

Antitrust Insights

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From the Editor

With the Supreme Court's recent decision in *Leegin*, minimum resale price maintenance (RPM) joins other vertical price restraints as being evaluated under the rule of reason. The Court's decision highlights some of the seemingly simple and familiar economic questions that would have to be addressed in such an inquiry (e.g., manufacturer and/or retailer market power and the competitive dynamics that led to the RPM policy in the first place), but it will take economic expertise and sophistication to get and analyze properly the relevant facts so that businesses and antitrust counsel can move forward with confidence.

In this issue of *Antitrust Insights*, three NERA economists with extensive experience in analyzing vertical restraints—Tim Daniel, Christine Meyer, and Steve Schwartz—discuss and debate the economics of RPM and the practical issues that would enter into a rule of reason analysis. They exchange their views on four key topics: the significance of *Leegin* going forward, the procompetitive benefits of RPM that are most likely to matter in practice, the types of situations in which consumers might be adversely affected by RPM, and the empirical tests that can be applied to quantify or demonstrate the consumer benefits or harm that might be associated with RPM.

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I hope you enjoy this issue.

—Lawrence Wu, Editor

Assessing the Competitive Impact of Resale Price Maintenance: Practical Implications of the Supreme Court's Decision in *Leegin*

A roundtable discussion with Timothy Daniel, Christine Meyer, and Steven Schwartz

Lawrence Wu: Will the decision in *Leegin* change the way resale price maintenance (RPM) is analyzed?¹ And is this a big change or a small change?

Timothy Daniel: At the risk of confirming that I am an economist right out of the box, I'll answer your question with a "yes and no." From a legal perspective, the *Leegin* decision is huge: going forward, a practice that, for almost a century, was treated as *per se* illegal now will be analyzed under the rule of reason.² *Leegin* will join *Sylvania* and *Brooke Group* as landmark legal decisions that have transformed the antitrust landscape.³

However, from an economic point of view, the *Leegin* decision acknowledges what economists have been saying for decades—that RPM, like other vertical restraints, can have both procompetitive and anticompetitive consequences and thus would seem not to be the sort of practice suitable for *per se* illegal status.⁴ RPM, in short, is not horizontal price fixing. Thus, how economists look at RPM is not going to change very much.

Wu: That may be true, but won't the Supreme Court's decision change how businesses and their antitrust counsel view RPM?



Daniel: Much interesting legal and economic work will, of course, emerge as firms consider whether to introduce to their marketing strategies a practice that for so long was considered off limits. I think firms would be wise to think through these decisions carefully. On the one hand, in cases where the inability to employ RPM has impeded the realization of consumer-enhancing efficiencies, firms will be eager to adapt their strategies to include RPM. On the other hand, some recent Supreme Court decisions—the Kodak tying case and the Aspen Ski monopolization case come to mind—have indicated that firms that *change* their marketing and distributional practices (even those that have a cogent procompetitive explanation for the change) may be more vulnerable to allegations of anticompetitive behavior compared to firms that maintain a particular practice over a long period of time.⁵ Of course, firms that introduce RPM will claim that the change was motivated by the prospect for efficiencies and that RPM was not introduced previously because it was *per se* illegal to do so. Potential plaintiffs will, just as predictably, contend that a firm’s decision to change its practices will allow it to reap anticompetitive profits that were unavailable when RPM was *per se* illegal. And what if a firm plans to introduce RPM simultaneously with another vertical restraint, such as exclusive territories? How firms and their antitrust counsel respond to *Leegin* should prove to be very interesting.

Wu: Economists have been writing about the procompetitive aspects of RPM for quite some time. What are the key benefits and which ones do you think matter the most in practice?

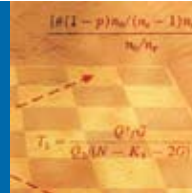
Steven Schwartz: For sure, there has been a lot of focus on the procompetitive characteristics of RPM, much of it coming from the Chicago School. It is important, however, to recognize that much of what is now mainstream economic thinking on RPM was once revolutionary thinking. I suspect that many firms, looking at *Leegin*, are going to heave a sigh of relief and say that the Supreme Court has caught up to what they have known all the time: RPM can be efficiency-enhancing and procompetitive. As Tim noted, we are not talking about horizontal agreements between competitors.

