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Contact Lenses and Contact Sports: An Update on State RPM Laws

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The year 2017 marks the 10th anniversary of the U.S. Supreme Court's *Leegin*[1] decision that overruled the longstanding *Dr. Miles*[2] rule that had considered resale price maintenance (RPM) agreements to be per se violations of the federal antitrust laws. The *Leegin* decision and its rule of reason approach to RPM agreements, however, did not directly apply to state antitrust laws, and as *The Antitrust Source* has documented over the last decade, not all of the states have embraced the federal interpretation. Since 2007, *The Antitrust Source* has published a series of articles tracking developments in state approaches to RPM agreements and has maintained an online chart providing relevant state-law authorities for each of the 50 states.[3]

The last two years have seen litigation in two areas—the contact lens industry and the contact sport of NFL football—that will provide insight into the last decade of state RPM jurisprudence. Before reviewing those two litigations, however, it is useful to understand the decade's earlier developments:

- Two years after *Leegin* was decided, the Maryland legislature amended its state statute—which clearly would have embraced the federal rule—and legislatively adopted an express per se condemnation of minimum RPM agreements.[4]
- Through a series of civil enforcement actions resulting in consent orders, the California Attor-

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[1] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[2] 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).

[3] The chart is directly accessible from the Supplementary Materials section of The Antitrust Source homepage at https://www.americanbar.org/publications/the_antitrust_source.html. For articles explaining the chart and describing key developments since its original publication, see Michael A. Lindsay, *Resale Price Maintenance and the World After* Leegin, Antitrust, Fall 2007, at 32, http://www.dorsey.com/files/upload/Antitrust_Lindsay_Fall07.pdf; Michael A. Lindsay, *Repatching the Quilt: An Update on State RPM Laws*, Antitrust Source, Feb. 2014 [hereinafter Lindsay, *Repatching the Quilt*], http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb14_lindsay_2_20f.pdf; Michael A. Lindsay, *From the Prairie to the Ocean: More Developments in State RPM Law*, Antitrust Source, Aug. 2012 [hereinafter Lindsay, *From the Prairie*], http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug12_lindsay_7_31f.pdf; Michael A. Lindsay, *A Tale of Two Coasts: Recent RPM Enforcement in New York and California*, Antitrust Source, Apr. 2011 [hereinafter Lindsay, *A Tale of Two Coasts*], http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr11-lindsay_4-20f.pdf; Michael A. Lindsay, *An Update on State RPM Laws Since* Leegin, Antitrust Source, Dec. 2010, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Lindsay12_21f.pdf; Michael A. Lindsay, *State Resale Price Maintenance Laws After* Leegin, Antitrust Source, Oct. 2009 [hereinafter Lindsay, *State Laws After* Leegin], http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct09_Lindsay10_23f.pdf.

[4] *See* Lindsay, *State Laws After* Leegin, *supra* note 3, at 2. For a recent case discussing the Maryland statute, see Yellow Cab Co. v. Uber Technologies, Inc., File No. RDB-14-2764 (Balt. County Cir. Ct. Feb. 29, 2016) ("Price-fixing is thus a per se violation of the Maryland Antitrust Act. . . . Plaintiffs allege that Uber, with the participation of its drivers, including the Driver Defendants, conspired to set a minimum price threshold below which the drivers may not charge. . . . Even if Uber was the driving force behind the alleged scheme, the Driver Defendants are alleged to be participants and co-conspirators within the ambit of the Maryland Antitrust Act.").

ney General has steadfastly maintained that the state's Cartwright Act still condemns RPM agreements as per se violations.[5] Two non-AG cases have reached the same conclusion.[6]

- The New York Attorney General pursued a similar interpretation of New York state law but has not persuaded courts to agree.[7]
- The Kansas Supreme Court held that Kansas law prohibited RPM agreements as per se violations, but its decision was overturned by the state legislature.[8]

Contact Sports, NFL Football, and Resale Price Floors

In January 2016, the New York Attorney General issued a report on the sale and resale of tickets for live entertainment events.[9] Until 2007, New York had an anti-scalping law dating from the early 20th century that was designed to address the problem of "gross profiteering" by "ticket speculators."[10] In 2007, the state legislature replaced that law with a new approach of legalizing, licensing, regulating, and taxing ticket resellers.[11] The statute makes it illegal for the entertainment provider to "restrict by any means the resale of any tickets included in a subscription or season ticket package."[12] The report generally described the Attorney General's "serious concerns about several ongoing practices related to the sale and resale of tickets in New York" and specifically referenced a rule of the NFL Ticket Exchange setting a price floor for the resale of individual tickets.

[T]he AGs concluded that "there was a League-wide Ticket Exchange Price Floor" . . . .

