



The American Antitrust Institute

October 24, 2014

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

The Honorable William J. Baer
Assistant Attorney General
U.S. Department of Justice Antitrust Division
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

**Re: Action Needed to Address Resale Price Maintenance in Contact Lenses—and
Countless Other Markets**

Dear Chairwoman Ramirez and Assistant Attorney General Baer:

The American Antitrust Institute (AAI) writes to urge you to investigate and take action to reverse the recent proliferation of so-called “unilateral pricing policies” (UPPs) in the contact lens market. UPPs restrict discounting in the industry and undermine the competitive gains achieved by the Fairness to Contact Lens Consumers Act of 2003. More broadly, given the increasing risk of harm to consumers caused by resale price maintenance (RPM) in this market and countless others, we urge you to use the discounting bans in the contact lens market to send a message to the public and the business community that the federal government will enforce the law against anticompetitive RPM. And it is also time for the agencies to assert leadership in formulating post-*Leegin* RPM doctrine by advocating a rebuttable presumption of anticompetitive harm for RPM agreements.

The Obama administration has brought *no* RPM cases, notwithstanding the growth of RPM since the Supreme Court abrogated the per se rule against RPM in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹ Yet the Supreme Court never intended to give RPM a free pass. On the contrary, the Court made clear that “the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.”² The Court invited the lower courts “to establish the litigation structure [including presumptions] to ensure that the rule [of reason] operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.”³ Seven years later, it has not happened. On the contrary, the two courts of appeals that have issued RPM decisions since *Leegin* have suggested a full-blown rule of reason may be necessary.⁴ And despite some tentative initial steps by the agencies to foster the adoption of a structured rule of reason,⁵ the

¹ 551 U.S. 877 (2007).

² *Id.* at 894. Assistant Attorney General Baer emphasized RPM at his confirmation hearing, stating that he supported legislative repeal of the *Leegin* decision because, among other reasons, “there was serious risk of antitrust harm to consumers from vertical price fixing.” Hearing Before the Committee on the Judiciary, U.S. Senate, 112 Cong. 2d Sess. 81 (July 26, 2012).

³ *Leegin*, 551 U.S. at 898-99.

⁴ See *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412 (5th Cir. 2010); *Jacobs v. Tempur-Pedic North America, Inc.*, 626 F.3d 1327 (11th Cir. 2010).

⁵ See *In re Nine West Group, Inc.*, FTC Dkt. C-3937, Order Granting In Part Petition To Reopen and Modify Order Issued April 11, 2000, at 12, 2008 WL 2061410 (May 6, 2008) [hereinafter “Nine West Order”]; Christine Varney, Assistant Attorney General, Antitrust Division, Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks as

failure of the government to bring actual cases has no doubt contributed to the dismal results in the courts to date.⁶

The information elicited by the Senate Judiciary Committee at a hearing this summer, and other information, suggests that the UPP pricing restrictions adopted by all four major contact lens manufacturers are anticompetitive under some or all of the three relevant factors articulated by the Supreme Court in *Leegin*. Moreover, the restrictions appear to lack any procompetitive justification. Contact lens manufacturers cannot invoke the usual justification for RPM—the deterrence of free riding on reseller investments in presale promotional services—because eye care providers are paid for their services and are not subject to free riding by discount rivals. And the *Colgate* doctrine should not be an obstacle to challenging the UPP arrangements as RPM agreements. Even under pre-*Leegin* case law, the “unilateral” pricing policies here are likely not protected by *Colgate*. But now that RPM is no longer per se illegal, there is every reason to narrowly construe the *Colgate* doctrine.

Accordingly, we urge you to investigate the minimum price policies in the contact lens industry not only because of the evident harm to consumers, but because this is an excellent vehicle for the agencies to shape the law on RPM post-*Leegin* and ensure that it protects consumers in *all* markets. Indeed, with the rise of powerful retailers, and consolidation across the economy, the risk of anticompetitive RPM has only increased while the legal constraints on the practice have diminished.

