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United States: Vertical Restraints

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Price restraints

There have been no significant judicial developments in the area of price restraints. No decisions have been made by the federal courts in the past year applying the rule of reason to resale price maintenance agreements, and there have been no changes in the status of *Leegin*[1] at the state level. A 2013 California court of appeal opinion observing that vertical price fixing continues to be per se illegal under the state's antitrust law, the Cartwright Act, has not been reversed or questioned.[2]

On the legislative front, the State of Utah enacted a law prohibiting contact lens manufacturers from unilaterally imposing minimum resale prices on retailers. In response to a practice implemented by major US lens manufacturers of refusing to deal with retailers selling below price floors set by the manufacturers, the Utah legislature amended its Contact Lens Consumer Protection Act in March 2015 to prohibit a manufacturer from 'fixing or otherwise controlling the price that a contact lens retailer charges or advertises for contact lenses' or discriminating against a retailer on the basis of its selling prices.[3] The amendment bars manufacturers from engaging in the unilateral announcement of resale prices and refusal to deal approved by the US Supreme Court nearly 100 years ago in *United States v Colgate & Co*[4] and reaffirmed in *Leegin*.[5] Bausch & Lomb Inc, Johnson & Johnson Vision Care, Inc and Alcon Laboratories, Inc have challenged the amendment on the ground that it violates the Commerce Clause of the US Constitution. The federal district court in Salt Lake City denied their motions for a preliminary injunction to prevent the law from going into effect, and the cases are currently pending on appeal in the US Court of Appeals for the Tenth Circuit.[6] Although this is industry-specific protective regulation enacted at the urging, it would appear, of a major internet contact lens retailer headquartered in Utah, its passage demonstrates the power of an individual state to prohibit pricing practices explicitly approved under the federal antitrust laws.

Non-price restraints on distribution

Exclusive appointments

A manufacturer may choose to appoint a single dealer or distributor to a given geographic area or for a single product category. This is known as an exclusive appointment. The Supreme Court acknowledged in *Arnold, Schwinn & Co*[7] that a manufacturer is free to confine its sales to 'selected dealers' and that there is no Sherman Act violation as long as competitive products are readily available to others.[8] This kind of appointment is a restraint by a manufacturer on its own sales, not on downstream sales by a dealer or distributor, and an exclusive appointment is presumptively legal.[9] Despite the clear state of the law, however, plaintiffs continue to challenge this type of vertical restraint.

In *Planetarium Travel, Inc v Altour International, Inc*,[10] a travel agency specialising in selling discounted first-class and business-class airline tickets objected to termination of an agreement with American Express Travel Related Services Company (Amex). Under the agreement, the agency, Planetarium, became an Amex travel representative office and, as such, could sell tickets to Amex's wholly owned travel offices and preferred suppliers, comprising the Amex Network. A competing firm, Altour, thereafter entered into an agreement with Amex to become a supplier of discounted airline tickets to the Amex Network. As part of its agreement with Amex, Altour negotiated 'host agreements' with members of the Amex Network requiring them to purchase discounted airline tickets exclusively from Altour. Planetarium objected to the host agreements, and Amex terminated its agreement with Planetarium effective 31 March 2010, allegedly at the urging of Altour. Planetarium thereafter sued Altour, alleging that it was terminated pursuant to a conspiracy between Altour and Amex to engage in a 'long term de facto exclusive dealing arrangement' in violation of section 1 of the Sherman Act (15 USC § 1).[11]

The district court dismissed the complaint. After holding that Planetarium had failed to allege any plausible relevant market, the court noted that it had failed to show how the arrangement between Altour and Amex would have an impact on any market, including a market for discounted airline tickets. Since American Express cardholders and the general public are not required to purchase discounted first-class or business-class tickets from Amex or Altour, the arrangement would have no effect on 'the ability of consumers to purchase airline tickets.'[12] Such an exclusive arrangement, substituting one downstream supplier for another, is 'presumptively lawful.'[13]

