Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?

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This past June, in a sharply divided five-to-four opinion, the U.S. Supreme Court decided the landmark case Leegin Creative Leather Products, Inc. v. PSKS, Inc.¹ and held that, henceforth, minimum resale price maintenance would be examined under the more lenient rule of reason rather than remaining a per se violation of Section 1 of the Sherman Act.² In doing so, the Court overruled a ninety-six-year-old precedent, Dr. Miles Medical Co. v. John D. Park & Sons Co.³

Simply defined, resale price maintenance (RPM), which is also known as vertical price-fixing, involves a supplier or franchisor’s attempt to control the price at which its distributors, dealers, or franchisees resell the goods supplied to them. Under the rule of per se illegality, a defendant was not permitted to offer a defense or justification for the practice. The per se rule was particularly burdensome to franchisors attempting to create national account pricing programs, whereby the franchisor would negotiate the price and other contract terms under which its franchisees would provide goods or services to large national or regional customers.⁴ Under the rule of reason, by contrast, in order to prevail on an RPM claim, an antitrust plaintiff must prove substantial harm to competition in the market as a whole (interbrand competition), not just to competition between franchisees of a particular brand. Further, a defendant supplier or franchisor has the right to offer evidence of off-setting pro-competitive justifications for the practice, such as the provision of high levels of service or the protection of brand equity.⁵

The advent of the post-Leegin world has been welcomed by many suppliers with great anticipation. It may be that RPM will prevail but there are several impediments to such an outcome. The Leegin majority itself recognized the anticompetitive potential in some RPM schemes, especially those that originate horizontally, e.g., from a cabal of competing dealers pressuring a manufacturer for protection from one or more discounting dealers.⁶ Further, the existence of power buyers in many markets (the Wal-Marts of the world) may preclude manufacturers from imposing RPM restrictions. Legislative action at the federal level is afoot to overturn Leegin; Senators Herb Kohl (D-WI) and Joseph Biden (D-DE) introduced a Discount Pricing Consumer Protection Act (S. 2261) on October 20, 2007, and FTC Commissioner Pamela Jones Harbour has supported such legislation.

This article explores yet another barrier to widespread adoption of RPM programs, one that is particularly applicable to franchisors seeking to negotiate national account pricing or to establish nationwide minimum pricing: state antitrust laws. Nearly all states have antitrust statutes, and those few that do not have such laws regulate anticompetitive conduct through consumer protection statutes or common law theories. The good news, at least for those who favor uniform national economic regulation, is that most state courts follow federal antitrust precedent, either because of statutory command or a decisional preference for uniform operation of state and federal antitrust laws. However, a significant minority of states feel themselves relatively unbound by federal precedent, and even those that do follow federal decisional law generally leave themselves an escape route if federal law varies from state statute or putative state policy goals.

This article reviews the current statutory and decisional law on RPM in the fifty states and the District of Columbia, and offers some predictions on which are likely to continue to prohibit RPM. Because this area of the law is now rapidly changing, it is also foreseeable that state legislatures will attempt to pass new statutes prohibiting RPM in reaction to Leegin. Twenty-five states did just that to permit “indirect purchasers” to sue for monetary damages after the Supreme Court held in Illinois Brick Co. v. Illinois that such purchasers lacked standing to sue under federal antitrust law.⁷ Ultimately, Leegin does offer significantly greater leeway to suppliers to regulate their customers’ pricing behavior and for national account pricing programs in particular to flourish. However, during the transition to the post-Leegin world, franchisors must still take care when designing sales and distribution programs to assess the likely response of individual states to restraints on resale prices.

State Levels of Adherence

Most states have antitrust statutes containing provisions analogous to, or the same as, Section 1 of the Sherman Act. In fact, only four states—Arkansas, Vermont, Georgia, and Pennsylvania—do not.⁸ Consistent with the manner in which many

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state statutes parallel the language of federal antitrust provisions, the majority of states also give deference to federal decisional law when interpreting their state antitrust statutes. There are exceptions for instances in which the state statutory language differs significantly from that of the Sherman Act or when the state legislature has expressed a policy interest at odds with federal precedent.

As a general matter, it is possible to group states into three categories, each representing the level of deference to federal antitrust precedent:

1. those states whose adherence to federal precedent is strong or moderately strong
2. those whose adherence is permissive
3. those states where adherence is limited or where it is unclear whether federal decisional law provides substantial guidance to courts interpreting state law.

Provided that a state has not prohibited RPM outright under its own statutory provisions, a state’s level of adherence to federal precedent when interpreting its own antitrust provisions should provide franchisors with guidance about the likelihood that a given state’s courts will follow the Supreme Court’s reasoning in Leegin and evaluate state-law RPM claims under the rule of reason.

### Thirteen States Prohibit RPM

Regardless of a state’s general level of adherence to federal antitrust precedent, there are thirteen states that appear to explicitly prohibit RPM under their own state antitrust or related trade regulation statutes. State statutes can have language that goes beyond that of Section 1 of the Sherman Act, specifically addressing vertical price-fixing. Such provisions have been interpreted—or could easily in the future be interpreted—as constituting per se bans on RPM regardless of federal authority. Eleven states whose antitrust and trade regulation statutes appear to go beyond the Sherman Act in prohibiting vertical price-fixing are California,9 Connecticut,10 Kansas,11 Mississippi,12 Montana,13 Nevada,14 New Hampshire,15 Ohio,16 South Carolina,17 Tennessee,18 and West Virginia.19 Additionally, in New York and New Jersey, statutes amending or repealing those states’ fair trade laws in the 1970s declare contractual provisions imposing RPM unenforceable.20 Thus, notwithstanding the following discussion, in these thirteen states, there is substantial doubt that the courts will follow Leegin in interpreting state antitrust law. Caution is called for in implementing resale price controls in these states until their courts clarify the legal standard that will govern such practices.

