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Adding Uncertainty to the Virtual Shopping Cart: Antitrust Regulation of Internet Minimum Advertised Price Policies

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NOTES

ADDING UNCERTAINTY TO THE VIRTUAL SHOPPING CART: ANTITRUST REGULATION OF INTERNET MINIMUM ADVERTISED PRICE POLICIES

*Julie Beth Albert**

Online commerce has fundamentally changed how consumers shop and how products are distributed. As a result, manufacturers impose Internet Minimum Advertised Price (IMAP) policies, prohibiting internet retailers from advertising prices below a fixed amount. Consumers often encounter these policies through website instructions such as “see price in cart,” “to view price, add to your shopping cart,” and “price unavailable—click to see more.” Manufacturers argue that IMAP policies are non-price vertical restraints that do not run afoul of antitrust laws because they regulate only advertising. However, IMAP policies can and do impact resale pricing, resulting in higher prices and unjustifiable limitations on consumer choice.

Recent jurisprudence regarding price fixing, general uncertainty around the legality of resale price maintenance (RPM) under state and federal antitrust statutes, and high pleading standards have led to nearly insurmountable barriers for plaintiffs who raise antitrust challenges to IMAP policies. The Supreme Court held in 2007 that RPM may have procompetitive justifications, and should thus be analyzed using the rule of reason when challenged under federal antitrust law. This Note examines the analysis of IMAP policies in the context of recent antitrust jurisprudence. After a discussion of the relevant antitrust law and an analysis of recent IMAP litigation, this Note concludes that IMAP policies are sufficiently anticompetitive to justify per se prohibition and should be treated as such in state and federal courts.

* J.D. Candidate, 2013, Fordham University School of Law; B.A., 2008, Brandeis University. Many thanks to Professor Mark Patterson for his guidance and for finding IMAP policies as interesting as I do. Thank you to my family and friends for their unwavering love and support.

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INTRODUCTION

It happened. The new iPhone was just released. Finally, after months of hype, a press conference, and countless scornful looks at your soon-to-be-obsolete regular phone, the day has arrived. Apple has been trumpeting the retail price for ages and it is far more than you want to pay, so you decide to look elsewhere. As a tech-savvy consumer who knows that things are often cheaper online, you head straight to the internet and search for “new iPhone.” Sure enough, you are linked to several websites selling the phone, but something is missing—the price. In order to see the internet seller’s price, the page instructs you to first add the phone to an online shopping cart. Some of the websites will not even display the price until you input your address and credit card information. Perhaps, at this point, you call off the search and just decide to head to the Apple store.

Whether searching for a new gadget or a replacement showerhead, instructions such as “see price in cart,” “to view price, add to your shopping cart,” and “price unavailable—click to see more” have become increasingly common for online shoppers. The underlying reason for this inconvenience (or even deterrence to purchasing) is an Internet Minimum Advertised Price (IMAP) policy. IMAP policies are set by manufacturers and prohibit retailers from advertising their products online below a fixed price.¹ Distributor violations of IMAP policies can lead to fewer manufacturer incentives, reduced supply, or termination of a distribution contract.² Manufacturers argue that these policies, like other non-price vertical restraints, do not fix a selling price, and are therefore valid under antitrust law.³ However, given recent jurisprudence regarding internet advertising

1. See J. Thomas Rosch, Comm’r, FTC, Current Issues in Competition and Consumer Protection Enforcement in the Retail Sector, Remarks at the Retail Industry Leaders Association’s Retail Law Conference (Nov. 10, 2010), available at <http://www.ftc.gov/speeches/rosch/101110roschretailerspeech.pdf>, at 22–23 [hereinafter Rosch Remarks]; see also *infra* Part I.C.3.

2. See, e.g., *Riado Internet Minimum Advertised Price Policy* ¶ 2, RIADO, <http://www.riado.com/files/Riado.IMAP.Policy.pdf> (last visited Feb. 23, 2012); see also *infra* Part I.C.3.

3. See *An FTC Guide to Dealings in the Supply Chain: Manufacturer-Imposed Requirements* 1, FTC, http://www.ftc.gov/bc/antitrust/factsheets/factsheet_manufacturer.pdf (last modified July 8, 2008).

and uncertainty around the legality of resale price maintenance, these policies may in fact violate state and federal antitrust statutes.⁴

Antitrust law governs the conduct of organizations and individuals in order to promote competition in the marketplace.⁵ Under state and federal antitrust statutes, businesses must refrain from engaging in conduct that impermissibly and unjustifiably restrains competition.⁶

Resale Price Maintenance⁷ (RPM) is the result of an agreement among organizations at different levels of a supply chain to establish a product's resale price.⁸ The legality of RPM has been the subject of significant judicial, public policy, and practical debate.⁹ After nearly 100 years of uncertain legal status,¹⁰ RPM was definitively held to be permissible—subject to a rule of reason analysis—by the Supreme Court in 2007 in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹¹

Even in light of this holding, discrepancies between state and federal antitrust legislation,¹² cautionary language in judicial decisions,¹³ and persistent arguments that RPM is anticompetitive¹⁴ have led to doubts in the contemporary regulation of RPM. Additionally, the expansion of the internet has changed how businesses operate and how products are distributed.¹⁵ IMAP policies, regulating the prices at which products can be advertised on the internet, blur the lines between advertising and pricing, and the emergence of dominant online vendors has shifted the balance of traditional retail sales.¹⁶

4. See *infra* Part II.A.

5. See DOUGLAS BRODER, U.S. ANTITRUST LAW AND ENFORCEMENT: A PRACTICE INTRODUCTION 2 (2010); *infra* Part I.A.

6. See LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 7 (2000); *infra* Part I.B.

7. Resale Price Maintenance is also known as vertical price maintenance or vertical price fixing. For the purposes of this Note, this conduct will be referred to as “Resale Price Maintenance” or “RPM.”

8. See Rosch Remarks, *supra* note 1, at 13; see also *infra* Part I.C.1.

9. ABA SEC. ANTITRUST L., 2007 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS 25–26 (2007).

10. After its initial characterization as per se illegal in *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), scholars offered numerous procompetitive rationales for RPM. See discussion *supra* Part I.D.2.a.

11. 551 U.S. 877 (2007) (overruling *Dr. Miles* and eliminating the rule that RPM is per se illegal).

12. See ABA SEC. ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 796 (6th ed. 2007); see also *infra* Part I.B.3.

13. See *Leegin*, 551 U.S. at 894 (“As should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.”); *infra* Part I.D.3.

14. See *infra* Part I.D.2.a.; see also *Leegin*, 551 U.S. at 894.

15. See Marina Lao, *Internet Retailing and “Free Riding”: A Post-Leegin Antitrust Analysis*, 14 J. INTERNET L., Mar. 2011, at 1, 16 (discussing the rapid growth of internet sales). See generally Note, *Leegin’s Unexplored “Change in Circumstance”: The Internet and Resale Price Maintenance*, 121 HARV. L. REV. 1600 (2008) (discussing how online retail has fundamentally changed product distribution).

16. See Note, *supra* note 15, at 1619–21.

The proliferation of IMAP policies has already begun to generate puzzlement in the courts.¹⁷ Given the ambiguity regarding RPM's legitimacy after *Leegin*, courts find themselves on shaky ground when analyzing questions regarding IMAP policies.¹⁸ IMAP presents a doubly complex analytical problem. First, IMAP policies are typically analyzed under the RPM framework, and the legality of RPM is a contentious issue in antitrust regulation.¹⁹ Second, IMAP policies do not fit cleanly into the category of RPM.²⁰ Ostensibly, IMAP policies regulate only advertised pricing, and as such, the applicability of RPM analysis in this context is even more uncertain.

Part I of this Note explores the context of antitrust law in the United States, particularly the tumultuous history of resale price maintenance under state and federal antitrust statutes. Part II lays out the conflict in regulation of IMAP policies, including the difficulties in categorizing IMAP, tensions between state and federal antitrust legislation, and uncertainty in applying rule of reason analysis after the Supreme Court's recent decision in *Leegin*. Part III argues that IMAP policies are not the kind of procompetitive resale price maintenance the Court envisioned in *Leegin*, and should therefore be prohibited.

I. PRICE FIXING THE OLD FASHIONED WAY: TRADITIONAL ANTITRUST TREATMENT OF MANUFACTURER-IMPOSED REQUIREMENTS

Part I of this Note provides the context under which IMAP policies are analyzed. This section includes a brief history of antitrust law in the United States and a description of relevant state and federal statutes. Additionally, Part I describes conduct prohibited by antitrust law, and how such conduct is handled by courts as either per se illegal or subject to rule of reason analysis. This part also summarizes the history and current state of resale price maintenance in American antitrust law, and the implications of the Supreme Court's decision in *Leegin*. Finally, it provides a description of IMAP policies and justifications for implementing them.

A. Antitrust: A Brief History

Competition law, known in the United States as antitrust law, is the regulation of anticompetitive conduct in order to promote or maintain market competition.²¹ This term originates from competition law's initial objective: to combat trusts (i.e., business entities formed with an intent to

17. See *infra* Part II.

18. See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 447-48 (2005).

19. See *id.*

20. See generally *Campbell v. Austin Air Sys., Ltd.*, 423 F. Supp. 2d 61 (W.D.N.Y. 2005).

21. See BRODER, *supra* note 5, at 2 ("The antitrust laws' primary focus is marketplace competition.").

monopolize), restrain trade, or fix prices.²² American antitrust law is based on a “commitment to the promotion of free enterprise and the existence of competition in the marketplace.”²³ Federal and state antitrust statutes are designed with several goals in mind: to promote vigorous competition in support of the free enterprise system, to protect and benefit consumers, and to establish a fair environment for competition.²⁴

The “trust problem” emerged in the United States as a matter of public concern in the late nineteenth century.²⁵ During this time period, academics,²⁶ occupational groups,²⁷ and the press²⁸ became frustrated with and increasingly vocal about the dramatic growth and questionable business practices of large organizations, particularly railroads.²⁹ These large firms joined together to create powerful trusts.³⁰ The high amount of initial capital required to construct railroads, coupled with rural construction locations, precluded competition, giving existing railroads unprecedented control over rates and services.³¹ Railroads engaged in numerous controversial practices, including the corporate creation and maintenance of trusts, pools, holding companies, and cartels.³² Additionally, these trusts were able to dominate multiple industries: the Standard Oil trust in the 1880s controlled markets in fuel oil, lead, and whiskey.³³

The states were first to act.³⁴ Prior to the enactment of federal antitrust legislation in 1890, “at least 26 states already had some form of antitrust prohibition,” generally via statute or constitutional provision.³⁵ Although they resulted in scattered instances of enforcement, state actions did not effectively remedy the trusts’ wide-scale corporate misconduct. Non-uniform development of state law, a “lack of coordinated and aggressive public prosecution, and . . . the lack of adequate penalties” seriously weakened the ability of states to effectively police anticompetitive

22. See JOHN MOODY, *THE TRUTH ABOUT THE TRUSTS: A DESCRIPTION AND ANALYSIS OF THE AMERICAN TRUST MOVEMENT* xii–xiv (1904); SULLIVAN & GRIMES, *supra* note 6, at 7.

23. 1 EARL W. KINTNER, *FEDERAL ANTITRUST LAW* § 1.1, at 1 (1980).

24. ELIOT G. DISNER, *ANTITRUST: QUESTIONS, ANSWERS, LAW AND COMMENTARY* 15–16 (3d ed. 2007).

25. See 1 KINTNER, *supra* note 23, § 4.2, at 132–33.

26. See HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 311–29 (1954) (describing scholarly approaches to economic theory in light of business consolidation in the 1890s).

27. See *id.* at 343–52 (analyzing the opposition of farmers and labor unions to corporate combinations in restraint of trade).

28. See *id.* at 329–43 (discussing how the late 1800s saw a dramatic increase in the number of articles devoted to criticism of monopolization and related corporate behavior).

29. See 1 KINTNER, *supra* note 23, § 4.2, at 129.

30. See SULLIVAN & GRIMES, *supra* note 6, at 6.

31. See ANESTIS S. PAPADOPOULOS, *THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY* 9–10 (2010).

32. See 1 KINTNER, *supra* note 23, § 4.2, at 129; accord John J. Binder, *The Sherman Antitrust Act and the Railroad Cartels*, 31 J.L. & ECON. 443, 444 (1988).

33. PAPADOPOULOS, *supra* note 31, at 10.

34. 1 KINTNER, *supra* note 23, § 4.2, at 129–30.

35. ABA SEC. ANTITRUST L., *STATE ANTITRUST ENFORCEMENT HANDBOOK* 4 (2d ed. 2008).

behavior.³⁶ Enforcement resources were extremely limited in comparison to those of the massive corporations targeted by state legislation. Additionally, jurisdictional issues plagued attempts to enforce antitrust measures consistently.³⁷ In this context, the Fiftieth and Fifty-First Congresses worked to develop and enact a comprehensive federal antitrust statute: the Sherman Act.³⁸

B. *Development of State and Federal Statutory Antitrust Oversight*

The Sherman Act and comparable state antitrust statutes (for example, New York's Donnelly Act³⁹) offer a starting point for analysis of the validity of resale price maintenance. Developed in reaction to anticompetitive business practices of large organizations in the late nineteenth century, these statutes were intended to "curb the power and monopolistic abuses of the trusts that had come to dominate the American economic scene."⁴⁰ Legislative history, the statutes themselves, and jurisprudence under state and federal antitrust statutes have guided the modern understanding of when and how vertical agreements including RPM can be used in business practices.⁴¹ This section first addresses the general development of antitrust legislation in the United States, and then describes the elements of the Sherman Act and relevant state antitrust statutes.

