ABA SECTION OF ANTITRUST LAW
THE PRICE POINT
The Newsletter of the Pricing Conduct Committee
Article Highlight August 2021

Does the Sherman Act Preempt State "Post-and-Hold" and Other Liquor Pricing Laws?

Robert M. Langer and Benjamin H. Diessel [1]

The Winter 2021 issue of THE PRICE POINT[2] featured an article by Laura Sedlak titled *State-Sanctioned Price Fixing? A Circuit Split to Watch*. Ms. Sedlak's article identifies an ongoing circuit split, where the Second, Fourth, and Ninth Circuits have reached conflicting results in their analysis of constitutional challenges to state liquor pricing laws, including post-and-hold, minimum resale price maintenance, and price discrimination laws. The challenges in these cases asserted that these state laws were preempted by virtue of their incompatibility with Section 1 of the Sherman Act.

The Fourth Circuit and Ninth Circuit opinions at issue in Ms. Sedlak's article each invalidated state post-and-hold laws as unconstitutional.[3] In this article, we explain why, in our view, the legal analysis in those opinions is flawed.

The Second Circuit's 2019 opinion in *Connecticut Fine Wine and Spirits, LLC v. Seagull* ("*Seagull*")[4] addressed a facial challenge to three of Connecticut's liquor pricing laws. That case provides a detailed and precise explanation for why, under prevailing United States Supreme Court case law, these types of liquor pricing are not preempted.

Two key precedents of the United States Supreme Court drive the analysis: *Rice v. Norman Williams Co.*[5] and *Fisher v. City of Berkeley, California*.[6]

First, in *Rice*, the Court stated:

> Our decisions in this area instructs us … that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all case, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation.[7]

[1] Messrs. Langer and Diessel of the law firm of Wiggin and Dana LLP served as co-counsel for the intervening defendant, Wine & Spirits Wholesalers of Connecticut, Inc., with Deborah Skakel and Craig M. Flanders of the law firm of Blank Rome LLP, in *Connecticut Fine Wine and Spirits, LLC v. Seagull*, discussed herein. Mr. Langer served as Counsel of Record for the Intervenors-Respondents in the U.S Supreme Court (No. 19-710), Mr. Diessel had primary responsibility for drafting the Brief of Intervenors-Respondents in Opposition to the Petition for a Writ of Certiorari, and Ms. Skakel argued orally on behalf of all Intervenors-Appellees before the Second Circuit.
[2] Laura E. Sedlak, *State-Sanctioned Price Fixing? A Circuit Split to Watch*, THE PRICE POINT, Winter 2021, at 6.
[3] *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001); *TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009); *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008); *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987).
[4] 932 F.3d 22 (2d Cir. 2019), *cert. denied*, 140 S.Ct. 2641 (2020).
[5] 458 U.S. 654 (1982).
[6] 475 U.S. 260 (1986).
[7] *Rice*, 458 U.S. at 661 (emphasis added).

Then in *Fisher*, the Court stated that the City of Berkeley's unilateral imposition of rent control did not constitute concerted action. The Court distinguished unilateral restraints imposed by government entities upon private actors from "hybrid" restraints where private actors are granted a degree of private regulatory power. Hybrid restraints may be challenged under Section 1 of the Sherman Act.[8]

With respect to the minimum price provisions challenged in *Seagull*, the Second Circuit held that, in light of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[9] which overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[10] a facial preemption challenge to a vertical minimum pricing statutory provision must fail because such vertical restraints are now judged under Section 1 of the Sherman Act under the rule of reason, not the per se rule.[11]

With respect to Connecticut's provisions prohibiting price discrimination, the *Seagull* court concluded such a restraint is unilateral in nature, because it is a restraint "imposed by government to the exclusion of private control."[12] Thus, a statutory provision prohibiting price discrimination "does not implicate the concerns of concerted activity animating § 1."[13] The *Seagull* court further concluded that even if the statutory prohibitions on price discrimination were deemed hybrid, those statutory provisions are vertical, not horizontal, and thus, in light of *Leegin*, the price discrimination provisions would not be preempted.[14]

Finally, with respect to Connecticut's post-and-hold law, the *Seagull* court concluded that its earlier opinion regarding a comparable New York post-and-hold statute, *Battipaglia v. New York State Liquor Authority*,[15] authored by Judge Henry J. Friendly, remains good law "in the absence of a change in the law by higher authority."[16] The *Seagull* court held that a state statute that requires a wholesaler to file monthly price schedules with the state liquor authority and then further commands that that wholesaler hold those prices for a set period of time "does not implicate the evil against which § 1 guards."[17] Importantly, the *Seagull* court concluded:

> Nothing about this arrangement requires, anticipates, or incents communication or collaboration among the competing wholesalers. Quite to the contrary: A post-and-hold law like Connecticut's leaves a wholesaler little reason to make contact with a competitor. The separate, unilateral acts by each wholesaler of posting and matching instead are what gives rise to any synchronicity of pricing.[18]

Thus, there is an obvious question. Why is there a Circuit split regarding post-and-hold laws? We believe it can, at least in part, be traced back to Judge Ralph K. Winter's dissent in *Battipaglia*.[19] Indeed, cases invalidating post-and-hold laws—*e.g.*, *Miller v. Hedlund*,[20] *TFWS, Inc. v. Schaefer*[21] and *Costco Wholesale Corp. v. Maleng*[22]—cite some of the same cases cited in Judge Winter's dissent, and *Costco* expressly cites Judge Winter's dissent.[23] Although Judge Winter acknowledged that under the Sherman Act the mere exchange of price information by competitors is not a per se

