

Marketing & Distribution

RPM, MAP & RPA

Resale Price Maintenance
Minimum Advertised Price Restraints, and
the Robinson-Patman Act

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Antitrust Counseling and Compliance 2019

Practising Law Institute

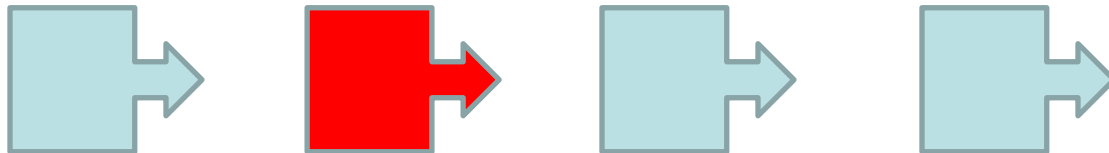
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Downey Law

Analysis. Advice. Advocacy.

What is your biggest pricing pain point?

- A. Resale price maintenance (RPM) restrictions
- B. Minimum advertised price (MAP) restrictions
- C. Price discrimination and/or discriminatory provision of promotional funds and services (Robinson-Patman Act)



Resale price maintenance (RPM)

- RPM is an **agreement** between a supplier and a reseller, under which the reseller agrees to charge resale prices set by the supplier
- Maximum and minimum RPM are both subject to the rule of reason. *State Oil Co. v. Khan* (U.S. 1997) (unanimous); *Leegin Products, Inc. v. PSKS, Inc.* (U.S. 2007) (5-4)
- Recognized procompetitive benefits of minimum RPM:
 - Preventing free riding
 - Facilitating entry of new products into the market
 - Encouraging dealer investments in competition-enhancing activities

RPM: Federal and state divergence

- Wherever state antitrust statutes are interpreted in the same manner as the Sherman Act, the rule of reason standard governs RPM claims
- Post-*Leegin*, **California** and **New York** AGs have asserted that their state laws treat RPM as per se illegal
- 2009 **Maryland** *Leegin* repealer legislation expressly made RPM per se illegal



100 Years of the *Colgate* doctrine

- Unilateral price policies – a/k/a *Colgate* policies – under which supplier announces **a policy of refusing to deal** with resellers that do not adhere to supplier-dictated prices or price levels, are OK under both federal and state law
- “In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer ... freely to exercise his own **independent discretion** as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.”

–*U.S. v. Colgate & Co.* (U.S. 1919)

Colgate policy fundamentals

- Supplier may announce a **unilateral** policy not to sell to resellers that sell below designated prices or price levels or sell to other resellers that violate the policy
- Resellers may **unilaterally** decide to adhere to the policy
- Urging or encouraging resellers to comply is OK; negotiating for or coercing compliance = RPM
- Supplier may monitor resellers' compliance with the policy, notify resellers of violations, and unilaterally terminate noncompliant resellers (subject to contractual restraints on termination)

Maryland v. Johnson & Johnson Vision Care

- AG's complaint alleged that JJVC's Unilateral Price Policy was a de facto RPM agreement that was the result of bilateral negotiations with Costco
- Vertical RPM agreement is per se violation of Maryland statute, § 11-204(a)(1) of the Commercial Law Article
- Settled and dismissed after JJVC discontinued policy and paid \$50,000 civil penalty

Evidence of agreement

From: McEvoy, Ashley [JJCUS]
To: Marques, Roberto [CPCUS]; Pappas, Caitlin [CONUS]
CC: Angelini, Laura [VISUS]
Sent: 8/21/2014 7:32:04 PM
Subject: FW: Costco Cash Card_Credit Details
Attachments: IMG_2707.jpg

We have reached an agreement with Costco which is a good solution.

Keeping you in the loop. We have reached an agreement with Costco which is a good solution. There may still be some noise with them because they are not fans of our UDP policy but we are partnering on a productive path forward.

From: Angelini, Laura [VISUS]
Sent: Thursday, August 21, 2014 12:41 PM
To: Hollin, Rob [MEDGB]; McEvoy, Ashley [JJCUS]
Subject: FW: Costco Cash Card_Credit Details

Ash, Rob,
Costco implementing the newly agreed model.
Thanks. Best regards,
Laura

Costco implementing the newly agreed model.

