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PSKS Knocked Out of Court But Not Giving Up the Fight Against Leegin - This and Other Recent Developments in Resale Price Maintenance

Two years ago, PSKS, Inc., dba Kay's Kloset ("PSKS"), lost its antitrust contest with Leegin Creative Leather Products, Inc. at the Supreme Court. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 127 S. Ct. 2705 (2007). PSKS argued to the Court that the 99 year old rule that makes minimum resale price maintenance agreements ("RPM") illegal *per se* should be upheld. The Court instead held that the appropriate standard of review for resale price maintenance agreements ("RPM") is the rule of reason, not the *per se* standard. The Court remanded PSKS's case to the lower court to determine whether Leegin's RPM conduct was unlawful under the rule of reason standard.

Last month, the U.S. District Court for the Eastern District of Texas, on remand from the Supreme Court, dismissed PSKS' renewed claims against Leegin. *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, No. CV 2:03 (E.D. Tex Apr. 6, 2009) (slip op). In a Second Amended Complaint ("SAC") filed in light of the changed legal standard, PSKS alleged that Leegin's RPM was illegal because it restrained competition in the relevant antitrust market. Additionally, in a further effort to subject Leegin's RPM to the *per se* standard, PSKS attempted to allege facts in its SAC supporting a horizontal price fixing agreement and a horizontal hub and spoke conspiracy, both of which are illegal *per se*.

1. Rule of Reason Analysis

(a) Untenable Product Market Definition

PSKS alleged two product markets in its SAC. The first is the "retail market for Brighton's women's accessories." The second is the "wholesale sale of brand-name women's accessories to independent retailers." The first, the district court held, was untenable because it does not get past "the clear law that a single brand cannot be its own market." Slip op at 5. "[C]ourts have regularly held that a single brand, no matter how distinctive or unique, cannot be its own market." Slip op at 4. PSKS's alternative definition of the product market failed as well. "Relevant markets must be defined in terms of the product itself without regard to the distribution level," the court stated. Slip op at 6. A relevant market must be defined, it clarified, in terms of the product market itself and not the distribution level of the product. Additionally, the inclusion of the words "brand name" was flawed because PSKS did not allege facts that

would support a showing that consumers in the market for "brand name' women's accessories may only turn to other brand-name products. Although PSKS could possibly amend its complaint to allege facts necessary to support an allegation that "brand name" accessories to its product definition, alleging such facts would not salvage the case in light of its other deficiencies. Likewise, "women's accessories," the court found, was not an appropriate product market because "women's accessories" is too broad and vague to constitute a market. Lastly, "independent retailers" was also erroneous. Relevant product markets include goods that are reasonably interchangeable in use. PSKS failed to allege facts explaining why the interchangeability of the goods is limited to one subset of retailers and not other retailers selling exactly the same goods.

(b) Impossible to Assess Anticompetitive Effects When Relevant Market Not Properly Defined

The court declined to decide whether the Supreme Court had intended to make a showing of market power a requirement for finding that a vertical price fixing agreement has an anticompetitive effect. Such a finding was not necessary, or possible, the court stated, because PSKS did not properly define a relevant market. Without a properly defined relevant market, the court observed, it cannot assess the alleged agreement's anticompetitive effect.

2. Horizontal Theories

(a) Dual Distribution Theory

When a manufacturer also distributes some of its own goods, this is referred to as "dual distribution." PSKS alleged that Leegin, a manufacturer, also distributes some of its own goods. As the district court observed, nine circuits, including the Fifth Circuit, have held that restraints in a dual distribution setting are properly analyzed under the rule of reason. PSKS argued however that those cases are distinguishable because they did not deal with price fixing agreements but instead dealt with other types of restraints. This is the same argument that plaintiffs in another RPM case against Leegin made. *Spahr v. Leegin Creative Leather Products, Inc.*, 2008 WL 3914461 (E.D. Tenn. 2008). The court, quoting from the *Spahr* decision, pointed out that PSKS had misconstrued the authority it relied on to support its dual distribution argument. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), involved an issue of statutory interpretation, and the Supreme Court did not address or discuss in that instance whether the restraints at issue were horizontal or vertical for Sherman Act purposes. Thus, the court found, the Court's analysis has little applicability, if any, to PSKS's dual distribution argument. The law in the Fifth Circuit, the court affirmed, is that dual distributorships should be analyzed under the rule of reason.