I. The Agencies Should Investigate and Take Action to Reverse UPPs in the Contact Lens Industry

A. Overview of the Contact Lens Market

The market for contact lenses in the United States is large and has idiosyncrasies that distinguish it from most consumer goods markets. Nearly 40 million Americans wear contact lenses and spend \$4.2 billion on them annually.⁷ Optometrists and ophthalmologists (hereafter “eye care providers” or “providers”) perform eye exams and contact lens fittings and receive payment for both services. Based on the examination, providers prescribe a specific brand, for example, Johnson & Johnson’s Acuvue Moist, for the patient. The law does not permit the consumer to substitute another brand for the prescribed brand. And unlike pharmaceutical products, generic equivalents cannot be obtained for branded contact lenses. Since many eye care providers also sell contact lenses, they have an incentive to prescribe more expensive, higher-margin brands over lower-priced alternatives.

Prepared for the National Ass’n of Attorneys General Columbia Law School State Attorneys General Program (Oct. 7, 2009). The FTC held several days of workshops on resale price maintenance in early 2009, but issued no report.

⁶ The only successful RPM case since *Leegin* of which we are aware is *BabyAge.com, Inc. v. Toys “R” Us, Inc.*, 558 F. Supp. 2d 575 (E.D. Pa. 2008) (denying motion to dismiss); *see also* *McDonough v. Toys “R” Us, Inc.*, 638 F. Supp. 2d 461 (E.D. Pa. 2009) (certifying consumer class). The complaints (involving the same conduct) were brought before *Leegin* was decided.

⁷ Statement of R. Joe Zeidner, General Counsel, 1-800 CONTACTS, Hearing Before the S. Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy and Consumer Rights 1 (July 30, 2014)).

Consumers do have freedom over where to purchase their contact lenses. Federal law mandates that eye care providers give patients a copy of their prescription.⁸ Because the purchase of contact lenses is unbundled from the prescription, consumers can buy their contact lens supply from warehouse clubs like Costco and online retailers like 1-800 CONTACTS. Nearly one-half of all contact lens wearers today purchase at least some of their supply from a retailer other than the prescribing provider.⁹

Retail competition produces significant savings. For example, until recently, a consumer could save 40 percent if she purchased a one-month supply of Acuvue Moist online, instead of from her optometrist.¹⁰ Consumer Reports 2011 ShopSmart List recommended purchasing contact lenses at Costco among its top 15 money-saving tips.¹¹ Even though they typically are passive in the selection of brands, consumers enjoy significant benefits from intrabrand price competition between retailers in the sale of contact lenses.

B. The End of Discounting of Contact Lenses

Retail price competition in contact lenses appears to be coming to an end. Four companies—Alcon, Bausch & Lomb, CooperVision, and Johnson & Johnson—dominate the manufacturing of contact lenses and account for over 97 percent of sales by revenue.¹² Over the past year, each manufacturer has implemented a so-called “unilateral pricing policy” (UPP), which effectively prevents resellers from discounting below a minimum retail price fixed by the manufacturer. Alcon adopted minimum pricing for one new product in June 2013 and two established products in January 2014.¹³ Bausch & Lomb imposed minimum pricing on one new product in February 2014.¹⁴ In June, Johnson & Johnson announced the most sweeping UPP, one that covers all but one brand.¹⁵ Last month, CooperVision, which had been the lone holdout, announced that it would maintain minimum pricing on some brands of a contact lens manufacturer it acquired recently.¹⁶ Approximately 40 percent of the U.S. contact lens market is now ineligible for discounting—a figure that could soon rise to 80 percent.¹⁷

The winners and losers from UPPs in contact lenses are not difficult to identify. Eye care providers are insulated from retail competition and enjoy higher margins on contact lens sales. Many of them have long publicly opposed competition from non-traditional sellers like Costco. Contact lens manufacturers also benefit because restrained retail competition diminishes pressure to cut wholesale prices.

⁸ Fairness to Contact Lens Consumers Act, P.L. 108-164, 1117 Stat. 2024 (2003).

⁹ Zeidner, *supra* note 7, at 8.

