Practical Tips for Maintaining Online Minimum Advertised Pricing Policies and Avoiding Antitrust Issues

By Daren S. Garcia, Whitney C. Gibson, and Kenneth J. Rubin

E-commerce has fundamentally changed consumer behavior. Prior to the internet, great deals were normally had by only the most savvy of customers. Now, however, price comparisons, blowout sales, and bargain shopping are the norm for anyone with a smart phone. As a result, the past few years have seen never-ending price wars waged between online merchants as well as traditional brick-and-mortar retailers with a significant web presence.

To compensate for this race to the bottom, manufacturers—and retailers/resellers wanting to maintain profit margins—have often turned to Internet Minimum Advertised Price (IMAP) policies to combat overzealous advertising. Generally speaking, an IMAP is a unilateral policy set by a manufacturer or supplier that informs a retailer or reseller that the manufacturer will only do business with those companies it chooses to do business with and that it will not work with companies that advertise below a manufacturer-selected minimum price. Unlike other restrictions used by manufacturers to control pricing, such as resale price maintenance (RPM) agreements between multiple entities in a supply chain, an IMAP does not impose any restriction on the sales price at which a product can be sold.

There are several potential benefits to both manufacturers and retailers/resellers in implementing and/or adhering to an IMAP policy. Initially, manufacturers have an incentive to protect their brand image and value by "avoiding unseemly discounting, which lowers the value of the product in the customer's eyes."[i] Retailers and resellers, on the other hand, benefit because an IMAP can help deter advertising wars between "basement" sellers.[ii] This, in turn, can help businesses "compete and sell on service and value," while retaining incentives for brick-and-mortar retailers to carry the product in-store without fear of online sellers advertising the products below the manufacturer's IMAP.

The legal issues surrounding IMAP policies have been the subject of increased scrutiny in jurisdictions across the country. Specifically, IMAP policies touch on aspects of antitrust law that have undergone significant changes within the past 10 years, starting with the Supreme Court's decision in *Leegin Creative Leather Prods. v. PSKS, Inc.*, which held that vertical minimum price fixing agreements were no longer a *per se* violation of the Sherman Act.[iii] Since *Leegin*—and due to the increased prevalence of IMAP policies and a corresponding increase in antitrust challenges—courts have struggled with fundamental questions ranging from how to analyze IMAP policies under state and federal antitrust laws to whether such polices even require antitrust analysis.

To date, challenges to IMAP policies have been, by and large, unsuccessful, as they are typically unilateral and do not actually restrict a reseller's ability to advertise or sell a product or service at whatever price they desire. Unanswered legal questions remain, however, and antitrust law is not uniform across all 50 states. This article reviews the legal framework potentially applicable to IMAP policies, provides a general overview and analysis of recent state and federal antitrust challenges to IMAP policies, and provides general tips for minimizing the risk of antitrust claims when implementing IMAP policies.

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LEGAL FRAMEWORK AND BACKGROUND

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, makes illegal "every 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," and provides for both criminal and civil penalties for violations of the act.[iv] Despite the statute's broad reference to *every* contract that restrains trade or commerce, the Supreme Court has determined that it does not proscribe all contracts, but rather, "outlaw[s] only unreasonable restraints."[v] In determining whether a contract is unreasonable, the Court has generally separated agreements into two categories: agreements that are deemed unlawful *per se* and agreements that are an unreasonable restraint on trade or commerce under a "rule of reason" standard.[vi]

To state a claim under the Act, a prospective plaintiff must show: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained competition under either a *per se* rule or a rule of reason analysis; and (3) that the restraint causes an "antitrust injury," that is, it actually restrains competition, causing injury that affects the field of commerce generally.[vii] Although most agreements will fall under the rule of reason analysis, examples of *per se* illegal restraints include certain forms of price fixing, market allocations, and group boycotts.[viii] *Per se* illegal restraints are those which the Court has determined are "manifestly anticompetitive" by their very nature and have no pro-competitive justification.[ix]

