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Supreme Court Hears Oral Argument on Vertical Price Fixing Case

By Jeffrey J. Keyes and James J. Long

Since 1911, manufacturers, suppliers and franchisors have been prohibited from setting the minimum retail prices at which retailers, dealers, distributors and franchisees have sold goods and services. They have only been able to "suggest" the minimum prices at which the goods or services could be sold; any agreement with the retailers, dealers, distributors or franchisees on the minimum prices or price levels has been considered a *per se* violation of the antitrust laws.

On Monday, March 26, 2007, the United States Supreme Court heard oral argument in what could be a groundbreaking antitrust case, *Leegin Creative Leather Products Inc. v. PSKS Inc.*, in which the Court is revisiting the long-standing *per se* prohibition on minimum vertical price fixing. If reversed, manufacturers, suppliers and franchisors will have much greater freedom in controlling the retail price offered to consumers.

Going into the oral argument of March 26, 2007, many antitrust attorneys believed that the Supreme Court granted *certiorari* in this case for the purpose of eliminating *per se* treatment of all vertical price fixing. Review of the oral argument identifies sharply divergent approaches on the Court to whether the *per se* prohibition on vertical price fixing should be retained. Justice Scalia expressed strong views favoring elimination of *per se* illegality, stating that vertical price fixing can increase consumer welfare by "giving the consumer a choice of more service at a somewhat higher price" and by eliminating free riding by discount stores, which sell at low prices without providing customers with the services a manufacturer might desire. Several justices articulated the view that a rule of reason analysis is sufficient to prevent anti-competitive vertical price fixing and appeared to accept the premise that "sound economic doctrine suggests" it is necessary to overturn the *per se* treatment of vertical resale price maintenance.

Following the U.S. Supreme Court's decision in *Leegin Creative Leather Products Inc. v. PSKS Inc.*, Briggs and Morgan will host a breakfast seminar discussing the full range of its implications for all businesses in the chain of distribution. If interested, please contact Tina Houareau at shouareau@briggs.com to receive specific event details.

Conversely, Justice Breyer disputed the view that a consensus exists among economists that vertical price fixing should not be *per se* illegal, and both Breyer and Justice Souter cited evidence that vertical price fixing increases prices and decreases the ability of large discount stores, such as Wal-Mart, to compete. In response, Justice Scalia argued that "the mere fact that it would increase prices doesn't prove anything" because a choice of more service at a higher price "would enhance consumer welfare." Some justices also focused on the fact that during the 96-year *per se* prohibition on vertical price fixing, Congress never has acted to change the law to a rule of reason analysis; they questioned whether scholarly economic thought had changed during the past 40 years to a degree that mandated reversing established antitrust precedent. Concern also was expressed that abandonment of the *per se* rule against resale price maintenance could have a major, negative effect on a retail economy that has thrived on discount retailing including recent electronic retailing. To read the U.S. Supreme Court's official transcript of the *Leegin* oral argument, click here.

The one conclusion that can be drawn from yesterday's oral argument is that it appears the decision reached in *Leegin* will be by a divided Court. No matter how the decision comes out, it will likely be a significant one for the American economy. The Supreme Court is expected to rule on this case by the end of June 2007. At that time, we will issue an Alert with a brief analysis of the opinion. Jeff Keyes and Jim Long will follow up several weeks later with a breakfast seminar discussing the full range of the implications of the decision in *Leegin* for all businesses in the chain of distribution from manufacturers to retail outlets. If interested in attending, please notify Tina Houareau at shouareau@briggs.com.

Please direct any questions regarding this Alert to your Briggs and Morgan attorney or the firm's Trade Regulation Group, including:

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