Top Topics: Rate Parity, Patent Controlling, Wage an Hour Class Actions

Imran Hayat, Esq.

Resale price maintenance ("RPM") or "rate parity" has been amongst the most contentious issues in antitrust laws because, on many levels, it attacks the fundamental notion free markets are predicated upon: free, fair and open competition. Recently, the hotel industry is alleged to have engaged in RPM that is illegal. This paper will briefly look at what RPM is; what factors courts consider in determining the legality of RPM; the general allegations made by Plaintiffs suing the hotel and online travel agents ("OTAs"); the general response by the hotels and OTAs; and the potential methods to limit exposure for hotels and OTAs.

Rate Parity: What is it?

Rate parity or "RPM" are often used interchangeably to refer to an arrangement pursuant to which a seller (manufacturer, distributor or franchisor) and a reseller (distributor, dealer, retailer or franchisee) reach an agreement on the resale price that the reseller will charge for a given product. Resale price maintenance agreements can set either the minimum or maximum price at which products will be sold. With respect to the hotel industry, the terms RPM or rate parity are used interchangeably to refer to the practice whereby hotels and OTAs agree that the OTA will make a non-packaged room reservation available at a predetermined price. For the vast majority of American legal jurisprudence, RPM was deemed, under any terms, illegal. See *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)* (Agreements between a manufacturer and its distributors to sell products at a minimum resale price violate Section 1 of the Sherman Act). However, while the *per se* illegality of RPM has been abrogated over time (at least with regard to federal law), this has not meant that industries that employ the RPM model may operate without regard to running afoul of antitrust laws.

Nationally, over 30 separate actions and class actions have been filed attacking the RPM practice allegedly engaged in by Hotel Defendants and the OTA Defendants. The Federal Panel on Multi-District Litigation has consolidated these actions before the U.S. District Court for the Northern District of Texas under the name *In re: Online Travel Company Hotel Book Antitrust Litigation* (3:12-cv-03515-B). A consolidated amended complaint was filed on May 2013 alleging, among other things, that the OTAs steadily grew their market share through discounting which created a concern for both the OTAs and Hotels. This practice was eroding the prices and thereby profit margins, and thus, they both sought to collectively address this issue. In order to address this concern, the Hotel and OTA Defendants allegedly used conferences they attended as a platform to discuss the need for rate parity. These meetings allegedly resulted in a uniform rate

parity agreement whereby the OTAs and Hotels set hotel room resale prices, and the OTAs agreed not to sell hotel rooms below those fixed prices. The central agreement of the alleged conspiracy contained most favored nation restrictions prohibiting hotels from offering lower prices through any other distribution channel, including the hotel's website. This allegedly allowed the OTAs to offer "best price" guarantees to their own customers, leading the consumer to believe competition occurred. It is further alleged that the OTA and Hotel defendants jointly policed and enforced this agreement.

Is "rate parity" legal?

Plaintiffs allege that these actions amount to price fixing and violate Section 1 of the Sherman Act, which provides in pertinent part that: ''[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal.''

RPM agreements may be illegal, depending upon their character, i.e. horizontal or vertical. Horizontal agreements are arrangements between entities operating at the same level of competition, e.g., between hotels, and are per se illegal under § 1. Vertical agreements set an agreed upon minimum and maximum price between a seller (Hotel) and a distributor (OTA) who are each operating at different levels in the distribution chain. Thus, these agreements are not per se illegal. Agreements between sellers and distributors, such as those between the OTAs and Hotels, regarding price are subject to greater scrutiny than a purely unilateral decision by the seller to refuse to sell to a distributor who does not adhere to its set price.

In *Leegin Creative Leather Products, Inc. v. PSKS*, 551 U.S. 877, 882 (2007) the U.S. Supreme Court overturned *Dr. Miles* application of the per se rule to vertical resale price maintenance agreements, and held that the rule of reason is the accepted standard in a vertical non-price restraint case for testing whether a practice unreasonably restrains trade in violation of Section 1 of the Sherman Act.

The Supreme Court has made clear that it overruled Dr. Miles as "the primary purpose of the antitrust laws" to protect interbrand competition (competition between hotels), which can be stimulated and enhanced when manufacturers limit intrabrand competition (competition between OTAs). *Leegin*, 551 U.S. at 889–90 (explaining procompetitive effects of vertical restraints); *Atl. Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 343 n.13 (1990) (recognizing "procompetitive potential" of vertical restraints). Interbrand competition is preferred as lower prices generally result from interbrand competition. *Leegin*, 551 U.S. at 895.

