Supreme Court Agrees to Hear Two Antitrust Cases
Has Opportunity to Clarify Resale Price Maintenance and Implied Immunity Doctrines

Continuing a trend of renewed focus on antitrust law, the Supreme Court recently agreed to hear two cases that should clarify the ability of a manufacturer to control the prices at which its products are resold in the distribution chain and the extent to which conduct subject to industry regulation is impliedly immune from antitrust law.

Leegin – Revisiting Minimum Resale Price Maintenance

In *Leegin Creative Leather Products v. PSKS, Inc.*, the Court has agreed to reconsider the question of whether vertical minimum resale price maintenance agreements should be deemed *per se* illegal under Section 1 of the Sherman Act. Leegin, which manufactures the Brighton line of women’s leather fashion accessories, adopted a pricing policy under which it would do business only with retailers that followed its suggested retail prices. When Leegin discovered that PSKS was discounting the Brighton products, it suspended product shipments to PSKS, who, in turn, filed suit, alleging that Leegin’s pricing policy was a *per se* illegal vertical resale price maintenance agreement.

At trial, the district court excluded Leegin’s proffered evidence, including the testimony of an expert economist, that its pricing policy was procompetitive because it encouraged its dealers to provide enhanced services in selling the Brighton goods and facilitated broader, more efficient distribution, thereby promoting interbrand competition. Without that evidence, the jury found Leegin’s policy illegal *per se*, and awarded PSKS $3.6 million in damages.

On appeal, the Fifth Circuit was sympathetic to Leegin’s claim that the program enhanced competition, but rejected it as a matter of law. The Fifth Circuit ruled that it was bound by the Supreme Court’s 1911 *Dr. Miles* decision, which held that minimum resale price maintenance agreements between manufacturers and dealers are *per se* illegal under the Sherman Act. The *Dr. Miles* decision has been the subject of considerable academic debate, but has never been explicitly overturned. The petitioners in the Leegin case expressly invite the Supreme Court to do so now, in light of what they assert to be the weight of modern economic theory.

Regardless of the outcome, *Leegin* should provide additional clarity for manufacturers concerning how their distribution practices will be treated under the antitrust laws. Under current law, vertical non-price restrictions (such as exclusive territories) and maximum resale price maintenance agreements are subject to the rule of reason, and are permitted when the procompetitive impact on interbrand competition outweighs any reduction in intrabrand competition among retailers selling the manufacturer’s products. Depending on how the
Supreme Court addresses *Dr. Miles*, manufacturers may be allowed to offer evidence of procompetitive effects to justify challenged minimum price maintenance agreements.

**Credit Suisse – Implied Immunity from Antitrust Law**

In *Credit Suisse First Boston v. Billing*, the Court will explore the extent to which conduct that is subject to federal securities regulation is impliedly immune from the antitrust laws. The plaintiffs, who purchased initial public offerings of high technology stocks in the late 1990s, filed multiple class actions against major investment banks alleging a conspiracy to manipulate the aftermarket prices of those stocks. The plaintiffs alleged that investment banks conspired to manipulate the Initial Public Offering market by requiring would-be purchasers of highly desired stock offerings to commit to buy less attractive securities from the same underwriters (“tie-in”) or to buy additional quantities of the same stock at higher, aftermarket prices (“laddering”). The plaintiffs also allege that the banks solicited and shared information about actual IPO purchases to facilitate enforcement of the tie-in and laddering agreements. The challenged practices have been investigated by the Securities and Exchange Commission, leading to multiple civil settlements, and are the subject of parallel class actions alleging violations of the federal securities laws.

The investment banks contend that the underwriting process, which admittedly included forming syndicates to buy shares from the offeror for resale and jointly soliciting information from prospective IPO purchasers, is subject to pervasive regulation under the securities laws and, therefore, is impliedly immune from antitrust liability.

The most notable facet of the case is that, after clashing over the appropriate standard at the district court, the SEC and Department of Justice filed a joint *amicus* brief urging the Court to grant *certiorari*. The securities and antitrust regulators criticized both the district court (which found immunity) and the Second Circuit (which did not) and have suggested a new standard for analyzing implied immunity arguments on a motion to dismiss: to state a claim, a plaintiff must set forth allegations sufficient to support a reasonably grounded expectation that the plaintiff’s claims do not rest on collaborative activities that are either permitted under the securities laws or are inextricably intertwined with such permissible activities. Whether the Court adopts this or a different standard, *Credit Suisse* should allow companies operating in regulated industries to better understand how they can operate without the specter of private treble damages antitrust actions.

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