AntitrustConnect Blog

Kansas Supreme Court Condemns Vertical Price Fixing Agreements as Per Se Illegal

Jeffrey May (Wolters Kluwer) · Tuesday, May 15th, 2012

Earlier this month, the Kansas Supreme Court ruled that the reasonableness of a vertical price fixing agreement is not to be considered when determining whether such an agreement violates the Kansas Restraint of Trade Act (KRTA). Kansas Supreme Court precedent that called for a "reasonableness rubric"—a determination of whether a restraint was reasonable in view of all of the facts and circumstances—was overruled. In addition, the court decided that the "rule of reason" of federal antitrust jurisprudence did not apply. It refused to read unwritten elements, such as a reasonableness requirement, into the otherwise clear legislative language of the Kansas antitrust law.

The action was brought by a consumer against Leegin Creative Leather Products, Inc.—the manufacturer and retailer of Brighton handbags, accessories, and luggage. The defendant is the same company whose pricing practices were considered by the U.S. Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877. In that decision, the U.S. Supreme Court held that, for purposes of a Sherman Act claim, the pricing practices were subject to "rule of reason" analysis. The Kansas Supreme Court rejected Leegin's argument that the consumer'sKansasantitrust claims were blocked by the rule of reason.

The consumer was permitted to pursue both horizontal and vertical price fixing claims on remand. Vertical and horizontal price fixing agreements are per se violations of the KRTA, the court ruled. The court rejected Leegin's argument that, because it was a dual distributor and dual-distribution systems were treated as vertical arrangements under federal law, the consumer's allegations did not support a horizontal price fixing claim. The applicable provisions of the KRTA neither differentiated between vertical and horizontal price fixing nor outlined a particular approach to a dual-distribution situation. The provisions prohibited all price fixing combinations or arrangements, regardless of the applicable label. To the extent the consumer's horizontal price fixing claim rested on conduct identical to that supporting her vertical price fixing claim, horizontal price fixing was an alternative theory of liability. Proof of an alternative theory did not entitle a plaintiff to additional damages, but it gave a factfinder another way to get to judgment in the plaintiff's favor, the court explained.

Antitrust Injury

In addition, the court ruled that the consumer was not required to provide "concrete evidence" that she personally paid higher prices for Brighton products as a result of the manufacturer's resale

price maintenance (RPM) policy in order to avoid summary judgment for failure to establish "antitrust injury." A genuine issue of material fact on injury precluded summary judgment in light of the RPM policy, its written pricing agreements, and its enforcement practices, as well as expert testimony. The expert opined that the manufacturer's practices fixed the prices of its products, severely limiting discounting. The expert based his conclusions on information from the manufacturer regarding its practices, a survey of "authoritative opinion" on the effects of vertical price fixing in general, and "empirical evidence" of the impact of price fixing documented by other scholars. There was adequate circumstantial evidence that consumers actually paid inflated prices for Brighton goods.

Leegin's contention that the consumer was required to offer proof of injury or damage in the form of a "benchmark analysis" set too high a bar, according to the court. Under the benchmark analysis approach, the consumer would have needed: (1) to conduct a benchmark analysis comparing the actual retail prices of the manufacturer's products before and after the manufacturer allegedly crossed the line between a lawful pricing policy and unlawful pricing agreements, (2) to compare the prices of the manufacturer's accessories against the prices of similar accessories from manufacturers who did not impose price restraints, or (3) to collect affidavits from Kansas retailers who were prevented from discounting.

Statute of Limitations

The consumer's claims for full consideration damages and treble damages were both subject to a three-year statute of limitations, the court ruled. They were civil remedies, not penalties. The court rejectedBrighton's call for an application of the one-year statute of limitations for an "action upon statutory penalty or forfeiture, on the ground that full consideration and treble damages provisions were statutory penalties because they awarded more than actual damages and were cumulative with actual damages. Moreover, the three-year statute of limitations gave a greater incentive to consumers to exercise their statutory rights by bringing private actions under the KRTA.

Class Actions

The consumer represented a class of similarly situated purchasers of Brighton products. Leegin had moved to decertify the class, but the lower court did not reach the issue. The State Supreme Court decided that it would be best for decertification to be considered on remand.

Legislative Response

Kansas legislators have quickly responded to the decision. A measure (HB 2797) was introduced in the Kansas Legislature on May 10, 2012, to overturn the court's rejection of rule of reason analysis. The bill would call for harmonizing the KRTA with Sec. 1 of the Sherman Act. Under the measure, an agreement that would be deemed a reasonable restraint of trade or commerce under Sec. 1 of the Sherman Act may not be deemed unlawful under Kansas law. The measure also would prohibit private class action lawsuits.

The May 4, 2012, decision in *O'Brien v. Leegin Creative Leather Products, Inc.*, No. 101,000, appears at **(CCH) 2012-1 Trade Cases ¶ 77,884**.

This entry was posted on Tuesday, May 15th, 2012 at 8:16 pm and is filed under Resale Price Maintenance
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.