(b) Hub and Spoke Conspiracy

In turning to PSKS's hub and spoke conspiracy argument, the court described the hub and spoke theory. A hub and spoke conspiracy involves a hub, generally a dominant purchaser or supplier and the spokes, made up of the distributors involved in the conspiracy. The rim of the wheel is the connecting agreements between the competing distributors that form the spokes. Each of the three parts is integral in establishing a per se violation under the hub and spoke theory. Slip op at

12, quoting *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*, 552 F.3d 430, 435 n.3. The critical issue in establishing a hub and spoke per se violation. the court stated, is how the spokes are connected to each other. Id.

A hub and spoke conspiracy was also alleged against Leegin in the *Spahr* case. The court in *Spahr* held the hub and spoke argument was deficient because plaintiffs did not allege that retailers agreed to fix prices and then compelled Leegin to utilize RPM. Rather, plaintiffs in that instance alleged the opposite, i.e., that Leegin coerced retailers and forced RPM upon retailers. In this instance, the court noted, PSKS attemped to resolve this deficiency by adding an allegation that "a consensus of retailers was reached" and a result of a meeting of retailers and Leegin "resulted in a policy being announced." Slip op at 13. The policy referred to, however, was that retailers would offer consumers a discount on the consumer's birthday. This addition, the court found, is insufficient to properly plead a hub a spoke conspiracy. There is no allegation that retailers agreed to RPM among themselves. Rather, it appears that Leegin was the driving force behind the birthday offer. PSKS argued that a jury could infer that in reaching a consensus about the birthday offer, retailers discussed Leegin's pricing policy in more detail and agreed to maintain the policy. The court rejected these arguments as unpersuasive. Further, it observed that, following *Bell Atlantic Corp v. Twombly*, 127 S.Ct. 1955 at 1965 (2007), a plaintiff must allege an agreement among the retailers, as well as "the who, what, when, where, and how." Without these facts, the court concluded, "PSKS is missing the requisite wheel in the classic hub and spoke arrangement." Slip op at 14.

Conclusion

PSKS appears unready to accept defeat. On May 6, 2009, it signaled it was ready for another round by filing a Notice of Appeal asking the Fifth Circuit to overturn the district court's dismissal of its SAC.

Meanwhile, as to the state of the law on RPM more generally, the Senate is still considering a law that would reverse the Supreme Court's *Leegin* decision. The bill, S.148, the Discount Pricing Consumer Protection Act, was introduced as S. 2261 in the 1st Session of the 110th U.S. Congress. On April 28, 2009, the House Judiciary Committee's Courts and Competition Policy Subcommittee held a hearing examining the impact of *Leegin* on consumer prices. One of the witnesses, Richard Brunell of the American Antitrust Institute, testified that two years after the *Leegin* decision, "the use of resale price maintenance programs has increased, even though antitrust counselors have advised caution because some state attorneys general have taken the position that RPM remains per se illegal under some state laws and other states have passed or may pass '*Leegin repealer*' bills." (Available online here).

Maryland, for example, passed a *Leegin* repealer law, approved by the governor, which takes effect October 1, 2009. The law expressly provides that RPM is unlawful. As Mr. Brunell testified, RPM may still be per se illegal in a number of states. Indeed, PSKS pleaded violations of state law in its original complaint, but it abandoned those allegations in the first district court trial. The district court thus dismissed these claims on remand.

Significantly, *Leegin* and the developments surrounding it do not disturb another important

precedent, *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Under *Colgate*, a purely unilateral minimum resale price policy escapes not only *per se* but also rule of reason scrutiny because it lacks the element of "agreement" essential to a violation of Section 1 of the Sherman Act. *Colgate* policies thus still afford the most protection for manufacturers seeking the benefits of minimum resale restrictions.

Authored By:

Heather M. Cooper

(213) 617-5457

HCooper@sheppardmullin.com