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Return to the Past? Congress Seeks to Overturn *Leegin*

Two years after the U.S. Supreme Court issued its historic decision in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), the latest congressional proposal to reverse that decision was introduced by Chairman of the House Judiciary Committee's Courts & Competition Policy Subcommittee Chairman Rep. Henry C. (Hank) Johnson, Jr. (D-Ga.) and the full Committee's Chairman Rep. John Conyers, Jr. (D-Mich.) on July 13, 2009. The Discount Pricing Consumer Protection Act of 2009 would restore the rule that agreements between manufacturers and retailers, distributors, or wholesalers to set the price below which the manufacturer's product or service cannot be sold are a per se violation of the Sherman Act. While the bill is not an exact duplicate or "companion" bill to a measure (S.148) introduced by Sen. Herb Kohl (D-Wis.) in January 2009, the Johnson-Conyers legislation has the same intent.

Before *Leegin*, it had been well settled for nearly a century that minimum resale price maintenance (RPM) agreements between manufacturers and their distributors are per se illegal under Section 1 of the Sherman Act, 25 U.S.C. § 1; that is, RPM agreements that set the minimum resale prices at which the manufacturer's or franchisor's products or services would be resold were automatically deemed to be unreasonable restraints of trade "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," and the parties to those agreements were subject to treble damages liability under the Sherman Act. (The *Leegin* decision was the subject of the June 28, 2007 edition of Legal News Alert: Antitrust http://www.foley.com/publications/pub_detail.aspx?pubid=4247.)

In *Leegin,* the Supreme Court abandoned the per se rule and held, instead, that such minimum RPM agreements are subject to a rule-of-reason analysis under which a court will look at and balance the anti- and pro-competitive effects of a particular agreement to decide whether the agreement unreasonably restrains trade. In other words, *Leegin* gave manufacturers and franchisors that seek to prohibit discounting a chance to tell their side of the story. Defenders of RPM have long argued that low margins and "free riding" by discounters can make it difficult for non-discounting retailers to meet their suppliers' standards for promoting the brand and providing after-market support. In fact, supporters have argued, minimum RPM can stimulate inter-brand competition among manufacturers selling different brands of the same type of product by reducing intra-brand competition among retailers selling the same brand. RPM also may give consumers more options to choose among low-price, low-service brands; high-price, high-service brands; and brands falling in between. Moreover, a manufacturer that owns its retail outlets can always "fix" its resale prices (as can a franchisor at its company stores), subjecting manufacturers and franchisors to different rules than competitors whose outlets are company-owned.

Despite the Supreme Court's decision in *Leegin*, most manufacturers and franchisors have not rushed to adopt RPM policies, and their counsel have urged caution as well. This is true for a number of reasons, including:

1. At the most practical level, many dealer, distributorship, and franchise agreements signed before *Leegin* contained provisions intended to avoid per se liability for RPM by expressly stating that dealers, distributors, and franchisees make independent pricing decisions and those agreements remain in effect.
2. *Leegin* did ***not*** change the rule that ***horizontal*** price-fixing — agreements on price among competitors at the same level of distribution — remains per se unlawful under Section 1 of the Sherman Act, and the consequences are significant. Because many suppliers are engaged in dual distribution of their products or services (i.e., manufacturers sell products through independent dealers, distributors, or retailers but also own some retail outlets or otherwise "sell direct," or franchisors operate "company stores" in addition to licensing franchisees to offer goods and services under the franchisor's trademark), it can be difficult to say with certainty that a particular restraint is truly vertical. Additionally, if a manufacturer or franchisor "guesses" wrong, the penalty may be a treble damages claim or, worse, criminal penalties for both the companies and individuals involved.[1]
3. *Leegin* did ***not*** make RPM permissible per se — it simply held that such agreements would be reviewed under a rule-of-reason analysis. Juries will still be left to decide if the pro-competitive effects of a particular agreement outweigh the anti-competitive effects, and preliminary results have indicated juries are not particularly sympathetic to the economic justifications for RPM if they believe that consumers will pay higher prices as a result.
4. *Leegin* did ***not*** change state laws prohibiting minimum RPM. Thirty-seven states jointly submitted an amicus brief in *Leegin* opposing relaxation of per se rules. Since *Leegin*, enforcement officials in several states, including New York, have gone on record that RPM remains per se unlawful under state law despite *Leegin* and, more recently, Maryland has enacted legislation expressly repealing *Leegin* as a matter of state law.
5. Christine Varney, recently appointed Assistant Attorney General for the Antitrust Division of the DOJ, who indicated she was

"surprise(d)" by *Leegin* during her confirmation hearings, believes there is still room to prosecute RPM and indicated the DOJ will be aggressive in antitrust enforcement and, specifically, prosecuting RPM.

All of this may be moot, however, if this new measure is passed by Congress. As of July 20, 2009, the Johnson-Conyers bill has been referred to the Judiciary Committee and will likely come before Rep. Johnson's own subcommittee as the first step in the process. Committee sources indicate that any movement on HR 3190 will not happen prior to the August recess due to that panel's current workload. Foley will monitor the bill, and the earlier provision introduced by Senator Kohl, for any upcoming actions that may be scheduled for later this fall.

[1] Individuals are subject to prison sentence of up to 10 years and a fine of up to $1 million per count for a criminal antitrust violation . Corporations face fines of up to $100 million per count for antitrust violation, and also can have fines imposed of up to twice the gain or loss caused by the antitrust violation. As of the U.S. Department of Justice's February 19, 2009 report, 67 companies had paid fines of $10 million or more, with 16 companies paying fines of $100 million or more.

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