

Supreme Court's Antitrust Review Expands

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The Supreme Court has recently agreed to review two additional antitrust cases this term:¹ *PSKS, Inc. v. Leegin Creative Leather Products* (“*Leegin*”) and *Billing v. Credit Suisse First Boston LTD.* (“*Credit Suisse*”). The former threatens antitrust precedent regarding Resale Price Maintenance (“RPM”) dating back to 1911, and the latter should clarify when antitrust immunity arises in the face of major regulatory oversight—in this case SEC oversight. In agreeing to hear these two cases, the Supreme Court continues its interest in reviewing and clarifying antitrust doctrine.

The Demise of *Dr. Miles*?

The question presented in *Leegin* is whether manufacturer-imposed vertical price maintenance requirements on distributors should be per se illegal, or whether courts should analyze such agreements under the rule of reason. A 1911 case, *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (“*Dr. Miles*”), originally set the precedent for RPM agreements, finding them per se illegal under the Sherman Act. In agreeing to hear this case, the Supreme Court has indicated that it might be willing to overturn this nearly century-old precedent.

Dr. Miles concerned agreements between a medicine manufacturer, Dr. Miles, and the wholesale and retail stores that sold its manufactured medicine. Dr. Miles attempted to set the price of its medicine at both wholesale and retail through contracts compelling its dealers to sell at predetermined prices. The Supreme Court held that this practice resulted in “all competition between retailers [being] destroyed,” because the contracts require each retailer to sell the medicine at identical prices. The Court ultimately held that the agreements were void. Courts have modified the *Dr. Miles* rule in the intervening years slightly, finding that it only applies to vertical *minimum* price fixing. Courts will analyze vertical maximum price fixing, refusals to deal, and other vertical restraints under the rule of reason.² The *Dr. Miles* rule on vertical minimum price fixing is the last of the vertical per se rules still standing.³

¹ The Court previously accepted review of two other cases, *Bell Atlantic v. Twombly* and *Weyerhaeuser Co. v. Ross-Simons Hardware Lumber Co.* *Twombly* addresses the appropriate pleading standard for claims under § 1 of the Sherman Act, and *Ross-Simons* addresses the issue of predatory bidding.

² *See, e.g., State Oil Co. v. Kahn*, 522 U.S. 3 (1997); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 117 (1988); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

³ The per se rule against RPM has been continually affirmed in later cases, including *Bus. Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) (Brennan, J., concurring).

Leegin is very similar to *Dr. Miles*. Leegin Creative Leather Products (“Leegin”) manufactures women’s accessories and sells its products to retailers for sale to customers. In 1997, Leegin began requiring retailers to adhere to its suggested prices for its products. It warned that if a retailer deviated from those prices, Leegin would terminate the relationship. PSKS was a retailer of Leegin products, and in 2002 it violated the suggested price policy by discounting Leegin products. Leegin, true to its word, discontinued shipments of its products to PSKS.

In a per curiam, relatively short decision, the Court of Appeals for the Fifth Circuit affirmed the lower court’s ruling that Leegin had violated the per se rule on minimum price-fixing agreements.⁴ Leegin argued nearly exclusively that the per se rule should not apply to its case, but the court stated the it “remain[ed] bound by [the Supreme Court’s] holding in *Dr. Miles*.”⁵ The court noted that several other vertical restrictions were governed, for antitrust purposes, under a rule of reason analysis, but the Supreme Court has held and re-affirmed that minimum price-fixing agreements as per se illegal under the Sherman Act.

Prior to accepting formal review, the Supreme Court stayed the Fifth Circuit’s holding, which many interpreted as an early indication of a possible reversal. Indeed, antitrust per se rules have been a pariah at the Supreme Court in the last several years (as well as in some academic circles), and this review may indeed overturn that last of the vertical per se rules. A ruling overturning the *Dr. Miles* rule would result in minimum price-fixing agreements being analyzed under the rule of reason, allowing defendants to economically justify the pro-competitive aspects of such requirements.

Critics of the per se rule most often cite the concept of free riding as the leading reason for overturning the per se treatment of minimum price-fixing agreements. That is, manufacturers attempt to restrict price competition within their own brands (intra-brand competition) to provide incentives for retailers to invest in marketing efforts. The marketing and promotional efforts, commentators argue, actually increase competition with the manufacturers of competing products (inter-brand competition). If some retailers were allowed to discount prices, then the incentive to the promotional retailer would disappear, allowing consumers to buy the product from the lower priced retailer after being convinced to buy it from the promotional retailer. The critics contend that the per se rule encourages free riding and discourages promotional activities by prohibiting manufacturers from controlling price at the retail and wholesale level.

Whatever the outcome of *Leegin* at the Supreme Court, both manufacturers and retailers should learn the more precise limits of these vertical price agreements. Oral argument is set for Monday, March 26, 2007.

