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Supreme Court Overturns Age-Old Precedent: Minimum Resale Price Agreements Are No Longer Per Se Illegal

In a landmark ruling that may cause more questions than it answered, the U.S. Supreme Court has overruled a nearly 100 year old precedent and held that minimum resale price agreements are now to be judged according to the rule of reason and are no longer per se illegal. The decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* may have a significant and immediate impact on pricing programs in every market and for every type of product.

The case came before the court on the petition of Leegin Creative Leather Products, Inc., a manufacturer of women's accessories. It had in place a program that offered retailers special incentives *if* they pledged to comply with Leegin's minimum pricing schedules. One of Leegin's retailers, PSKS, refused to comply with the pricing schedules, and Leegin terminated PSKS's retail contract. PSKS then filed suit, alleging that Leegin violated Section 1 of the Sherman Act by fixing minimum resale prices through agreements with its retailers.

At trial, Leegin sought to introduce expert testimony demonstrating the procompetitive benefits of its pricing policy. The trial court excluded the expert's testimony, however, because under *Dr. Miles Medical Company v. John D. Park & Sons, Company*, 220 U.S. 373 (1911), minimum resale pricing agreements were per se illegal and no amount of procompetitive justification could convert the resale pricing program into a legal program.

On appeal, the Fifth Circuit, bound by Supreme Court precedent in *Dr. Miles*, held that the trial court did not abuse its discretion in excluding the expert's testimony on the procompetitive nature of the agreements and upheld the judgment. The Supreme Court granted certiorari to consider whether minimum resale price agreements should remain per se illegal.

Writing for a five justice majority, Justice Kennedy began his analysis by reviewing why the court in *Dr. Miles* held that minimum resale price agreements were per se illegal. According to Justice Kennedy, *Dr. Miles* was based on the common law at the time and on now outdated economic thinking. Justice Kennedy then opined that because the Sherman Act was a common law statute that needed to evolve, the state of the common law and economic theory at the time *Dr. Miles* was decided

should have no bearing on whether resale price agreements should still be per se illegal. Accordingly, the majority felt it necessary to reexamine whether minimum resale price agreements should still be per se illegal under today's economic realities.

In reviewing the economic impact of resale price agreements, Justice Kennedy relied on economic treatises discussing both the possible procompetitive and anticompetitive aspects of these types of agreements. Kennedy observed that resale price agreements can protect interbrand competition by eliminating intrabrand price competition, protect against free riders, and may encourage retailers to invest in selling the products because they would be guaranteed a minimum return on investment. Conversely, Justice Kennedy observed that resale price agreements can be used to set artificially high prices, can be used by cartels to police and enforce price fixing agreements, and can also be used to hamper innovation or to prevent retailers from selling a rival's or new entrant's products.

Because of the potential procompetitive aspects of vertical resale price maintenance agreements, the Court overruled *Dr. Miles*. Accordingly, all vertical relationships must be reviewed under the rule of reason test. Only certain horizontal agreements remain subject to the per se rule.

In light of this decision, manufacturers and retailers may move to enact resale pricing programs or modify programs already in place. But if they do, they must do so carefully. Some states vow to follow federal law so long as federal judicial decisions are consistent with protecting competition and protecting consumers within the state. Texas takes such an approach. Similarly, Illinois law specifically states that federal decisions are not binding if the federal decision is not well reasoned. On the other hand, Florida and Massachusetts expressly defer to federal law and judicial decisions in determining the scope of their state's antitrust laws, and New York generally defers to federal judicial decisions in interpreting the scope of its state's antitrust laws.

Greenberg Traurig's Antitrust & Trade Regulation team can help clients determine whether a current or proposed pricing program would survive a challenge under the rule of reason test. Moreover, with offices across the country, Greenberg Traurig's team can also help clients maximize the strength of their current or proposed pricing programs under the new federal law, while also remaining in compliance with state laws that may remain unchanged.

This *GT Alert* was written by **Greg Casas** in the Houston office. Questions regarding the subject matter of this *Alert* can be directed to Mr. Casas at 713.374.3561 (casasg@gtlaw.com) or any member of the Antitrust & Trade Regulation Practice Group in the GT offices listed below.

Albany
518.689.1400

Amsterdam
+ 31 20 301 7300

Atlanta
678.553.2100

Boca Raton
561.955.7600

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813.318.5700

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703.749.1300

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