Resale Price Maintenance: What's the Latest?
Bills before the Senate and the House would again make minimum resale price maintenance per se illegal under federal law.
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Recently, newspapers have reported the issue of minimum resale price maintenance may be going to the United States Supreme Court again.

From 1911 until 2007, when the United States Supreme Court decided the Leegin case, it was per se illegal under federal antitrust law for a manufacturer to control, directly or indirectly, the minimum resale prices of its customers. This is called "resale price maintenance" or "resale price fixing." Per se illegal means that the government or private plaintiff does not have to prove harm to competition in the market or to consumers.

The harm is presumed regardless of the sales volume involved. Thus, the rule is limited to conduct invariably harming competition. (Price fixing among competitors is the classic per se violation for which the government will seek criminal penalties for companies and individuals.)

In Leegin, the Court examined the history of the rule against minimum resale price maintenance, business reasons in support of and against the rule, and related economic literature. It concluded there were pro-competitive reasons a manufacturer would not want to deal with discounters. One reason is ensuring adequate profit margins for resellers so that they will undertake after-sale service, advertising and employee training.

Another reason was to stop "free riding" where one reseller expends time and resources convincing a customer to buy "Brand X" only to have another Brand X reseller undercut the price and win the sale. Free riding is a disincentive for a reseller to invest time and resources in selling. The Court concluded, therefore, the per se rule should not apply to resale price maintenance agreements.

As a result of this decision, minimum resale price maintenance practices are now tested under the antitrust "rule of reason." This means a plaintiff must prove that the manufacturer practiced resale price maintenance and that anti-competitive effects outweigh the pro-competitive effects to the market. This obviously is a much greater hurdle for the plaintiff. It is further compounded by another important Supreme Court decision that says, as a general rule, a manufacturer with a market share below 30% has no market power. This means such a manufacturer's minimum resale price maintenance practice would not be illegal under the rule of reason.

This is a huge safe harbor for most manufacturers, and a big change from the per se rule where competitive harm is presumed and the defendant's sales volume makes no difference to the outcome.

When the Leegin case went back to the lower courts for reconsideration, the result was not unexpected under the rule of reason test. The trial court and the Fifth Circuit Court of Appeals ruled in favor of the defendant.

The plaintiff recently filed a petition with the Supreme Court asking it to review the appellate court's decision. The Court agrees to review lower court decisions about 1% of the time, making it unlikely it will hear this case. Even if it does, the issues raised for decision are not sweeping. The Court is not being asked to go back to the per se rule, for example. The issues are framed as "conflicts" between decisions in the Leegin lower courts and other lower courts in other cases. So ruling in favor of the plaintiff here would refine the way

issues are analyzed in some courts but not others because they already are consistent with the change being sought.

There are two more important points here. First, there are bills before the Senate and the House of Representatives which would overturn the Leegin decision and again make minimum resale price maintenance per se illegal under federal law. These bills have strong support from consumer groups and many state attorneys general. Though it will not be acknowledged by the Supreme Court, such pending legislation may be a factor in it deciding not to hear the case.

Second, Leegin only applies to federal law. There are many states, such as California, Illinois and New York, with statutes or court decisions which make minimum resale price maintenance per se illegal and subject companies to treble damage claims in state courts. Thus, even if the federal antitrust risks are relatively minor under the current law due to Leegin, state law risks should be evaluated before embarking on a resale price maintenance program.

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