Although there are slight differences between the Sherman Act and some state statutes, state and federal antitrust legislation typically proscribe two categories of anticompetitive conduct, agreements in restraint of trade and monopolization.⁴² All business practices subject to antitrust scrutiny can be governed by three possible legal rules: per se illegality, rule of reason analysis, or per se legality.⁴³ Some conduct has been classified as per se illegal under the Sherman Act, and as such, is subject to very little judicial scrutiny before the conduct is deemed unenforceable or in violation of the statute.⁴⁴ Other types of conduct require a deeper analysis, known as the

36. WILLIAM R. ANDERSEN & C. PAUL ROGERS III, *ANTITRUST LAW: POLICY AND PRACTICE* 8 (2d ed. 1992). By the Sherman Act's enactment in 1890, Arkansas, Connecticut, Georgia, Indiana, Kentucky, Maryland, Montana, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Washington, and Wyoming had adopted anti-monopoly constitutional provisions. 1 KINTNER, *supra* note 23, § 4.2, at 130 n.23. At this time, Iowa, Kansas, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, South Dakota, Tennessee, and Texas had enacted antitrust statutes. *Id.* § 4.2, at 130 n.24.

37. *See* 1 KINTNER, *supra* note 23, § 4.2, at 130.

38. *See id.* §§ 4.3, 4.5; at 139–44, 152–57; *see also* ANDERSEN & ROGERS, *supra* note 36, at 8 ("The state of the common law at the end of the century demanded federal action.").

39. N.Y. GEN. BUS. LAW § 340 (McKinney 2009).

40. ANDERSON & ROGERS, *supra* note 36, at 23–24.

41. *See* BRODER, *supra* note 5, at 35–37.

42. *See id.* at 15–16.

43. *See* HOVENKAMP, *supra* note 18, at 477.

44. *See* ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 18 (1978) ("Behavior is illegal per se when the plaintiff need prove only that it occurred in order to win his case, there being no other elements to the offense and no allowable defense.").

“rule of reason,” that takes into account market effects and the circumstances of particular industries to justify the imposition of potentially anticompetitive policies.⁴⁵

This section describes conduct generally prohibited under state and federal antitrust statutes, and then summarizes how courts analyze business practices using the per se or rule of reason test.

1. General Principles of Antitrust Statutes and the Sherman Act

Antitrust legislation reflects a careful balance between “necessary business arrangements having primarily reasonable objectives and effects” and those which are “unduly restrictive and attributable to anticompetitive motives.”⁴⁶ Antitrust statutes in the United States are broad and malleable, necessitating a review of relevant legislative history to understand the underlying goals and intentions.⁴⁷ Generally, antitrust statutes contain terms, such as “restraint of trade,” “monopolize,” “contract” and “combine,” that were familiar to the American population in the late 1800s, but these terms are not explicitly defined in statutory language.⁴⁸

According to Justice Thurgood Marshall, “Antitrust laws . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”⁴⁹ In the United States, the Sherman Act is the country’s foundational antitrust statute.⁵⁰ Additionally, forty-eight states and the District of Columbia have enacted their own antitrust statutes.⁵¹ Antitrust statutes direct themselves “not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.”⁵² The intention of the Sherman Act was to promote “full and free competition” in interstate and foreign commerce by removing artificial or monopolistic restraints on the free operation of the market.⁵³ The Sherman Act does not expressly mention specific rationales for imposing its prohibitions, and for this reason, legislative history is particularly relevant.⁵⁴

The record of Sherman Act congressional proceedings reflects several motives for developing and implementing comprehensive antitrust statutes

45. Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1754 (1994).

46. 1 KINTNER, *supra* note 23, § 4.18, at 240–41.

47. See HOVENKAMP, *supra* note 18, at 49.

48. 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 14 (1978).

49. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

50. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 40 (3d ed. 2006); RICHARD A. POSNER, ANTITRUST LAW 33 (2d ed. 2001).

51. See Michael A. Lindsay, *Overview of State RPM*, ANTITRUST SOURCE, Apr. 2011, available at http://www.americanbar.org/content/dam/aba/publications/antitrust_law/source_lindsay_chart.authcheckdam.pdf.

52. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

53. 1 KINTNER, *supra* note 23, § 4.18, at 238 (quoting Senator Sherman in early drafts of the Sherman Act).

54. See *id.*

in the late nineteenth century. The most obvious goal, as perceived by the general public was to create “a weapon to be used against [railroad, oil, sugar and whiskey] combinations” which had collectively raised prices and created barriers to market entry.⁵⁵ More specific goals included preventing high prices related to monopoly or cartel activity and protecting individuals’ rights to practice a vocation or trade.⁵⁶ Over time, the Sherman Act has evolved to achieve contemporary economic goals, such as efficiency and fostering innovation; these modern goals, however, were not major factors in the early congressional debates and record.⁵⁷

a. Elements of the Sherman Act

The Sherman Act contains two main sections. Section 1 specifically regulates agreements. This section condemns agreements in restraint of trade, including all contracts, combinations, and conspiracies that tend to reduce competition.⁵⁸ Section 2 prohibits active behavior linked to monopoly or monopolization.⁵⁹ Both provisions were written broadly, and much of the United States’ modern antitrust law was developed through evolving judicial interpretation of the Sherman Act’s broad proscriptions.⁶⁰

The breadth and flexibility of the Sherman Act has allowed for continuous adjustment based on social, economic, and political climates.⁶¹ The practical approach taken by the courts has allowed the Sherman Act to remain relevant and effective despite major economic changes over the past century.⁶² The application and relevance of antitrust laws and their enforcement has been compared to a pendulum, oscillating between high and low enforcement based upon global economic sentiments.⁶³ Few cases were brought in the first few years following the Sherman Act’s passage.⁶⁴ The “fervor of the trustbusters,” however, led to strong enforcement in the early twentieth century, followed by limited application during the Great Depression and World War II.⁶⁵ In the late twentieth century and through today, some have linked the nature and degree of antitrust enforcement to political ideology, with limited application under Presidents Reagan, George H.W. Bush, and George W. Bush, and more vigorous enforcement under the Clinton and Obama administrations.⁶⁶

55. SULLIVAN & GRIMES, *supra* note 6, at 6.

56. *See id.*

57. *See* BORK, *supra* note 44, at 21; SULLIVAN & GRIMES, *supra* note 6, at 6.

58. 15 U.S.C. § 1 (2006); *see also* SULLIVAN & GRIMES, *supra* note 6, at 6.

59. 15 U.S.C. § 2; *see also* SULLIVAN & GRIMES, *supra* note 6, at 6–7.

60. *See* SULLIVAN & GRIMES, *supra* note 6, at 7.

61. *See* BRODER, *supra* note 5, at 3 (“Although the basic concepts of antitrust . . . have long been clear, the courts’ and the regulatory authorities’ interpretation of the laws has continuously evolved.”); *see also* SULLIVAN & GRIMES, *supra* note 6 at 7.

62. *See* 1 KINTNER, *supra* note 23, § 4.18, at 239.

63. *See* BRODER, *supra* note 5, at 5.

64. *See* POSNER, *supra* note 50, at 36 tbl.1 (Antitrust Cases Filed by U.S. Department of Justice, 1890–99).

65. BRODER, *supra* note 5, at 5.

66. *See, e.g., id.* at 5–6.

b. Sherman Act Prohibitions

The first two sections of the Sherman Act represent the primary sources of antitrust regulation. Although additional sections define jurisdiction,⁶⁷ address joinder of parties,⁶⁸ and discuss foreign commerce,⁶⁹ sections 1 and 2 represent the crux of the statute. Section 1 of the Sherman Act broadly prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”⁷⁰ Section 2 of the Sherman Act regulates monopolization, stating that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”⁷¹ Shortly after the Sherman Act’s passage, the Supreme Court observed that simple restraint of competition cannot make a business practice illegal because “[e]very agreement concerning trade, every regulation of trade, restrains.”⁷² For this reason, courts often look into the effects of particular types of agreements and business practices to interpret their validity under antitrust law.⁷³

In order to state a valid section 1 Sherman Act claim, a plaintiff must sufficiently allege that an agreement has taken place.⁷⁴ According to the Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp.*,⁷⁵ to prove an agreement, a plaintiff must provide “evidence that tends to exclude the possibility of independent action” and shows a “conscious commitment to a common scheme.”⁷⁶ Although “[t]he Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes,”⁷⁷ courts have established categories of prohibited conduct that unreasonably and unjustifiably restrain trade. Examples of clearly proscribed behavior include price fixing (setting

67. 15 U.S.C. § 4 (2006).

68. *Id.* § 5.

69. *Id.* § 6a.

70. *Id.* § 1.

71. *Id.* § 2.

72. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *see also Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996) (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (“Virtually all business agreements restrain trade to some extent; section 1, therefore, has been construed to make illegal only those contracts that constitute unreasonable restraints of trade.”)).

73. *See* ABA SEC. ANTITRUST L., MONOGRAPH NO. 23: THE RULE OF REASON 1 (1999); *see also* BRODER, *supra* note 5, at 3.

74. *See* ABA SEC. ANTITRUST L., PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS xiii (2010) (“Without an agreement, there is no need for further application of Section 1.”); *see also, e.g., Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954) (holding that even with clear evidence of parallel behavior, a plaintiff must additionally show concerted action or agreement).

75. 465 U.S. 752 (1984).

76. *Id.* at 768.

77. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978).

prices),⁷⁸ market allocations (splitting up a specific market),⁷⁹ and group boycotts.⁸⁰ Conduct that is suspect under section 1 but does not fall into categories of codified per se illegal behavior is subject to more in-depth, rule of reason analysis.⁸¹

The Sherman Act regulates monopolies and monopolization in section 2. “Monopoly power is the power to control prices or exclude competition.”⁸² In order to prove a violation of section 2, a plaintiff must show that the defendant has (1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or “development as a consequence of a superior product, business acumen, or historic accident.”⁸³ A section 2 claim does not require evidence of an agreement between parties.

The Sherman Act was not intended to prevent the growth of successful businesses; courts therefore distinguish between coercive and innocent monopoly.⁸⁴ Obtaining monopoly power because of a particularly successful product or reasonable and effective business practices does not subject an organization to liability under section 2.⁸⁵ If a plaintiff can prove “willfulness”—that the organization acted impermissibly to retain or secure monopoly power—the organization is subject to antitrust liability.⁸⁶

2. State Antitrust Statutes

In addition to federal antitrust regulation under the Sherman Act, forty-eight states and the District of Columbia have enacted antitrust laws.⁸⁷ These laws evolved out of the same political and historical rationales as the Sherman Act, and many existing state statutes served as foundations for federal legislation and enforcement as the Sherman Act was being developed.⁸⁸

78. *See, e.g.*, *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (discussing the permissibility of horizontal price fixing).

79. *See generally* *United States v. Topco Assocs.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

80. *See generally* *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 365–66 (1963); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659–60 (1961); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

81. *See* BORK, *supra* note 44, at 18.

82. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

83. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

84. *See* SULLIVAN & GRIMES, *supra* note 6, at 101.

85. *See* BRODER, *supra* note 5, at 91 (“Though the antitrust laws will not punish those who earn their monopolies through effective business practices or through simple good luck, they do not tolerate those who cheat . . . to obtain a monopoly or to maintain it.”).

86. *Id.* *See generally* *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) (differentiating “willful acquisition” of monopoly power from organic development).

87. *Lindsay*, *supra* note 51. In addition, Montana has enacted a statute prohibiting price fixing but has no general antitrust statute. *See* MONT. CODE ANN. § 30-14-205 (2007). Pennsylvania has no statute, but permits the use of common law remedies to combat antitrust violations. *See Lindsay*, *supra* note 51.

88. *See* ABA SEC. ANTITRUST L., *supra* note 35, at 4 (discussing the foundations of federal antitrust legislation, including the per se rule against price fixing).

a. General Characteristics

Some state antitrust statutes, such as that of Massachusetts,⁸⁹ mirror the language of the Sherman Act, while others, like New York,⁹⁰ track only specific provisions while providing more expanded or limited protections in various areas. State governments may seek federal relief under the Sherman Act, and state law may also identify and regulate business practices with a “substantial local impact.”⁹¹

State enforcers may rely on state antitrust statutes even when such statutes differ from federal law or those of other states.⁹² State attorneys general may pursue proprietary claims on behalf of state entities, represent consumers under state or federal law, and represent the public interest.⁹³ Generally, “state antitrust law may be enforced even though it prohibits less, the same, or more than federal antitrust law” if it does not place an undue burden on interstate commerce, is not one of a set of isolated exemptions from federal law, and does not mandate anticompetitive results.⁹⁴

b. Supplemental Prohibitions in State Antitrust Legislation

Individual states have the “right to make enforcement decisions that differ from those of other state and federal enforcers.”⁹⁵ In the case of resale price maintenance, seventeen states have statutes explicitly prohibiting the practice as of April 2011.⁹⁶ For example, courts in California have consistently held that resale price maintenance is unlawful because resale price maintenance schemes “destroy[] horizontal competition as effectively as would a horizontal agreement among distributors or retailers.”⁹⁷

3. Standards of Analysis: Per Se and Rule of Reason

Courts determine whether a business practice violates antitrust law by either finding that the conduct falls into a per se category, or by utilizing rule of reason analysis. Conduct that clearly meets the characterization of section 1,⁹⁸ such as group boycotts⁹⁹ and tying contracts,¹⁰⁰ is per se

89. MASS. GEN. LAWS ch. 93, § 4 (2010).

90. Donnelly Act, N.Y. GEN. BUS. LAW § 340 (McKinney 2009).

91. AREEDA & TURNER, *supra* note 48, at 58.

92. See ABA SEC. ANTITRUST L., *supra* note 35, at 2.

93. See *id.* at 3.

94. AREEDA & TURNER, *supra* note 48, at 59–60.

95. ABA SEC. ANTITRUST L., *supra* note 35, at 2.

96. States with broad price fixing prohibitions as of April 2011 are: California, Connecticut, Hawaii, Illinois, Indiana, Kansas, Maryland, Minnesota, Mississippi, Montana, Nevada, New Jersey, New York, Ohio, South Carolina, Tennessee, and West Virginia. See Lindsay, *supra* note 51.