Exclusive licences were analysed the same way in *Spinelli v NFL*.[14] A group of sports photographers who, with authorisation from the National Football League (NFL), had taken photographs of games and other events for the NFL challenged licensing agreements covering their photographs. They alleged that an agreement between NFL Properties, LLC (NFLP) and Getty Images (US), Inc (Getty) which granted Getty the exclusive right to license commercial use of NFL photographs violated section 1 of the Sherman Act. The Getty agreement expired 31 March 2009 and was supplanted by a similar agreement between NFLP and Associated Press (AP). Plaintiffs claimed that this agreement also violated section 1. The court dismissed the antitrust claims against Getty and AP, observing that the plaintiffs were challenging vertical arrangements and noting that '[e]xclusive vertical arrangements of this nature are presumptively legal...'[15] The court held that plaintiffs had failed to allege that the agreements produced any meaningful market foreclosure and stressed that there could have been no injury to competition since there was unrestrained competition among potential licensees at the outset, ie, when they were seeking to be awarded licences by NFLP.[16]

Anti-steering rules

The United States District Court for the Eastern District of New York considered the competitive effects in *United States v American Express Co*[17] of vertical restraints imposed by American Express Company on merchants accepting the American Express card. The case is significant because the court found a violation of section 1 even though American Express had argued that its comparatively small market share precluded a finding of market power.

Under its agreement with a merchant, American Express prohibited the merchant from informing a customer that the merchant may prefer another card (Visa, MasterCard or Discover) and 'steering' the customer to use that card. The fee American Express charges a merchant is typically higher than that charged by other credit card networks, and American express deemed these anti-steering provisions, called Non-Discrimination Provisions (NDPs), as necessary to preserve its premum brand positioning. Following a trial on the merits, the court held that the NDPs violated section 1 of the Sherman Act under the rule of reason.

American Express argued that it lacked market power and that the restraints could therefore have no effect on competition. There was no dispute that American Express had only 26.4 per cent of the volume of purchases in 2013 in the relevant market, general purpose credit and charge card network services in the US.[18] Visa had a 45 per cent market share, MasterCard had 23.3 per cent, and Discover had 5.3 per cent.[19] The court turned aside the contention that market power could not exist when a firm has less than 30 per cent market share and held that American Express's share of a 'highly concentrated market with significant barriers to entry' suggested that it had market power.[20]

Added to this indicium of market power, the court found that 'cardholder insistence' amplified the effect of American Express's position in the market. Weighing anecdotal and other non-statistical evidence, the court concluded that cardholder insistence, or loyalty, effectively prevents merchants from dropping the American Express card. Rather than resort to a different card, an American Express cardholder would opt not to shop at a retail store that does not accept the card.[21] As further evidence of market power, the court noted that American Express had been able to raise its fees, or pricing, in various industry segments between 2005 and 2010 without any significant loss of merchant accounts: '[T]he company's ability to profitably impose such price increases across a broad swath of its merchant base with little or no meaningful buyer attrition is compelling proof of such [market] power.'[22]

Satisfied that American Express had market power, the court had little difficulty finding that the NDPs adversely affected competition by preventing merchants from offering lower-priced card alternatives to customers:

> *On the basis of the record developed at trial, the court finds that the challenged restraints have impaired the competitive process in the network services market, rendering lowprice business models untenable, stunting innovation, and resulting in higher prices for merchants and their customers.*[23]

The court considered, but rejected, American Express's pro-competitive justifications for the NDPs, ie, that they were needed (1) to preserve its business model based on a 'welcome acceptance' of the American Express card by all participating merchants[24] and (2) to prevent merchants from 'free riding' on the services that American Express provides to merchants. Under the free-riding justification, American Express argued that 'merchants could draw Amex cardholders to their establishments through a targeted marketing campaign facilitated by Amex's investments . . . only to steer those cardholders to the less expensive card at the register.'[25] The court held that 'these purported justifications do not offset, much less overcome, the more widespread and injurious effects of the NDPs on interbrand competition in the relevant market.'[26]

Non-price restraints on purchasing

Tying arrangements

Tying claims have been the subject of a number of decisions in the past year. We will look at two of the most important, which explore the nature of market power needed to establish an antitrust violation in the provision of aftermarket services.