These distinctions, and the body of jurisprudence analyzing them, are important for understanding how courts may view IMAP policies within this framework. Significantly, some plaintiffs have attempted to classify IMAP policies as vertical price fixing arrangements, alleging that they have the desired *effect* of "fixing" prices within a supply chain. And, at least one court has found this argument convincing, holding that an IMAP policy potentially constituted vertical price fixing, which would be subject to the rule of reason analysis.[x]

The majority of courts to address IMAP policies, however, have upheld their legality even at the pleading stage, construing such policies as both "unilateral" and as not being a restraint upon prices at all.[xi] Indeed, the typical IMAP often explicitly states that it does not dictate the price at which a retailer or reseller may sell a product or service. Nonetheless, an understanding of the various categories of price fixing agreements, and the manner in which courts have analyzed those agreements, are crucial to determining whether a specific IMAP policy may be susceptible to antitrust challenges.

Attempts to Analogize to Vertical Price Fixing

Price fixing—generally defined as an agreement between one or more parties to "fix, control, or otherwise stabilize the price for a good or service sold in the marketplace"[xii]—is an example of potentially anti-competitive activity under either a *per se* or rule of reason analysis. There are two general types of price fixing agreements: (1) "horizontal" price fixing, where two or more competitors agree or otherwise conspire to fix the price of a product or service, and (2) "vertical" price fixing, where typically a supplier and retailer/reseller agree to sell a product or service at a minimum or maximum price.

Horizontal price fixing has been deemed a *per se* violation of the Sherman Act regardless of whether the prices set are minimum or maximum. As a result, it is important that an IMAP policy (even if it does not restrict prices) be implemented *unilaterally*, without any involvement or agreement with competitors.

Similarly, vertical price fixing was also deemed a *per se* violation of the Sherman Act until two relatively recent Supreme Court decisions, *State Oil Co. v. Khan* (maximum pricing), and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (minimum pricing), reversed this near-century-long precedent.[xiii] Today, under federal law, vertical price fixing agreements (otherwise known as "resale

price maintenance" or "RPM"), are analyzed under a rule-of-reason analysis. However, several states' antitrust laws still apply *per se* scrutiny to RPM, requiring caution when deciding whether or not to pursue a vertical pricing strategy.

Plaintiffs have attempted to analogize IMAP policies to vertical price fixing arrangements alleging, for example, that the policy constitutes a "[vertical] price-fixing scheme," because it is "designed to force internet resellers to maintain artificially high prices."[xiv] Although most courts have rejected this arrangement,[xv] at least one case has survived a motion to dismiss on this theory.[xvi] Significantly, although RPM is no longer a *per se* violation of federal antitrust law, as set forth below, several states either have adopted explicit statutes making vertical price fixing *per se* illegal and/or do not follow *Leegin* in interpreting their respective antitrust statutes.

The Colgate Doctrine

A common defense in antitrust litigation, particularly when it comes to IMAP policies, is that the manufacturer acted independently and thus there is no "contract, combination, or conspiracy," that could violate the Sherman Act. In what has become known as the "Colgate Doctrine," arising from the Supreme Court's decision in *United States v. Colgate & Co.* (1919), independent action by a manufacturer is not proscribed under antitrust law. Under the Colgate Doctrine, "a manufacturer has the right: (1) to deal or refuse to deal with whomever it chooses; and (2) to announce in advance the circumstances under which it will refuse to sell, so long as it does so independently."[xvii] In order for the Colgate Doctrine to apply, there cannot be any agreement between a manufacturer and retailer/reseller.[xviii] Rather, the manufacturer may simply "announce its resale prices in advance and refuse to deal with those who fail to comply," while "a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination."[xix]

As further explained below, the Colgate Doctrine has been a critical argument in defending the legality of IMAP policies against both state and federal antitrust claims.