⁴ PSKS, Inc. v. Leegin Creative Leather Products, 171 Fed. Appx. 464 (2006).

⁵ *Leegin*, 171 Fed. Appx. at 466 (2006).

The SEC v. Sherman Act

Credit Suisse presents the question of what the appropriate standard is for implying antitrust immunity. Specifically, is implied antitrust immunity warranted where a potential conflict with securities laws exists, or rather where there is clear congressional intent to create antitrust immunity? The case concerns underwriting companies' activities in initial public offerings ("IPOs"). The private plaintiffs allege that several major underwriting companies participated in a scheme that led to inflated security prices in violation of the antitrust laws.

The consolidated complaint consists of two groups of plaintiffs, the IPO plaintiffs and the Class Action plaintiffs, both alleging antitrust injury under Federal and State antitrust laws. The IPO plaintiffs consist of direct IPO purchasers and aftermarket purchasers, both complaining of inflated security prices resulting from the defendant underwriters' conspiracy of "tie-in" agreements, including additional aftermarket purchase requirements with inflated commissions and laddering transactions.⁶ The aftermarket purchasers allege that this conspiracy further resulted in them paying supra-competitive prices for the securities. Finally, the Class Action plaintiffs allege that defendants violated the Robinson-Patman Act by receiving or paying bribes to the institutional defendants in order to raise the prices of the securities.

The district court granted defendants' 12(b)(6) motion to dismiss under the theory of implied immunity from the antitrust laws, because the SEC "either permits the conduct . . . or has the power to regulate the conduct."⁷ The Second Circuit disagreed.

After canvassing the history of implied antitrust immunity, the Second Circuit determined that two general categories of implied immunity exist: pervasive legislation and potential conflicts. Pervasive legislation, in the court's broad definition, means that where regulation is "so pervasive that Congress must be assumed to have forsworn the paradigm of competition," immunity should be granted.⁸ Alternatively, potential conflict means, "when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct."⁹ The Second Circuit, however, reiterated the overarching principle that courts have generally disfavored implied immunity.

In addressing the pervasiveness argument, the Second Circuit noted that pervasiveness does not merely mean "subject to regulation," but rather means SEC

⁶ The initial IPO purchasers argue that the underwriting firms conspired to force purchasers into agreeing to these additional terms. For example, two particular plaintiffs alleged that in order to purchase shares of IPO companies, Merrill Lynch required them to "agree to purchase additional shares of the respective securities in the aftermarket at inflated prices and subject to excessive commissions." *Credit Suisse*, 426 F.3d at 144 n.16.

The court defined laddering as "inducing investors to give orders to purchase shares in the aftermarket at pre-arranged *escalating prices* in exchange for receiving IPO allocations." *Id.* at 142 (internal citations omitted) (emphasis in original).

⁷ *Id.* at 146.

⁸ *Id.* at 160–61.

⁹ *Id.* at 161 (internal citations omitted).

approval of the specific activity.¹⁰ The SEC certainly had not approved the alleged conduct, and in fact, the “SEC has long considered tying the award of allocations . . . to additional consideration to be fraudulent and . . . actionable.” Therefore, the court found no reason to imply immunity from the antitrust laws: “While their conduct may be subject to regulation and control by the SEC in great detail, that does not mean that the SEC approved those acts”¹¹

The potential conflict argument met a similar fate. The Second Circuit did not describe SEC authority; rather, it searched for legislative intent to immunize. The court found no legislative history authorizing or indicating authorization of the conduct; it found no SEC power to compel the practices in question; it found nothing in the SEC regulations that would be “mooted or even significantly curtailed by applying the antitrust laws”; and, again, it found no specific SEC authorization approving the conduct in question. With no express or implied Congressional intent to immunize, the principle disfavoring immunity prevails. In the Second Circuit’s conclusion, it stressed that merely because the SEC could, in theory, immunize the defendant’s conduct, the court had no obligation of repealing the antitrust laws in absence of SEC or Congressional immunization. Until such immunization occurs, the antitrust laws will apply.

Importantly, the SEC, FTC, DOJ, and others submitted an amicus brief at the Supreme Court urging the Court to adopt a rule that gives antitrust immunity both to conduct authorized by the SEC and activities “inextricably intertwined with permitted collaboration.” The brief rejects plaintiffs’ immunity argument as too narrow, defendants’ arguments as too broad, and the lower court’s holding as incorrect, arguing instead for a new standard. The Supreme Court decision should provide needed clarity as to when antitrust immunity is implied in the face of other regulatory oversight.

Oral argument is scheduled for Tuesday, March 27, 2007.

¹⁰ The court found that this was the holding of the leading case, *U.S. v. Nat’l Ass’n of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

¹¹ *Credit Suisse*, 426 F.3d at 171.