MEMORANDUM

TO: NYSBA Antitrust Law Section Executive Committee
FROM: Coordinated Conduct Committee
DATE: October 12, 2018
RE: DARC Memorandum on Resale Price Maintenance Under the Donnelly Act

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I. INTRODUCTION

The Coordinated Conduct Committee was tasked with evaluating whether it recommends revising New York's Donnelly Act, N.Y. Gen. Bus. Law §§ 340 *et seq.*, to specify whether resale price maintenance ("RPM") agreements are *per se* unlawful or subject to a rule of reason analysis.

As discussed below, following the U.S. Supreme Court's decision in *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007), vertical price restraints, such as RPM, challenged under federal antitrust law are to be evaluated under the rule of reason. The Donnelly Act does not specify whether RPM agreements are *per se* unlawful under the Act or are subject to the rule of reason. Moreover, the New York Court of Appeals has not yet ruled on this issue. Nevertheless, the New York Court of Appeals has instructed that courts should construe the Donnelly Act in light of federal precedent, unless a state policy or statute justifies a different interpretation.

This memorandum recommends against revising the Donnelly Act at this time given that: (i) there is no clear New York policy or statute in favor of a *per se* rule; (ii) it is not necessary to revise the statute to specify that the rule of reason standard should apply because that is the applicable standard under federal law; and (iii) if the New York legislature has strong concerns about RPM in a particular industry, it could consider passing legislation making RPM *per se* unlawful in that industry. The Committee also recommends reevaluating this issue if the New York Court of Appeals holds that a *per se* standard should apply to RPM in New York.

II. ANALYSIS

A. New York's Donnelly Act

The Donnelly Act provides, in part:

> Every contract, agreement, arrangement or combination whereby
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> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
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> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

> For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

N.Y. Gen. Bus. Law § 340. According to the New York Court of Appeals, New York "State antitrust law 'should generally be construed in light of Federal precedent'" because the "Donnelly Act was modelled on the Federal Sherman Act[.]" *People v. Rattenni*, 81 N.Y.2d 166, 171 (1993) (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988)); *see also WorldHomeCenter.com, Inc. v. Franke Consumer Prod., Inc.*, No. 10 CIV. 3205 BSJ, 2011 WL 2565284, at *3 (S.D.N.Y. June 22, 2011) ("Courts interpreting New York's Donnelly Act have historically relied on interpretations of the federal antitrust statute, the Sherman Act, for persuasive guidance."). The Donnelly Act may be interpreted differently than federal law "'only where State policy, differences in the statutory language or the legislative history justify such a result.'" *Id*. (quoting *Anheuser-Busch*, 71 N.Y.2d at 335). Courts have interpreted the Donnelly Act, like the Sherman Act, to "prohibit only 'unreasonable' restraints on trade[.]" *Anheuser-Busch*, 71 N.Y.2d at 333 (citations omitted).[1]

"Under New York's Donnelly Act (and the Sherman Act upon which the New York statute was based), there are two types of antitrust claims: *per se* claims and rule of reason claims." *Franke*, 2011 WL 2565284, at *3. Certain trade practices are "so pernicious to competition that they are found to be *per se* unreasonable," and, thus, presumed to be unlawful. *People v. Rattenni*, 81 N.Y.2d 166, 171 – 72 (1993) (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).[2] *Per se* unlawful conduct includes horizontal price fixing and market division. *Id*.; *see also Leegin*, 551 U.S. at 886 ("[r]estraints that are *per se* unlawful include horizontal agreements among competitors to fix prices or to divide markets[.]") (internal citation omitted).

In contrast, "[m]ost trade practices are analyzed under the 'rule of reason' standard, which requires a showing that 'under the circumstances there is an unreasonable restraint of trade.'" *Franke*, 2011 WL 2565284, at *3 (quoting *People v. Rattenni*, 81 N.Y.2d 166, 171-72 (1993)); *see also State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (explaining that "most antitrust claims are analyzed under a 'rule of reason[,]'" which "tak[es] into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect."). Under the rule of reason, courts employ a burden shifting analysis and weigh competitive factors to determine whether an alleged restraint of trade is unreasonable. First, "a plaintiff will bear 'the initial burden of

[1] Restraints on trade may be horizontal or vertical in nature. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988).

