

Effectively Combating Resale Price Erosion with Resale Price and MAP Policies

What Manufacturers and Distributors Need to Know

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Introduction

This program is provided for educational purposes as a service to the Members and friends of the National Marine Distributors Association (NMDA). While issues of common interest may be addressed and various practices may be described, NMDA, in areas of competitive significance, does not advocate or require any particular approach. It encourages each attendee independently to decide what is best for its own business and act accordingly, including obtaining legal advice suited to its circumstances.

Terminology

- **Minimum Resale Price (MRP) Program:**
All Offers and Actual Selling Prices



Terminology

- **Minimum Resale Price (MRP) Program: All Offers and Actual Selling Prices**
- **Minimum Advertised Price (MAP) Programs: Some Offers, But Never Actual Selling Prices**



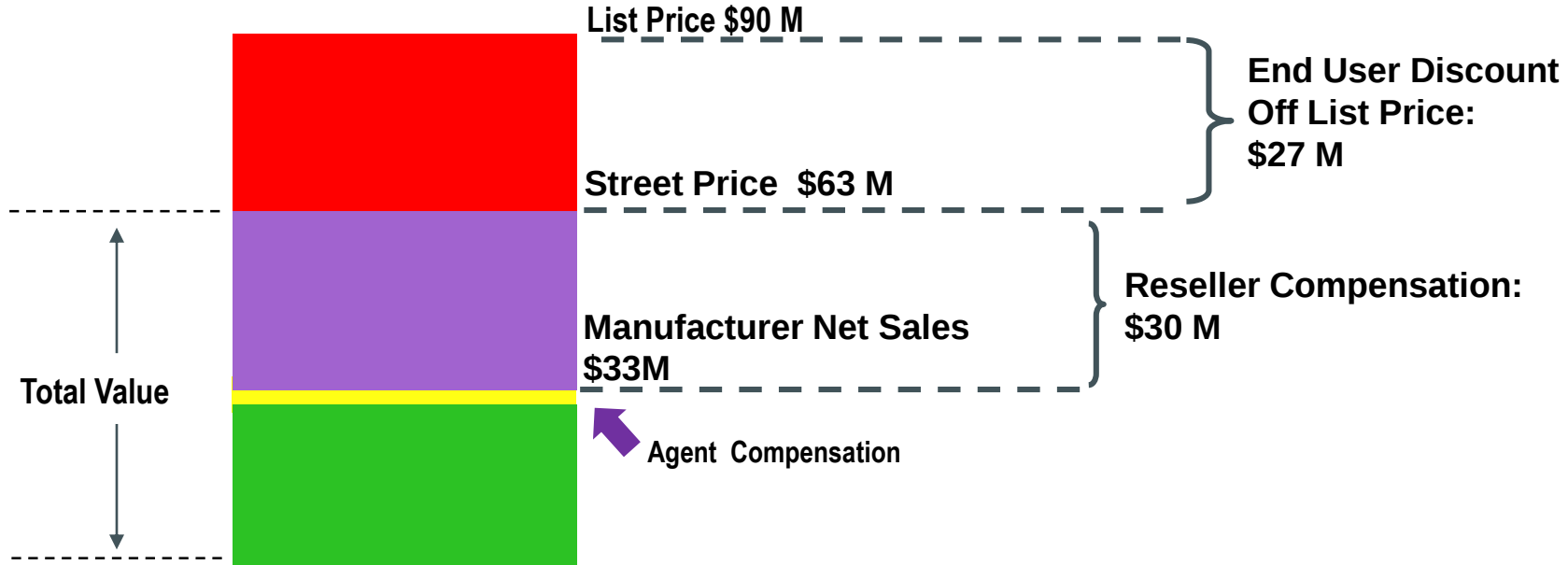
Channel Conflict



Resale Price Erosion



The Stakes: Sale of Products Through Resellers



Fighting Resale Price Erosion

- Use Agents
- Cull Discounters
- Price Discussions
- Restrict Distribution
- Selectively Raise Prices
- Direct Dealing
- Target Price Rebates
- Minimum Resale Price (MRP) Programs
- MAP Programs



Adopting a Pricing Policy: The Essential Pieces

- **Philosophy**
- **Step 1: Foundation**
- **Step 2: Diagnosis**
- **Step 3: Policy Design**
- **Step 4: Implementation and Enforcement**
- **Step 5: Analyze and Adjust**



Philosophy

- **Strong, Clear Policy with Sting**
- **Chilling Effect**
- **Commitment**



Step 1: Foundation

- **Internal Champion**
- **Senior Management Backing**
- **Team**
- **Necessary Additional Support**



Step 2: Diagnosis

- **What Exactly is the Problem?**
- **What Products are Involved?**
- **Where Does the Problem Occur?**
- **Are There Contracts or State Protection Laws?**
- **How Does Supplier Sell in Each Relevant Channel?**



