

State Resale Price Maintenance Laws After *Leegin*

Michael A. Lindsay

Two years ago the U.S. Supreme Court overruled the longstanding per se rule against minimum resale price maintenance (RPM) agreements.¹ Since then, news media have reported a resurgence of RPM policies with headlines like “Price-Fixing Makes Comeback After Supreme Court Ruling”² and “The Legacy of *Leegin*: Price-Fixing, the Comeback Kid of Antitrust Law.”³ Meanwhile, the Federal Trade Commission has conducted several sessions of a workshop on RPM under the Sherman Act and the Federal Trade Commission Act,⁴ and Congress held hearings on legislation seeking to repeal the *Leegin* decision.⁵ And just this month, Assistant Attorney General Christine Varney proposed a structure for using rule of reason analysis in RPM cases.⁶ In short, the future of *Leegin* and federal enforcement remains in flux.

Whatever is happening at the federal level, however, *Leegin* did not directly address the status of minimum RPM agreements under state law,⁷ and on remand the state law claims were abandoned.⁸ Practitioners still need to consider whether there are state law prohibitions on RPM agreements. For that reason, two years ago, *The Antitrust Source* published a chart providing relevant authorities for each of the 50 states, and that chart has remained available through *The Source*'s home page since then.⁹ The chart accompanied an article that originally appeared in *Antitrust* magazine.¹⁰

■ **Michael A. Lindsay** is a partner at Dorsey & Whitney LLP. Mr. Lindsay thanks James Nichols for his assistance with this article and the accompanying chart and Dorsey summer associates Annie Trimberger and Eric Barstad for their research assistance in updating the accompanying chart.

¹ Dr. Miles Med. Co. v. John D. Park & Sons, 220 U.S. 373 (1911), overruled by *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

² Joseph Pereira, *Price-Fixing Makes Comeback After Supreme Court Ruling*, WALL ST. J., Aug. 10, 2008, at A1, available at http://online.wsj.com/article/SB121901920116148325.html?mod=hps_us_pageone. For a follow-up on RPM policies and the use of third-party monitors, see Joseph Pereira, *Discounters, Monitors Face Battle on Minimum Pricing*, WALL ST. J., Dec. 4, 2008 at A1, available at <http://online.wsj.com/article/SB122835660256478297.html>.

³ Dan Slater, *The Legacy of Leegin: Price-Fixing, the Comeback Kid of Antitrust Law*, WALL ST. J. LAW BLOG, <http://blogs.wsj.com/law/2008/08/18/the-legacy-of-leegin-price-fixing-the-comeback-kid-of-antitrust-law/>.

⁴ Sessions of the workshop were held on February 17 and 19 and May 20–21, 2009, but the FTC has not announced whether any further sessions will be held. Materials from the ongoing workshop are available at <http://www.ftc.gov/opp/workshops/rpm/>.

⁵ See, e.g., *Bye Bye Bargains? Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices: Hearing Before the Subcomm. on Courts and Competition Policy of the Comm. on the Judiciary*, 111th Cong. (2009), available at http://judiciary.house.gov/hearings/hear_090428_1.html.

⁶ Christine A. Varney, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks Prepared for the National Ass’n of Attorneys General Columbia Law School State Attorneys General Program (Oct. 7, 2009), available at <http://www.usdoj.gov/atr/public/speeches/250635.pdf>.

⁷ Michael Lindsay, *Resale Price Maintenance and the World After Leegin*, ANTITRUST, Fall 2007, at 1, 32 (2007) [hereinafter *World After Leegin*], available at http://www.dorsey.com/files/upload/Antitrust_Lindsay_Fall07.pdf; see also Michael Lindsay, *Leegin and RPM [Nearly] One Year Later*, [http://www.mnbar.org/sections/antitrust/Leegin%20and%20RPM%20\(MSBA%20Presentation\).ppt](http://www.mnbar.org/sections/antitrust/Leegin%20and%20RPM%20(MSBA%20Presentation).ppt). Cf. Fed. Trade Comm’n, *FTC Modifies Order in Nine West Resale Price Maintenance Case* (May 6, 2008), available at <http://www.ftc.gov/opa/2008/05/ninewest.shtm> (modifying prior FTC order but noting that modification does not affect consent orders that Nine West had agreed to with states).