In re Disposable Contact Lens Antitrust Litigation

- Allegations were sufficient to show resale price policies were not unilateral *Colgate* policies:
 - There was direct evidence of negotiations and formation of an agreement between JJVC and Costco
 - Complaint described “a flow of information up and down the distribution chain about UPPs”
 - As “evidenced by trade journals, social media, direct correspondence, and subsequent testimony,” all parties to the vertical agreements participated in enforcement of the UPPs

Counseling takeaways

- *Colgate* policies should be adopted and tailored to further bona fide procompetitive purposes--not just to eliminate price competition for its own sake
- Make sure unilateral *Colgate* policies are **independently** and **unilaterally** developed, adopted, and enforced
- Distinguish between voluntary compliance with a policy and negotiated agreement or coerced acquiescence
- Consider whether minimum *advertised* price (MAP) restrictions might achieve legitimate marketing objectives with less antitrust risk

Minimum advertised price (MAP) restraints

- MAP restrictions are non-price restraints normally assessed under the rule of reason under both federal and state law
- MAP policies or agreements may be enforced by withholding promotional support (e.g., coop ad funds for non-complying ads), termination, or by other reasonable, non-coercive, non-deceptive means
- MAP policies and agreements may pose antitrust risks where they facilitate horizontal collusion to increase prices and/or effectively reduce or eliminate intrabrand price competition

When do eMAP restrictions become de facto RPM?

- Non-compliant selling price is disclosed only
 - in the “shopping cart” after consumer selects product?
 - after clicking “CHECKOUT” but before entering personal information?
 - after entering personal information but before confirming order?
 - after clicking “PURCHASE”?
- Selling price is visible only to logged-in site members?
- Policy forbids “Call for price” and similar phrases?
- Policy forbids disclosure of policy to customers?
- Policy forbids disclosure of non-compliant prices even in one-on-one communications with individual consumers?

Online resellers sue, get mixed results

- *House of Brides v. Alfred Angelo, Inc.* (N.D. Ill. 2014) (dismissing online bridal dress retailer's RPM claims based on failure to allege cognizable relevant product market)
- *Darush v. Revision, L.P., et al.* (C.D. Cal. 2013) (upholding online retailer's complaint alleging per se illegal RPM under California law, where supplier allegedly coerced compliance with "suggested" resale price program and colluded with plaintiff's competitors to terminate non-complying retailers)
- *WorldHomeCenter.com* cases (dismissing claims under federal and New York law that various suppliers' MAP policies amounted to per se illegal setting of online retailer's selling price)

Other special issues with online retailing restrictions

- Can the supplier enforce an eMAP policy against the customers of its customers and if so, how?
- How long does the supplier have to wait before it can resume selling to non-compliant resellers?
- Can resellers themselves or their affiliates offer price-monitoring and enforcement services to suppliers?
- How can a MAP policy be enforced against selling platforms that display noncompliant prices but do not buy or resell any products?

RPM/MAP counseling suggestions

- Assess client's stated objectives and level of commitment to implementing RPM or MAP at the expense of sales growth
- Analyze risk of challenge in anti-RPM jurisdictions within and outside the U.S., if applicable
- Stay on the unilateral side of the line in communicating with resellers about the policy; do not negotiate or solicit feedback on policy terms
- Reject reseller entreaties to discuss other resellers' prices
- Reiterate intent to make unilateral decisions regarding policy terms and enforcement

RPM and MAP in the EU



- Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), prohibits agreements that appreciably restrict or distort competition
- If an agreement appreciably restricts competition, it is null and void according to Article 101(2)
- Article 101(3), exempts agreements for which the benefits outweigh its anticompetitive effects
- Block Exemption Regulation expressly provides a safe harbor for vertical agreements in which no party has a market share exceeding 30%

A more restrictive approach

- Minimum RPM is a “hardcore” restriction for which **there is no safe harbor**. Prohibited conduct includes
 - Applying “pressure” on resellers
 - Incentives to follow recommended prices
 - Disincentives for not following recommended prices
 - Fixing margins
 - Prohibiting rebates or imposing maximum rebates
- 2010 Guidelines for Vertical Restraints identify a few narrow, fact-specific exceptions for short-term product launches and the prevention of free riding

Anticompetitive effects of RPM

- RPM's presumed anticompetitive effects include:
 - Higher prices
 - Reduced price competition
 - Encouragement/facilitation of collusion among suppliers
 - Encouragement/facilitation of collusion among distributors
- MAP restrictions may be viewed as *de facto* RPM if they effectively discourage sales below the supplier's suggested resale prices
- Member states (including UK) take a similarly dim view of RPM
- China, Korea, and other countries diverge from US in treatment of RPM and MAP by "dominant" companies

RPM and MAP in Canada



- Section 76 of the Canadian Competition Act prohibits “price maintenance” conduct, where that conduct has had, is having or is likely to have an adverse effect on competition in a market:
 - where a person influences upward or discourages the reduction of the price at which another person supplies, offers to supply or advertises a product within Canada;
 - when a person refuses to supply or otherwise discriminates against another person because of the low pricing policy of that person; and
 - when a person induces a supplier to refuse to supply a product to another person because of the low pricing policy of that person