According to the report, the NFL Ticket Exchange set a minimum resale price for tickets sold over the exchange, with the floor typically being the face value of the ticket. The report identified two concerns with this arrangement. First, a ticket-buyer may not be aware of the rule and may therefore be led to believe that the price paid is a market price. Second, and more important, buyers are deprived of the lower prices that the "market-based" approach of the New York statute was intended to provide. The pricing restraint on the official NFL site, either directly or because of the relative difficulties of using other sites, might prevent sales at market prices.

The New York Attorney General partnered with the Attorneys General of Pennsylvania, Massachusetts, Ohio, and the District of Columbia (collectively, the AGs) to investigate the NFL ticket exchange. In November 2016, the AGs reached a settlement agreement with the National Football League.[13] As a result of their investigation, the AGs concluded that "there was a League-wide Ticket Exchange Price Floor" but that it "was removed in 2016 and is no longer in effect." As of the date of the settlement agreement, "the NFL . . . leaves the decision whether to maintain a 'price

[5] *See* Lindsay, *A Tale of Two Coasts*, *supra* note 3, at 1–3.

[6] Lindsay, *Repatching the Quilt*, *supra* note 3, at 1–3.

[7] Lindsay, *A Tale of Two Coasts*, *supra* note 3, at 3–4; Lindsay, *From the Prairie*, *supra* note 3, at 2–3.

[8] Lindsay, *From the Prairie*, *supra* note 3, at 3–6.

[9] Associated Press, *New York Investigating NFL over Its Ticket-Selling Website* (Jan. 28, 2016), http://www.espn.com/nfl/story/_/id/14668620/new-york-investigators-target-nfl-ticket-resale.

[10] Eric T. Schneiderman, New York Attorney General, *Obstructed View: What's Blocking New Yorkers from Getting Tickets* 7 (Jan. 2016), https://ag.ny.gov/pdfs/Ticket_Sales_Report.pdf [hereinafter NYAG Report].

[11] *Id.* at 7–8.

[12] N.Y. Arts & Cultural Affairs Law § 25.30. The prohibition applies to any "operator of a place of entertainment, or operator's agent."

[13] Settlement Agreement, In the Matter of NFL Ticketing Investigation, Assurance No. 16-181 (Attorney General of the State of New York, Antitrust Bureau) [hereinafter Settlement Agreement], https://ag.ny.gov/sites/default/files/11.15.2016_-_nfl_tix_investigation_final.pdf. Although the agreement is entitled a "settlement," there was no underlying litigation. Depending on the state, the agreement was actually an "assurance of discontinuance" or an "assurance of voluntary compliance." *Id.* at 1 n.1.

floor' on the NFL Ticket Exchange for tickets resold on that platform for its own home games to each individual member club, to be made unilaterally."[14]

Somewhat curiously, the Settlement Agreement also reported that the AGs had not "identified an injury to consumers resulting from the League-wide Ticket Exchange Price Floor, alone or in combination with other ticketing practices."[15] Unless one's view of antitrust is based purely on allocative efficiency (without regard to wealth transfers), consumer harm is the touchstone of antitrust. If the AGs were unable to identify consumer harm (and the practice had already been discontinued anyway), then one wonders why the Settlement Agreement was "appropriate and in the public interest."[16] Nevertheless, the agreement did obtain a ten-year ban on the NFL's reinstating a price floor on the exchange, as well as a prohibition on any NFL efforts to facilitate member teams' ticket resale prices in a way that would result in a resale price floor on the NFL exchange.[17]

The Settlement Agreement does not address the two clearly vertical practices that it could have addressed: resale price floors for tickets originally sold by the NFL, and resale price floors for tickets sold by member teams. Indeed, the Settlement Agreement explicitly excludes tickets that are distributed primarily by the NFL (rather than the member clubs), such as the Super Bowl or the Pro Bowl and games played outside the United States.[18] Individual teams remain free under the Settlement Agreement to set their own respective price floors.[19]

Despite the vertical nature of the New York statute that precipitated the investigation, the issues that the Settlement Agreement addresses seem more horizontal. The exchange can be characterized as a collaboration among the member teams (through their other collaboration, the NFL). The prohibition on the NFL's setting a price floor in the exchange is really simply a prohibition on the kind of rule to which the member teams can agree, and the prohibition on NFL coordination of member team agreements on price floors is clearly a ban on vertical orchestration (but of a horizontal agreement).[20] The Settlement Agreement also prohibits the NFL from facilitating agreements that would disadvantage competing ticket-resale platforms[21]—again, at most a prohibition on the kind of rules to which the member teams could agree.

One final observation on the Settlement Agreement: its provisions are not limited either to resale price floors for tickets for games played within the jurisdictions of the AGs who secured the

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14 *Id.* at 2.

15 *Id.*

16 *Id.*

17 *Id.* at 3 para. 2 ("The NFL shall not reinstate a League-wide Ticket Exchange Price Floor during the Term of this Settlement Agreement.").