⁸ *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, File No. 03-CV-107, 2009 WL 938561 at *8 (E.D. Tex. Apr. 6, 2009).

⁹ Michael A. Lindsay, *Overview of State RPM (Complete)* (2007), available at http://www.abanet.org/antitrust/at-source/07/12/Lindsay_FullChart11-29.pdf.

¹⁰ See Lindsay, *World After Leegin*, *supra* note 7.

The chart has proved to be a valuable resource for practitioners. *The Antitrust Source* thought it would be useful to describe key developments since the chart's publication and to update the chart to include those developments. *The Antitrust Source* would like to continue to publish timely updates to the enclosed chart. If you become aware of a case or statute that should be added, e-mail *The Source* at antitrust@att.net.

The updated chart keeps the same basic organization as the original. Each state's law is divided into two broad categories: "legislation" and "litigation." The chart identifies statutes and cases (including recent developments) in a number of areas: antitrust (providing the state's general principles of antitrust law); price-fixing (identifying statutes or cases specific to prohibitions on price-fixing); and federal harmonization (statutes and cases that describe the role that federal law plays in interpreting the state's antitrust statutes).¹¹ I have not attempted to collect state statutes providing industry-specific RPM prohibitions.¹²

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Several of the recent developments in state RPM law, however, warrant more extended discussion than the chart format permits.

State *Leegin* Repealer Statute and State Deference to Federal Law

Most states (by statute or case law) try to conform their antitrust laws to judicial interpretations of analogous federal law, although the phrasing and strength of the principle varies.¹³ The three most notable developments in this area since the chart's publication were Maryland's enactment of a statute expressly making minimum RPM agreements illegal under state law, and two trial court decisions (one by a Tennessee federal district court and the other by a Kansas state court) rejecting the per se rule for RPM agreements under state antitrust law and instead assessing the state RPM claims under the rule of reason.

In April 2009, the Maryland legislature adopted what is the first and so far only statute expressly rejecting the application of *Leegin* to state law.¹⁴ The Maryland statute became effective on October 1, 2009. Maryland had a general prohibition on contracts, combinations, and conspiracies in restraint of trade, as well as a fairly strong federal harmonization statute and supporting case law,¹⁵ so without the legislature's action, state courts would almost certainly have imported the reasoning of *Leegin* into Maryland law. The new statute added this definition: "[A] contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce."¹⁶

¹¹ The updated chart adds a fourth category: *Illinois Brick* repealer statutes. Knowledge of a specific *Illinois Brick* repealer statute may be useful in predicting whether a state will adopt a *Leegin* repealer as well.

¹² For examples of such statutes, see Thomas B. Leary & Erica S. Mintzer, *The Future of Resale Price Maintenance, Now that Doctor Miles Is Dead*, 4 N.Y.U. J. L. & BUS. 303, 340 n.139 (2007) (citing FLA. STAT. § 526.307(1) (2007) (RPM prohibitions relating to the resale of motor fuel at retail) and KAN. STAT. ANN. § 41-701(f) (2007) (prohibiting fixing resale prices for liquor and beer)), available at <http://www.ftc.gov/opp/workshops/rpm/may09/docs/leary.pdf>.

¹³ See Lindsay, *World After Leegin*, *supra* note 7, at 33–34.

¹⁴ MD. CODE ANN., COM. LAW. § 11-204(a)(1) (2009); Posting of Darius Summer to Trade Regulation Talk Blog, <http://traderegulation.blogspot.com/2009/04/maryland-amends-antitrust-law-to-make.html> (Apr. 28, 2009, 16:58 EST). For a brief legislative history, see Alan M. Barr, *State Challenges to Vertical Price Fixing in the Post-Leegin World*, Comment to 2009 FTC Workshop: Resale Price Maintenance Under the Sherman Act and the Federal Trade Commission Act 4 n. 31, available at <http://www.ftc.gov/opp/workshops/rpm/may09/docs/abarr.pdf>. For an account of the statute's adoption in the business press, see Joseph Pereira, *State Law Targets "Minimum Pricing,"* WALL ST. J., at D1 (Apr. 28, 2009), available at <http://online.wsj.com/article/SB124087840110661643.html>.

¹⁵ See accompanying chart.

