

Supreme Court Holds Minimum Resale Price Maintenance No Longer Per Se Illegal

06/29/07

Breaking Developments In Business Law

After 96 years, a venerable legal precedent has been overruled. On June 28, 2007, the Supreme Court directly overruled the rule established in 1911 in a case known as *Dr. Miles*, which made resale price maintenance almost automatically illegal. In *Leegin Creative Leather Products, Inc. v. Kay's Kloset*, a narrow majority of the Court held that the general standard of antitrust liability, the "rule of reason," which is evaluated on a factual case-by-case basis, applies to such cases.

In *Leegin*, defendant Leegin manufactured branded handbags and accessories that it sold to a number of retailers, including Kay's Kloset. Kay's Kloset refused to comply with Leegin's "Brighton Retail Pricing and Promotion Policy" that prohibited discounting prices of their goods. Leegin then refused to sell to Kay's Kloset. PSKS, parent company of Kay's Kloset, sued Leegin for antitrust violations and was awarded \$3.6 million in trebled damages. On appeal, the Supreme Court changed nearly a century of antitrust law.

Under the Supreme Court's 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons*, mandatory minimum price agreements between manufacturers and distributors were per se illegal. The defendant in *Leegin* argued that this rule was based on outdated economics. It contended that a better legal analysis would be the "rule of reason," under which price minimums should be held illegal only in cases where they could be shown to be anticompetitive. Both the District Court and Fifth Circuit Court of Appeals rejected these arguments. These courts felt compelled to follow the rule in the *Dr. Miles* case, under which the defendant's practices were illegal regardless of whether they were shown to be anticompetitive.

In a 5 to 4 opinion by Justice Kennedy, the Supreme Court reversed the Fifth Circuit, holding that challenges to vertical price restraints would be judged by the rule-of-reason analysis. In reaching its decision, the Court noted that it had abandoned the rule of per se illegality for other vertical restraints a manufacturer imposes on its distributors, and that respected economic analysts have concluded that vertical price restraints can have procompetitive effects. The Court concluded that the reasons upon which *Dr. Miles* relied do not justify a per se rule.

Leegin has direct and immediate impact for manufacturers and retailers. Now, a manufacturer may openly negotiate with a retailer to set minimum retail prices for its goods. However, to avoid legal exposure, the manufacturer must consider all the circumstances surrounding the

restraint to ensure that it does not unreasonably restrict competition. Such circumstances may include the number of manufacturers in a given industry who are using vertical price restraints; the source of the restraint, i.e., from a cartel-like group or from an individual company acting independently; and, the manufacturer's or retailer's market power. Vertical minimum price restraints remain unlawful when used to facilitate a horizontal agreement among manufacturers or retailers.

Businesses must continue to be vigilant to ensure pricing policies do not unreasonably diminish competition. Minimum resale price maintenance can still be unlawful under a lesser standard of liability, the rule of reason, and it is still per se unlawful in some other jurisdictions (i.e., Canada). Also, wholly intrastate matters may be covered by state competition laws that may still consider minimum resale price maintenance per se illegal and which may have a stronger consumer protection orientation.

Lane Powell antitrust lawyers are fully familiar with the court's decision. Contact us if you have questions regarding the decision or other resale price issues.

206.223.7000 Seattle
503.778.2100 Portland
businesslaw@lanepowell.com
www.lanepowell.com

We provide *Business Connections* as a service to our clients, colleagues and friends. It is intended to be a source of general information, not an opinion or legal advice on any specific situation, and does not create an attorney-client relationship with our readers. If you would like more information regarding whether we may assist you in any particular matter, please contact one of our lawyers, using care not to provide us any confidential information until we have notified you in writing that there are no conflicts of interest and that we have agreed to represent you on the specific matter that is the subject of your inquiry.

Copyright © 2007 [Lane Powell PC](#)
Seattle - Portland - Anchorage - Olympia - Tacoma - London