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Infrastructure, Legal and Regulatory Policy

March 16, 2010

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
U.S. Senate  
Washington, DC 20510

The Honorable Jeff Sessions  
Ranking Member  
Committee on the Judiciary  
U.S. Senate  
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

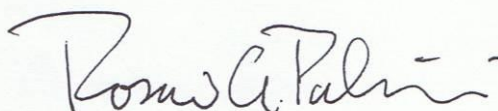
On behalf of the National Association of Manufacturers (NAM) and the twelve million men and women working in manufacturing in the United States, I urge you to oppose S. 148 the "Discount Pricing Consumer Protection Act." The legislation purports to protect consumers from minimum resale price maintenance agreements that will lead to the end of discount retailing as we know it. Years after the *Leegin* decision, this has not proved to be the case nor will it prove to be so in the future.

The NAM supports the *Leegin* decision because it is sound antitrust policy. *Leegin* follows the guiding rule of modern antitrust jurisprudence that limits the per se analysis to practices that "always or almost always tend to restrict competition or decrease output." This is simply not true of minimum resale price maintenance. *Leegin* applies the rule of reason, the accepted standard for antitrust cases, to minimum resale price maintenance agreements.

*Leegin* reflects the progression of antitrust law for the past thirty years in limiting the scope of the per se rule. *Sylvania* in 1977 and *Khan* in 1997 each overruled prior Supreme Court decisions to apply the rule of reason to vertical restraints; and *Leegin* requires courts to make decisions based on substance – the effect of the restraint on competition in a market – rather than on formalistic analysis of whether conduct shows an agreement between a manufacturer and a reseller. In addition, it will permit defendants to defend themselves in these cases by proving facts about competitive effects that they were precluded from using under the per se rule. *Leegin* does not give manufacturers the green light to enter into minimum resale price agreements without the possibility of challenge; resale price maintenance is not per se legal. Resale price maintenance imposed as a result of an agreement with competing suppliers will remain per se illegal.

For these reasons, Congress should allow the *Leegin* decision to stand as sound antitrust policy and I urge you to vote no on reporting S. 148 from the Committee.

Sincerely,



Leading Innovation. Creating Opportunity. Pursuing Progress.

## **BACKGROUND**

In 1911 the Court decided *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). The case held that an agreement between a manufacturer and its distributor on the minimum price the distributor can charge for the manufacturer's goods was per se illegal under Section 1 of the Sherman Act. Eight years later, the Court decided, in *United States v. Colgate & Co.*, 250 U.S. 300 (1919), that a manufacturer that refused to deal with retailers that discounted did not violate Section 1, since this was a unilateral policy and there was no agreement as is required to find a violation of Section 1.

*Leegin* overrules *Dr. Miles* and requires that the rule of reason analysis be applied to minimum resale price maintenance, as is already the rule for maximum resale price maintenance (*State Oil v. Kahn*, 522 U.S. 3 (1997)) and non-price vertical restraints (*Continental T.V. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977)). As discussed below, *Sylvania* and *Kahn* each overruled prior Supreme Court precedent.

## **LEEGIN DECISION**

*Leegin Creative Leather Products, Inc. v. PSKS, Inc.* \_\_\_ U.S. \_\_\_, 2007 WL 1835892 (No. 06-480) (June 28, 2007) overruled *Dr. Miles* and held that minimum resale price maintenance would be judged under the rule of reason on a case-by case basis. *Leegin* is a maker of women's leather goods and accessories sold under the Brighton brand. It developed a policy of dealing with boutique stores, and asked retailers to sell the goods at prices *Leegin* specified. It ultimately grew to supplying over 5,000 retailers, but had a very small share of the total market for women's leather goods and accessories. PSKS discounted *Leegin*'s products, allegedly to compete with other firms discounting the Brighton line. When requested to cease discounting, PSKS refused and *Leegin* stopped selling product to it. PSKS sued, alleging that *Leegin* had violated Section 1 of the Sherman Act by entering into agreements with retailers specifying the price at which the goods would be resold. The district court judged the case under the per se rule, excluding expert testimony offered by *Leegin* of the procompetitive effects of its resale pricing practices. The jury awarded PSKS an amount, after trebling, of almost \$4 million; on appeal *Leegin* did not dispute that it had entered resale price maintenance agreements, and the Fifth Circuit affirmed on the basis of *Dr. Miles*'s holding that the per se rule applied.

