinted with permission at*: [http://www.wiggin.com/files/19547_Antitrust%20Report,%2012.30.10,%20Langer,%20Amarante,%20Zwicker.pdf].

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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[15] and Maryland,[16] dictate the RPM rules throughout the country.[17]

To avoid violation of these state RPM laws, some companies employ an extremely expensive, cumbersome and highly risky system, called the *Colgate* Doctrine, named after another century-old U.S. Supreme Court decision.[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.[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.[20] I can personally attest to the Leibnizian complexity of a properly administered *Colgate* program. Indeed, the U.S. Supreme Court in *Leegin* stated that the risk that ''a jury might conclude [that a manufacturer's] unilateral policy was really a vertical agreement, subjecting it to treble damages and potential criminal liability . . . can lead, and has led, rational manufacturers to take wasteful measures.''[21]

Unlike many federal statutes that contain very explicit, detailed and voluminous rules (such as the Internal Revenue Code), Congress left it to the courts to establish the metes and bounds of national antitrust policy under the Sherman Act.[22] The U.S. Supreme Court has done just that, setting national antitrust policy with respect to RPM agreements, only to have that policy effectively countermanded by a handful of the most aggressive states on this issue.

Several states do have a long antitrust history of their own that even precedes the adoption of the Sherman Antitrust Act in 1890.[23] Importantly, in 1890 and for many years thereafter the reach of federal law was limited to conduct in the ''flow of commerce'' across state lines.[24] Thus, intrastate RPM agreements, and, even more significantly, many intrastate price fixing conspiracies among competitors, were beyond the reach of the Sherman Act in its early formative years. As we all know, the ''flow of commerce'' test was jettisoned many decades ago, replaced by the ''affecting commerce'' test, thus acknowledging that the impact of most commercial transactions cross state lines in one way or another.[25] The neat compartmentalization of federal and state antitrust law into separate spheres is a matter of historical interest. It is not, however, a basis upon which one can justify deferring to substantive state antitrust laws that materially differ from federal antitrust law.

The question that remains is whether there exists a constitutional basis to challenge the continued per se treatment of RPM under state law post-*Leegin* in light of the admitted reluctance of the U.S. Supreme Court to infer preemption.[26]

The *Rice v. Williams*[27] line of preemption cases are not analytically similar because they do not address the per se treatment of RPM under state antitrust law. *Rice v. Williams* in fact presented precisely the obverse circumstance, i.e., when a state statute ''mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or . . . places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.''[28] In other words, the *Rice v. Williams* line of cases concern state statutes which *permit* that which is *prohibited* by the federal antitrust laws, rather than state statutes that prohibit that which is permitted under the federal antitrust laws.[29]

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[15] CAL. BUS. & PROF. CODE § § 16720(b) and (e).

[16] MD. CODE ANN., COM. LAW § 11-204(b).

[17] It is instructive to note that even during the period of time in our nation's history, 1937 to 1975, when the Miller-Tydings Fair Trade Act, 50 Stat. 693, and the McGuire Act, 66 Stat. 632, permitted states to authorize vertical pricing agreements as between manufacturers and distributors, thus treating such agreements as per se *legal*, ''no more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases, ever employed [resale price maintenance] in any single year in the [United States],'' *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. at 907 (*citing* Bureau of Economics Staff Report to the FTC, T. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* 169 (1983)).

[18] *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

[19] The *Colgate* Doctrine, itself, is under attack; *see* Utah contact lens law, UTAH CODE § 58-16a-905.1, which states, ''A contact lens manufacturer or contact lens distributor may not (1) take any action, by agreement, unilaterally, or otherwise, that has the effect of fixing or otherwise controlling the price that a contact lens retailer charges or advertises for contact lenses;'' *Johnson & Johnson Vision Care v. Reyes*, No. 15-cv-04071 (10th Cir.) (Utah statute challenged on Commerce Clause grounds, *citing,* inter alia, *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989)); *see also* Robert M. Langer, Erika L. Amarante and Adam Farbiarz, *Unilateral Price Policies in the Contact Lens Industry: Can Manufacturers Be Forced to Sell to Every Retailer?* 109 ATRR 112 (Bloomberg BNA, 7/24/15), *reprinted with permission at*: [http://www.wiggin.com/files/32554_Unilateral%20Price%20Policies%20in%20the%20Contact%20Lens%20Industry%20Can%20Manufacturers%20Be%20Forced%20to%20Sell%20to%20Every%20Retailer,%20Langer,%20Bureau%20of%20National%20Affairs,%2007.24.15.pdf].