Coercion

The Court of Appeals for the Sixth Circuit in *Collins Inkjet Corp v Eastman Kodak Co*[27] considered whether differential pricing may be coercive in the absence of an explicit tie-in between two products. It held that coercion may be inferred if a defendant is selling the tied product below its incremental cost.[28] The case involved competing sellers of ink for Versamark printers manufactured by Kodak. Ink was the tied product. The tying product was a replacement printhead for the Versamark printer. The Versamark was used by commercial printing firms, and its initial cost exceeded US$200,000. Printheads, the components through which ink flowed onto a page, required replacement periodically, and users sent them to Kodak to be 'refurbished'. Kodak was the only source of refurbished printheads. Both Kodak and Collins sold specially formulated ink for use with the printer. Kodak adopted a new pricing policy for refurbished printheads in 2013 under which printer owners who bought ink from Kodak would be given a discount on refurbished printheads while the price of refurbished printheads for owners who bought ink from Collins would be increased over the historic price.

The district court entered a preliminary injunction barring Kodak from implementing the pricing policy, and Kodak appealed. There was no question that Kodak had 100 per cent of the market for refurbished printheads for the Versamark printer,[29] but Kodak contended that it lacked market power over the tying product. It pointed to competition in the primary market for commercial printers as limiting its ability to raise prices for printheads in the aftermarket, and it argued that information costs for sophisticated Versamark customers were not so high that customers would be unfairly locked into Kodak's pricing policy. Relying on *Eastman Kodak Co v Image Technical Services, Inc*,[30] the court of appeals rejected Kodak's no-market-power argument and held that the record showed that the 'classic indicators of market power in an aftermarket – high information costs and switching costs – are present here.'[31]

The pricing policy did not require a customer to purchase ink from Kodak if it wanted to buy a refurbished printhead, and Kodak contended that there was therefore no coercion of customers to buy ink along with the printhead. The court of appeals disagreed, holding that a tie-in can be established if the discount offered on the tying product is sufficiently pronounced that the tied product is effectively being sold below cost. Using the discount attribution standard approved by the Ninth Circuit for evaluating bundled discounts under section 2 of the Sherman Act,[32] the court considered whether allocation of the printhead discount to the price of the tied ink would show that the ink was priced below Kodak's incremental costs. Since the case was on review following entry of a preliminary injunction, the court was careful to note that the facts in the record could change at trial, but the record suggested that 'Kodak was in effect selling ink below its incremental cost.'[33] This would constitute an unlawful tie, damaging to equally efficient competitors. In contrast, if Kodak's pricing policy were 'the equivalent of offering an above-cost discount on ink, equally efficient competitors will not be forced out of the market.'[34]

The Sixth Circuit's opinion is important because it is the first appellate decision to apply economic bundling analysis from

section 2 monopolisation cases to a pure tying case. Because the tie was not explicit, it made sense to evaluate its operation and coercive effect, if any, by focusing on economic analysis. In the process of approving the discount attribution standard used in *Cascade Health Solutions*,[35] the court expressly declined to follow the Third Circuit's bundling analysis in *LePage's, Inc v 3M*.[36] It rejected *LePage's* by noting that a bundled pricing scheme that yields aggregate prices above cost – which would pass muster under *LePage's* – may nonetheless be unlawful under the discount attribution standard if the discount on the tying product were deep enough to take the competitive or tied product's price below cost.[37]

Economic market power

In another case alleging aftermarket tying, *Oracle America, Inc v Terix Computer Co*,[38] the court weighed Oracle's argument that the tying alleged by the claimants was the result of contract terms, not Oracle's market power, and was therefore unobjectionable. At issue was the provision of updates and firmware to owners of servers from Sun Microsystems, Inc (Sun) incorporating the Solaris operating system. After Oracle acquired Sun, it discontinued Sun's practice of providing updates and firmware for Solaris at no charge and, instead, conditioned delivery of updates and firmware on the owner signing an annual contract for technical support services to be performed by Oracle. Terix Computer Co and other defendants (collectively, Terix) were independent service providers that offered support services for Solaris. Oracle sued them for copyright infringement, fraud and other torts, and they counterclaimed for antitrust violations. Terix alleged that Oracle was unlawfully tying software updates and firmware to the purchase of support services.