18 *Id.* at 3 para. 3(a) (prohibiting NFL from "formally or informally coordinating or encouraging any pricing practices among its member clubs that would result, directly or indirectly, in formal or informal agreements among its member clubs with respect to price floors for the resale of tickets for preseason, regular season or postseason playoff games").

19 *See* Kenneth Lovett, *NFL Ticket-Sale Reforms Could Bring Drop in Secondhand Prices, AG Announces*, N.Y. Daily News, Nov. 15, 2016, http://www.nydailynews.com/sports/football/nfl-ticket-sale-reforms-bring-drop-secondhand-prices-ag-article-1.2874076.

20 Even the "vertical" aspect of this characterization ignores the fact that the NFL itself is a collaboration among competing member teams.

21 Settlement Agreement at 3 para. 3(b) ("promoting or requiring that its member clubs implement ticketing technologies or practices that are designed or intended to substantially impede or preclude the ability of consumers to buy or sell tickets on secondary ticket exchanges unless permissible under applicable law."); *id.* at 4 para. 5 (prohibiting NFL from "intentionally and substantially interfere[ing] with or otherwise preclude[ing] any member club from coordinating with any secondary ticket exchange in efforts to combat ticket fraud"). The latter provision is particularly important in promoting competition between platforms because the NFL Ticket Exchange is "frequently billed as the official resale site and the only 'safe' place to buy secondary NFL tickets." NYAG Report, *supra* note 10, at 32.

agreement or to games played by teams within those jurisdictions.[22] In other words, the Settlement Agreement applies to tickets for games played at such stadiums as Lambeau Field in Green Bay, U.S. Bank Stadium in Minneapolis, and the Los Angeles Memorial Coliseum, as well as to games played within the AGs' respective jurisdictions. Perhaps it may not have been practical for the NFL to structure its platform according to game location or buyer/seller zip code, and the NFL may not have cared in any event, since it had already discontinued its price floor. Nevertheless, it is worth noting that the Settlement Agreement applies to events clearly outside the jurisdictions of the participating AGs.

Contact Lenses

Contact lenses require a prescription from an eye care professional (ECP), such as an ophthalmologist or optometrist, and those ECPs can also sell contacts to their patients. Once the patient has a prescription, however, the patient can buy the contacts (but only the prescribed brand, unless the prescription specifies private label lenses[23]) from other retailers, including big-box stores and online discounters. Perhaps unsurprisingly, these non-ECP channels are able to offer contact lenses at lower prices than ECPs.[24] The contact lens industry has a history of previous antitrust litigation, and it is now regulated by the Federal Trade Commission[25] under the Fairness to Contact Lens Consumers Act.[26]

At various times in 2013 and 2014, each of the four leading manufacturers (accounting for approximately 90 percent of contact lens sales) announced its own "unilateral pricing policy"[27] or RPM policy.[28] In April 2016, Johnson & Johnson Vision Care (J&JVC) discontinued its policy,[29] and Alcon discontinued its policy in December 2016.[30]

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[22] Indeed, the Washington D.C. team does not actually play its games within the jurisdiction of the D.C. AG!

[23] *See generally* Fed. Trade Comm'n, *The Contact Lens Rule: A Guide for Prescribers and Sellers* (Oct. 2004), https://www.ftc.gov/system/files/documents/plain-language/bus62-contact-lens-rule-guide-prescribers-and-sellers.pdf.

[24] *See, e.g.*, Press Release, California Dep't of Justice, Attorney General Lockyer Announces Settlement of Contact Lens Antitrust Lawsuit (May 22, 2001), https://oag.ca.gov/news/press-releases/attorney-general-lockyer-announces-settlement-contact-lens-antitrust-lawsuit ("The settled lawsuits alleged that retail prices of disposable contact lenses were too high because Johnson & Johnson and the other defendant manufacturers agreed with Optometric Association representatives, in violation of the antitrust laws, that their lenses would be available only from eye care professionals (optometrists, ophthalmologists and opticians), retail optical stores or certain mass merchandisers.").

[25] On December 7, 2016, the FTC issued a notice of proposed rulemaking and request for public comment on a revision of its Contact Lens Rule. *See* 81 Fed. Reg. 88,526 (Dec. 7, 2016), https://www.ftc.gov/system/files/documents/federal_register_notices/2016/12/contact_lens_rule_published_frn12716.pdf.

[26] Public Law 108-164, *codified at* 15 U.S.C. § 7601 et seq. The House committee report referred to the "practice of optometrists withholding the prescription," which "has limited the consumer's ability to shop for the best price and has impacted competition." Report of the Committee on Energy and Commerce 4, H.R. Rep. No. 108-318 (Oct. 15, 2003), https://www.congress.gov/108/crpt/hrpt318/CRPT-108hrpt318.pdf.

