Testimony of

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On behalf of the National Association of Manufacturers
To the Senate Judiciary Subcommittee on Antitrust, Competition Policy and
Consumer Rights
"The Leegin Decision: The End of Consumer Discounts or Good Antitrust Policy?"
Tuesday, July 31, 2007

Thank you, Mr. Chairman and members of the Subcommittee. For the record, I am Stephen Bolerjack. I'm a lawyer with Dykema Gossett in Detroit. I chair the Competition Task Force of the National Association of Manufacturers ("NAM"). I and the NAM appreciate the opportunity today to provide the perspective of manufacturers on the Supreme Court's recent Leegin decision. The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory growth environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role that manufacturing plays in America's economic future and living standards.

The National Association of Manufacturers supports the Leegin decision as sound antitrust policy:
? Leegin follows the guiding rule of modern antitrust jurisprudence that limits the per se analysis to practices that "always or almost always tend to restrict competition or decrease output." This is simply not true of minimum resale price maintenance. Leegin applies the rule of reason, the accepted standard for antitrust cases, to minimum resale price maintenance agreements;
? Leegin reflects the progression of antitrust law for the past thirty years in limiting the scope of the per se rule. Sylvania in 1977 and Khan in 1997 each overruled prior Supreme Court decisions to apply the rule of reason to vertical restraints; and
? Leegin requires courts to make decisions based on substance - the effect of the restraint on competition in a market - rather than on formalistic analysis of whether conduct shows an agreement between a manufacturer and a reseller. In addition, it will permit defendants to defend themselves in these cases by proving facts about competitive effects that they were precluded from using under the per se rule.

Importantly, Leegin does not give manufacturers the green light to enter into minimum resale price agreements without the possibility of challenge; resale price maintenance is not per se legal. Resale price maintenance imposed as a result of an agreement with competing suppliers will remain per se illegal.

BACKGROUND

In 1911 the Court decided Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). The case held that an agreement between a manufacturer and its distributor on the minimum price the distributor can charge for the manufacturer's goods was per se illegal under Section 1 of the Sherman Act. Eight years later, the Court decided, in United States v. Colgate & Co., 250 U.S. 300 (1919), that a manufacturer that refused to deal with retailers that discounted did not violate Section 1, since this was a unilateral policy and there was no agreement as is required to find a violation of Section 1.

Leegin overrules Dr. Miles and requires that the rule of reason analysis be applied to minimum resale price maintenance, as is already the rule for maximum resale price maintenance (State Oil v. Kahn, 522 U.S. 3 (1997)) and

non-price vertical restraints (Continental T.V. v. GTE Sylvania Inc., 433 U.S. 36 (1977)). As discussed below, Sylvania and Kahn each overruled prior Supreme Court precedent.

LEEGIN DECISION

Leegin Creative Leather Products, Inc. v. PSKS, Inc. __ U.S. __, 2007 WL 1835892 (No. 06-480) (June 28, 2007) overruled Dr. Miles and held that minimum resale price maintenance would be judged under the rule of reason on a case-by case basis. Leegin is a maker of women's leather goods and accessories sold under the Brighton brand. It developed a policy of dealing with boutique stores, and asked retailers to sell the goods at prices Leegin specified. It ultimately grew to supplying over 5,000 retailers, but had a very small share of the total market for women's leather goods and accessories. PSKS discounted Leegin's products, allegedly to compete with other firms discounting the Brighton line. When requested to cease discounting, PSKS refused and Leegin stopped selling product to it. PSKS sued, alleging that Leegin had violated Section 1 of the Sherman Act by entering into agreements with retailers specifying the price at which the goods would be resold. The district court judged the case under the per se rule, excluding expert testimony offered by Leegin of the procompetitive effects of its resale pricing practices. The jury awarded PSKS an amount, after trebling, of almost $4 million; on appeal Leegin did not dispute that it had entered resale price maintenance agreements, and the Fifth Circuit affirmed on the basis of Dr. Miles's holding that the per se rule applied.

Per Se Rules Should be Reserved for Restraints that Almost Always Would be Invalidated Under the Rule of Reason.

The majority opinion started by explaining that "the rule of reason is the accepted standard for testing whether a practice restrains trade in violation of §1." 2007 WL 1835892, at *4. "As a consequence, the per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason . . . ." Id. at *5 (emphasis added). After reviewing the potential competitive effects of resale price maintenance, the Court asserted that "it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output.'" Id. at *8. The dissenting opinion by Justice Breyer does not disagree; it describes the procompetitive and anticompetitive effects of resale price maintenance, noting that "as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits." Id. at *17. It concludes however that there are insufficient grounds for overruling a well-established precedent. Id. at *15.