¹⁰ *Id.*

¹¹ Statement of George Slover, Senior Policy Counsel, Consumers Union, Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights, S. Comm. on the Judiciary, on Pricing Policies and Competition in the Contact Lens Industry: What You See is What You Get? 5 (July 30, 2014)

¹² Zeidner, *supra* note 7, at 7.

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *CooperVision Institutes UPP for Clariti Contact Lenses*, HEALIO, Sep. 20, 2014, available at <http://www.healio.com/optometry/contact-lenses-eye-wear/news/online/%7Bc63ded7b-af8c-4df7-9c44-ca234baafd10%7D/coopervision-institutes-upp-for-clariti-contact-lenses>.

¹⁷ Zeidner, *supra* note 7, at 7.

On the other hand, consumers bear the price of higher profit margins for contact lenses. More efficient retailers are also harmed because they cannot compete on price and pass their lower costs through to consumers. In fact, UPPs are poised to undo the development of new retail formats for contact lenses and restore the dominance of eye care providers. Threatened competitors include internet-based resellers and warehouse clubs who offer lower prices and greater convenience.¹⁸ By some estimates, the loss of competition from these retail channels stands to increase the price of Johnson & Johnson brands by anywhere from 40 to over 100 percent.¹⁹ Consumers could collectively pay hundreds of millions of dollars more annually for their contacts.

C. UPPs in the Contact Lens Market Appear to be Anticompetitive and Without Redeeming Virtues

Because consumers are typically passive in selecting among brands, intrabrand competition between retailers is vital. This competition not only saves consumers significant sums, but it fosters retail innovation that offers further value to consumers. UPPs undermine this competitive dynamic and subvert Congress' aim to create retail choice in contact lenses. Public information indicates that the proliferation of UPPs is likely anticompetitive based on an application of the relevant factors articulated by the Court in *Leegin*: (1) If several competing manufacturers adopt RPM, it calls for greater scrutiny; (2) If retailers, rather than manufacturers, instigate RPM, it is more likely to be anticompetitive; and (3) If manufacturers or retailers have market power, RPM is more likely to be anticompetitive.²⁰

The first *Leegin* factor is met. Between June 2013 and September 2014, the four major contact lens manufacturers implemented UPPs on one or more brands, and it appears that at least forty percent of the market is now covered by UPPs.

The second factor may also be satisfied. While we have no information on whether retailers or manufacturers were the source of the restraint, eye care providers—a key group of retailers—have reacted very positively to the development. They have welcomed the restriction on price competition because it protects their margins on contact lens sales.²¹ Moreover, history suggests that eye care providers may be the moving force behind UPPs. Eye care providers in the past have sought to choke off competition from retail rivals. In 1996, state attorneys general and private plaintiffs challenged and eventually terminated an agreement between providers and contact lens manufacturers to deprive emerging retail channels of contact lens supplies.²² To preserve a captive customer base, providers have also resisted giving patients a copy of their prescription.²³

¹⁸ *Id.* at 3-4.

¹⁹ *Id.* at 8.

²⁰ *Leegin*, 551 U.S. at 897-98.

²¹ Zeidner, *supra* note 7, at 8-9; Maria Sampalis, *Minimum Pricing on Contact Lenses: A Win for Independent ODs*, REV. OPTOMETRIC BUS., Dec. 30, 2013; Gary Gerber, *What's UPP, Doc?*, REV. CORNEA & CONTACT LENSES, June 15, 2014.

²² Zeidner, *supra* note 7, at 2; *In re Disposable Contact Lens Antitrust Litigation*, 2001 U.S. Dist. LEXIS 5499 (M.D. Fla. 2001).

²³ Zeidner, *supra* note 7, at 4-5.

The third *Leegin* factor unquestionably applies to the contact lens market. Johnson & Johnson has a market share of 35 percent,²⁴ and the four leading manufacturers have a collective share of 97 percent. All four have instituted UPPs on at least some of their brands.

At the same time, the UPPs appear to lack any procompetitive justification. There is no plausible free rider argument. Contact lens wearers pay providers a separate fee for the contact lens fitting where presale promotion occurs, on top of the fee for the eye exam. In other words, eye care providers are compensated for their services and cannot suffer from free riding.

