

Competition - USA

Kansas legislature overrides state court departure from Supreme Court precedent

Contributed by [Hogan Lovells US LLP](#)

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On April 16 2013 the Kansas legislature enacted a law that re-establishes that resale price maintenance (RPM) agreements are subject to a rule-of-reason analysis under Kansas antitrust law. The legislation was a direct response to the Kansas Supreme Court's recent decision in *O'Brien v Leegin Creative Leather Products*,⁽¹⁾ which held that, contrary to the US Supreme Court's decision in *Leegin Creative Leather Products v PSKS, Inc.*,⁽²⁾ RPM agreements are still considered *per se* unlawful under Kansas antitrust law.

The new legislation brings Kansas antitrust law further into line with the US Supreme Court's decision, which permits RPM agreements whose pro-competitive benefits outweigh their anti-competitive effects, if any. Similarly, Kansas law provides that RPM agreements will not be deemed unlawful if they are reasonable. The law permits the use of RPM agreements when their use is "reasonable in view of all the facts and circumstances of the particular case and does not contravene public welfare".⁽³⁾ The legislature's notes evince its intent specifically to overturn the state supreme court's decision, which was a blatant departure from more than 60 years' of Kansas precedent, which had applied a rule-of-reason analysis and condemned only unreasonable restraints of trade.⁽⁴⁾

Although the new law has harmonised Kansas antitrust law with existing US Supreme Court precedent and the antitrust laws of most states, companies with national resale networks should proceed with caution. Minimum RPM agreements still are *per se* unlawful under the laws and case law of certain states (eg, California, New York and Maryland), and other states have also begun to move in that direction. For example, in March 2013 a Pennsylvania state senator reintroduced an antitrust bill that, if enacted, would make RPM agreements *per se* unlawful in Pennsylvania.⁽⁵⁾ As Pennsylvania does not have its own comprehensive antitrust law and thus applies federal law to antitrust actions, the proposed legislation would dramatically alter the landscape of permissible business practices for companies conducting business in the state. Moreover, Congress has repeatedly introduced legislation that would overturn the US Supreme Court's *Leegin* decision and declare minimum RPM agreements *per se* unlawful.⁽⁶⁾ In 2011 41 state attorneys general wrote to Congress in support of such legislation. The law did not pass, but demonstrates the widespread scepticism attached to the pro-competitive benefits of minimum RPM agreements. These sentiments were echoed by William Baer, head of the Department of Justice Antitrust Division, during his confirmation hearing in July 2012.⁽⁷⁾

Companies with RPM policies also risk violating international antitrust laws. For example, in China there has been a recent increase in enforcement activity against RPM agreements and practices.⁽⁸⁾ Additionally, the EU Block Exemption Regulation (330/2010) prohibits suppliers from fixing the minimum price at which distributors can resell their products.⁽⁹⁾ This hardcore restriction applies regardless of the market shares of the supplier and buyer.

It has been almost six years since the US Supreme Court's *Leegin* decision and dissent still percolates in many states and the international community. During that time, most of the action to override *Leegin* has occurred at the state level. The Kansas example is interesting because, despite the state court's attempt to ignore *Leegin* and deem all RPM agreements *per se* unlawful, the state legislature stepped in to prevent a departure from US Supreme Court precedent and prior state court decisions. Nonetheless, companies should take these divergent policies into account and would be well advised to consult antitrust counsel before implementing any resale policies or agreements with RPM language.

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Endnotes

- (1) 294 Kan 318 (Kan 2012).
- (2) 551 US 877 (2007).
- (3) SB 124, 58th Leg, 2013 Reg Sess (Kan 2013) (enacted).
- (4) See *Okerberg v Crable*, 341 P2d 966, 971 (Kan 1959); *Heckard v Park*, 188 P2d 926, 931 (Kan 1948).
- (5) See SB 848, Gen Assemb, 2013-14 Reg Sess (Pa 2013).
- (6) See Discount Pricing Consumer Protection Act of 2011, HR 3406, 112th Cong (2d Sess 2011), available at www.govtrack.us/congress/bills/112/hr3406.
- (7) US Senate Committee on the Judiciary: Hearings & Meetings (webcast of July 19 2012 confirmation hearing), available at www.judiciary.senate.gov/hearings/hearing.cfm?id=2c59d4c3c1a374efdd74344bc8f7423d.
- (8) See Moutai, "Wuliangye Hit with CNY 449 Mn Antitrust Fine", China Scope Financial, February 19 2013, available at www.chinascopfinancial.com/en/news/post/23096.html.
- (9) See Commission Regulation 330/2010, April 20 2010, 2010 OJ (L 102) 1, 2.

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