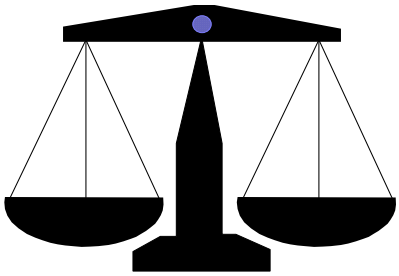

GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

Is The Doctor Out?

In *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 171 Fed.Appx. 464 (5th Cir. 2006), the federal appellate court was presented with what appeared to be almost a ludicrously simple case. The jury had found that a manufacturer of women's accessories had terminated its retailer illegally because the retailer had discounted the manufacturer's goods. On appeal, the manufacturer conceded that its conduct constituted price fixing of the sort ruled *per se* illegal almost a century ago in *Dr. Miles Medical Co. v. John D. Clark & Sons Co.*, 220 U.S. 373 (1911).

Unanimously affirming the jury's verdict, the appellate court emphasized that the Supreme Court "has consistently applied the *per se* rule …, consistent with Congressional intent, to distributor-termination cases in which there is a concerted action to set prices."

Enter the Justice Department and the Federal Trade Commission, which now appear to be more interested in dismantling the antitrust laws than in their enforcement.

Despite their purported concern with consumer welfare, which would appear to be well served by the long-standing rule that condemns agreements intended to increase the prices that consumers are required to pay for goods, the Justice Department and the Federal Trade Commission united to urge the Supreme Court to reverse the jury's verdict and to disavow the *Dr. Miles* rule. Oral argument in the Supreme Court was scheduled for March 26, 2007.

In a remarkable gesture of protest, dissenting Federal Trade Commissioner Pamela Jones Harbour addressed a lengthy open letter to the Supreme Court Justices in defense of *Dr. Miles*. It begins emphatically, "Vertical minimum price fixing is almost always harmful to consumers."

Arguing persuasively for the retention of the *Dr. Miles* rule, Commissioner Harbour urges that overruling the decision would be ––

- bad as a matter of law;
- bad as a matter of economic policy;
- expressly contrary to Congressional findings and intent; and
- unsupported by the facts of the *Leegin* case itself.

As a matter of economics, Commissioner Harbour contends that reversing the *Dr. Miles* rule will likely result in ––

- higher prices set by manufacturers;

- reduced efficiency in distribution and retailing;
- lower levels of retail sales per outlet;
- higher rates of business failure;
- reduced opportunities for effective entry by new competitors and products;
- distortion of retailer incentives to provide objective comparisons of competing brands on the shelves;
- diminished levels of competition between competing brands of goods; and
- Increased competition by manufacturers for the loyalty of their dealers, the cost of which would be borne by consumers.

Commissioner Harbour concludes, "It is no wonder, therefore, that most industrialized nations of the world treat vertical minimum price fixing as *per se* illegal."

Commissioner Harbour also argues forcibly that the effort to jettison *Dr. Miles' per se* prohibition of minimum price fixing flies in the face of the express intent of Congress, which "explicitly forbade the use of federal antitrust enforcement appropriations to advocate for the reversal of *per se* illegalities for such conduct." And, after all, it is the role of the Justice Department and Federal Trade Commission to uphold and implement –– and not to frustrate –– Congress' enforcement objectives with respect to the nation's antitrust laws. Or so one would think.

The Supreme Court will not rule in the *Leegin* case for several months. Nevertheless, it is disturbing that the nation's antitrust enforcement agencies have aggressively assailed well-recognized Supreme Court precedent, which is intended to protect both consumers and independent retailers and distributors against coerced price fixing. We hope that their effort will be rejected, and that the venerable *Dr. Miles* will retain his office hours.

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