While I think that almost any economist would agree that a price restraint can potentially have an anticompetitive impact, most mainstream economists would also agree that the impact on competition of an RPM policy will depend on the realities of the specific marketplace in which RPM is introduced. Arguments in favor of the rule of reason treatment for RPM have basically invoked many of the same justifications that are invoked for vertical non-price restraints. In other words, you should analyze the effects of a *vertical price* restraint in much the same manner as you would analyze the effects of a *vertical non-price* restraint.

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The specific arguments that will be invoked are bounded only by the creativity of the lawyers making the argument. But, when the economics is boiled down to its essence, I suspect that economists will analyze the validity of various procompetitive explanations for RPM, such as the alignment of incentives between manufacturers and downstream retailers; the enhancement of a manufacturer's ability to be an effective interbrand competitor; and the reduction in opportunities for free riding. These analyses start from the sensible premise that a manufacturer needs focused and attentive distributors if it is to succeed competitively relative to its rivals and that the proper incentives need to be created to do that. RPM facilitates that effort because it minimizes the scope of potential discounting. By increasing the profit associated with retailing or distributing the manufacturer's product, RPM creates incentives for the retailer or distributor to focus on that firm's product relative to those of its rivals.

Much as is the case with non-price restraints, these justifications emphasize the relatively greater value placed on interbrand versus intrabrand competition. And, as with non-price restraints, these arguments hinge on the prospect that interbrand competition is sufficiently vigorous as to prevent a firm from adopting practices that are competitively harmful. In other words, everything old is new again. I would bet a lot of money—even my own—that analyses of the procompetitive rationale for RPM will sound familiar to those of us who have done a lot of work in assessing the competitive impact of vertical non-price restraints. And, as is the case for non-price vertical restraints, the determination of whether they are anti- or procompetitive will be fact-dependent. Theory gives us a road map about where to look for pro- or anticompetitive effects in price and non-price vertical restraint cases, but, in the end, the facts tell the story.

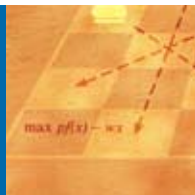
Wu: *Are these efficiencies and consumer benefits largely theoretical? Or do they have some practical significance?*

Schwartz: All of the benefits I just mentioned are realistic and possible justifications for an RPM program. But whether they actually support a conclusion—under a rule of reason analysis—that an RPM scheme is *not* anticompetitive depends entirely on the specific facts of any given case. So, the theoretical justifications for RPM are there. But, there is still the factual hurdle to be overcome.

Christine Meyer: The factual hurdle, as Steve calls it, is the key to a rule of reason analysis. I once consulted for a firm that felt very strongly that its minimum advertised pricing program was procompetitive. The company's own experience was quite revealing. When the company introduced a new product along with a minimum advertised pricing strategy, the launch was successful. But this was after two prior launches of similar products that were unsuccessful due to the lack of retailer support and the perception of low quality. Of course, these facts alone probably would not be sufficient to justify an RPM program under a rule of reason analysis, but they indicate that some firms think that the procompetitive aspects of RPM are not just theoretical.

Wu: *In its decision, the Supreme Court clearly emphasized the importance of interbrand competition and the role of RPM in stimulating such competition. But consumers care about intrabrand competition, too, and wasn't that the essence of the initial antitrust plaintiff's case in Leegin?*

Schwartz: Yes. If you are a consumer who has decided that you want to buy a particular brand of any product, you'd love to have as many stores as possible competing to sell you *that* product so that you can get as low a price as possible. But, in the end, that might not be the best thing for competition as a whole. Interbrand rivalry, which drives competition generally, is enhanced by an alignment of incentives between manufacturers and downstream retailers. That alignment makes it



rational for manufacturers to invest in new products, advertising, and brand-building activities. If we stimulate interbrand competition among manufacturers, the result is downstream competition that benefits consumers. In other words, an RPM policy that increases interbrand competition only gives consumers more choice, not less choice, which means consumers can—and will—realize the benefits of competition.

Now, let me anticipate your next question. I am not saying that intrabrand competition is unimportant. What I am saying, though, is that a practice—such as RPM—that can reduce intrabrand competition can also increase the vigor and effectiveness of interbrand competition. The gains in one need to be weighed against the reduction in the other. If there is competition upstream between manufacturers, it is likely that the gain in interbrand competition upstream will overwhelm any reduction in intrabrand competition. However, if there is a monopoly upstream and therefore no meaningful interbrand competition, we have a different situation and intrabrand competition will certainly be important. A rule of reason analysis provides the courts with an opportunity to balance the pro- and potential anticompetitive effects of RPM. In contrast, a *per se* rule against RPM is likely to chill attempts to stimulate interbrand competition.