[27] This term and its acronym "UPP" have become increasingly common in the last decade, and they do properly focus attention on two features: that the text is "unilateral" and is a "policy"—and is therefore not an "agreement." Labeling a text as a UPP, of course, does not necessarily make it so, as *Leegin* itself noted. 551 U.S. at 903 ("The problem for the manufacturer is that a jury might conclude its unilateral policy was really a vertical agreement, subjecting it to treble damages and potential criminal liability.").

[28] *See* Order at 5–6, *In re* Disposable Contact Lens Antitrust Litig., File No. 3:15-md-2626 (M.D. Fla. June 16, 2016) [hereinafter Contact Lens Class MTD Order] (Alcon UPP in June 2013; Bausch & Lomb UPP in Feb. 2014; J&JVC UPP effective July 2014; CooperVision UPP in Sept. 2014).

[29] *Johnson & Johnson Ends Contacts Lens Policy amid Price Wars* (Apr. 14, 2016), http://bigstory.ap.org/article/a1dd274291ac4eb7bfd5f0022296c0ed/johnson-johnson-ends-contacts-lens-policy-amid-price-wars.

[30] *Alcon Ends UPP Program and Will Focus on Its 'Innovative Partnerships' to Support ECPs*, Vision Monday (Dec. 28, 2016) (Alcon policy termination effective Dec. 23, 2016), http://www.visionmonday.com/latest-news/article/alcon-ends-upp-program-and-will-focus-on-its-innovative-partnerships-to-support-ecps-1/; For Alcon's statement, see https://www.alcon.com/content/unilateral-pricing-policy.

Maryland Attorney General Action. In February 2016, the Maryland Attorney General filed suit against J&JVC, alleging an agreement to set minimum retail prices for the sale of contact lenses to consumers.[31] Until 2009, Maryland law provided that courts "be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters."[32] In 2009, Maryland adopted a statute that excluded the *Leegin* decision from this general rule by providing that an agreement setting "a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service" to be an unreasonable restraint of trade.[33] The complaint against J&JVC is the first enforcement action that the Maryland AG has brought under this statute.[34]

The Maryland Act (like the Sherman Act) applies only to "agreements" that restrain trade, and not to unilateral policies that might have the same effect. The Maryland AG alleged that for an RPM policy to be legal in Maryland, the policy "must result from the purely unilateral decision of a manufacturer, without negotiation as to its terms, and must be enforced unilaterally."[35] Consequently, the Maryland AG had to identify and allege an agreement between J&JVC and someone else: Costco. After J&JVC announced its RPM policy, Costco objected, but J&JVC told Costco that it had to "bring its prices up to UPP levels or work out an adjustment to the pricing policy so that Costco would not have its supply of lenses cut off."[36] According to the complaint, J&JVC and Costco "negotiated" over the content of the policy.[37] The Maryland complaint attached as an exhibit an internal J&JVC email stating, "We have reached an agreement with Costco which is a good solution," and although the writer recognized that "there may still be some noise" (because Costco "[is] not fans of our UPP policy"), J&JVC and Costco were "partnering on a productive path forward."[38] J&JVC answered the complaint, admitting that it had an RPM policy but denying that there was an agreement.

The court had not issued any substantive rulings, but on October 2016, J&JVC filed an "Assurance of Discontinuance." (Like many states, Maryland empowers the AG to accept an assurance that a party has discontinued an act or practice that might be a violation of the state antitrust law.[39]) The Maryland AG rejected the assurance, and the parties disagreed both on whether the trial court could approve an assurance without the AG's consent and whether the AG's action was

[31] Complaint, State of Maryland v. Johnson & Johnson Vision Care, Inc., File No. 03C16002271 (Balt. Cty. Cir. Ct. Feb. 29, 2016) [hereinafter Maryland Complaint], http://www.marylandattorneygeneral.gov/News%20Documents/JJVC_COMPLAINT.pdf.

[32] Md. Code Ann., Com. Law §11-202(a)(2).

[33] Md. Code Ann., Com. Law §11-204(b).

[34] Press Release, Maryland Office of Attorney General, Attorney General Frosh Announces Settlement of Price-Fixing Lawsuit Against Johnson & Johnson Vision Care, Inc. 1 (Mar. 30, 2017). Interestingly, the press release also notes that "while a state senator [in 2009], Attorney General Frosh sponsored an amendment to the Maryland Antitrust Act that prohibits any agreement setting a minimum price below which a retailer may not sell goods. The amendment was subsequently signed into law."

[35] Maryland Complaint, *supra* note 31, ¶ 17.

[36] *Id.* ¶ 35.

[37] *See, e.g.*, *id.* ¶¶ 34, 36–37, and 41. The Maryland Complaint, however, did not name Costco as a defendant.

[38] *Id.* at Ex. 2.