The court accepted the claimants' allegation that the relevant market comprised updates and firmware for the Solaris operating system and that this was separate and distinct from the primary market for servers.[39] Oracle had market power in the aftermarket, and the court considered whether it was the result of contract terms to which server purchasers had consented. The court noted that contract terms that limit an equipment buyer's purchase or buying decisions in the aftermarket 'do not constitute antitrust violations because the resulting restrictive market is a 'contractually created market' rather than a manifestation of 'economic market power.''[40] Prior to Oracle's acquisition of Sun, customers could download updates and firmware for little or no cost, and the court held that these customers could not have consented to Oracle's later imposition of restrictions on aftermarket service. It held that Terix had adequately shown market power for a claim of tying in the aftermarket because it was not alleging 'market power that arises solely from contractual rights that customers knowingly and voluntarily gave' to Oracle.[41]

Exclusive dealing arrangements

Exclusive dealing arrangements continue to give rise to antitrust challenges. We review two recent cases in which courts addressed them on the merits.

A court looked at exclusive dealing arrangements in the motion picture distribution industry in *Cobb Theatres III, LLC v AMC Entertainment Holdings, Inc*.[42] At issue were 'clearances' granted by motion picture distributors to theatre operators in the Atlanta area. A clearance gives a theatre operator the exclusive right to exhibit a movie in a geographic area, called a 'zone.' The plaintiffs, Cobb Theatres (Cobb), operated a movie theatre in Brookhaven, Georgia. The defendants, AMC Entertainment Holdings and its affiliates (AMC), operated theatres in Buckhead, an Atlanta neighborhood adjacent to Brookhaven. AMC and Cobb competed for customers, and Brookhaven and Buckhead constituted a single zone for film distribution purposes.

AMC is one of the largest theatre operators in the US, and Cobb alleged that it had coerced Sony Pictures and other major film distributors to grant clearances to AMC after Cobb opened its theatre in Brookhaven. As a result, major distributors allocated fewer high-grossing, popular films to Cobb for its Brookhaven theatre, and, according to Cobb, its ability to compete against AMC was impaired. Cobb alleged that the clearances constituted exclusive dealing in violation of section 1.

AMC contended in a motion to dismiss that clearances are pro-competitive as a matter of law and that failure by Cobb to allege that they had been 'unduly extended' either as to area or duration precluded any inference of illegality.[43] The court acknowledged that clearances granted to a theatre that is in 'substantial competition' with another theatre have repeatedly been upheld as long as they are not unduly extended as to area or duration.[44] It noted, however, that evaluation of the reasonableness of a vertical restraint requires a 'systematic comparison' of the negative and positive effects of the restraint on competition and that this could not be done in response to a motion to dismiss.[45] Cobb urged that, without regard to area or duration, the clearances constituted an unreasonable restraint, because they severely restricted intrabrand competition without providing 'counterbalancing enhancements to interbrand competition.''[46] It argued that past judicial approval of clearances was based on a distributor's interest in incentivising theatres to promote films at the local level and that this justification no longer had any validity. Distributors now invest heavily, according to Cobb, in national instead of local advertising campaigns.[47] The court held that Cobb had sufficiently alleged that the clearances were unreasonable under section 1 of the Sherman Act and were 'exclusionary or predatory' under section 2 of the Sherman Act,[48] and it denied the motion to dismiss.

