

## DR. MILES DIES AT AGE 96 -- SO WHAT?

In a long-awaited decision the Supreme Court, by a 5 to 4 vote on June 28, 2007, overruled one of the country's oldest anti-trust cases, Dr. Miles Medical Company v. John D. Park & Sons, 220 U.S. 373 (1911). The case is Leegin Creative Leather Products, Inc. v. PSKS, Inc. Resale price maintenance (RPM) is no longer **per se** illegal.

But before you take aim at that notorious price-cutting retailer (your customer if you are a manufacturer or your competitor if you are a fellow retailer), here are some critical points to remember.

### I.

The Supreme Court has only said that RPM is not **per se** illegal. It did **not** say that it is now **per se** legal. This sounds like double-talk, but it is an important concept. All anti-trust claims are evaluated either by **per se** rules or rule of reason analysis. **Per se** illegality simply means that some practices (usually blatant price-fixing or market division among competitors) are so detrimental to competition that no justification for the conduct can be raised as a defense. Rule of reason analysis means that there will be a full airing of all of the potentially pro-competitive justifications and anti-competitive consequences of the conduct. A court will then decide whether the conduct is legal or illegal.

**Per se** rules have some important benefits, the most significant of which is the fact that they provide a bright line test for conduct. This makes business decisions easier, and it makes prosecution of **per se** cases easier as well.

Rule of reason cases, on the other hand, can be exceptionally expensive since much market analysis, usually done by economists, is necessary and the result is uncertain.

Both the majority and the dissent acknowledged that there is a wealth of scholarly analysis of RPM, the result of which is that it is a close call as to whether resale price maintenance has pro-competitive or anti-competitive effects. Some point out that it will likely raise prices to consumers; others point out that it allows specialty and service-oriented retailers to compete more effectively with price discounting retailers. Thus, it is very important to keep in mind that a resale price maintenance program can still be illegal. The Supreme Court clearly did not give *carte blanche* approval to resale price maintenance schemes. The Court stated in essence that it expects that it will take some time and many lawsuits to define the parameters of its ruling. To avoid becoming a test case, caution is certainly advised when considering changes to existing distribution practices.

### II.

Collusion among competing distributors is still **per se** illegal. Manufacturers should not take the Leegin decision as a license to start making their decisions on resale pricing in conjunction with their distributors. Manufacturers must continue to be very careful that their pricing decisions are theirs and theirs alone and not made in collaboration with their distributors.

Indeed, the Court went out of its way to acknowledge that one of its concerns in eliminating the **per se** rule for resale price maintenance is that it could make collusion between manufacturers and distributors easier. This would turn the collusion into a horizontal combination, which the Court made very clear was still a **per se** violation of the anti-trust laws.

### III.

Other circumstances, such as a high degree of concentration among manufacturers in a particular industry, particularly if everyone is doing it, could facilitate horizontal price fixing among manufacturing competitors and lead to a ruling that resale price maintenance is illegal in that circumstance. Before undertaking any program of involving resale price maintenance or some variation on that theme, a thorough evaluation of the competitive factors of the industry needs to be made. This again is nothing new.

### IV.

The decision of the Supreme Court was remarkable principally to legal scholars and on an issue that has nothing to do with anti-trust law. It has to do with the legal concept called *stare decisis*. In plain terms, this means that courts ought not to change long-standing law without very good reasons. In our system, which relies heavily on judge-made law, it is an important concept because it allows companies to have a high degree of predictability in making business decisions. Overruling a case that was almost 100 years old was remarkable simply because of that. Indeed, even the dissenters acknowledged that if the question of resale price maintenance was put to them as a new proposition today, it never would have been accorded **per se** illegality. The dissents' reason for keeping the **per se** rule in place was based solely on the concept of *stare decisis*.

In fact, the concept of **per se** illegality of resale price maintenance has eroded greatly in recent years. Suggested retail prices; unilateral directives from manufacturers to either sell at specified prices or be fired; and policies that require advertisements to be at manufacturers' set prices while allowing retailers to set their own prices within their stores, are now generally accepted. Thus, the overall effect of not making resale price maintenance **per se** illegal may not be significant for many companies.

### V.

The Leegin case does not alter Robinson-Patman price discrimination rules. Though many think it is also an antiquated legal concept, price discrimination laws are still alive and well.

### VI.

If you are an international distributor, this decision has no effect in other parts of the world. Resale price maintenance is still illegal in the European Union, for example.

### SUMMARY

In general, the same old rules apply. If you are thinking of modifying or changing your product distribution scheme or if you think this decision may have implications for you, you should consult your attorneys. We would be pleased to discuss the matter with you.

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