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'MSRP' phrase may be history

The MSRP has gone the way of the dodo bird.

In the final days of its recently completed term, the U.S. Supreme Court struck down the rule that manufacturers can't set the prices retailers charge for their products. In ending this decades-old prohibition, the court may have ushered in years of uncertainty and litigation over when and how manufacturers can control prices.

For nearly a century, antitrust law has prevented manufacturers from entering into agreements with distributors and retailers to set minimum resale prices. Instead, manufacturers have been limited to "suggesting" prices — as in the "manufacturer's suggested retail price," or MSRP — and they have had little power to enforce their pricing policies.

The source of the prohibition on "resale price maintenance" is a 1911 Supreme Court opinion interpreting the Sherman Antitrust Act. The effect of that case, Dr. Miles Medical Co. v. John D. Park & Sons Co., has been to give discounters the freedom to reduce their margins to attract customers.

Economists in recent decades have criticized Dr. Miles' prohibition against resale price maintenance. They observe, for example, that manufacturers of big-ticket items often set an MSRP at a level where their retailers are able to hire a well-trained sales staff and offer a pleasant store environment.

But when discounters can offer a cheaper price with a bare-bones retail experience, then customers will "free-ride:" visiting the full-service retailer to learn about the product but then purchasing from the discounter. Allowing manufacturers to dictate minimum prices can avoid this threat to full-service retailers.

GUEST COLUMN

Lori Irish Bauman

The Supreme Court acknowledged economists' criticisms when, on June 28, it decided Leegin Creative Products v. PSKS, Inc., overturning Dr. Miles and holding that manufacturers may now in most cases agree with distributors and retailers about resale prices.

Whatever its demerits from an economist's point of view, the Dr. Miles rule had the advantage of certainty: Resale price maintenance agreements were always unlawful, making it easy for participants in the retail sector to know what they could and couldn't do.

Under Leegin, in contrast, resale price maintenance agreements will be legal under many circumstances, but will continue to be illegal at times. That's the case because, according to the court, such agreements will now be subject to what antitrust law calls the "rule of reason."

This means that an agreement on minimum retail price is acceptable if its procompetitive benefits outweigh its anticompetitive effects. Agreements that don't conform to the rule of reason are viewed as improperly impairing competition and will continue to be illegal under the Sherman Act.

Who decides when a resale price maintenance agreement is consistent with the rule of reason and doesn't unfairly restrain competition? The courts. And how will the courts come to decide these issues? When retailers, customers and perhaps even the government start suing to challenge the resale price maintenance agreements that manufacturers may now require from retailers and distributors.

As the Supreme Court itself suggests in Leegin, the dividing line between legal and illegal resale price maintenance agreements will remain unclear until the courts provide guidance to the business community.

The court in Leegin does list some factors courts should consider. Resale price maintenance agreements are more likely to be illegal if many competing manufacturers adopt the practice, the impetus for the restraint comes from retailers or distributors rather than manufacturers, or the manufacturer requiring the agreement dominates the market and it is difficult for competitors to enter the market.

The new paradigm on resale pricing may or may not improve the lot of consumers, but at least until the new rules are ironed out, lawyers will surely continue to benefit.

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