The Court of Appeals for the Eleventh Circuit affirmed a ruling by the Federal Trade Commission on exclusive dealing in *McWane, Inc v FTC*.[49] The Commission had considered whether a distribution programme of McWane, Inc, called the Full Support Program (FSP), was exclusionary. McWane manufactured ductile iron fittings for pipes used in the transport of pressurised water in municipal and regional waterworks projects. Under the FSP, McWane announced that it would only sell to distributors sourcing fittings from it exclusively. McWane was the only full-line supplier of domestic fittings, and Star Pipe Products, Inc (Star) was its only US competitor. If McWane learned that a distributor had purchased fittings from Star in disregard of the FSP, the distributor could be cut off by McWane for up to three months. The Commission had determined that the FSP was exclusionary and that McWane had used it to maintain a monopoly in the domestic fittings market, in violation of section 5 of the FTC Act. The court reviewed the Commission's fact findings under the substantial evidence standard.[50]

If the Commission's holding that McWane violated section 5 of the FTC Act were to stand, according to the court, the Commission must have 'successfully defined the relevant market, demonstrated that McWane had monopoly power in that market, and showed that . . . [the FSP] constituted the illegal maintenance of that monopoly power.''[51] The court concluded that the Commission had properly defined the relevant market and properly found that McWane had monopoly power. McWane had 100 per cent of the relevant market before Star entered in 2009, but Star had gained 10 per cent market share by 2011. McWane argued that Star's entry proved that barriers to entry were sufficiently low to preclude any inference of monopoly power, but the court held that there was evidence to support the

Commission's finding to the contrary, particularly in light of the fact that Star's entry had had no apparent effect on McWane's ability to price domestic fittings at levels of its choosing.[52]

The court then turned to consider whether the Commission's determination of monopoly maintenance could be sustained. It rejected McWane's contention that the FSP was presumptively legal because it was short-term and distributor participation was voluntary. Direct sales to customers were infeasible, and Star had no alternative but to sell through distributors. The practical effect of the FSP was to make it economically infeasible for distributors to switch to Star.[53]

The court held that there was substantial evidence to support the Commission's finding that McWane had engaged in anti-competitive conduct 'that reasonably appears to significantly contribute to maintaining monopoly power.'[54] Looking first at whether the FSP resulted in substantial foreclosure of the market, the court reviewed evidence that distributors declined to buy from Star after the FSP had been announced. Acknowledging that foreclosure was not absolute, the court held that the test is not total foreclosure but, rather, whether 'the challenged practices bar a substantial number of rivals or severely restrict the market's ambit.'[55] The court next considered evidence of harm to competition. It noted that the FSP 'made it infeasible for distributors to drop the monopolist McWane and switch to Star.'[56] Without revenue from increased sales, Star was unable to purchase its own domestic foundry and thereby provide meaningful price competition. The court observed that direct pricing evidence offered 'the most powerful evidence of anti-competitive harm,'[57] and it noted that Star's entry into the market had no effect on McWane pricing:

> *Since McWane was an incumbent monopolist already charging supracompetitive prices... evidence that McWane's prices did not fall is consistent with a reasonable inference that the Full Support Program significantly contributed to maintaining McWane's monopoly power.*[58]

After commenting that Star had no alternative channels of distribution and that its foreclosure from major distributors 'was particularly likely to harm competition in this market,'[59] the court addressed evidence that the FSP was the product of anti-competitive intent. Recognising that anti-competitive intent is not alone sufficient to establish an antitrust violation, the court considered it relevant that McWane's executives viewed the FSP as a means by which to prevent Star from reaching 'critical market mass' and to prevent price erosion that would follow from its emergence as a competitor.[60]

