# Antitrust Alert: Leegin on Remand: Retailer Fails to Sell Vertical Price Fixing Allegation

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In 2007, the Supreme Court overturned a nearly century-old precedent, holding that resale price maintenance (RPM) plans were no longer *per se* illegal under Section 1 of the Sherman Act, and instead must be analyzed under the Rule of Reason.[1] Since *Leegin,* there has been much speculation about how RPM would now be treated by the courts, as well as attempts to overturn the decision legislatively. We now have a concrete example of the difference between *per se* and Rule of Reason on RPM issues—and it involves the continued saga of the *Leegin* case.

After the Supreme Court's decision, the *Leegin* case went back to the trial court, and has now returned to the court of appeals. On August 17, 2010, the Fifth Circuit, having originally upheld a verdict for plaintiff PSKS under a *per se* theory, now has affirmed the complaint's dismissal under the Rule of Reason. Issues which are less important in the *per se* context—properly defining the relevant product market and demonstrating anticompetitive effects—now fatally trip up and doom a plaintiff under the Rule of Reason analysis.[2]

## Background

Under the Brighton trademark, Leegin manufactured women's purses and other accessories, which were sold by many retailers, including PSKS. The case arose when Leegin decided to stop supplying PSKS because PSKS had violated an RPM agreement and had discounted the Brighton products. PSKS sued under the Sherman Act, and prevailed under the *Dr. Miles* precedent. The Fifth Circuit affirmed. The Supreme Court then explicitly overruled *Dr. Miles*, reversed the Fifth Circuit, and remanded.

## *Leegin* on Remand

The Fifth Circuit, after receiving the case from the Supreme Court, sent the case back to the District Court. The District Court, applying the new Rule of Reason standard, dismissed the case and the Fifth Circuit affirmed.

PSKS alleged in its Second Amended Complaint that independent retailers of Brighton products were involved in the enforcement of Leegin's RPM policy in a "hub-and-spoke" conspiracy. Under the alleged conspiracy, PSKS claimed that Leegin would resolve pricing disputes between competing retailers who had reached a consensus regarding acceptable discounts. PSKS also alleged that Leegin acted at the retail level, and was involved in a horizontal price fixing conspiracy relating to the price of Brighton goods. Furthermore, because Leegin acted as a dual distributor (both a manufacturer and a retailer), PSKS alleged that the Rule of Reason should not apply.

# Lack of Product Market

The District Court held that in order to prevail on a vertical minimum price fixing claim, PSKS had to plead and prove a relevant market. The Fifth Circuit agreed.

PSKS proposed the "retail market for Brighton's women's accessories" and the "wholesale sale of brand-name women's accessories to independent retailers" as the relevant markets. The Fifth Circuit affirmed the District Court's holding that a single brand can only constitute a relevant market if consumers are "locked in" to that specific brand by some nature of the product. The Fifth Circuit found that PSKS failed to allege any such structural barriers to the interchangeability of Brighton products with goods from competing manufacturers. The Court also held that "wholesale sale" could not constitute a relevant market, because market definition must be based on the product rather than the distribution level.

The Fifth Circuit therefore affirmed the dismissal of the vertical restraint claim for failure to adequately allege a relevant market.

# Lack of Anticompetitive Harm

PSKS also alleged that Leegin's RPM policy resulted in artificially high prices for Brighton products. However, the Fifth Circuit found this claim implausible, reasoning that absent market power, artificially high prices would have caused Leegin to lose sales to competitors.

PSKS further alleged that Leegin's RPM policy deprived consumers of free and open competition for Brighton products, reasoning that RPMs limit price competition. The Fifth Circuit disagreed with this argument, finding that it ignores competition with other brands.

If anyone believed that the *Leegin* decision altering the standard for RPM claims to the more forgiving Rule of Reason standard was merely cosmetic, this subsequent *Leegin* history should now belie it. From a counseling point of view, we are still waiting for clarification on when, if ever, an RPM program could violate the Rule of Reason. The Fifth Circuit's approach, however, does confirm that a plaintiff will have to allege properly and prove all traditional elements of a Rule of Reason claim. This sets the bar quite high for a plaintiff to prevail, and gives comfort to manufacturers that the door has been more than unlocked—perhaps even opened wide—to permit RPM programs to avoid federal antitrust scrutiny in most circumstances.

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**Endnotes**

[1] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), *overruling Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

[2] *PSKS, Inc. v. Leegin Creative Leather Prods.,* 5th Cir., No. 09-40506 (August 17, 2010).

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