[2] *See also Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993) (conduct is *per se* unlawful "only in a limited class of cases, where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination.") (internal citation and quotation marks omitted).

showing that the challenged action has had an actual adverse effect on competition' . . . [or] 'that defendants possess the requisite market power so that their arrangement has the potential for genuine adverse effects on competition[.]'" *Glob. Reinsurance Corp.-U.S. Branch v. Equitas Ltd.*, 867 N.Y.S.2d 16 (Sup. Ct. N.Y. Cnty. 2008) (quoting *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543, 546 (2d Cir. 1993)). Next, the burden shifts to the defendant, who must offer evidence of legitimate, pro-competitive benefits of its arrangement. *Id*. (quoting *Capital Imaging*, 996 F.2d at 543). If the defendant offers such evidence, the burden shifts back to the plaintiff to demonstrate that defendant could have achieved its legitimate objectives through means that are less restrictive on competition. *Id*.

B. RPM Under Federal and New York Law

RPM agreements are typically vertical arrangements between a manufacturer and distributor to set the minimum price (*i.e.*, price floor) at which the distributor may resell the manufacturer's goods.[3] Following the U.S. Supreme Court's decision in *Leegin*, 551 U.S. 877, RPM agreements challenged under the Sherman Act are subject to a rule of reason analysis.[4]

In New York, the standard that applies to RPM agreements challenged under the Donnelly Act is less clear. The Donnelly Act is silent as to whether vertical restraints, such as RPM, are *per se* unlawful or subject to the rule of reason. In addition, the New York Court of Appeals has not addressed which standard applies to RPM challenged under the Donnelly Act. Moreover, there is a paucity of lower state court opinions that address this issue. Thus, following "*Leegin*, it is uncertain whether New York courts evaluating vertical RPM claims brought under the Donnelly Act will continue to apply the *per se* rule or will follow *Leegin* in adopting the rule of reason." *Worldhomecenter.com, Inc. v. KWC Am., Inc.*, No. 10 CIV. 7781 NRB, 2011 WL 4352390, at *3 (S.D.N.Y. Sept. 15, 2011).[5] Nevertheless, post-*Leegin*, federal courts applying New York law have concluded that the rule of reason standard applies to Donnelly Act claims based on RPM agreements, in part relying on the New York Court of Appeals' directive that courts should construe the Donnelly Act in light of federal precedent. These cases are instructive.

For example, in *Franke*, the plaintiff, an internet retailer, argued that the defendant-seller's minimum advertised price policy, which allegedly had the effect of a price floor imposed on internet retailers, constituted vertical price fixing and should be deemed a *per se* violation of

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[3] *Worldhomecenter.com, Inc. v. KWC Am., Inc.*, No. 10 CIV. 7781 NRB, 2011 WL 4352390, at *3 (S.D.N.Y. Sept. 15, 2011). "RPM" as discussed in this memorandum refers to minimum resale price maintenance. The U.S. Supreme Court has ruled that maximum resale price agreements (*i.e.*, price ceilings), are not *per se* illegal. Rather, these arrangements are subject to a rule of reason analysis. *State Oil v. Khan*, 522 U.S. 3, 16 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)). "New York courts would be likely to apply the same standard under the Donnelly Act given their history of construing the two acts in parallel." New York State Bar Association, *New York Antitrust and Consumer Protection Law* § 1.11 (3d ed. 2011).

