

CLIENT ALERT

Practical Considerations Arising From Supreme Court's *Leegin* Decision Overturning *Per Se* Treatment of Minimum Resale Price Maintenance Agreements

Jun.28.2007

Today, the Supreme Court overturned nearly a hundred years of antitrust precedent in a groundbreaking 5-4 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* The decision overturned *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), which made it *per se* illegal for a manufacturer and its distributor to agree on a minimum price at which the distributor may resell the manufacturer's goods. *Dr. Miles's* demise completes a long series of Court decisions loosening restrictions on manufacturers' ability to structure and discipline their distribution networks as they see fit, including 1977's *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, and 1997's *State Oil v. Khan*, 522 U.S. 3 (abolishing the treatment of nonprice vertical restraints and maximum RPM agreements, respectively, as *per se* illegal).

The majority stressed that the rule of reason is the accepted standard for determining whether agreements violate Section 1 of the Sherman Act, and that *per se* rules should be reserved only for those agreements that always, or almost always, would be found unreasonable after a full rule of reason analysis. The majority opinion noted that "the economic literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance." As the opinion observes, the practice can stimulate interbrand competition by eliminating wasteful intrabrand competition – eliminating the opportunity for free-riding distributors who invest little to support the manufacturer's brand and use the savings to undercut distributors who have invested in brand development. The majority cited recent economic analysis suggesting that by doing so, minimum RPM policies can also encourage new manufacturers to enter the market and increase the services competing brands offer to their customers through retailers.

Leegin's treatment of minimum RPM is not entirely adoring. The opinion acknowledges that such policies may facilitate horizontal cartels among manufacturers, or among retailers, and that dominant manufacturers or retailers might use the policies to squeeze out rivals. Overall, the Court did not find that these risks were severe enough to warrant treating minimum RPM as illegal *per se*, since this treatment is reserved for practices, like horizontal price fixing, that "always or almost always tend to restrict competition and decrease output."

So, minimum RPM agreements have moved out of the forbidden category, but caution is still warranted, as *Leegin* is by no means a rule of *per se* legality. Before significantly altering pricing policies to take advantage of the Supreme Court's new thinking, a manufacturer should consult with counsel and consider, among other issues, the following:

- Would a new approach to RPM be beneficial? Can costly unilateral MAP or MSP programs be abandoned and replaced with a more straightforward agreement? Would the existing distribution structure benefit from a brand new pricing policy where none has been implemented before?
- Would an RPM scheme have real and demonstrable procompetitive effects for the brand? Will it result in bigger investments in marketing, additional services for consumers, or better brand visibility?

- What percentage of the industry will be likely to adopt RPM agreements? *Leegin* suggests that the broader the industry coverage, the greater the risk.

Finally, it is worth recalling that 37 state attorneys' general opposed this outcome, and at least some of those states take the view that their state antitrust laws do not have to be interpreted in harmony with the Sherman Act. Whether that proves to be a real barrier to broad implementation of *Leegin* remains to be seen.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Wm. Randolph Smith

Partner – Washington, D.C.

Phone: +1 202.624.2700

Email: wrsmith@crowell.com

Ryan C. Tisch

Partner – Washington, D.C.

Phone: +1 202.624.2674

Email: rtisch@crowell.com