Once harm to competition had been shown, the burden shifted to McWane to offer pro-competitive justifications for the FSP, and the court held that there was substantial evidence to support the Commission's conclusion that the proffered justifications were unpersuasive. The first justification – that the FSP was needed to retain enough sales to keep its domestic foundry operational – was rejected because the steps McWane took to preserve sales volume were not those, like price reductions, that promote consumer welfare by increasing market output. The second justification – that the FSP was needed to prevent Star from cherry-picking the most popular fittings rather than offering a full line like McWane – was similarly rejected, because McWane could have lowered prices to compete against Star for the fittings in greatest demand. Since McWane's internal documents showed that its primary motivation in implementing the FSP was prevention of price competition from Star, the court viewed the proffered justifications as 'merely pretextual.'[61]

McWane is the latest in a growing line of exclusive-dealing decisions in which firms with market power have been found to have used it to block distribution channels to competitors.[62] Exercise of market power to achieve the result has led courts to discount what might otherwise have proved to be plausible defences, eg, contracts terminable at-will or of short duration or, in the case of McWane, a unilaterally imposed policy.

Most-favoured nation clauses: United States v Apple, Inc

The US District Court for the Southern District of New York held in *United States v Apple, Inc*[63] that use of a most-favoured nation (MFN) clause by Apple, Inc in contracts with publishers was in furtherance of a per se illegal price-fixing agreement, and the Second Circuit affirmed the holding in a 2-1 ruling on 30 June 2015.[64] The dissent rejected application of the per se rule and viewed Apple's conduct as lawful under the rule of reason. The appellate decision reflects sharp disagreement over whether Apple should be condemned for the means by which it entered the market or, instead, commended for breaking Amazon's monopoly over e-book retail distribution. The disagreement highlights a matter of fundamental antitrust importance in an era of rapidly evolving technology: what section 1 rule should apply to market entry by a firm whose product transforms the market?

The US Department of Justice and 33 states sued Apple and major publishers – Macmillan, HarperCollins, Hachette, Penguin and Simon & Schuster – in 2012, alleging that they had conspired in order to facilitate Apple's entry into the e-book market and to fix retail prices. The publishers settled before trial. Following a bench trial, the district court entered judgment against Apple for violation of section 1.[65]

In preparing for introduction of the iPad, Apple sought to reach agreement with major publishers on distribution of e-books. Prior to Apple opening its iBooks Store in 2010, Amazon had 90 per cent of the market for retail distribution of e-books in the US Amazon charged readers US$9.99 for new books and bestselling titles under what was known as a 'wholesale' pricing model. Apple proposed, in contrast, that the retail price for an e-book should be set by the publisher, under an 'agency' pricing model. Publishers had objected to Amazon's $9.99 price point because it threatened the profitability of hardcover editions and sales at brick-and-mortar stores.

In negotiations with publishers, Apple insisted on inclusion of an MFN clause in the distribution agreement, ie, a promise by the publisher that it would sell a new release to Apple at a price equal to its lowest price to any other retailer. The trial court found that the publishers understood that they would have to move Amazon from the wholesale pricing model to the agency model if the arrangement with Apple were to prove profitable. Otherwise, Apple would, by operation of the MFN clause, be selling titles at US$9.99 alongside Amazon. The trial court rejected Apple's argument that the MFN clause was needed to protect Apple from price competition, finding, instead, that it provided an incentive for publishers to abandon the wholesale pricing model.[66]

Apple entered into a separate distribution agreement with each publisher, and the publishers thereafter notified Amazon that they would require it to convert to the agency pricing model. Amazon acquiesced. The trial court held that Apple had violated section 1 of the Sherman Act by facilitating the publishers' conversion to the agency pricing model:

> *Apple is liable here for facilitating and encouraging the Publisher Defendants' collective, illegal restraint of trade. Through their conspiracy they forced Amazon (and other resellers) to relinquish retail pricing authority and then they raised retail e-book prices. Those higher prices were not the result of market forces but of a scheme in which Apple was a full participant.*[67]

In an opinion by Judge Livingston, the court of appeals held that Apple had participated in a classic 'hub-and-spokes' conspiracy. Agreeing with the trial court's conclusion that the publishers had engaged in a horizontal conspiracy to elevate prices for e-books, the court affirmed the trial court's finding that Apple had participated in their conspiracy in order to force abandonment of the wholesale pricing model.[68] It turned aside Apple's argument that its agreements with publishers were conventional vertical supply arrangements.[69] Since Apple was a knowing participant in the price-fixing agreement among the publishers, the court of appeals affirmed the holding that its conduct was a per se violation of section 1.