[8] *Fisher*, 475 U.S. at 266-67.
[9] 551 U.S. 877 (2007).
[10] 220 U.S. 373 (1911).
[11] *Seagull*, 932 F.3d at 33.
[12] *Id.* (citing *Fisher*, 475 U.S. at 266).
[13] *Id.*
[14] *Id.* (citing *Rice*, 458 U.S. 654).
[15] 745 F.2d 166 (2d Cir. 1984). *Battipaglia* cited with approval two decisions upholding the constitutionality of Connecticut liquor laws, both of which Mr. Langer had successfully defended during his tenure with the Connecticut Attorney General's Office: (a) *Serlin Wine & Spirits Merchants, Inc. v. Healy*, 512 F. Supp. 936, 938 (D. Conn. 1981) (Connecticut's then extant minimum mark-up law), *aff'd sub nom. Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981); and (b) *United States Brewers Assn. v. Healy*, 532 F. Supp. 1312, 1329-30 (D. Conn. 1982) (Connecticut's then extant beer price affirmation law), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff'd*, 464 U.S. 909 (1983). In both cases, the principal argument proffered by Mr. Langer, several years before the *Fisher* decision, was that the Connecticut statutes were in the nature of unilateral restraints imposed by the government and thus beyond the reach of the antitrust laws.
[16] *Seagull*, 932 F.3d at 39.
[17] *Id.*
[18] *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 568 (2007)).
[19] 745 F.2d at 179-80 (Winter, J. dissenting).
[20] 813 F.2d 1344,1349 (9th Cir. 1987).
[21] 242 F.3d 198, 206-10 (4th Cir. 2001).
[22] 522 F.3d 874, 893 (9th Cir. 2008).
[23] *Id.* at 893-94.

violation, he opined that the mandate to adhere to the publicly announced prices is per se unlawful.[24] Judge Winter thus concluded that *Rice v. Norman Williams* did not govern the outcome.[25] Rather, in his view, the relevant jurisprudence would be found in cases such as *California Retail Liquor Dealers Association v. Midcal Aluminum*,[26] *Sugar Institute v. United States*[27] and *Catalano v. Target Sales, Inc.*[28]

Additionally, *Miller*,[29] *TFWS*,[30] and *Costco*[31] each concluded that the "hold" in the post-and-hold statutes were hybrid restraints, and equated, as did the dissent in *Battipaglia*, the post-and-hold statutory directives to agreements among competitors to fix prices under Sherman § 1.

Seagull, on the other hand, and we believe correctly, observed the following:

> [A]s to the "hold" component of the law that was the basis of the *Battipaglia* dissent, Connecticut's prohibition on altering prices for a 30-day period is a purely negative restraint.[32] It does not call for any private action, let alone concerted action. *Fisher*'s emphasis on the need for concerted action reinforces that Judge Friendly [author of the majority opinion in *Battipaglia*] was right both to focus on the posting, rather than the holding, component of New York's post-and-hold law, and to find the law non-preempted.[33]

Seagull thereby exposed the analytical flaws in the *Battipaglia* dissent, and in doing so, also exposed the same analytical flaws in the Fourth and Ninth Circuits' post-and-hold decisions.

With the Circuit split in mind, Ms. Sedlak's article concluded in part that one "can only speculate why the Supreme Court declined to hear the challenge to Connecticut's Liquor Pricing Laws [in *Seagull*]."[34] We choose not to do so. But, for the reasons set forth in our opposition to certiorari, we believe the Supreme Court appropriately denied the petition. Specifically, the Second Circuit's ruling on the minimum-retail-price provisions was a straightforward application of *Leegin* that was not even substantively addressed in the Petition. Its ruling on Connecticut's price-discrimination-prohibition provisions was correct and consistent with the Ninth Circuit, the only other circuit to have substantively addressed the issue.[35] And its ruling on Connecticut's post-and-hold provisions was not only correct, but also did not present any issue of national importance. Connecticut's post-and-hold provisions are unique. And to the extent circuits have differed in their treatment of post-and-hold provisions, that split has tolerably existed for over three decades, during which the industry has thrived with robust interbrand competition.

About the Authors

Robert M. Langer is a Senior Counsel at Wiggin and Dana LLP

Benjamin H. Diessel is a Partner at Wiggin and Dana LLP

[24] *Battipaglia*, 745 F.2d at 179 (Winter, J. dissenting).
[25] *Id.*
[26] 445 U.S. 97 (1980) (invalidating a state regulatory system in which the state simply enforced privately set prices, e.g., wholesalers were required to post a resale price schedule and were prohibited from selling wine to a retailer at other than the price set in the price schedules, which, prior to *Leegin*, was deemed per se illegal resale price maintenance).
[27] 297 U.S. 553, 601 (1936).
[28] 446 U.S. 643, 649-50 (1980). Of note, neither *Sugar Institute* nor *Catalano* were preemption challenges, but rather suits brought under Section 1 of the Sherman Act against horizontal competitors for having agreed to fix prices, and neither involved a statutory scheme comparable to that at issue in either *Battipaglia* or *Seagull*.
[29] 813 F.2d at 1349-51.
[30] 242 F.3d at 206-10.
[31] 522 F.3d at 894-96.
[32] For what it is worth, we note that both the Connecticut Attorney General's Office, on behalf of the named state officials, and the Intervenors, strenuously argued before the Second Circuit in *Seagull* that the Connecticut post-and-hold provisions were unilateral restraints.
[33] 932 F.3d at 38 (citations omitted) (emphasis added).
[34] Laura E. Sedlak, *State-Sanctioned Price Fixing? A Circuit Split to Watch*, THE PRICE POINT, Winter 2021, at 6, 11.
[35] *See Costco*, 522 F.3d at 898-99.

ABA SECTION OF ANTITRUST LAW
THE PRICE POINT
The Newsletter of the Pricing Conduct Committee