

Supreme Court Rules Minimum Resale Price Maintenance Is Not Per Se Illegal

Reversing century-old precedent, on June 28, 2007, the Supreme Court ruled in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, that agreements between a manufacturer and a reseller to set the minimum price for which the manufacturer's goods could be sold (resale price maintenance), are no longer per se illegal, and that all vertical price restraints should be judged by the rule of reason. Under the rule of reason, courts weigh the evidence to determine whether or not an agreement's procompetitive effects outweigh any anticompetitive effects that are harmful to consumers.

In *Leegin*, a retailer brought an antitrust action against Leegin, a manufacturer of leather goods, after Leegin terminated its relationship with the retailer for selling products at a significant discount from Leegin's suggested retail prices. The district court held that Leegin's pricing and promotion policy fixed a minimum resale price and therefore was prohibited under federal antitrust law.

In overturning established precedent strictly prohibiting minimum resale price maintenance, the Supreme Court found that minimum resale price maintenance may have significant procompetitive effects and therefore should not be automatically condemned. The Court pointed to two ways in resale price maintenance could benefit consumers by promoting competition among brand manufacturers. First, by guaranteeing a certain margin for all participating retailers, setting a minimum resale price gives resellers an incentive to promote a brand and its reputation without risk that their efforts would be undermined by resellers who free ride by engaging in limited promotion. Second, the Court stated that minimum resale price agreements may encourage new brands to enter a market by increasing the incentives available to resellers. Importantly, the Court also pointed to circumstances where minimum resale price maintenance would be anti-competitive, such as when a manufacturer or reseller has market power or where resale maintenance policies are adopted by several competing manufacturers and may evidence cartel behavior.

In the wake of *Leegin*, lower courts will apply the rule of reason in federal antitrust cases, but it may take years for clear trends to emerge regarding the legality of minimum resale price maintenance agreements. Moreover, although the *Leegin* decision changes federal law, minimum resale price maintenance agreements are still strictly prohibited in several states and in some foreign jurisdictions. Manufacturers and resellers should therefore seek legal advice when considering any form of resale price maintenance. The Antitrust attorneys at Ropes & Gray regularly counsel clients on such issues.

If you have questions about *Leegin* and its effect on your business activities, please call one of the antitrust attorneys below or your regular Ropes & Gray contact.

Contact Information

William Patton

617-951-7572

william.patton@ropesgray.com**Cary Armistead**

617-951-7832

cary.armistead@ropesgray.com**Mit Spears**

202-508-4681

mit.spears@ropesgray.com**Jane Willis**

617-951-7603

jane.willis@ropesgray.com