

March 2009: 18 Months after *Leegin*

Eighteen months have passed since the US Supreme Court decided *Leegin Creative Leather Products, Inc. v. PSKS, Inc. (Leegin)*. In *Leegin*, the Court announced that it no longer is automatically unlawful under federal antitrust law for a manufacturer to establish and maintain the minimum resale prices of its retailers.

When the case was decided a year and a half ago, one of the questions was to what extent will manufacturers employ resale price maintenance programs (RPM). The jury is still out on this, but we now are gaining empirical evidence that will be evaluated in an effort to determine how pervasive the practice is and what its effects on competition are – e.g., higher prices or not; and, if so, have higher prices also resulted in higher sales of the products?

In December 2008, Wall Street Journal reporter Joseph Pereira published two articles on this issue. The first one focused on discounters being increasingly spotted online by small internet snoop companies such as NetEnforcers. The second article highlighted companies such as eBay and Costco Wholesale Corporation trying to turn the *Leegin* case around through consumer education and support from their respective web sites.

Some have criticized the Supreme Court's decision because it rested upon theoretical economic underpinnings rather than empirical evidence. We are reaching the point where actual market functions are no longer merely predictive. RPM and MAP programs are now beginning to actually happen among the actors in the vertical distribution of products and services. It now may be possible to measure a manufacturer's pro-competitive justifications for using RPM in a given industry.

The Supreme Court's decision in *Leegin* provides limited guidance in determining when various MAP and RMP programs benefit consumers, and when they do not. In other words, some uses of RPM are pro-competitive and some uses are anticompetitive. The question that we now are going to face is how courts will distinguish between the two. They now must develop appropriate methodology for applying the rule of reason – i.e., measuring competitive effects in a relevant market – to this type of vertical restraint.

Courts and antitrust regulators have moved away from mandating a traditional rule of reason approach in all cases. The FTC's decision in *Nine West*, as well as certain court decisions, suggest that RPM may not be subjected to heightened scrutiny where the manufacturer is not the source of the restraint, the manufacturer does not have market power, and there are significant numbers of other market participants who are not using RPM; or, alternatively, where the manufacturer can demonstrate significant pro-competitive justifications for its use of RPM.

Opponents of the Court's decision are beginning to mobilize in an effort to evaluate empirical market functions in the face of RPM, and to advocate legislative change to the judicial FTC rule in favor of RPM. In addition, some states – e.g., California and New York – are still adamant that RPM is per se unlawful under their state antitrust laws.