### Thirty-Six States Adhere Strongly

In positive news for franchisors, thirty-six states adhere strongly21 or moderately strongly22 to federal antitrust precedent, particularly in cases involving state statutory provisions analogous to the Sherman Act. Many of the states fall into the strong or moderately strong categories because of mandatory statutory language directing courts to look to federal precedent when interpreting state law. For example, the antitrust statutes in Delaware, Hawaii, Idaho, and Iowa, among others, all indicate that state law “shall be construed” in harmony or accordance with federal law.23

In strong or moderately strong adherence states where there is no statutory directive, the courts have indicated that federal statutes are to inform state construction. Alabama is one example where the state’s supreme court dictated that “federal statutes . . . prescribe the terms of unlawful . . . restraints of trade as they should also be administered” under state law.24 States with moderately strong adherence to federal decisional law, on the other hand, generally have softer statutory language. Colorado’s statute, for example, states that “courts shall use [federal decisional law] as a guide.”25 Case law in these states generally directs the courts to view federal decisional law as persuasive26 or influential.27

In these thirty-six states, some courts have specifically addressed adherence to federal decisional law in the context of RPM, providing franchisors with further insight into how such states may respond to Leegin. Minnesota, Texas, New

| Potential State Law Bar to Resale Price Maintenance | California, Connecticut, Kansas, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, South Carolina, Tennessee, West Virginia |
| Permissive Adherence to Federal Precedent and No State-Law Bar | Arizona, North Carolina, South Dakota, District of Columbia |
| Uncertain Adherence to Federal Precedent and No State-Law Bar | Arkansas, Georgia, Maine, North Dakota, Vermont, Wyoming |
| Evaluates Resale Price Maintenance Under Rule of Reason | Illinois |

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Jersey, and New York provide good examples of the range of approaches possible in states whose adherence to federal precedent is strong or moderately strong under their own statutory schemes.

Minnesota

The Minnesota Antitrust Law of 1971 contains a provision analogous to Section 1 of the Sherman Act, prohibiting the “unreasonable restraint of trade or commerce.” The Minnesota courts have explicitly acknowledged that they are to interpret the state antitrust statute in accordance with federal precedent unless there is a clear conflict between the two. This preference is based on the courts’ desire to ensure that businesses are able to predict the outcome of decisions that implicate antitrust laws and to facilitate government enforcement of those laws. Consequently, when the Minnesota Court of Appeals had the occasion to rule on whether RPM was per se illegal under state law, it looked to then-existing federal precedent to support its determination that it was.

In *State v. Alpine Air Products Inc.*, the defendant, a manufacturer and distributor of air purifiers required that its dealers “sign a written contract . . . to sell the purifiers at the manufacturer’s suggested retail price.” This contract was “a condition of the [sales] relationship.” The court quickly concluded that Alpine Air had engaged in vertical price-fixing and referenced federal case law in order to determine the appropriate standard under which to evaluate the legality of the practice. Ultimately, the court concluded that, given the *Dr. Miles* case, RPM must be per se illegal under the Minnesota statute as well. Interestingly, there is also strong language in *Alpine Air* regarding the anticompetitive effect of vertical price-fixing but it appears that the court’s aversion to RPM was closely tied to the former federal disdain for the practice.

If the Minnesota courts continue to look to federal case law as a guide for interpreting provisions analogous to the federal Sherman Act, they likely will analyze state-law RPM claims under *Leeinin’s rule-of-reason standard*. As a result, franchisors’ ability to establish minimum resale prices for franchisees increases, provided that they are mindful that the net effect of the restraint does not substantially reduce interbrand competition in the market.

It is important to note, however, that while Minnesota courts have closely adhered to federal precedent in the few RPM cases that have come before them, the Minnesota attorney general was one of thirty-seven state attorneys general that submitted a brief to the Supreme Court urging it not to overrule *Dr. Miles* in *Leegin*, thereby advocating for the continuance of the per se rule. Whether this anti-rule-of-reason mentality will persist despite the result in *Leegin* is yet to be seen.

Texas

Texas is another example of a state where, post-*Leegin*, franchisors should be able to set resale prices to a greater degree. The Texas Free Enterprise and Antitrust Act of 1983 contains a provision analogous to Section 1 of the Sherman Act. In the statute, the Texas legislature specifically directs that the courts be “guided by interpretations given by the federal courts to comparable federal antitrust statutes” when interpreting the state’s antitrust law.

One of the few Texas cases addressing manufacturer practices that establish minimum resale prices is *Texas v. Head Sport Wear, International*. In *Head Sport Wear*, a Texas trial court addressed allegations that Head had been setting minimum resale prices for its line of tennis sportswear in Houston. The manufacturer entered into a consent decree agreeing not to engage in price-fixing behavior and additionally agreeing to place a “conspicuous legend” on promotional and sales material “explaining that a retail dealer is free to determine its own resale price.”

Despite the limited case law with regard to RPM, given the Texas courts’ general adherence to federal decisional law in other areas of antitrust litigation, it is likely that courts will continue to analyze RPM claims under Texas law in accordance with federal precedent. If so, then franchisors will be able to contract for minimum resale prices under the rule of reason.

New Jersey

Section 3 of the New Jersey Antitrust Act is modeled after Section 1 of the Sherman Act, and, as in Texas, the New Jersey statute explicitly directs courts to construe its provisions “in harmony with ruling judicial interpretations of comparable Federal antitrust statutes.” As a result, courts interpreting state law often analyze state and federal law claims together.

The New Jersey Supreme Court specifically addressed the legality of minimum RPM by a franchisor under state law in *State v. Lawn King, Inc.*, finding that the practice was per se illegal. The court made this determination in accordance with federal decisional law at the time, namely *Dr. Miles*. Ultimately, however, the New Jersey court found that there was no price-fixing. Soon thereafter, in *Glasofer Motors v. Osterlund, Inc.*, a lower court reiterated the per se illegality of RPM under state law, again specifically citing federal case law. But as in *Lawn King*, the Glasofer court also found no evidence of price-fixing.

The principal barrier to New Jersey courts following *Leegin* and applying the rule of reason to RPM lies in the statute the state passed to repeal its fair trade law. That 1975 statute declares contract provisions that impose minimum RPM to be unenforceable. Another indication of New Jersey’s hesitancy to apply the rule of reason to minimum RPM is the fact that the New Jersey attorney general was one of the signatories to the amicus brief that argued for the continuance of the per se ban on the practice.

New York

New York’s antitrust act, the Donnelly Act, also contains a provision analogous to Section 1 of the Sherman Act, and it has often been referred to as a Little Sherman Act. While unlike Texas or New Jersey, there is no statutory provision
directing New York courts to look to federal precedent when interpreting the Donnelly Act, the New York Court of Appeals has ruled that the state statute’s provisions “should generally be construed in light of Federal precedent.”