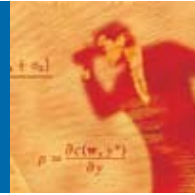
Daniel: I agree with Steve that the main reason we have antitrust laws and antitrust enforcement is to promote and protect interbrand competition. Consumers gain directly and enormously from the direct competition between competitors to develop new products and attract new customers. I also concur with Steve that in cases that involve restrictions imposed by manufacturers on retailers, economists spend a fair amount of time explaining why such vertical restraints—which necessarily restrict parties' actions—can nonetheless promote competition to the benefit of consumers. I will never forget being asked the following question by a judge at the conclusion of several hours of testimony on the procompetitive rationale for a particular noncompete agreement: “But aren’t noncompete agreements inherently anticompetitive?” Thus, even if I can convince you that RPM can benefit consumers, I would not be surprised if I am still asked the following: “But RPM means that a retailer cannot lower its prices even if it wanted to. How can consumers benefit from that?”

At the same time, I am not sure what it means to balance interbrand competition against intrabrand competition. An upstream manufacturer, even a monopolist, has every incentive to promote vigorous downstream competition among its retailers and distributors. Upstream firms typically have no incentive to provide extra margins to retailers—which is what is meant by a reduction in

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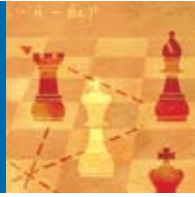
intradbrand competition—unless that extra margin helps to align better the retailers’ incentives with the upstream manufacturers’ incentives. I use the word “typically” because there are economic models that conclude that upstream manufacturers can benefit by providing supra-competitive margins to their retailers when doing so allows the upstream manufacturers to compete less aggressively.⁶ But the conditions under which these models yield these conclusions are exacting and do not, in my view, undercut the general proposition that upstream manufacturers benefit when their downstream retailers compete vigorously. So, if upstream manufacturers—even monopolists—have no incentive to reduce intradbrand competition, what exactly are we balancing? The main thing that makes sense to me from the phrase “reduction in intradbrand competition” is the concern that RPM might foster anticompetitive coordination among retailers, a concern of manufacturers that has long been understood.

Schwartz: Tim, I am not sure I agree with you when you say that a manufacturer has “every incentive to promote vigorous downstream competition among its retailers and distributors.” Surely, a manufacturer would like its retailers to be aggressive and vigorous competitors when it comes to the promotion of their products against those of a rival. But, why would a manufacturer necessarily want to promote aggressive intradbrand competition? A price war between competing retailers over the sale of some product may not benefit the manufacturer by much because it may generate few incremental sales relative to the movement of sales from one retailer to another. And, it may shift the retailers’ primary focus away from trying to win sales from rival manufacturers.

As I see it, a manufacturer has an incentive to limit the scope of intradbrand competition. What the manufacturer balances is the expected (actual) gain in the intensity of interbrand competition against the loss in the vigor of intradbrand price competition. Depending on whether there

are non-price restraints in play, this will, at a minimum, affect the dimensions over which competition occurs. That does not mean that there is no intradbrand competition. It just means that there is a reduction in intradbrand price competition. And, to go back to Lawrence’s question, intradbrand competition does matter, but if we define that competition as only price competition or if we ignore the potential for RPM to stimulate interbrand price competition, we make a mistake.

Daniel: But is this balancing by a manufacturer an internal business decision or an antitrust matter? We should be careful not to confuse the two. With regard to antitrust concerns, I am quite certain that Steve and I agree that an upstream manufacturer does not have an incentive to establish a distribution network that provides its retailers the opportunity to earn greater-than-competitive profits, unless the manufacturer participates in and benefits from a dealer cartel. The manufacturer doesn’t want too few retailers because that might give the retailers the opportunity to elevate the price of the manufacturer’s products, which would benefit the retailer but not the manufacturer. This is what I mean when I say that the manufacturer has every incentive to promote vigorous downstream competition among its retailers and distributors. You are correct that the manufacturer may want to limit the number of retail outlets, or otherwise restrict the retailers’ practices, for the reasons you mention. But I use the phrase “reduction in intradbrand competition” to pertain to a practice that provides downstream retailers with the opportunity to earn greater-than-competitive profits—that’s what we ought to be worried about. And upstream manufacturers simply do not have an incentive to provide this opportunity to its retailers unless the manufacturer gets something in return (such as point-of-sale services or product demonstrations) that ultimately increases the demand for the upstream manufacturer’s products.



