

*Prepared in preparation for:*

*O'Brien v. Leegin*: Perspectives on  
State-Law Resale Price Maintenance  
Actions

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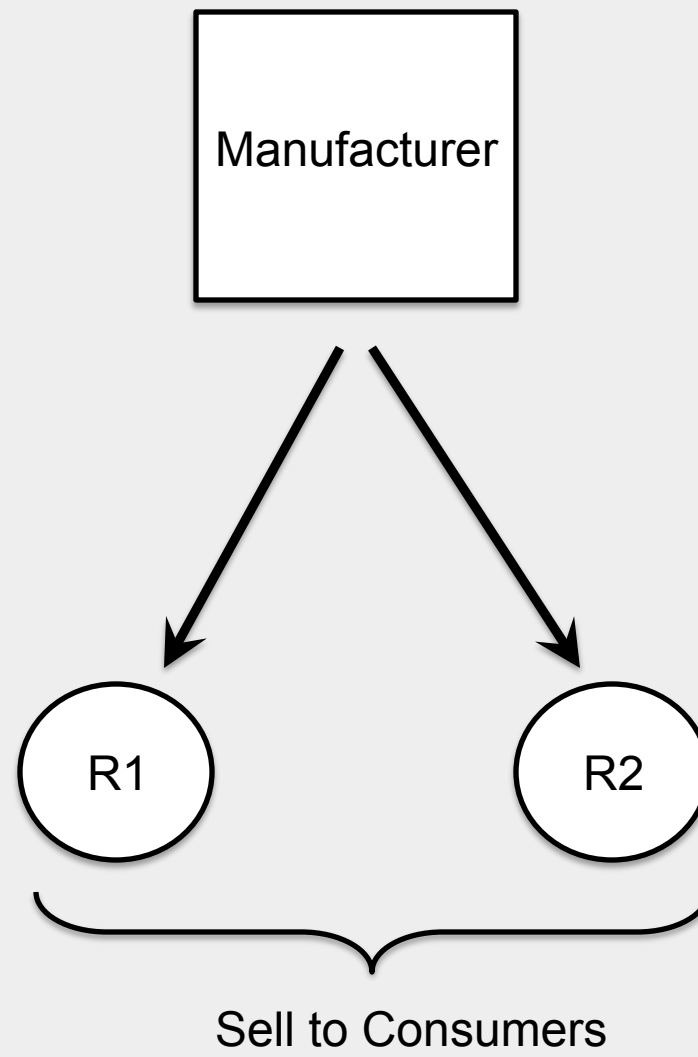
1. What is it?
2. What does it do?
3. Structuring Argument
4. Conclusion
5. Useful References

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ABA Antitrust Section, State Enforcement and  
Pricing Conduct Committees

## Definitions

- What is Resale Price Maintenance? (RPM)



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Resale Price  
Maintenance

Empirical  
Relevance

From  
Overstreet  
(1983), Resale  
Price  
Maintenance,  
FTC Staff  
Report

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TABLE 3

Price Comparisons Prepared by the Maryland Pharmaceutical Association and the Baltimore Retail Druggists Association\*

Product	Fair Trade Prices	D.C. Free-Trade Prices	Product	Fair Trade Prices	D.C. Free-Trade Prices
Aspirin:			Liquid shampoo		
100 Bayer	\$0.59	\$0.46	continued		
100 Squibb	.54	.47	Laco	.43	.39
100 St. Joseph	.49	.43	Conte Castille	.49	.33
100 APC Co.	.39	—	Packers	.48	.43
Toothpaste:			Watkins Coconut	.48	.39
Colgate	.47	.33	Richard Hudnut	1.00	.79
Ipana	.47	.33	Wildroot	.48	.44
Pepsodent	.47	.39	Woodbury's	.43	.29
Phillips	.39	.27	Halo	.57	.43
Squibb	.47	.39	Fitch	.59	.47
Lyons	.47	.33	Deodorants:		
Armident	.53	.47	Veto	.59	.53
Clordent	.69	.53	Arrid	.63	.47
Afco	.47	.39	Fresh	.59	.43
Pebanmo	.49	.39	Sanite	.39	.38
Shaving cream:			Chad	.43	.39
Colgate	.53	.47	Coty	1.00	—
Barbasol	.39	.33	Hush	.49	.43
Palmolive	.53	.41	Mum	.59	.39
Burmashave	.40	.33	Olorono	.48	.37
Molle	.43	.37	Barz	.39	.33
Noxzema	.59	.47	Five-day pads	.59	.47
Mennen	.53	.43	Ydoro	.59	.43
Gillette	.43	.37	Zipp	.50	.47
Williams	.47	.37	Stoppette	.60	.47
Hair tonics:			Dyrad	.49	.37
Wildroot	.48	.43	Mennens	.59	.41
Kreml	.57	.43	Amolin	.59	.47
Vitalis	.49	.33	Heed	.59	.47
Vaseline	.47	.39	Hand lotions:		
Jeris	.49	.39	Hinds	.49	.39
Lucky Tiger	.48	.39	Italian Balm	.45	.37
Liquid shampoo:			Cashmere Rouquet	.43	.37
Admiration	.49	.43	Frostilla	.47	.43
Breck	.60	.53	Jergens Lotion	.49	.31
Wonder	.48	—	Trushay	.49	.33
Drene	.57	.47	Pacquin	.49	.39
Kreml	.59	.47			

Source: Standard Drug Co., Washington, D.C.

\* Study of Monopoly Power, Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 82nd Congress, 2nd Session, on Resale Price Maintenance, Serial No. 12, February 1952, p. 124.