“[O]nly where State policy, differences in the statutory language or the legislative history justify such a result” should state construction differ from federal law. Anheuser-Busch, Inc. v. Abrams provides an example of the state’s preferred adherence to federal precedent. In that case, the state appellate court refused to condemn vertical territorial restrictions as per se illegal because “it would [have] result[ed] in an interpretation of the Donnelly Act at odds with the settled interpretation of its Federal counterpart,” namely, Continental T.V. v. GTE Sylvania, which held vertical territorial restrictions to be subject to the rule of reason. Specifically with regard to RPM, pre-Leegin courts interpreting New York law found the practice per se illegal in accordance with federal precedent and have also invalidated contracts that establish minimum prices under the New York General Business Law § 369-a. In Carl Wagner & Sons v. Appendagez, Inc., for example, a jeans manufacturer/distributor informed one of its retailers that the company’s policy was to sell jeans at “‘keystone’ prices, an industry term meaning a 100% advance over the retailer’s cost.” The retailer saw that the jeans line was being discounted at other stores in the area and marked-up the product “only 80% over wholesale price.” Other retailers complained to the manufacturer and, as a result, the manufacturer threatened to discontinue supplying jeans if the retailer did not sell them at keystone prices. Ultimately, the manufacturer cut off the retailer’s supply. The U.S. District Court for the Southern District of New York found that under the Donnelly Act the contract between the retailer and manufacturer was invalid, drawing attention to the fact that the state law was “modeled” on the Sherman Act, which prohibited such a practice. The court further invalidated the contract between the retailer and the manufacturer under the New York General Business Law.

Consequently, while New York’s Donnelly Act does not direct courts to look to federal decisional law as antitrust precedent in all cases, given the history of the courts in relying on federal precedent in the context of RPM and vertical nonprice restraints, it is likely that the New York courts will now adhere to the rule of reason, as directed by Leegin.

Franchisors should be cautious, however, because unlike many states that repealed their fair trade laws following the repeal of the Miller-Tydings Act (or after the laws were found to violate state constitutional provisions), New York did not repeal its fair trade law. Instead, the state assembly amended it to declare unenforceable the types of RPM contracts that the law had previously allowed. Consequently, until the state assembly again amends this provision, contracts authorized by Leegin may still be invalid in New York. Of interest, during the period when New York had a fair trade law, the New York courts ruled that even without the authorization that the fair trade law provided, minimum RPM was not per se illegal under the Donnelly Act. If the statutory impediment of § 369-a is removed, RPM should be analyzed under the rule of reason by state courts.

Adherence in Five States and D.C. Is Permissive

While the majority of states adhere strongly or moderately strongly to federal antitrust precedent, there are at least five states where adherence is better classified as permissive. Those states are Arizona, Kansas, North Carolina, South Dakota, and Tennessee. The District of Columbia also falls into this camp. The more lax adherence to federal antitrust precedent is conveyed in a number of ways. First, the language of the antitrust statutes indicates that the courts may look to federal precedent to inform their construction of state law as opposed to using firmer language such as shall. This is the case in Arizona, South Dakota, and the District of Columbia. Second, in both Kansas and North Carolina, there are no statutory provisions directing the courts one way or the other in terms of adherence to federal precedent, but courts in those states have found that while federal case law may be helpful, it is certainly “not binding.”

Another indicator of a state’s reluctance to turn to federal law as authority on antitrust issues is case law in which the state deviated from federal practice. This has occurred in the context of the rights of indirect purchasers in both Arizona and Tennessee. Given the more permissive statutory language or the courts’ past reluctance to rely on federal decisional law to construe state antitrust provisions, it is difficult to determine whether these states will adopt Leegin’s reasoning. A closer look at Arizona demonstrates this lack of clarity.

Arizona

The Arizona Uniform State Antitrust Act is patterned after federal law. In line with most states, it includes a provision that is analogous to Section 1 of the Sherman Act. As mentioned, Arizona’s statutory directive concerning whether courts should look to federal precedent in interpreting state law is more permissive than the majority of states since “the courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes.” Interestingly, while Arizona courts are not required to follow federal case law, there are numerous instances in which courts have explicitly held that adherence to federal precedent is appropriate. In fact, in Wedgewood Investment Corp. v. International Harvester Co., the Arizona Court of Appeals concluded that “[t]he
Arizona legislature clearly intended to strive for uniformity between federal and state antitrust laws.”

However, in a more recent case, Bunkers Glass Co. v. Pilkington PLC, which held that indirect purchasers could sue in state court for antitrust violations, the Arizona Supreme Court declined to follow the federal Illinois Brick decision. Instead, the court indicated that it must look to the specific nature of the holdings of the cases where the courts followed federal precedent to see if they held weight in the present case. By doing so, the court determined that Arizona courts have “followed federal law in determining the standard of conduct required by antitrust law” and “not for guidance on the threshold issue of who may bring a state-law-based claim in a state court.”

There are very few cases dealing directly with the legality of RPM under Arizona law. In Dunn v. Phoenix Newspapers, Inc., the Ninth Circuit, applying Arizona law, found that there was no antitrust violation relating to RPM because there was no express agreement to fix prices. The court’s analysis addressed only the federal law at issue in the case, but the last paragraph of the opinion indicated that the lower court did not err in disposing of both the state and federal claims together because Arizona law “incorporates federal court interpretations.” While the Ninth Circuit’s language overstates the case, and Arizona as a general matter does not fall within the strong-adherence category because of permissive statutory language and past practice, it appears that Arizona courts are likely to follow federal precedent when determining the legality of RPM.

**Eight States Have Limited Adherence**

Eight states federal precedent is not necessarily controlling or it is unclear what level of deference the states give federal decisional law. In Arkansas, Georgia, Montana, Vermont, and Wyoming, the level of adherence to federal precedent is essentially a blank slate—neither the courts nor the legislature have explicitly addressed the matter and there is limited or no case law providing material guidance.

Maine and North Dakota also fall within this category but there is at least some indication that federal precedent could be authoritative. A federal court in Maine, for example, noted that state law parallels the Sherman Act and then ruled on both state and federal antitrust claims in the same manner. In North Dakota, the attorney general has acknowledged the lack of guidance, yet relied on federal precedent in at least one opinion.

**California**

The remaining state that falls within this category is California. California’s antitrust statute is known as the Cartwright Act, and its provisions address activities similar to those contained within Section 1 of the Sherman Act. Despite similarities between federal and state law, however, the California Supreme Court stated in California ex rel. Van De Kamp v. Texaco that “judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters’ intent.” The legislative history of the Cartwright Act indicates further that it was not modeled after the Sherman Act but rather upon the state laws of Michigan and Texas. While the California Supreme Court has thus cautioned against allowing federal decisional law to hold too much weight, courts construing the Cartwright Act consistently cite to decisions preceding Van De Kamp for the proposition that federal law is influential.

The California Supreme Court explicitly addressed the legality of RPM in Mailand v. Burckle. There, franchisees agreed to operate a dairy and gas station owned by the defendants. The agreement between the franchisees and the defendants required the franchisees to purchase gasoline from Powerine Oil Company. It further “provided that defendants could set the price of gasoline” that the franchisees sold “in exchange for a guaranteed profit of seven percent” to the franchisees on gasoline sales. The defendants, in turn, “collected a rebate from Powerine for each gallon of gasoline Powerine sold” to the franchisees.

