VERTICAL MINIMUM PRICE FIXING – STILL A PROBLEM?

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For almost 100 years vertical minimum price fixing was per se illegal under Federal antitrust law. Vertical minimum price fixing occurs when a manufacturer tells its dealer or distributor the minimum price at which it must resell the goods. In 2007, in what some viewed as a landmark case, the United States Supreme Court overruled its prior decision and held that henceforth vertical price fixing would be analyzed under a "rule of reason" approach. Under a rule of reason analysis, the totality of facts and circumstances surrounding a manufacturer's fixing of prices must be looked at in deciding whether the behavior is illegal.

The case overturning prior precedent in this area was *Leegin Creative Leather Products v. PSKS, Inc*. The decision led some to hope that manufacturers would now be able to fix the price at which their customer could resell product. Economic theorists had for some time argued that their were bona fide pro-competitive reasons why a manufacturer might want to engage in such price fixing. An example would be the situation in which a manufacturer wanted to target a high end market for its product.

The excitement generated by the *Leegin*, however was short-lived, and the reason for the manufacturer's continuing dilemma is that some states still treat vertical price fixing as per se illegal. This means that a manufacturer relying on *Leegin* would have to have different pricing rules for different states, which is not a very practical approach. Currently the states in which the state law continues to treat vertical price fixing as illegal, at least in the opinion of the states' attorneys general, are California, Maryland and New York. Maryland actually passed a statute making vertical price fixing per se illegal.

Because of the problem of instituting a national marketing plan in the face of the non-uniformity of state laws, manufacturers wanting to control resale pricing must consider other alternatives. One possibility is to adopt a so-called "*Colgate*" program in which a manufacturer suggests a minimum price to its dealers and notifies the dealers that any dealer who does not charge such prices will be terminated. So long as there is no "agreement" to fix prices the manufacturer will not be deemed to have violated antitrust laws. An effective *Colgate* program requires careful training of a manufacturer's sales force and is impractical for many companies. Thus, despite the Supreme Court's decision, vertical price fixing may still be unattractive to a manufacturer selling its products nationwide.

A word of caution. Horizontal price fixing where competing manufacturers or distributors agree amongst themselves to fix the minimum price at which certain products may be sold is still very much per se illegal. Horizontal price fixing is in fact one of the few types of behavior which can still result in criminal prosecution and prison terms.

Anyone interested in considering a *Colgate* program or who has questions about terminating distributors who sell below recommended resale prices may contact John Washburn at 312-899-1609 or jwashburn@gouldratner.com for more information.

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