[39] Md. Comm. L. Code § 11-206 (2015).

wholly or partially mooted.[40] The parties finally reached a negotiated resolution, and on March 29, 2017, the court accepted an agreed assurance of discontinuance. Unlike the NFL Settlement Agreement and (as discussed below) the Utah statute, the assurance is clearly confined to sales made to consumers in a single state: the assurance provides that J&JVC will not enter into any agreement that requires a retailer "to sell contact lenses at or above a minimum retail price in *Maryland*."[41] Moreover, the assurance will terminate if the Maryland statute is held unconstitutional (although J&JVC waived its constitutional defense to approval or enforcement of the assurance).[42] The assurance also provided for J&JVC to pay a civil penalty of $50,000.[43]

Private Class Action Litigation. Beginning in March 2015, the class action bar swung into action, ultimately filing over 50 complaints in multiple jurisdictions.[44] The Judicial Panel on Multi-District Litigation transferred the cases to Judge Harvey Schlesinger in the Middle District of Florida. The defendants filed a motion to dismiss the consolidated class action, which the district court denied in June 2016.

The complaint alleges both a vertical agreement (between the lens manufacturers and a wholesaler, ABB Optical) and a horizontal agreement among the lens manufacturers to adopt RPM policies. The complaint describes both the enormous market share (97 percent) of the manufacturers with RPMs and the unusual structure of the industry: the ECPs (who are also themselves retailers) act as gatekeepers by specifying the brand of the prescribed lens.[45] A manufacturer who cannot persuade ECPs to prescribe its lenses will suffer: "Unless the patient comes back for another eye examination, or switches ECPs, he or she has to buy the prescribed brand of lenses for the length of the prescription, typically from one to two years."[46]

The court noted that vertical and horizontal conspiracies can intersect in a "hub and spoke" conspiracy—a vertical orchestration of a horizontal conspiracy, such as alleged in *Toys "R" Us* or *United States v. Apple*.[47] The court was persuaded that the class complaint's allegations of a horizontal conspiracy were sufficient to survive *Twombly* because the adoption of RPM policies represented a "fundamental" change in the industry, the policies were all adopted within a compressed time period, the number of persons (the ECPs) to be coordinated was very large, the price increases were dramatically large (40 percent to 112 percent), and no one lens manufacturer would be able to raise its prices significantly unless others went along.[48] The large combined mar-

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[40] J&JVC consented to the entry of injunctive relief "in accordance with this assurance of discontinuance." J&JVC Assurance of Discontinuance 3 & n.1, Maryland v. Johnson & Johnson Vision Care, Inc., File No. 03C16002271 (Balt. Cty. Cir. Ct. Oct. 20, 2016). J&JVC also argued that the state civil penalty is capped at $100,000 and that any further proceedings or mediation should be directed toward determining an appropriate penalty within that cap.

[41] Assurance of Discontinuance, Maryland v. Johnson & Johnson Vision Care, Inc., File No. 03C16002271 (Balt. Cty. Cir. Ct. Mar. 29, 2016).

[42] *Id.* ¶ III (assurance continues for five years unless statute "is repealed or held unconstitutional") and at 1 n.2.

[43] *Id.* ¶ IV.

[44] Market Scope, *54 Class Action Lawsuits Accuse Contact Lens Makers of Price Fixing* (Oct. 23, 2015), https://market-scope.com/breaking-post/54-class-action-lawsuits-accuse-contact-lens-makers-of-price-fixing/.

[45] Plaintiffs' Corrected Consolidated Class Action Complaint ¶ 6, File No. 3:15-md-02626, Dkt. No. 135 (M.D. Fla. Nov. 23, 2015).

[46] Contact Lens Class MTD Order, *supra* note 28, at 4.

[47] Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000); United States v. Apple, Inc., 791 F.3d 290, 314 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016).

[48] Contact Lens Class MTD Order, *supra* note 28, at 32–34. Here the court was certainly giving plaintiffs the benefit of the doubt, because every RPM policy worth undertaking involves either a price increase or protection of an existing or proposed price level. Furthermore, in a concentrated industry, a firm will take into consideration the likely—but still nonconspiratorial—responses of its competitors.

ket share and the compressed period of sequential adoptions were particularly important. As the court explained:

> If the drastic sea-change in pricing of contact lenses stopped here, the Court would be examining no more than an alleged vertical agreement between Alcon and the ECPs through ABB, and would necessarily consider Alcon's 30.6% market share as a factor in determining whether the adoption of the UPP was indeed a lawful independent action under *Colgate*. But the parade of UPPs did not stop there.[49]

In the context of the hub-and-spoke horizontal conspiracy, the court found the vertical allegations sufficient because ABB had ample opportunity to facilitate communications among the manufacturers, had the goal of helping "ECPs to 'make more money,'' and had "acknowledged that it 'worked closely' with the Manufacturer Defendants to develop the UPPs."[50]

