

# Resale Price Maintenance, MFNs & Conspiracy in US Antitrust Law

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# Resale Price Maintenance in the U.S.: A New Regime

- Pre-2007: Resale price maintenance a *per se* violation of Sherman Act Section 1 (condemning agreements unreasonably restraining trade)
- 2007: U.S. Supreme Court overrules old rule of *per se* illegality in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)
  - RPM agreements now subject to rule of reason analysis (full analysis of competitive effects on relevant market)
  - RPM encourages dealer investment, including as to new products
  - But RPM can facilitate manufacturer or dealer cartels, or be used by dominant manufacturer or dealer to limit competition

# Resale Price Maintenance in the U.S.: Resistance at the State Level

- Most State antitrust laws follow federal case law
- One State – Maryland – has enacted a law forbidding RPM
  - Creating interesting challenges for online sales
- High-profile efforts by State Attorneys General to preserve *per se* illegality under State antitrust laws
  - Consent decrees in cases brought by New York and California Attorneys General
  - But later litigated cases in both New York and California produced decisions rejecting *per se* rule
    - *Worldhomecenter.com, Inc. v. PLC Lighting, Inc.*, 851 F. Supp. 2d 494 (S.D.N.Y. 2011)
    - *Kaewsawang v. Sara Lee Fresh, Inc.*, No. BC360109 (LA Superior Court May 6, 2013)

# Most Favored Nation (MFN) Agreements

- Generally viewed as procompetitive under US antitrust law
- No court decision in the last 30+ years has held a MFN clause illegal
- “‘Most favored nations’ clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers. . . . [T]hat is the sort of conduct that the antitrust laws seek to encourage.”
  - *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (Posner, J.)

## Most Favored Nation Agreements: OK Even With Desire to Harm Competitor

- “We agree with the district court that such a policy of insisting on a supplier's lowest price — assuming that the price is not ‘predatory’ or below the supplier's incremental cost — tends to further competition on the merits and, as a matter of law, is not exclusionary. “
- “Even a monopoly can engage in a competitive course of conduct, so long as it does so for valid business reasons (such as the desire to get the lowest possible price), rather than in order to smother competition.”
  - *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101 (1st Cir. 1989)

# Most-Favored Nation Agreements: US Antitrust Enforcement

- US federal antitrust enforcers have brought several challenges to MFNs involving arguably dominant firms, frequently health insurers
  - *United States v. Delta Dental of Rhode Island*, 943 F. Supp. 172, 176 (D.R.I. 1996) (denying motion to dismiss DOJ suit challenging MFN clause in dominant dental insurer's contracts with dentists)
    - Settled with consent decree prohibiting enforcement of MFN. 1997 U.S. Dist. LEXIS 11239 (D.R.I. 1997)
  - *United States v. Blue Cross Blue Shield of Mich.*, No. 2:10-cv-15155-DPH-MKM (March 25, 2013) (dismissed by stipulation after Michigan legislature enacted law barring insurers and other health care organizations from using MFNs in provider contracts)

# E-Books Litigation

- “The MFN clause required publishers to match in Apple's iBookstore any lower retail price of a New Release offered by any other retailer. The proposed MFN read: "If, for any particular New Release in hardcover format, the then-current Customer Price at any time is or becomes higher than a customer price offered by any other reseller ("Other Customer Price"), then Publisher shall designate a new, lower Customer Price to meet such lower Other Customer Price." Customer Price was defined as "the price displayed to the [customer] on the [Apple] Online Store, as designated by [the] Publisher for each eBook by selecting from the prices set forth" in an exhibit to the contract.”
  - *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 664 (S.D.N.Y. 2013)

# E-Books Litigation: Not About the MFN

- “If Apple is suggesting that an adverse ruling necessarily implies that agency agreements, pricing tiers with caps, MFN clauses, or simultaneous negotiations with suppliers are improper, it is wrong. As explained above, the Plaintiffs have not argued and this Court has not found that any of these or other such components of Apple's entry into the market were wrongful, either alone or in combination. What was wrongful was the use of those components to facilitate a conspiracy with the Publisher Defendants.”

