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On August 17, 2010, the Fifth Circuit resolved the long-standing case of *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*,<sup>1</sup> affirming the district court's dismissal of plaintiff's claims of resale price maintenance. This was the second time that the Fifth Circuit reviewed the case; in 2006, the court affirmed a \$1.2 million damages award based on the same claims.<sup>2</sup> The Supreme Court reversed, overturning its ancient ruling in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) ("*Dr. Miles*"), and holding that resale price maintenance (or "vertical price-fixing") should no longer be considered per se illegal.<sup>3</sup>

The case arose after Leegin, a manufacturer of "Brighton" brand high-end women's purses and accessories, terminated retailer PSKS after the latter's violations of Leegin's policy requiring retailers to maintain certain minimum resale prices for its products. The jury found that Leegin had violated Section 1 of the Sherman Act by entering into a series of agreements with its retailers fixing minimum prices at which those retailers would sell its products. Pursuant to the long-standing rule established in *Dr. Miles*, the jury found Leegin per se liable.

After the Fifth Circuit's initial affirmance, Leegin petitioned the Supreme Court to revisit *Dr. Miles*, citing extensive evidence and case law suggesting that resale price maintenance is not under all circumstances anticompetitive. The Supreme Court agreed, and effectively reconciled the law governing vertical price agreements with that governing vertical non-price agreements.<sup>4</sup> Such agreements are now evaluated under the rule of reason, which balances any anticompetitive harms against any procompetitive benefits.<sup>5</sup> The Court remanded the case to the district court, where PSKS asserted a rule of reason claim, along with new per se claims alleging a horizontal component to the agreements at issue.

The district court held that the amended complaint was defective as a matter of law and dismissed the case.<sup>6</sup> The Fifth Circuit affirmed, finding that the Supreme Court had "tor[n] down the artificial doctrinal wall between vertical price and nonprice restraints."<sup>7</sup> The court rejected each of two alternative product markets PSKS posited. As to the "retail market for Brighton's women's accessories," the court determined that a single-brand market could not be presumed absent an allegation that "consumers are 'locked in' to a specific brand by the nature of the product" — an allegation PSKS could not make.<sup>8</sup> The court determined that the second market — the "wholesale sale of brand-name women's accessories to independent retailers" — was improperly focused on the chain of distribution more than the product itself.<sup>9</sup> The court also ruled that "'accessories' is too broad and vague a definition to constitute a market."<sup>10</sup>

The court also rejected the competitive harms alleged by PSKS, holding that "[a]bsent market power, an artificial price hike by Leegin would merely cause it to lose sales to its competitors."<sup>11</sup> Furthermore, "robust competition can exist even in the absence of price competition" if consumers are influenced by non-price factors, such as service and shopping environment.<sup>12</sup> The court rejected PSKS's horizontal conspiracy allegations because Leegin's agreements with its retailers lacked for any horizontal component. Finally, the court concluded that "[a] manufacturer's discussion of pricing policy with retailers and its subsequent decision to adjust pricing to enhance its competitive position do not create an antitrust violation or give rise to an antitrust claim."<sup>13</sup>

Notwithstanding *Leegin*, the antitrust laws of more than 30 states make conduct such as *Leegin*'s per se illegal, and support for the abrogated rule of *Dr. Miles* is widespread among state enforcement officials. Two recent cases challenging resale price maintenance as per se illegal highlight the states' active investigations into companies that engage in the practice.

In *California v. DermaQuest*, No. RG10497526 (Sup. Ct. Ca. Feb. 5, 2010), the state alleges that DermaQuest, a manufacturer of beauty-care products, entered into a vertical price-fixing arrangement with its distributors in per se violation of California antitrust law. DermaQuest allegedly entered into contracts that provide that its distributors "may not resell Product in a price structure that yields a Product price at ultimate retail sale below DermaQuest's Suggested Retail Price" and that the "reseller may not resell Product in a price structure that yields a Product price at resale below DermaQuest's Suggested Retail Price." Within thirty days after being served with the complaint, DermaQuest entered into a settlement agreement that enjoins the company from making entering into similar agreements and requiring it to pay \$70,000 in civil penalties and \$50,000 in legal costs.

In *New York v. Tempur-Pedic Int'l*, No. 400837/10, the state alleged that Tempur-Pedic, a leading manufacturer of premium mattresses and pillows, violated the New York General Business Code, which makes unenforceable "any contract provision that purports to restrain a vendee of a commodity from reselling . . . at less than the price stipulated by the vendor or producer."<sup>14</sup> Tempur-Pedic denied the existence of a "contract provision" or agreement concerning resale prices; rather, it argued that it had a unilateral policy not to sell its products to retailers who do not follow its suggested prices. The state nevertheless alleged that "the parties' course of dealings, the usage in trade, or otherwise" can represent evidence of a resale price maintenance agreement. The case is pending as of the time of publication, and stands as a reminder of the stark contrast between state and federal law in this context.

1. 615 F.3d 412 (5th Cir. 2010).
2. *PSKS, Inc. v. Leegin Creative Leather Prods.*, 171 Fed. Appx. 464 (5th Cir. 2006)
3. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 907-08 (2007).
4. See *Continental TV, Inc. v GTE Sylvania Inc.*, 433 U.S. 36 (1977).
5. *Id.* at 899.
6. *PSKS, Inc. v. Leegin Creative Leather Prods.*, 2009 U.S. Dist. LEXIS 28505, at \*23 (E.D. Tex. Apr. 6, 2009).
7. *PSKS*, 615 F.3d at 415.
8. *Id.* at 418.
9. *Id.*
10. *Id.*
11. *Id.* at 419.
12. *Id.*
13. *Id.* at 420.
14. *New York v. Tempur-Pedic Int'l, Inc.*, N.Y. Sup. Ct., N.Y. Cty., No. 400827/10 (Mar. 29, 2010) (Petition) (citing N.Y. Gen. Bus. Code § 369-a (2006)).