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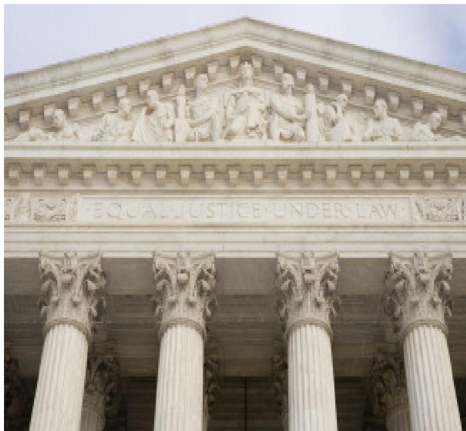

Antitrust Law Alert

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Supreme Court Denies Certiorari in the *Leegin* Follow-up Case

The United States Supreme Court recently declined a petition for writ of certiorari, which requested review of a subsequent lower court decision in its landmark vertical minimum price fixing decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[1]

Leegin Creative Leather Products, Inc. ("Leegin") manufactured and distributed women's handbags and other products under the "Brighton" brand. PSKS, Inc. ("PSKS"), owner of a retailer that sold Brighton products, violated Leegin's resale price maintenance ("RPM") policy by offering Brighton products at a discount. Leegin decided to stop supplying goods to PSKS and the company was sued under the Sherman Act. In 2007, the Supreme Court ruled that Leegin's agreements requiring retailers to adhere to a manufacturer's minimum resale prices were not *per se* illegal and, instead, should be evaluated under the rule of reason.[2] In so doing, the Court overturned its almost century-old precedent, which had held that vertical resale price fixing or RPM was unlawful on its face. The Court remanded the case to the district court to apply the rule of reason upon retrial.

PSKS then amended its complaint, alleging that independent retailers of Brighton products participated in the enforcement of Leegin's RPM policy. PSKS alleged that there was a "hub-and-spoke" conspiracy, with Leegin as the "hub" and the retail dealers as the "spokes." PSKS further alleged that because Leegin also owned retail outlets, the subject conduct also constituted a horizontal price fixing conspiracy.

The district court, applying the rule of reason standard, dismissed PSKS's second amended complaint in April 2009. PSKS appealed, but the U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's decision holding that PSKS's amended complaint failed to properly allege a relevant market in which to conduct the rule of reason analysis.

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[1] 551 U.S. 877 (2007), *aff'd, PSKS Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412 (5th Cir. 2009), *cert. denied, PSKS Inc. v. Leegin Creative Leather Products, Inc.*, No. 10-653 (2011).
[2] *Id*

The Fifth Circuit affirmed the district court's determination that PSKS had to plead and prove a relevant market because "anticompetitive uses of RPM do not create concern unless the relevant entity has market power."[3] It rejected PSKS's claims that a plaintiff sufficiently pleads a vertical price fixing claim just by pleading the "existence of the agreement and the scope of the operation,"[4] noting that PSKS's claim failed "anyway as a matter of market definition."[5]

The upshot of this most recent *Leegin* development is that a plaintiff is required to properly allege and prove all traditional elements of a rule of reason claim, including the relevant market. Despite this recent development at the federal level, a large number of states have laws and case precedents that support continued application of the *per se* approach to RPM programs. Although the Supreme Court so far has refrained from revisiting its prior decision, *Leegin* continues to face resistance in the states. In addition, proposed legislation in Congress proposes to reinstate the *per se* rule.

Several states continue to approach resale price maintenance and related activity as *per se* violations. The state of Maryland enacted legislation, effective October 1, 2009, specifically designed to repudiate *Leegin*'s non–*per se* approach and making unlawful any contract, combination or conspiracy "that establishes a minimum price below which a retailer, wholesaler or distributor may not sell a commodity or service." Md. Code Ann., Com. Law § 11-204. New York has legislation that, on its face, makes unenforceable any contract provision that purports to restrain a vendee of a commodity from reselling at less than the price stipulated by the vendor. N.Y. Gen. Bus. Law § 369-a (McKinney 2002). New Jersey and California have similar or comparable statutes that on their face would make RPM programs unlawful. *See* N.J. Laws of 1975, ch. 107 § 3; and Cal. Bus. & Prof. Code § 16720(d) (West1997 & Supp. 2007).

In addition, in 2008, 35 states supported proposed federal legislation that would overrule *Leegin* and specifically make RPM policies *per se* illegal. The main thrust of congressional and state concern is the need to protect consumers from higher prices that they believe flow from these programs. Statement of State Attorneys General, Support for the Discount Pricing Consumer Protection Act (S. 2261) (May 14, 2008).

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[3] *PSKS Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412, 418 (5th Cir. 2009).
[4] *Id.* at 417.
[5] *Id.*