Channel Configuration

- **One-Step: One Intermediary**
- **Two-Step: Two Intermediaries**
- **Other**



Step 3: Policy Design



Choice of Approach

- **MAP vs. MRP**
- **Variants: EMAP/EMRP**
- **Hybrids**
 - **MRP + MAP**
 - **MAP + Promo MAP**
 - **MRPs or MAPs that Vary**
 - **Online vs. Brick and Mortar**
 - **Stage of Buy Process**
 - **EDLP/Hi-Lo Election**



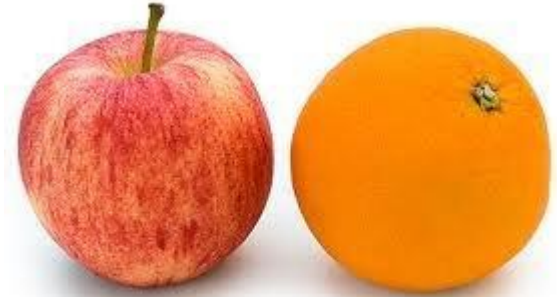
Method: By Agreement or Policy

- **MAP: Either Agreement or Policy**
- **MRP: Policy Only (in U.S.)**



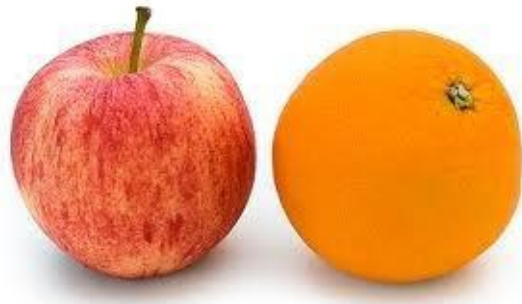
What's the Difference?

- **Agreements: Require Approval from Other Side to Implement or Change**



What's the Difference?

- **Agreements: Require Approval from Other Side to Implement or Change**
- **Policies: Announcements that Can be Adopted or Changed Anytime**



U.S. Legal Standard for Agreements

- **MAP: Rule of Reason at Federal and State Levels**



Section 1 of the Sherman Act

“Every contract, combination . . . or conspiracy, in restraint, of trade . . . , is hereby declared to be illegal.”

U.S. Legal Standard for Agreements

- **MAP: Rule of Reason at Federal and State Levels**
- **MRP:**
 - **Federal and Most States: Rule of Reason**
 - **Five States: Illegal on Its Face**



U.S. Legal Standard for Policies

Section 1 of the Sherman Act:

“Every *contract, combination . . . or conspiracy*, in restraint of trade . . ., is hereby declared to be illegal.”

U.S. Legal Standard for Policies

- **Not Covered by Antitrust Law at Federal and State Levels**
- **First Choice for MAP or MRP Programs**

Canadian Legal Standard: Agreements or Policies

- **MAP: Rule of Reason**
- **MRP: Rule of Reason**



Key Considerations

- **Brand or Market Power**
- **Limited Reach**
- **Pragmatic Design**



Penalties for Policy Violations

- Financial
- Loss of Product Access
- Combination



Careful Implementation Necessary

- **Avoid Agreement**
 - **No Contracts**
 - **No Assurances**
 - **No Probation**
- **Training**
 - **Field People**
 - **Headquarters**



Supplement Policy with Other Options

- **Selectively Raise Prices**
- **Direct Dealing**
- **Control Distribution**

Dealing with Two-Step Situation

- **Resale Price Policies:
One-Step-Down Problem**



One-Step-Down Problem

- **Conversion to Agent**
- **Authorization of Indirects**



Dealing with Two-Step Situation

- Resale Price Policies:
One-Step-Down Problem
- Identifying and Communicating
with Indirects
 - Point-of-Sale (POS) Reporting
 - Authorization Program



Policy Details

- **Timing**
- **Minimum Price**
- **Covered Products**
- **Violation Penalties**
- **Resetting the Clock**

Show Details

More Policy Details

- **Cheat-Proofing**
- **Approved Giveaways**
- **Exemptions**
- **Distribution/Online Restrictions**
- **Proper Intellectual Property Use**
- **Designation of Policy Administrator**



Additional Materials

- **Distribution Agreements or Policies**
- **FAQs**
- **Internal Guidance**
- **Violation Notices**
- **Other**



