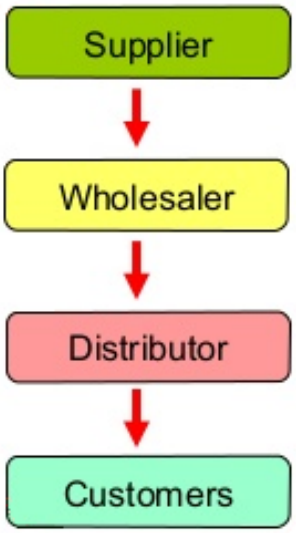
Vertical Restraints of Trade

February 11, 2019

Eva W. Cole
Winston & Strawn LLP

Definition of Vertical Restraints

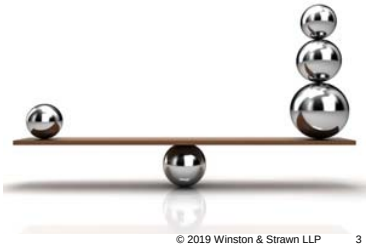
- ***Vertical*** restraints are agreements, understandings, or other anticompetitive measures undertaken between *different levels* of production, distribution, or supply—for example, between a manufacturer and a retailer.
  - **Intrabrand:** imposed *within* a brand or single manufacturer's products
  - **Interbrand:** imposed *across* and *between* brands or competitors
- Vertical restraints influence **price** *or* **other product, contract, or market attributes** that have potential to affect competition.



Rule of Reason

- Courts use the "rule of reason" standard to determine whether most vertical restraints unreasonably restrict competition.
- "To determine this question, the court must ordinarily consider the facts peculiar to the business, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable." *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

- What harms to competition may result?
- Is there a pro-competitive reason for the restraint?
- Is there a better way to achieve the pro-competitive objective of the restraint which would result in less harm to competition?

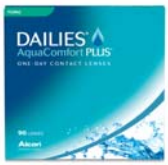


Resale Price Maintenance ("RPM")

- An agreement between a manufacturer and a distributor or a retailer that stipulates the price at which the products will be sold, i.e., **the supplier requires the seller to resell its product at some specific price.**
- Where those agreements set a minimum, they can run afoul of competition laws.
  - In ***Leegin Creative Leather Products v. PSKS Inc.*,** 551 U.S. 877 (2007), the Supreme Court overruled earlier precedent that deemed such agreements *per se* illegal and determined that rule of reason analysis should instead be applied in assessing RPMs because of possible procompetitive effects.

RPM: Recent Example

- ***In re Disposable Contact Lens Antitrust Litigation***, No. 3:15-md-02626-HES-JRK (M.D. Fla. Dec. 4, 2018)
  - Complaint alleged that various manufacturers of disposable contact lenses, e.g., Alcon Labs, Inc., Johnson & Johnson Vision Care, Inc., Bausch & Lomb Inc., and CooperVision, Inc., and wholesaler, ABB Concise Optical Group, LLC engaged in a **"hub-and-spoke" conspiracy to impose RPMs** on contact lens lines by subjecting them to unilateral pricing policies, which in turn, reduced or eliminated price competition by preventing retailers from discounting those products.
  - On December 4, 2018, the Middle District of Florida certified a class of consumers of all U.S. residents who made retail purchases of lenses made by Alcon, Johnson & Johnson or Bausch & Lomb from June 1, 2013 to present.



Resale Price Maintenance Under State Law

- **Post-*Leegin*, some states continue to treat minimum RPM as *per se* illegal under their state antitrust laws.**
  - **California** - *California v. Bioelements, Inc.*, No. 10011659 (Cal. Super Ct. Jan. 11, 2011) (settled with permanent injunction in 2011).
  - **Maryland** - Md. Code Ann., Com. Law §§ 11-201 *et seq*.
  - **Kansas** - *O'Brien v. Leegin Creative Leather Products, Inc.*, No. 101,000 (Kan. Sup. Ct. May 4, 2012) ("*Leegin II*")
  - **New York** - depends: Courts have thus far rejected NY AG's argument.
    - NY AG cites to New York General Business Law § 369(a), which provides that "any contract provision that purports to restrain a vendee of a commodity from reselling . . . at less than the price stipulated by the vendor or producer is unenforceable."
    - *New York v. Tempur Pedic Int'l Inc.*, 2011 WL 198019, at *5 (N.Y. Sup. Ct. Jan. 14, 2011)
      - The New York Supreme Court held that RPM is not an "illegal act" – the language of the applicable provision makes such contracts *unenforceable, but not illegal*.