— *Apple*, 952 F. Supp. 2d at 708

# US Online Hotel Reservation Antitrust Litigation

- *In re Online Travel Company (OTC) Hotel Booking Antitrust Litig.*, Case No. 3:12-cv-3515-B (N.D. Tex., Feb. 18, 2014)
  - Over 30 separate class actions filed across US consolidated in district court in Dallas
  - Plaintiffs, individual travelers who booked hotel rooms via Defendants’ online sites, alleged “industry-wide conspiracy”:
    - OTAs agreed with each other to coerce hotel chains to agree to enter into agreements (a) setting minimum room price and (b) granting MFN
    - Each hotel chain then became part of “industry-wide conspiracy” by entering into bilateral agreements with each OTA
    - Although claims focused on RPM and MFN, plaintiffs did not challenge them directly.

# US Online Hotel Reservation Antitrust Litigation: An Intra-brand Conspiracy

“ . . . Defendants allegedly conspired to eliminate, on an industry-wide basis, *intra*-brand competition – that is, competition among each hotel’s online distribution channels, including its own website and OTA-run websites. . . . Here are just two examples set out in the Complaint . . . illustrating the rate parity Defendants’ conspiracy allegedly created:”

Dallas Marriott, 1 King Bed or 2 Double Beds, June 1-2, 2013 (posted 4/25/13):

Expedia	\$159
Hotels.com	\$159
Orbitz	\$159
Priceline	\$159
Travelocity	\$159
Booking.com	\$159
Marriott’s website	\$159

Hilton Dallas/Park Cities, 1 King Bed, June 1-2, 2013 (posted 4/25/13):

Expedia	\$139
Hotels.com	\$139
Orbitz	\$139
Priceline	\$139
Travelocity	\$139
Booking.com	\$139
Hilton’s website	\$139

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# US Online Hotel Reservation Antitrust Litigation: Court Grants Motion to Dismiss

- “Plaintiffs’ antitrust claims rest entirely on the circumstantial facts purportedly showing that Defendants entered into an . . . industry-wide conspiracy not to compete.”
- Court agreed with Defendants that “the alleged parallel behavior is simply the result of each Defendant’s independent effort to protect their business interests by rationally adopting similar vertical distribution agreements.”
  - RPM “gave hotels a right they highly value, the right to control online pricing for their rooms.”
  - MFN gave OTAs assurance “that the minimum rate it must publish will not be undercut by the hotel itself or an OTA competitor.”

# US Online Hotel Reservation Antitrust Litigation: Now a Cartel Case v. OTAs?

- 20 March: Plaintiffs file Motion for Leave to Amend Complaint
  - Proposed Second Amended Complaint (“SAC”) v. OTAs only
  - “[F]irst and foremost”: “a *per se* price fixing agreement between the Defendant OTAs”; rate parity “a necessary tool to effectuate the underlying agreement not to compete between Defendant OTAs.”
    - “Further investigation and research by Plaintiffs has revealed that the restraints at issue in this industry were naked agreements between rival OTAs to stop competing on price.”
    - Major hotel chains “were coerced by the dominant OTA Cartel into giving up their rights to price selectively between different distribution channels.”

# US Online Hotel Reservation Antitrust Litigation: Contrasts with HRS

	HRS	US Online Hotel Litigation (original theory)
Nature of claim	Vertical MFN agreements	Horizontal/vertical conspiracy to enter into RPM/MFN agreements
Relevant product market	Online portals, <u>not</u> including hotel sites	Online hotel reservations, <u>including</u> hotel sites (alleged)
Complaining hotels	Yes	No
Allegations that hotels would have acted differently without MFN	Yes	No
Central issue in decision	Effect of MFNs	Sufficiency of allegations of conspiracy
Outcome as to MFN	MFN anticompetitive	MFN not challenged, but court views it as something OTAs would reasonably seek