After analyzing the per se allegations of the horizontal conspiracy, the court turned to a rule of reason analysis of the vertical allegations. The court found that the plaintiffs had plausibly alleged a relevant product market of disposable contact lenses. The court also found that the market share at issue was large enough that anticompetitive effects were plausible. The defendants had focused on each individual firm's market share (with the highest being about 30 percent), but because the vertical agreements were "integral" to the broader horizontal conspiracy, the court looked to the market share of *all* of the manufacturer defendants (97 percent) and of the affected products (40–80 percent of lenses).[51] The court also considered that the ECPs who had driven the adoption of RPM policies "controlled" two-thirds of the disposable lens market.[52]

But were there vertical agreements? The court recited a litany of allegations that it believed

> plausibly establish a flow of information up and down the distribution chain about UPPs, from the ECPs' pressure on the Manufacturer Defendants to relieve ECPs of the price competition and thus the siphoning of sales of contact lenses to the Discount Retailers, to the Manufacturer Defendants' dramatic response out of a concern for the ECPs' ability to make a profit on selling contact lens which in turn would incentivize ECPs to prescribe their lenses.[53]

Most of the specific factual allegations involved manufacturers communicating with their ECP customers about pricing policies. Citing and quoting *Monsanto*, the court acknowledged that manufacturers "have legitimate reasons to exchange information [with distributors] about the prices and the reception of their products in the market" and that "constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions."[54] But the specific circumstances (including, again, the compressed period in which the policies were adopted) persuaded the court that the allegations were sufficient.

The case remains in the discovery phase. Fact discovery is currently scheduled to close in August 2017, with dispositive motions due in April 2018, and a final pretrial conference set for October 10, 2018.[55]

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[49] *Id.* at 37.

[50] *Id.* at 36 (quoting Plaintiffs' Corrected Consolidated Class Action Complaint).

[51] *Id.* at 44.

[52] *Id.* at 45.

[53] *Id.* at 46.

[54] *Id.* at 47 (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762 (1984)).

[55] Order, *In re* Disposable Contact Lens Antitrust Litig., File No. 3:15-md-2626 (M.D. Fla Nov. 17, 2016).

Costco Suit Against J&J. In March 2015, Costco filed an antitrust suit against J&JVC, alleging that J&JVC had conspired with ECPs to adopt an RPM policy. In June 2016, the MDL panel transferred this case to Judge Schlesinger in Florida. Although Judge Schlesinger had denied J&JVC's motion to dismiss the complaint in November 2015, the parties stipulated to dismissal of the case without prejudice in May 2016.

J&JVC had argued first of all that Costco had not suffered any injury-in-fact. J&JVC claimed that Costco was actually making greater profits under the RPM policy, and that other retailers were charging higher prices (presumably meaning that Costco was still at a competitive advantage against other retailers). Costco argued that it was selling fewer units at the higher prices (as well as fewer units of other products), that any short-term gains were outweighed by long-term harm to Costco's business model, and that the RPM policy hampered Costco in using low contact lens prices to attract new members. The court held that the Costco's allegations of injury were sufficient at the pleading stage.[56]

[T]he court found that J&JVC's 43 percent market share and the alleged effects on competition were sufficient to allege antitrust injury.

The court similarly rejected J&JVC's argument that Costco had not suffered antitrust injury. Its analysis required consideration of the product market and alternative "Wholesale and Retail Contact Lens Markets" that Costco alleged. The injury to competition in the wholesale market was that lens manufacturers were focused on "facilitating high minimum retail prices and margins rather that lowering wholesale prices," and that without the vertical collusion with ECPs, the lens manufacturers would have competed with each other by using more efficient retailers.[57] Costco also alleged that because of the prescription-based nature of contact lenses and the relative inability of retailers to substitute one brand for another, each brand was its own market, but even viewing contact-lens retailing as a single market, the court found that J&JVC's 43 percent market share and the alleged effects on competition were sufficient to allege antitrust injury.

J&JVC also challenged the sufficiency of the allegations of any vertical agreement. Costco had alleged two different agreements: (1) between J&JVC and ECPs, and (2) between J&JVC and distributors. As to the first, Costco alleged that some ECPs had "urged" J&JVC to adopt the policy, that ECPs had complained about discounting, that J&JVC was "strongly motivated" to agree with these ECPs who had the power to write prescriptions, that J&JVC had sought and received "open and candid responses" from ECPs that helped J&JVC "define our strategy and implement the changes and actions that you [ECPs] told us were needed."[58] As to the distributors, Costco alleged that J&JVC "needed" the distributors' help to enforce the RPM policy and that the policy on its face indicated that distributors had agreed to enforce it. As to both categories of agreement, the court held that the allegations were sufficient to get past *Twombly*.[59]

Costco alleged a third category of agreement as well—between J&JVC and non-ECP retailers—including Costco itself. J&JVC argued that the complaint alleged only "pricing suggestions, persuasion, and pressure"—but not enough to establish a coerced agreement. The court found that the alleged threat of termination was sufficient to establish coercion, in large part because J&JVC's products accounted for such a large percentage (over 50 percent) of Costco's contact

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[56] Order at 21–25, Costco Wholesale Corp. v. Johnson & Johnson Vision Care, Inc., File No. 3:15-cv-734 (M.D. Fla. Nov. 4, 2015). Costco (which is an investor-owned membership organization) also claimed standing based on injury to its members. The court discussed but made no decision on the concept of associational standing, because Costco had adequately pleaded direct standing. *Id.* at 21.