2014 Price Maintenance Guidelines

- Subparagraph 76(1)(a)(i) of the Competition Act applies where a person, by agreement, threat, promise or any like means, influences upward or discourages the reduction of the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada.
- “An important requirement under section 76 is that price maintenance conduct has had, is having or is likely to have an adverse effect on competition in a market”
- Absent unusual market features, Competition Bureau is unlikely to find that a company with less than 35% market share has market power--a key factor in analyzing likely competitive effects

Price Maintenance Guidelines: Suggested resale prices

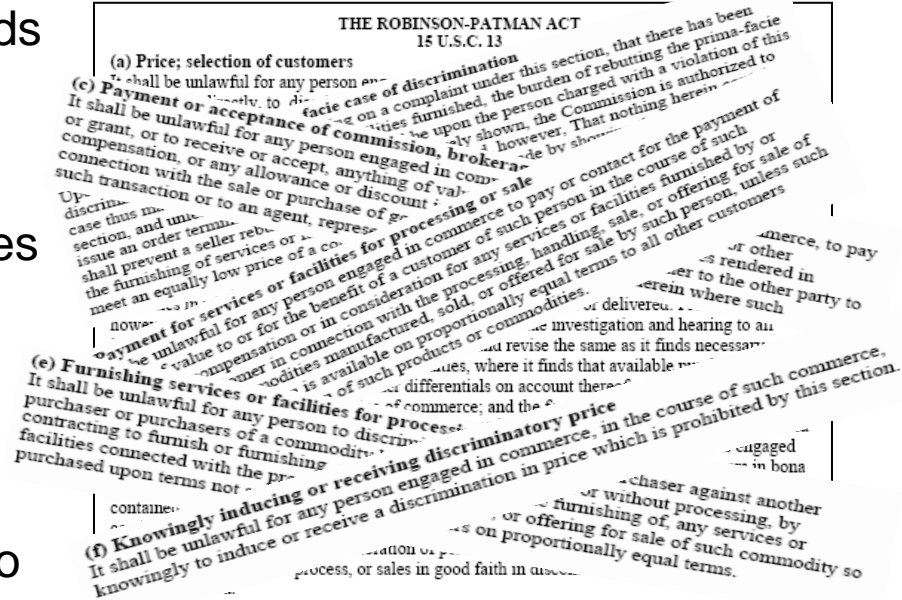
- In some circumstances, a supplier's use of minimum resale prices, MSRP or MAP may satisfy the "influencing" requirement of subparagraph 76(1)(a)(i)
- Supplier's suggestion to retailer of resale price is proof that retailer has been "influenced" in its pricing, except where supplier establishes that it made clear to the retailer there was no obligation to accept the suggestion and it will not suffer in its business relations with the supplier or any other person if it fails to accept the suggestion

Price Maintenance Guidelines: Supplier's resale price advertising

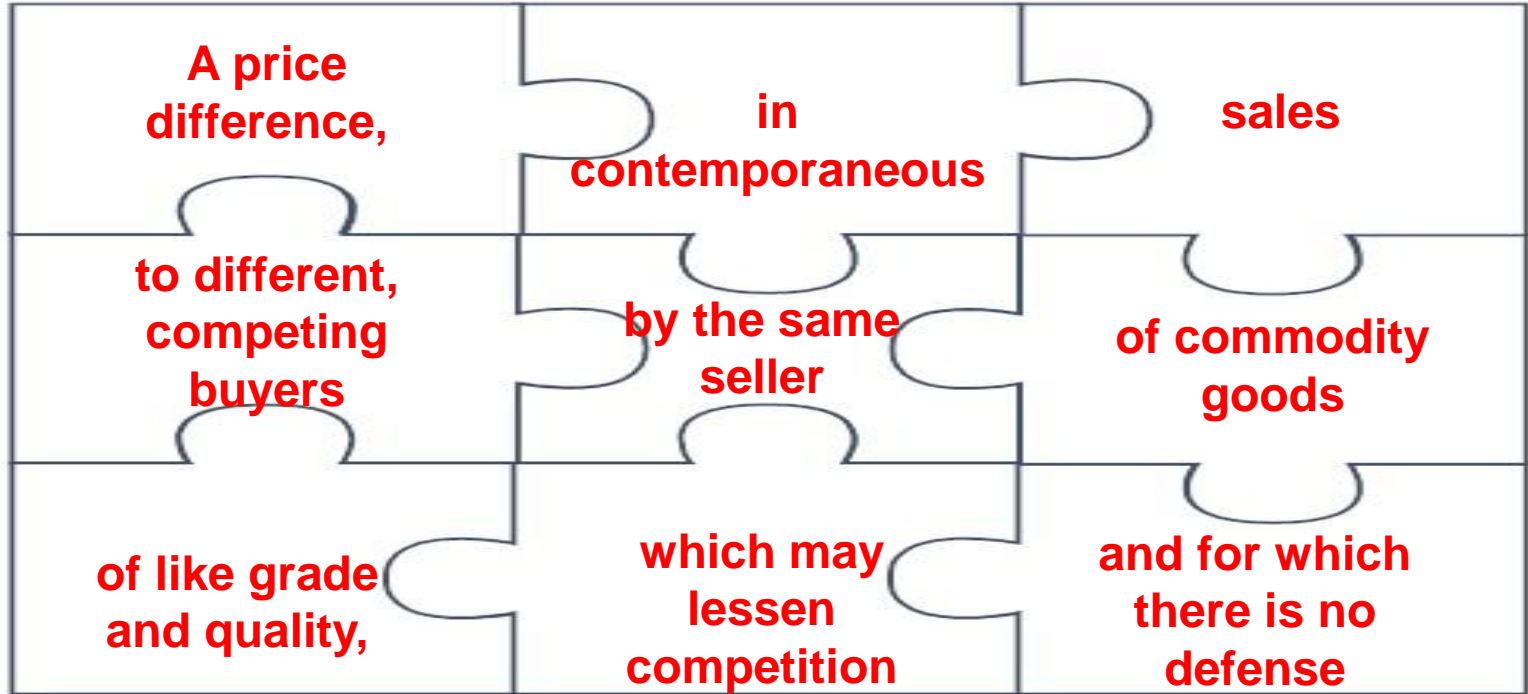
- Supplier's publication of an advertisement that mentions a resale price is proof that supplier is "influencing upward" the selling price
- The presumption does not apply "where the price is expressed in the advertisement in a way that makes it clear to any person who may view the advertisement that the product may be sold at a lower price."
- The Act expressly allows prices to be affixed or applied to a product or its packaging

