

# One Minute Memo<sup>®</sup>



## Minimum Resale Price Fixing Agreements No Longer *Per Se* Illegal

In a five to four opinion issued June 28, 2007 in *Leegin Creative Leather Products Inc. v. PSKS, Inc.*, the Supreme Court overturned 96 year old precedent that had made it *per se* illegal under Section 1 of the Sherman Act for a manufacturer to agree with its distributor(s) to set a minimum price that can be charged by the distributor(s) for the goods of the manufacturer. Such agreements will now be viewed under a rule of reason analysis which require the fact finder to weigh the procompetitive and anticompetitive effects of the arrangement.

As a result, vertical price fixing agreements that promote interbrand competition will likely be permissible despite some lessening of intrabrand competition. For instance, if the arrangement encourages retailers to invest in seller service or promotional activities that enhance competition with other brands, the fact of no price competition regarding the specific brand, will likely be acceptable. However, if the arrangement is used by a powerful manufacturer or retailer or if the arrangement facilitates a manufacturer or retailer cartel, such arrangement would still violate the antitrust laws.

By overturning the decision of *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373 (1911), the Court has opened the door to allowing a manufacturer to enter into agreements to fix minimum resale prices. Most manufacturers will no longer be required to impose the more limiting unilateral price policies that have restricted manufacturers ability to discuss resale prices with their distributors.

Clients that currently have a unilateral retail pricing policy should be encouraged to have said policies reviewed to determine if they may be expanded and improved. Similarly, clients that previously considered and rejected such unilateral pricing policies due to enforcement limitations or the risk of a salesman reaching an inadvertent agreement, may now want to amend their distributor agreement so as to impose minimum pricing requirements.

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