

Supreme Court Holds That Minimum Resale Price Maintenance is Not a *Per Se* Violation of Antitrust Law

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Today, the United States Supreme Court reversed a century-old precedent and ruled that minimum resale price maintenance is no longer an automatic (or *per se*) antitrust violation. Instead, such vertical restraints will now be judged under the “rule of reason,” which permits a defendant to show that challenged conduct has procompetitive benefits.

In today’s decision, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Court continued its reliance on modern economic principles in the application of the antitrust laws. Applying such principles, the Court has been limiting substantially the application of the *per se* rule to an ever decreasing list of specific market conduct, in favor of the rule of reason. The rule of reason analysis requires fact finders to examine all the circumstances of the challenged arrangement on a case by case basis within a defined market and balance any anticompetitive effects against legitimate business justifications and any procompetitive effects. Thus, only restraints that have a net negative effect on competition are deemed unlawful.

Virtually all vertical non-price restraints are analyzed under the rule of reason. Further, in 1997, the Supreme Court held that the practice of setting *maximum* resale prices should be analyzed under the rule of reason. Consistent with this trend, the *Leegin* decision today held that the possible beneficial effects of *minimum* resale price maintenance require the application of the rule of reason as well.

BACKGROUND

Leegin, a manufacturer of women’s accessories, instituted a policy whereby Leegin would only do business with retailers that followed the company’s suggested resale prices. Leegin ceased supplying PSKS, Inc. with merchandise when PSKS put Leegin’s products on sale below the suggested minimum price. PSKS sued Leegin, and a jury found that Leegin’s pricing policy was a *per se* violation of Section 1 of the Sherman Act. At the district court, Leegin attempted to introduce expert testimony establishing the procompetitive effects of its vertical price restraints warranting the application of a rule of reason analysis. The trial court excluded the expert testimony on the grounds that the procompetitive effects are irrelevant under the *per se* analysis.

Leegin appealed to the Fifth Circuit. The Fifth Circuit affirmed the jury verdict, holding that under an almost century old Supreme Court precedent, minimum resale price maintenance was *per se* illegal.

The question before the Supreme Court was whether vertical minimum resale price maintenance agreements should continue to be deemed illegal *per se* under Section 1 of the Sherman Act, or whether such conduct should be evaluated under the rule of reason. Leegin argued that minimum resale price maintenance can have a number of procompetitive uses that can enhance consumer welfare, such as by guaranteeing a product’s brand image, by increasing interbrand competition,

and by mitigating the adverse effects of free-riding. Notably, the Federal Trade Commission and Department of Justice, as *amici*, supported Leegin's positions.

In contrast, PSKS argued that no economic, practical or legal reasons exist for overturning the longstanding rule of *per se* illegality. Among other arguments, PSKS stressed that minimum resale price policies increase prices to consumers, and could be used to facilitate either manufacturer or retail horizontal cartels to fix prices. Further, PSKS argued, the rule of reason creates a litigation hurdle for plaintiffs making it less likely that meritorious lawsuits will be brought.

SUMMARY OF THE DECISION

In a 5-4 majority opinion authored by Justice Kennedy, the Court held that minimum resale price maintenance arrangements should be judged under the rule of reason. The Court stated that the *per se* rule is an outdated approach to the complex economic issues raised by minimum resale price maintenance. Reviewing the economic effects, the Court referred to the arguments made by the parties—the stimulation of interbrand competition, reduction of free-riding, and the facilitation of market entry on the one hand, and the facilitation of cartel behavior and abuse by powerful manufacturers or retailers on the other hand. Given the possible pro- and anticompetitive effects of vertical price maintenance, the Court concluded that it cannot be stated with any degree of confidence that minimum resale price maintenance “always or almost always tend[s] to restrict competition and decrease output.” Accordingly, the Court held that vertical price maintenance should be analyzed under the rule of reason.

The decision also sheds light on this Court's tendency to favor the rule of reason. Justice Kennedy strongly rebuked Respondents' claims that the *per se* rule should be continued for administrative convenience. While *per se* rules may “decrease administrative costs . . . [t]hose rules can be counterproductive” by increasing litigation costs through frivolous suits against legitimate practices and by increasing the total costs of the antitrust system by prohibiting procompetitive conduct.

IMPLICATIONS

While the Court's decision does not mean that manufacturers can impose minimum prices without any regard to antitrust challenges, it does enable manufacturers to create efficiencies in the marketing and distribution of their products using such vertical price restraints on retailers or other distributors. The application of the rule of reason—as opposed to the *per se* rule—has significant implications. As a practical reality, unlike the *per se* analysis, under the rule of reason analysis, plaintiffs typically have to prove a relevant product market and show that the defendant has market power before any anticompetitive and procompetitive effects can be analyzed. Therefore, future challenges against minimum resale price maintenance arrangements are likely to focus on defendants who have market power. In addition, under the rule of reason, the defendants facing such challenges will be able to present evidence of the procompetitive justifications of their conduct.

In short, although today's decision does not mean that all minimum resale price restraints are lawful, the rule of reason does provide significant flexibility to businesses in their vertical pricing policies so long as they can articulate why the restraints are necessary for the successful realization of efficiencies in marketing and distribution of their products.

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