After two years of adhering to the agreement, the franchisees sued the defendants, claiming that they were unlawfully setting the price at which the franchisees could sell gasoline. The court concluded that such price-fixing constituted an “illegal restraint of trade as a matter of law” and ruled in favor of the franchisees. Of interest, the California Supreme Court based its conclusion in part on the idea that federal precedent in the area required such a result because the Cartwright Act was patterned after the Sherman Act, a notion that, as mentioned, that same state supreme court has since rejected.

More recently, the California Court of Appeal has been forceful in asserting that RPM violates the Cartwright Act, independently of the Sherman Act. In Kunert v. Mission Financial Services Corp., that court stated:

A vertical price-fixing or resale price maintenance agreement between supplier and distributor destroys horizontal competition as effectively as would a horizontal agreement among distributors or retailers and is per se unlawful under the Cartwright Act.

Interestingly, there are a few older California cases which adopted a rule of reason approach to RPM and found it not to be an unreasonable practice, even post-Dr. Miles, if the supplier did not control a sizeable portion of the market for the product at issue. These cases do not reflect the current California courts’ treatment of the subject under state law.

In addition to simply stating that RPM is a per se violation of the Cartwright Act, California courts have defined the test of its legality as “whether the agreement, or conduct, interferes with the freedom of sellers or traders in such a manner as to prohibit or restrain their ability to sell in accordance with their own judgment, and not what the particular effect the agreement or conduct has on the actual prices.” Consequently, it appears that because of the general
reluctance of California courts to strictly follow federal antitrust precedent and the standard by which the courts there analyze RPM, California is unlikely to follow Leegin in addressing RPM claims under the rule of reason.

**Illinois**

At the present, it appears that the antitrust statute in only one state, Illinois, is consistent with the Supreme Court’s decision in *Leegin*. The Illinois Antitrust Act does not contain provisions analogous to federal antitrust provisions although it does generally prohibit unreasonable restraints on trade. Additionally, under that act, price-fixing is only per se illegal when it occurs between competitors. As a result, RPM is not prohibited unless it “unreasonably restrains trade or commerce.” In other words, RPM practices are subject to a rule-of-reason analysis, not a per se rule, under the current statutory structure.

The U.S. District Court for the Northern District of Illinois articulated this reading of the statute in *Nichols Motorcycle Supply v. Dunlop Tire Corp.* In *Nichols*, a car tire distributor sued the manufacturer, claiming that the manufacturer was involved in vertical price-fixing, among numerous other antitrust violations. In response, the court held that the distributor’s claims of vertical price-fixing “fail as a matter of law” because the relevant state law “necessarily requires a rule of reason analysis of the ‘economic purposes and consequences’ of the agreement.” The statute, consequently, “does not contemplate per se violations” outside of the realm of competitors.

Because it appears that Illinois already adheres to the rule of reason to analyze vertical price-fixing, *Leegin* poses no novel issue for the state’s law. Franchisors should be able to contract for minimum resale prices to the same extent as they could before *Leegin*.

**State Attorneys General and RPM**

Despite general state adherence to federal precedent, many state attorneys general are averse to using the rule of reason to evaluate RPM claims. As noted above, in connection with *Leegin*, thirty-seven state attorneys general led by New York submitted a brief to the Supreme Court urging it to maintain the per se bar against minimum RPM and not to overrule *Dr. Miles*. Many of the states that signed as amici curiae generally adhere strongly or moderately strongly to federal precedent. A few of the states are less likely to adhere to federal precedent, however.

Further, the antitrust guidelines issued by the National Association of Attorneys General in 1985, and revised in 1995, identify RPM as per se illegal.

The participation of so many attorneys general in opposing the switch to the rule of reason may also indicate that even if state courts do follow federal precedent on the issue, the state attorneys general will be closely monitoring the activities of those engaging in RPM, or they may propose legislation in their respective states. As an example, following the *Leegin* decision, Connecticut Attorney General Richard Blumenthal publicly expressed his “disappointment” with the ruling and stated that he had “significant concerns” about the decision. Blumenthal explained that the *Leegin* decision “potentially jeopardize[es] discounters and ultimately consumers who will pay higher prices for products.” He continued by warning RPM participants that “his office will monitor the marketplace, and take action to protect consumers, if necessary.”

**Fair Trade Laws**

Another potential indicator of the state response to *Leegin* may be found in particular states’ prior adoption of so-called fair trade laws. As described earlier, during their existence, these laws expressly authorized the practice of RPM and were exempted from the scope of Section 1 of the Sherman Act by the Miller-Tydings Act of 1937. Ultimately, many of these state statutes were either struck down as violative of state constitutional provisions or repealed following the passage of the Consumer Goods Pricing Act of 1975, which repealed the Miller-Tydings Act.

Four states never passed fair trade laws: Alaska, Missouri, Texas, and Vermont.

**Conclusion**

*Leegin* will change the legal landscape in favor of a much more permissive judicial attitude toward RPM, certainly at the federal level and ultimately at the state level as well. Because the majority of states follow federal antitrust precedent fairly scrupulously, we can expect state law to follow federal law in this area, perhaps after three or four years of accumulating decisional law. In particular, if courts in states with a hospitable attitude toward federal antitrust precedent, and a reasonably well-developed base of state antitrust jurisprudence, such as Arizona, Colorado, Minnesota, Florida, or Texas, accept *Leegin*’s economic analysis of RPM and decide to treat the practice under the rule of reason, such decisions can have a domino effect in moving other states toward adoption of what will become a de facto national rule-of-reason standard for RPM.

However, there are approximately thirteen to seventeen states—notably California and New York, but also Arkansas, Connecticut, Georgia, Kansas, Mississippi, Montana, Nevada, New Hampshire, New Jersey, Ohio, South Carolina, Tennessee, Vermont, Wyoming, and West Virginia—in which, due to an idiosyncratic combination of state constitutions or statutes addressing the topic specifically, and judicial independence from federal antitrust precedent generally, there is doubt whether *Leegin* will be followed. Until that doubt is resolved, by judicial decision or statutory revision, franchisors and other suppliers of goods will still have to exercise caution in implementing national account programs or other programs controlling the price at which franchisees and distributors resell goods.

**Endnotes**


2. 15 U.S.C. § 1. Section 1 of the Sherman Act bars “[e]very contract, combination . . . or conspiracy, in restraint of trade.” The courts have never enforced this prohibition literally, applying it only to unreasonable restraints of trade. Justice Brandeis provided the classic
formulation of the rule of reason in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918):

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences.