97. *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 263 (2003); *accord Maitland v. Burckle*, 572 P.2d 1142, 1147 (Cal. 1978).

98. Section 1 of the Sherman Act prohibits any agreement which unreasonably restrains competition and which affects interstate commerce. 15 U.S.C. § 1 (2006).

illegal.¹⁰¹ This type of conduct has a “pernicious effect on competition and lack of any redeeming virtue” and thus merits no further inquiry.¹⁰² Because such conduct “would always or almost always tend to restrict competition and decrease output,”¹⁰³ a plaintiff need only allege conduct that falls into a per se category, and prove that the impermissible conduct in fact occurred.¹⁰⁴

Analysis under the rule of reason requires further inquiry. Established in *Standard Oil Co. of New Jersey v. United States*, the rule states that the Sherman Act “should be construed in the light of reason; and, as so construed, it prohibits all contracts and combination which amount to an unreasonable or undue restraint of trade in interstate commerce.”¹⁰⁵ Rule of reason analysis looks at the totality of the circumstances, analyzing facts peculiar to the business, the history of the restraint, and the reasons why it was imposed¹⁰⁶ in order to evaluate the impact the contested behavior has on competition in a relevant market.¹⁰⁷ Additionally, the intent and motivations of the parties are relevant to a court’s rule of reason inquiry, but not necessarily outcome-determinative.¹⁰⁸ According to the Supreme Court in *National Society of Professional Engineers v. United States*,¹⁰⁹ “the purpose of the analysis is to form a judgment about the competitive significance of the restraint.”¹¹⁰ As originally outlined by the Court in *Chicago Board of Trade v. United States*, the rule of reason inquiry encompasses a broad range of factors,¹¹¹ but courts have attempted to apply more specific criteria for analyzing particular business practices.¹¹² For

99. Group boycotts, also known as concerted refusals to deal, are agreements between or among multiple competitors to refuse to do business with another competitor, another class of competitors, or particular individual or groups of suppliers or customers. BRODER, *supra* note 5, at 49.

100. A tying contract or tying agreement occurs when a seller conditions the sale of a desirable product on the purchase of a less desirable product. *Id.* at 50.

101. *See id.* at 272 (“The Supreme Court has decreed that certain agreements (including agreements involving *horizontal and some vertical price-fixing, restrictions on output, bid-rigging, tying, market or customer allocations, and group boycotts*) are *per se* illegal.”); *see also* POSNER, *supra* note 50, at 36.

102. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

103. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19–20 (1979).

104. *See* ABA SEC. ANTITRUST L., *supra* note 73, at 3.

105. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 1 (1911).

106. *See* *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 n.15 (1977).

107. *See* SULLIVAN & GRIMES, *supra* note 6, at 61.

108. *See* ABA SEC. ANTITRUST L., *supra* note 73, at 114–15.

109. 435 U.S. 679 (1978).

110. *Id.* at 691–92.

111. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (discussing factors in a rule of reason analysis). The breadth of Justice Brandeis’s description of the rule of reason inquiry in *Chicago Board of Trade* has been the subject of significant criticism. *See* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 303–04 (1986).

112. *See, e.g., Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54–58 (1977) (stating that in analyzing territorial restraints, courts should compare the increased interbrand competition encouraged by additional point-of-sale services with the potential corresponding reduction in intrabrand competition).

example, lower courts have supplied a more concrete structure¹¹³ in order to determine “whether the anticompetitive effects of [a] restraint are outweighed by the procompetitive benefits for which the challenged restraint is reasonably necessary.”¹¹⁴

Over time, courts have limited the number and scope of business practices meriting per se prohibition in favor of a broader application of the rule of reason.¹¹⁵ Currently, the rule of reason is the “prevailing standard of [section 1] analysis.”¹¹⁶ The manner in which the rule of reason is applied can vary significantly, however, and the rule of reason has been subject to a great deal of criticism for its vagueness.¹¹⁷ Although it purports to provide a complete, detailed analysis, some have called the rule of reason “dangerously open-ended.”¹¹⁸ Others assert that rule of reason analysis “has no substantive content.”¹¹⁹ Additionally, the breadth of a rule of reason inquiry can result in ceaseless discovery and consequent enormous increases in litigation costs.¹²⁰

Scholars also argue that conduct subject to the rule of reason becomes de facto permissible in practice and that the conduct is nearly always allowed to continue when adjudicated, particularly by juries.¹²¹ Because the standard is so uncertain and courts are willing to give businesses the benefit of the doubt, alleged anticompetitive conduct that does not fall into a per se category is rarely found to violate section 1 of the Sherman Act.¹²² Manufacturers insist, however, that modern applications of rule of reason analysis are far from permissive, citing the Court’s recent *Leegin* decision.¹²³

113. 1 ABA SEC. ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 53 (4th ed. 1997) (“[U]nder the traditional rule of reason, the plaintiff bears the initial burden of proving that an agreement has had or is likely to have a substantially adverse effect on competition. If the plaintiff meets its initial burden, the burden shifts to the defendant to demonstrate the procompetitive virtues of the alleged wrongful conduct. If the defendant does demonstrate procompetitive virtues, then the plaintiff must show that the challenged conduct is not reasonably necessary to achieve the stated objective.”).

114. ABA SEC. ANTITRUST L., *supra* note 73, at 133.

115. *Id.* at 2.

116. *GTE Sylvania*, 433 U.S. at 49.

117. *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12 (1984) (“When everything is relevant, nothing is dispositive.”).

118. Jesse W. Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916223.

119. Piraino, *supra* note 45, at 1754.

120. *See* Alan M. Barr, *State Challenges to Vertical Price Fixing in the Post-Leegin World 2*, Testimony Before the FTC, Hearings on Resale Price Maintenance (May 21, 2009) (“In the absence of the *per se* rule, proof becomes more complex and already expensive litigation becomes even more expensive.”); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 155 (1984).

121. *See, e.g.*, Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 64, 92–94 (2007); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977) (describing the rule of reason as “little more than a euphemism for nonliability”).

122. *See* Crane, *supra* note 121, at 64.

123. *See, e.g.*, *Retail Price Maintenance Polices: A Bane for Retailers, but a Boon for Consumers?*, KNOWLEDGE@WHARTON (Aug. 8, 2007), <http://knowledge.wharton.upenn>.

C. Manufacturer-Imposed Pricing and Advertising Requirements

Judicial opinions on resale price maintenance and other manufacturer-imposed requirements have varied since the enactment of antitrust legislation. In fact, “[f]ew areas of antitrust law have provoked more reconsideration of established rules, or more disagreement between courts and commentators, than vertical price and nonprice restraints.”¹²⁴ This section defines resale price maintenance, as well as several other techniques used by manufacturers to control the resale advertisement and pricing of their products.

1. Resale Price Maintenance

Resale price maintenance, also known as vertical price fixing or vertical price maintenance, occurs when a manufacturer and its distributors agree to sell at certain prices.¹²⁵ When the agreed price is a price floor below which a product cannot be sold, this is called minimum resale price maintenance.¹²⁶ Generally, a manufacturer imposes restraints by “express promises, threats or other mechanisms, with the goal of controlling . . . price.”¹²⁷ RPM is an “intra-brand” restraint because it regulates a retailer’s sales of a single brand without limiting sales of brands made by other suppliers.¹²⁸

Resale price maintenance became increasingly popular in the United States in the late 1800s, when the growth of the fields of advertising and branding led to increased product differentiation.¹²⁹ The establishment of RPM allowed manufacturers greater control over the efficient distribution and sale of their products.¹³⁰ Manufacturers often, and reasonably, wish to control their products’ resale prices.¹³¹

In a competitive market, intra-brand competition occurs when retailers compete against each other when selling the same branded product from a manufacturer.¹³² The imposition of resale price maintenance or another non-price vertical restraint by a manufacturer has the potential to limit this

edu/article.cfm?articleid=1789 [hereinafter *Retail Price Maintenance Policies*] (statement of deputy legal counsel for the National Association of Manufacturers).

124. HOVENKAMP, *supra* note 18, at 447. See generally Barak Y. Orbach, *RPM Landmarks*, BARAK ORBACH, <http://www.orbach.org/RPM/index.html> (last visited Feb. 23, 2012) (listing landmark Supreme Court cases and their impact on the per se illegality or permissibility of resale price maintenance since *Fowle v. Parke*, 131 U.S. 88 (1889)).

125. See HOVENKAMP, *supra* note 18, at 447 (defining RPM as the “manufacturer or supplier regulation of the price at which a product is resold by independent dealers”).

126. See BRODER, *supra* note 5, at 55.

127. 2 JOSEPH P. BAUER & WILLIAM H. PAGE, KINTNER: FEDERAL ANTITRUST LAW § 12.2, at 178 (2002).

128. See HOVENKAMP, *supra* note 18, at 447.

129. See Barak Y. Orbach, *Antitrust Vertical Myopia: The Allure of High Prices*, 50 ARIZ. L. REV. 261, 262 (2008).

130. See BORK, *supra* note 44, at 289 (“When a manufacturer wishes to impose resale price maintenance . . . his motive . . . can only be the creation of distributive efficiency.”).

131. See BRODER, *supra* note 5, at 56.

132. See *id.* at 57.

type of competition.¹³³ On the other hand, price maintenance policies have the concomitant effect of promoting interbrand competition—competition among manufacturers.¹³⁴ Additionally, higher prices can be indicative of product quality or desirability.¹³⁵ A reputation of discounting can be damaging to a product, brand, or manufacturer’s reputation.¹³⁶ Strong relationships with dealers also provide incentives for imposing RPM: dealers can be encouraged to provide additional services to consumers, including trained sales personnel, showrooms, and advertising.¹³⁷ Absent an RPM policy and the correspondingly higher resale prices, dealers could be less likely to provide these types of services to consumers.¹³⁸ Discounters argue that these policies exist merely to protect existing distribution strategies or to maintain a product’s “snob appeal.”¹³⁹

2. Additional Manufacturer-Imposed Resale Restrictions

It is important to note that Manufacturer’s Suggested Retail Prices (MSRPs), list prices, and Recommended Retail Prices (RRPs) imposed by manufacturers or distributors are distinguishable from RPM. In the case of an MSRP, the manufacturer suggests or recommends a price for its retailers but does not require that their product be sold at that price.¹⁴⁰ According to the Federal Trade Commission (FTC), as long as the dealer comes to the pricing decision on its own, it may price at the MSRP or any other price.¹⁴¹ Additionally, a manufacturer may permissibly choose not to use distributors that do not adhere to their MSRP.¹⁴²

Manufacturers also impose indirect pricing requirements via Minimum Advertised Price (MAP) policies or the offer of a cooperative advertising program.¹⁴³ MAP policies set a price floor below which dealers cannot advertise.¹⁴⁴ A cooperative advertising program is an initiative in which a supplier offers a subsidy or service to distributors and resellers in order to advertise a product.¹⁴⁵ Often, these programs are conditioned on the reseller’s compliance with a MAP policy. Should the reseller sell the

133. *See id.*

134. *See id.*

135. *See generally* William F. Baxter, *Vertical Prices—Half Slave, Half Free*, 52 ANTITRUST L.J. 743 (1983) (discussing how restricted dealing, like advertising, permits retailers to lend their reputation to manufacturers); *see also* Orbach, *supra* note 129, at 278 (arguing that for premium brands, high prices are a component of a product’s allure).

136. *See* 2 BAUER & PAGE, *supra* note 127, § 12.2, at 180.

137. *See, e.g.*, Easterbrook, *supra* note 120, at 147–48.

138. *See* 2 BAUER & PAGE, *supra* note 127, § 12.2, at 180.

139. *See* Robert A. Pollak, *Price Dependent Preferences*, 67 AM. ECON. REV. 64, 64 (1977); Symposium, *Foreword: Antitrust and the Discounters’ Case Against Resale Price Maintenance*, 14 ANTITRUST L. & ECON. REV. 1, 3 (1982).

140. *See An FTC Guide to Dealings in the Supply Chain*, *supra* note 3, at 2.

141. *See id.* at 1.

142. *See id.* at 2.

143. *See* ABA SEC. ANTITRUST L., ANTITRUST HANDBOOK FOR FRANCHISE AND DISTRIBUTION PRACTITIONERS 62–64 (2008).

144. *See* BRODER, *supra* note 5, at 56.

145. *See* ABA SEC. ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 144 (6th ed. 2007).

product at a price below that required by the manufacturer, the manufacturer may terminate the program or choose not to continue with distribution.¹⁴⁶ Manufacturers are given “considerable leeway” in setting terms for cooperative advertising, but in some cases, courts have held these agreements to be anticompetitive.¹⁴⁷ The Fifth Circuit upheld a cooperative advertising program in *In Re Nissan Antitrust Litigation*¹⁴⁸ because the evidence indicated that dealers who participated in the program could sell cars “at whatever price they chose.”¹⁴⁹ Generally, cooperative advertising programs are permissible, subject to rule of reason analysis, so long as a dealer is “free to decline to participate in the program and advertise and charge its own price.”¹⁵⁰ Under federal antitrust law, distinguishing between advertised and retail pricing is no longer necessarily outcome-determinative.¹⁵¹

Rather than restrict dealer pricing, manufacturers may also incentivize behavior via promotional allowance.¹⁵² Promotional allowances compensate retailers for providing particular consumer services, shifting the cost of services from the consumer to the manufacturer.¹⁵³ While they are not classified as a manufacturer-imposed restriction, promotional allowances are an alternative means of balancing product price with essential consumer services.