In choosing to promote interbrand competition, the Supreme Court has acknowledged that "vertical agreements setting minimum resale prices . . . may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly

profits, is an ever–present temptation." *Leegin*, 551 U.S. at 893. "Resale price maintenance may, for example, facilitate a manufacturer cartel." *Id.* "An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer." *Id*. "Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers." *Id.*

"To prove a Section 1 violation under rule of reason analysis, [plaintiffs] must show that the defendants' activities caused an injury to competition." *Doctor's Hosp., Inc. v. Southeast. Med. Alliance, Inc*., 123 F.3d 301, 307 (5th Cir. 1997). Under the rule of reason, the court must examine the effect of the alleged restraint on competition, considering all the circumstances, "including the facts peculiar to the business and the history of, reasons for, and market impact of the restraint . . . ." *Royal Drug Co. v. Group Life & Health Ins*. Co., 737 F.2d 1433, 1436 (5th Cir. 1984) (quotations omitted). It must also balance the "anticompetitive evils of a restrictive practice . . . against any procompetitive benefits or justifications within the confines of the relevant market." *Southeast. Med. Alliance*, 123 F.3d at 307.

The Claims

It is under this backdrop that Plaintiffs claims in *In re: Online Travel Company Hotel Book Antitrust Litigation* must be pleaded.

Plaintiffs claim that:

- Plaintiffs need only "nudge" their allegations across the line from conceivable to plausible;
- Defendants had a common motive to eliminate price competition;
- The OTA Defendants had the market power to force the Hotel Defendants to do it;
- Defendants had the opportunity and means to conspire at industry conferences and did so by discussing price restrictions and "rate parity";
- An unprecedented and coordinated pricing agreement resulted in which price competition and discounting were replaced by higher retail prices market-wide;
- All Defendants policed and enforced the conspiracy in a "mafia" like manner;
- For the foregoing reasons, the activities engaged in by the Hotel and OTAs are per se illegal.

The Hotels and OTA Defendants proffer that Plaintiffs' allegations do not state a claim for among the following reasons:

- The allegations of the complaint show fierce interbrand competition, i.e., the OTA provided consumers seeking to book a room in any given city and on any given night, a vast number of options from which to choose based on brand, location, room size, and price;
- Interbrand restrictions are permitted as the Supreme Court has recognized that to protect and enhance the paramount competition between a seller and its competitors, the seller must carefully manage how its offerings are sold across various distribution channels (i.e., "intrabrand"). See *Leegin,* 551 U.S. at 890;
- No "resale" occurs as no "good" exists in the traditional sense; the OTA are merely acting as agents for who hotels can legally set a price. *See United States v. Gen. Elec.* Co., 272 U.S. 476, 482-85 (1926);
- Plaintiffs fail to identify an unreasonable restraint of trade or a legally sufficient relevant antitrust market as required by law. *See Tanaka v. Univ. of S. Cal.,* 252 F.3d 1059, 1063 (9th Cir. 2001) (affirming dismissal of Sherman Act claim for failure to properly allege a plausible relevant market and the existence of anticompetitive effects within that relevant market);
- Plaintiffs cannot show a conspiracy based on allegations which simply amount to claims that Defendants had the opportunity to conspire; and
- Plaintiffs state antitrust and consumer protection claims fail for the same reasons above.

What now?

The foregoing arguments were excerpted from the parties' briefs filed in connection with the Hotel and OTA Defendants Motion to Dismiss the Amended Consolidated Complaint. The Court has held a hearing and heard arguments from the parties but has yet to rule. Given that courts will ordinarily afford plaintiffs at least one opportunity to amend their complaints, and that antitrust RPM complaints require a fact intensive inquiry, it would appear that Plaintiffs will be able to pursue their claims on the merits. If this occurs and further evidence is adduced, it will become clearer if in fact the agreements between the Hotel and OTA Defendants constitute RPM and whether such RPM is legal. In the interim, the Court has made one thing clear in ruling on OTA Defendant Travelocity's Motion to Compel Arbitration: Where Plaintiffs were required to assent, and complied, to a User Agreement containing a valid arbitration clause and a class waiver, those Plaintiffs must arbitrate their claims.