From FTC Hearing Transcript (5/21/2009)

>> Lloyd Constantine: Hi. Let me be an iconoclast, as usual. I'm not actually happy to be here. But I did expect to be here, and I realized I'd be here sometime in October 1986 when I was -- I had a case in the Supreme Court. It was called 324, Liquor v. Duffy. And we were defending an RPM scheme which the state of New York had erected. And during the argument, amicus curiae by the United States by a guy named Steve Cannon, who later on became the other part of Constantine Cannon -- Justice Scalia, who had been on the court for around 15 minutes at that point in time, sort of challenged Cannon on an RPM and observed -- he said, "Is that -- is RPM still per se illegal?" This was what Justice Scalia said. And Steve Cannon said, "Yes, it is." And Scalia said, "Well, we'll see about that." So, I knew I would be here. I just didn't know exactly when I would be here. But I am happy to be with Laurel and Pamela. Laurel is one of my teachers in this field, and Pamela is one of my teachees, so it's always nice to be with them and with all of you guys, as well. I'll use the few minutes that I have now to state my bottom line and briefly outline the reasons I draw this line where I do. During the longer discussion, I hope to expand each of these things that I say is just a topic sentence. My bottom line is simply that Congress, at this moment, has the opportunity to enact a per se rule for RPM. It should do so promptly, in the manner it recently enacted a law to overrule Ledbetter, which has a lot more to do with this dynamic than some might think. It should do this because resale price maintenance virtually always actually raises prices, rarely, if ever, promotes interbrand competition in the convoluted and attenuated manner that neoclassical economics predicts that it might. Resale price maintenance therefore meets the prime criterion for application of a rule of per se illegality. That is, the restraint of trade in question almost always harms competition. No more can be asked since that is also true for other per se offenses, including horizontal price fixing and market allocation. And worth our time today for the panelists here today or the economists from yesterday's panel, we could all quickly construct hypotheticals where price fixing and market allocation enhance competition or certainly don't diminish consumer welfare. It's not worth doing that. And a cursory examination of the hypothetical pro-competitive effects of resale price maintenance described in both the Leegin majority and descent and the literature, of which I've been some contributor to, are of a similar hypothetical and fanciful nature. I come to this conclusion not as some have come to theirs, by what has derisively been called a "leisure of the theory class." I come to my bottom line through experience. I principally wrote, as Laurel graciously said, the '85 and '88 state vertical restraints guidelines with a lot of help from Laurel. And if you examine them, you will see that their explanation of how vertical restraints harm competition, the factors such as market power,contractual longevity, coordinated dealer pressure, ubiquity of their restraint -- these are the same as recognized by the majority and the descent in Leegin. By the way, those guidelines -- the state guidelines, Alan -- they continue to serve an important purpose, but they need to be revised to deal with the reality of Khan and Legion. And I will contribute the printing costs for you to actually do that, if you want to do that, 'cause I think it'd be a nice thing to do. It's only been 12 years since Khan. More relevant, as the government enforcer, I was lead or co-lead counsel in all of the midto-late 1980s national RPM cases -- Minolta, Mitsubishi, Panasonic, Nintendo, and others. Michael Crichton lists most of them on page 325 of his novel "The Rising

Sun." I also took more than 60 guilty pleas, around half of those to felonies for committing resale price maintenance under the New York Donnelly Act, the criminal provisions of the Donnelly Act. One thing we in the States learned back then in the '80s and '90s when we were actually litigating these cases is that, in those days, Japanese firms, all with significant market power, were all simultaneously employing aggressive vertical price fixing policies, right after successfully destroying the U.S. TV industry in a conspiracy which the Federal Antitrust Division and the Supreme Court told us was economically implausible -- with one big footnote. That conspiracy actually occurred and it actually worked and it actually destroyed the American TV industry and that had all happened by the time the Supreme Court announced its decision in 1986. I also litigated several large national nonprice vertical cases in the AG's office, but, unfortunately, departed before the trial in the biggest one, Anheuser-Busch and Miller Brewing. In private practice, I successfully defended a national vertical price fixing case -- class-action. I also litigated the Visa Check case, which was mentioned before, for seven active years, resulting in a summary-judgment decision for my clients, including Wal-Mart, of $3.4 billion in cash and an injunction valued by the 2nd Circuit at upwards of $87 billion and the court's pronouncement that it was by far the largest settlement in federal antitrust history and that the U.S. government's late and reluctant pursuit of Visa/MasterCard had "piggybacked on our case." My colleagues, that was a pure and simple nonprice vertical restraint case, with a tagalong Section 2 count. As was the later-filed U.S. and 19-states case against Microsoft, also a nonprice vertical case with some added Section 2 bells and whistles. Let me just pose one question to the panel for their consideration, without now attempting myself to answer it. What is the chance, the likelihood that a terminated discounter, even a large one, will have the resources and will to litigate, as I did in both private practice and government, a uccessful vertical restraints case under the rule of reason, to discover and present a trial, the market circumstances which demonstrate the anticompetitive effect of the RPM scheme that led to the termination, the market power of its and other brands, the ubiquity of the restraint beyond the brand it has lost, the illusory nature of the additional services promoted by increased margins to the detriment of consumer, the existence of coordinated dealer pressure imposed on manufacturers, who now, in most cases, are less powerful than their dealers? What chance is there for developing a meaningful rule of reason analysis, as the Leegin majority cynically hypothesize? In that case I talked to you about, in that vertical restraints case, it cost us $20 million in costs to litigate that case, 276,000 billable hours, and we produced something like 5 million documents. In the next case I took, a smaller case we produced 150 million pages of documents, because that's the exponential increase in documents, which has been caused by e-mail and other cyberdiscovery. So, what is the likelihood that these cases are going to be litigated? There is no likelihood. I leave that question and others to the panel and look forward to the discussion ahead. Thanks.