The Federal Trade Commission's Comments on Minimum Advertised Price Policies

Although not binding on state or federal courts, the FTC has issued its own position on the propriety of standard, non-internet specific Minimum Advertised Price (MAP) policies, determining that a unilateral policy set by a manufacturer regarding a desired level of prices does not violate federal antitrust law:

> "If a manufacturer, on its own, adopts a policy regarding a desired level of prices, the law allows the manufacturer to deal only with retailers who agree to that policy. A manufacturer also may stop dealing with a retailer that does not follow its resale price policy. That is, a manufacturer can implement a dealer policy on a 'take it or leave it' basis."[xx]

The FTC further notes that MAP policies can actually *increase* competition in the overall marketplace, even if the immediate effect is to reduce "intrabrand" competition amongst resellers:

> "[m]anufacturer-imposed requirements can benefit consumers by increasing competition among different brands (*interbrand competition*) even while reducing competition among dealers in the same brand (*intrabrand competition*)."[xxi]

Finally, the FTC has also determined that a cooperative advertising program utilized by a manufacturer who imposes a minimum advertised price as a prerequisite for retailer/reseller participation is also lawful:

> "Q: My supplier offers a cooperative advertising program, but I can't participate if I advertise a price that is below the supplier's minimum advertised price. I think

that's unfair.

A: The law allows a manufacturer considerable leeway in setting the terms for advertising that it helps to pay for. The manufacturer offers these promotional programs to better compete against the products of the other manufacturers. There are limited situations when these programs can have an unreasonable effect on price levels. For instance, the FTC challenged the Minimum Advertised Price (MAP) policies of five large distributors of pre-recorded music because the policies were unreasonable in their reach: they prohibited ads with discounted prices, even if the retailer paid for the ads with its own money; they applied to in-store advertising; and a single violation required the retailer to forfeit funds for all of its stores for up to 90 days. The FTC found that these policies, in effect for more than 85 percent of market sales, were unreasonable and prevented retailers from telling consumers about discounts on records and CDs. Issues involving advertising allowances may become of less practical concern as manufacturers adjust to new standards that allow more direct influence on retail prices."

The FTC's comments are not binding on state and federal courts deciding antitrust claims. Further, the FTC has not made any explicit comments with respect to "IMAP" policies that are specific to internet retailers/distributors. Despite this, the FTC's comments may prove useful to manufacturers with IMAP policies.

Variations in State Antitrust Law

In interpreting the Sherman Act, the Supreme Court has determined that Congress intended to supplement, rather than preempt, state antitrust law. As a result, nearly every U.S. state has promulgated its own antitrust act, some modeled after the Sherman Act, and some varying significantly from it.[xxii]

Although IMAPs differ significantly from RPM—the former being a unilateral policy while the latter is an explicit agreement—state law is not uniform on this issue. Accordingly, manufacturers should be aware of the differences in state law with respect to prohibitions on RPMs, which vary from state to state post-*Leegin*.

At least one recent commentator who conducted a 50-state survey of antitrust laws (as of 2015) suggested that at least three states (California, Maryland and Wyoming) still explicitly prohibit vertical agreements post-*Leegin*, approximately 13 "likely" diverge from *Leegin*,[xxiii] 9 states "likely" follow *Leegin*,[xxiv] 27 states follow *Leegin*,[xxv] and 2 states are "unknown."[xxvi] Accordingly, if a specific IMAP is determined to be a type of RPM or vertical agreement rather than a unilateral policy, it may still be deemed a *per se* violation in some states.

DEVELOPMENTS IN THE LAW ON INTERNET MINIMUM ADVERTISING PRICE POLICIES

Challenges to Traditional MAP Policies under Federal Antitrust Law

To date, Courts have often rejected federal antitrust claims involving MAP policies, primarily relying on the Colgate Doctrine.

For example, in *Holabird Sports Discounters v. Tennis Tutor* (1993) the Fourth Circuit upheld a manufacturer's "Statement of Policy," which provided that it would "not sell, or will discontinue selling, Tennis Tutor ball machines to dealers who . . . advertise the Tennis Tutor in any general circulation regional or national publication for less than suggested retail price, including call for price advertisements." Although not explicitly citing *Colgate,* the Court reasoned that "[t]his advertising restriction, which was independently formulated by [defendant], does not prevent dealers

from selling Tennis Tutor ball machines at whatever price they choose; instead, it only prohibits advertising the machines for sale at less than suggested retail price in regional or national publications."[xxvii]

