

Carlton Fields Newsflash

Supreme Court Says Resale Price Maintenance Is No Longer *per se* Illegal

Since the Supreme Court's 1911 decision in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), it has been *per se* illegal under Section 1 of the Sherman Act for a manufacturer to agree with its distributor to set the minimum price the distributor could charge for the manufacturer's goods. No more. In Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. ____ (June 28, 2007), the Supreme Court overruled this long-standing rule and held that resale price maintenance is to be judged by the rule of reason.

Leegin, a manufacturer of leather goods, refused to sell its products to retailers unless they agreed to charge its suggested retail prices. One of the retailers sued Leegin, alleging that the pricing scheme constituted *per se* unlawful minimum resale price maintenance.

In rejecting the retailer's argument, the Supreme Court emphasized that resorting to the *per se* rule must be confined to restraints of trade that would always, or almost always, tend to restrict competition and decrease output. The Court stated that the rule of reason is the "accepted standard" for evaluating violations of Section 1. Under the rule of reason, the fact finder weighs all of the circumstances of the case to decide whether a restraint should be prohibited, including the restraint's history, nature, and effect.

After discussing the procompetitive and anticompetitive aspects of resale price maintenance, the Court concluded that resale price maintenance was not the type of restraint that always, or almost always, tended to restrict competition, and should therefore not be subject to the *per se* rule. The Court noted that resale price maintenance:

- Prevents free riding on retailers who offer services to consumers, who, after taking advantage of these services, buy the product elsewhere;
- Facilitates market entry for new firms;
- Enhances interbrand competition among manufacturers selling the same product;
- Gives consumers more options to choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between; and
- Encourages retailers to invest in services or promotional efforts to aid the manufacturer's competitive position.

As a result of Leegin, all vertical restraints, whether price-related or not, are to be judged according to the rule of reason. This decision will have enormous implications for manufacturers and suppliers who wish to standardize pricing in their distribution chains.



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