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A Window into Washington: Proposed Legislation to Prohibit Resale Price Maintenance Agreements

Congress has taken preliminary steps to adopt legislation that would restore the rule that minimum resale price agreements between manufacturers and retailers, distributors or wholesalers, violate the Sherman Act without requiring proof of their anticompetitive effects.

More than two years ago, the Supreme Court overturned the 96-year-old rule established in a prior Supreme Court decision, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), that made minimum resale price agreements ("RPM agreements," also called "vertical price-fixing") per se illegal under the Sherman Act, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). In Leegin, the Court held that RPM agreements should be evaluated under the rule of reason, a standard requiring that proof the agreement has unreasonably restrained competition. On January 13, 2010, the House Judiciary Committee met and voted on whether to adopt H.R. 3190, the "Discount Pricing Consumer Protection Act of 2009." H.R. 3190 would overturn the ruling in *Leegin* and restore the per se rule of illegality with respect to RPM agreements.

Report on Hearing on H.R. 3190

The Committee voted along party lines, 15-14, to adopt H.R. 3190. Representative Hank Johnson (D., Ga) provided a brief explanation of the bill. He described the legal standard for challenging RPM agreements adopted in *Leegin* as more "expensive," "fact intensive" and "less favorable to plaintiffs." According to Representative Johnson, an increasing number of manufacturers have implemented minimum retail prices in the two years since *Leegin* was decided, which in turn means retailers cannot offer lower prices of the manufacturers' goods to consumers. Representative Johnson further maintained (as Justice Breyer argued in his dissenting opinion in *Leegin*) that even if only ten percent of manufactures implement RPM agreements, the average annual shopping bill for a family of four could increase by between $750 and $1000. H.R. 3190 would simply "restore the state of play that existed in the market for 96 years prior to *Leegin*." Manufacturers' suggested minimum retail price *policies* would remain permissible, and companies that wholly own their franchises can set minimum prices without violating the law. Representative Johnson noted that 41 out of 50 state attorneys general as well as the National Consumers League, American Antitrust Institute, the Consumers Union, U.S. PIRG and online retailers such as Amazon.com and eBay endorse the bill. The Committee's clerk entered these

third parties' letters into the record.

Representative Lamar Smith (R., Tx) also commented on the bill. He observed that over time, the Supreme Court has moved away from per se standards of illegality to a rule of reason standard. The rule of reason allows courts to conduct "the kind of detailed fact-finding necessary to determine the actual harm and benefits to consumers of resale price maintenance." Before legislating a return to the per se standard, Representative Smith urged the Committee and the courts to "take a hard look" at the facts supporting RPM. Congress, he argued, should only repeal the Supreme Court's ruling if it is "absolutely clear that the practice in question is never procompetitive," and two years of rule of reason analysis is not sufficient to establish a record and justify a return to the old rule. He urged the Committee not to adopt decisions that have unintended consequences. As an example, Representative Smith observed that while it is clear that the sponsor of H.R. 3190 did not intend to overrule *Copperweld Corp. v. Independence Tube Corp.*, a Supreme Court decision which holds that a parent corporation and its wholly owned subsidiary cannot conspire under the Sherman Act, the text of H.R. 3190 could be interpreted to subject agreements between parent corporations and their wholly-owned subsidiaries to the Sherman Act. Representative Johnson disagreed with this example, stating that a parent and its wholly owned subsidiary are, for the purposes of the Sherman Act, part of the same entity. The bill is sufficiently clear, he maintained, because it employs the term "agreement" which has been interpreted under the antitrust laws "for decades" as requiring two or more separate entities.

Representative Melvin Watt (D., N.C.) also spoke during the meeting. He referred to a law review article analyzing how the rule of reason shifts the burden of proof and how the courts have handled such cases. (M.A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, GEO. MASON L. REV., 827 (2009)) The article analyzed antitrust cases from 1977-1999 in which the rule of reason was the applicable standard, and found that, of those cases, only four percent of the claims prevailed under the rule of reason standard. Mr. Carrier conducted a similar analysis for antitrust cases decided between February 2, 1999 and May 5, 2009 and found that in the more recent period, only two percent of the cases survived a rule of reason analysis. Thus, Representative Watt concluded, "the application of the rule of reason has not been nearly as reasonable as the articulation of the rule of reason," and H.R. 3190 is "not only appropriate but necessary if the consumer is to be protected." Rep. Darrell Issa (R., Calif.) proposed an amendment to H.R. 3190 that would render the retail pricing practices of any person with market power—even manufacturers who sell exclusively through their own retail outlets—subject to review. A majority of the Committee voted to reject this amendment.

Report on S. 148, Discount Pricing Consumer Protection Act

In January 2009, a bill nearly identical to H.R. 3190 was introduced in the Senate. S. 148, the Discount Pricing Consumer Protection Bill, is sponsored by Senator Harry Kohl (D., Wisc.). The bill was referred to the Senate's Committee on the Judiciary and further review is pending.

While it is not clear whether Congress will eventually pass some form of *Leegin* repealer legislation, there is significant support for the bills. Even if the legislation is passed, it should not impact the legality of unilateral minimum resale price policies where the manufacturer preannounces, as a term and condition of dealing, the minimum resale price at which its products

may be resold. Such policies have long been permitted because, to the extent they are implemented and enforced without creating an agreement, they do not satisfy the concerted action requirement of Section 1 of the Sherman Act.

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