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The Continuing Benefit of Minimum Advertised Price Policies

By Jock A. Marlo, Esq.

Minimum Advertised Price (“MAP”) policies continue to be a valuable business tool for manufacturers of automotive aftermarket products. A MAP policy allows a manufacturer to announce the minimum resale prices in which it wants its products to be advertised, and to enforce a declaration that the manufacturer will not deal with discounters. Under such a policy, a reseller, retailer or other end seller is free to sell its existing inventory at whatever price it chooses, but the manufacturer may lawfully refuse to continue to do business with and supply a reseller, retailer or other end seller if it discovers they are discounting below the MAP price.

A MAP policy is not considered to be a violation of antitrust laws because it is not an agreement between a manufacturer and a reseller. Rather, a MAP policy is a unilateral, one-sided methodology by which a manufacturer alone controls prices of its products. Violations of antitrust law may occur when there is an agreement between a manufacturer and a reseller to fix

prices. Although federal law has recently adopted a broader interpretation of what could constitute an acceptable minimum pricing agreement between a manufacturer and a reseller (as compared to a flat out ban on such agreements that had been the law for almost one hundred years), there are still situations in which minimum pricing agreements could be considered illegal. This includes a dominant retailer, with sufficient market power, that demands resale price maintenance so as to discourage innovation in distribution that would decrease costs and prices, as well as a dominant manufacturer with sufficient market power to give resellers an incentive not to sell comparable products of smaller rivals or newcomers to the market. In both situations, the powerful entity uses a pricing policy to minimize competition.

The recent change in federal law requires courts to examine, under a “rule of reason”, the specific agreement between a manufacturer and reseller and evaluate that agreement in terms of its real effects on competition. Under this “rule of reason” an agreement is illegal only if it has a net negative effect on competition. This is a change from the prior law that held that such pricing agreements between a manufacturer and reseller were “per se” presumed illegal, and that the wrongful conduct almost always has a

net negative effect on competition.

In the states where a retail price maintenance agreement between a manufacturer and reseller are permitted, such agreements can actually increase competition between sellers of different brands because they decrease competition between sellers of the same brand. By providing confidence to resellers that they will not face competition from other resellers of the same brand, a minimum pricing agreement allows resellers to direct their attention to spend more in sales efforts to sell that brand against other brands. The agreements also minimize “free-riding” by other retailers (i.e. avoiding the situation where a brick and mortar store invests time and effort in promoting a brand, only to lose a sale to an online discounter) thereby giving the end consumer more choices among premium service/price brands and lower service/lower price brands, and those in between.

However, it is also important to note that many states, including California, still prohibit minimum resale price maintenance agreements. In California, any agreement that

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increases the price of merchandise or commodity, or sets a standard price to the public or consumer, which results in restricted competition among manufacturers, resellers, or purchasers, is illegal.

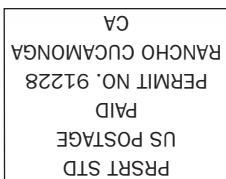
Once implemented, the key to maintaining an effective MAP policy is to enforce it consistently against all resellers. Manufacturers must follow the terms of its MAP policy, and may not engage in any sort of agreement with the resellers as to price. If a manufacturer allows a single reseller to dictate terms, or suggest conditions that result in an agreement, the price policy could become illegal as an anti-trust violation.



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