The Supreme Court has continued to rely on this statement to analyze conduct under the rule of reason. E.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 n.15 (1977) (holding vertical territorial distribution restraints subject to rule of reason, and overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)). However, certain practices, notably price-fixing and market division among horizontal competitors and, until *Leegin*, vertical price-fixing between suppliers and customers, have been deemed unreasonable per se and hence unlawful. *See* State Oil Co. v. Khan, 522 U.S. 3, 10–11 (1997) (tracing development of per se rule against resale price maintenance and then holding that maximum resale price maintenance would be analyzed under the rule of reason, overruling Albrecht v. Herald Co., 390 U.S. 145 (1968)).

1. 220 U.S. 373 (1911).


6. *Id.* at 2717.

7. 431 U.S. 720 (1977). A search as of the date of completion of this article located no states in which legislative action to prohibit RPM had been proposed. This article will not examine the subject of potential federal preemption of state statutes governing RPM. However, the federal courts have generally been solicitous of joint state regulation in the antitrust field. The Supreme Court has specifically upheld state indirect purchaser statutes against a preemption challenge pursuant to the U.S. Constitution, so long as the state statutes confine themselves to actions under state law. *See* California v. ARC Am. Corp., 490 U.S. 93 (1989).

This article also does not attempt to define the outer jurisdictional boundaries of state antitrust laws. While most state statutes theoretically confine themselves to conduct having an intrastate effect, one cannot reliably assume that merely because a business buys or sells across state lines that state courts will not find intrastate harm to competition sufficient to trigger jurisdiction under state antitrust law.


9. *See infra* notes 88–99 discussing California’s statutory antitrust provisions.

10. The Connecticut Antitrust Act outlaws “any contract, combination, or conspiracy” that has the effect of “[f]ixing, controlling, or maintaining prices, rates, quotations, or fees in any part of trade or commerce.” *Conn. Gen. Stat. Ann.* § 35-28a (West 2006). There are no reported cases applying this provision to RPM. Various consent decrees have prohibited the practice, however. *See*, e.g., State v. Ty, 1997-2 Trade Cas. (CCH) ¶ 71,917 (Conn. Super. Ct. 1997) (prohibiting a manufacturer from fixing the price at which dealers advertised or sold its products); State v. Auto Time, 1984-1 Trade Cas. (CCH) ¶ 65,788 (Conn. Super. Ct. 1983) (prohibiting wholesaler from fixing prices at which a retailer could advertise, promote, or sell watches); State v. Viking Sewing Mach. Co., 1980-1 Trade Cas. (CCH) ¶ 63,101 (Conn. Super. Ct. 1979) (prohibiting a manufacturer from agreeing with dealers on resale prices).

11. *Kan. Stat. Ann.* § 50-101 (West 2006) (declaring it unlawful and void “[t]o fix any standard or figure, whereby such person’s price to the public shall be, in any manner, controlled or established, [on] any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state”).

12. The Mississippi Antitrust Act prohibits combinations “[t]o limit, increase or reduce the price of a commodity.” *Miss. Code Ann.* § 75-21-1(b) (West 2006). There are no reported cases interpreting the scope of this provision; however, it appears to apply to RPM.

13. Montana’s antitrust provisions make it “unlawful for a person or group of persons, directly or indirectly . . . to enter an agreement for the purpose of fixing the price . . . of an article of commerce.” *Mont. Code Ann.* § 30-14-205 (West 2006). There are no reported cases interpreting the scope of this provision; however, it could be construed as applying to RPM.


15. New Hampshire’s antitrust provisions appear to cover RPM. *See* N.H. Rev. Stat. Ann. § 356:2, II(a) (West 2006) (prohibiting “[f]ixing, controlling or maintaining prices, rates, quotations or fees in any part of trade or commerce”). There are no judicial decisions confirming this result, however.

16. Ohio’s antitrust statute, the Valentine Act, prohibits “fix[ing] at a standard figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise.” *Ohio Rev. Code Ann.* § 1311.01 (West 2006). State courts have interpreted this provision as a per se bar to RPM. *See*, e.g., *Ohio ex rel. Brown v. Andrew Palzes, Inc.*, 317 N.E.2d 262, 266 (Ohio Com. Pl. 1973) (collecting cases).
17. South Carolina’s sweeping prohibition on “[a]ll arrangements, contracts, agreements, trusts or combinations . . . between persons or corporations designed or which tend to advance, reduce or control the price or the cost to the producer or consumer of any such product or article” appears to cover RPM. S.C. CODE ANN. § 39-3-10 (West 2006). There are no reported cases, however.

18. Tennessee’s antitrust statute is similar in this regard to South Carolina’s. See TENN. CODE ANN. § 47-25-101 (West 2006) (“[A]ll arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.”).

19. The West Virginia Antitrust Act prohibits contracts “[f]or the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service.” W. VA. CODE ANN. § 47-18-3 (West 2006). There are no reported cases applying this provision to RPM, however.

20. See infra text accompanying note 53, discussing the New Jersey fair trade law repeal, and notes 68-70, discussing New York’s fair trade law amendment.