In vertical restraints cases, we must balance the procompetitive, proconsumer potential of the vertical restraint (be it RPM or another restraint) against the possibility that the restraint will foster anticompetitive outcomes. At the retailer level, this might manifest itself as an increase in retail margins over and above what would be necessary to induce the retailers to provide the requested services, an outcome that could occur if the restraint permits the retailers to coordinate their actions successfully.

Schwartz: I agree with you that there is no reason for a manufacturer to allow its retailers to earn supracompetitive profits. Defining a “reduction in intrabrand competition” as you do makes it clearer to me that we are really saying much the same thing. If a vertical restraint—price or non-price—makes it possible for a retailer to offer services that are expensive and still earn a competitive return, that ought not to raise a competitive concern. A court may be concerned when price competition is limited by a vertical restraint—price or non-price—and economists have the burden of explaining why that facial reduction in competition, when balanced against the competitive benefits of the restraint, is not a material concern. Our disagreement—if you call it that—is as much a semantic one as a real one, isn’t it? But, that semantic issue should not obscure the fact that the problem of explaining this point to a judge or a jury is very real and a challenge to economists and to lawyers.

Daniel: I suspected we were on the same page. Just goes to show that it is important to be clear about the

definition of key terms, such as intrabrand competition, when discussing vertical restraints and their possible competitive effects. As noted above, I use the term “reduction in intrabrand competition” to refer to the realization of supracompetitive margins by retailers, as opposed to the implications of an upstream manufacturer’s business decisions regarding how best to distribute its products. Much of what economists need to do in this arena is to explain to a judge or jury what might, at first blush, be viewed as an implausible statement: restricting retailers from lowering prices can actually be good for consumers.

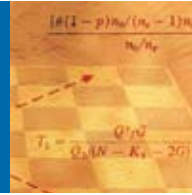
Wu: *Let’s turn to the other side of the coin. What have we learned about how RPM might facilitate collusion or otherwise harm competition? And when should we be more concerned about the potential for consumers to be adversely affected by RPM?*

Daniel: Economists have attempted to measure the impact of RPM on prices and quality of service, but the inquiry is difficult for at least two reasons. First, RPM has been *per se* illegal at the federal level since 1911 and in all states since 1975. Second, even where RPM could be used in states that permitted the practice, it often was accompanied by other vertical restraints, such as exclusive dealing or territorial restrictions, rendering difficult the determination of an RPM program’s impact empirically. Still, a number of interesting studies have been conducted, and while they tend to support the conclusion that RPM is typically used for efficiency-enhancing, not anticompetitive, reasons, some do point to anticompetitive uses of the practice.

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For example, a study by Ornstein and Hanssens in 1987 concluded that RPM facilitated the maintenance of anticompetitive cartel activities.⁷ They examined the distilled spirits industry, in which minimum resale prices were established by state-level regulation. One lesson from this study is that cartels that can rely on governments to enforce their pricing terms may be more successful, as the cartel members experience reduced monitoring costs and reduced incentives to cheat on the anticompetitive pricing terms.

In 1991, Pauline Ippolito examined approximately 200 litigations between 1976 and 1982 in which plaintiffs alleged anticompetitive RPM.⁸ In these matters, concerns about collusion were present approximately 15 percent of the time. This result does not imply that collusion occurred 15 percent of the time that RPM was practiced, but rather that collusion might have played a role in explaining the use of RPM in these cases. By the way, Justice Breyer, in his dissent in *Leegin*, questioned the validity of Ippolito's inference that collusion could potentially explain the use of RPM in only a small proportion of cases. In Justice Breyer's view, the *per se* illegality of RPM meant that plaintiffs did not need to include allegations of collusion in their legal complaints.