¹⁶ MD. CODE ANN., COM. LAW. § 11-204(a) (2009). Interestingly enough, Maryland has made the opposite policy choice for cigarettes and gasoline, for which the state requires minimum mark-ups. MD. CODE ANN., COM. LAW. § 11-401 (prohibiting below-cost sales of cigarettes; defining cost to include a minimum mark-up of approximately 7 percent); MD. CODE ANN., COM. LAW. § 11-501 (prohibiting below-cost sales of cigarettes; defining cost to include a minimum mark-up of 8 percent).

In *Spahr v. Leegin Creative Leather Products*,¹⁷ the federal district court for the Eastern District of Tennessee considered a Rule 12 motion to dismiss a complaint alleging that Leegin's RPM agreements with independent resellers violated Sherman Act section 1 and its Tennessee state-law equivalent. After dismissing the federal claims,¹⁸ the court considered whether *Leegin's* principles applied to the Tennessee state law claim as well. The court found no pre-*Leegin* state court cases analyzing whether the Tennessee Trade Practice Act prohibited minimum RPM agreements. The court found that there was no good reason to believe that Tennessee courts would not follow *Leegin*. Consequently, the court applied the rule of reason and held that the plaintiff had not adequately pled a relevant market.¹⁹

A Kansas trial court reached a similar result in *O'Brien v. Leegin Creative Leather Products Inc.*²⁰ Relying on two Kansas Supreme Court decisions, the trial court rejected a per se analysis of a minimum RPM agreement and concluded that the state Supreme Court would apply the rule of reason. The trial court observed: "Whether competition is regulated by a contract dictating who can provide a service in a given territory . . . or by an agreement to set retail prices for manufactured goods (as is claimed in this case), the impact to the consumer is not sufficiently dissimilar to justify differing legal analyses."²¹ The case is now on appeal before the Kansas Supreme Court and will likely provide the first post-*Leegin* state appellate court decision on minimum RPM agreements.²²

Other than Maryland, no state has yet adopted a *Leegin* repealer, and other than Tennessee and Kansas, I have not found a case that directly addresses whether a state will now apply the rule of reason to minimum RPM claims.

State Attorney General Actions

In her recent remarks at the Columbia Law School program for state attorneys general, Assistant Attorney General Varney commented that "one of the most important legal challenges facing State Attorneys General is how to proceed in light of the Supreme Court's decision in *Leegin*."²³ She also observed that "In the wake of *Leegin*, many states are reevaluating their legal oversight over RPM arrangements and considering whether state law may treat them as per se illegal."²⁴ Nevertheless, there have been surprisingly few state attorney general challenges to minimum RPM agreements. The most noteworthy was the case brought by the States of New York, Michigan, and Illinois against Herman Miller Inc., a manufacturer of high-end, ergonomically designed office chairs. The

¹⁷ No. 07-CV-187, 2008 WL 3914461 (E.D.Tenn. Aug. 20, 2008), *appeal dismissed*, File No. 08-6165 (6th Cir. Nov. 20, 2008).

¹⁸ On the federal claims, the court first considered whether to apply the rule of reason or the per se approach. *Leegin* sold both directly through its own retail outlets and indirectly through resellers, and it had RPM agreements with the independent resellers. Although *Leegin* was thus engaged in "dual distribution" (i.e., it was both a supplier to and at least potentially a competitor of its independent resellers), the district court applied the rule of reason, rather than the per se approach. *Spahr*, 2008 WL 3914461 at *7. The court then held that plaintiff had not sufficiently alleged a relevant market or anticompetitive effects. *Id.* at *11–*12.

¹⁹ *Spahr*, 2008 WL 3914461 at *14. On the federal claims the court also found that plaintiff had failed to adequately allege anticompetitive effects. *Id.* at *12.

²⁰ *O'Brien v. Leegin Creative Leather Prods. Inc.*, No. 04-CV-1668 (8th Judicial Dist., Sedgwick County Kan. July 9, 2008), *direct appeal to supreme court granted*, File No. 101,000 (Oct. 6, 2008), docket available at http://judicial.kscourts.org:7780/pls/coa2/CLERKS_OFFICE.list_case_detail?i_case_number=101000&i_case_name=.

²¹ *Id.*, slip op. at 14.

²² *O'Brien*, Appeal No. 101,000. Interestingly, however, the trial court opinion did not cite *Leegin*.