21. Alabama (Ex parte Rice, 67 S.2d 825, 829 (Ala. 1953) (“The federal statutes . . . prescribe the terms of unlawful . . . restraints of trade as they should also be administered in Alabama.”)); Alaska (West v. Whitney-Fidalgo Seafoods, 628 P.2d 10, 14 (Alaska 1981) (“The legislature intended that Alaska courts would look to Sherman Act cases in construing the [state] act.”)); Connecticut (CONN. GEN. STAT. ANN. § 35-44b (West 2006) (“The courts of this state shall be guided by interpretations given by the federal courts to federal antitrust law.”)); Delaware (DEL. CODE ANN. tit. 6, § 2113 (LexisNexis 2006) (indicating that state law “shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes”)); Florida (FLA. STAT. ANN. § 542.32 (West 2006) (“It is the intent of the Legislature that [that] due consideration and great weight be given to the interpretations of the federal courts . . . .”)); Hawaii (HAW. REV. STAT. ANN. § 480-3 (LexisNexis 2006) (“This chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes . . . .”)); Idaho (IDAHO CODE ANN. § 48-102 (LexisNexis 2006) (indicating that state law “shall be construed in harmony with federal judicial interpretation of federal antitrust statutes and consistent with [the state law’s] purposes . . . .”)); Iowa (IOWA CODE ANN. § 553.2 (West 2006) (“[S]hall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose . . . .”)); Massachusetts (MASS. GEN. LAWS ANN. ch. 93 § 1 (West 2006) (“[S]hall be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable.”)); Michigan (MICH. COMP. LAWS ANN. § 445.784(2) (West 2006) (“The courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason.”)); Missouri (MO. REV. STAT. § 416.141 (West 2006) (“[S]hall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes.”)); Nebraska (NEB. REV. STAT. ANN. § 59-829 (LexisNexis 2006) (“When any provision . . . is the same as or similar to the language of a federal antitrust law, the courts of this state . . . shall follow the construction given to the federal law by the federal courts.”)); Nevada (NEV. REV. STAT. ANN. § 598A.050 (West 2006) (“The provisions of this chapter shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes.”)); New Jersey (N.J. STAT. ANN. § 56:9-18 (West 2006) (“This act shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it.”)); New Mexico (N.M. STAT. ANN. § 57-1-15 (West 2006) (“[T]he Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws.”)); Oklahoma (OKLA. STAT. ANN. tit. 79, § 212 (West 2006) (“The provisions of this act shall be interpreted in a manner consistent with Federal Antitrust Law . . . and the case law applicable thereto.”)); Pennsylvania (Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1014 (3d Cir. 1994) (conceptualizing the Sherman Act as the statutory application of common law doctrine relating to the restraint of trade and indicating that courts look to federal precedent for guidance in defining unreasonable restraints of trade)); Rhode Island (R.I. GEN. LAWS § 6-36-2(b) (LexisNexis 2006) (“[S]hall be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable, except where provisions of this chapter are expressly contrary to applicable federal provisions as construed.”)); South Carolina (Drs. Steuer & Latham, P.A. v. Nat’l Med. Enters., 672 F. Supp. 1489, 1521 (D.S.C. 1987) (“South Carolina has long adhered to a policy of following federal precedents in matters relating to state trade regulation enforcement.”)); Texas (TEX. BUS. & COM. CODE ANN. § 15.04 (Vernon 2006) (“The provisions of this Act . . . shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with the Act’s purpose.”)); Virginia (VA. CODE ANN. § 59.1-9.17 (West 2006) (“This chapter shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions.”)); West Virginia (W. VA. CODE ANN. § 47-18-16 (West 2006) (“This article shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes.”)); Wisconsin (Grams v. Boss, 294 N.W.2d 473, 480 (Wis. 1980) (stating that the state statute was a reenactment of the Sherman Act and, therefore, federal decisional law provides persuasive authority)).

22. Colorado (COLO. REV. STAT. ANN. § 6-4-119 (West 2006) (“It is the intent of the general assembly that, in construing this article, the courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust laws”); People ex rel. Woodard v. Colorado Springs Bd. of Realtors, Inc., 692 P.2d 1055, 1061 (Colo. 1984) (“[B]ecause our statute is intended to protect the public from illegal restraints of trade beyond the reach of federal law, decisions of federal courts construing the Sherman and Clayton Acts, although not controlling, are entitled to careful scrutiny in resolving issues arising under Colorado’s antitrust statute.”)); Indiana (Bi-Rite Oil Co. v. Ind. Farm Bureau Coop. Ass’n, 720 F. Supp. 1363, 1378 (S.D. Ind. 1989), aff’d, 908 F.2d 200 (7th Cir. 1990) (“Indiana antitrust law . . . was substantially patterned after the federal Sherman Antitrust Act and references to decisional law under the Sherman Act may be made in construing Indiana antitrust provisions . . . .”)); Kentucky (Neither statute nor case law requires courts to look to federal precedent, but the courts and the Attorney General have done so. See, e.g., 85-70 Op. Ky. Att’y Gen. 1-2 (1985); Borg-Warner Protective Servs. v. Guardsmark, Inc., 946 F. Supp. 495, 500 n.5 (E.D. Ky. 1996) (stating that state and federal statutes were “virtually identical” and granting summary judgment on state claims because the defendant was entitled to summary judgment).
on the federal claims)); Louisiana (Louisiana Power & Light Co. v. United Gas Pipe Line Co., 493 S.2d 1149, 1158 (La. 1986) (“The United States Supreme Court’s interpretation of the Sherman Act should be a persuasive influence on the interpretation of our own state enactments. However, the federal analysis is not controlling.”)); Maryland (Md. Code Ann., Com. Law § 11-202(a)(2) (West 2006) (“It is the intent of the General Assembly that, in construing this subtitle, the courts are guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters, including [the Sherman Act].”)); Minnesota (Minn. Twigs P’ship v. State by Hatch, 592 N.W.2d 847, 851 (Minn. 1999) (“Minnesota’s antitrust laws are generally interpreted consistently with federal courts’ construction of federal antitrust laws.”)); Mississippi (NAACP v. Claiborne Hardware Co., 393 S.2d 1290, 1301 (Miss. 1980), rev’d on other grounds, 458 U.S. 886 (1982) (indicating that state law is patterned after the Sherman Act and that the state supreme court has “been influenced by the decisions of the [U.S.] Supreme Court in interpreting and applying” the state statute)); New Hampshire (N.H. Rev. Stat. Ann. § 356:14 (West 2006) (“In any action or proceeding under this chapter, the courts may be guided by interpretations of the United States’ antitrust laws.”)); New York (Anheuser-Busch, Inc. v. Abrams, 520 N.E.2d 535, 539, Bus. Franchise Guide (CCH) ¶ 9,062 (N.Y. 1988) ("[The] Donnelly Act—often called a ‘Little Sherman Act’—should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result."); Ohio (C.K. & J.K., Inc. v. Fairview Shopping Ctr. Corp., 407 N.E.2d 507, 509 (Ohio 1980) (noting that the statute is “patterned” after the Sherman Act and should be construed in harmony therewith)); Oregon (Or. Rev. Stat. Ann. § 646.715(2) (West 2006) (“The decisions of federal courts in construction of federal law relating to the same subject shall be persuasive authority in the construction of ORS 646.705 to 646.805 and 646.990.”)); Utah (Utah Code Ann. § 76-10-926 (West 2006) (“The Legislature intends that the courts . . . will be guided by interpretations given by the federal courts to comparable federal antitrust statutes . . . .”)); Washington (Wash. Rev. Code Ann. § 19.86.920 (West 2006) (“It is the intent of the legislature that . . . the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters . . . .”)).


24. Ex parte Rice, 67 S.2d at 829.


27. See, e.g., NAACP v. Claiborne Hardware, 393 S.2d at 1301.


29. See State by Humphrey v. Alpine Air Prods., Inc., 490 N.W.2d 888, 894 (Minn. Ct. App. 1992), aff’d, 500 N.W.2d 788 (Minn. 1993) (“We believe policy considerations suggest following federal precedent for substantive offenses . . . .”; Minn. Twins P’ship, 592 N.W.2d at 851 (following Alpine Air Products).

