



Fashion and Luxury Brands Law

ALERT

JULY 2007

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Price Restraints No Longer *Per Se* Illegal

On June 28, 2007, the Supreme Court concluded in a 5-4 opinion that arrangements between manufacturers and retailers setting price floors for the resale of products to consumers are not illegal on their face and must be evaluated on a case-by-case basis. The Court's decision overturned the nearly century-old rule that banned all such price fixing agreements as a restraint on trade and competition.

Under the Sherman Antitrust Act of 1890, all practices restraining commerce are illegal. Later Supreme Court cases interpreted the Act to render all *unreasonable* restraints on trade illegal. As such, the rule of reason standard was implemented to determine whether a trade restriction was reasonable based on the individual circumstances surrounding the restriction. However, the Court deemed certain types of restraint as *per se* illegal, no matter what the circumstances. Prior to June 28, 2007, one such *per se* illegal restraint was intentional price fixing, an agreement between business competitors to sell the same product at the same price.

Notwithstanding this *per se* treatment, one form of price fixing has been routinely employed in the apparel industry for a number of years. So-called "Price Maintenance Agreements" ("PMA") prohibit retailers from selling goods below a specified price point. Manufacturers have utilized PMAs as a way to maintain brand integrity by preventing merchants from drastically discounting under performing products, or selling these products to off price retailers.

The case, *Leegin Creative Leather Products vs. PSKS*, was brought by PSKS, a clothing retailer doing business as Kay's Kloset, against Leegin Creative Leather Products,

the manufacturer of "Brighton" branded leather accessories for women. In an effort to position Brighton as an upscale brand sold only in boutique stores, Leegin adopted a policy refusing to sell the Brighton line to retail stores reselling the products below the suggested retail price. In order to do business with Leegin, retailers had to agree not to discount the Brighton products.

Leegin discovered Kay's Kloset was in breach of their agreement by discounting the Brighton leather goods twenty percent below the set retail price. Refusing to adhere to the suggested minimum resale price, Kay's Kloset brought suit against Leegin claiming its arrangement with retailers constituted illegal price fixing in violation of antitrust laws. While Leegin did not dispute that its policy amounted to price fixing, it argued that consumers benefited from the extra care that the retailers' guaranteed margin enabled them to give to promoting and servicing the products. The ultimate effects were procompetitive rather than anticompetitive, because it encouraged competition among manufacturers selling other brands of leather goods rather than retailers selling the Brighton brand.

The Court noted, "Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending on the circumstances in which they are formed." As such, resale price fixing agreements cannot be concluded as illegal on their face, since they do not always or almost always tend to restrict competition and decrease output. By setting a minimum

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resale price, competition among manufacturers selling different brands of the same type of goods can be stimulated by reducing competition among retailers selling the same branded goods. By not competing with each other, retailers would invest in services or promotional efforts that encourage competition among the manufacturers. Furthermore, consumers would have increased options of prices and brands from which to choose their products.

Manufacturers and retailers agreeing to price restraints may enable competition among brands in several ways. First, retailers would compete among themselves over various retail services provided to the consumer, such as quality showrooms, product demonstrations or well-trained employees. Such services generate an increased demand for the product amongst consumers, but at a cost to the retailer providing those services. Forbidding sale of the product below a certain price prevents discounting retailers from riding the coat tails of others that have spent time and money developing the consumer demand and encourages them to compete by providing their own retail services.

Another procompetitive effect of resale price maintenance is facilitating entry of new companies and brands into the market. A restriction on resale price will provide an incentive to knowledgeable retailers to expend the resources necessary to successfully distribute an unknown brand to consumers. The Court observed, "New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect."

Finally, the Court recognized that even if retailers were not getting a free ride by discounting products, vertical price fixing may increase retail services not otherwise provided in other ways. By offering a guaranteed profit margin and threatening termination for failure to meet expectations, the manufacturer may more efficiently increase its market share by motivating the retailer to provide valuable services to its consumers on its own initiative rather than contracting with the retailer specific retail services to be performed.

While the procompetitive benefits of resale price maintenance is evident, the risk of anticompetitive effects re-

mains present. For example, anticompetitive effects stem from horizontal agreements to fix prices, such as manufacturers colluding with one another to set high prices at which to sell to retailers or retailers banning together to fix a price at which they will buy the products from the manufacturers. Furthermore, a powerful manufacturer or retailer could use resale price maintenance as a tool to monopolize its market.

In recognition that not all vertical price arrangements are anticompetitive, the lower courts may now determine whether such arrangements between manufacturers and retailers may be justified under the rule of reason. A plaintiff would need to show actual harm to competition from the challenged practice in order to prevail.

As a result of the Court's decision, manufacturers will have more control over their products. Rather than include provisions relating to distribution channels or advertising requirements in their contracts with retailers, manufacturers can fix the minimum resale price at the outset in order to protect their brands. Because such agreements may give rise to anticompetitive effects or violate state antitrust laws, manufacturers should always ensure procompetitive benefits exist to justify the restraint.

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