Judge Jacobs dissented on the ground that Apple's conduct should be evaluated under the rule of reason, not the per se rule. Applying the rule of reason, he concluded that the conduct did not violate section 1. Pointing to the Supreme Court's continuing circumscription of the per se rule, Judge Jacobs took issue with the majority's view that a hub-and-spokes conspiracy is to be evaluated under the per se rule. He noted that, 'Collusion among competitors does not describe Apple's conduct or account for its motive... [and] Apple's conduct had no element of collusion with a horizontal rival.'[70] Since Apple was downstream from the publishers, rule of reason analysis should have been followed, and Judge Jacobs had no difficulty concluding that Apple's entry into the e-book retailing market was pro-competitive: 'Apple's challenged conduct broke Amazon's monopoly, immediately deconcentrated the e-book retail market, added a platform for reading e-books, and removed barriers to entry by others.'[71]

In light of the dissent and Apple's insistence that its market entry was pro-competitive, it can be expected that Apple will seek Supreme Court review of the appellate ruling.

Notes

1 *Leegin Creative Leather Prods. v PSKS, Inc*, 551 US 877 (2007).
2 *Alsheikh v Superior Court*, 2013 Cal. App. Unpub. LEXIS 7187, at *3 (Cal. Ct. App. Oct. 7, 2013) ('vertical price fixing is a per se violation of the Cartwright Act,' unaffected by the holding in *Leegin*).
3 Utah Code Ann. § 58-16a-905.1.
4 250 US 300 (1919).
5 551 US at 902 ('[a] manufacturer can exercise its *Colgate* right to refuse to deal with retailers that do not follow its suggested prices').
6 *Johnson & Johnson Vision Care, Inc et al v Reyes*, Nos. 15-4071, 15-4072, 15-4073 (10th Cir.).
7 *United States v Arnold, Schwinn & Co*, 388 US 365 (1967).
8 Id at 376.
9 Eg, *Elecs. Communc'ns Corp v Toshiba Am. Consumer Prods.*, 129 F.3d 240, 245 (2d Cir. 1997).
10 2015 US Dist. LEXIS 36253 (SDNY 2015).
11 Id at *4.
12 Id at *17.
13 Id at *16, citing *E & L Consulting, Ltd v Doman Indus., Ltd*, 472 F.3d 23, 30 (2d Cir. 2006).
14 2015 US Dist. LEXIS 40716 (SDNY 2015).
15 Id at *77.
16 Id at *74, 78.
17 2015 US Dist. LEXIS 20114 (EDNY 2015).
18 Id at *122.
19 Id.
20 Id at *129.
21 Id at *130-33.
22 Id at *147.
23 Id at *182.
24 Id at *233.
25 Id at *266.
26 Id at *233.
27 781 F.3d 264 (6th Cir. 2015).
28 Id at 275.
29 Id at 277.
30 504 US 451 (1992).
31 781 F.3d at 277.
32 See *Cascade Health Solutions v PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).
33 781 F.3d at 275.
34 Id at 274.
35 Cascade Health Solutions, 515 F.3d at 907-09.
36 324 F.3d 141 (3d Cir. 2003)
37 781 F.3d at 274.
38 2014 US Dist. LEXIS 158060 (N.D. Cal. 2014).
39 Id at *19.
40 Id at *17, quoting *Newcal Indus., Inc v IKON Office Solutions*, 513 F.3d 1038, 1048-49 (9th Cir. 2008) (citing *Queen City Pizza, Inc v Domino's Pizza, Inc*, 124 F.3d 430 (3d Cir. 1997)).
41 2014 US Dist. LEXIS 158060, at *20.
42 2015 US Dist. LEXIS 52668 (ND Ga. 2015).
43 Id at *20.
44 Id at *23.
45 Id at *25–27, quoting *Maris Distrib. Co v Anheuser-Busch, Inc*, 302 F.3d 1207, 1213 (11th Cir. 2002).
46 Id at *24.
47 Id at *25.
48 Id at *40.
49 2015 US App. LEXIS 6111 (11th Cir. 2015), aff'g *In the Matter of McWane, Inc*, 2014 FTC LEXIS 28 (FTC 2014).
50 Id at *24.
51 Id at *26.
52 Id at *36.
53 Id at *42-43.
54 Id at *50.
55 Id at *52, quoting *United States v Dentsply Int'l,* 399 F.3d 181, 191 (3d Cir. 2005).
56 Id at *53.
57 Id at *54.
58 Id.
59 Id at *57.
60 Id at *58.
61 Id at *63.
62 Eg, *United States v Dentsply Int'l, Inc*, 399 F.3d 181, 196 (3d Cir. 2005) ('Dentsply's grip on its 23 authorized dealers effectively choked off the market for artificial teeth, leaving only a small sliver for competitors'); *Pro Search Plus, LLC v VFM Leonardo, Inc*, 2013 US Dist. LEXIS 169856, at *20 (CD Cal. 2013) (denying motion to dismiss); *Minn. Mining & Mfg. Co v Appleton Papers, Inc*, 35 F.Supp.2d 1138, 1144 (D. Minn. 1999) (denying defendant's motion for summary judgment).
63 952 F.Supp.2d 638 (SDNY 2013), aff'd, 2015 US App. LEXIS 11271 (2d Cir. 2015).
64 *United States v Apple, Inc*, 2015 USApp. LEXIS 11271 (2d Cir. 2015).
65 952 F.Supp.2d 638 (SDNY 2013).
66 Id at 692.
67 Id at 709.
68 2015 U.S. App. LEXIS 11271, at *95-96.
69 Id at *77-86.
70 Id at *148.
71 Id at *156.