30. Alpine Air Prods., Inc., 490 N.W.2d at 894 (“Without uniform construction between state and federal antitrust laws, businesses will have a difficult time predicting the antitrust implications of their business decisions. Enforcement of state and federal antitrust laws will also be aided by a policy of uniform interpretation.”).

31. Id.

32. Id. at 890.

33. Id.

34. Id. at 893 (“There is no dispute Alpine engaged in vertical price-fixing with its dealers . . . . Federal courts have long held that vertical price-fixing agreements, because of their manifestly anticompetitive effect, are per se illegal. See e.g., Business Elecs. v. Sharp Elecs., 485 U.S. 717, 723–24 (1988) . . . .”).

35. Id. at 894.

36. Id. (“Vertical price-fixing is almost always pernicious because an unfair benefit is conferred on the seller or the dealer to the detriment of consumers . . . . Almost every instance of vertical price-fixing is harmful to the operation of our free market economy due to decreased competition and increased prices . . . . We believe the possibility that some legitimate business purpose will be achieved through vertical price-fixing is minimal,” citing Fair Trade: Hearings on H.R. 1253 before the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 506–07 (1959) (testimony of Robert Bicks, First Assistant of the Antitrust Division of the Department of Justice).

37. But see Lorix v. Crompton Corp., 736 N.W.2d 619 (Minn. 2007) (refusing to follow federal precedent on antitrust standing in the application of Minnesota state law).


When the Supreme Court was considering whether maximum resale price maintenance should be subject to the rule of reason, Minnesota’s attorney general also joined a brief urging the court to maintain the rule that such practices were per se illegal. Brief of Thirty-Three States and the Territory of Guam in Support of Respondents, State Oil Co. v. Kahn, No. 96-871 (U.S. May 2, 1997). In Kahn, 522 U.S. 3 (1997), the Supreme Court reached the opposite result. Minnesota courts have not addressed the issue under state law since Khan, providing limited guidance on how the attorney general’s posture in amicus curiae briefs informs the state courts’ ultimate decisions.

40. Tex. Bus. & Com. Code Ann. § 15.05(a) (Vernon 2006) (“Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful.”).

41. Tex. Bus. & Com. Code Ann. § 15.04 (Vernon 2006); see DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 678 (Tex. 1990) (“Section 15.05(a) is comparable to, and indeed taken from, section 1 of the Sherman Antitrust Act . . . . Accordingly, we look to federal judicial interpretations of section 1 of the Sherman Act in applying section 15.05(a) of
our state antitrust law.”); Red Wing Shoe Co. v. Shearer’s, Inc., 769 S.W.2d 339, 343 (Tex. App. 1989) (“[T]he Texas Legislature not only used language tracking that of the federal antitrust statute in the substantive portions of the 1983 Act, but it also included a clause specifying uniformity of construction between the federal and Texas statutes.”).


43. Id.

44. Id.

45. See Red Wing Shoe, 769 S.W.2d at 341-42 (following the federal rule of reason standard for vertical nonprice restraints); Winston v. Am. Med. Int’l, 930 S.W.2d 945, 952 (Tex. App. 1996) (affirming summary judgment on a conspiracy claim with reference to the federal standard); Naftawi v. Hendrick Med. Ctr., 676 F. Supp. 770, 774 (N.D. Tex. 1987) (same). Of interest, the Texas attorney general did not sign on to the amicus brief in Leeggin urging the Supreme Court to maintain the rule of per se illegality.


49. Id. at 1035.

50. Id. at 1037-38 (finding that the retailers had voluntarily adhered to the supplier’s suggested prices).

51. Glaasofer Motors v. Osterlund, Inc., 433 A.2d 780, 788-89 (N.J. Super. Ct. App. Div. 1981) (“[R]esale price maintenance and price-fixing schemes have long been recognized as illegal per se because they are designed to, and do in fact, reduce price competition not only among sellers of the affected product but also between that product and competing brands.” (citing federal case law)).

52. Id. at 790; see also EZ Sockets, Inc. v. Brighton-Best Socket Screw Mfg., 704 A.2d 1309, 1310 (N.J. Super. Ct. App. Div. 1997) (holding that the lower court’s dismissal of the resale price maintenance claim was proper because there was no agreement on prices).

53. N.J. STAT. ANN. § 56:4-1.1 (West 2007). The New Jersey courts have only referred to this statute once in a published decision, and then only in passing. However, the reference came in a case decided after Lee- gen, and the statute is cited as having continuing vitality. See Exit A Plus Realty v. Zumiga, 930 A.2d 491, 497 (N.J. Super. Ct. App. Div. 2007).

54. See supra note 39 (listing states that participated).

55. N.Y. GEN. BUS. LAW § 340 (McKinney 2006); see Anheuser-Busch v. Abrams, 520 N.E.2d at 539.

56. Anheuser-Busch, 520 N.E.2d at 539.

57. Id.

58. Id. at 538, 539.

59. Id., see Continental T.V. v. GTE Sylvania, 433 U.S. at 59. See also People v. Rattenni, 613 N.E.2d 155, 159 (N.Y. 1993) (refusing to “depart from the Supreme Court’s interpretation of the Sherman Act” because the parties had “presented no persuasive reason grounded in statutory language, legislative history or policy”); cf. Sperry v. Crompton Corp., 863 N.E.2d 1012, 1018 (N.Y. 2007) (conceptualizing treble damages as a penalty is an example of where a court is justified in construing the state statute differently from the federal one given the legislative history of the state provision).


61. N.Y. GEN. BUS. LAW § 369-a (McKinney 2006) (voiding contracts that “purport[] to restrain vendee[s] of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer”). See, e.g., Carl Wagner & Sons, 485 F. Supp. at 772. See also infra text accompanying notes 68-70, discussing § 369-a.


63. Id.

64. Id. at 767.

65. Id. at 768.

66. Id. at 773.

67. Id. at 772.


69. 1975 N.Y. Laws ch. 65 (1975), codified at N.Y. GEN. BUS. LAW § 369-a (McKinney 2006) (“Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.”).


71. Port Chester Wine & Liquor Shop, Inc. v. Miller Bros. Fruiterers, Inc., 253 A.D. 188, 194 (N.Y. App. Div. 1938) (“The State enactment [the Donnelly Act] assumed to ban horizontal price-fixing arrangements only, that is, contracts between dealers or contracts between manufacturers or producers of particular commodities . . . . It did not purport to concern itself with vertical price arrangements . . . .”).

72. See ARIZ. REV. STAT. ANN. § 44-1412 (West 2006) (“[T]he courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes.”); South Dakota S.D. CODIFIED LAWS, § 37-1-22 (West 2006) (“[T]he courts may use as a guide interpretations given by the federal or state courts to comparable antitrust statutes.”); D.C. CODE ANN. § 28-4515 (LexisNexis 2006) (“[A] court
... may use as a guide interpretations given by federal courts to comparable antitrust statutes.