Price discrimination & the Robinson-Patman Act

- § 2(a) Price discrimination that tends to lessen competition
- § 2(d) and § 2(e) Discriminatory promotional allowances and services provided in connection with resale
- § 2(f) Inducement of unlawful price discrimination
- § 2(c) False brokerage payments to buyer or buyer's agent



The price discrimination puzzle



Statutory defenses

- **Meeting competition:** seller may meet but not beat competitor offer on a customer-specific or market area basis (but do not verify directly with competitor)
- **Changing market or marketability:** actual or imminent deterioration of perishable goods, obsolescence, distress sales under court process, or bona fide going-out-of-business sales
- **Cost justification:** price difference must correspond to actual difference in cost of making sales to favored buyer

Judicially-recognized defenses

- **Practical availability:** no actionable claim if buyers are informed of and can feasibly qualify for favorable price
- **Functional discounts:** permits charging different prices to buyers at different levels of the distribution chain, where discount reasonably relates to the value of services provided by the buyer
- ***De minimis* price discrimination** that does not satisfy competitive injury requirement Is not actionable

Discriminatory resale support

- RPA prohibits discriminatory provision of payments, services or facilities to resellers “in connection with” the resale of the seller’s product
- What constitutes “services” or “facilities” in connection with resale depends on whether they “convey a promotional message”
- Different forms of promotional support must be provided to different resellers on a “proportionally” equal basis
- Counseling rests on case law and *FTC Guides for Advertising Allowances and Other Merchandising Payments and Services* (2014), 16 C.F.R., Part 240

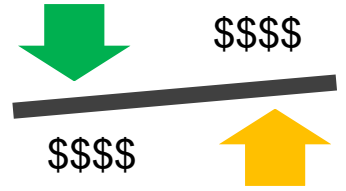
FTC Guidance

- Competing bricks-and-mortar stores and Internet retailers may be entitled to proportionally equal promotional allowances and services
- “Common sense and good faith” will be relevant in assaying efforts to proportionalize promotional allowances and services across different sales formats
- Giving or knowingly inducing or receiving proportionally unequal promotional allowances may violate Sections 2(a) and 2(f), “where no promotional services are performed in return for the payments, or where the payments are not reasonably related to the customer’s cost of providing the promotional services.”

Buyer liability

- Section 2(f) of the RPA makes buyer liable for knowingly inducing price discrimination
- Buyer must have known or reasonably should have known that price was unlawful
- Section 2(f) is silent regarding buyer liability for unlawful discrimination in provision of promotional support
- FTC reiterates it has authority under § 5 of the FTC Act to challenge buyer's inducement of unlawfully discriminatory promotional support

RPA counseling suggestions



- Check for at least two actual sales to similarly-situated purchasers in head-to-head competition for the same customers
- Assess whether discounts or other favorable price terms were announced and practically available to similarly-situated competing buyers
- Was the client meeting competition in good faith?
- Use “common sense and good faith” to ensure proportional equality of promotional funds and services to competing buyers in different trade channels



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