[4] *Leegin* overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407 (1911), which held that vertical price-fixing agreements were *per se* violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

[5] Pre-*Leegin*, some New York courts applied a *per se* rule to vertical price-fixing cases. *See, e.g.*, *George C. Miller Brick Co. v. Stark Ceramics, Inc.*, 770 N.Y.S.2d 235 (N.Y. App. Div. 2003) (applying *per se* rule to RPM agreement).

the Donnelly Act. 2011 WL 2565284, at *4. The court found that the challenged conduct should be analyzed under the rule of reason, rejecting the plaintiff's argument that New York General Business Law Section 369-a (discussed *infra*) evinces a policy preference in favor of a *per se* rule and warrants departure from the rule that the Donnelly Act should be interpreted in accordance with federal precedent. *Id*. at *4-5. The U.S. District Court for the Southern District of New York reached a similar conclusion in multiple other cases. *See, e.g.*, *WorldHomeCenter.com, Inc. v. PLC Lighting, Inc.*, 851 F. Supp. 2d 494 (S.D.N.Y. 2011); *see also Bel Canto Design, Ltd. v. MSS HiFi, Inc.*, No. 11 CIV. 6353 CM, 2012 WL 2376466, *11-13 (after applying the rule of reason, the court found that the plaintiff failed to state a Sherman Act claim and, therefore, failed to state a Donnelly Act claim under the same reasoning); *Gatt Comm's, Inc. v. PMS Assocs., LLC*, 2011 WL 1044898 at *4 (S.D.N.Y. Mar. 10, 2011).

New York Attorney General RPM Enforcement. Despite the lack of New York precedent directing that RPM be analyzed under a *per se* rule or the rule of reason, or a clear New York policy or statute on this issue, enforcement action by the New York Attorney General ("NYAG") demonstrates a legitimate concern about RPM in New York. The below list provides examples of post-*Leegin* enforcement action by the NYAG.

- In 2008, the NYAG, along with the Attorneys General of Michigan and Illinois, entered into a consent decree with furniture manufacturer Herman Miller, Inc. to settle allegations of unlawful RPM. *State v. Herman Miller, Inc.*, No. 08-2977, 2008-2 Trade Cas. (CCH) P 76,454 (S.D.N.Y. Mar. 25, 2008). In that case, the State asserted that the manufacturer's alleged RPM constituted a *per se* violation of the Donnelly Act. Under the settlement, the manufacturer was required to pay $750,000 and was prohibited from engaging in minimum RPM for 30 months.

- In 2010, the NYAG filed a petition against Tempur-Pedic International, Inc. ("Tempur-Pedic") alleging that it entered into RPM agreements with retailers to prevent discounting in violation of New York General Business Law Section 369-a. In 2012, the First Department affirmed the lower court's decision denying the NYAG's petition, finding that Section 369-a does not deem RPM illegal as a matter of law. *People v. Tempur-Pedic Int'l, Inc.*, 944 N.Y.S.2d 518, 519 (N.Y. App. Div. 2012). Instead, according to the court, Section 369-a provides that contract provisions which impose minimum resale prices cannot be enforced. *Id*. In addition, the First Department found that NYAG did not establish that Tempur-Pedic had a RPM agreement and that retailers could unilaterally decide whether to acquiesce to the pricing policy. *Id*.

- In January 2016, the NYAG issued a report on the ticketing industry, in which the NYAG expressed concern about the "growing imposition of resale price floors (*i.e.* 'no sales below list price')." *See* New York State Attorney General, *Obstructed View: What's Blocking New Yorkers from Getting Tickets* at 5.[6] The NYAG report went on to explain price floors imposed by National Football League ("NFL") sports teams in connection with sales made on the teams' official ticket resale platforms. *Id*. at 32. According to the NYAG, these price floors may deceive consumers into believing that they paid market

[6] Available at https://ag.ny.gov/pdfs/Ticket_Sales_Report.pdf.

price for a ticket, when the resale price may be artificially inflated by the mandated price floor. The report implies that there is little pro-competitive benefit to minimum RPM in the ticketing context: "Overall, NYAG believes there is little to say in favor of price floors: They tend to expose the public to the full costs of the new ticket economy, while depriving the public of the benefits." *Id.*