73. See Bergstrom v. Noah, 974 P.2d 520, 530-31 (Kan. 1999) (“While such cases dealing with the Sherman Act may be persuasive authority for any state court interpreting its antitrust laws, such authority is not binding upon any court in Kansas interpreting Kansas antitrust laws.”); Rose v. Vulcan Materials Co., 194 S.E.2d 521, 530 (N.C. 1973) (holding that Sherman Act authority is “not binding” but is “nonetheless instructive in determining the full reach of [Section 75-1 of North Carolina’s Antitrust and Unfair Competition Act]”).

74. See Bunker’s Glass Co. v. Pilkington, 75 P.3d 99, 102-03 (Ariz. 2003) (permitting indirect purchasers to sue under the Arizona Act). A Tennessee court has held that authority dealing with the Sherman Act is “most persuasive.” Tenn. ex rel. Leech v. Levi Strauss & Co., 1980-2 Trade Cas. (CCH) ¶ 63, 558 (Tenn. Ch. Ct. 1980) (“The State antitrust statute . . . is quite similar to the Sherman Antitrust Act . . . . [The authorities which define the character of private damage suits under the federal antitrust statutes, particularly the Sherman Act, are most persuasive.”). But see Blake v. Abbott Labs., Inc., 1996-1 Trade Cas. (CCH) ¶ 71,369 (Tenn. Ct. App. 1996) (holding that indirect purchasers can sue under the state statute, which is not the case under federal law).


76. Id. at § 44-1402.

77. Id. at § 44-1412 (emphasis added).


80. See Bunker’s Glass Co., 75 P.3d at 106.

81. Id.

82. Id.

83. Dunn v. Phoenix Newspapers, Inc., 735 F.2d 1184, 1187 (9th Cir. 1984).

84. Id. at 1190.

85. Vermont, for instance, allows indirect purchaser actions, but follows other federal antitrust standing rules. See Fucile v. Visa U.S.A. Inc., No. S1560-03 CNC, 2004 WL 330037 (Vt. Super. Ct. 2004). Georgia’s constitution precludes the legislature from authorizing contracts that lessen competition. See Ga. Const. art. 3, § 6 ¶ 5(c); see also Strickland v. Ports Petro. Co., 353 S.E.2d 17, 18 (Ga. 1987) (holding that prohibitions against discriminatory pricing and sales below cost were unconstitutional under the Georgia due-process clause because “the gasoline industry is not affected with a public interest”); see also Ga. Code Ann. § 13-8-2(a)(2) (West 2006) (declaring “Contracts in general restraint of trade” are against public policy).

86. Tri-State Rubbish, Inc. v. Waste Mgmt., Inc., 875 F. Supp. 8, 14 (D. Me. 1994) (indicating as well that judgment for the defendant was appropriate on the parallel claims “[s]ince [the] Plaintiff has offered no argument why there should be liability under state law in the event that the federal law provides no relief”).


89. California ex rel. Van De Kamp v. Texaco, 762 P.2d 385, 395 (Cal. 1988) (“The Attorney General cites authorities stating the Cartwright Act is modeled after the Sherman Act. He then asserts that the Sherman Act has been construed as applying to mergers, and concludes that the Cartwright Act should be construed as applying to mergers as well. In light of the above discussion, however, the Attorney General’s fundamental premise is flawed.”).

90. Id.


93. Id. at 1144.

94. Id.

95. Id. at 1147.

96. Id. (“Since the Cartwright Act is patterned after the Sherman Act (15 U.S.C. § 1 et seq.), federal cases interpreting the Sherman Act are applicable in construing our state laws.”); see also supra note 89 and accompanying text (indicating that the law was not, after all, patterned after the Sherman Act).

97. Kunert v. Mission Fin. Svs. Corp., 110 Cal. App. 4th 242, 263 (Cal. Ct. App. 2003) (citations and quotations omitted). The specific provisions of the Cartwright Act that most directly apply to RPM are found in the statute’s definition of a “trust,” which includes conduct with the purpose of “fix[ing] at any standard or figure, whereby [a commodity’s] price to the public or consumer shall be in any manner controlled or established . . . .” or agreeing to “[b]ind themselves not to sell . . . any article or any commodity . . . below a common standard figure, or fixed value.” Cal. Bus. & Prof. Code § 16720(d) and (e)(1) (West 2007).

98. See, e.g., D. Ghirardelli Co. v. Hunsicker, 128 P. 1041, 1044 (Cal. 1912).


100. See generally 740 ILL. COMP. STAT. ANN. §§ 10/1 to 10/11 (West 2006).

101. Id. § 10/3(1).

102. Id. § 10/3(2); see also Nichols Motorcycle Supply v. Dunlop Tire Corp., 913 F. Supp. 1088, 1129 (N.D. III. 1995) (“a vertical agreement may not constitute a per se violation of section 3 of the [Illinois Act], because per se claims are only those listed in section 3(1), which does not cover vertical price-fixing agreements”).

103. Nichols Motorcycle Supply, 913 F. Supp. at 1129 (concluding that “[s]ection 3(1) does not reach vertical agreements, such as agreements between buyers and sellers fixing the price at which the buyer shall resell” as supported by the Illinois Bar Committee commentary).

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104. Id.
105. Id.
106. Id.
107. See supra note 39 (listing states that participated).
113. Id. (referring to discounters as “endangered species”).
114. Id.
116. Only one state, Alabama, appears to have deemed a fair trade law in its entirety unconstitutional under its state constitution. See Bulova Watch Co. v. Zale Jewelry Co., 147 S.2d 797, 799 (Ala. 1962) (“To recapitulate, we hold that the Fair Trade Regulations, especially the ‘non-signer’ provision are unconstitutional, being in violation of §§ 1 and 35 of the 1901 Constitution of Alabama, because the business sought to be controlled is not one wherein the ‘public interest’ is affected, and therefore the legislation is outside the scope of the state’s police power.”). The highest courts in numerous states, however, found that so-called nonsigner provisions, or those provisions that allowed contracts establishing a minimum resale price to bind retailers despite no affirmative agreement to be bound, were unconstitutional under a variety of theories. The courts in the following states held that the acts exceeded police power, denied due process, and/or amounted to an unlawful delegation of legislative power to private interests: Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Washington, West Virginia, and Wyoming; see also 1963 Haw. Sess. Laws, ch. 88, 51 (repealing only the nonsigner provision). See generally R.D. Hursh, Validity, Under State Constitutions, of Nonsigner Provisions of Fair Trade Laws, 60 A.L.R.2d 420 (2d ed. West 2007).