In *Blind Doctor, Inc. v. Hunter Douglas, Inc.* (2004), the U.S. District Court for the Northern District of California rejected a retailer's claim that a manufacturer's MAP policy constituted "price fixing" under the Sherman Act, noting that "Courts have long recognized that such advertising restrictions do not rise to the level of an antitrust violation," and "the Supreme Court has said that non-price restrictions like those enacted by defendant 'arise in the normal course of business' and are not illegal under the Sherman Act." Citing *Colgate*, the Court further emphasized that "a manufacturer can announce its resale prices or other non-price restrictions and refuse to deal with those who fail to comply without running afoul of antitrust laws."[xxviii]

Courts have also upheld agreements where manufacturers made minimum price advertising a prerequisite to receiving funds under a cooperative marketing program. For instance, in *Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc.* (2001), the Fifth Circuit affirmed the dismissal of plaintiff's claims alleging that defendant's cooperative advertising program, which reimbursed dealers for advertising only when that advertising stated either defendant's suggested retail price or no price at all, violated the Sherman Act.[xxix]

In contrast, manufacturers/distributors increase their risk of antitrust scrutiny if there is collusion (or the appearance of collusion) with competitors in implementing MAP policies. MAP policies pose a higher risk if they are implemented in conjunction with horizontal agreements or discussions with competitors, which is generally prohibited under antitrust law.

Recent Cases Specific to IMAP Policies Brought Under State and Federal Antitrust Law

Since 2007, a handful of federal courts have upheld IMAP policies. Several of these cases have been brought in New York federal courts, asserting claims under both the Sherman Act and New York's corollary antitrust statute, the Donnelly Act.

In an early case pre-dating *Leegin*, *Campbell v. Austin Air Sys.* (2005), the U.S. District Court for the Western District of New York upheld an IMAP policy integrated into a distribution agreement. Applying the rule of reason analysis, the Court held (as an additional reason for affirming summary judgment) that the IMAP policy did not impose an unreasonable restraint on competition. The Court reasoned that "[defendant's] Internet MAP policy restricts only the minimum price for which a dealer could advertise on the Internet," and "[w]ith respect to actual sales pricing, the Agreement explicitly states that a dealer may sell [defendant's products] for any price." It concluded that, "[a]s such, this Court finds that the Agreement itself does not violate Section 1 of the Sherman Act, nor does it constitute proof of a vertical agreement to fix prices."[xxx]

Since then, a series of cases brought by an online retailer, WorldHomeCenter.com, have challenged the MAP and IMAP policies of several manufacturers. These cases alleged generally that there is no distinction between "advertised prices" and "resale" prices when products are sold on the internet—an important distinction for previous courts that have held that MAP policies do not constitute vertical price fixing—because a shopper only sees the advertised price of products on a website and does not have the capability of visiting a "bricks-and-mortar" store for further investigation, as the store does not exist.[xxxi]

The majority of these cases have been unsuccessful and dismissed at the pleading stage. At least two of these cases have held that the IMAP policies at issue do not implicate the Sherman Act or New York's antitrust law.

In WorldHomeCenter.com, Inc. v. Franke Consumer Prods. (June 22, 2011), the U.S. District Court for the Southern District of New York upheld a MAP policy that prohibited a reseller from

advertising or otherwise promoting defendant's products below a "net price" established by defendant.[xxxii] The policy at issue applied to all retailers, but also made clear that internet retailers specifically were not permitted to publish prices below the allowed price range anywhere on their website. The Court rejected Plaintiffs' claim that the MAP policy at issue constituted vertical price fixing, which they argued was a *per se* violation of New York's antitrust law. The Court reasoned that the policy did "not actually constitute a vertical price restraint," as it "plainly discuss[es] advertised prices, not resale prices."[xxxiii] Further, the Court found significant that "the policy applies to all retailers, not just online sellers," and although "the policy may burden internet retailers slightly more than 'brick and mortar' sellers, [defendant] offers internet retailers viable strategies to provide online customers with reduced prices."[xxxiv]