Johnson & Johnson has suggested that the intent of its policy “is to reinvigorate the rich clinical dialogue that is so important to effective patient care, rather than focusing on cost.”²⁵ However, its policy does the opposite; it seeks to use high margins to ensure that its products are promoted instead of potentially better, if not cheaper, rivals’ products.²⁶ Indeed, one optometrist has written that “savvy practitioners” would prescribe a UPP brand over a non-UPP brand that is otherwise identical for the patient.²⁷ Because eye care providers prescribe the brand and often also sell contact lenses, they have an incentive to prescribe higher-margin brands over lower-margin brands. The ability for consumers to purchase contacts from alternative, lower-cost outlets limits the incentive for self-dealing. In a market in which all retailers sell contacts at the same price, this competitive check disappears.

Finally, while promoting new entry is sometimes considered to be a procompetitive justification for RPM,²⁸ that justification is inapt here. Assuming arguendo that the justification is applicable to new products offered by well-established manufacturers in the market, it cannot apply to Johnson & Johnson’s UPP because that policy applies to old products as well as new. But even as to UPPs on new products, optometrists do not need to be bribed with high margins to learn about those products and educate consumers—it is their professional responsibility to do so. And if

²⁴ *Id.* at 7.

²⁵ Johnson & Johnson has publicly justified its UPP on the basis that it will result in *lower* prices because its minimum prices were generally lower than the average prices of its products in the market. Statement of Millicent L. Knight, Head of Professional Affairs, Johnson & Johnson Vision Care Inc., Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights, Hearing on “Pricing Policies and Competition in the Contact Lens Industry: Is What You See What You Get?” 5 (July 30, 2014). But this does not take into account prices charged by discounters, which have risen substantially. *Zeidner*, *supra* note 7, at 8. In any event, setting minimum (rather than maximum) prices can hardly be expected to keep prices low.

²⁶ It is sometimes argued that the principal purpose of RPM is to provide high margins so that the multibrand retailer will promote the RPM brand rather than lower margin brands. *See, e.g.*, Benjamin Klein, *Assessing Resale Price Maintenance after Leegin*, in *Research Handbook on the Economics of Antitrust Law* 174 (Einer Elhauge ed. 2012). But as Professor Elhauge points out, this “brand pushing” justification has long been considered an anticompetitive—rather than procompetitive—effect because it distorts the retailers’ advice to consumers. Einer Elhauge, *Introduction and Overview to Current Issues in Antitrust Economics*, in *Research Handbook*, *supra*, at 10-11; *see also* 8 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1614, at 178-81 (3d ed. 2010). Such distortion obviously creates greater risks to consumers when purchasing healthcare products like contacts lenses, rather than say, golf clubs. Moreover, when all manufacturers impose RPM, sales are not shifted; the only result is higher prices and retail margins. *See* Elhauge, *supra*, at 10. *Leegin* itself suggests that using RPM to induce the loyalty of multibrand distributors may be anticompetitive. *See Leegin*, 551 U.S. at 894 (“A manufacturer with market power . . . might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants.”).

²⁷ Gerber, *supra* note 21.

²⁸ *See Leegin*, 551 U.S. at 891.

they prescribe a brand because of its high margin rather than its merits, that is an anticompetitive harm, not a procompetitive benefit.

D. The UPPs Are Not Protected by the *Colgate* Doctrine

Contrary to the manufacturers' assertions, their UPPs are not "unilateral" for antitrust purposes. If the manufacturers conferred with eye care providers before implementing the UPPs, obtained some assurances from them that they would comply, and/or changed the policies in response to provider objections, the conduct fits well within the contours of an agreement under traditional vertical agreement doctrine.²⁹ If an investigation determines that manufacturers adopted UPPs at the behest of retailers, this finding alone would vitiate claims of unilateral conduct and be evidence of an agreement.³⁰

Moreover, the UPPs on their face are not protected by the *Colgate* doctrine because they involve only partial refusals to deal and allow for second chances. Specifically, the policies provide that noncompliance with minimum prices will not result in immediate termination; rather, offending resellers will be given a warning for a first offense. And a failure to correct the pricing after the first violation will not result in complete termination; only those products subject to the UPP will cease to be supplied. These limitations go "beyond" what is permitted by *Colgate* and *Monsanto*.