Step 4: Implementation and Enforcement

- **Sell-in**
- **Enforcement Alternatives**



Enforcement Alternatives

- Sales Force (Very Bad Idea)
- Ratting Out: Snitch Network
- Monitoring



Step 5: Analyze and Adjust

- **New Developments**
- **Enhance or Drop Existing Features**



Ongoing Challenges



Ongoing Challenges

- **Clash: Long-Term vs. Short-Term**



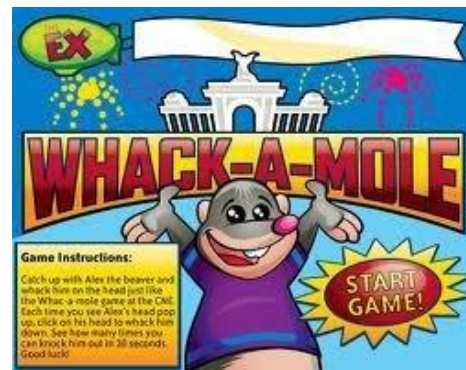
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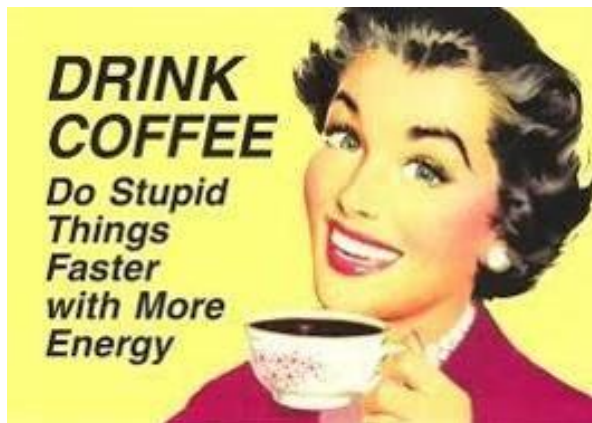
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Ongoing Challenges

- Clash: Long-Term vs. Short-Term
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- Whack-a-Mole Enforcement
- **Stupid Behavior Toward Distributors**



Stupid Behavior Toward Distributors

- **Expecting Distributors to Enforce the Manufacturer's Policies**
- **Oral Policies**
- **Vague Policies**
- **Hard to Use Do-Not-Sell Information**
- **Inconsistent or Unclear Direction**
- **Wishy-Washy Manufacturer Enforcement**

DUH!

What Distributors Can Do

- **Pass on Communications to Dealers**
- **Don't Sell Anyone on the Do-Not-Sell List**
- **Sell only to Authorized Dealers**
- **Provide Point-of-Sale (POS) Information**

Ongoing Challenges

- **Clash: Long-Term vs. Short-Term**
- **Unrealistic Expectations**
- **Whack-a-Mole Enforcement**
- **Stupid Behavior Toward Distributors**
- **The A-Word: Amazon**



Amazon: Facts of Life

- **No Cooperation with Unauthorized Reseller Problems**
- **Inventory Commingling**
- **The Algorithm Ate My Homework and Other Excuses**
- **Only the Nuclear Option Seems to Work**



Amazon: Ongoing Traps

- **Rip-Your-Face-Off Contract Provisions**
- **Brand Registry**
- **Promotional Agreements**
- **Revolving Door**
- **Hands-Off-the-Wheel**



Amazon: New Tricks

- **Margin Protection Demands**
- **Purchases from Third-Parties**
- **Amazon-Funded Discounts**
- **Intensified Amazon/Walmart Rivalry**



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- **Unrealistic Expectations**
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- **Stupid Behavior Toward Distributors**
- **The A-Word: Amazon**
- **Lack of Resolve**

Lack of Resolve: Policy Timidity

- **Vagueness**
- **May vs. Will**
- **Lack of Sting**
- **More than Four Strikes**
- **Restarting the Clock**
- **Bad Behaviors Allowed**
- **Ineffective Monitoring**
- **No Uniform Enforcement or Any Enforcement**



Ongoing Challenges

- **Clash: Long-Term vs. Short-Term**
- **Unrealistic Expectations**
- **Whack-a-Mole Enforcement**
- **Stupid Behavior Toward Distributors**
- **The A-Word: Amazon**
- **Lack of Resolve**
- **Rigidity**



Ongoing Challenges

- **Clash: Long-Term vs. Short-Term**
- **Unrealistic Expectations**
- **Whack-a-Mole Enforcement**
- **Stupid Behavior Toward Distributors**
- **The A-Word: Amazon**
- **Lack of Resolve**
- **Rigidity**
- **Myopia**

Myopia: Failure to See the Whole Problem

- **Forgetting Other Means**
- **Overlooking Business and Legal Conflicts and Friction**
- **Neglecting Distribution Realities**



Neglecting Distribution Realities

- **Uncontrolled Distribution**
- **Powerful Resellers**
- **Multi-Step Implications**

Multi-Step Implications

- Ignoring Integrated Resellers
- Inability to Track Products
- Invisibility of the Indirects



Dealer of the Year



Summing It All Up



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