Similarly, in *WorldHomeCenter.com, Inc. v. KWC Am., Inc.* (September 15, 2011), the court affirmed the dismissal of Sherman Act and Donnelly Act claims alleging that defendant's IMAP policy constituted an impermissible RPM. Unlike *Franke*, the IMAP at issue was directed at internet retailers specifically, in that the manufacturer's policy stated that it "unilaterally determined that it will sell its products only to those accounts that . . . [d]o not use the Internet . . . to advertise KWC America products to the general public at a price that is more than twenty percent (20%) for KWC branded products and twenty-five percent (25%) for HANSA branded products below the list price set forth in the effective KWC and HANSA Price Books." The Court ultimately held that the IMAP at issue "cannot be the basis of a vertical RPM claim because it does not restrain resale prices, but merely restricts advertising," and that it could not constitute a non-price restraint of competition in violation of the Donnelly Act because it was a unilateral policy that was not proscribed under the Act.[xxxv]

At least one case, however, construed a MAP policy as a type of vertical price fixing arrangement, finding the "virtual" versus "brick-and-mortar" distinction described above persuasive. *See, e.g.*, *WorldHomeCenter.com, Inc. v. L.D. Kichler Co.* (March 28, 2007). That case, decided in 2007, has not gained traction and has been explicitly rejected by subsequent decisions.

GENERAL TIPS FOR AVOIDING ANTITRUST SCRUTINY WHEN IMPLEMENTING IMAP POLICIES

Although there are no hard rules for avoiding antitrust allegations, the trends in recent IMAP cases highlighted above can provide helpful guidance for manufacturers wanting to implement or maintain IMAP policies. Some best practices are set forth below:

(1) An IMAP Should Be Implemented Unilaterally. A consistent theme throughout court decisions upholding MAP and IMAP policies is that such policies represent unilateral actions by the manufacturer that do not implicate antitrust violations pursuant to the Colgate Doctrine. In several cases that have dismissed antitrust claims, courts cite to specific sections of the policy expressing that it is the unilateral statement of the manufacturer and not a binding agreement with any retailer.[xxxvi]

(2) Limit IMAPs to Advertised Pricing. For several reasons, an IMAP policy should be limited to advertised prices, and should not restrict actual resale prices. First, an IMAP that affects the actual sale price is more likely to be considered to be RPM, which can be a *per se* violation of the antitrust laws of several states. Further, although the *Leegin* decision abrogated RPM policies as a *per* se violation of the Sherman Act, such contractual restrictions are still subject to the rule of reason analysis. Manufacturers and distributors may want to include specific language in their IMAP policies that further emphasize this. The IMAP policy at issue in *WorldHomeCenter.com, Inc. v. KWC Am., Inc.*, for example, explicitly stated that "[the] Policy applies only to advertised prices and does not apply with approval actual resale prices," to which the Court cited in its opinion.[xxxvii]

(3) Universal Application. At least one Court, in determining whether a MAP policy

constituted a "vertical price restraint," as applied to online retailers/resellers, noted the fact that the MAP policy at issue applied universally to brick-and-mortar stores and online businesses. In *WorldHomeCenter.com, Inc. v. Franke Consumer Prods*, the Court found significant that "the policy applies to all retailers, not just online sellers," which was one of several reasons for dismissing plaintiffs' antitrust claims.

(4) Even-Handed Application. IMAP policies should be enforced consistently across all levels of retailers. For example, manufacturers should not favor large retailers by allowing them to deviate from an IMAP out of fear of losing their business, while strictly enforcing their IMAP policies against smaller retailers who generate less revenue. Doing so increases the risk of potential antitrust claims.

CONCLUSION

With e-commerce on a meteoric rise, retailers and distributors are likely to see a continued increase in manufacturers' use of IMAP policies as a means to reign in excessive price reductions on the internet. Although the majority of courts to address the issue have upheld these policies as valid under the Sherman Act, given the lack of uniformity in state law, a risk still remains that some courts may construe these policies as RPM agreements subject to *per se* treatment under their state's antitrust law. As such, manufacturers, distributors, and other companies should carefully vet the language of their IMAP policies to avoid unwanted antitrust scrutiny.

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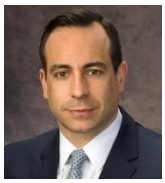

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[iii] *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007).

[iv] *See* 15 U.S.C. § 1 (providing that a violation of Section 1 is a felony and setting fines up to $100 million for corporations, or $1 million for individuals, who violate the act).