- In November 2016, the NYAG announced a multi-state settlement with the NFL to prohibit a league-wide policy that required NFL teams to impose price floors, set at face value, on tickets that were resold on the teams' official ticket resale platforms. The settlement agreement also includes disclosure requirements for individual teams that impose their own price floors.[7]

Attempts to Deem RPM *Per Se* Unlawful Under N.Y. Gen. Bus. Law § 369-a. Some antitrust plaintiffs and practitioners have argued that RPM agreements should be deemed *per se* unlawful under the Donnelly Act based upon a separate statute, New York General Business Law Section 369-a.[8] Section 369-a provides:

> Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.

Proponents in favor of a *per se* rule based on Section 369-a have argued that it reflects a New York state policy preference that vertical price fixing should be deemed illegal, which "justifies a departure from federal precedent." *KWC*, 2011 WL 4352390, at *4 (summarizing plaintiff's argument).

However, New York and federal courts have rejected plaintiffs' attempts to employ Section 369-a to deem RPM agreements *per se* unlawful. Instead, courts have found that, while Section 369-a provides that RPM arrangements cannot be enforced, it does not deem them *per se* unlawful. In *Tempur-Pedic*, the First Department agreed with the lower court's finding that Section 369-a "does not make RPMs illegal as a matter of law." *Tempur-Pedic*, 944 N.Y.S.2d at 519. The court went on to explain that there was "nothing in the text [of 369-a] to declare those [RPM] contract provisions to be illegal or unlawful; rather the statute provides that such provisions are simply unenforceable in the courts of this state." *Id.*[9] In other words, a party to

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[7] New York Attorney General, Press Release, *A.G. Schneiderman Announces Multi-State Settlement With NFL Permanently Barring League-Wide Mandatory Ticket Price Floor* (Nov. 15, 2016), https://ag.ny.gov/press-release/ag-schneiderman-announces-multi-state-settlement-nfl-permanently-barring-league-wide.

[8] *See, e.g.*, *Franke*, 2011 WL 2565284, at *4 (stating that "Plaintiff offers an apparently novel theory to establish *per se* liability, relying on NYGBL § 369-a."); *PLC Lighting*, 851 F. Supp. 2d 494; *KWC*, 2011 WL 4352390; Jay L. Himes, *New York's Prohibition of Vertical Price-Fixing*, N.Y.L.J., Jan. 29, 2008 at 4.

[9] The lower court in *Tempur-Pedic*, in relying on the plain meaning of the unambiguous language in Section 369-a, found it unnecessary to consider the title of Section 369-a ("Price fixing prohibited") and the legislature's intent regarding criminalizing resale price restraints, contrary to the AG's urging, because "[t]here is no ambiguity in the text of General Business Law § 369-a." *People ex rel. State v. Tempur-Pedic Int'l, Inc.*, 916 N.Y.S.2d 900, 905 (Sup. Ct. N.Y. Cnty. 2011), *aff'd sub nom.* 944 N.Y.S.2d 518 (N.Y. App. Div. 2012); *see also Squadrito v.*

this type of agreement cannot successfully maintain an action to enforce the agreement in New York, but the contracting parties do not violate the law by entering into such agreements. Similarly, in *Franke*, the U.S. District Court for the Southern District of New York found that, [u]nder the plain language of the statute, contracts between supplier and seller to set prices are unenforceable, but not illegal." 2011 WL 2565284 at *5 (citing *People v. Tempur-Pedic Int'l, Inc.*, 916 N.Y.S.2d 900 (Sup. Ct. N.Y. Cty. 2011), *aff'd sub nom.* 944 N.Y.S.2d 518 (N.Y. App. Div. 2012). The court in *Franke* noted that the plaintiff in that case "offer[ed] no persuasive authority or precedent" for its argument that "§ 369-a provides a means to establish *per se* liability under the Donnelly Act" and that "[i[f the New York legislature had intended to make such contracts illegal, it plainly could have done so." *Id.* at *4-5. Further, courts have also found that there is no private right of action under Section 369-a.[10]

In light of the above, Section 369-a is not a clear statute or policy that justifies a finding that the Donnelly Act should diverge from federal precedent by specifying that RPM agreements are *per se* unlawful.

