

U.S. Supreme Court Overrules Per Se Ban On Resale Price Maintenance

by Chris C. Gair

The Supreme Court today issued its most important antitrust opinion of the Term, which has far-reaching implications for the manufacturing, distribution and retail industries. The opinion, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, overrules a century-old decision making minimum resale price maintenance agreements between a manufacturer and retailers unlawful *per se* under the antitrust laws. The rule announced today in *Leegin* establishes that minimum resale price maintenance agreements will now be judged for antitrust purposes, like most other restraints, under the “rule of reason,” which balances the procompetitive and anticompetitive effects of such agreements in determining whether they comport with the Sherman Act.

The case arose from a dispute between Leegin, a manufacturer of women’s fashion accessories, and Kay’s Closet, a women’s apparel store. Beginning in 1997, Leegin instituted a program under which it refused to sell to retailers that discounted its goods below suggested retail prices. Kay’s sold belts and other accessories manufactured by Leegin for several years, until Leegin discovered in 2002 that Kay’s had been marking down its line of Leegin products by twenty percent. Leegin stopped selling to the store, and Kay’s sued for violation of the Sherman Act.

The trial court refused to allow Leegin to present expert testimony that its resale price maintenance policy had procompetitive effects, benefiting consumers, citing the Supreme Court’s 1911

decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, which held that minimum resale price maintenance agreements are always unlawful. Leegin was then forced to defend on the ground that its policy was unilateral, not concerted action covered by Section 1 of the Sherman Act. The jury found in favor of Kay’s, and a \$4 million judgment was entered against Leegin. The appellate court affirmed the decision, and Leegin petitioned the Supreme Court to review the case.

The Supreme Court’s decision relied primarily on an analysis of the economic arguments regarding possible procompetitive effects of retail price maintenance policies. The Court found that there were a number of procompetitive justifications for such agreements. Resale price maintenance restrictions can stimulate inter-brand competition, a key goal of the antitrust laws, by reducing intra-brand competition, which in turn encourages retailers to invest in other services and promotional efforts that benefit consumers. It also has the potential to give consumers more options, and it can be used to prevent free-riding by discounters on the efforts of retailers who furnish additional services. Such agreements can also facilitate market entry by new firms.

The Court was careful to note, however, that vertical agreements setting minimum resale prices can also have anticompetitive effects in some settings which cannot be ignored or underestimated. The Court observed that such

agreements can be used to organize or facilitate manufacturer or retailer cartels or to forestall innovation in distribution that decreases costs.

The *per se* illegality rule of *Dr. Miles* ignored the possible procompetitive uses of vertical minimum resale price maintenance agreements. But, the Court held, the rule of *per se* illegality is only appropriate when restraints always or almost always tend to restrict competition and decrease output. The Court found that resale price maintenance agreements do not fit that description, and that instead they should be judged under the rule of reason standard. The Court decided *Leegin* by a 5-4 majority.

Clients should be aware that *Leegin* does not approve all programs that could earlier have come under the *Dr. Miles* rule regarding resale price maintenance agreements, including minimum advertised pricing (MAP) programs; it holds instead that they are judged under a different legal standard. Before establishing a resale price maintenance or MAP policy, firms must carefully consider the circumstances to determine whether a court could later find that the agreement violates the rule of reason. The factors to be considered, among others, include the number of manufacturers in an industry adopting such a policy, whether the restraint is initiated by retailers or manufacturers, and the market power of the relevant companies.

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