The Court supported this conclusion by noting that more recent cases had rejected the rationales underlying Dr. Miles's per se holding. Dr. Miles's reliance on the rule against restraints on alienation was deemed irrelevant to the effect of antitrust laws on vertical restraints. In addition, the Court noted that more recent cases had rejected the doctrine of Dr. Miles that a vertical agreement between manufacturers and distributors is the equivalent of a horizontal agreement among competing retailers, citing Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 734 (1988) (disclaiming the "notion of equivalence between the scope of horizontal per se illegality and that of vertical per se illegality").

Leegin Continues the Trend of Limiting the Scope of the Per Se Rule

In overruling Dr. Miles, the Leegin Court continued the progression of antitrust law for the past thirty years in limiting the application of the per se rule to vertical restraints. The seminal case in this area is Continental T.V. v. GTE Sylvania Inc., 433 U.S. 36 (1977), which applied the rule of reason to non-price vertical restraints, overruling the per se rule announced in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). In Sylvania, the Court explained that vertical restraints have the "potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition." Id. at 51-52. Since there was a potential for procompetitive effects, the Court applied the rule of reason. The trend of decisions limiting the application of the per se rule continued with the decision in Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988). The Court held that the termination of a price-cutting distributor at the behest of another distributor ("it's him or me") was not illegal per se, absent an understanding between the manufacturer and the remaining distributor on the price or price level to be charged.

The progression continued in State Oil v. Kahn, 522 U.S. 3 (1997). The Court unanimously overruled its prior decision in Albrecht v. Herald Co., 390 U.S. 145 (1968) that vertical maximum resale price maintenance agreements are per se unlawful. The Kahn Court held that per se treatment is only "appropriate once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." Id. at 10.

Leegin Focuses on the Effect of the Restraint on Competition, Rather than a Formalistic Analysis of Whether an Agreement Exists

The Leegin decision will result in courts examining the substantive issues of the effects of the restraint when analyzing challenges to alleged resale price maintenance. The per se rule of Dr. Miles foreclosed analysis of the restraint, but restricted courts to a formalistic inquiry of whether a particular manufacturer-dealer arrangement constitutes an agreement on prices.

For almost as long as Dr. Miles has existed, there has been a tension with the primary case limiting its reach. In United States v. Colgate & Co., 250 U.S. 300 (1919), the Court made an exception to Dr. Miles by asserting a manufacturer's right to announce a unilateral resale pricing policy and to refuse to deal with a dealer that did not follow it. Colgate properly confirmed a manufacturer's right to choose its dealers, but, in conjunction with the Dr. Miles rule, resulted in an inappropriate focus on evidence of an agreement. While Monsanto, id. at 768, limited the breadth of "agreement" (requiring "evidence that tends to exclude the possibility of independent action by the manufacturer and distributor" and "reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective"), it did not eliminate the formalism in the inquiry.

In addition, the Leegin case will allow defendants in resale price maintenance cases to use evidence similar to that available to them in other antitrust cases challenging their distribution arrangements - they can now defend themselves with evidence which would be irrelevant if the per se rule applies.

Unlike the per se rule, the rule of reason requires the fact-finder to weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Sylvania, id. At 49. Leegin notes that appropriate factors to take into account include "'specific information about the relevant business and the restraint's history, nature and effect.' Whether the businesses involved have market power is a further, significant consideration." Id. at *5 (internal citation omitted.)

LEEGIN DID NOT MAKE RESALE PRICE MAINTENANCE PER SE LEGAL

Leegin does not give manufacturers the ability to enter into minimum resale price agreements without the possibility of challenge. The Court drew a bright line around agreements by a group of retailers or manufacturers to engage in resale price maintenance:

"A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason" Id., at *8. The Court also identified dominant firms using resale price maintenance as sources of anticompetitive effects, if a dominant retailer seeks to forestall innovation by smaller rivals or when a dominant manufacturer gives retailers incentives not to carry the products of smaller or newer competitors. The Court described the need to be diligent in eliminating anticompetitive uses of resale price maintenance and identified certain factors relevant to the inquiry. This is not a "free pass" for manufacturers.

Thank you. I would be happy to take any questions.

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