Anti-Steering Rules

Ohio v. American Express Co.
No. 16-1454, 585 U.S. __ (2018)

- DOJ and State AGs alleged American Express (Amex) violated antitrust laws by contractually barring merchant customers from steering cardholder customers to credit cards that charge merchants lower fees.
- EDNY held: Amex's contracts violated § 1 of the Sherman Act in a two-sided market by stifling competition among credit card companies for merchant fees and competition among credit card companies for consumers' purchases.
- Second Circuit reversed: held that to show harm to competition, government needed to show *not only* anticompetitive effects on the merchant side, ***but also*** that these anticompetitive effects outweighed any benefits on the cardholder side. ***United States v. American Express,*** 838 F.3d 179 (2d Cir. 2016).
- Supreme Court affirmed: held that Amex's anti-steering provisions do not violate federal antitrust law.

Exclusive Dealing Arrangements

- A supplier may prohibit a distributor from selling products made by a competing supplier, or may incentivize a distributor or dealer to focus on its brand of products.

United States v. Dentsply
399 F.3d 181 (3d Cir. 2005)

- Dentsply wouldn't sell to a dealer unless the dealer agreed to "not add further tooth line [i.e. sell competitor's products] to their product offering."
- None of Dentsply's dealers gave up Dentsply's product line to take on a competitor.
- Third Circuit held that Dentsply's exclusive dealing agreements had substantial anticompetitive threats.
- **Exclusive dealing arrangements can violate Sherman Act § 2 if manufacturer has monopoly power and the effect of the arrangement is to block competitors' access to consumers or end users.**

Exclusive Dealing Arrangements

Methodist Health Servs. Corp. v. OSF Healthcare Sys.
859 F. 3d 408 (7th Cir. 2017)

- Competitor hospital alleged that certain exclusive dealing agreements between the largest hospital in the area and major payers (e.g. Blue Cross) substantially foreclosed its ability to compete for insured patients' business.
- District court refused to conclude that the contract alone was enough to prove foreclosure, focusing on how competition works in the market to determine that any foreclosure of plaintiffs was the same.
  - Certain patients were not excluded: foreclosure amounted to 15-22%
  - Agreements were renegotiated every 1-2 years
- Seventh Cir. affirmed, focusing on (1) plaintiff's periodic opportunities to become the exclusive provider (noting that competition-for-the-contract is a form of competition that is protected by the antitrust laws); and (2) lack of harm to consumers, pointing out that no insurers, other hospitals, or the DOJ had joined suit.

Most Favored Nations ("MFN") Clauses

- MFN clauses guarantee a party to a contract that it is receiving the best deal that the other party will offer to anyone (e.g. no one will pay a lower price for the same good).
- MFN clauses are generally considered pro-competitive, but DOJ has challenged their use by companies with monopoly power.

Most Favored Nations Clauses

Blue Cross Blue Shield of Michigan

United States et al. v. Blue Cross Blue Shield of Michigan
2:10-cv-14155-DPH-MKM (E.D. Mich. 2010)

- DOJ complaint claimed that Michigan's biggest health care provider—Blue Cross Blue Shield ("BCBS")—used MFN clauses to prevent other health plans from entering local markets in the state, thus stifling competition, raising health care costs, harming consumers, and preventing other health plans from entering local markets.
- The relevant MFN clause prevented health care providers from charging BCBS a rate higher than the lowest reimbursement rate the provider agrees to with any other insurer.

In re Vitamins Antitrust Class Actions
215 F.3d 26, 28 (D.C. Cir. 2000)

- DC Circuit affirmed district court's denial of motion by presumptive class members who had opted out of class settlement to intervene in an appeal of the settlement on the basis that they lacked standing.
- Appellants had sought to oppose the MFN clause "requiring defendants to hike their payments to the class in the event that within two years of that date they reached a more favorable settlement with a plaintiff who had opted out of the class."

 11

Tying Arrangements

- Elements:
  - two separate products or services;
  - sold or leased;
  - on condition that the buyer or lessee take both;
  - if seller or lessor has sufficient economic power in tying product market;
  - coercion (tie must be coerced and not mere a not mere package sales or lease); and
  - effect "may be to substantially lessen competition or tend to create a monopoly."

United States v. Microsoft
253 F.3d 34 (D.C. Cir. 2001)

- Microsoft was found to have violated antitrust laws for tying Internet Explorer web browser software with its Microsoft Windows operating system.
- This bundling was allegedly responsible for Microsoft's victory in the "browser wars," as every Windows user had a copy of Internet Explorer.
- In settlement agreement, Microsoft agreed to allow manufacturers of personal computers to adopt non-Microsoft software.

 12

Questions

WINSTON & STRAWN LLP