3. Internet Minimum Advertised Price Policies

IMAP policies are advertising price restrictions imposed by manufacturers on online retailers and traditional retailers that sell products online.¹⁵⁴ These policies aim to regulate internet-based

146. See, e.g., *SonicWall MAP Policy*, SONICWALL, <http://www.sonicwall.com/us/partners/4697.html> (last visited Feb. 23, 2012).

147. See *An FTC Guide to Dealings in the Supply Chain*, *supra* note 3, at 3; see also M. Courtney McCormick, Note, *The Recording Industry, Minimum Advertised Pricing Policies and Non-price Vertical Restraints of Trade*, 4 VAND. J. ENT. L. & PRAC. 220, 229 (2002) (discussing consent agreements between five record companies and the FTC mandating stringent restrictions on advertising restraints).

148. 577 F.2d 910 (5th Cir. 1978).

149. *Id.* at 915.

150. Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs—Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057, at 41,638 (May 21, 1987) (“The Commission now concludes that price restrictions in cooperative advertising programs, standing alone, are not per se unlawful.”); see also *Magnavox Co.*, 113 F.T.C. 255 (1990) (amending consent order to permit price restrictions in cooperative advertising programs because such restrictions are not per se unlawful and because, absent further pricing agreements, restriction of interbrand competition or reduced output is unlikely).

151. See ABA SEC. ANTITRUST L., *supra* note 143, at 64.

152. See Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83, 101 (1995).

153. See generally *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) (describing promotional allowance program where Toys “R” Us received separate compensation from toy manufacturers for providing retailer services); Robert L. Steiner, *Manufacturers’ Promotional Allowances, Free Riders and Vertical Restraints*, 36 ANTITRUST BULL. 383 (1991) (discussing promotional allowances).

154. See Rosch Remarks, *supra* note 1, at 22–23.

advertising of a manufacturer's products.¹⁵⁵ As with traditional MAP policies, failure to comply with IMAP policies can result in loss of incentives, temporary reductions in order fulfillment, and permanent termination of future dealership contracts.¹⁵⁶ Specific policy language can vary, and IMAP policies can be directed at products sold by internet-only vendors (such as Amazon.com and smaller websites like Homecenter.com); brick-and-mortar stores with online retail capacity (like Walmart or Best Buy); and, less frequently, to product manufacturers (including Apple and Quozel).¹⁵⁷ This section discusses how IMAP policies relate to manufacturers' traditional methods of price, advertising, and resale restrictions.

IMAP policies fall in a gray area between typical RPM and non-price advertising restrictions. In order to merit analysis under section 1 of the Sherman Act and related state antitrust statutes, a contested policy must be the result of an *agreement* between multiple parties.¹⁵⁸ In order to avoid classification as an agreement, many IMAP policies contain specific, detailed language asserting that the policy's development and imposition are purely unilateral.¹⁵⁹ Even in instances where distributors or dealers must agree, sign, or consent to new policies, these contracts frequently include confusing clauses stating that "nothing in this agreement shall constitute an agreement."¹⁶⁰ Despite such provisions touting unilateral conduct, IMAP policies are allegedly designed to support existing distribution models and, by definition, only regulate a certain type of vendor—those on the internet.¹⁶¹ Instances where an IMAP policy primarily benefits or harms one defined sector can provide evidence of indirect agreement; thus, questions of agreement arise when brick-and-mortar stores encourage or support the imposition of an IMAP policy.¹⁶²

155. *See id.* at *11.

156. *See, e.g., Riado Internet Minimum Advertised Price Policy, supra* note 2, ¶ 2 ("If a customer violates this IMAP policy, Riado will request the customer to cease advertising or promoting products on the Internet in violation of its IMAP policy. In addition, Riado will cease to accept from and/or ship orders for said customer.").

157. *See* Rosch Remarks, *supra* note 1, at 22–23.

158. *See* 15 U.S.C. § 1 (2006).

159. *See, e.g., Riado Internet Minimum Advertised Price Policy, supra* note 2, ¶ 3 ("In executing this policy, Riado will act at all times unilaterally, and will neither solicit, consider nor agree to any recommendation, request or demand of any other person. All matters of interpretation and application of the terms of this policy and all matters concerning enforcement of this policy shall remain with the sole, unilateral authority of Riado.").

160. *See, e.g., Quozel Internet Minimum Advertised Price Policy 1* (Jan. 1, 2008) (on file with the Fordham Law Review) ("Quozel does not ask for, nor will it accept any assurance of compliance or agreement Notwithstanding anything to the contrary which may be expressed or implied in or by one or more agreements between a Dealer or Customer and Quozel, nothing in those agreements shall constitute an agreement . . . to comply with IMAP. Honoring IMAP by selling at or above the IMAP price is not communicating acceptance or compliance.").

161. Affidavit of Brian Okin, Worldhomecenter.com CEO ¶ 9, *Worldhomecenter.com, Inc. v. Quozel, Inc.*, No. 651444/2010 (N.Y. Sup. Ct. 2011).

162. Absent an agreement or other direct evidence, courts look at several factors when a lack of direct evidence requires using circumstantial evidence based on defendants' conduct to plausibly prove a conspiracy including proof of conscious parallelism, sharing of prices,

IMAP policies differ from cooperative advertising programs because manufacturers do not necessarily offer assistance in generating, producing and disseminating advertisements.¹⁶³ IMAP policies simply restrict how internet vendors may publicize their own pricing online.

D. Resale Price Maintenance in Public Policy, Legislation, and the Courts

This section addresses the historical treatment of resale price maintenance in the courts, in scholarship, and in state and federal legislation. Next, it discusses the various anticompetitive effects and procompetitive rationales for establishing RPM that have served to inform judicial decision and classification as either per se illegal or subject to the rule of reason. Finally, this section describes the facts and holding of the Supreme Court's most recent RPM case, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹⁶⁴

1. Historical Treatment of RPM

Under the common law, agreements in restraint of trade were unenforceable, if not affirmatively illegal.¹⁶⁵ In the early twentieth century, resale price maintenance agreements were generally enforceable except where a supplier possessed a large market share,¹⁶⁶ or where RPM was used to facilitate horizontal price fixing.¹⁶⁷

Resale price maintenance was first definitively evaluated by the Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* and deemed to be per se illegal.¹⁶⁸ In this case, Dr. Miles Medical Company, a manufacturer of patented medicines, required retail drugstores to sign a contract ordering that the Dr. Miles products be sold only at manufacturer-imposed prices.¹⁶⁹ The Court held that this and other RPM agreements, "having for their sole purpose the destruction of competition and the fixing of prices," were "injurious to the public interest and void."¹⁷⁰ As such, RPM was categorized as per se illegal.

Even though state court anti-price-fixing principles guided the Court in *Dr. Miles*, states shifted their perspectives and began to permit price fixing under their own antitrust statutes.¹⁷¹ In the early 1930s, the United States was in the midst of the Great Depression and antitrust enforcement reached

pretextual explanations, and market structure. See ABA SEC. ANTITRUST L., *supra* note 74, at 63–86.

163. See *An FTC Guide to Dealings in the Supply Chain*, *supra* note 3, at 3.

164. 551 U.S. 877 (2007).

165. See HOVENKAMP, *supra* note 18, at 472.

166. See generally *Grogan v. Chaffee*, 105 P. 745 (Cal. 1909).

167. See *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 42 (6th Cir. 1907).

168. 220 U.S. 373 (1911).

169. See *id.* at 394.

170. *Id.* at 408.

171. The per se rule against price fixing was based to some degree on state court principles in evaluating state antitrust laws. See, e.g., *United States v. Trenton Potteries, Co.*, 273 U.S. 392, 400 (1927) (holding price fixing to be illegal per se, in reliance on earlier state case law).

its nadir.¹⁷² In reaction to the economic turmoil and its impact on business operations, many states developed and passed fair trade legislation that permitted resale price maintenance.¹⁷³

As the Sherman Act was interpreted more and more broadly, Congress sought to avoid conflict with the will of the states to permit producers to set retail prices.¹⁷⁴ For this reason, Congress passed the Miller-Tydings Fair Trade Act¹⁷⁵ in 1937, carving out an exception to the Sherman Act to permit state acceptance of RPM. Miller-Tydings remained in effect¹⁷⁶ until it was repealed by the Consumer Goods Pricing Act of 1975.¹⁷⁷ After World War II, resale price maintenance became unpopular; although thirty-six states explicitly permitted RPM by 1975, a Department of Justice (DOJ) official informed Congress that customers in states that allowed RPM faced 19 to 27 percent higher prices than those in states that proscribed it.¹⁷⁸ Additionally, the Supreme Court in 1968 extended per se analysis to maximum resale price maintenance in *Albrecht v. Herald Company*.¹⁷⁹

The Consumer Goods Pricing Act restricted the form of lawful price maintenance agreements to suggested list prices, resulting in “essentially no restriction since suggested list prices [can]not be legally enforced.”¹⁸⁰ Although the enactment of the Consumer Goods Pricing Act in 1975 ostensibly sent RPM back into disfavor, the Antitrust Division of the DOJ was “reluctant to enforce the per se rule.”¹⁸¹ This reluctance was based on a belief that RPM could have procompetitive justifications that would merit rule of reason, not per se, analysis.¹⁸² Nevertheless, the Court continued to extend and reinforce the pre-existing rule of per se illegality.¹⁸³ As per se

172. SULLIVAN & GRIMES, *supra* note 6, at 7 (“[A]ntitrust enforcement was tepid, perhaps reaching a low point during the first years of the Great Depression.”).

173. *See Note, supra* note 15, at 1603.

174. *See SULLIVAN & GRIMES, supra* note 6, at 318.

175. Pub. L. No. 314, 50 Stat. 693 (1937) (repealed 1975).

176. The McGuire Act of 1952 expanded Miller-Tydings by permitting states to enact fair trade laws that made minimum price agreements enforceable, even against nonsigners—non-party sellers in the distribution chain with notice of a fixed price. 66 Stat. 631 (1952), *repealed by* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975); *see also SULLIVAN & GRIMES, supra* note 6, at 318.

177. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975). The Consumer Goods Pricing Act also repealed the McGuire Act. *Id.*

178. *Fair Trade: Hearing on H.R. 2384 Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 94th Cong. 1, 122 (1975) (statement of Keith I. Clearwaters, Deputy Assistant Att’y Gen., Dep’t of Justice, Antitrust Div.).

179. 390 U.S. 145 (1968) (extending the per se rule against minimum resale price maintenance to maximum resale price maintenance).

180. *Retail Price Maintenance Policies, supra* note 123.

181. Note, *supra* note 15, at 1603.

182. *See, e.g.,* Anthony J. Greco, *The Resale Price Maintenance Struggle: Its Legislative Updating*, 51 AM. J. ECON. & SOC. 173, 175 (1992).

183. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (reaffirming per se illegality of RPM); *Rice v. Norman Williams*, 458 U.S. 654 (1982) (same); *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (same); *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), by holding non-vertical price restraints to the rule of reason, but reaffirming the existing per se prohibition of RPM); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (holding that maximum RPM is per se illegal, as are other kinds of RPM).

illegal conduct, an RPM plaintiff was required only to prove “(1) that the arrangement at issue includes a sale and a resale, and is not merely a consignment; (2) that there is a qualifying agreement between two or more distinct firms; and (3) that the agreement is a qualifying agreement on price or price levels.”¹⁸⁴ After *Dr. Miles*, courts generally assumed that the subsequent economic effects of minimum RPM were analogous to those created by horizontal price fixing by a cartel.¹⁸⁵ Over time, though, experts and courts offered procompetitive justifications for RPM.¹⁸⁶ When the Supreme Court most recently addressed the issue of resale price maintenance, it was in the context of growing scholarship detailing possible procompetitive justifications for imposing these policies on retailers.¹⁸⁷

2. Divergent Viewpoints on RPM

a. Anticompetitive Effects

Courts have historically held RPM policies to be in restraint of trade, and as such, have frequently cited the numerous potential anticompetitive effects of establishing these policies.¹⁸⁸ The primary argument against minimum vertical price agreements is that they lead to “higher, and usually uniform, resale prices.”¹⁸⁹ Some have argued that these agreements “completely eliminate price flexibility at the dealer level and may stabilize higher prices at the manufacturer level.”¹⁹⁰

Additionally, courts and policymakers are concerned that resale price maintenance facilitates manufacturer and retailer cartels.¹⁹¹ Cartels are a group of aligned competitors who explicitly agree in order to attain supracompetitive pricing.¹⁹² According to the *Leegin* Court, RPM can

184. HOVENKAMP, *supra* note 18, at 481 (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 735 (1988)).

185. *See* BORK, *supra* note 44, at 33 (discussing how the *Dr. Miles* opinion “equated horizontal cartel behavior with vertical price fixing,” rendering vertical price fixing per se illegal); *see also* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407–08 (1911).

186. *See generally* BORK, *supra* note 44, at 280–91 (discussing procompetitive justifications for RPM); POSNER, *supra* note 50, at 172–73 (addressing motives for imposing RPM); *infra* Part I.D.2.b.

187. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007) (“[R]espected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects.”).

188. *See, e.g., Cal. Retail Liquor Dealers Ass’n*, 445 U.S. at 102 (affirming adherence to a *per se* approach to RPM); *GTE Sylvania*, 433 U.S. at 51 n.18 (stating that the court’s holding was intended to preserve the pre-existing *per se* rule against RPM).

189. Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 *GEO. L.J.* 1487, 1488 (1983). *See generally* *Fair Trade: Hearing on H.R. 2384*, *supra* note 178 (discussing study on prices of consumer goods in fair trade and non fair trade states).

190. *See, e.g.,* Pitofsky, *supra* note 189, at 1488.

191. *See, e.g., Leegin*, 551 U.S. at 892–93 (2007) (discussing the potential for cartel development).

