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Antitrust Pricing War: Congress v. the Court

By

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ANTITRUST PRICING WAR: CONGRESS v. THE COURT

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) *("Leegin")*, the Supreme Court completed the erosion of the *per se* rule against resale price maintenance ("RPM") that began nearly 100 years prior. It took only three months, however, for Congress to take steps toward reversing course by introducing the Discount Pricing Consumer Protection Act ("DPCPA") in October 2007, which sought to legislatively overturn *Leegin* and mandate a rule of *per se* illegality in RPM cases.[1]

Leegin Creative Leather Products, Inc. v PSKS, Inc.

Neither *Leegin* nor the DPCPA arose in a vacuum. The Supreme Court originally laid down the rule of per se illegality against RPM in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). ("*Dr. Miles*") The *Dr. Miles* Court analogized minimum RPM, a vertical price restraint, to horizontal price-fixing arrangements, such as a dealer cartel. Relying on that assumption, the Court imposed a *per se* rule of liability – conventionally only reserved for those restraints that always or almost always are facially dominated by anticompetitive effects – against RPM. No sooner than *Dr. Miles* was handed down did the Court begin to carve out exceptions in recognition of business realities. Eight years after *Dr. Miles*, the Supreme Court established in *United States v. Colgate & Co.*, 250 U.S. 300 (1919) the "*Colgate* doctrine", allowing manufactures to unilaterally refuse to deal with distributors who failed to adhere to suggested resale prices. State "fair trade" laws subsequently emerged following *Colgate*, allowing states to create their own exceptions to *per se* illegality for RPM.[2] The *per se* rule suffered its most significant wound from the then-emerging Chicago school of antitrust analysis in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). ("*GTE Sylvania*") Decided thirty years before *Leegin*, the Supreme Court held in *GTE Sylvania* that vertical non-price restraints would be evaluated under a rule of reason analysis, embracing an economic logic that undercut the reasoning behind the *per se* prohibition of vertical price restraints. This trend accelerated in *State Oil Co. v. Khan*, 522 U.S. 3 (1997) ("*State Oil*"), in which the Supreme Court unanimously embraced rule of reason analysis for maximum resale price maintenance.

In *Leegin*, the Court extended the legal and economic rationales underlying *GTE Sylvania* and *State Oil* to minimum resale price maintenance, declaring RPM would be subject to rule of reason analysis in the future.[3] The *Leegin* majority noted that the Court's modern antitrust jurisprudence has rejected the formalistic legal doctrines on which *Dr. Miles* was based. Moreover, and perhaps more importantly, the Court rejected the intellectual framework that *Dr. Miles* adopted – that minimum RPM was analytically equivalent to a dealer cartel.[4] At the heart of the Court's decision was the issue of whether the existing economic theory and evidence on RPM met the exacting standard necessary to justify imposition of the *per se* rule. The Court's traditional test for *per se* analysis is, and has been, that a challenged restraint or class of restraints "always or almost always reduces output." Unlike the underpinnings of the *Dr. Miles* case, however, contemporary research has been far more positive about the potential economic benefits of RPM. While a handful of legal scholars, such as Warren Grimes, have concluded that RPM is generally anticompetitive, a number of other prominent law and economics scholars, including Judge Frank Easterbrook, Judge Richard Posner, and Judge Robert Bork have written in defense of RPM.[5] Furthermore, a host of economists co-authored an *amicus curiae* brief demonstrating a substantial consensus that minimum RPM often had procompetitive virtues justifying its legality.[6] Consistent with the economic literature, the *Leegin* majority accredited both pro- and anti-competitive explanations for RPM. In the face of what was, economically, a decidedly ambiguous practice, and after a thorough examination of the relevant economic literature, the Court declined to continue to categorize RPM as "always or almost always reducing output," and resorted instead to the case-by-case rule of reason analysis, leaving lower courts to develop the analytical framework that will be applied to RPM cases in the future.[7] Justice Breyer's dissent, which attracted three votes, focused both on concerns of judicial economy in developing a new body of minimum RPM jurisprudence, as well as concerns over the value of *stare decisis*, potential consumer losses, and what he perceived to be the lack of new information about RPM to support a changed standard.[8] The DPCPA echoed the latter concern, spawning a great deal of debate regarding the proper standard of analysis for RPM.

The Discount Pricing Consumer Protection Act

First introduced on October 30, 2007 as S2261, the DPCPA aimed to the restore the *per se* rule for RPM established by *Dr. Miles*. Sen. Herbert Kohl (D-WI), whose family started the Kohl's department store, first introduced the bill in support of discount retail giants, arguing that they "offer consumers a wide array of highly desired products at discount prices."[9] After the death of S2261 in the Senate last year, the bill was reintroduced on January 6, 2009, before the 111th Congress as S148.[10] The bill has since been assigned to the Senate Judiciary Committee, and has led to various discussions outside of Congress.[11] As re-introduced, the bill's intention remains the same: to restore a standard of *per se* illegality for vertical minimum resale price maintenance.

Proponents of the bill argue that RPM restricts both inter- and intra-brand competition and necessarily raises prices for consumers.[12] The proponents further insist that injured distributors will generally lack the resources to litigate complicated and often expensive rule of reason antitrust suits. Thus, underlying much of the bill's support is a fear of the disappearance of discount retailers. The bill's opponents, however, point out the inconsistency between the heightened standard for *per se* analysis – appropriate, for example, in horizontal price-fixing cases – and the often economically ambiguous nature of RPM. The bill's opponents note that the *per se* rule's application to RPM is essentially a historical anomaly, and, moreover, that RPM often generates competitive benefits, thus making *per se* illegality inappropriate under the Court's traditional justifications for the *per se* rule.

