



**TUCKER ELLIS & WEST LLP**  
ATTORNEYS AT LAW

**CLIENT ALERT**

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**MINIMUM RESALE PRICE MAINTENANCE AFTER *LEEGIN***

We routinely are asked for guidance on minimum resale pricing agreements post-*Leegin*. Below is a synopsis of the current law and some suggested guidance.

In 2007, the Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>1</sup> (*Leegin*) overruled the long standing rule that minimum resale price agreements were unlawful per se under the Sherman Act and held that the rule of reason should instead be applied to determine the legality of such agreements. Federal courts have uniformly followed *Leegin*, applying the rule of reason to minimum resale price maintenance cases. After reviewing the post-*Leegin* federal cases, including *Toledo Mack Sales & Services, Inc. v. Mack Trucks*,<sup>2</sup> *McDonough v. Toys “R” Us*,<sup>3</sup> and *Lotus Business Group LLC v. Flying J Inc.*,<sup>4</sup> we offer the following guidance:

- Minimum resale price agreements are most often found anticompetitive under a rule of reason analysis when they are viewed as facilitating a horizontal conspiracy – at the retailer or supplier level.

- Evidence tending to demonstrate a retail-level conspiracy typically includes evidence that a group of retailers communicated among themselves, and then approached a common supplier either to impose minimum resale prices, or discipline price-cutting retailers. Even without evidence that a supplier was aware of the retailers’ agreement, if a supplier’s imposition of minimum resale pricing facilitates a retailer conspiracy, a court may find that while not horizontal and hence not per se, the supplier’s minimum resale pricing requirement fails a rule of reason analysis.
- Two other instances where minimum resale price maintenance may fail a rule of reason analysis are (1) where it is sought by a dominant retailer to harm horizontal competitors (for example, new entrants seeking to enter the market via price cutting), and (2) where a dominant supplier uses the agreement to foreclose its competitors from access to necessary distribution outlets.
- Finally, minimum resale pricing instituted across an industry by competing suppliers, or by a dominant supplier with significant

<sup>1</sup> 551 U.S. 877 (2007).

<sup>2</sup> 530 F.3d 204 (3d Cir. 2008).

<sup>3</sup> 2009 WL 2055168 (E.D. Pa. July 15, 2009).

<sup>4</sup> 532 F.Supp.2d 1011 (E.D.Wis. October 12, 2007).

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market power, may subject the supplier(s) to greater scrutiny under a rule of reason analysis. In some jurisdictions, such as the Second and Third Circuits, such facts may be sufficient to shift the burden of proof in a rule of reason analysis to the supplier to prove that the conduct promotes a sufficiently pro-competitive objective despite seeming anti-competitive effects.

With regard to California's Cartwright Act, to date there are no reported cases dealing with minimum resale pricing post-*Leegin*. However, pre-*Leegin* California case law held that such agreements were per se unlawful under the Cartwright Act.<sup>5</sup> Despite similarities between the Sherman Act and the Cartwright Act, California's courts have held that federal case law interpreting the Sherman Act, while helpful to interpretation of the Cartwright Act, is not binding upon the State.<sup>6</sup> Because California courts do not strictly follow federal antitrust precedent, we cannot be certain that California courts will follow *Leegin*. However, past experience teaches that in cases where the federal laws apply a rule of reason and California remains per se, the California courts may not entirely exclude rule of reason evidence (e.g., business justification, no harm to competition).

As to state and federal laws explicitly overturning *Leegin*, only Maryland has passed such a law.<sup>7</sup> Congressional efforts to overturn *Leegin* at the federal level have been unsuccessful to date.

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<sup>5</sup> *Mailand v. Burckle*, 20 Cal.3d 367, 377 (1978); *Kunert v. Mission Fin. Svcs. Corp.*, 110 Cal.App.4th 242, 263 (2003).

<sup>6</sup> *California ex rel. Van De Kamp v. Texaco*, 46 Cal.3d 1147, 1164 (1988) (overruled in part on other grounds by statute).

<sup>7</sup> MD COML § 11-204 (2009), amended by MD LEGIS 43, approved April 14 2009.

With regard to the much publicized *Herman Miller* settlement with the attorneys general of New York, Michigan and Illinois, it is our opinion that, unless there were additional facts not disclosed in the complaint, the case was not a clear violation of the post-*Leegin* antitrust laws. However, based on the documents filed, it appears that the basis of the complaint may have been that the resale price restrictions facilitated a horizontal agreement among retailers reacting to new entrants.

With regard to minimum resale price agreements or restrictions considered by your clients:

- All should be vetted with the legal department prior to implementation
- Your clients should be able to identify legitimate, pro-competitive business reasons for such restrictions – particularly where products or services subject to the restrictions account for a significant share of a potential relevant market. The Court in *Leegin* noted that acceptable reasons are those designed to make the product more competitive vis-à-vis other brands. Does the pricing restraint encourage retailers to better promote the brand, or to provide more or better services to customers?
- Your clients should not discuss minimum resale pricing plans with their retailers (other than as necessary to implement the plan after the clients have unilaterally determined it appropriate).
- If your clients receive complaints from retailers about other retailers' pricing practices, they may of course act unilaterally on those complaints.

However, they should avoid any conduct that could be characterized as evidence of an agreement between your company and the complaining retailers, such as communicating back to the complaining retailers that “the problem has been dealt with.” Moreover, the legal department should be consulted prior to any action being taken against a retailer for violation of a minimum price agreement or requirement – particularly when the clients were advised of such breach by another retailer.

- If retailers request minimum resale pricing, the legal department should be contacted immediately and certainly prior to any further communications with the retailers.

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