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Kansas Supreme Court Declares Resale Price Maintenance Per Se Unlawful Under Kansas Law, Confirming the Need for Continued Caution in the Post-*Leegin* World

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On May 4, 2012, the Kansas Supreme Court held that resale price maintenance ["RPM"] agreements, or vertical price-fixing, should be treated as *per se* unlawful under Kansas's state law. This is an important decision because it is the first time that a state court has refused to follow the U.S. Supreme Court's landmark 2007 *Leegin*[1] decision eliminating *per se* treatment of RPM under federal antitrust law.

In 2007, the Supreme Court in *Leegin* reversed the nearly 100 year old *Dr. Miles* decision[2] and held that resale price agreements would no longer be condemned as illegal *per se* under federal antitrust law but would instead be judged under the rule of reason. Many manufacturers seized on *Leegin* as offering an opportunity to enter into agreements with resellers of their products to ensure desired minimum prices.

Many states were unhappy with the Supreme Court ruling: a number of them had signed an amicus brief urging the Court to retain the *per se* rule in RPM cases. Since *Leegin*, some state attorneys general have launched challenges to RPM policies, seeking to enjoin manufacturers from engaging in the practice.[3] And Maryland passed a "*Leegin* repealer" law expressly declaring RPM unlawful under Maryland state law even without proof of anticompetitive harm.

But until now, no state supreme court has weighed in on the question of whether state antitrust laws should be construed differently from the Sherman Act in this controversial area. So the Kansas decision is a significant milestone in the post-*Leegin* landscape, with important implications for how firms should operate in the marketplace.

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[1] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,* 51 U.S. 877 (2007).

[2] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 US 373 (1911).

[3] *See, e.g., People v. Bioelements Inc.*, File No. 10011659 (Cal. Super. Ct. Riverside County, filed Dec. 30, 2010) (injunction); *People v. DermaQuest,* Case No. RG10497526 (Cal. Super. Ct. Alameda County, filed Feb. 23, 2010) (injunction); *People v. Tempur-Pedic International, Inc.,* 2011 NY Slip Op. 21019 (Sup. Ct. N.Y. County Jan. 14, 2011) (case dismissed).

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The Kansas ruling came in *O'Brien v. Leegin Creative Leather Products, Inc.* ["*O'Brien*"],[4] a case involving the same defendant and essentially the same conduct as the case that resulted in the 2007 U.S. Supreme Court decision.

The court began by acknowledging that state courts interpreting state antitrust laws often look to the substantial body of federal case law interpreting the federal antitrust statutes. But it observed that those cases "compel nothing" when a separate state statute is at issue. It then rejected the argument that O'Brien must introduce "concrete evidence" of antitrust injury: i.e., evidence that consumers actually paid higher prices for Leegin's goods. Instead, the court held that O'Brien need show only that the agreements were designed to control prices for Leegin's goods and "tended to" do so.

Rejecting the application of *Leegin* to the Kansas law, the court ruled that *all* agreements on price are illegal under Kansas law, because the Kansas Restraint of Trade Act ["KRTA"] prohibits "[a]ll arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to" fix prices. Because none of the relevant Kansas statutory language "mentions reasonableness or a rule of reason," the Kansas court refused to read one into the statute, even though the United States Supreme Court has long read such a limitation into the very similar Sherman Act language.[5]

Vertical and dual distribution agreements must be treated the same as horizontal ones under state law, the court held, because the KRTA does not distinguish between them. The court acknowledged that every federal appeals court to consider the question has held that dual distribution arrangements should be analyzed under the rule of reason but nonetheless held that O'Brien had properly claimed the existence of both a vertical arrangement and a horizontal one as two independently viable theories of liability.

O'Brien signifies that firms must continue to operate gingerly in the area of RPM, despite the *Leegin* ruling. *O'Brien* may well embolden the anti-*Leegin* movement and lead to additional state rulings that depart from the lenient federal approach. (A legislative effort to overturn the Kansas court's decision failed last week.) If a firm operates in multiple states, chances are good that it will come under the jurisdiction of at least one that treats RPM as *per se* unlawful.

The best way to navigate these waters remains what it has always been: to follow a "*Colgate*" approach, named after the 1919 Supreme Court decision[6] that remains viable following all of the post-*Leegin* activity. A *Colgate* policy is simply a unilateral announcement by a manufacturer, making clear (i) that it is not seeking the agreement of any other party but (ii) that the manufacturer will refuse to deal with resellers who sell below certain prices.

The one piece of good news from *O'Brien* is that the court held that federal precedents *do* control the question of what constitutes an "arrangement" to fix prices, since the KRTA and the Sherman Act share the same "between persons" language. Citing the *Monsanto*[7] decision, the Kansas court held that while an explicit written agreement is not necessarily required for liability, Kansas law requires "something more than merely a unilateral pricing policy."

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[4] Case No. 101,000 (May 4, 2012), *available at* http://www.kscourts.org/Cases-and-opinions/opinions/SupCt/2012/20120504/101000.pdf.

[5] *See, e.g., Bd. of Trade of Chicago v. United States*, 246 U.S. 231 (1918).

[6] *United States v. Colgate & Co.,* 250 U.S. 300 (1919).

[7] *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752 (1984).

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The safety of the *Colgate* approach was confirmed by a New York intermediate appellate court's ruling, on May 8, 2012, affirming dismissal of the state attorney general's suit against Tempur-Pedic to enjoin its policies calling for retailers to refrain from advertising discount prices.[8] Since those policies took the form of unilateral announcements, rather than agreements, the New York court found that Tempur-Pedic had not violated New York state law.

In sum, after *O'Brien*, manufacturers can still rely on the *Colgate* doctrine, and they can continue to enforce suggested resale prices by announcing those prices in advance and refusing to deal with noncomplying dealers. But manufacturers must be careful not to engage in any communications with dealers that could be used to support a claim of agreement.

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[8] *See People v. Tempur-Pedic International, Inc.,* 2012 N.Y. Slip Op. 03557 (App. Div. 1st Dep't May 8, 2012).