State Implications

The debate over *Leegin* reaches across both branches and levels of government. Many states remain unpersuaded that RPM should fall under a rule of reason analysis. Thirty-five state attorneys general backed the first bill (S2261), and continue to support its re-introduction (S148).[13] These attorneys general argue that consumer welfare is best served by a *per se* prohibition of RPM because, they argue, RPM will result in higher retail prices. *Leegin* may join the relatively narrow ranks of cases provoking state-based legislation to curtail or reverse an antitrust holding. While minimum RPM remained *per se* illegal under many state antitrust laws after *Leegin*, many other state laws contain provisions requiring interpretation of the state law to follow interpretation of the Sherman Act. In those states, the DPCPA would overturn *Leegin* and restore the *per se* rule. Some states, however, have already passed legislation restoring the *per se* rule under the state law. For example, Maryland has already expressly rejected the *Leegin* decision by statute.[14] The recent amendment to the Maryland Antitrust Act, which goes into effect October 1, 2009, provides that "a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce."[15]

Conclusion

For now the federal bill remains in committee; it is not clear when or if it will be reported out to the Senate. A hearing on the bill was held on May 19, 2009.[16] Meanwhile, *Leegin* remains good law in Sherman Act cases in federal court and in those states that follow federal interpretation in interpreting their state fair trade acts. Notably, however, both California and New York, the two most populous states, have laws that likely permit or require a *per se* analysis in state RPM cases.[17] As a consequence, manufacturers looking to implement potentially procompetitive RPM arrangements with distributors face ambiguity in determining potential antitrust liability on multiple fronts.

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[1] S.148, 111th Cong. (2009).
[2] See Michael A. Lindsay, *Overview of State RPM*, Antitrust Magazine (Fall 2007) (summarizing treatment of RPM under state antitrust laws), available at: http://www.abanet.org/antitrust/at-source/07/12/LindsayFullChart11-29.pdf
[3] *Leegin Creative Leather Products, Inc. v PSKS, Inc.,* 127 S. Ct. 2705 (2007).
[4] *Id.* at 2714.
[5] *See* Letter from Rep. John Conyers, Jr., Chairman, House Judiciary Committee, to Thomas O. Barnett, Assistant Attorney General, Antitrust Division, Department of Justice (Jan. 10, 2007) (on file with author), *available at* http://judiciary.house.gov/hearings/pdf/110-Leegin.pdf (listing in bibliography to primer major economists supporting and opposing *per se* rule).
[6] *See generally* Brief of Economists as Amici Curiae in Support of Petitioner, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).
[7] Leegin, supra *note 3*, at 2714-15.
[8] *Id.* at 2737. Of note, it is widely-understood that Breyer's principal objection with the majority's decision was with its willingness to abandon precedent rather than with its understanding of the economics—a relic of ongoing abortion debates more than ongoing antitrust debates. *See generally Id*.
[9] 111th Cong. Rec. S.2261 (daily ed. Oct. 30, 2007) (statement of Sen. Kohl).
[10] S.148, 111th Cong. (2009).
[11] *See, e.g.,* Pamela Jones Harbour, Commissioner, Federal Trade Commission, Consumer Benefits and Harms from Resale Price Maintenance: Sorting the Beneficial Sheep from the Antitrust Goats?, Opening Remarks at Resale Price Maintenance Workshop (Feb. 17, 2009), *available at* http://www.ftc.gov/speeches/harbour/090217rpmwksp.pdf; Joseph Pereira, *State Law Targets 'Minimum Pricing'*, THE WALL STREET JOURNAL, April 28, 2009, http://online.wsj.com/article/SB124087840110661643.html; Joseph Pereira, *Price-Fixing Makes Comeback After Supreme Court Ruling*, THE WALL STREET JOURNAL, August 18, 2008, http://online.wsj.com/article/SB121901920116148325.html?mod=hps_us_pageone.
[12] *Id*.
[13] Alan Barr, STATE CHALLENGES TO VERTICAL PRICE FIXING IN THE POST-*LEEGIN* WORLD (2009), http://www.ftc.gov/opp/workshops/rpm/may09/docs/abarr.pdf
[14] *Id.*
[15] S.B. 239 (Md. 2009); H.B. 657 (Md. 2009).
[16] *See generally "The Discount Pricing Consumer Protection Act: Do We Need to Restore the Ban on Vertical Price Fixing?": Hearing on S.B. 148 Before the Senate Judiciary Committee*, 111st Cong. (2009).
[17] There is some ambiguity as to whether, for example, New York's Donnelly Act should apply *Leegin* and any subsequent federal precedent in determining the *per se* illegality (or lack thereof) of vertical resale price maintenance regimes. *See, e.g., Barr, supra* note 12, at 4-5 (explaining the legislative history following New York's Donnelly Act and the potential ambiguity post-*Leegin* it creates).

Related Links:

“The End of the Road for Dr. Miles: *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*” by Robert T. Miller, *Engage*, October 1, 2007: http://www.fed-soc.org/publications/pubID.718/pub_detail.asp