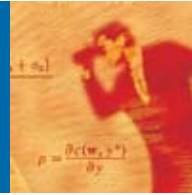
Wu: *Does the empirical evidence provide us with any lessons?*

Daniel: The empirical evidence provides us with some guidance on the circumstances in which RPM might have the potential to foster anticompetitive outcomes. First, if the minimum prices are set and enforced by a government agency, then some of the cartel's work is already done. Second, RPM is more likely to foster collusion—among either manufacturers or retailers—in less competitive markets. Also, RPM might foster collusion when all (or most) of the firms in a concentrated market adopt the practice. Conversely, RPM is less likely to foster collusion when only one or a few of the firms do so. Also, reducing the potential for free riding is less likely to be a valid

explanation for RPM when the product at issue is easier for ultimate consumers to evaluate without extensive service at the point of purchase. But, even here, we must be careful. For example, in a paper that was published in 1996, Pauline Ippolito and Tom Overstreet concluded that Corning relied on RPM to expand the number of retail outlets willing to carry its cookware, but cookware is arguably a product for which consumers do not need significant point-of-sale service.⁹

Meyer: It is also important to remember that economics can tell us quite a bit about when collusion is likely to work and when it is unlikely to be successful. Although RPM policies may increase the ability of other manufacturers and retailers to monitor prices, there are many other market characteristics that must be considered when analyzing an alleged collusive scheme. These characteristics include, but are not limited to, the symmetry of the manufacturers and/or retailers in terms of their products, product mix, and cost structure. The presence of a maverick, the market power of the firm(s) involved, the ability of firms to identify cheating, the profitability of cheating, and the likelihood and ability of firms to punish cheaters also matter. Consumers are more likely to be adversely affected by RPM in a regime with characteristics that are conducive to a cartel-like arrangement. In circumstances that are not conducive to collusion, such as markets in which there are numerous upstream and downstream competitors and low barriers to entry and exit, an RPM program, by itself, is not likely to be enough to lead to successful anticompetitive collusion. In such circumstances, RPM is likely to be efficiency-enhancing.

Wu: *You have mentioned several market facts that ought to be considered in a competitive analysis of RPM. But let's take that one step further. What empirical analyses or tests have you applied or seen applied to quantify or demonstrate the consumer benefits or harm associated with RPM?*



Meyer: I am sure we agree that the appropriate empirical tests will have to be determined on a case-by-case basis, with the results highly dependent on the facts of the case and the specific mechanisms that might lead to either a pro- or anticompetitive outcome. Having said that, I do think there are some identifiable lines of analysis that economists are likely to consider in post-*Leegin* RPM cases.

Putting aside direct evidence of collusion by retailers or manufacturers, the starting point for a rule of reason analysis in an RPM case has to be the consideration of whether the manufacturer has market power. However, the ability to exercise market power is a necessary, but not sufficient, condition for the types of anticompetitive effects that are likely to be alleged by plaintiffs in minimum RPM cases.

Wu: *How would you conduct a market power analysis in this context? Would you start by looking for supracompetitive pricing?*

Meyer: It's not that easy. Inferences about market power will likely be made based on traditional analyses of relevant market definition, the degree of substitutability among competing products, and market shares. However, basic economic theory tells us that RPM will likely lead to higher prices, whether the RPM program at issue is pro- or anticompetitive. In other words, even an RPM program that leads to increased prices may be procompetitive. This is why a price test may not be particularly helpful in these types of cases.

Daniel: Christine's point that RPM may lead to higher prices, even if it is used for procompetitive purposes, is important and often forgotten. Even Justice Breyer, who understands the arguments well, cited to evidence that RPM has price-increasing effects—but evidence of a price increase has no bearing on the competitive analysis.

Wu: *Does that mean that we should focus on an output test instead?*

Meyer: An output test is a reasonable place to begin an examination of whether the marketplace outcomes are consistent with the pro- or anticompetitive theories in the case. The specific test would ask whether sales are higher or lower in the RPM regime, as compared to a but-for world without the RPM program. If the RPM program were purely a scheme that was designed to enable collusion, output should fall, relative to the world without RPM. On the other hand, if the RPM program's procompetitive aims are met, sales should be higher than they would be without the program. Therefore, an important test for which of the two effects is dominant is a test of whether the program, on net, increases or decreases sales. For example, both Ippolito and Overstreet's analysis of Corning's RPM program and Ornstein and Hanssens' analysis focus on output.¹⁰