When a manufacturer obtains compliance with minimum prices by threatening not to deal with nonconforming retailers, an implied agreement to maintain prices could easily be found but for the *Colgate* doctrine. As Judge Posner has explained, "If a manufacturer distributes a price list, together with an announcement that he will cut off dealers who sell below the list prices, and dealers adhere to those prices because they don't want to be cut off, there is a realistic sense in which the threat of termination has induced the dealers to agree not to cut prices—to agree, in other words, to fix prices."³¹

Colgate created an exception to ordinary contract doctrine in order to protect "the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal."³² In *Parke Davis*, the Court construed *Colgate* narrowly, noting that coerced compliance with minimum prices under *Colgate* was "tolerated," even though RPM was per se illegal, only when it involved the "simple" exercise of the manufacturer's right to refuse to deal.³³ But "[w]hen the manufacturer's actions . . . go beyond mere announcement of his policy and the simple refusal to deal, and he employs other

²⁹ See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); e.g., *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 221-23 (3d Cir. 2008) (finding evidence sufficient to infer agreement where manufacturer's policy was result of "collaboration" between manufacturer and its dealers, including dealer approval of policy before it was issued).

³⁰ See PHILLIP E. AREEDA & HERBERT HOVENKAMP, 7 ANTITRUST LAW ¶1437c, at 10 (3d ed. 2010).

³¹ *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987); see also AREEDA & HOVENKAMP, *supra* note 30, ¶¶ 1443-44, at 51-66 (discussing "extended agreement" theories of implied acceptance or coercion as basis for finding concerted action when a manufacturer announces conditions for future dealing and retailers comply).

³² *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); see AREEDA & HOVENKAMP, *supra* note 30, ¶¶ 1449c2 (denial of agreement status to compliance with announced conditions "could rest less on the agreement concept than on a need for a qualified manufacturer privilege for customer selection and termination"); *Leegin*, 551 U.S. at 902 (discussing manufacturer's "*Colgate* right to refuse to deal with retailers that do not follow its suggested prices").

³³ *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

means which effect adherence to his resale prices, this countervailing consideration [preserving manufacturer freedom] is not present and therefore he has put together a combination in violation of the Sherman Act.”³⁴ *Monsanto* is in accord.³⁵ Antitrust counselors have long understood that half measures to enforce minimum price policies pose significant risk of running afoul of *Colgate*.³⁶

Authority prior to *Leegin* suggested that refusing to supply only certain products or giving warnings or second chances is not protected by *Colgate*.³⁷ But if the issue was in doubt, *Leegin* changes the equation. As discussed further below, now that RPM is subject to the rule of reason there is no longer any reason to construe *Colgate* broadly to shelter such practices from ordinary agreement principles.³⁸

II. The Agencies Should Advance a Rebuttable Presumption of Harm for RPM and Also Seek to Narrow the *Colgate* Doctrine

The Supreme Court in *Leegin* invited the lower courts to establish a structured analytical framework for RPM.³⁹ It directed them “to be diligent in eliminating [RPM’s] anticompetitive uses from the market.”⁴⁰ In its order in *Nine West*, the FTC stated, “The *Leegin* decision may be read to suggest a truncated analysis, such as the one applied in *Polygram Holding*[], might be suitable for analyzing minimum resale price maintenance agreements, at least in some circumstances,” and “The Court’s elaboration of these relevant factors provides an approach for identifying when RPM might be subject to closer analytical scrutiny, such as that anticipated by *Polygram Holding*[] or other truncated rule of reason analyses.”⁴¹ But seven years after *Leegin*, the FTC has gone no further, and no structured test has been established for RPM.

