

Membership Meeting

morning, the topic was originally MAP and Unilateral Policies, but with the advent of the Supreme Court decision in Leegin Case. I would like to fold the impact of that case into a broader discussion of distribution and price erosion.

If we are going to discuss the issue of price erosion, our discussion must begin with the Internet. The growth of online sales commoditized consumer electronic almost immediately, but it took more time to reach more stable products with longer life cycles.

In spite of this, I think many of you have seen what the effect of transparent competition on the Internet can have on the price of products.

In fact, the most common question I hear today is, "what can I do, there are a bunch resellers destroying my market online? Even the brick and mortar guys are complaining."

The Internet is the world's largest marketplace. The average US consumer today spends more time Online than they do watching television. It is no longer a question of embracing the Internet, it is one of exploiting the Internet. And while the Internet has caused headaches for a lot of industries, there is as much opportunity to promote brand recognition and stabilized price.

Branding and price stabilization are parallel issues and working to stabilize and grow both starts in the same place, with distribution. Many of you are familiar with MAP policies and Unilateral Policies, and you have likely heard of the recent Leegin decision in the Supreme Court. It is important to discuss the differences and limitations of each at the beginning of any price maintenance discussion. So let's begin with some essential definitions:

Unilateral: Undertaken or done by or on behalf of one side only; not mutual.

Acquiescence: To consent or comply passively or with protest, adopt without agreement.

Illegal per se: An act that is inherently illegal, illegal without extrinsic proof of any surrounding circumstances or defenses.

M.A.P.: Minimum Advertised Price Policy

Basic Definition: M.A.P. is an agreement between a manufacturer and a reseller by which the reseller, in order to gain access to cooperative advertising funds, must advertise at or above the minimum price set by the manufacturer.

Unilateral Policy

Basic Definition: An announcement by the manufacturer to its reseller that if the reseller advertises and/or sells the manufacturer's products below the minimum price set by the manufacturer, the reseller may lose access to the manufacturer's products.

Well although those are pretty plain definitions, the differences between the two are profound. Not only from a legal standpoint but also from an administrative standpoint for the manufacturer.

A MAP policy is a contract which limits the reseller's access to manufacturer's co-op advertising funds for a predetermined period of time, while a Unilateral Policy is not an agreement but instead the harmonization of two distinct rights. A right of the reseller and a right of the manufacturer.

1. Every reseller has the absolute right to advertise and sell at any price they wish.

2. The manufacturer has the right to sell to whomever they want, and to announce under what conditions they will make those sales.

At its most basic, a Unilateral Policy is an announcement by the manufacturer that they will not continue to sell to resellers who do not sell at or above the manufacturer's announced minimum price. But the manufacturer cannot require its reseller to sell at any price, they can only limit a reseller's access to their products.

Both MAP and Unilateral Policies have pros and cons.

A MAP policy has effect only on the advertised price of products and has modest penalties for non-compliance while a Unilateral Policy can have a dramatic effect on advertised and resale price and is easily flexible to allow for both promotions and changes in the market, but the termination penalties are harsh without room for negotiation.

Now the major remaining question is how has Leegin changed any of these rules? Basically, what the Supreme Court said in Leegin is that the per se rule against vertical price fixing has been replaced with a rule of reason analysis for the same conduct. The Per Se Rule is the harshest standard available with no wiggle room, so with its replacement with Rule of Reason we have a relaxing of the standard.

So what does this mean? Well, for the past 90 years, there had been an absolute and unwavering ban of vertical price fixing. The court in Leegin has reversed that rule and created the possibility of legal vertical price fixing agreements. Does this mean that manufacturers should go out and start making price agreements with their resellers? No. The rule of reason is extremely complicated and its results are difficult to predict. And the Supreme Court in Leegin gave limited guidance on how the standard should be applied

What it has done, though, is given those with unilateral policies a second layer of defense from scrutiny. Where previously, manufacturers were fearful of the absoluteness of the per se rule, now they will have a two tiered defense:

1. That there was no agreement, the policy was unilateral, and therefore legal; and
2. That even if there was an agreement, the policy was reasonable under the rule of reason.

So the Supreme Court has increased the manufacturer's arsenal for fighting price erosion, but without

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