An output test is useful as a starting point, and in many cases will provide the correct answer, but there is an important caveat. A simple output test does not assess directly whether the gains to consumers who are made

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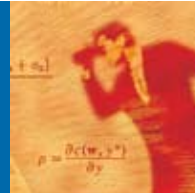
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better off by the RPM program exceed the reduction in consumer welfare experienced by other consumers who do not benefit from the RPM program and instead are made worse off by having to pay higher prices. If data are available, a test of the impact of the program on overall consumer surplus may be possible, and would more fully answer the question of whether, on balance, the RPM program is pro- or anticompetitive. Furthermore, a consumer surplus test would directly address one critique of output tests, namely, that, under certain restrictive conditions, consumer welfare does not increase with output-enhancing RPM. But it is worth reiterating that an output test is, in many instances, a good proxy for a consumer surplus analysis, and considerably easier to implement.

Wu: *If that's the case, then perhaps we should focus on tests that directly quantify the potential efficiencies and consumer benefits of the RPM program at issue?*

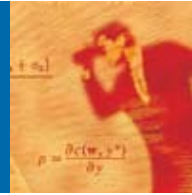
Meyer: A direct test of the specific procompetitive implications of the RPM program itself can often be a useful exercise. For example, in the case of an RPM program designed to increase advertising expenditures by retailers, a direct test could examine whether such increased expenditures accompanied the implementation of the RPM program. If a manufacturer indicated that it needed an RPM program to increase the number of retail outlets carrying his product, that proposition might be directly testable. However, two caveats are important. First, these tests must be viewed in light of other marketplace changes that may have occurred contemporaneously with the expected procompetitive result. Second, these tests require a benchmark against which to judge the program, and such benchmarks are not always available. The actual tests that are implemented will depend on the specific facts of the case, the procompetitive justifications being advanced, and the availability of data.

Daniel: This raises an interesting question. Suppose a firm implements an RPM program and—for reasons totally independent of RPM—suffers a decline in both demand and output. Will a group of plaintiff distributors who also suffer the decline in sales be inclined to sue the manufacturer, alleging that the RPM program reduced output? Will manufacturers have to be ready to explain to the court why the output decline was not related to the RPM program? What allegation and evidence will be sufficient for the plaintiff to survive a motion to dismiss? For example, if output goes down, is the allegation of anticompetitive effect now plausible? This goes back to my earlier point that firms that change their marketing practices may face greater antitrust risk than those that maintain the same policies over time.

Meyer: Good questions. But in this respect, analyses of harm to competition from RPM are not much different from analyses that are applied in other types of antitrust cases. In this regard, one important role for economists is to identify and distinguish the pro- and anticompetitive effects of the RPM program itself from other factors and events in the market.

Daniel: Christine is making a similar point to the one I made above—what evidence will be sufficient to assess properly the effect on competition from the imposition of an RPM program? As she notes, economists will need to be creative to develop benchmarks and credible but-for worlds so as to disentangle the empirical effects of RPM from other factors. This is a familiar role for economists in litigation matters involving vertical non-price restraints and commercial damages more generally.

Wu: *How would you approach the empirical question that Justice Breyer raised in his dissent? Specifically, how would you assess whether the free riding problem was serious enough in a particular instance to significantly deter*



dealer investment in presale services that are important to consumers?¹¹

Daniel: My first reaction is that the question presumes that the only reason RPM might be introduced would be to cure a free riding problem, which can arise when dealers that provide costly and beneficial point-of-sale services to potential customers find that they lose sales when customers who obtain the point-of-sale service from them actually make their purchases from no-frills retailers that can charge lower prices (because they don't provide the point-of-sale service). When this free riding occurs, the full-service retailer has diminished incentives to provide the valuable point-of-sale service, which implies that they will provide a lesser amount of such service, which implies further that consumers are less informed and thus less likely to purchase the product.

As we've discussed, there are a number of other procompetitive reasons why an upstream manufacturer might want to implement RPM, and an analysis of the effects of an RPM program would need to account for the presence of these alternative motivations. With that said, the short description of the free riding problem above provides some guidance as to what to look for empirically to assess whether the RPM program was introduced to deal with the free riding issue. The products involved would be ones for which consumers (or at least a significant proportion of them) would benefit from point-of-sale explanations and demonstrations—cameras, computers, and complex cell phones come to mind.