192. *See* SULLIVAN & GRIMES, *supra* note 6, at 40.

facilitate manufacturer cartels “in identifying price-cutting manufacturers who benefit from the lower prices they offer.”¹⁹³ In addition to facilitating manufacturer cartels, RPM also may be used to organize retailer cartels. As stated in *Leegin*,

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. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement.¹⁹⁴

One of the *Leegin* Court’s primary concerns about RPM was the potential for abuse by a powerful manufacturer or retailer.¹⁹⁵ Justice Anthony Kennedy stated that “[a] dominant retailer, for example, might request [RPM] to forestall innovation. . . . A manufacturer might consider it has little choice but to accommodate the retailer’s demands for vertical price restraints if the manufacturer believes it needs access to the retailer’s distribution network.”¹⁹⁶ When an entire industry engages in price fixing, the Court has held that establishing RPM agreements would reduce both interbrand and intrabrand competition because doing so prevents any price competition at the retail level.¹⁹⁷

Finally, RPM can interfere with consumer choice by “authorizing the manufacturer to decide what mix of products and services is desirable.”¹⁹⁸ Unrestricted pricing offers consumers more options: they can choose among cheaper brands with fewer services, more expensive brands with broad services, or something in between.¹⁹⁹

b. Procompetitive Justifications

Under the rule of reason, these anticompetitive concerns are weighed against the potential for procompetitive justifications for imposing RPM

193. *Leegin*, 551 U.S. at 892; *see also* *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 725 (1988). For more information, *see generally* Posner, *supra* note 121; Thomas R. Overstreet, Jr., *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Bureau of Economics Staff Report to the FTC (Nov. 1983).

194. *Leegin*, 551 U.S. at 893; *accord* Howard P. Marvel & Stephen McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J.L. & ECON. 363, 373 (1985).

195. *See Leegin*, 551 U.S. at 893.

196. *Id.* at 893–94; *see also* *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 937–38 (7th Cir. 2000) (discussing how a system of vertical arrangements between retailers and toy manufacturers required parties to comply or risk losing access to a distribution network).

197. *See* *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342 (1987) (“Mandatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition.”).

198. Pitofsky, *supra* note 189, at 1493.

199. *See* Lao, *supra* note 15, at 19 (noting that consumers “can shop in the manner that suits them”).

policies.²⁰⁰ The main business rationale for imposing resale price maintenance is similar to that for other vertical restraints: the stimulation of interbrand competition by reducing intrabrand competition among retailers.²⁰¹ For example, if the manufacturers of different brands of ibuprofen painkillers engage in RPM, retailers charge the prices set by the manufacturers. Then, the activities of the manufacturers themselves (Advil's marketing or a generic brand's strategic decision to price lower) would allow consumers to choose.²⁰²

This leads to several potential benefits. First, RPM that eliminates intrabrand price competition encourages retailer investment in tangible or intangible services or promotions "that aid the manufacturer's position as against rival manufacturers."²⁰³ Second, RPM is also justifiable because it can "facilitat[e] market entry for new firms and brands."²⁰⁴ With a comprehensive price maintenance scheme, a new firm or brand is guaranteed a profit margin, and can utilize that buffer in order to cover initial start-up costs.

One of the most frequently invoked rationales for imposing RPM, particularly on the internet, is the prevention of "free riding."²⁰⁵ Some argue that without RPM, retailers would be less likely to provide valuable consumer services that enhance interbrand competition because discounters can "free ride" on the retailers who do provide services.²⁰⁶ Internet retailers have low overhead costs and lack a physical shopping environment where consumers can interact with products and staff. For these reasons, online retailers are often characterized as free riders.²⁰⁷ Supporters of RPM claim that minimum resale pricing prevents discounters from undercutting a retailer that provides services, including showrooms, product

200. ABA SEC. ANTITRUST L., *supra* note 73, at 116 ("If the plaintiff has shown a substantial anticompetitive effect, the defendant must come forward with some justification for the restraint.").

201. RPM can stimulate competition among manufacturers of different brands of the same product, which would consequently reduce intrabrand competition among retailers selling the same brand. *See Leegin*, 551 U.S. at 878. When a retailer need not worry about competing with others for a certain brand, competition occurs on the manufacturer level instead. *See id.* at 890.

202. *See* Easterbrook, *supra* note 120, at 148–49 (discussing how restricted dealing can play a role in expanding consumer choice).

203. *Leegin*, 551 U.S. at 890.

204. *Id.*; *see also* *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977); *Marvel & McCafferty*, *supra* note 194, at 369 (stating that reliance on retailer reputation declines as a brand becomes better known and that RPM may be a competitive device for new entrants).

205. *See GTE Sylvania*, 443 U.S. at 55 (discussing the prevention of free riding as a justification to adopt the rule of reason for vertical non-price restraints).

206. *See generally* Easterbrook, *supra* note 120; Lester Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 91 (1960) (describing the free rider effect).

207. *See* Lao, *supra* note 15, at 16; POSNER, *supra* note 50, at 172–73 (describing an example of the free rider problem where consumers might learn about a product at a demonstration provided by a retailer, and then ultimately purchase from a discount seller).

demonstrations, warranties, and customer assistance in selecting and maintaining a product.²⁰⁸

Some take the argument even further, stating that even the rule of reason is not sufficiently permissive and that all vertical price restraints should be per se legal.²⁰⁹ For these advocates, price fixing and other forms of restricted dealing are simply an additional and effective means of competition.²¹⁰ For example, in the case of luxury brands, discounting can “harm the appeal of brands and adversely affect sales.”²¹¹ Thus, prohibiting a manufacturer from setting prices would remove a permissible and competitive tool from its arsenal.²¹²

3. The Supreme Court’s *Leegin* Decision

The Supreme Court recently addressed the issue of RPM in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*²¹³ This 2007 decision held RPM to be subject to rule of reason analysis, and no longer per se illegal in light of growing scholarship emphasizing the potential positive, procompetitive business justifications for imposing RPM.²¹⁴ In *Leegin*, the plaintiff, a manufacturer of leather goods, sold belts to PSKS for resale at its store, Kay’s Kloset.²¹⁵ After years of successful distribution, Leegin imposed a “Retail Pricing and Promotion Policy” that set minimum resale prices.²¹⁶ Kay’s Kloset did not comply, and Leegin terminated the distribution relationship.²¹⁷

In its *Leegin* opinion, the Supreme Court weighed the procompetitive rationales and anticompetitive objections to resale price maintenance, and determined that because there may be a concrete set of valid business reasons to impose RPM, the practice could not be per se invalid.²¹⁸ In his majority opinion, however, Justice Kennedy emphasized that “[a]s should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.”²¹⁹ Justice Kennedy also

208. See Easterbrook, *supra* note 120, at 148; cf. Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 196, 202–03 (Robert Pitofsky ed., 2008). See generally Telser, *supra* note 206.

209. See Easterbrook, *supra* note 120, at 135 (“No practice a manufacturer uses to distribute its products should be a subject of serious antitrust attention.”). See generally Orbach, *supra* note 129.

210. Easterbrook, *supra* note 120, at 140.

211. Orbach, *supra* note 129, at 261, 278 (discussing how high prices can aid sales and influence how consumers perceive quality for luxury brands and premium products).

212. See Easterbrook, *supra* note 120, at 140–53 (discussing how restricted dealing is a permissible, effective competitive strategy).

213. 551 U.S. 877 (2007).

214. See *id.* at 889.

215. See *id.* at 882–83.

216. *Id.* at 883.

217. See *id.* at 884.

218. See *id.* at 900 (“[R]espected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects.”).

219. *Id.* at 894.

described the potential for a “change in circumstances” that may require general reexamination of RPM.²²⁰

Leegin’s controversial shift on RPM, from per se illegality to analysis under the rule of reason, has created great uncertainty in the antitrust world.²²¹ Subsequent to *Leegin*, all Sherman Act RPM claims—and thus, all IMAP policies if so classified—are reviewed under the rule of reason.²²² However, there are concerns about *Leegin*’s applicability to state antitrust statutes,²²³ and persistent questions about the implementation of the rule of reason standard itself.²²⁴ Accordingly, courts and antitrust enforcers have yet to reach a clear consensus on when and how RPM can be pro- or anticompetitive. Further, there is uncertainty regarding how IMAP policies fit into the already complex RPM analytical framework.²²⁵

II. OLD TRICKS, NEW DOG: STRUGGLES TO APPLY TRADITIONAL RPM ANALYSIS TO IMAP POLICIES

As consumers flock to the internet in search of low prices,²²⁶ IMAP policies have become increasingly prevalent among manufacturers.²²⁷ IMAP policies are currently being examined through the lens of resale price maintenance.²²⁸ Given the significant uncertainty surrounding RPM in the antitrust world after *Leegin*, the unique characteristics of IMAP policies, and the burden of a heightened pleading standard introduced by *Bell Atlantic Corp. v. Twombly*,²²⁹ plaintiffs have numerous barriers to a successful IMAP claim.²³⁰

In order to bring a valid antitrust claim against an IMAP policy, a plaintiff must overcome two challenging analytical hurdles: first, arguing that RPM is anticompetitive, whether per se or subject to the rule of reason,²³¹ and second, convincing a court that IMAP is equivalent to

220. See generally Note, *supra* note 15, at 16, 19–21 (quoting *Leegin*, 551 U.S. at 919) (discussing how the expansion of internet commerce could have so fundamentally changed the antitrust environment that the *Leegin* holding may need to be revisited).

221. See Robert L. Hubbard, *Protecting Consumers Post-Leegin*, 22 ANTITRUST 41, 41 (2007).

222. See ABA SEC. ANTITRUST L., *supra* note 9.

223. See Barr, *supra* note 120, at 3.

224. See Easterbrook, *supra* note 120, at 153.

225. See Barr, *supra* note 120, at 3.

226. See Walter Baker, Mike Marn, & Craig Zawada, *Price Smarter on the Net*, 79 HARV. BUS. REV. 122, 123 (2001) (discussing how online shoppers report that “far and away the most important factor motivating them to buy on-line is lower prices”).

227. See generally Rosch Remarks, *supra* note 1.

228. See, e.g., *Worldhomecenter.com, Inc. v. L.D. Kichler Co.*, No. 08-CV-020, 2009 WL 936675 at *4–5 (E.D.N.Y. Mar. 31, 2009) (discussing IMAP policies in relation to vertical price fixing).

229. 550 U.S. 544 (2007); see, e.g., *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1332–33, 1340 (11th Cir. 2010) (reading *Leegin* and *Twombly* together to require that RPM plaintiffs meet the plausibility standard for all elements of a Sherman Act claim).

230. See Hubbard, *supra* note 221, at 41 (“[S]tate enforcers will have more difficulty proving the [RPM] violation under federal antitrust law in light of [*Leegin*].”).

231. See generally *Kichler*, 2009 WL 936675.

RPM.²³² Courts have been neither quick nor unanimous to assume that RPM and IMAP are analogous.²³³ Moreover, even if a consensus were to be reached, much uncertainty remains regarding the legality of RPM in light of the *Leegin* holding.²³⁴

Part II.A analyzes the uneven implementation of rule of reason analysis of RPM after *Leegin*. Next, Part II.B identifies key elements of a successful IMAP claim and illustrates how these elements can function as roadblocks to challenging manufacturer-imposed IMAP policies. Finally, Part II.C discusses recent attempts to challenge IMAP policies specifically.

A. *Difficulties in Applying Leegin to RPM and Internet Minimum
Advertised Price Policies*

As a result of the Supreme Court's rejection of per se illegality for resale price maintenance in *Leegin*, courts have validated RPM policies or dismissed lawsuits due to an inability to plead all of the required elements for a successful rule of reason claim.²³⁵ The Court's *Leegin* holding has been applied relatively consistently in federal courts.²³⁶ The manner in which courts conduct rule of reason analysis, and the treatment of RPM under state antitrust statutes, however, have been far more disjointed.²³⁷ IMAP policies remain relatively untested, and add an extra layer of complexity to an already uncertain area of law.

1. Federal Court Decisions and Proposed Legislation on Resale Price
Maintenance After *Leegin*

Federal courts have been fairly consistent in their post-*Leegin* holdings on RPM, but there is a great deal of resistance to *Leegin* in academia and state enforcement.²³⁸ In *Toledo Mack Sales & Service, Inc. v. Mack Trucks*,

232. See, e.g., *Campbell v. Austin Air Sys., Ltd.*, 423 F. Supp. 2d 61 (W.D.N.Y. 2005).

233. *Compare Worldhomecenter.com, Inc. v. L.D. Kichler Co.*, No. 05-CV-3297, 2007 WL 963206, at *5 (E.D.N.Y. Mar. 28, 2007) (stating that a contested IMAP policy had the effect of restricting retail prices for internet retailers), with *Campbell*, 423 F. Supp. 2d (holding that the IMAP policy at issue, by definition, restricted only the advertised price and had no price-fixing implications).

234. See generally Barr, *supra* note 120; Hubbard, *supra* note 221, Rosch Remarks, *supra* note 1; *infra* Part II.A.

235. See, e.g., *Rick-Mik Enters. v. Equilon Enters.*, 532 F.3d 963, 975–76 (9th Cir. 2008) (holding that plaintiff's allegation that a gasoline production joint venture conspired with banks and others to fix credit card processing fees was merely conclusory and dismissed for vagueness pursuant to the *Twombly* plausibility pleading standard). See generally Spahr v. *Leegin Creative Leather Prods., Inc.*, No. 2:07-CV-187, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008) (holding, similarly, that the alleged RPM scheme was no longer per se illegal in light of *Leegin*).

236. See ABA SEC. ANTITRUST L., 2008 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS 23–25 (2009) (summarizing the application of rule of reason analysis in federal courts after *Leegin*).

