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Fifth Circuit Dismisses *Leegin* Resale Price Maintenance Case Anew, Following Supreme Court Remand

In 2007, the United States Supreme Court, updating the application of the cumulative advances in antitrust economics as applied to vertical restraint cases, overruled the venerable *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). The Court held that because economic learning now demonstrates that there may be a number of procompetitive justifications for the imposition of vertically imposed resale price maintenance ("RPM"), such cases should now be evaluated under a rule of reason. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (*"Leegin"*). The Supreme Court remanded *Leegin* back to the Fifth Circuit. Previously, the District Court for the Eastern District of Texas had granted Defendant Leegin's motion to dismiss on the merits, only to be overruled in the Fifth Circuit by the application of the *per se* rule of *Dr. Miles*. *See PSKS, Inc. v. Leegin Creative Leather Prods.*, 498 F.3d 486 (5th Cir. 2007). On remand from the Fifth Circuit's reversal by the Supreme Court, the Eastern District of Texas again granted Leegin's motion to dismiss. *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. 2:03-CV-107, 2009 WL 938561 (E.D. Tex., April 6, 2009). On appeal again to the Fifth Circuit, the court now affirmed. Case dismissed. *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, No. 09-40506 (5th Cir. August 17, 2010).

Leegin manufactures and distributes handbags, belts, jewelry and related products under its "Brighton" brand. In addition to selling the Brighton products to independent retailers, it also owns and operates over 100 Brighton retail stores. To harmonize and control the price at which its Brighton line of goods was moving at retail, Leegin imposed a resale price maintenance policy. Perhaps more by inadvertence then by design, the RPM policy required aquiesance and agreement by its retail dealers. PSKS violated the policy by offering the line at discount prices through its Kay's Kloset stores. Leegin refused to sell PSKS further product, and PSKS brought suit, alleging a *per se* violation of the rule in *Dr. Miles* that vertical RPM agreements were *per se* illegal under the Sherman Act. On certiorari review of the Fifth Circuit's affirmance of a substantial jury verdict in favor of PSKS, in the Eastern District of Texas, the United States Supreme Court reversed. In so doing, it overruled the then 96-year old precedent of *Dr. Miles*, which declared that all vertical price restraint agreements were *per se* unlawful.

The Supreme Court recognized that RPM arrangements can have important procompetitive effects, including encouraging retailers to invest in services and promotions, eliminating free riding by price discounters, and increasing consumer demand through brand building. It

nevertheless acknowledged that there were also a number of anticompetitive justifications that would allow for condemnation of vertical resale price maintenance, depending on appropriate rule of reason analysis, such as cartel agreements at either the manufacturer or retail level. It could also include a variant, namely an RPM agreement at a retail level which then went upstream for approval and implementation at the manufacturer level. A third variant is the use of RPM agreements by either a dominant retailer or manufacturer. In other words, where market power was incumbent at either a retailer or manufacturer level, the dominant retailer or manufacturer could "flunk" a typical "market power screen" test utilized to measure the degree of foreclosure in either a nonprice or a price vertical restraint situation.

On remand, PSKS filed a second amended complaint alleging that the independent dealers were involved in the enforcement of Leegin's RPM policy. PSKS further alleged that this resulted in a "hub-and-spoke" conspiracy, with Leegin as the "hub", and the independent retail dealers as the "spokes".

Finally, PSKS claimed that there was a horizontal agreement among retailers, which was instigated by Leegin, acting as a retailer through its retail stores. However, PSKS did *not* allege that the retailers were the "source" of the RPM policy or that Leegin established the policy at the behest of the retailers. Nor did it allege any agreement among retailers or between Leegin and competing manufacturers. PSKS also argued that the rule of reason was inapplicable, because Leegin was acting as a "dual distributor."

However, where PSKS came up short was that it failed to allege a properly defined relevant product market. The District Court dismissed the second amended complaint, and the Court of Appeals affirmed, holding that PSKS had failed to plead a plausible relevant market, as required as the first step under a typical rule of reason analysis. Next, the District Court held, and the Court of Appeals affirmed, that the horizontal restraint allegations were barred by the mandate rule as they were not before the court on the initial proceedings before the remand and reversal by the Supreme Court. Thus, the horizontal claims failed as a matter of law.

The Court of Appeals also affirmed the District Court's rejection of Brighton as a single brand market, noting that such an allegation was untenable. Brighton products were reasonably interchangeable with other competing brands, and could not be a "tenable dominant market." Thus, a single brand market, in a spirit of *Image Technical. Servs. v. Eastman Kodak Co.*, 504 U.S. 451, 481-82 (1992) was similarly untenable. The court noted that *Kodak* was limited to situations were consumers were "locked in" to a specific brand by "structural barriers" to interchangeability with products produced by competing manufacturers. Here, PSKS failed to allege such "barriers."

Having failed to satisfy the market definition element under a rule of reason analysis, the plaintiff was unable to show any injury to competition. Thus, the court finally noted, as did the Supreme Court in its *Leegin* decision, at 551 U.S. at 898, that even "anticompetitive uses of RPM do not create concern unless the relevant entity has market power." Thus, the court noted that "a market-power screen is thus compatible with *Leegin* and our precedent and that of our sister circuits." As PSKS flunked the first step under the traditional rule of reason, it was deemed unnecessary for the court to comment on, much less to address, the arguments of amicus

American Antitrust Institute that RPM "arrangements" should "carry a presumption of illegality or should be treated as "inherently suspect."

The bottom line is that to allege a viable vertical restraint claim, according to the Fifth Circuit, a plaintiff must *plausibly* allege the defendant's market power. The court noted: "[PSKS's] claim defies the basic laws of economics. Absent market power, an artificial price hike by Leegin would merely cause it to loose sales to its competitors." Quod erat demonstrandum.

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