

## U.S. Supreme Court Considers Resale Price Maintenance Case

On March 26, 2007, the U.S. Supreme Court heard oral arguments in Leegin Creative Leather Products, Inc. v. PSKS, Inc. The ruling in this case may determine whether vertical minimum resale price maintenance will continue to be a *per se* violation of the Sherman Act.

Leegin is a manufacturer of leather goods based in the City of Industry, California. In 1990, it introduced a line of leather goods under the Brighton brand. In 1997, Leegin instituted a Brighton Retail Pricing and Promotion Policy, and announced that it would conduct business exclusively with retailers who follow its suggested retail price (“MSRP”). In December 2002, Leegin discovered that PSKS, one of its retailers, was violating that policy by selling Brighton products below MSRP. Leegin then suspended all shipments to PSKS.

The *per se* rule prohibiting vertical minimum resale price maintenance was established almost a century ago in the landmark case of Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). The *per se* rule was created as a shortcut in the analysis of whether certain restraints of trade violated the Sherman Act, so as to minimize the expenditure of judicial and enforcement resources. It applies to types of restraints, which, in the Supreme Court’s view, have particularly clear anticompetitive characteristics.

However, since Dr. Miles, the Supreme Court has held that certain other types of vertical restraints of trade are not *per se* violations of the Sherman Act. In Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court overturned its prior decision (in Schwinn) and held that vertical *non-price* restraints are not subject to the *per se* rule. Twenty years later, in State Oil v. Kahn, 522 U.S. 3 (1997), the Supreme Court overturned another of its prior decisions (in Albrecht) and held that vertical *maximum* price fixing is not subject to the *per se* rule.

Rather, the Supreme Court held that these types of vertical restraints of trade are subject to the rule of reason, which entails an in-depth analysis into both the pro-competitive and the anticompetitive effects of the restraint of trade in question. In the Sylvania and Kahn decisions, the Supreme Court reasoned that the types of vertical restraints at issue may actually *promote* inter-brand competition, the “primary purpose” of antitrust law.

Leegin argues that, especially for smaller manufacturers, vertical minimum resale price maintenance has similar pro-competitive effects on inter-brand competition. Leegin contends that the Brighton Retail Pricing and Promotion Policy encourages its retailers to provide service and otherwise promote its products, and discourages the “free rider” effect (where discounters provide no service and rely on other retailers to promote Brighton products in order to sell for a low price). This allows the Brighton brand to compete against more established competitors in the market.

Many free-market economists agree, and see Leegin as an opportunity for the Supreme Court to overrule Dr. Miles. Some legal observers suggest that the Supreme Court may hold that vertical minimum resale price maintenance agreements are merely presumed illegal (rather than *per se* illegal), but that presumption may be rebutted by the rule of reason or a similar analysis.