237. See Michael A. Lindsay, *An Update on State RPM Laws Since Leegin*, ANTITRUST SOURCE, Dec. 2010, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Lindsay12_21f.authcheckdam.pdf.

238. See Barr, *supra* note 120, at 2.

Inc.,²³⁹ the Third Circuit vacated a judgment as a matter of law in favor of defendants and held that the plaintiff had sufficiently alleged and proved an unreasonable RPM agreement among Mack Trucks and its distributors.²⁴⁰ The anticompetitive outcomes of RPM predicted in *Leegin* were cited directly, particularly the concerns that “[i]f there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel” and “that a dominant manufacturer . . . can abuse [RPM] for anti-competitive purposes.”²⁴¹

In *Rick-Mik Enterprises v. Equilon Enterprises*,²⁴² the Ninth Circuit dismissed Rick-Mik’s RPM claim as overly vague under *Twombly*.²⁴³ Regardless, the court cited *Leegin* to state that even had the complaint adequately alleged that Equilon engaged in price fixing, a vertical RPM scheme “is not a valid per se antitrust violation.”²⁴⁴

Although federal courts have applied the rule of reason to RPM claims since 2007, the *Leegin* holding continues to be controversial in public policy. Congress has made several attempts to re-impose the per se ban on RPM after *Leegin* by drafting statutes to repeal *Leegin*.²⁴⁵ Immediately after the decision, Senators Herb Kohl, Joseph Biden, and Hillary Clinton introduced the Discount Pricing Consumer Protection Act.²⁴⁶ This bill proposed to revise section 1 of the Sherman Act to provide that “[a]ny contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act.”²⁴⁷ Although Senate Bill 2261 never made it out of committee, the cause continued. Senate Bill 75, the Discount Pricing Consumer Protection Act, which contains identical language to Senate Bill 2261, has been approved by the Senate Judiciary Committee but, as of February 2012, has yet to reach a vote in the Senate.²⁴⁸ In the House of Representatives, House Bill 3190, the Discount Pricing Consumer Protection Act of 2009, contains the same language as its Senate counterpart.²⁴⁹ House Bill 3190 passed the House Judiciary committee in January 2010 by voice vote, but also has not reached a full vote in the House.²⁵⁰ This legislation was reintroduced in 2011 as House Bill 3406.²⁵¹

239. 530 F.3d 204 (3d Cir. 2008).

240. *See id.* at 208–09, 226.

241. *Id.* at 225 (quoting *Leegin Creative Leather Prods., Inc., v. PSKS, Inc.*, 551 U.S. 877, 897–98 (2007)).

242. 532 F.3d 963 (9th Cir. 2008).

243. *See id.* at 975–76.

244. *Id.* at 976.

245. *See* Hubbard, *supra* note 221, at 41–42.

246. Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (2007); *see also* Hubbard, *supra* note 221, at 41–42.

247. S. 2261, § 3.

248. Discount Pricing Consumer Protection Act, S. 75, 112th Cong. (2011), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112s75rs/pdf/BILLS-112s75rs.pdf>. Senate Bill 75 is cosponsored by Senators Kohl, Feinstein, Durbin, Whitehouse, Klobuchar, Franken, Wyden, Schumer, and Blumenthal. *Id.*

249. Discount Pricing Consumer Protection Act of 2009, H.R. 3190, 111th Cong. (2009), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h111-3190>.

250. *See id.*

2. State Court Decisions and Legislation After *Leegin*

Leegin's implications are particularly muddled when applied to antitrust cases arising under state statutes. As of April 2011, seventeen states have statutes specifically prohibiting resale price maintenance.²⁵² Additionally, the common law in several states has established a per se rule against RPM that has either been unchallenged or affirmed after *Leegin*.²⁵³ Some states have harmonization clauses that indicate that state law is intended to mirror federal law and its jurisprudence, but others assert that "federal rulings [are not] blindly accepted," but "serve primarily as 'guides' to the interpretation and application of state law 'in the light of the economic and business conditions of [the] State.'"²⁵⁴ Courts in some states that proscribe RPM have elected to follow rule of reason analysis after *Leegin*.²⁵⁵ Nonetheless, these decisions have been subject to significant scrutiny: in 2009, forty-one state attorneys general wrote to Congress requesting that the *Leegin* holding be overruled.²⁵⁶

New York, Michigan, and Illinois filed a post-*Leegin* challenge to minimum RPM agreements under both federal law and the laws of the three states.²⁵⁷ This resulted in a \$750,000 settlement within days, and Herman Miller, the defendant, agreed not to enter into any future RPM agreements and to accept limitations on dealer termination.²⁵⁸ However, the settlement and consent decree are not binding and hold no precedential authority in New York or otherwise.²⁵⁹

Both New York and California have state antitrust statutes that include provisions that allow for lawsuits against vertical price fixers, even after

251. See Discount Pricing Consumer Protection Act of 2011, H.R. 3406, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3406ih/pdf/BILLS-112hr3406ih.pdf>.

252. States with broad price fixing prohibitions as of April 2011 are: California, Connecticut, Hawaii, Illinois, Indiana, Kansas, Maryland, Minnesota, Mississippi, Montana, Nevada, New Jersey, New York, Ohio, South Carolina, Tennessee, and West Virginia. See Lindsay, *supra* note 51.

253. See *id.*; see also *Exit A Plus Realty v. Zuniga*, 930 A.2d 491, 497 (N.J. Super. Ct. App. Div. 2007) (referring to New Jersey's statutory proscription of RPM after *Leegin* and declaring vertical price fixing agreements per se unenforceable).

254. *Island Tobacco Co. v. R.J. Reynolds Tobacco Co.*, 627 P.2d 260, 268 (Haw. 1981).

255. See, e.g., *Spahr v. Leegin Creative Leather Prods., Inc.*, No. 2:07-CV-187, 2008 WL 3914461, at *7, *14 (E.D. Tenn. Aug. 20, 2008) (holding that rule of reason analysis applies to challenged minimum RPM agreement under state law).

256. See Rosch Remarks, *supra* note 1, at 20. Additionally, several states whose state antitrust statutes are similar to the federal Sherman Act have drafted or enacted legislation to declare RPM illegal under state law. *Id.* at 19.

257. See *New York v. Herman Miller, Inc.*, No. 08-CV-2977, at 7–8 (S.D.N.Y. filed Mar. 21, 2008) (alleging that Herman Miller, Inc. violated state and federal antitrust law by imposing minimum resale prices for retailers).

258. *New York v. Herman Miller, Inc.*, No. 08-CV-2977, at 4–11 (S.D.N.Y. Mar. 25, 2008) (stipulated final judgment and consent decree), available at http://www.oag.state.ny.us/bureaus/antitrust/pdfs/Signed_FJ.pdf.

259. See Eric A. Rosand, *Consent Decrees in Welfare Litigation: The Obstacles to Compliance*, 28 COLUM. J.L. & SOC. PROBS. 83, 96 (1994) (stating that consent decrees bind only the two parties to the degree and thus have no further judicial precedential value).

Leegin.²⁶⁰ California state courts have repeatedly confirmed²⁶¹ the illegality of RPM under California's antitrust statute, the Cartwright Act.²⁶²

Recently, the California Attorney General obtained a consent decree against Dermaquest, Inc., enjoining violations of the Cartwright Act.²⁶³ This case contested two clear RPM agreements: the first, a "Distribution Agreement," provided that a distributor could not resell "Product in a price structure that yields a Product price at ultimate retail sale below Dermaquest's Suggested Retail Price."²⁶⁴ The second was a "Reseller Agreement," prohibiting resellers from reselling "Product in a price structure that yields a Product price at resale below Dermaquest's Suggested Retail Price."²⁶⁵ Although both of these policies were held to be unenforceable, and Dermaquest was required to cover attorney's fees and other litigation costs, the decree is not binding legal authority and sets no precedent.²⁶⁶

In 1975, the New York state legislature amended its Fair Trade Law,²⁶⁷ the Feld-Crawford Act,²⁶⁸ to state that "[a]ny 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."²⁶⁹ This section is entitled "Price-fixing prohibited."²⁷⁰ In light of Feld-Crawford, "it remains to be seen whether New York courts will embrace the more lenient post-*Leegin* federal antitrust approach."²⁷¹

The New York Attorney General's office cited the Feld-Crawford Act in *People v. Tempur-Pedic International, Inc.*,²⁷² alleging that Tempur-Pedic's Retail Partner Obligations and Advertising Policies (RPOAP) and pricing policies violated the statute.²⁷³ Tempur-Pedic had implemented an advertising policy requiring the agreement of retailers, as well as a unilateral pricing policy.²⁷⁴ The trial court held that the RPOAP was not illegal.²⁷⁵ Although the RPOAP was an agreement, there was no indication

260. See Barr, *supra* note 120, at 3.

261. See *Mailand v. Burckle*, 572 P.2d 1142, 1147 (Cal. 1978) (confirming the per se illegality of RPM); *Kunert v. Mission Fin. Servs. Corp.*, 1 Cal. Rptr. 3d 589, 605 (Cal. Ct. App. 2003) (same).

262. CAL. BUS. & PROF. CODE §§ 16700–70 (West 2006).

263. Consent Judgment, *People v. Dermaquest, Inc.*, No. 10497526 (Cal. Super. Ct. Alameda Cnty. Feb. 23, 2010).

264. Complaint ¶ 11, *Dermaquest, Inc.*, No. 10497526.

265. *Id.* ¶ 12.

266. See *supra* note 262 and accompanying text.

267. See 2 ABA SEC. ANTITRUST L., STATE ANTITRUST PRACTICE AND STATUTES New York, § 35, at 15 (4th ed. 2009).

268. See N.Y. GEN. BUS. LAW § 369-a (McKinney 2009).

269. *Id.*

270. *Id.*

271. 2 ABA SEC. ANTITRUST L., *supra* note 267, at 35–36.

272. 30 Misc. 3d 986, 2011 N.Y. Slip Op. 21019 (Jan. 14, 2011).

273. See *id.* at 987–90.

274. See *id.* at 989.

275. See *id.* at 996–97.

that the purpose was to regulate price.²⁷⁶ Also, the pricing policy did not fulfill the statutory elements because it was not the result of an agreement or conspiracy.²⁷⁷

In 2009, the Maryland legislature passed a *Leegin*-repealing statute,²⁷⁸ expressly rejecting the application of *Leegin*'s reasoning to the Maryland Antitrust Act.²⁷⁹ This amendment stated that "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."²⁸⁰ The legislative history and unambiguous text make clear that the intent was to preserve the per se rule for RPM.²⁸¹

B. Barriers to Successful IMAP Litigation

Under a rule of reason standard, plaintiffs challenging an IMAP policy must draft complete and artful pleadings in order to survive motions to dismiss. Initially, courts must establish that RPM is the correct framework under which to analyze an IMAP policy. From there, proving the existence of an agreement is challenging even under a per se standard, let alone under the rule of reason.²⁸² Many IMAP policies contain express language insisting that these policies are purely unilateral.²⁸³ It is difficult to provide evidence of concerted activity even when such conduct is evident in the parties' course of dealing.²⁸⁴ Finally, a company that does business exclusively on the internet presents significant difficulties for plaintiffs in defining a relevant market and quantifying antitrust injury.²⁸⁵ Although it

276. *See id.* at 997.

277. *See id.*

278. *See* Maryland Antitrust Act – Establishment of Minimum Sale Price for Commodities or Services – Prohibited, S.B. 239, 2009 Leg., 426th Sess. (Md. 2009), available at <http://mlis.state.md.us/2009rs/bills/sb/sb0239t.pdf>; Maryland Antitrust Act – Establishment of Minimum Sale Price for Commodities or Services – Prohibited, H.B. 657, 2009 Leg., 426th Sess. (Md. 2009), available at <http://mlis.state.md.us/2009rs/bills/hb/hb0657t.pdf>. Both were signed into law in April 2009 and became effective on October 1, 2009. *See* Barr, *supra* note 120, at 4 n.31.

279. MD. CODE ANN., COM. LAW §§ 11-201 to -213 (LexisNexis 2005 & Supp. 2011).

280. *Id.* § 11-204(b).

281. *See* Barr, *supra* note 120, at 5.

282. *See, e.g.,* *Jacobs v. Tempur-Pedic Int'l Inc.*, 626 F.3d 1327 (11th Cir. 2010) (reading *Leegin* and *Twombly* together to require that RPM plaintiffs meet the plausibility standard for all elements of a Sherman Act claim); *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 94 (N.Y. App. Div. 2006) ("To state a claim under the Donnelly Act, a party must: (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities.").

283. *See Riado Internet Minimum Advertised Price Policy*, *supra* note 2; *see also infra* Part II.C.2.

284. *See* ABA SEC. ANTITRUST L., *supra* note 74, at 51–89 (discussing the numerous relevant factors in establishing conspiracy based on indirect evidence).

285. *See* Jared Kagan, Note, *Bricks, Mortar, and Google: Defining the Relevant Antitrust Market for Internet-Based Companies*, 55 N.Y.L. SCH. L. REV. 271, 272–73 (2010); *see also infra* Part II.B.3.

is possible that one could state a valid antitrust claim for an IMAP policy within the existing analytical framework, plaintiffs face an uphill battle.

1. Categorization of IMAP Policies as Resale Price Maintenance

Based on the decisions in *Quoizel* and *Kichler*, a persuasive case can be made regarding the nature of IMAP policies, despite their inclusion of the term “advertising.” In the *Quoizel* case, Homecenter.com’s complaint included an affidavit from the company’s president, stating that Quoizel salespeople have berated him for advertising and selling Quoizel’s products below a certain price point.²⁸⁶ Additionally, the plaintiff submitted a letter with language indicating that the application of IMAP was about more than simply an advertised price.²⁸⁷ The inclusion of direct evidence that tends to indicate that a manufacturer imposed IMAP to regulate price, and not merely advertising, would help to secure classification as RPM. These cases, however, are the first to directly address the issue of IMAP policies, as opposed to general advertised pricing. As such, they may not be indicative of the likelihood of similar categorization.