## Source of antitrust injury

Most recent statement: Majority decision in *Leegin* (2007)

- Cartel Facilitation: (making monitoring easier)
  - *Resale price maintenance may, for example, facilitate a manufacturer cartel ... Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer.*
  - *A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance*
- Exclusive Effect: (using monopoly profits as a bribe for anticompetitive service)
  - *A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs.*
  - *A manufacturer with market power, by comparison, might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants.*

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Source of  
consumer  
benefit

- Again organizing around *Leegin* (2007)...
- *Minimum resale price maintenance can stimulate interbrand competition the competition among manufacturers selling different brands of the same type of product by reducing intrabrand competition the competition among retailers selling the same brand.*
- Service: often based around a free riding argument (try on shoes at a store then buy online for cheap)
- Less subtle things are usually ignored in the literature: e.g. advertising
- Make entry easier by ensuring good service
- Fairly standard summary statement of broad pro-competitive principles:
  - *Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services*

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## Challenges/ opportunities in making arguments

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- Often a symmetry in the anti- and pro-competitive arguments: e.g (from *Leegin*)
  - *Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services*
    - Q: Service in pursuit of a pro- or anti-competitive goal?
- Very frequently, a non-price restraint, in theory (a big caveat), will serve much the same pro-competitive end as a price-restraint.
  - This cuts both ways: Distribution contracts are full of restraints. Surely not all are problematic...
  - Useful to keep in mind for counseling clients
- These pro-competitive service and anti-competitive effects may be complementary
  - If service pushes out the demand curve, the profits this creates may provide the means and incentive to engage in anticompetitive conduct

## Economic Evidence

- Say RPM being used in a state, following the basic fact pattern in Kansas. The allegation is basically a vertical price fixing one. Economic evidence can be used in at least three areas:

- *Class certification*
- *Establishing liability under some sort of rule of reason*
- *Damage assessment*

- Focus on the last two, which I will frame as:

- Is there an harm to competition?
- If so, how big is it?

- Assume that any documents are not dispositive on either issue

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## Types of Economic Evidence

- A retailer breaks the RPM agreement:
  - Price must go down (that's what breach means)
  - Presumably the retailer breached for a reason, so output should go up (or else not making more profit).
- This tells us that the price restraint binds. So it is doing something...
- But is problematic for two reasons:
  - The breach is isolated, so would not expect a retailer-network wide change in service provision
  - The disagreement is selected: that is, it occurs because the retailer thinks it will make more money by doing it
- So good for establishing the possibility of harm, but beyond that unclear.
- In the absence of a credible service argument, it puts a lower bound on the price drop due to competition, so could be helpful for damages.

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- Possible types of evidence that could be used to raise a service type argument:
  - What do retailers do?
    - Documentary evidence, terms in distribution contracts
  - Do retailers have service staff? What training is done?
    - Is there evidence of training days or expenditures? What procedures exist for training new hires?
  - Do consumers need advice? Is it a rare purchase or a regular purchase?
    - Consumer surveys, consumer diary data
  - Who does the advertising? Is it local or regional?
    - This may be in distribution agreements and in accounts
  - Is the consumer display important? Who puts it in place?
    - Documentary evidence, marketing evidence on consumer purchasing
  - Do consumers comment on service?
    - Survey evidence
  - To what extent do consumers buy the product online?
    - Analyst reports, third party consumer databases, diary data
  - Is RPM a recent policy? What happened prior to it? Why was it introduced?

Resale Price  
Maintenance

Kansas *Leegin*

Other  
approaches to  
data based  
analysis

- Demand estimation
- Exploiting Cross state variation
- pre- and post- RPM introduction

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## Useful references in the economics of RPM

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This is a very incomplete list, mainly designed to point to the rest of the literature:

• *Overviews:*

- Mathewson, Frank and Ralph Winter, (1998). The Law and Economics of Resale Price Maintenance, Review of Industrial Organization, 13(1-2), 57 - 84.
- Overstreet, Thomas R. (1983), Resale Price Maintenance: Economic Theories and Empirical Evidence, Bureau of Economics Staff Report to the Federal Trade Commission. At: <http://www.ftc.gov/be/econrpt/233105.pdf>

• *Collusive theories of harm:*

- Jullien, Bruno and Patrick Rey (2007), Resale Price Maintenance and Collusion, RAND Journal of Economics, 38(4), 983-1001.
- Yamey, Basil (1954), The Economics of Resale Price Maintenance, Sir Isaac Pitman & Sons, Ltd., London.

• *Exclusion based theories of harm:*

- Asker, John and Heski Bar-Isaac (2010), Exclusionary Minimum Resale Price Maintenance, NBER Working Paper w16564
- Bowman, Ward (1955), The Prerequisites and Effects of Resale Price Maintenance, The University of Chicago Law Review, 22(4), 825-873.

• *Service based pro-competitive theories:*

- Klein, Benjamin and Kevin Murphy (1988), Vertical Restraints as Contract Enforcement Mechanisms, Journal of Law and Economics, 31(2), 265-297.
- Telser, Lester (1960), Why Should Manufacturers Want Fair Trade?, Journal of Law and Economics, 3, 86-105.

• *Empirical Research (of which there is very little):*

- Ippolito, Pauline (1991), Resale Price Maintenance: Empirical Evidence From Litigation, 34 Journal of Law and Economics. 263
- Aron Smith, David and Alexander MacKay (2013), The Empirical Effects of Minimum Resale Price Maintenance on Prices and Output, January 10, 2013 at [http://home.uchicago.edu/~davidsmith/research/Leegin\\_and\\_MRPM.pdf](http://home.uchicago.edu/~davidsmith/research/Leegin_and_MRPM.pdf)