[20] *See, e.g., Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

[21] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. at 903 (*citing* Brief for PING, Inc. as amicus curiae).

[22] *Id.* at 899 (''From the beginning, the [U.S. Supreme] Court has treated the Sherman Act as a common-law statute. . . . Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions.'').

[23] *See, e.g.,* James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918,* 135 U. PA. L. REV. 495 (1987).

[24] *See, e.g., United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

[25] *See, e.g., McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 241 (1980) (summarizing cases).

[26] *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *see also In re Cipro Cases I & II*, 348 P.3d 845, 872 (Cal. 2015).

[27] *Rice v. Williams*, 458 U.S. 654 (1982).

[28] *Id.* at 661.

[29] In a somewhat ironic twist, since preemption of certain state price posting laws that facilitated RPM had been premised upon the per se rule announced in *Dr. Miles, see, e.g., 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341 (1987), in light of the fact that *Leegin* overruled *Dr. Miles*, and utilizing the analytics of *Rice,* ''*Leegin* would thus appear to upset any rule of

An often cited example of a state statute that withstood a challenge on preemption grounds is *Exxon Corp. v. Governor of Maryland*.[30] 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,[31] *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.[32] 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.,[33] which is also often cited as support for permitting differences between state and federal antitrust laws, held that a state *Illinois Brick*[34] 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,[35] citing both *California v. Zook*[36] and *Silkwood v. Kerr-McGee Corp.*[37] 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*,[38] 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 baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law.[39]

Emphasis supplied.

The question which courts may eventually confront is whether the continued per se treatment of RPM by certain states may fairly be characterized as a type of obstacle preemption, i.e., the state law constitutes an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.[40] As noted earlier, if we were analyzing a detailed Congressional enactment, the analysis would be based upon comparing and contrasting federal and state laws. We are, however, faced with a fundamentally different scenario, precisely because Congress has intentionally delegated to the U.S. Supreme Court the role of articulating the contours of our national antitrust policy under the Sherman Act, which the U.S. Supreme Court has now done with respect to RPM with the issuance of its *Leegin* decision.[41]

I suggest that under our constitutional system a state should not be able to impede national competition policy by declaring RPM to be unlawful per se when the U.S. Supreme Court has stated that such conduct may in fact be procompetitive and entirely benign. RPM deserves the opportunity to be analyzed in all its various manifestations under the Rule of Reason.[42]

As the Supreme Court observed in *Leegin:*

> [The per se treatment of RPM] is a flawed antitrust doctrine that serves the interests of lawyers—by creating legal distinctions that operate as traps for the unwary—more than the interests of consumers—by requiring manufacturers to choose second-best options to achieve sound business objectives.[43]

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automatic Sherman Act preemption of [state] liquor price posting provisions that facilitate resale price maintenance.'' Areeda and Hovenkamp, ANTITRUST LAW, ¶ 217 at 401 (4th ed. 2013).

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

[31] 15 U.S.C. § 13(b).

[32] *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 132-33 (''[T]he basic purposes of the state statute and the Robinson-Patman Act are similar. Both reflect a policy choice favoring the interest of equal treatment of all customers over the interest in allowing sellers freedom to make selective competitive decisions.'').

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

[34] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[35] *California v. ARC America Corp.*, 490 U.S. at 105.

[36] *California v. Zook*, 336 U.S. 725 (1949).

[37] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

[38] *Flood v. Kuhn*, 443 F.2d 264 (2d Cir. 1971), *aff'd* 407 U.S. 258 (1972).

[39] *Flood v. Kuhn*, 443 F.2d at 268; *see also Robertson v. NBA*, 389 F. Supp. 867, 880 (S.D.N.Y. 1975) (citing *Flood*); *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 677-79 (Cal. 1983) (citing *Flood*); and *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 635 (1975) (interference with federal labor policy).

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

[41] Obstacle preemption is, of course, separate and distinct from occupation of the field preemption. ''Congress has never expressed the least willingness to limit state antitrust by making 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*)).

[42] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. at 897-98 (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.'').

[43] *Id.* at 904.

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