## **Per Se Rules Should be Reserved for Restraints that Almost Always Would be Invalidated Under the Rule of Reason**

The majority opinion started by explaining that "the rule of reason is the accepted standard for testing whether a practice restrains trade in violation of §1." 2007 WL 1835892. "As a consequence, the per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason . . ." *Id.* (emphasis added). After reviewing the potential competitive effects of resale price maintenance, the Court asserted that "it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output.'" *Id.* The dissenting opinion by Justice Breyer does not disagree; it describes the procompetitive and anticompetitive effects of

resale price maintenance, noting that "as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits." *Id.* He concludes however that there are insufficient grounds for overruling a well-established precedent. *Id.*

The Court supported its decision to overturn *Dr. Miles* by noting that more recent cases had rejected the rationales underlying *Dr. Miles's* per se holding. *Dr. Miles's* reliance on the rule against restraints on alienation was deemed irrelevant to the effect of antitrust laws on vertical restraints. In addition, the Court noted that more recent cases had rejected the doctrine of *Dr. Miles* that a vertical agreement between manufacturers and distributors is the equivalent of a horizontal agreement among competing retailers, citing *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 734 (1988) (disclaiming the "notion of equivalence between the scope of horizontal per se illegality and that of vertical per se illegality").

### ***Leegin* Continues the Trend of Limiting the Scope of the Per Se Rule**

In overruling *Dr. Miles*, the *Leegin* Court continued the progression of antitrust law for the past thirty years in limiting the application of the per se rule to vertical restraints. The seminal case in this area is *Continental T.V. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), which applied the rule of reason to non-price vertical restraints, overruling the per se rule announced in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). In *Sylvania*, the Court explained that vertical restraints have the "potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition." *Id.* at 51-52. Since there was a potential for procompetitive effects, the Court applied the rule of reason. The trend of decisions limiting the application of the per se rule continued with the decision in *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988). The Court held that the termination of a price-cutting distributor at the behest of another distributor ("it's him or me") was not illegal per se, absent an understanding between the manufacturer and the remaining distributor on the price or price level to be charged.

The progression continued in *State Oil v. Kahn*, 522 U.S. 3 (1997). The Court unanimously overruled its prior decision in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) that vertical maximum resale price maintenance agreements are per se unlawful. The *Kahn* Court held that per se treatment is only "appropriate once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Id.* at 10.

### ***Leegin* Focuses on the Effect of the Restraint on Competition, Rather than a Formalistic Analysis of Whether an Agreement Exists**

The *Leegin* decision will result in courts examining the substantive issues of the effects of the restraint when analyzing challenges to alleged resale price maintenance. The per se rule of *Dr. Miles* foreclosed analysis of the restraint, but restricted courts to a formalistic inquiry of whether a particular manufacturer-dealer arrangement constitutes an agreement on prices.

For almost as long as *Dr. Miles* has existed, there has been a tension with the primary case limiting its reach. In *United States v. Colgate & Co.*, 250 U.S. 300 (1919), the Court made an exception to *Dr. Miles* by asserting a manufacturer's right to announce a unilateral resale pricing policy and to refuse to deal with a dealer that did not follow it. *Colgate* properly confirmed a

manufacturer's right to choose its dealers, but, in conjunction with the *Dr. Miles* rule, resulted in an inappropriate focus on evidence of an agreement. While *Monsanto*, id. at 768, limited the breadth of "agreement" (requiring "evidence that tends to exclude the possibility of independent action by the manufacturer and distributor" and "reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective"), it did not eliminate the formalism in the inquiry.

In addition, the *Leegin* case will allow defendants in resale price maintenance cases to use evidence similar to that available to them in other antitrust cases challenging their distribution arrangements – they can now defend themselves with evidence which would be irrelevant if the per se rule applies.

Unlike the per se rule, the rule of reason requires the fact-finder to weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Sylvania*, id. at 49. *Leegin* notes that appropriate factors to take into account include "specific information about the relevant business and the restraint's history, nature and effect." Whether the businesses involved have market power is a further, significant consideration." Id. at 5 (internal citation omitted.)

### **LEEGIN DID NOT MAKE RESALE PRICE MAINTENANCE PER SE LEGAL**

*Leegin* does not give manufacturers the ability to enter into minimum resale price agreements without the possibility of challenge. The Court drew a bright line around agreements by a group of retailers or manufacturers to engage in resale price maintenance:

"A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason." The Court also identified dominant firms using resale price maintenance as sources of anticompetitive effects, if a dominant retailer seeks to forestall innovation by smaller rivals or when a dominant manufacturer gives retailers incentives not to carry the products of smaller or newer competitors. The Court described the need to be diligent in eliminating anticompetitive uses of resale price maintenance and identified certain factors relevant to the inquiry. This is not a "free pass" for manufacturers.