[57] *Id.* at 26 (quoting complaint).

[58] *Id.* at 33 (quoting complaint).

[59] *Id.* at 34–35.

lens sales. The court recognized that it was "[t]o be sure . . . unusual in this posture" for Costco to name itself as a counterparty to an illegal agreement,[60] but the fact that Costco and J&JVC may have had different motives for making the agreement did not mean there was no agreement.[61]

Lens Manufacturer Challenge to Utah Statute. In 2015, after the lens manufacturers had adopted their RPM policies, Utah enacted a statute prohibiting the enforcement of RPM policies or agreements against lens retailers in Utah.[62] The statute makes it illegal for a lens manufacturer or distributor to "take any action, by agreement, unilaterally, or otherwise, that has the effect of fixing or otherwise controlling the price that a contact lens retailer charges or advertises for contact lenses."[63] Three points leap out from this language:

- The statute applies not only to "agreements" but also to a manufacturer's unilateral actions. In other words, the statute is an express rejection, at least within its contact-lens domain, of the *Colgate* doctrine.[64]
- The statute applies not only to actual selling prices, but to advertised prices as well. In other words, it rejects even the pre-*Leegin* law that applied rule of reason analysis to agreements on advertised price.
- The statute applies to both minimum and maximum prices (although the statute was prompted, presumably, by concerns about minimum prices). In other words, the statute rejected not only *Leegin*'s analysis of minimum price agreements, but also *Khan*'s[65] analysis of maximum resale price agreements.

Several contact lens manufacturers brought suits against the Utah Attorney General challenging the law as violating the Commerce Clause of the U.S. Constitution. The federal district court consolidated the suits and permitted intervention by two large lens-retailers, Costco and 1-800 Contacts. The district court denied a motion for preliminary injunction. In May 2015, the Tenth Circuit issued a temporary injunction pending briefing, but on June 12, 2015, the court vacated the temporary injunction. In December 2016, the Tenth Circuit affirmed the district court's denial of a preliminary injunction (albeit in a nonprecedential opinion decided under the standard for review of denial of a preliminary injunction).

The Tenth Circuit rejected the lens manufacturers' Commerce Clause argument on a 2–1 vote. According to the court, the state statute did not discriminate on its face between in-state and out-of-state businesses. The statute also applied only to sales to resellers in Utah and did not purport to apply to sales to retailers located outside of Utah. The statute's prohibition of discrimination against a retailer who "sells or advertises contact lenses for a particular price" is not explicitly limited to the retailers' sales and advertising within Utah, but the Tenth Circuit stated that the district court did not err in relying on the "Utah Attorney General's interpretation . . . saying that the statutes don't apply to the conduct of manufacturers or retailers selling outside Utah."[66]

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[60] *Id.* at 37.

[61] *Id.* at 37–38.

[62] Utah Code Ann. § 58-16a-905.1.

[63] *Id.* § 58-16a-905.1(1).

[64] An amendment to delete the phrase "unilaterally, or otherwise" was defeated on the floor of the state House of Representatives. *See* S.B. 169, Contact Lens Consumer Protection Act Amendments—House Floor Verbal Amendment No. 2 (Mar. 10, 2015), http://le.utah.gov/~2015/pamend/sb0169.hfvf.02.pdf.

[65] State Oil Co. v. Khan, 118 S. Ct. 275 (1997) (holding vertical maximum price fixing is not a per se violation of the Sherman Act).

[66] Johnson & Johnson Vision Care, Inc., v. Reyes, 665 Fed. App'x 736, 743 (10th Cir. Dec. 19, 2016) ("relying on the Utah Attorney General's interpretation, neither section 58-16a-905.1 nor 58-16a-906 regulate the price retailers charge for contact lenses outside of Utah. Retailers outside of Utah are free to sell contact lenses for whatever price they would like, including the prices set by the Manufacturers' UPPs.").

