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CASE NOTE:

Leegin and the Future of Resale Price Maintenance

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Leegin and the Future of Resale Price Maintenance

By Tad Lipsky and Alexi Maltas*

On June 28, the U.S. Supreme Court issued its opinion in *Leegin Creative Leather Products, Inc. v. PSKS, Inc*.[1] The Court in *Leegin* overruled a 96-year-old precedent, and held that minimum resale price agreements should now be judged based on their reasonableness, rather than being deemed *per se* unlawful. The Court's opinion changes the legal landscape under federal law for evaluating the legality of minimum resale price agreements. The degree to which state antitrust laws follow suit, however, remains to be seen.

Summary of *Leegin*

On its facts, *Leegin* is a common resale price maintenance case in a terminated dealer context. Plaintiff PSKS operates a women's apparel store in Texas. Defendant Leegin manufactures and distributes leather goods and accessories sold under the brand name "Brighton." To promote better customer service, Leegin established a minimum resale price policy pursuant to which Leegin refused to sell to retailers that sold Brighton products below Leegin's suggested prices. When Leegin discovered that PSKS's store was discounting its Brighton products below its suggested prices, Leegin stopped selling to the store.

PSKS filed a federal lawsuit, alleging that Leegin's agreements with retailers to charge prices at or above levels set by Leegin violated federal antitrust law. The trial court found Leegin's minimum resale price policies *per se* illegal under the rule established by the Supreme Court decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[2] The Fifth Circuit agreed.[3]

In an opinion authored by Justice Kennedy, the Supreme Court overruled *Dr. Miles* and reversed the decision below by a 5-4 vote. The Court warned that *per se* rules are to be reserved for restraints that have "'manifestly anticompetitive' effects, … and 'lack … any redeeming virtue,'" and held that minimum resale price agreements are not so clearly anticompetitive that they should be deemed *per se* illegal.[4] The Court found that "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."[5] The Court also found that, like other vertical restraints recently liberated from the *per se* rule, "minimum resale price

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[1] No. 06-480, 551 U.S. __ (2007).

[2] 220 U.S. 373 (1911).

[3] 171 Fed. Appx. 464 (2006) (*per curiam*).

[4] *Id.*, (quotes omitted).

[5] *Leegin*, Slip Op. at 9.

maintenance can stimulate interbrand competition."[6] The Court acknowledged that such agreements can also be anticompetitive, but held that minimum resale price agreements can have sufficient procompetitive effect that they should be judged on their reasonableness.[7]

Navigating Resale Price Agreements After *Leegin*

The opinions in *Leegin* offer some guidance on both attacking and defending minimum resale price policies under the new rule of reason standard.

1. Attacking Minimum Resale Price Policies After *Leegin*

First, the Justices suggested that courts will still invalidate resale price maintenance in cases involving a dealer or manufacturer cartel, (which the Court says still "is and ought to be" *per se* illegal[8]). Indeed, the Court noted that the prevalence of minimum resale price maintenance policies may be "useful evidence" that a cartel exists.[9] Second, for purely vertical cases, the Court recognized that, if either level of the distribution chain had market power, the potential for potential anticompetitive effects increases.[10] Third, the Court pointed to the source of the resale price agreement as an appropriate inquiry. Where the minimum resale price policy originates from a retailer, rather than the supplier, that may be an indication of a dominant retailer's efforts to maintain resale prices for anticompetitive purposes.

The Court also invited further development of rule of reason analysis in this context, "to establish the litigation structure … to provide more guidance to businesses," and even to "devise rules over time for offering proof, or even presumptions where justified."[11] The Court, however, declined to establish its own presumptions, leaving it to lower courts to create new analytic rules.

2. Defending Minimum Resale Price Policies After *Leegin*

Defendants can defend any rule of reason case by rebutting the plaintiffs' proof of anticompetitive effects, but the Court in *Leegin* highlighted some particular pro-competitive justifications applicable to minimum resale price policies.

The Court noted that minimum resale price agreements can prevent discounting retailers from free riding on the service provided by other retailers.[12] This holds particular interest for manufacturers like Leegin that seek to promote top quality service for their products. The Court also pointed to the possibility that minimum price agreements will

[6] *Id.* at 10.
[7] *Id.* at 28.
[8] *Id.* at 13.
[9] *Id.* at 13.
[10] *Id.* at 14, 18.
[11] *Id.* at 19.
[12] *Id.* at 10-11.

facilitate "market entry for new firms and brands" and increase interbrand competition.[13] Likewise, they may "encourage[e] retailers to invest in tangible or intangible services or promotional efforts" and give consumers "more options" on the spectrum of price-service mix.[14] Finally, such agreements can encourage stocking of adequate inventories in the face of uncertain demand.[15]

State Laws in the Wake of *Leegin*

A less-appreciated but perhaps equally significant issue for every business engaged in distribution and retailing concerns the future treatment of minimum resale price agreements under state antitrust law. State antitrust laws often follow federal law, but some states have shown a willingness in the past to step out on their own in the face of Supreme Court precedent with which they disagree. The most striking recent example is provided by the over twenty states that have "repealed" the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) on indirect purchaser standing, either through legislative action or judicial decision. This state trend to a large extent prevented *Illinois Brick* from achieving its intended purpose of denying indirect purchasers an opportunity to assert treble-damage claims.

And, indeed, in *Leegin*, thirty-seven states filed an *amicus curiae* brief urging the Court to uphold *Dr. Miles*. The issue of minimum resale price agreements is clearly on the radar screens of state Attorneys General, and some may call for their state legislatures and courts to retain the *per se* standard. It remains to be seen whether all states will follow *Leegin* or whether some will choose to retain (or establish) a *per se* rule under state law.

If any significant number of states in fact refuses to follow *Leegin*, the result may be a patchwork of laws on vertical resale price maintenance. Manufacturers who choose to establish minimum resale price policies in the wake of *Leegin* will have to keep a close eye on the state legislatures and courts. Conceivably, for national and global businesses, such a patchwork result could blunt or even eliminate the impact of *Leegin*.

[13] *Id.* at 11.
[14] *Id.* at 10.
[15] *Id*. at 10-12.