C. Other State RPM Statutes

Certain states have statutes specifying whether a *per se* rule or the rule of reason standard should apply to RPM agreements under their respective state antitrust laws.

- Maryland. In 2009, Maryland adopted the first so-called "*Leegin*-repealer" statute. The Maryland Antitrust Act now provides that minimum RPM agreements are unreasonable restraints of trade and, thus, *per se* illegal. Md. Code, Com. Law § 11-204(a) ("A person may not: (1) By contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce"); *id.* § 11-204 (b) ("a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce").[11]

- Kansas. In 2013, the Kansas legislature amended the Kansas Restraint of Trade Act to clarify that a reasonableness standard (*i.e.*, rule of reason) applies to RPM

Griebsch, 1 N.Y.2d 471, 475 (1956) ("While a title or heading may help clarify or point the meaning of an imprecise or dubious provision, it may not alter or limit the effect of unambiguous language in the body of the statute itself.").

[10] *See PLC Lighting*, 851 F. Supp. 2d at 503 (finding that Section 369-a does not "provide[] for a private right of action on [its] face" and a private right of action cannot be implied because it would be inconsistent with the legislative scheme) (citing *Carrier v. Salvation Army*, 667 N.E.2d 328, 329 (1996)). The Court explained that, because "the only references to enforcement in Article 24–A of the General Business Law, which contains both Section 369-a and 369-b, are to enforcement by the attorney general and not by private parties, the Court finds that implying a private right of action here would be inconsistent with the enforcement means chosen by the New York legislature." *Id.*; *see also*, *Costco Wholesale Corp. v. Johnson & Johnson Vision Care, Inc.*, No. 3:15-CV-734-J-20JRK, 2015 WL 9987969, at *22 (M.D. Fla. Nov. 4, 2015) (recognizing that Section 369-a does not authorize a private right of action and dismissing plaintiff's claim).

[11] *See also State of Maryland v. Johnson & Johnson Vision Care, Inc.*, No. 03C16002271 (Balt. Cty. Cir. Ct. 2016), http://www.marylandattorneygeneral.gov/News%20Documents/JJVC_COMPLAINT.pdf (bringing *per se* claim under Maryland Antitrust Act, Md. Code., Comm. Law § 11-204(a) and (b), against contact lens manufacturer for establishing minimum retail price for the sale of contact lenses).

agreements and to add a federal harmonization provision. *See* Kan. Stat. § 50-163(b) (requiring that "the Kansas restraint of trade act . . . be construed in harmony with ruling judicial interpretations of federal antitrust law by the United States [S]upreme [C]ourt"); *id*. § 50-163(c) (arrangements are not unlawful under the Act if they are "reasonable in view of all of the facts and circumstances of the particular case and do[] not contravene public welfare."). This statute has been interpreted to mean that minimum RPM agreements are not *per se* unlawful and should be analyzed under a rule of reason standard, in accordance with *Leegin*.[12]

- Utah. In 2015, Utah enacted a specific statute, entitled the Contact Lens Consumer Protection Act, that prohibits RPM in the contact lens industry. The statute provides, in part: "A contact lens manufacturer or a contact lens distributor may not: (1) take any action, by agreement, unilaterally, or otherwise, that has the effect of fixing or otherwise controlling the price that a contact lens retailer charges or advertises for contact lenses." Utah Code § 58-16a-905.1. The Utah law was passed in response to policies implemented by contact lens manufacturers to restrict contact lens retailers from discounting or selling contact lenses below a certain price.[13] 1-800-Contacts, a large online contact lens retailer, is based in Utah.