AAI has long advocated that RPM agreements should generally be treated as presumptively anticompetitive.⁴² Canvassing the literature, it has detailed the rationale elsewhere.⁴³ In short, the

³⁴ *Id.*

³⁵ AREEDA & HOVENKAMP, *supra* note 30, ¶ 1449d, at 103-04 (“*Monsanto* did not totally reject the extended agreement theories but merely qualified them to allow simple enforcement of announced conditions on future dealing”); *see also Isaksen*, 825 F.2d at 1164 (*Monsanto* does not mean that a party’s “agreement to adhere can never be implicit, or signified by conduct in lieu of promissory language.”).

³⁶ *See, e.g.*, Brief of Ping, Inc. as Amicus Curiae in Support of Pet’r at 15, *Leegin*, 551 U.S. 877 (No. 06-480) (brief cited by the Court explained that “PING does not warn its retailers when it becomes aware of a violation; it does not contact the retailer to investigate whether the violation was intentional; it does not consider how long that retailer has been a PING account or the size of the retailers’ sales numbers. PING simply closes the account.”).

³⁷ *See, e.g., Isaksen*, 825 F.2d at 1162-63 (threat to mix-up orders not protected by *Colgate*); *In re New Balance Athletic Shoes, Inc.*, 122 FTC 137 (1996) (in case alleging RPM where *Colgate* policy was subject to “one time warning,” consent decree prohibited manufacturer from securing compliance with minimum prices through “partial or temporary suspension or termination”); Areeda & Hovenkamp, *supra* note 30, ¶ 1447b4, at 89-90 (“compliance after [deferred termination] can be treated as an agreement, even if a clean refusal to deal is not so regarded”).

³⁸ Areeda & Hovenkamp, *supra* note 30, ¶ 1437c, at 10 (“Under the rule of reason . . . strictness [in finding an agreement] is no longer necessary”).

³⁹ *Leegin*, 551 U.S. at 898-99.

⁴⁰ *Id.* at 897.

⁴¹ *Nine West Order*, *supra* note 5, at 12, 14.

⁴² *See, e.g.*, Brief of the American Antitrust Institute as Amicus Curiae in Support of Respondent at 28-30, *Leegin*, 551 U.S. 877 (No. 06-840) (Feb. 26, 2007) (arguing that Court should adopt rebuttable presumption of illegality if *Dr. Miles* is overturned); AAI Letter to Deborah Platt Majoras, Re: Petition of Nine West Footwear Corp. to Reopen and Modify Order, FTC File No. 981-0386 (Dec. 5, 2007) (urging “inherently suspect” approach to RPM); THE NEXT ANTITRUST

guaranteed result of RPM—higher consumer prices and the inability of more efficient retailers to pass on their lower costs to consumers—and the relative improbability of redeeming effects not achievable by less restrictive means⁴⁴ call for a rebuttable presumption of harm that shifts the burden to defendants to justify the restraint. Based on similar policy considerations, the European Commission treats RPM as a “hard-core” restraint and applies a strong presumption of illegality.⁴⁵

Parties engaged in resale price maintenance should have the initial burden of justifying it under the *Polygram Holding* framework. RPM is “inherently suspect” because it “falls within the category of restraints that are likely, absent countervailing procompetitive justifications, to have anticompetitive effects – i.e., lead to higher prices or reduced output.”⁴⁶ Treating RPM agreements as presumptively or prima facie illegal is also consistent with *Indiana Federation of Dentists*, which held that “proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects.’”⁴⁷

Under the *Polygram Holding* framework, the defendant could rebut the initial presumption of anticompetitive harm by “identify[ing] some reason the restraint is unlikely to harm consumers or identify[ing] some competitive benefit that plausibly offsets the apparent or anticipated harm.”⁴⁸ The defendant must come forward with evidence sufficient to establish that RPM was adopted to achieve one of the procompetitive purposes identified by *Leegin*, or some other legitimate purpose that benefits consumers. In addition, it must demonstrate that RPM is reasonably necessary to serve that purpose; mere theoretical justifications are insufficient. If the defendant satisfies its burden of production, then the plaintiff must “show that anticompetitive effects are in fact likely.”⁴⁹

