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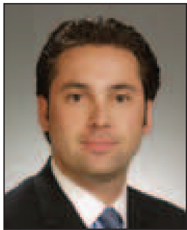
A Leegin Up on Colgate

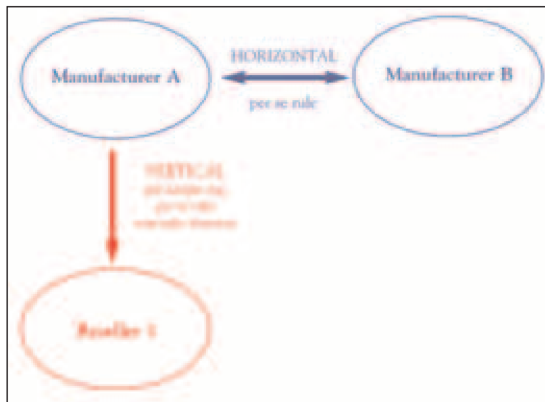
by Chris Finnerty

Background:



On June 28, 2007, the Supreme Court of the United States issued an unexpected decision in Leegin Creative Leather Products v. PSKS, Inc. (No. 06-480, 2007 U.S. LEXIS 8668). The Supreme Court overturned its own 96 year-old decision in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), which originally established the per se rule against vertical price agreements.

The pivotal question that arises from the new Leegin decision is, do manufacturers now have the freedom to agree on resale prices with resellers at will? The answer to this question is no.



While vertical and horizontal arrangements conjure images to the practitioner, they may not for the layman. A horizontal relationship is East and West, one between competitors at the same level of distribution, demonstrated here by Manufacturers A and B. Agreement on price at this level is still absolutely prohibited and is per se illegal. In Contrast, a vertical relationship is one of North and South, with Manufacturer A selling downstream to Reseller 1. Vertical relationships were changed by the Leegin decision. Horizontal relationships were not.

The per se rule is an absolute ban, regardless of any justification, for a specific practice. It makes such a practice illegal, no matter what. While the rule of reason is not an absolute ban, it is not carte blanche to price fix either. The basic standard for the rule of reason focuses on determining whether the agreement, or restraint promotes or harms competition. This may seem straightforward, but justifying a particular restraint is anything but simple. Adding to the importance of having a defensible rule of reason analysis to support an agreement is that the penalties and fines for violations have remained the same as they were when the standard was per se.

Where We Are:

Even though manufacturers must still be careful while traversing the price agreement waters, Leegin has created opportunity in the form of additional case law support for price stabilization. Although policies based on the landmark U.S. v. Colgate, 250 U.S. 300 (1919) decision have been available for almost 90 years, Leegin has given the manufacturer an additional defense from liability. Leegin has created a two-step defense for the manufacturer with a Colgate-based policy. The first defense is that there is no agreement (the traditional defense for Colgate), and the second defense is that even if there was agreement, the practice is "reasonable" under the rule of reason. This added defense, coupled with the Supreme Court's positive treatment, should create added comfort at the manufacturer and reseller level with Colgate-based policies.

Continued on page 3

IN THIS ISSUE

Employee Theft Investigation 5
New Members. 7
Nominees for '07 Pioneer Award. . 9
Nominees for Person and Manufacturer of the Year. 9
MAP Participants . . 11
Nominees for PWA Board of Directors. 12
'07 Conference Sponsors 13
New Products 16
Miscellaneous Ramblings. 21
PWAU Update 23
SEMA Hall of Fame Inductees . . 25
An Open Letter . . . 25
Manufacturers' Reps 26-30

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