Confusion Persists on Resale Price Maintenance: Unilateral Pricing Policy May Be the Answer

More than 10 years after the Supreme Court decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (*Leegin*), which overturned almost 100 years of precedent concerning the *per se* treatment of minimum resale price maintenance, there remains considerable confusion about what companies can and cannot do with regard to vertical price restraints.

Leegin decided that minimum resale price maintenance, under the Sherman Act, would no longer be judged under the *per se* rule, but would instead be judged under the rule of reason. The US Supreme Court was probably reacting in part to the overwhelming weight of economic literature that found that minimum resale price maintenance had significant procompetitive justifications. In fact, the *Leegin* Court declared that the justifications for vertical agreements setting minimum resale prices were similar to non-price restraints (like geographic restrictions) imposed by suppliers on their customers. Although intrabrand competition between customers would be effected by these restraints, the restraints could also encourage these customers to invest time, money and effort in competing against the products of other manufacturers. Balancing these interbrand competitive benefits against the intrabrand pricing restraints would be a rule of reason determination, and would not be permissible using the *per se* rule.

Given the persuasive reasoning and strong evidence presented by the Court in overturning the *per se* rule, with regard to resale price maintenance, some state courts and legislatures reacted negatively. Maryland, for example, passed a law (Section 11-204(b) of the Maryland Code Annotated), which defines any "contract, combination or conspiracy that establishes a minimum price, below which a retailer, wholesaler or distributor may not sell a commodity or service" to be an unreasonable restraint of trade. In essence, Maryland rejected the application of *Leegin* to the state antitrust law. Similarly, California's antitrust law, the Cartwright Act, was interpreted to retain the *per se* rule. See, for example, a California Court of Appeal decision, *Alsheikh v. Superior Court*, which states, in part, that vertical price fixing would be "a *per se* violation under the Cartwright Act, notwithstanding a change of law under the Sherman Act." Another state, Utah, has kept the *per se* minimum resale price rule for contact lens products.

Given the confusion at the state level about whether minimum resale price maintenance is to be evaluated under a *per se* or rule of reason standard, what is a supplier or manufacturer to do when it discusses resale prices with its customers? As we can see, *Leegin* did not make minimum resale price maintenance legal (it is now subject to a rule of reason under the Sherman Act in most, but not all states). If a manufacturer or supplier sells products in multiple states, agreeing with a customer about the prices its customer will charge raises significant antitrust risk. What to do?

Prior to the decision in *Leegin*, suppliers were usually counselled not to agree with their customers about the resale prices they were to charge. That advice is still good. A Supreme Court decision that is more than 100 years old, *U.S. v. Colgate & Co.,* holds, in part, that federal antitrust laws (in particular Section 1 of the Sherman Act) do not prevent a manufacturer from: (i) unilaterally announcing prices at which goods may be advertised or sold; and (ii) subsequently refusing to deal with retailers that choose not to acquiesce with the announcement. This sort of unilateral pricing policy has been upheld, and even with the *Leegin* decision and the permissiveness of its rule of reason analysis, is probably the safest way for a manufacturer or supplier to make certain its resale prices are followed.

As a practical matter, a unilateral price is not an agreement, and, therefore, does not run afoul of the Sherman Act, which requires a contract, combination or conspiracy to fix prices. Here, the manufacturer or supplier would say something to a customer like the following, "We have unilaterally adopted a pricing policy applicable to the sale of our products by all of our customers located in the US. Each such customer remains free to establish its own resale prices, however we will cancel all orders and refuse to accept new orders from any customer immediately following verification that the customer has advertised, promoted or sold one of our products inconsistent with our pricing policy. Each of our customers is free to decide independently and unilaterally whether to follow this pricing policy. We will not ask for, nor will we accept, any assurance of compliance or agreement from any customer regarding our pricing policy. The only person at our company authorized to answer questions regarding this pricing policy is our Unilateral Minimum Resale Pricing Policy Administrator. No representative or employee of the company has the authority to modify or alter this pricing policy."

Working within the constraints of a unilateral pricing policy, like that detailed above, should protect any supplier or manufacturer, wherever its products are sold, in its pricing discussions with its customers. This would apply in states that have retained a *per se* review standard, as well as states that have adopted *Leegin* or in states where the law is ambiguous.

As long as the supplier imposes its restrictions unilaterally, the principles established more than 100 years ago in the *Colgate* decision should provide protection. All this is to say that even following the *Leegin* decision, manufacturers must be very careful with regard to their use of resale price maintenance, and probably the best way to do this is through a unilateral pricing policy and consultation with counsel.

Contact

Barry A. Pupkin
Senior Partner, Washington DC
T +1 202 626 6662
E barry.pupkin@squirepb.com

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