

## Supreme Court Strikes Down Ban on Minimum Resale Price Maintenance

### INTRODUCTION

In a 5-4 decision issued today, the Supreme Court struck down the longstanding, strict prohibition on minimum resale price maintenance (“RPM”). The Court’s opinion – in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, \_\_\_ S. Ct. \_\_\_ (2007) – holds that minimum RPM, which had been prohibited outright under the *per se* rule, will now be subject to review under the antitrust laws’ more lenient rule of reason. By overturning its nearly one hundred year old decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which first applied the *per se* rule to minimum RPM, the Court has greatly expanded the flexibility of manufacturers and suppliers in developing and implementing product distribution strategies.

### BACKGROUND

The case arose out of a dispute between Leegin, a manufacturer of premium leather goods, and one of its retailers, Kay’s Kloset. Kay’s distributed Leegin’s Brighton product line, which consisted of belts and a variety of other women’s fashion accessories. The Brighton line became so important to Kay’s that, at one point, it accounted for 40%-50% of the company’s profits. Consequently, when Leegin learned that Kay’s had been marking down the entire Brighton line by 20%, and terminated Kay’s as a distributor, Kay’s filed an antitrust suit. Specifically, Kay’s alleged that Leegin had violated Section 1 of the Sherman Act

– as interpreted by the Supreme Court in *Dr. Miles* – by engaging in minimum RPM.

### THE COURT’S DECISION

In holding that minimum RPM would no longer be automatically condemned under the antitrust laws, the Court did not attempt to disguise the fact that it was overruling its prior decision in *Dr. Miles*. Rather, the Court acknowledged that, in the century or so separating the two cases, economic thinking regarding the competitive impact of minimum RPM had changed significantly. The Court noted that the Sherman Act, unlike many other pieces of federal legislation, is a “common law statute” whose requirements evolve over time to reflect the state-of-the-art in economic thinking.

The Court then went on to cite a variety of sources – ranging from an *amicus* brief filed by leading economists, to the Federal Trade Commission and the Department of Justice, to the ABA Section of Antitrust Law – for the proposition that minimum RPM is not *always* anticompetitive and, in many circumstances, may actually increase competition. For example, minimum RPM can promote *interbrand* competition – the primary objective of the antitrust laws – by ensuring retailers the margin they need to provide product information, customer service, and an enhanced in-store experience, while simultaneously protecting them from “free-riding” discounters. Based on this

analysis, the Court concluded that holding minimum RPM to be unlawful under all circumstances was no longer appropriate, as the *per se* rule has traditionally been reserved for practices that “always or almost always tend to restrict competition.”

### KEY CONSIDERATIONS GOING FORWARD

The Court’s decision provides an important opportunity for companies to consider updating or amending their distribution policies. Companies that elect to do so should:

- **Re-consider minimum RPM work-arounds** – Some common features of modern distribution policies – such as complicated minimum advertised price and *Colgate* policies (pursuant to which a discounting retailer is automatically terminated without further communication) – were adopted primarily as a means of avoiding the antitrust prohibition on minimum RPM. With the prohibition gone, it may be worthwhile to consider minimum RPM as a more efficient, streamlined alternative.
- **Examine the requirements of state law** – The Supreme Court’s decision abolishes the prohibition on minimum RPM as a matter of *federal* antitrust law. Some states – including states with large consumer markets, like California (whose antitrust statute, the Cartwright Act, is not necessarily interpreted in conformity with federal law) – may not follow suit.
- **Examine the requirements of foreign law** – Companies with distribution networks that extend not only nationally, but internationally,

should also consider the requirements of foreign law. For example, under the competition law of the United States’ largest trading partner, Canada, minimum RPM is still prohibited.

- **Heed the limitations of the rule of reason** – The Supreme Court’s decision merely means that minimum RPM will not automatically be condemned as unlawful. It does *not* mean that the practice will be considered lawful in all circumstances. In the *Leegin* opinion itself, the Court provided a few examples of situations where minimum RPM might not pass muster under the rule of reason. These include situations in which: (1) a significant number of competing manufacturers in a particular market adopt the practice, (2) a manufacturer adopts the practice at the behest of its retailers, or (3) the practice is adopted by a manufacturer with significant market power.

### FOR MORE INFORMATION

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