The court also held that the statute did not have extraterritorial effect. The lens manufacturers argued that the statute "'bars an out-of-state contact lens manufacturer from setting a minimum resale price for the sale of its products by a Utah contact lens retailer to a customer in California.'"[67] The court noted that this argument "ignores Utah's interest" and "ignore[s] the location of the retailer—Utah" and that the statute "doesn't regulate conduct occurring wholly outside of Utah—it only regulates sales from a Utah retailer that is located within Utah."[68]

The Tenth Circuit majority appears to have conflated the location of the reseller with the nature of the commerce. One can easily envision business models that make this clear. For example, a manufacturer could have two agreements with a reseller: one applying to resales to consumers located in Utah, and a separate agreement relating exclusively to its sales to consumers located outside Utah. A law that prohibited RPM policies as to sales made under the first agreement would presumably advance the two interests that Utah identified—"(1) [the statute] returns intrabrand competition to the contact-lens market in Utah; and (2) it allows retailers in Utah to charge lower prices to consumers buying contact lenses in Utah"—even though non-Utah retailers might be commercially disadvantaged if they did not have the benefit of the same statute.[69] In contrast, a law that prohibited RPM policies as to sales under the second agreement certainly does not advance those interests—but it does put Utah-based resellers at a commercial advantage relative to non-Utah resellers.[70]

Indeed, the dissent was based on essentially this point. Although agreeing that the statute did not discriminate against out-of-state manufacturers, Judge Bacharach would have remanded the case for district court review under a strict scrutiny standard because the statute discriminated against out-of-state retailers. As Judge Bacharach noted, this discrimination "exists partly because Utah hosts a retailer, 1-800 CONTACTS, which sells roughly 99% of its contact lenses outside of Utah."[71] The practical consequence is that the Utah statute thus "allows 1-800 CONTACTS to always undersell retailers outside of Utah when competing for sales in 49 states."[72] Certainly a manufacturer could avoid this discrimination for their non-Utah resellers by abandoning sales to all Utah resellers, but Judge Bacharach disagreed that the Commerce Clause allows a state to put a manufacturer to that choice, at least on the facts at hand.[73]

Some Takeaways

Devising and implementing an RPM policy remains challenging, and counselors need to be aware of potential pitfalls. The last few years have taught or reminded practitioners of some key points:

Retailer-driven policies are more likely to be challenged, and the challenge is more likely to survive a motion to dismiss. A typical RPM policy will state that it is unilateral, that no agreement

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[67] *Id.* at 746 (quoting *Alcon* opening brief).

[68] *Id.*

[69] *Id.* at 744–45.

[70] *Cf.* Lindsay, *A Tale of Two Coasts*, *supra* note 3, at 2–3 ("The *Bioelements* consent decree does not distinguish between Internet resellers and brick-and-mortar resellers, although it plainly applies to both, and it does not distinguish between in-state and out-of-state resellers. Arguably the consent decree's reference to the applicable state statute means that the injunction applies only to in-state resellers (and possibly only to in-state sales by in-state resellers). But the consent decree also required Bioelements to notify all distributors and resellers with whom it had RPM agreements—seemingly without regard to whether the reseller or its customers were located in California.").

[71] Johnson & Johnson Vision Care, Inc. v. Reyes, 665 Fed. App'x. at 751 (Bacharach, J. dissenting).

[72] *Id.*

[73] *Id.* at 754–55.

is invited or accepted, and that no employee is authorized to say or do otherwise. A manufacturer that is considering adopting an RPM policy, however, may well want to understand how its resellers will react. Moreover, there is a natural tendency to tell business partners "we've listened to you, and we are responding to your request." That does not necessarily mean that there was an "agreement" in the legal sense, but those words may well be repeated in a plaintiff's complaint.

Beware of RPM Policies in Concentrated Industries. As the contact lens litigation illustrates, RPM policies adopted by multiple firms in concentrated industries are more likely to face challenges. This lesson certainly is not new. Back at the beginning of this century, the FTC obtained consent orders against "the five largest distributors of recorded music who sell approximately 85 percent of all compact discs (CDs) purchased in the United States to end their allegedly illegal advertising policies that affected prices for CDs."[74]

Products that consumers purchase repeatedly may be a poor candidate for RPM policies. A consumer who purchases a product on a regular and relatively frequent basis may see less value in any pre-sale services or other functions that the RPM policy is supposedly designed to facilitate. Although the customer may have some brand preference (and, in the contact lens case, some barriers to brand-switching), that may not signal any willingness to pay the higher prices that an RPM policy would require.

Large price movements get attention. An RPM policy that is followed by large price increases across a broad range of a manufacturer's products is more likely to draw attention. Manufacturers might want to consider applying a new RPM policy to a narrower range of products, as well as offering their own lower-priced alternatives to the higher-priced products covered by the RPM policy.●

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[74] Press Release, Fed. Trade Comm'n, Record Companies Settle FTC Charges of Restraining Competition in CD Music Market—All Five Major Distributors Agree to Abandon Advertising Pricing Policies (May 10, 2000), https://www.ftc.gov/news-events/press-releases/2000/05/record-companies-settle-ftc-charges-restraining-competition-cd.