[v] *Leegin*, 551 U.S. at 885.

[vi] *Id.*

[vii] *Blind Doctor, Inc. v. Hunter Douglas, Inc.*, No. C-04-2678 MHP, 2004 U.S. Dist. LEXIS 18480, at *13 (Sept. 7, 2004).

[viii] Passo, Alexander, Internet Minimum Advertising Price Policies: Why Manufacturers Should Be Wary When Implementing, 48 Suffolk U. L. Rev. 795, 798 (2015) ("IMAPP") (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

[ix] *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1997).

[x] *See, e.g.*, *WorldHomeCenter.com, Inc. v. L.D. Kichler Co.*, No 05-CV-3297, 2007 U.S. Dist. LEXIS 22496 (E.D.N.Y. Mar. 28, 2007).

[xi] *See, e.g.*, *Campbell v. Austin Air Sys.*, 423 F. Supp. 2d 61, 68, n.6 (W.D.N.Y. 2005); *WorldHomeCenter.com, Inc. v. Franke Consumer Prods.*, No. 10 civ. 3205 (BSJ), 2011 U.S. Dist. LEXIS 67798 (S.D.N.Y. June 22, 2011); *WorldHomeCenter.com, Inc. v. KWC Am., Inc.*, No. 10 Civ. 7781 (NRB), 2011 U.S. Dist. LEXIS 104496 (S.D.N.Y. Sept. 15, 2011).

[xii] *IMAPP*, at *799.

[xiii] *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007).

[xiv] *WorldHomeCenter.com, Inc. v. L.D. Kichler Co.*, No. 05-cv-3297, 2007 U.S. Dist. LEXIS 22496, at * 13 (Mar. 28, 2007).

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[xvi] *Kichler*, 2007 U.S. Dist. LEXIS 22496, at * 13.

[xvii] *Campbell v. Austin Air Sys.*, 423 F. Supp. 2d 61, 68 (W.D.N.Y. 2005) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

[xviii] *Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. 752, 761 (1984).

[xix] *Id.*

[xx] FTC, Manufacturer-imposed Requirements, available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/manufacturer-imposed.

[xxi] *Id.*

[xxii] *See, e.g.*, Michael A. Lindsay, Overview of State RPM, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf; *IMAPP*, at *805-11 (evaluating state statutes that follow or diverge from federal antitrust law, noting that "forty-eight states and the District of Columbia have enacted antitrust laws").

[xxiii] *IMAPP*, at *806-07 (Connecticut, Hawaii, Indiana, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, Ohio, South Carolina, Tennessee, West Virginia).
[xxiv] *Id.* at *807-08 (Arizona, Iowa, Kentucky, Mississippi, North Carolina, Oregon, South Dakota, Vermont, Wisconsin).
[xxv] *Id.* at *808-11 (Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington).
[xxvi] *Id.* at *811 (Maine, North Dakota). Vorys has not conducted an independent review of these states' laws. The article is intended for reference only.
[xxvii] *Holabird Sports Discounters v. Tennis Tutor, Inc.*, No. 92-204, 1993 U.S. App. LEXIS 10918, at *2 (4th Cir. May 7, 1993).
[xxviii] *Blind Doctor, Inc. v. Hunter Douglas, Inc.*, No. C-04-2678 MHP, 2004 U.S. Dist. LEXIS 18480, at *18-19 (N.D. Ca. Sept. 7, 2004).
[xxix] *Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc.*, 246 F.3d 752 (5th Cir. 2001).
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[xxxi] *WorldHomeCenter.com, Inc. v. L.D. Kichler Co.*, No 05-CV-3297, 2007 U.S. Dist. LEXIS 22496 (E.D.N.Y. Mar. 28, 2007).
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[xxxiii] *Id.* at 14-15.
[xxxiv] *Id.*
[xxxv] *WorldHomeCenter.com, Inc. v. KWC Am., Inc.*, No. 10 Civ. 7781 (NRB), 2011 U.S. Dist. LEXIS 104496 (S.D.N.Y. Sept. 15, 2011).
[xxxvi] *See, e.g.*, KMC, at *10.
[xxxvii] *Id.*