

**Senate Subcommittee on Antitrust, Competition Policy and Antitrust
“Pricing Policies and Competition in the Contact Lens Industry:
Is What You See What You Get?”**

Questions for the Record: Senator Amy Klobuchar

For Mr. Slover:

- 1. Do you believe that the *Leegin* decision opened the door for more minimum retail price policies such as these UPPs? Is there any empirical evidence about how minimum retail price policies impact consumer prices?**

Answer:

Yes, *Leegin* did open that door.

As a threshold matter, much depends on the particular facts involved in a particular restrictive pricing policy. If the pricing policy is genuinely instituted by each manufacturer unilaterally and independently of any competing manufacturer, and independently of any retailer, then the *Colgate* doctrine would already provide a defense under the antitrust laws, regardless of the harm to consumer pocketbooks. But if there is interaction between two or more manufacturers, or between a manufacturer and one or more retailers, in either the development and implementation of the policy, or in the maintenance or evolution of that policy over time, then there is an antitrust question.

And that antitrust question has unfortunately become murkier as a result of *Leegin*. There now has to be a more elaborate – and expensive – economic analysis of the market effects to substantiate precisely how the particular prohibition on discounting has resulted in a net harm to consumers. The higher expense means, as a practical matter, that fewer restrictive pricing policies will be investigated and challenged.

It should be noted, however, that the reason the *Leegin* majority gave for overturning the per se prohibition against minimum resale price maintenance agreements was that it had determined that the 100-year-old rationale for the per se prohibition was no longer an adequate justification under current economic understanding. (Four Justices disagreed.) The majority’s decision did not make those agreements lawful; instead, it subjected them to that more elaborate economic analysis, under the rule of reason. It left open the door that with more experience judging such agreements under the rule of reason, a new understanding might emerge, a new basis for recognizing that indeed such agreements are inherently anticompetitive and that the per se prohibition should be reinstated.

We hope that happens. That is likely to take some time, however. And in the meantime, there is no doubt that more of these agreements will go unchallenged, and more consumers will be denied the benefits of competition at the retail level, where they shop.

As to empirical evidence, one recent empirical study, published in April 2013 by two economists at the University of Chicago, Alexander MacKay and David Aron Smith, focused on the effects of a switch from per se prohibition to rule-of-reason analysis for RPM under *Leegin* and found, as one might expect, that prices rose and output decreased, both resulting in harms to consumers that outweighed the potential benefits, if any, to consumers. An updated version of their study, from June 2014, can be found at [http://home.uchicago.edu/~mackay/MacKay%20and%20Smith%20\(2014\)%20-%20The%20Empirical%20Effects%20of%20MRPM.pdf](http://home.uchicago.edu/~mackay/MacKay%20and%20Smith%20(2014)%20-%20The%20Empirical%20Effects%20of%20MRPM.pdf).

- 2. CooperVision is the only major manufacturer not setting minimum retail prices. Is CooperVision at a disadvantage and risking eye care professionals not prescribing their product, or do they have an advantage because they can gain market share from consumers who want to be able to shop around for the best prices?**

Answer:

When a restrictive pricing strategy becomes widespread, whether it becomes riskier for those who do not go along, or more advantageous for them, may depend on where the leverage points are and how they are exercised. If consumers who seek better value are able to call the shots, then they could demand from their doctors a prescription tailored to a manufacturer whose contact lenses can be obtained at a discount. But if those eye doctors who are benefitting from the restrictive pricing policy, and who want to discourage discounting, are able to call the shots, then they could refuse to write prescriptions for the contact lenses that can be obtained at a discount. Or more subtly, they could strongly recommend against those contact lenses, or could simply neglect to mention them in the options they tell their patients about. Under the current system, the eye doctors have a lot of built-in advantages as to leverage that will be difficult for all but the most determined consumers to overcome.