²³ *Antitrust Federalism*, *supra* note 6, at 7.

²⁴ *Id.* at 8.

complaint alleged that certain Herman Miller dealers began advertising Herman Miller's Aeron chair at discounted prices and selling the chair through the Internet, again at discounted prices. In response to this discounting, Herman Miller adopted a minimum advertised price policy. It is not entirely clear from the complaint that the policy applied to actual selling prices (as opposed to advertised prices), but the States did allege that the Suggested Resale Price policy controlled "the prices at which retailers could display any price to the public, including in-store price tags, and on the retailers' own internet websites, thereby uniformly setting the retail price or the retail price level."²⁵ In any event, the complaint alleged that Herman Miller sought and obtained agreements from resellers to comply with the minimum advertised price policy, allegedly resulting in higher prices. The case was resolved through a consent agreement.

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The *Herman Miller* case is remarkable for several reasons. First, the challenged practice was not a clear agreement on actual selling prices, and the States did not distinguish the legal rules that might apply differently to these different practices. Second, the States seem to have taken a per se approach. Although the complaint does allege some anticompetitive effects (higher prices, less information), it does not allege that Herman Miller had market power or that anticompetitive effects outweigh whatever procompetitive benefits the practice may have. Indeed, reading the complaint, one would hardly realize that *Leegin* had been decided. Third, one of the plaintiff states—Illinois—is the only state whose courts have expressly held that minimum RPM agreements are judged under the rule of reason,²⁶ but the complaint does not suggest a different analysis for Illinois law.

Other than the *Herman Miller* case (and one other that barely post-dated the *Leegin* decision²⁷), I have found no state attorney general formal complaints or consent decrees. State attorneys general, however, have remained vocal on the topic of *Leegin*. For example, the attorneys general of 27 states submitted comments opposing a post-*Leegin* petition seeking modification of an FTC order that prohibited Nine West from using vertical pricing agreements with its dealers.²⁸ These attorneys general described their states' "strong interest in preserving adequate remedies for the practice that the Commission's Order is designed to prevent—vertical price-fixing," and they offered examples of their "vigorously prosecut[ing] vertical price-fixing."²⁹ Similarly, Maryland's Assistant Attorney General (and Deputy Chief, Antitrust Division) testified at the FTC's RPM work-

²⁵ Complaint at ¶ 20, *New York v. Herman Miller, Inc.*, 08-cv-2977 (S.D.N.Y. Mar. 25, 2008) (emphasis added).

²⁶ *Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc.*, 620 N.E.2d 1349, 1350, 1354 (Ill. App. Ct. 1993) (ruling that vertical price-fixing agreements are to be tested under rule of reason because "per se" violations are normally agreements between competitors or agreements that would restrict competition and decrease output" and also recognizing that federal case law is instructive but not binding), *aff'd*, 642 N.E.2d 470 (Ill. 1994).

²⁷ *North Carolina v. McLeod Oil Co.*, No. 05 CVS 13975 (N.C. Super Ct., Wake County, July 30, 2007). The North Carolina Attorney General had announced the filing of the complaint two years earlier. See Press Release, North Carolina Attorney General, AG Cooper Takes Action on Gas Laws (Oct. 10, 2005), available at <http://www.ncdoj.com/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/AG-Cooper-takes-action-on-gas-prices.aspx> (including the colorful allegation that the gasoline reseller had "refused to hike his prices, asked the representatives to have [the distributor's manager] contact him in the morning, and then left to attend Wednesday evening church services with his wife. When church ended, [the reseller] got a message from a[n] . . . employee that [the distributor] had padlocked the gas pumps.").

²⁸ See *Amended States' Comments Urging Denial of Nine West's Petition*, *Nine West Group Inc.*, FTC Docket No. C-3937 (Jan. 17, 2008), available at http://www.oag.state.ny.us/bureaus/antitrust/pdfs/Amended_State_comments_011708-9west.pdf. The comments were originally submitted on December 28, 2007, and were amended on January 17, 2008, to add additional states. The FTC granted Nine West's petition in part. Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, *Nine West Group Inc.*, FTC Docket No. C-3937 (May 6, 2008), available at <http://www.ftc.gov/os/caselist/9810386/080506order.pdf>.

