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## Supreme Court Rewrites Century of Law on Vertical Price Controls

# MAJOR POTENTIAL IMPACT ON BRANDS, RETAILERS SEEN

In a controversial 5-4 decision, the United States Supreme Court swept aside nearly a century of established antitrust law and ruled that vertical price fixing is no longer per se (or automatically) unlawful.

In Leegin Creative Leather Products, Inc. v. PSKS, Inc., No. 06-480, decided June 28, 2007, the Court concluded that an agreement between a manufacturer and its dealers establishing resale prices should now be judged under what is known as the Rule of Reason. Under that approach, a dealer wishing to challenge a resale price agreement must show that the agreement's purpose and effect is not only anti-competitive but also outweighs any pro-competitive benefits to interbrand competition. Since 1911, forcing retailers to adhere to minimum resale prices had been a per se violation of federal antitrust law.

It was an accessory item — a handbag — that led to the decision. Leegin, which makes the Brighton line of designer purses, required its retailers, including Kay's Kloset in suburban Dallas, Texas, to agree in writing not to sell Leegin products below specified prices. When Kay's Kloset sold at



lower prices, Leegin terminated it as a dealer. Kay's Kloset sued in 2002 and won a \$3.6 million jury verdict. The high court decision vacates that award, and remands the case for further proceedings in the trial court.

On appeal, Leegin argued it needed to maintain price consistency among the niche retailers to which it sells to make sure the stores can and will offer high quality service to customers. As a result, smaller stores would be able to compete against rival brands sold by discounters, Leegin urged.

The majority decision relied heavily on economic analysis, while the dissenters warned the result would lead inevitably to higher consumer prices. The majority expressed the hope that, over time, lower courts would work out which kinds of vertical price restrictions tended to benefit competition, and which hurt it. But Rule of Reason cases are far more fact and expert intensive, and cost more and take longer to resolve, so it may be some time before consensus emerges, if it ever does.

This change in the law will not be one size fits all. Luxury goods makers, particularly those offering lots of post-sale service, will have reasons to consider adopting resale price maintenance. The same may be true for those making products with high brand recognition. Discounters may find life tougher, although the very largest may have the market power to stare down their sources. But small boutiques and internet sellers may not.

Despite the reliance on economic analysis, the Court's opinion took no notice of the rapid consolidation of retail outlets which has taken place. Suppose a retailer with coveted shelf space "encourages" a manufacturer to impose minimum prices, hoping to shelter itself against retail competition? Nor did the Court address what happens if the manufacturer also has economic interests at retail, but there the reason was procedural. Leegin itself has interests in retail outlets, but this issue was first raised only after trial, and so couldn't be considered on the appeal.

**An important caveat:** Manufacturers should not assume they now have carte blanche to impose minimum resale prices. Unless and until state courts or legislatures decide otherwise, resale price maintenance is still illegal per se under many states' antitrust laws (including California and New York) and in the European Union. State attorneys general have worked together to bring class actions to challenge resale price maintenance. And Rule of Reason challenges will still be available, and may pose real risks to price-setting manufacturers in concentrated markets. Beyond that, the Federal Trade Commission could use its power under the FTC Act to treat some vertical price controls as unfair.

## RETAILER BEWARE:

In the wake of massive credit card information thefts, like that at TJ Maxx in Massachusetts, Minnesota has adopted a law which could shift banks' costs of notifying customers whose data was stolen and issuing replacement cards if they arise from a merchant's credit card or debit card data kept beyond specified time limits and it is compromised. The restriction on keeping the data took effect August 1. Banks will be allowed to sue for costs they suffer from data breaches occurring after August 1, 2008. Similar legislation has been tabled elsewhere, including Massachusetts.

## BYE BYE SALES TAX

New York City approved dropping its sales tax on clothing items, including luxury ones. Items under \$110 in cost already escaped city taxation, but the new change would eliminate the cap. The tax elimination has been approved at the State level and takes effect September 1.

### This just in

## FIRST LEAD, NOW FORMALDEHYDE?

Regular readers of this newsletter will remember our warning in the April, 2007 issue about the risks of lead in accessories, a reminder all too timely in light of later massive recalls of lead-tainted products made in China. Is formaldehyde in apparel and textile products the next big problem?

Formaldehyde is used as a wrinkle retardant in various apparel products. Both the United States and the European Union sets limits on the permissible amount, depending on the product involved. In July and August, China-made products in Australia and New Zealand were found to have excessive formaldehyde levels. In Australia, the product was a blanket which was recalled. In New Zealand, the product which prompted an "urgent" investigation by the Consumer Affairs Ministry was children's clothing. Too much formaldehyde can cause skin problems, severe allergic reactions and perhaps cancer.

## STOP THAT PHOTOGRAPHER — HE STOLE MY BAG DESIGN!

It's too soon to tell how this story ultimately will come out, but a decision by the U.S. Court of Appeals for the Second Circuit suggests U.S. courts may be more willing to recognize foreign judgments protecting fashion designs than generally thought, even if the



foreign judgment is broader than U.S. law would allow. A federal trial court had refused to enforce French judgments finding that Viewfinder, which calls itself an on-line fashion magazine, had violated the French intellectual property rights of Parisian design houses, including those for “creations of the seasonal industries of dress and articles of fashion.” The trial court reasoned the default judgments were repugnant to First Amendment principles. Not necessarily so, the Court of Appeals concludes, sending the matter back for further pondering. Both countries have copyright laws, so that part is fully consistent. First Amendment interests could be protected by fair use provisions of those laws. Nor would the fact that U.S. law does not allow dress designs to be copyrighted as such make the French judgments repugnant. The decision could have broad-reaching implications if the judgments stand up. SARL Louis Feraud International v. Viewfinder, Inc. (2d Cir. June 5, 2007).

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The Accessories Council is a not-for-profit, national trade association that was established in 1995 with the mission of increasing consumer use and awareness of accessories.

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