The Wichita Eagle
Kansas.com

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Thursday, May 31, 2012

Posted on Thu, May. 31, 2012

Kansas manufacturers may face legal risks

By James M. Burns and Adam M. Wenner

In 2007, in Leegin Creative Leather Products v. PSKS , the U.S. Supreme Court overturned almost 100 years of settled antitrust law by declaring that resale price maintenance (RPM), the practice by which a manufacturer attempts to dictate the resale price at which its products are sold, was no longer per se unlawful under the federal antitrust laws.

Instead, RPM would be assessed under the "rule of reason," which, unlike the per se test that declares such conduct unlawful in all circumstances, requires the court to weigh the justifications for the agreement against its anticompetitive effects in determining the legality of the conduct.

This development appeared to open the door for some manufacturers to exert greater control over retail pricing.

Since the Leegin decision, however, the ability of manufacturers to impose pricing restrictions on the resale of their products has been anything but clear.

Perhaps this should have been expected, given that more than 30 state attorneys general urged the Supreme Court in Leegin to continue to hold RPM agreements per se illegal.

When the Supreme Court rejected that position, the states were faced with a difficult decision:

Would they follow federal antitrust precedent as to their state antitrust laws (as they typically do)?

Or would they reject Leegin and continue to subject manufacturers to per se liability under their state antitrust laws?

Over the course of the past five years, the states have failed to take a uniform approach to the issue.

Some attorneys general have staked out the position that RPM agreements remain per se unlawful under their particular state antitrust law, and have brought enforcement actions predicated on that view. California has led the way in this regard.

In other states, including New York and Tennessee, Leegin's "rule of reason" approach has been applied, albeit only by the lower courts.

Into this unsettled legal landscape, the Kansas Supreme Court recently became the first state Supreme Court to issue a definitive ruling on this issue.

In O'Brien v. Leegin Creative Leather Products , the court held that the U.S. Supreme Court's decision has no bearing on how state antitrust law should be interpreted and that RPM continues to be per se unlawful under Kansas law.

In reaching this result, Kansas now joins Maryland as the only states that have definitively declared resale price maintenance per se unlawful under state law. (Maryland declared RPM per se unlawful through legislative action in 2009.)

Perhaps out of recognition (or fear) that the O'Brien decision could dissuade manufacturers from doing business in the state, legislation was quickly introduced in the Kansas Legislature to "correct the interpretation of the Kansas Restraint of Trade Act ... made in O'Brien."

The bill passed in the Kansas House but failed in the Senate. The Legislature then adjourned, leaving the O'Brien decision undisturbed.

In light of O'Brien , manufacturers in Kansas cannot engage in resale price maintenance without facing significant legal risk, greater than that faced anywhere else in the country (other than Maryland).

Given this, will national manufacturers decide that the legal risks make doing business in Kansas – at least through independent retailers – undesirable?

In short, will corporate America's response to the O'Brien decision be to declare, like Dorothy to Toto in "The Wizard of Oz," that "We're not in Kansas anymore"?

Only time will tell.

James M. Burns is a partner in the Washington, D.C., office of Dickinson Wright. Adam M. Wenner is an associate in the firm's Detroit office.

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