Alternatively, as a second-best solution, a plaintiff should be able to establish a prima facie case by showing the existence of an RPM agreement as well as one of the three “*Leegin* factors,”

AGENDA: THE AMERICAN ANTITRUST INSTITUTE’S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT 89-92 (Albert A. Foer ed. 2008) (same); Brief for the American Antitrust Institute as Amicus Curiae in Support of Appellant and Reversal, *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412 (5th Cir. 2010) (No. 09-40506) (Aug. 14, 2009) (same); AAI Letter to Christine Varney and Jon Leibowitz Re: Cert petition in *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, No. 10-653 (Dec. 21, 2010) (urging agencies to support certiorari and reject Fifth Circuit market-power screen) (hereafter “AAI Dec. 21, 2010 Letter”).

⁴³ See *supra* note 42; see also Warren S. Grimes, *The Path Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L.J. 467 (2008); Richard Brunell, *United States: Dr. Miles’ Last House Call*, in LANDMARK CASES IN COMPETITION LAW: AROUND THE WORLD IN FOURTEEN STORIES 345 (Barry Rodger ed., 2013).

⁴⁴ The standard free-rider argument has been subject to particular criticism. See, e.g., Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 196, 210 (Robert Pitofsky ed., 2008); Greg Gundlach, *Distribution: Is Free-Riding Bad After All?*, 4 EURO. COMPETITION L. & PRAC. 96, 97 (2013).

⁴⁵ EUR. COMM’N, GUIDELINES ON VERTICAL RESTRAINTS ¶ 223, 2010 O.J. (C 130) 1, 45 (2010); see Luc Peepkorn, *Revised EU Competition Rules for Supply and Distribution Agreements*, in FINNISH COMPETITION LAW YEARBOOK 201, 210-14 (Arttu Mentula ed., 2010).

⁴⁶ *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 352 (2003), *aff’d*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36-37 (D.C. Cir. 2005).

⁴⁷ 476 U.S. 447, 460-61 (1986). To be sure, *Leegin* rejected the price-elevating effect of RPM as an argument for retaining the per se rule because higher prices may be accompanied by additional services that consumers value. However, that does not mean it is inappropriate to place the initial burden on the manufacturer to demonstrate a procompetitive rationale for barring discounting. In the absence of other evidence, eliminating discounting may be presumed to harm consumers, and the manufacturer is in the best position to provide that evidence, if it exists.

⁴⁸ *Polygram Holding*, 416 F.3d at 36.

⁴⁹ *Id.*

discussed above. It is not appropriate to require proof of all three factors. The theories of harm associated with each of the first two factors (widespread adoption by manufacturers and retailers-as-source of the restraint) may be independent. And the third factor (market power) may unnecessarily complicate litigation and deter meritorious cases insofar as it requires proof of relevant markets.⁵⁰ A fourth factor that should trigger the presumption is a manufacturer that also participates in the retail market. Under this “dual-distribution” scenario, any presumed alignment between a manufacturer’s and consumers’ interest in low dealer margins is undermined because of the manufacturer’s interest in its own retail profits.⁵¹ Other triggering factors may also be appropriate, such as distribution through multibrand retailers,⁵² and can be added as the agencies gain more enforcement experience.⁵³

The agencies should also seek to overturn the *Colgate* doctrine insofar as it permits manufacturers to coerce adherence to RPM by threatening to cut off noncompliant retailers.⁵⁴ As noted above, the *Colgate* doctrine distorts the definition of “agreement” in the context of RPM.⁵⁵ Inconsistent with modern antitrust law, *Colgate* and its progeny require courts to fixate on “formalistic distinctions rather than actual market realities.”⁵⁶ Indeed, the rule has encouraged wasteful legal gamesmanship to create the appearance of “unilateral” conduct.⁵⁷ As they do with horizontal restraints, courts should instead engage in a “functional consideration of how the parties in the alleged [RPM arrangement] actually operate”⁵⁸ to see whether an agreement existed under ordinary agreement principles.

