# Department of Legislative Services

Maryland General Assembly
2009 Session

## FISCAL AND POLICY NOTE

Senate Bill 239 (Senator Frosh)
Judicial Proceedings Economic Matters

**Maryland Antitrust Act - Establishment of Minimum Sale Price for Commodities or Services - Prohibited**

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The bill classifies a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service as an unreasonable restraint of trade or commerce under the Maryland Antitrust Act.

## Fiscal Summary

**State Effect:** The bill does not directly affect State finances or operations.

**Local Effect:** The bill does not directly affect local finances or operations.

**Small Business Effect:** Potential minimal.

## Analysis

**Current Law/Background:** The Maryland Antitrust Act is designed to promote fair and honest competition, free of conspiracies, combinations, or agreements which unreasonably restrain trade or commerce. The State's antitrust laws are complementary to the federal Sherman Antitrust Act, contained in 15 U.S.C. §§ 1, *et seq.* The General Assembly has expressed its intent that, in construing the Maryland Antitrust Act, the courts be guided by the interpretation given by the federal courts to the federal statutes dealing with the same or similar matters. (*See* Commercial Law Article § 11–202.)

Under the State's antitrust laws, a person is prohibited from unreasonably restraining trade or commerce by contract, combination, or conspiracy. A restraint of trade or commerce is interference with the ordinary, usual, and free competitive pricing or distribution of goods or services in an open market. A restraint of trade is unreasonable if

it tends to restrict production, raises prices, or otherwise control the market to the detriment of sellers, purchasers, or consumers of goods or services.

Some practices or agreements are *per se* unreasonable restraints of trade by their very nature and are illegal without any inquiry as to their harm, due to the adverse effect they have on competition and trade. Horizontal restraints, such as agreements between competitors to fix, stabilize, raise, or lower the price of goods or services are *per se* violations of State and federal antitrust law. Prior to a line of Supreme Court decisions beginning in 1977, all vertical resale restraints, such as a restraint imposed by a supplier on its franchisees, were treated as *per se* antitrust violations.

In June 2007, the Supreme Court held in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, __U.S.__,127 S.Ct. 2705 (2007), that minimum vertical price fixing, also known as minimum resale price maintenance, should be examined under the "rule of reason standard," rather than the *per se* standard in determining a violation of Section 1 of the Sherman Antitrust Act. The rule of reason standard is a more difficult standard for a plaintiff in an antitrust case to meet. To prevail under the rule of reason standard, the plaintiff must prove the defendant's restraint has a substantial adverse effect on competition in the "relevant market."

In the 1st Session of the 110th U.S. Congress, a similar bill was introduced as S.2261, the Discount Pricing Consumer Protection Act. The legislation intended to overturn the Supreme Court's decision in *Leegin* in order to restore the rule that minimum vertical price fixing agreements between manufacturers and retailers, distributors, or wholesalers are *per se* violations of the Sherman Antitrust Act

## Additional Information

**Prior Introductions:** None.

**Cross File:** HB 657 (Delegate Manno) - Economic Matters.

**Information Source(s):**Office of the Attorney General, Department of Legislative Services

**Fiscal Note History:** First Reader - February 24, 2009
ncs/ljm

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