

# Theories of harm from RPM: Exclusion, the equivalence principle, and *per se* rules

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# Topics

- Prepared prior to other presentations
- Supreme Court: “A manufacturer with market power, by comparison, might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants”
- Direct exclusion as harm? Main focus (Greg, Warren)
- Indirect exclusion? RPM as discouraging breach of exclusive dealing arrangements (Greg, Warren)
- Equivalence principle: If X is legal and Y is no worse than X, should Y ever be illegal?
- Is rule-of-reason practical?

## Summary – For RPM to be directly exclusionary:

- Tests for direct exclusion in general
  - Tying up a “dominant” share of a relevant complement market (e.g., distribution, retailing) through the exclusive arrangement
  - Effect of the arrangement on the price rivals have to pay for the complementary service (e.g., shelf space, service)
- 1) A single upstream firm imposes it over a dominant share of a relevant retail market
- 2) Covered retailers must have limited capacity to carry the type of product sold by the upstream firm
- 3) Discount outlets are unlikely to be acceptable substitutes in that retail market, at least with regard to selling the upstream firms’ rivals’ products

## Indirect exclusion

- Best guess as to what *Leegin* court had in mind?
- Marvel and McCafferty (via Klein and Murphy)
  - Paldor (2008) elaborates on this theme
- But RPM is ancillary to exclusion, not the problem itself
  - Higher retail margins like any other contract enforcement mechanism
  - Recognize that exclusion need not be explicit (*U.S. v Dentsply*)
- The harm, if any, is in making RPM contingent reward for not carrying rivals' product
  - Isn't this bundled rebates? Oops, wrong panel ....
- Banning RPM like banning cash, contracts
  - Zerbe's "bribe"

## Leads to consider an “equivalence principle”

- Suppose X is legal, Y is no worse than X. Should Y ever be illegal?
- Numerous examples from RPM
- Why care about intrabrand cartels if vertical integration into retailing is legal?
  - Against the wishes of the manufacturer?
  - Why can't they police it?
- Why care about restrictions on price if exclusive territories are at least evaluated by “rule of reason”?
- Apparently persuasive to *Leegin* court
- Should an equivalence principle apply?

## *Per se* vs. rule of reason for RPM

- *Leegin* court allowed, invited “rule of reason” analysis
- Easy when obvious
  - Harm vs. no benefit, benefit vs. no harm
  - *Dentsply* trial court: No harm or benefit, tie goes to defendant
- But what if there are harms and benefits?
- Can there be a rule of reason without instruction on how to do the cost benefit test?
- Explain D. Ginsburg finding that non-price vertical restraints essentially *per se* legal following *Sylvania*
- Will this happen to RPM? Should it?
- “Discuss amongst yourselves”