²⁹ *Amended States' Comments*, *supra* note 28, at 2.

shop. He stated that “attorneys general will not end their pursuit of RPM cases because of a central truth—RPM means higher prices to consumers,” and he identified three courses that the state attorneys general would pursue: “(1) bringing federal antitrust *parens patriae* cases under the *Leegin* regime; (2) advocating legislative repeal of *Leegin* in the United States Congress; and (3) suing under state antitrust law to challenge RPM in state courts.”³⁰

Preemption of State Law

My 2007 article noted, among other things, the possibility that state laws contrary to *Leegin* might be preempted.³¹ The Supreme Court’s *ARC America*³² decision concluded that the procedural rule at issue in that case posed no “obstacle to the accomplishment of the purposes and objectives of Congress,”³³ but *Leegin* dealt with a substantive rule of conduct: whether minimum RPM agreements are automatically illegal. There is an important federal policy that minimum RPM agreements be judged under the rule of reason—that is, that they be judged based on their actual effects in the particular circumstances. A state substantive rule that excludes consideration of the potential procompetitive benefits of minimum RPM agreements would defeat this federal policy.

As seemed likely in 2007, state enforcers have argued that *Leegin* does not preempt contrary state laws.³⁴ Nevertheless, the extent to which federal law preempts state law remains an open question. Indeed, Commissioner Pamela Harbour invited discussion of this issue at the FTC RPM workshop.³⁵ One commentator—a former Assistant Attorney General and Department Head, Antitrust and Consumer Protection, in the Connecticut Attorney General’s office—argued that permitting state laws contrary to *Leegin* would frustrate an important policy of the federal antitrust laws.³⁶

One state trial court has expressly addressed the issue of federal preemption of state antitrust laws, although not specifically in the RPM context. In *Global Reinsurance Corp. v. Equitas Ltd.*,³⁷ a New York court considered whether the Sherman Act preempted New York’s Donnelly Act when the underlying conduct occurred in London and affected both interstate and international conduct. The court cited *ARC America*³⁸ for the proposition that states have traditionally regulated monop-

³⁰ Barr, *supra* note 14, at 1–2, (citations omitted).

³¹ Lindsay, *World After Leegin*, *supra* note 7, at 33.

³² *California v. ARC America Corp.*, 490 U.S. 93 (1989).

³³ *Id.* at 101 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). See also Antitrust Modernization Commission, Report and Recommendations 185 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

³⁴ See, e.g., Barr, *supra* note 14.

³⁵ Pamela Jones Harbour, Commissioner, Fed. Trade Comm’n, Opening Remarks at the Retail Price Maintenance Workshop: Consumer Benefits and Harms from Resale Price Maintenance: Sorting the Beneficial Sheep from the Antitrust Goats? (Feb. 17, 2009) (“What should be the relationship between federal and state law? In states whose laws still condemn RPM as a *per se* violation, should *Leegin* preempt state law?”), available at <http://www.ftc.gov/speeches/harbour/090217rpmwksp.pdf>.

³⁶ Robert M. Langer, Resale Price Maintenance Workshop—P090400, Comment To 2009 Ftc Workshop: Resale Price Maintenance Under the Sherman Act and the Federal Trade Commission Act 10, available at <http://www.ftc.gov/os/comments/resalepricemaintenance/00001.pdf> (“The application of state antitrust law to minimum resale price maintenance agreements after the Supreme Court’s decision in *Leegin* implicates this latter form of conflict preemption: state antitrust law stands as an obstacle to the accomplishment and execution of the Sherman Act’s purposes.”). But see Leary & Mintzer, *supra* note 12, at 339 (“Under [*Arc America*], any state ultimately has the power to nullify the *Leegin* result by express statute.”).

³⁷ No. 600815-2007, 2008 WL 2676805 (N.Y. Sup. Ct., N.Y. County July 3, 2008). In this decision, the court denied a motion to dismiss the Donnelly Act claim but granted the motion as to other claims, with leave to amend. In a later decision, the court granted a motion to dismiss the Donnelly Act claim. *Global Reinsurance Corp. v. Equitas Ltd.*, 876 N.Y.S.2d 325 (N.Y. Sup. Ct., N.Y. County Mar. 3, 2009), *appeal pending* File No. 600815/2007.