An expansive *Colgate* doctrine was arguably appropriate when RPM was per se illegal. With *Leegin* relaxing the antitrust treatment of RPM, courts no longer have to invoke “unilateral” conduct to avoid harsh results from the per se rule. Under the proposed presumptive illegality standards, courts would have an opportunity to examine the economic effects of RPM and acquit a defendant that used RPM for pro-consumer ends. The agencies should revive efforts to limit *Colgate* to

⁵⁰ See AAI Dec. 21, 2010 Letter, *supra* note 42; see also *In re N. Texas Specialty Physicians*, 140 FTC 715, 771 (2005) (proof of market definition and market power is not required in the first instance because “[i]f there is no legitimate justification for the practice, there is no need for a burdensome inquiry into market conditions”), *aff’d*, *N. Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

⁵¹ See *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1576 (11th Cir. 1983); see generally Gregory T. Gundlach & Alex G. Loff, *Dual Distribution Restraints: Insights from Business Research and Practice*, 58 ANTITRUST BULL. 69, 88-90, 94 (2013) (canvassing literature suggesting that dual distribution makes RPM more likely to be anticompetitive).

⁵² See, e.g., Patrick Rey & Thibaud Verge, *Resale Price Maintenance and Interlocking Relationships*, 58 J. INDUS. ECON. 928, 953 (2010) (recommending “cautious attitude towards price restrictions in situations where rival manufacturers rely on the same competing retailers”); Greg Shaffer, *Theories of Harm from Resale Price Maintenance*, FTC Hearings on Resale Price Maintenance, Feb. 19, 2009 (power point presentation and testimony explaining theory where RPM gives multibrand retailer an incentive to raise price of non-RPM brands).

⁵³ Even those not hostile to RPM agree that reduced output should be a trigger. See, e.g., *The Economics of Resale Price Maintenance & Implications for Competition Law and Policy*, Remarks of Joshua D. Wright, Commissioner, FTC, before the British Inst. of International & Comparative Law, Apr. 9, 2014, at 25 (recommending structured rule of reason that shifts the burden to the defendant upon a showing that minimum RPM resulted in a reduction in output).

⁵⁴ Cf. EUR. COMM’N, GUIDELINES ON VERTICAL RESTRAINTS, *supra* note 45, ¶ 48 (restriction on RPM applies when it is achieved through indirect means, including threats of termination).

⁵⁵ See also George A. Hay, *Observations: Sylvania in Retrospect*, 60 ANTITRUST L.J. 61, 66 (1991); Donald Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 686-87 (1962).

⁵⁶ *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466 (1992).

⁵⁷ See *Leegin*, 551 U.S. at 902-03; Grimes, *supra* note 43, at 489-90.

⁵⁸ *Am. Needle, Inc. v. National Football League*, 560 U.S. 183, 191 (2010).

protecting a manufacturer's initial customer selection.⁵⁹ In addition, the FTC should seek to avoid *Colgate* altogether by prosecuting RPM cases (including the UPPs at issue in the contact lens market) as standalone Section 5 violations, without any proof of agreement.⁶⁰

III. Conclusion

By investigating and reversing the proliferation of UPPs in the contact lens market, the antitrust agencies can protect valuable retail competition. Americans spend more than \$4 billion on contact lenses annually and, at least until recently, have saved significant sums of money when they buy supplies from discount retailers. More generally, by advancing a consumer-friendly structured rule of reason and narrowing the anachronistic *Colgate* doctrine, the antitrust agencies would root out anticompetitive RPM throughout the economy, potentially saving consumers billions of dollars every year.

Sincerely,



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Commissioner Maureen Ohlhausen
Commissioner Joshua Wright

⁵⁹ See *In re Russell Stover Candies*, 100 FTC 1 (1982), *rev'd*, *Russell Stover Candies, Inc. v. FTC*, 718 F.2d 256, 258 (8th Cir. 1983) (rejecting FTC's contention "that *Colgate* only protected a manufacturer's right to initially select its customers and not to conditioning continued dealing on announced policies").

⁶⁰ See *AREEDA & HOVENKAMP*, *supra* note 30, ¶ 1460b, at 198 ("the Sherman Act agreement concept is not essential for application of § 5 to conditioned refusals to deal").