D. Recommendation

The Coordinated Conduct Committee recommends against revising the Donnelly Act to specify whether a *per se* or rule of reason standard should be applied to minimum RPM agreements for the following reasons:

First, the Donnelly Act should not be amended to specify that RPM is *per se* unlawful because there is not a clear New York policy preference or statute in favor of a *per se* rule. As discussed above, the Donnelly Act is silent and the New York Court of Appeals has not yet ruled on this issue. Moreover, Section 369-a of the New York General Business Law does not deem RPM *per se* unlawful or reflect a policy preference in favor of a *per se* standard, according to both New York and federal courts. Thus, until there is a clear ruling from the New York Court of Appeals that a *per se* rule should apply to RPM, at this time, there is not a strong reason to revise the Donnelly Act to impose a *per se* rule. Doing so would deviate from the New York Court of Appeals' instruction that the Act should be construed in accordance with federal precedent. *See Rattenni*, 81 N.Y.2d at 171; *Franke*, 2011 WL 2565284, at *3.

Second, the Donnelly Act should not be revised to specify that RPM agreements should be analyzed under the rule of reason because the New York Court of Appeals already made clear that the Donnelly Act is to be construed in accordance with federal precedent. *Rattenni*, 81

[12] *See generally* Joshua A. Ney, *The Revised KRTA: O'Brien and the Legislative Response*, 53 WASHBURN L.J. 265 (2014). The 2013 amendments to the Kansas restraint of trade act abrogated *O'Brien v. Leegin Creative Leather Prod., Inc.*, 294 Kan. 318 (2012), a post-*Leegin* Kansas Supreme Court decision, which held that minimum RPM agreements were *per se* unlawful. *O'Brien* was criticized for vacating the "reasonableness standard" framework under which certain alleged antitrust violations were reviewed for decades, thus calling into question business arrangements that were previously considered legitimate under state and federal antitrust law.

[13] *See Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 F. App'x 736, 738 (10th Cir. 2016).

N.Y.2d at 171. In practice, federal courts analyze RPM agreements under the rule of reason. There is no clear indication that New York state courts will deviate from this standard. Moreover, application of the rule of reason is a flexible concept that is not typically defined by statute. According to the U.S. Supreme Court, "[j]udicial construction of anti-trust legislation has generally been left unchanged by Congress. This is true of the Rule of Reason." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 386-87 (1956). Leaving the language of the Donnelly Act untouched will allow the courts flexibility to ensure harmonization with federal law, instead of binding New York courts to rigid statutory language, which could deviate from federal precedent in the future. Moreover, although the legislature in Kansas, for example, did enact a law specifying that the rule of reason standard should apply to certain restraints, such as RPM, it did so in response to a Kansas Supreme Court decision which held that a *per se* rule should apply. Given that the New York Court of Appeals has not made a similar ruling, it is not necessary to revise the Donnelly Act at this time.

Third, as an alternative to revising the Donnelly Act to specify how all RPM agreements should be evaluated, the New York legislature could create an industry-specific *per se* statute, similar to the Utah contact lens law, if the State has a strong interest in preventing RPM in a particular industry. Given that the NYAG brought enforcement proceedings in the past against entities for RPM, the State may have a strong interest in enacting a narrow *per se* statue relating to a particular industry (*e.g.*, ticketing or furniture industries). Under these circumstances, such a clear policy or statute against RPM for a specific industry would justify a deviation from federal antitrust precedent. *Rattenni*, 81 N.Y.2d at 171.

III. CONCLUSION

At this time, the Coordinated Conduct Committee does not recommend revising the Donnelly Act to specify that either a *per se* rule or the rule of reason standard should apply to minimum RPM agreements. As an alternative to amending the Donnelly Act at this time, New York could create an industry-specific *per se* rule if it has strong RPM concerns in a particular industry. These recommendations should be reevaluated if the New York Court of Appeals rules that minimum RPM is a *per se* violation of the Donnelly Act.