Second, after the RPM program was implemented, one would expect to see retailers incurring additional costs to provide these valuable point-of-sale services to consumers—there may be additional training of sales staff, greater allocation of valuable retail space to market the product, or increased retailer advertising of the products. One would also expect to see the proportion

of overall sales made through no-frills retailers diminish, perhaps significantly. Ultimately, if using RPM is the most efficient way for the upstream manufacturer to market its products, one would expect to see the upstream manufacturer's overall output increase after RPM was introduced. But this might take a little while to manifest itself given the costs that retailers would need to incur to provide these services effectively.

Schwartz: Tim, that example, it seems to me, highlights two important issues. First, analyzing RPM under a rule of reason is not the same as *per se* legality as some critics of the *Leegin* decision have asserted. There are hard questions about how we assess the economic impact of an RPM scheme and it is certainly not obvious—at least not to me—that under a rule of reason analysis, the defendant will always win. Situations such as the one you posit make for hard cases, and the economic evidence that will be needed to respond to those kinds of allegations and fact patterns make for difficult cases.

The second point is that your example also demonstrates the need to think broadly about the possible effects of an RPM policy—or any vertical restraint policy. In your example about the full-service and no-frills retailers, the underlying hypothesis in your test is that the full-service retailer's output is lower without RPM. But this may assume the conclusion. That may be right, but it is not correct as a matter of economic necessity. It begs the question of how firms actually behave when confronted with an RPM policy. That is where the hard economic analysis that will separate out the impact of RPM from everything else going in the market necessarily occurs and those analyses are not easy.

Meyer: There also may be some interesting natural experiments worth studying. Given the historical *per se* illegality of RPM policies, we may be able to compare the sales or sales growth of product launches without RPM

with the results of product launches that took place with an RPM policy in place. The comparison may help us gauge the effects that Tim eloquently outlined.

Wu: This returns us to the issue that we debated earlier, which is whether interbrand competition is greater with more vigorous retail price competition (i.e., intrabrand competition) or more vigorous promotional and retail sales efforts that may result from RPM. It seems to me that this is an empirical question, and while the path ahead may be uncertain after *Leegin*, the analyses and tests that you describe will certainly help guide the way. Thank you for a terrific discussion.

NOTES

- 1 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 US ____ (2007) (slip op.).
- 2 *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 US 373 (1911).
- 3 *Continental T.V. v. GTE Sylvania Inc.*, 433 US 36, 49 (1977) and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 US 209 (1993).
- 4 For a summary of the economics of RPM, see ABA Section of Antitrust Law, *Antitrust Law and Economics of Product Distribution* (Chicago, Illinois: American Bar Association, 2006) and Kenneth G. Elzinga and David E. Mills, "The Economics of Resale Price Maintenance," forthcoming in *Issues in Competition Law and Policy*, ed. Wayne D. Collins (Chicago, Illinois: American Bar Association) and available at <http://ssrn.com/abstract=926072>. Also see the Brief of *Amici Curiae* Economists In Support of Petitioner, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, January 22, 2007, and the economic literature that is referenced in that brief.
- 5 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 US 585 (1985) and *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 US 451,452 (1992).
- 6 See, for instance, Patrick Rey and Joseph Stiglitz, "The Role of Exclusive Territories in Producers' Competition," *RAND Journal of Economics* 26, 3 (Autumn 1995): 431-451.
- 7 Stanley I. Ornstein and Dominique M. Hanssens, "Resale Price Maintenance: Output Increasing or Restricting? The Case of Distilled Spirits in the United States," *Journal of Industrial Economics* 36, 1 (September 1987): 1-18.
- 8 Pauline M. Ippolito, "Resale Price Maintenance: Empirical Evidence from Litigation," *Journal of Law and Economics* 34, 2 (October 1991): 263-295.
- 9 Pauline M. Ippolito and Thomas R. Overstreet, Jr., "Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works," *Journal of Law and Economics* 39 (April 1996): 285-328.
- 10 See Ippolito and Overstreet, "Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works" (as cited in note 9) and Ornstein and Hanssens, "Resale Price Maintenance: Output Increasing or Restricting? The Case of Distilled Spirits in the United States" (as cited in note 7).
- 11 See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 US ____ (2007) (slip op., at 9) (Breyer, J., dissenting) (as cited in note 1).

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