2. Successful Pleading of an Agreement or Conspiracy

To bring a successful claim, courts require that plaintiffs “offer a plausible theory of conspiracy, supported not only by a showing of ‘consciously parallel’ conduct but also by evidence of the existence of ‘plus factors’ enabling the court to distinguish between unilateral and conspiratorial conduct.”²⁸⁸ IMAP policy language is often particularly tortured around the notion of “agreement.” Additionally, there are questions regarding who the parties to an IMAP policy agreement would be. A typical IMAP policy frequently contains a clause asserting that the development, implementation, and enforcement of the policy is purely unilateral. For example, the IMAP policy for Riado, a furniture manufacturer, states:

In executing this policy, Riado will act at all times unilaterally, and will neither solicit, consider nor agree to any recommendation, request or demand of any other person. All matters of interpretation and application of the terms of this policy and all matters concerning enforcement of this policy shall remain with the sole, unilateral authority of Riado.²⁸⁹

Quoizel’s IMAP policy goes even further, stating in a section titled “Retail Partner Options” that agreeing to comply or actually complying with IMAP is still not an agreement.²⁹⁰ In the 2007 *Kichler* case, the plaintiffs provided a letter from Kichler stating that the IMAP policy was instituted “to help our dealers compete with companies that advertise our

286. Affidavit of Brian Okin, *supra* note 161, ¶ 10.

287. *See id.* ¶ 10.

288. ABA SEC. ANTITRUST L., *supra* note 74, at 60 (citing *Merck-Medco Managed Care v. Rite Aid Corp.*, No. 98-2847, 1999 WL 691840, at *8-9 (4th Cir. 1999)).

289. *Riado Internet Minimum Advertised Price Policy*, *supra* note 2.

290. *See supra* note 160.

products at reduced prices on the web.”²⁹¹ This type of statement implies an agreement between manufacturers and brick-and-mortar retailers to fix prices.

IMAP policies, by definition, apply only to internet sales. Depending on analysis, this may or may not put a thumb on the scale of the existence of an agreement. Courts are not typically supportive of claims that infer, rather than prove, agreement. They require that a complaint “establish a nonnegligible probability that the claim is valid.”²⁹²

3. Antitrust Harm in a Relevant Market

The internet presents a challenging forum within which a plaintiff must establish a relevant market, and specific harms within that market. “[A] relevant market is comprised of a product market and a geographic market.”²⁹³ In *Brown Shoe Co. v. United States*,²⁹⁴ the Supreme Court required that plaintiffs identify the relevant product and geographic market so that a district court can determine the area of competition, and whether the alleged unlawful acts have anticompetitive effects in that market.²⁹⁵ Frequently, it is difficult to define the scope of a particular market: it must be broad enough to completely encompass the alleged harm, but narrow enough to only include what is reasonably affected.²⁹⁶ Difficulties arise with product interchangeability and blurry geographic boundaries.²⁹⁷ The internet presents nearly unlimited geographic bounds. Anyone in the world could order a product from Homecenter.com. Additionally, IMAP policies may impact several product or service markets: the market for the manufactured product generally, the market for the product online, or, more expansively, the online market for all products.

A private plaintiff in an antitrust action must also define the nature and extent of antitrust harm inflicted by the policy.²⁹⁸ The Supreme Court established a two-part test for the requisite antitrust injury in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*²⁹⁹ The harm at issue must be “of the type the antitrust laws were intended to prevent and . . . flow[] from that which makes defendants’ acts unlawful.”³⁰⁰ Lost profits from more

291. *Worldhomecenter.com, Inc. v. L.D. Kichler Co.*, No. 05-CV-3297, 2007 WL 963206, at *2 (E.D.N.Y. Mar. 28, 2007).

292. *In re Text Messaging Antitrust Litigation*, 630 F.3d 622, 629 (7th Cir. 2010).

293. See ABA SEC. ANTITRUST L., *supra* note 73, at 108; SULLIVAN & GRIMES, *supra* note 6, at 61.

294. 370 U.S. 294 (1962).

295. *Id.* at 324.

296. See SULLIVAN & GRIMES, *supra* note 6, at 61.

297. See *id.* at 61, 64.

298. See ABA SEC. ANTITRUST L., PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 21 (2d ed. 2010) (stating that plaintiffs must prove that “they were harmed by an antitrust violation . . . [and] that their injury is proximately related to the harm and within the ambit of the antitrust laws”).

299. 429 U.S. 477 (1977).

300. *Id.* at 489.

effective competition do not constitute antitrust injury: the alleged harm must come from a decrease in competition, not competition itself.³⁰¹

It is often difficult and expensive to hire experts to quantify the harm experienced. There is currently little concrete data on the impact of IMAP policies in particular, or the strategies utilized by internet sellers to skirt them. Attempts to differentiate the “advertised” price from the “selling” price online often involve putting a product into an online shopping cart in order to view the price. Although this type of policy could reasonably deter ultimate purchasing, a potential plaintiff would have to collect extensive data in order to establish this fact.

C. Recent Attempts to Challenge IMAP Policies

Although general RPM has been litigated across the country, very few courts have addressed IMAP policies directly. Recent litigation regarding compact disc manufacturers, however, has implied that “price-advertising programs that cover virtually all forms of price advertising and could be characterized as eliminating the ability of discounters to communicate lower resale prices to consumers” could violate antitrust statutes even under the rule of reason.³⁰² This section discusses how IMAP policies could be construed either as impermissibly preventing the communication of low prices, or sufficiently transparent to allow consumers unimpeded access to online discounts.

Once a plaintiff is able to establish that an IMAP policy should be analyzed under an RPM framework, he must then adequately plead all the requisite elements of an RPM claim.³⁰³ Due to the uncertainty after *Leegin*, the claim may assert that an IMAP policy is per se illegal, but must also be sufficiently pled under the rule of reason.³⁰⁴

The only IMAP policy lawsuits thus far have been brought in New York under both federal and state antitrust law. District courts in the Eastern and Western Districts of New York have come to opposite conclusions on whether IMAP policies are merely non-price restraints or RPM.³⁰⁵ A New York state court in Manhattan analyzed a contested IMAP policy as RPM, but dismissed the complaint for failure to state a valid claim.³⁰⁶

301. ABA SEC. ANTITRUST L., *supra* note 298, at 22.

302. ABA SEC. ANTITRUST L., *supra* note 151, at 63.

303. See *Worldhomecenter.com, Inc. v. Quozel, Inc.*, No. 651444/2010, slip op. at 6–7 (N.Y. Sup. Ct. Oct. 25, 2011).

304. See *id.* at 7.

305. Compare *Worldhomecenter.com v. L.D. Kichler Co.*, No. 05-CV-3297, 2007 WL 936206, at *5 (E.D.N.Y. Mar. 28, 2007) (classifying an IMAP policy as RPM for analytical purposes), with *Campbell v. Austin Air Sys., Ltd.*, 423 F. Supp. 2d 61, 68 n.6 (W.D.N.Y. 2005) (categorizing an internet advertising policy as a non-price restraint).

306. See generally *Quozel*, No. 651444/2010.

1. RPM or Not RPM Under Federal Law? That Is the Question

In *Campbell v. Austin Air Systems, Ltd.*,³⁰⁷ a federal court in New York's Western District court held that a contested IMAP policy regulated only advertising, and not price.³⁰⁸ Campbell was a distributor of Austin's air filters and cleaners.³⁰⁹ In 2001, Austin imposed an IMAP policy, but Campbell refused to comply with the policy, and Austin terminated his dealership contract.³¹⁰ According to the court, "By its plain language, Austin's Internet MAP policy restricts only the minimum price for which a dealer could advertise on the Internet. . . . With respect to actual sales pricing, the Agreement explicitly states that a dealer may sell Austin Air Cleaners for any price."³¹¹

Despite this holding, the Eastern District came to the opposite conclusion in *Worldhomecenter.com v. Kichler*.³¹² In this motion to dismiss, the court stated that IMAP policies could be defined as RPM.³¹³ According to the *Kichler* court, "although facially the IMAP restricts only advertising prices . . . it has the concomitant effect of restricting retail prices for Internet retailers as well."³¹⁴ For this reason, the plaintiff's Sherman Act claim (and related claim under New York's Donnelly Act) was able to survive past the dismissal stage.

In New York, *Worldhomecenter.com* (or *Homecenter.com*) has attempted to bring several state and federal claims against the IMAP policies of various manufacturers.³¹⁵ *Homecenter.com* is a New York corporation that operates a website to sell home improvement products. Sales are made exclusively online, and *Homecenter.com* asserted that products could be sold at "steep discounts" due to reduced overhead costs inherent to online distribution.³¹⁶ At various times, the manufacturers of products sold at *Homecenter.com*, including *Kichler Lighting*,³¹⁷ *Quoizel*,³¹⁸ *Thermasol*,³¹⁹ and *KWC America*,³²⁰ established IMAP policies. Although each company's IMAP policy differed slightly, they all set minimum advertising prices. Failure to comply with this policy would

307. 423 F. Supp. 2d 61.

308. *See id.* at 68 n.6.

309. *See id.* at 64.

310. *See id.* at 64–65.

311. *Id.*

312. *Worldhomecenter.com v. L.D. Kichler Co.*, No. 05-CV-3297, 2007 WL 936206, at *5 (E.D.N.Y. Mar. 28, 2007).

313. *See id.*

314. *Id.*

315. *See id.*; *Worldhomecenter.com, Inc. v. Quoizel, Inc.*, No. 651444/2010, slip op. at 6 (N.Y. Sup. Ct. Oct. 25 2011).

316. *See Quoizel*, No. 651444/2010, slip op. at 2; *see also* Amended Complaint ¶ 9, *Quoizel*, No. 651444/2010 (Jan. 28, 2011).

317. *See Kichler*, No. 05-CV-3297.

318. *See Quoizel*, No. 651444/2010.

319. *See Worldhomecenter.com, Inc. v. Thermasol, Ltd.*, No. 05 Civ. 3298, 2006 WL 1896344 (E.D.N.Y. July 10, 2006).

320. *See Worldhomecenter.com, Inc. v. KWC America, Inc.*, No. 10 Civ. 7781, 2011 WL 4352390 (S.D.N.Y. Sept. 15, 2011).

result in consequences ranging from temporary prohibition of listing or selling the manufacturer's products to the complete termination of a retail agreement.³²¹ When Homecenter.com did not comply, manufacturers took action by refusing to fulfill orders and terminating dealership contracts. Consequently, Homecenter.com commenced litigation.

Homecenter.com's complaints were dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a valid claim.³²² Pleading deficiencies stemmed mainly from the failure to sufficiently plead a conspiracy under the heightened *Twombly* standard.³²³ Homecenter.com's primarily failed due to its inability to plausibly establish that IMAP policies "operated unreasonably to restrain interstate trade."³²⁴ Homecenter.com was able to survive a motion for judgment on the pleadings in its claim against Kichler in 2007. On that motion, the court held that Homecenter.com had adequately pled a conspiracy, and that since IMAP could be classified as RPM (which was still per se illegal at the time, as *Leegin* was decided in 2007), the requirements of the second prong were met as well.³²⁵ The issue was later reexamined by the court in 2009, and dismissed for failure to state a claim.³²⁶ The court determined that Homecenter.com did not allege a contract, and was not persuaded by Homecenter.com's argument that a contract could be established by Kichler's course of dealing.³²⁷ The court suggested that Homecenter.com would have a valid claim in state court, under New York's Donnelly Act.³²⁸

2. Pleading Problems in State Court

Homecenter.com's claims in state court against fixture manufacturer Quoizel failed as well. In his decision, Justice Charles E. Ramos classified IMAP as RPM, but applied *Leegin*, holding that RPM was subject to rule of reason analysis.³²⁹ As Homecenter.com's complaint only addressed per se illegality, it was dismissed with leave to replead the necessary elements of a rule of reason claim under the Donnelly Act.³³⁰ In order to state a valid

321. See *Quoizel*, No. 651444/2011, slip op. at 2; see also Amended Complaint, *supra* note 316, ¶ 15.

322. See *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 113 (2d Cir. 2005) ("[A] Section 1 plaintiff must allege that (1) the defendants were involved in a contract, combination, or conspiracy that (2) operated unreasonably to restrain interstate trade, together with the factual predicate upon which those assertions are made.").

323. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that, in order to bring a successful Sherman Act section 1 claim, a plaintiff must provide "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement").

324. *Twombly*, 425 F.3d at 113.

325. See *Worldhomecenter.com, Inc. v. L.D. Kichler Co.*, No. 05-CV-3297, 2007 WL 963206, at *5 (E.D.N.Y. Mar. 28, 2007).

326. See *Worldhomecenter.com, Inc. v. L.D. Kichler Co.*, No. 08-CV-020, 2009 WL 936675, at *5 (E.D.N.Y. Mar. 31, 2009) (ruling for defendants on Rule 12(c) motion for judgment on the pleadings).

327. See *id.* at *4.

328. See *id.* at *5.

329. *Quoizel*, No. 651444/2010, slip op. at 6.

330. See *id.* at 6, 8.

Donnelly Act claim, a plaintiff must: “(1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities.”³³¹ The claim failed for failure to plead a conspiracy. The court found Quozel’s IMAP policy to be unilateral, and stated that “[a] manufacturer’s independent acts to set minimum resale prices, without seeking agreement from its retailers, do not amount to a contract.”³³² Although Homecenter.com was granted leave to replead, given the dual barriers of deference to manufacturers under the rule of reason and *Twombly*’s heightened pleading standard, it is unlikely that a future claim under the current analytical framework would be successful.