³⁸ *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989).

olies, and it concluded that state law is not preempted where there is a significant intrastate anti-competitive impact and minimal interstate consequences.³⁹ In its discussion of *ARC America*, the court also observed that state antitrust laws are not preempted if they are “consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct.”⁴⁰ The court did not discuss any tension between the Donnelly Act and the Sherman Act, though, in fact, a state law prohibiting RPM agreements without regard to the actual effects on competition—that is, that deters what federal law might consider procompetitive conduct—may well be considered inconsistent with federal law and thus preempted.⁴¹

Dual Distribution

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In *Leegin*, the plaintiff had also argued that the RPM agreement should be judged under the per se rule because Leegin was a dual distributor—it sold both directly (through stores in which Leegin’s president had an ownership interest) and indirectly (through independent resellers). The Court declined to reach this issue, however, because it had not been raised in the courts below.⁴² On remand, the trial court found that the horizontal price-fixing claims had been waived because they had not been raised in the first trial.⁴³ Nonetheless, the trial court concluded that in general the rule of reason applied to agreements in a dual-distribution system, and it rejected any special rule for price-related dual-distribution agreements.⁴⁴ Both the *Spahr* and *O’Brien* courts reached similar results.⁴⁵

Other Defenses

Even if a state’s law permits a per se challenge to RPM, practitioners should remember that the defenses traditionally available for per se claims remain available today. For example, a manufacturer can adopt a unilateral policy not to deal with discounters, and if truly unilateral in adoption and implementation, thereby negate the “agreement” element of a conspiracy claim.⁴⁶ Likewise a manufacturer can adopt (where it is otherwise feasible and appropriate) an agency business model: the manufacturer retains title, sets the selling price, and pays the selling agent a commission. If the manufacturer otherwise satisfies the requirements for demonstrating a true agency relationship, a ban on resale price maintenance will not apply.⁴⁷

³⁹ *Global Reinsurance*, 2008 WL 2676805 at *8–*9. The court found that there was an intrastate effect and therefore found that the Donnelly Act was not preempted, but the court does not seem to have addressed the second half of its own balancing test—the extent of interstate or international consequences.

⁴⁰ *Id.* at *8–*9 (quoting *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989) (internal quotation marks omitted)).

⁴¹ Practitioners should also consider any potential implications of *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (drug labeling duties resulting from state claims not preempted by the Food, Drug & Cosmetic Act).

⁴² *Leegin*, 127 S. Ct. at 2724. See also Lindsay, *World After Leegin*, *supra* note 7, at 35.

⁴³ *PSKS, Inc.*, 2009 WL 938561 at *5, *8.

⁴⁴ *Id.* at *6–*7.

⁴⁵ *Spahr*, 2008 WL 3914461 at *7; *O’Brien*, slip op. at 14–15, 26.

⁴⁶ *Toledo Mack Sales & Serv., Inc. v. Mack Trucks Inc.*, 530 F.3d 204, 225–26 (3d Cir. 2008) (though unsuccessful, the defense that there was no agreement was raised in a rule of reason challenge to RPM).

⁴⁷ This defense prevailed in *Valuepest.com v. Bayer Corp.*, 561 F.3d 282, 287–88 (4th Cir. 2009), although the case did not appear to involve a state-law claim.

Conclusion

Two years ago practitioners predicted that “[a]bsent legislation, this could be a long and messy slog.”⁴⁸ We are still mid-slog, and unless Congress enacts legislation (either pro-*Leegin* or contra), the slog will continue to be long and messy. To ensure compliance with federal law, a manufacturer designing an RPM program obviously must assess the competitive effects under the rule of reason. A manufacturer must also identify the states in which the program’s effects will be felt and thus the state laws that might apply and the likely substance of those laws. Given the uncertainty and sheer number of potentially different state laws, a manufacturer considering a nationwide program should determine whether the program could be tailored on a state-specific basis, and if not, whether a national program’s potential benefits outweigh the legal risk that some number of states might challenge the program under a per se rule of illegality. ●

⁴⁸ Dr. Miles *officially overruled*, AT-Conversation Archives (June 28, 2007), <http://mail.abanet.org/scripts/wa.exe?A2=ind0706&L=at-conversation&D=0&T=0&P=3460> (comments of Dan Wall, Michael H. Byowitz, and Chris Compton), *quoted in* Lindsay, *World After Leegin*, *supra* note 7, at 32.