Crowell

CLIENT ALERT

"Toto – We Can't Be In Kansas": Kansas Supreme Court Scuttles Rule of Reason for Resale Price Agreements Under State Law

May 7, 2012

UPDATE NOTE: On April 16, 2013, the Kansas legislature reversed the decision discussed below, and adopted a "reasonableness" standard for analyzing vertical price agreements.

On May 4, 2012, Kansas joined the growing trend among states to limit the distribution flexibility that had been anticipated would flow from the 2007 U.S. Supreme Court decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877 (2007). In a far reaching and potentially disruptive opinion, the Supreme Court of the State of Kansas in *O'Brien v. Leegin Creative Leather Products, Inc.*, No. 101,000 (May 4, 2012) held that vertical resale price agreements, whether purely vertical or in a dual distribution setting, are *per se* illegal under the Kansas Restraint of Trade Act. While explicitly acknowledging that both types of agreements would be analyzed under the "rule of reason" at the federal level, the Kansas Supreme Court rejected the applicability of federal antitrust jurisprudence to claims brought under the Kansas antitrust statute, K.S.A. 50-101, 102, 112.

The Kansas Supreme Court overturned a state district court's decision that had granted summary judgment to Brighton Collectibles, a unit of Leegin Creative Leather Products Inc., in a state antitrust suit brought against it by a class of consumers alleging that Brighton's pricing policy for retailers constituted price-fixing under state antitrust laws. The Kansas Supreme Court not only applied a *per* se standard to the resale price agreements, but also established a lower bar for "antitrust injury" and thus standing by consumers to assert the vertical price fixing claims, holding that the lower court set the bar too high by requiring plaintiff to present "concrete" evidence that she had paid higher prices as a result of the Brighton pricing policy.

Starting in 1997, Brighton provided its retailers with suggested pricing guidelines, asking stores to sell their products for a little more than twice the wholesale value. For at least a year, the company required all of its retailers to initial an acknowledgment that sales below its suggested retail price could be grounds for termination as an authorized retailer.

The Kansas high court held that the Kansas antitrust statute forbids all vertical and horizontal price-fixing by two or more persons or between persons. The court explained that the Kansas antitrust statute does not differentiate between vertical and horizontal price-fixing, or outline a particular approach to a dual-distribution situation. The court noted that plaintiffs alleged both vertical and horizontal price-fixing, and they are free to pursue the alternate theories as long as they are supported by the evidence.

Further, the Kansas Supreme Court observed that the Kansas antitrust statute prohibits "combinations" and "arrangements" to fix prices, conduct that the Court's opinion suggests is something short of an actual agreement, but leaves unanswered precisely how the lines should be drawn. But, even a "combination" must be "by two or more persons" and an "arrangement" must be "between persons." Both requirements demand something more than merely a unilateral pricing policy adopted by a wholesale supplier, and thus the freedom to establish unilateral pricing policies under *U.S. v. Colgate*, 250 U.S. 300 (1919), still exists, even in Kansas. The Kansas Supreme Court looked to *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763, 768 (1984), to determine what evidence, short of an express agreement, qualifies as more than merely unilateral behavior.

The Kansas high court's decision reflects continuing state antipathy to the 2007 *Leegin* decision, continuing the application of *per se* treatment to the very same vertical agreements that the *Leegin* court declared should be assessed only under the rule of reason. Enforcement actions under state law in New York and California, coupled with the passage of *Leegin* repealers, such as the one enacted by the State of Maryland, Md. Code Ann., Com. Law. § 11-204(a)(1) (2009), have effectively eviscerated the U.S. Supreme Court's *Leegin* decision as a viable basis for a national distributor seeking to use vertical price agreements. Despite its vintage, *Colgate* is looking more and more like the only effective way for manufacturers to control pricing downstream.

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