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Tom heads the antitrust, competition and distribution practice of Thompson Hine LLP. He handles antitrust and other commercial litigation and is admitted to practice before the US Supreme Court, the US Courts of Appeals for the Sixth, Seventh, Eighth, Tenth and Eleventh Circuits, and US District Courts for the Northern and Southern Districts of Ohio. He has represented clients under investigation for antitrust violations by the US Department of Justice, the Federal Trade Commission and state attorneys general. Counselling is an important part of his practice, and Tom regularly advises on compliance with antitrust and competition laws, particularly as they bear upon pricing and distribution.

Tom has written and spoken extensively on antitrust, distribution and competition matters. He is active in the leadership of the Section of Antitrust Law of the American Bar Association (ABA), and he has edited ABA publications on antitrust law, including *Antitrust Law And Economics Of Product Distribution* (2006). A member of the Ohio Bar, Tom is ranked in the 2015 edition of *Chambers USA* as a leading Ohio lawyer in antitrust litigation.

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Our lawyers have litigated antitrust cases throughout the US, defending firms in direct and indirect purchaser price-fixing class actions, representing firms in monopolization cases, both as plaintiffs and defendants, and defending against price discrimination and other antitrust claims. We counsel clients on compliance with the antitrust laws in their relationships with suppliers, with distributors, dealers and other customers and with competitors.

We advise clients on potential mergers, handle premerger filings and second requests and represent clients in clearance negotiations with the Department of Justice and the Federal Trade Commission. We work closely with foreign counsel on regulatory clearances for international deals.

We represent both individuals and firms in government investigations, and our grand jury practice has covered an array of industries, including agricultural feed additives (lysine), magnetic iron oxide, high-pressure laminates, commercial explosives, carbon fiber, pre-packaged ice, and automotive parts. We represent clients charged with civil or criminal violations of the antitrust laws and take cases to trial when satisfactory settlements cannot be reached.

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