

The Law Against Resale Price Maintenance: Alive And Well And Not Afraid To Take On The Former Champ's Signature Product

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Most corporations that use an independent distribution network as a means of getting their product to market know (or should know) that it is illegal to prevent distributors from reselling their product below a certain price. What many corporations may not know is that the antitrust enforcement agencies – including state antitrust officials – are serious about prosecuting companies who disregard this law. For example, in the past few months, the Florida Attorney General's office has been investigating Nike for allegedly fixing prices by limiting access to its premier shoe lines to only those retailers who agree to charge "suitable" prices. And, make no mistake; the penalties for getting caught can be costly.

In a case settled just last September, Salton, Inc., a Lake Forest, Illinois-based housewares manufacturing company and maker of the popular George Foreman™ line of grills, agreed to pay \$8.2 million to resolve an antitrust suit filed by 44 states, Puerto Rico, and the District of Columbia in Federal District Court in New York. Salton settled the lawsuit after enduring a two-year investigation, during which the States alleged that Salton had illegal-

ly coerced retailers into fixing the price for George Foreman™ grills and into excluding Salton's competitors from the market. In addition to the large monetary payment that forced Salton to take a \$2.6 million charge against its fourth-quarter 2002 earnings, Salton agreed to significant injunctive relief required by the States to settle the action.

Salton's Allegedly Illegal Activities

According to the States' Complaint, "contact grills" – which cook food on both sides simultaneously – have "rapidly become one of the most sought-after kitchen appliances in the United States." The States alleged that Salton dominated the market for these grills, with a market share substantially in excess of 50 percent. The States further alleged that Salton illegally attempted to maintain its "monopoly power."

The States' investigation focused on Salton's policy of requiring wholesalers to sell Salton's grills through most major retailers at or above the price charged by Salton on its website and through infomercials (Salton's "minimum advertised price"). Under the policies challenged by the States, when a retailer sold grills at a discount or stocked a competitor's product, Salton suspended the retailer's grill sales until it complied with Salton's pricing poli-

cies. Salton also allegedly told its wholesalers that it would suspend them if one of the retailers to which they provided grills resold them below Salton's minimum advertised price. Salton allegedly publicized these suspensions throughout its entire distribution network, emphasizing the consequences of failing to adhere to Salton's pricing policies.

The States also claimed that Salton prevented consumers from accessing other manufacturers' contact grills by forbidding retailers from selling any grills other than its own, again suspending retailers until they complied with this policy.

The States alleged that Salton's actions violated Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act, and various corresponding state law claims. It is important to note that Salton wholesalers and retailers who allegedly agreed with Salton not to charge below Salton's minimum advertised price also could have been named in the States' Complaint. But the States chose merely to identify those firms that bowed to Salton's alleged coercive tactics as "unnamed co-conspirators," and did not seek affirmative relief from them on this occasion.

The States' Investigation

Each state has the authority to act in its sovereign capacity, as *parens patriae* on behalf of its citi-

zens. The State Attorneys General initiate antitrust investigations as a result of constituent complaints, state agency complaints, referrals from federal agencies, and leads obtained through the media. State antitrust officials possess a powerful subpoena tool that enables them to require companies to comply with investigative requests even before litigation is commenced. The States also routinely share information they receive through the use of a National Association of Attorneys General (NAAG) task force.

In this case, Salton's retailers appear to have initially informed the States of Salton's allegedly anticompetitive acts. A press release issued by Salton stated that the manufacturer ultimately entered into the settlement "as a result of complaints from a few retailers concerning our allocation in 1998 and 1999 of certain George Foreman™ grills."

Each State participating in the settlement will receive a share of the \$8.2 million settlement payment proportionate with the percentage of U.S. residents in that State. The settlement requires that each State distribute its share of the settlement to health or nutrition-related causes so that purchasers of the grills may benefit from the States' action.

The Consequences of Getting Caught

Salton's sizable monetary payment was far from the only concession that the undisputed heavyweight champion of the indoor grill was forced to make.

Under the consent decree, Salton agreed not to enforce or

enter into any agreement without state approval through which any of its wholesalers or retailers is restrained from selling non-Salton indoor grills. Salton also must affirmatively advise *all* dealers of indoor grills that sales of Salton grills are not contingent on refusal to sell competing products.

Further, Salton agreed not to prevent wholesalers or retailers from selling its grills below any resale price "designated, stated or suggested" by Salton. Salton also agreed not to advertise or promote its grills at prices that are higher than the retail prices at which the grills are actually sold by most Salton wholesalers or retailers.

To comply with the consent decree, Salton must keep detailed monthly records – and any communications related thereto – of its grill inventory, the amount shipped, the amount forecast, the amount actually ordered, the amount allocated to each customer, and the amount that Salton has on order. Additionally, Salton sales personnel, as well as the Chairman of the Board and Salton's President, must attend antitrust seminars designed to teach legitimate sales and marketing strategies.

What Does Salton Mean For You?

Although the lessons of *Salton* are not necessarily novel, they do underscore what corporate executives should already know about the impact antitrust law must have on their marketing and distribution decisions. The most relevant "lessons learned" from *Salton* include:

- Manufacturers may suggest

retail prices to distributors if legitimate business justifications exist, such as encouraging distributors to provide the necessary service and support for their product.

- Manufacturers cannot coerce distributors – either through words or action – to sell product at or above a particular price.
- Manufacturers, especially those with smaller market shares, may enforce exclusive dealing arrangements so long as a legitimate business justification exists and they are not part of a broader scheme to monopolize a market.
- Manufacturers, especially those with higher market shares, cannot refuse to deal with distributors who sell competing products unless an extremely compelling business justification exists and few, if any, other restrictions are already in place.
- Finally, manufacturers should not assume that there is little cause for concern simply because the U.S. Department of Justice and the Federal Trade Commission have not actively investigated retail pricing practices. Not only have the States pursued retail price maintenance claims, but they also have sought remedies that can be just as damaging to a company's operations.

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