

The Supreme Court Rules on Retail Price Pacts

BY BETTY JOYCE NASH

When a Texas retailer marked down its Brighton brand leather collection, the manufacturer cut off its supply. That set off a chain of legal cases that finally wound up in the U.S. Supreme Court.

Earlier this year, the court overturned the presumption, and almost 100 years of antitrust legal precedent, that resale price maintenance arrangements (RPMs) always, *per se*, violate antitrust laws. RPMs are agreements that give manufacturers say over the prices retailers charge for their goods. The court ruled 5-to-4 in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* that those cases should be decided by the “rule of reason” rather than be considered automatically, or *per se*, illegal. Manufacturers traditionally have sidestepped such agreements by “suggesting” retail prices.

University of Virginia economist Kenneth Elzinga noted that it’s never made any economic sense for resale price maintenance to always be presumed anticompetitive. In fact, price agreements can enhance distribution and marketing that may benefit consumers and promote competition. Elzinga served as the economic expert for the manufacturer in the case.

“Resale price maintenance can give downstream retailers incentives to offer more in-store information and services about a product, stay open longer hours, display a product more attractively, and offer other retail amenities that will expand the demand for the product [benefiting the product’s manufacturer], and make the shopping experience more attractive [benefiting consumers],” Elzinga says.

Their marketing investments will pay off and “not be subject to free riding by discounting retailers who do not offer these services but free ride off the retailers who do,” he says.

Since the 1911 decision which held that it is always illegal to use market power to set prices, there have been gargantuan changes in the retail industry. It’s not likely that big-box retail companies, in a strong position to dictate terms to manufacturers, would be interested in resale price maintenance contracts, especially in light of intense international price competition. That leaves smaller retailers and boutiques, where service is more important than price, as the most likely partners in RPM agreements. But Mallory Duncan, counsel for the National Retail Federation, says all manufacturers will ask themselves whether they want to lose the push from low price leaders by retrenching to full-service stores.

Quentin Riegel, vice president for litigation for the National Association of Manufacturers, says the interpretation may have a modest effect. But price agreements will be hard and expensive to defend, so few companies will adopt

them, he predicts. “First of all, if a company wants to set the retail price of its product, it’s going to have to do so in the face of competition,” he says. “Their first hurdle [is that] they have to believe that price is really going to increase sales.” Second, the firm will need a “very good reason to do it that’s competitively justified,” Riegel says. He adds that it’s still illegal (with triple damages) to set unjustified price floors. Now, however, a plaintiff in a vertical pricing case must prove that competition has been lessened.

The National Retail Federation, unlike the National Association of Manufacturers, filed no brief on the issue — its members sit on both sides of the fence. Duncan points out that there’s been tension in the law. As long as there was no explicit price maintenance, manufacturers could do business with whomever they wished, even pulling product “if someone wasn’t looking.”

Power retailers might decide to throw their weight behind a competitor who is not going to condition sales, Duncan says, and that could radically shift market share.

The Consumer Federation of America opposes the court’s decision. So does the American Antitrust Institute (AAI), which insists that higher prices will result. There’s also fear that the decision will stifle retail innovation which has been seen over the last century, especially if manufacturers and retailers get together on deals. However, economists think it is unlikely manufacturers would want to discourage competition among retailers because that would hurt sales.

The AAI also says it will be too expensive to successfully bring a “rule of reason” case, so it’s “inevitable that *Leegin* will mean an increased incidence of anticompetitive RPM and higher prices for consumers.”

But Elzinga points out that it’s also expensive to lose a case under the *per se* rule and unfair if the action did not hurt competition, as in the *Leegin* case. “RPM contracts are voluntary contracts between manufacturers and retailers,” he says. “That alone should afford them some protection from litigation or regulation. With regard to *Leegin*, most stores who sold the Brighton brand were pleased to enter into the ‘Brighton Pledge’ to maintain the resale prices that *Leegin* requested. No one held a gun to anybody’s head on either side of the transaction.”

But uncertainty abounds as to how states will react. Thirty-seven states, including the Fifth District states of North Carolina, South Carolina, Maryland, and West Virginia, filed briefs in opposition. Some states said they will enforce the *per se* rule despite the Supreme Court decision because they have explicit rules against resale price agreements. **RF**