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"Per Se" or Not "Per Se" - An Historical "Quick Look" at Minimum RPM Under California Law

On June 28, 2007, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,1[1] the United States Supreme Court decided in a 5-4 vote to overrule the long-lived rule in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*2[2]The decision in *Dr. Miles*, issued in 1911, had a long but checkered life. In *Dr. Miles*, the Court affirmed the sustaining of a demurrer to a bill in equity, and held that it was illegal under Section 1 of the Sherman Act for a manufacturer and its distributors to agree on a minimum price that the distributor must charge for the manufacturer's goods, upon resale.

Leegin followed a series of Supreme Court decisions that have whittled away the use of *per se* rules in "vertical" antitrust cases (cases involving restraints between two or more parties on different levels of distribution). In 1977, the Court issued a seminal sea-change decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,3[3] in which the Court turned to a presumption in favor of the rule of reason, and eliminated the application of *per se* rules in all non-price vertical restraint cases. The Court determined that the accepted standard for testing whether a practice unreasonably restrains trade in violation of Section 1 of the Sherman Act, is the rule of reason. This standard requires the fact finder to "weigh all of the circumstances of a case." This includes specific information about the relevant business and the restraint's history, nature and effect.4[4] The rule of reason distinguishes between restraints with anticompetitive effects that are harmful to consumers, and those with procompetitive effects that are in the consumer's best interest.

In 1988, the Court went on to hold, in *Business Electronics Corp. v. Sharp Electronics Corp.*,5[5] that resort to *per se* rules is confined to restraints "that would always or almost always tend to restrict competition and decrease output.6[6] The Court determined a *per se* rule is only

appropriate after courts have developed considerable experience with the type of restraint at issue. It is only where the court can predict with confidence that the restraint would be invalidated in "all or almost all" instances under the rule of reason, that a *per se* rule would be appropriate. This will tend to preserve scarce judicial resources.

With *Leegin*, the Supreme Court closed the circle it drew with *Continental T.V., Business Electronics* and other decisions such as *State Oil v. Khan*.7[7] Recognizing that there has been considerable insight into the economic analysis relevant to inquiries into minimum resale price agreements ("RPM"), the Court in *Leegin* stated that currently, "all or almost all" economists and commentators would agree that there are at least some instances where RPM, while degrading intrabrand competition, will have a salutary effect on interbrand competition, and will thus be, on balance, more pro-competitive than anti-competitive.8[8] With this experience, the Court found a per se rule is no longer appropriate for RPM, and that the appropriate legal standard is the rule of reason.

Virtually from the moment it was decided, there has been a substantial and growing body of literature on *Leegin's* reach and significance, particularly as it may apply to state antitrust law.9[9] Beginning almost immediately after the Court issued its opinion, legislation has been introduced in Congress to overrule *Leegin*, and return to the world of *Dr. Miles*.10[10] At last count, 41 state attorneys general, including California, New York and Florida, have written to Congress to express support for the "Discount Pricing and Consumer Protection Act", S. 148, which is currently before the 111th Congress. This legislation would amend the antitrust laws to restore the rule of *Dr. Miles* that minimum RPM agreements violate the Sherman Act.

California has taken a further step, and has taken the position that *Leegin* notwithstanding, the California Cartwright Act "explicitly defines" a resale price maintenance agreement as a "trust", and is thus per se unlawful by the terms of the statute itself.11[11] This article examines the pros and cons of that position, and concludes that the better rule is exemplified by a venerable maxim of jurisprudence, that predated *Dr. Miles* by 39 years: "when the reason of a rule ceases, so should the rule itself."

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12[1] 551 U.S. 877 (2007).

13[2] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

14[3] 433 U.S. 36 (1977). *See*, Don T. Hibner, Jr. and Andrea B. Hasegawa *The Silver Anniversary of an Antitrust Sea-Change: Continental T.V. and Brunswick at Twenty-Five*, 11 COMPETITION 27 (2002-2003). *Continental T.V.* not only transformed vertical non-price restraint doctrine, but also implicitly criticized the approach evident in a number of Supreme Court decisions relating to the use of *per se* tests to condemn behavior whose economic effects are not immediately clear. The Court noted that early decisions, including *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911) "established the rule of reason as the prevailing standard of analysis." *Id.* at 60-68. The *Continental T.V. Court* described the rule of reason analysis as a "demanding standard", and emphasized that any "departure from the rule of reason standard must be based upon demonstrable economic effect rather than … upon formulistic line drawing." 433 U.S. at 59.

15[4] 433 U.S. at 49.

16[5] 485 U.S. 717 (1988).

17[6] 485 U.S. at 726.

18[7] 522 U.S. 3 (1997) (holding that the appropriate legal standard for evaluating vertical maximum resale price agreements is the rule of reason, not the per se rule).

19[8] 551 U.S. at 900-902.

20[9] Thomas Brom, *The Price is Right*, CALIFORNIA LAWYER (September 1, 2009); Steven G. Mason, *The Price is Right*, LOS ANGELES LAWYER 29 (April, 2009); M. Russell Wolford, Jr. and Kristen C. Limarzi, *The Reach of Leegin: Will the States Resuscitate Dr. Miles?* THE ANTITRUST SOURCE (October 2007); Richard A. Dunkin and Allison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?* FRANCHISE LAW JOURNAL 173 (Winter 2008); Paul Gift, *Price Fixing and Minimum Resale Price Restrictions Are Two Different Animals*, 12 GRAZIADIO BUSINESS REPORT Issue 2 (2009); Michael A. Lindsay, *Overview of State RPM*, ANTITRUST MAGAZINE (Fall 2007); Frank M. Hinman and Sujal J. Shah, *Counseling Clients on Vertical Price Restraints*, 23 ANTITRUST MAGAZINE 60 (Summer 2009); Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free Riding*, (to be published in ANTITRUST LAW JOURNAL, Fall 2009).

21[10] See, Discount Pricing Consumer Protection Act, S. 148, introduced January 6, 2009 by Senator Herb Kohl (D WI). A substantially similar bill was introduced previously on October 30, 2007, the "Discount Pricing Consumer Protection Act," S. 2261.

22[11] Thomas Brom, *The Price is Right*, supra.