The existing frameworks for analyzing IMAP policies are uncertain even when considering traditional resale price maintenance. Anti-RPM litigants must contend with significant confusion regarding the legality of RPM under state antitrust laws, growing resistance to the *Leegin* holding at both the state and federal level, and uneven application of the rule of reason.³³³ Recent attempts to contest IMAP policies have only muddied the waters by adding an additional layer of complexity. Opponents to the imposition of IMAP policies must proceed with caution, and have yet to move past the stringent requirements of the rule of reason test. As described above, IMAP policies are particularly unlikely to meet the high pleading requirements to survive dismissal.

III. IMAP IS MORE THAN RPM 2.0: BUILDING A NEW FRAMEWORK FOR ANALYSIS OF IMAP POLICIES

This part discusses the inadequacy of the current analytical system for evaluating resale price maintenance when applied to IMAP policies, and recommends an alternative solution. Part III.A addresses how IMAP policies effectively regulate resale prices even though they ostensibly address only advertising. By fixing prices, IMAP policies limit consumer choice and result in higher prices and less flexibility for internet purchasers. Part III.B discusses how the circumstances and actual effects of IMAP policies could be significantly different from those of traditional RPM. Initial research and the antitrust harm alleged in recent pleadings indicate that the imposition of an IMAP policy can generate negative outcomes that do not fall within traditional RPM pro-competitive and anti-competitive rationales and concerns.³³⁴

331. *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 94 (N.Y. Sup. Ct. App. Div. 2006) (internal citations omitted).

332. *Quozel*, No. 651444/2010, slip op. at 6 (citing *People v. Tempur-Pedic Int’l, Inc.*, 30 Misc. 3d 986 (N.Y. 2011)).

333. See Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 71 (1991) (characterizing rule of reason analysis as a de facto legality rule for instances of vertical restraints).

334. See, e.g., Amended Complaint, *supra* note 316, ¶9.

Savvy consumers use the internet to take advantage of its efficiencies and lower prices.³³⁵ The use of IMAP policies could jeopardize this critical innovation in product distribution, prevent competition online, and create barriers to entry for small upstart internet sellers. For these reasons, Part III.C recommends that IMAP policies be analyzed independently under a per se illegality standard, with only clear and carefully defined exceptions.

*A. IMAP Policies Effectively Regulate Resale Prices
and Limit Consumer Choice*

As the court reasoned in *Worldhomecenter.com v. Kichler*,³³⁶ IMAP policies do far more than regulate advertising. As discussed in Part II, these policies prevent retailers from communicating product prices to consumers online.³³⁷ Viewing a product's price in a virtual shopping cart allows a price to be displayed eventually, but requires at least the same number of clicks as going to a competing website or closing an online window completely.³³⁸ Even if large, reputable sites like Amazon.com are not affected seriously, the establishment of IMAP policies creates a significant barrier for upstart online discounters to enter a product market. With higher barriers to entry for internet retailers, consumers will experience less competition online, resulting in higher prices.

As with RPM, IMAP policies additionally assume that a manufacturer is better suited to decide which types of accompanying services—if any—consumers want.³³⁹ Without the meddling of IMAP policies, the market should be able to decide that question most effectively by freely permitting consumers to choose between low prices and more services. Online resale is an innovative and efficient distribution model, but if consumers feel that their needs are not being met or that a site is untrustworthy, they can and will return to traditional purchasing at brick-and-mortar stores.³⁴⁰

Scholars often cite the negative impact of free riding, including reduced services for consumers,³⁴¹ but there has been little study into the potential positive impact of free riding: lower costs and higher efficiency at brick-and-mortar stores.³⁴² A recent study reported that 78 percent of survey respondents who use the internet gathered information online before purchasing a product from a physical store.³⁴³ If customers could research

335. See generally Baker, Marn, & Zawada, *supra* note 226.

336. See *Worldhomecenter.com, Inc. v. L.D. Kichler Co.*, No. 05-CV-3297, 2007 WL 963206, (E.D.N.Y. Mar. 28, 2007).; see also *supra* Part II.B.1.

337. See *supra* Part I.C.3.

338. Consumers who purchase on the internet are price sensitive. See Judith Chevalier & Austan Goolsbee, *Measuring Prices and Price Competition Online: Amazon.com and BarnesandNoble.com*, 1 QUANTITATIVE MARKETING & ECON. 203, 220 (2003).

339. For a discussion on free riding and consumer choice, see *supra* Part I.D.2.

340. See Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 MGMT. SCI. 563, 578–79 (2000) (discussing how trust in an internet seller is a factor in purchasing).

341. See *supra* notes 205–08.

342. See Lao, *supra* note 15, at 17.

343. See JIM JANSEN, PEW INTERNET PROJECT, ONLINE PRODUCT RESEARCH: 58% OF AMERICANS HAVE RESEARCHED A PRODUCT OR SERVICE ONLINE 4 (Sep. 29, 2010), *available*

and compare products online, brick-and-mortar stores would need to invest fewer resources in employee training.

B. Rule of Reason Analysis for RPM Does Not Capture the Actual Impact of IMAP on Retailers

Rule of reason analysis for RPM, even in its most concrete form, does not adequately address the unique concerns about and rationales for IMAP policies. Although IMAP policies and RPM are closely related, the differences between them are significant enough to merit alternative analysis.

IMAP policies are anticompetitive not only because they can prevent internet vendors from selling a product to consumers at the lowest price, but also because they create a new category of online sellers. Prominent websites like Amazon.com store customer information and have the sophisticated functionality to handle IMAP policies without losing customers, but nevertheless criticize these policies in online forums. In one such forum, an Amazon moderator states:

[S]ome manufacturers have imposed . . . [IMAP] policies that restrict how retail prices may be displayed if they are lower than the manufacturer's . . . price. . . . Some manufacturers tell us that showing . . . prices on . . . our own website is "advertising." Others say we can't even show . . . the price . . . until much later in the checkout process. We disagree with these policies.³⁴⁴

Despite Amazon's distaste for IMAP policies, the only parties who have litigated the issue thus far are smaller, less reputable online retailers.³⁴⁵ These sellers allege significant lasting damages as consumers choose other purchasing options rather than put an item in an online shopping cart—competition is only a click away.³⁴⁶ It may be true that, for a large online vendor like Amazon, the IMAP policy actually has no effect on purchase rates. If this is true, then a large online vendor may actually benefit from an IMAP policy: it can set lower prices than traditional brick-and-mortar stores, and profit from the customers that an IMAP policy may dissuade from purchasing at a less prominent retailer.

at <http://www.pewinternet.org/~media/Files/Reports/2010/PIP%20Online%20Product%20Research%20final.pdf>; see also Gregory T. Gundlach, Joseph P. Cannon & Kenneth C. Manning, *Free Riding and Resale Price Maintenance: Insights from Marketing Research and Practice*, 55 ANTITRUST BULL. 381 (2010); Peter C. Verhoef, Scott A. Neslin & Björn Vroomen, *Multichannel Customer Management: Understanding the Research-Shopper Phenomenon*, 24 INT'L J. RES. MARKETING 129, 130 (2007) (reporting on a Double Click 2004 study demonstrating that 43 percent of respondents browsed on the internet prior to in-store purchase, versus 16 percent who searched at stores prior to purchasing online).

344. *Welcome to the "Where's the Price?" Forum*, AMAZON.COM, http://www.amazon.com/forum/where%20is%20the%20price/ref=cm_cd_ttp_ef_tft_tp?_encoding=UTF8&cdForum=FxGDJ62NQQH2Y8&cdThread=Tx3S4NTJ7361EQT.

345. Despite IMAP's ubiquity, as of January 2012, the only IMAP-specific lawsuits that have been filed are the *Homecenter.com* series of cases and *Campbell v. Austin Air Systems, Ltd.* See *supra* Part II.C.

346. See Amended Complaint, *supra* note 316, ¶ 25.

Online retailing has changed the way that manufacturers and retailers distribute products, and reflects a major alteration to the market. A more permissive approach to RPM threatens the growth of the industry, and particularly small retailers like Homecenter.com. Banning discounting using RPM eliminates the inherent advantage of Internet retailers: the ability to sell for less due to lower operating costs.”³⁴⁷ The Court in *Leegin* was concerned that RPM could forestall innovative and cost-efficient distribution methods. This fear seems to be coming to fruition. In implementing its IMAP policy, Kichler justified its existence in a letter stating that “[d]ue to the growth of the Internet . . . we are seeing more and more of our distributors losing sales to . . . Internet web sites. . . . [I]t’s just not possible to compete with the prices now being advertised . . . therefore we have created this policy to help protect our distributors.”³⁴⁸

Additionally, the Court held in *324 Liquor Corp. v. Duffy* that “[m]andatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition.”³⁴⁹ Although this holding predates *Leegin*, it describes a particular set of circumstances where there are simply no procompetitive justifications for establishing RPM. In certain industries, 90 percent of the market is controlled by IMAP policies. This description falls precisely in line with the kind of conduct that courts have held to be per se illegal.³⁵⁰

It is possible, but not sufficient, to analyze antitrust claims against IMAP policies under an advertising framework. In the late 1990s, the FTC found that cooperative advertising programs initiated by record companies were illegal under the FTC Act using a rule of reason standard.³⁵¹ The FTC then negotiated consent agreements with the record distributors to restrict the implementation of advertising restrictions. However, the consent agreements were in effect for only seven years,³⁵² and FTC enforcement lacks the binding authority of the courts or legislation.

347. See Lao, *supra* note 15, at 19.

348. See *Worldhomecenter.com v. L.D. Kichler Co.*, No 05-CV-3297, 2007 WL 963206, at *2 (E.D.N.Y. Mar. 28, 2007).

349. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342 (1987).

350. See *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (holding that the “pernicious effect on competition and lack of any redeeming virtue” of Northern Pacific Railway’s conduct justified per se proscription); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19–20 (1979) (stating that conduct that “would always or almost always tend to restrict competition and decrease output” is per se illegal under the Sherman Act).

351. See Press Release, FTC, Record Companies Settle FTC Charges of Restraining Competition in CD Music Market (May 10, 2000), available at <http://www.ftc.gov/opa/2000/05/cdpres.shtm>. The FTC Act empowers the FTC to establish and prevent unfair trade practices. 15 U.S.C. §§ 41–58 (2006).

352. See *id.*

C. *IMAP Policies Should Be Analyzed Independently
Under a Per Se Standard*

The existing resale price maintenance analytical framework for IMAP policies fails small businesses and consumers. The potential anticompetitive implications far outweigh any possible justification offered by manufacturers, and it is hardly clear that IMAP policies have the results that manufacturers intend. The unique characteristics of internet retailing, the nature of online competition, and the efficiencies inherent in new, innovative distribution methods justify an independent standard for analysis of IMAP policies in the courts.

RPM can occur in a variety of ways in the business world. For this reason, and in light of *Leegin*, it is essential to have a flexible standard of review to account for competitive justifications.³⁵³ The rule of reason, properly applied, helps to achieve the antitrust goal of protecting competition, not competitors.³⁵⁴ Conversely, IMAP policies are relatively uniform. Even if RPM is not per se illegal, it is possible to establish a per se standard uniquely for IMAP policies. Courts have created narrow, carefully defined exceptions to per se rules in the past to account for permissible behavior.³⁵⁵

Professor Marina Lao has recommended that courts apply a rebuttable presumption of illegality for RPM agreements generally. Thus, a prima facie case would be established “so long as the plaintiff shows an RPM agreement and higher resale prices, and no apparent procompetitive reason exists for the agreement.”³⁵⁶ This reasoning is even more convincing for the regulation of IMAP policies. A broad MAP policy applies to all retailers of a product equally and could arguably have little impact on competition as a whole; IMAP policies target only products sold online.

A promotional allowance would present a more efficient and less restrictive means of ensuring competitive prices and critical services for consumers.³⁵⁷ Promotional allowances do not restrict prices, but compensate retailers for providing services deemed beneficial by a manufacturer.³⁵⁸ A manufacturer would then simply not compensate dealers who do not provide services. Online sellers could elect to continue to offer products at low prices, but miss out on supplemental manufacturer incentives.

353. See Pitofsky, *supra* note 189, at 1495 (discussing occasional exceptions to the per se rule); Lao, *supra* note 15, at 20–21 (discussing alternatives to a strict approach to the rule of reason).

354. See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

355. See, e.g., *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 556–58 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) (permitting a new entrant exception to the per se rule regarding tying agreements).

356. Lao, *supra* note 15, at 21 (proposing that RPM be analyzed either as a rebuttable presumption of illegality or subject to a less stringent, “quick look” rule of reason analysis).

357. See *id.* at 7–8.

358. See Grimes, *supra* note 152, at 101; see also Steiner, *supra* note 153, at 403 (arguing that promotional allowances would be more effective at promoting services for the benefit of consumers than RPM).

With less disruptive alternatives to IMAP policies available and other means of permissibly addressing online discounting, IMAP policies lack the requisite procompetitive justifications to merit rule of reason analysis. For the above reasons, even if RPM policies are generally subject to the rule of reason, courts should find IMAP policies to be illegal per se.

CONCLUSION

The proliferation of internet retail sales has created a new paradigm for antitrust analysis. Even as recently as 2007, courts have not effectively integrated the nuances of online distribution into their traditional analytical framework. IMAP policies do not fit neatly into RPM jurisprudence, and attempts to litigate these policies are stymied by a combination of unclear law, challenging pleading standards, and difficulty in classifying the contested behavior.

IMAP policies, like RPM, rise above non-price restraints because they can and do impact resale pricing. However, the imposition of these policies can result in higher prices, and unjustifiable limitations on consumer options. For these reasons, IMAP policies should not be subject to rule of reason analysis, but instead should be per se illegal under state and federal antitrust law.