

***Leegin Creative Leather Products, Inc. v. PSKS, Inc.:*  
Supreme Court Abrogates Century-Old *Per Se* Rule Against Resale Price Maintenance**

**June 29, 2007**

Overturing a century-old precedent, the Supreme Court yesterday laid to rest—at least for federal antitrust purposes—the last *per se* prohibition on vertical restraints. The 5-to-4 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* holds that resale price maintenance agreements should be evaluated under the rule of reason standard rather than the *per se* standard that has applied since the Court’s decision 96 years ago in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* The rule of reason standard, unlike the *per se* standard, requires courts to consider both the procompetitive and anticompetitive effects of challenged conduct.

The *Leegin* case involved a challenge to a policy of Leegin Creative Leather Products, a manufacturer of leather goods and accessories, prohibiting retailers from selling Leegin products below Leegin’s suggested retail prices. A terminated Leegin retailer, PSKS, sued, alleging that Leegin had violated the antitrust laws by agreeing with its retailers to offer them certain incentives in exchange for their agreement to sell at or above suggested retail prices. The United States District Court for the Eastern District of Texas, compelled by *Dr. Miles*, found the agreements *per se* illegal and entered judgment against Leegin in the amount of nearly \$4 million. The Court of Appeals for the Fifth Circuit affirmed, and the Supreme Court granted certiorari.

The Supreme Court reversed, holding that Leegin’s resale price maintenance policies should be analyzed under the rule of reason, rather than the *per se* rule. The *per se* rule is reserved for conduct that “always or almost always tends to restrict competition and decrease output.” The Court concluded that there were sufficient reasons to believe that resale price maintenance could be procompetitive, and therefore a *per se* prohibition was inappropriate.

Minimum vertical price restraints often are justified by procompetitive rationales, the Court explained. For example, a single manufacturer’s enforcement of minimum resale prices may be designed to allow retailers of its products to invest in “tangible or intangible services or promotional efforts that aid the manufacturer’s position as against rival manufacturers.” Consumers also have more options, being able to choose “among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.” In other words, resale price maintenance increases interbrand competition by restricting intrabrand competition.

The Court acknowledged that in some circumstances resale price maintenance may pose a threat to competition, such as by facilitating a manufacturer cartel. The restraints may assist the cartel in determining whether a manufacturer is selling below the cartel's agreed-upon prices where retail prices are easier to track than wholesale prices. Resale price maintenance "also might be used to organize cartels at the retailer level." Colluding retailers may solicit a manufacturer to enforce the price levels agreed upon by the retailer cartel. With these concerns in mind, the Court held that resale price maintenance agreements would be evaluated under the rule of reason standard, which requires courts to balance the anticompetitive effects of conduct against the conduct's procompetitive benefits.

To differentiate between procompetitive and anticompetitive resale price maintenance, the Court advised lower courts to consider the number of manufacturers employing the practice, the restraint's source (i.e., whether the restraint was initiated by the retailers or the manufacturer), and the manufacturer's or retailer's market power. Minimum retail price restraints imposed by multiple competing manufacturers in an oligopolistic market at the behest of a retailer cartel would pose a serious threat to competition. A similar restraint imposed by a single manufacturer of its own accord in a crowded market likely would not be troublesome.

Despite the *per se* rule against retail price maintenance, manufacturers have long been able to wield substantial control over retail prices. Since the Supreme Court's 1919 decision in *United States v. Colgate*, "a manufacturer [could] announce suggested resale prices and refuse to deal with distributors who do not follow them." Similarly, manufacturers have been able to use minimum advertised price programs and similar means to influence retail prices. Post-*Leegin*, however, manufacturers may be able to go one step further and, at least in some circumstances, enter into explicit resale price maintenance agreements with distributors. Whether the restraint will withstand antitrust scrutiny will depend on whether factors are present, such as those described above, that differentiate an anticompetitive restraint from a procompetitive one.

In addition, there are state laws to consider. *Leegin* overturned only the federal *per se* rule against vertical minimum price restraints. Many states have held that resale price maintenance is a *per se* violation of their antitrust laws. It remains to be seen whether those states that currently prohibit resale price maintenance *per se* will now follow the *Leegin* Court's lead in changing the standard under which resale price maintenance agreements are evaluated.

Because of the continuing threat of state antitrust enforcement, the more practical consequence of the decision may not be to encourage manufacturers to implement explicit resale price maintenance programs, but rather to discourage plaintiffs who might previously have been tempted to challenge *Colgate* and minimum advertised price programs on the theory that, despite appearances, such programs were "really" thinly disguised resale price maintenance agreements.

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