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***Leegin* antitrust case marks end of an era**

The U.S. Supreme Court was to hear argument in *Leegin Creative Leather Products Inc. v. PSKS Inc.*, No. 06-480, a case in which the only issue was whether to sustain or to overrule the condemnation of minimum resale price agreements between a manufacturer and its customers, also known as resale price maintenance (RPM). There is no dispute about the existence of resale price agreements.

The Supreme Court held in *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), that it was illegal for a manufacturer and a retailer to agree on the resale prices that the retailer would charge.

The Court reasoned that a restriction on the retailer's prices for goods that it owned would violate the centuries-old prohibition against *restraints on alienation*. The Court found that an agreement between a manufacturer and a retailer was equivalent to a horizontal agreement between the retailers themselves, and *can fare no better*.

Eight years later, the Court held in *U.S. v. Colgate & Co.*, 250 U.S. 300 (1919), that a manufacturer could legally establish a price that it wanted retailers to charge and announce that it would refuse to sell to any retailers that deviated from it, as long as it was wholly unilateral and the retailers did not verbally *agree* to the policy. The rationale was that a seller should be free to choose its own customers, and that absent agreement there could be no violation of section 1 of the Sherman Act.

The two cases *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911) and *U.S. v. Colgate & Co.*, 250 U.S. 300 (1919)

There was an obvious difference between the cases of *Dr. Miles* and *Colgate*. If a manufacturer-imposed *restraint on alienation* is as pernicious as a restraint that the retailers decide on among themselves, it should not matter whether the retailer agrees verbally with a manufacturer or whether it simply adheres to a manufacturer's preferences under threat of termination.

The common law has long recognized that agreements can be established by performance, as well as by words of assent.

For almost 60 years, the high court failed to acknowledge this tension. The emphasis was on *words of agreement* rather than competitive effects. Evidence of manufacturer coercion or termination for non-performance, followed by a settlement with the retailer, made it easier for a plaintiff to recover. Since the outcome was based on formal criteria, such as absence of agreement, the logic was also applied to non-price restrictions.

This led to a new set of formalistic distinctions, such as the difference between the assignment of *primary responsibility* for a sales territory and a restriction on sales *out of territory*. These distinctions made little sense to business people.

The high court's decision in *Continental T.V. Inc. v. GTE Sylvania*, 433 U.S. 36 (1977), first modified the anti-trust rules governing distribution. The Court declared that a restriction on dealer territories should be analysed under *the rule of reason* rather than subjected to condemnation. The opinion relied on relatively recent advances in economic learning to distinguish the effects of vertical agreements among manufacturers and retailers from the effects of horizontal agreements. It recognized the pro-competitive and pro-consumer rationales for vertical restraints. *Sylvania* undercut the fundamental rationales of *Dr. Miles*, but did not overrule it and, the opinion drew a distinction between *resale price restraints* and the *non-price restraints*.

***Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and *Business Elecs Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988)**

Subsequent opinions in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and *Business Elecs Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988), reaffirmed the Court's recognition that non-price vertical restraints can be pro-competitive.

The case *State Oil Co. v. Khan*, 522 U.S. 3 (1997) held that agreements between a manufacturer and a retailer on maximum resale prices were subject to the *rule of reason*, but minimum resale price agreements continued to be illegal under the authority of *Dr. Miles*.

Industrial-organisation economists believe that difference between RPM and other vertical restraints is unjustified

There can be differences between the competitive effects of minimum RPM and other vertical restraints. A resale price agreement eliminates one aspect of retail competition in the sales of a particular brand but a territorial restriction can eliminate all retail competition altogether. The tensions between the two cases have been eased but not eliminated.

Dr. Miles ruling still stands, even though its intellectual foundations have been undermined, and efforts to apply *Colgate* emphasise the concept of *form over substance*.

It seems obvious that the High Court has agreed to hear *Leegin* because it wants to consider the continued vitality of a prohibition on RPM. At the *certiorari* stage, *Leegin*, a manufacturer, was supported by three amicus briefs from business organisations and more than twenty economists, including several with experience at the anti-trust agencies. *Leegin* also included in its appendix extensive written testimony from its own economic expert (which the Trial Court had excluded as irrelevant).

Four key arguments in *Leegin's* amicus briefs

* The authority of *Dr. Miles* has been undercut by subsequent Supreme Court decisions, which have rejected the premises upon which *Dr. Miles* was based.

* There is no support among mainstream economists for the proposition that minimum RPM always has anti-competitive effects.

* The *Colgate* doctrine is almost impossible to implement in practice. Summary termination of discounters who cut prices without discussions or opportunities to cure is seldom practical.

* The focus of a *rule-of-reason* inquiry in both *non-price vertical restraints* and *RPM* is appropriately on economic effects. In cases that involve RPM, the focus has been misdirected to discerning agreement from communications between manufacturers and retailers because the lower courts have been reluctant to apply the rule to conduct that may be benign.

These themes have been repeated in the amicus briefs on the merits that were submitted on behalf of Leegin and four *amicus*, which included a brief for the-

*United States, by the solicitor general,

*Antitrust Division of the Department of Justice and

*Federal Trade Commission.

The fact that these agencies support the petitioner's effort to overturn *Dr. Miles* is significant.

The arguments of the respondent, retailer *PSKS Inc.*, at the certiorari stage were made in summary form, which was not surprising because its basic theme was that the case is not worthy of Supreme Court review.

However, the respondent has now submitted a more expansive brief on the merits, supported by four amicus including 36 of the states.

Key arguments in these submissions are:

1. Traditional *stare decisis* principles favour retention of the *Dr. Miles* precedent, which has been endorsed by Congress and is efficient to administer.

2. There is empirical evidence to show that RPM increases consumer prices. The offsetting benefits are supported only by speculation and, in any event, can be achieved in less-restrictive ways.

3. There are valid distinctions between price and nonprice vertical restraints, and present tensions on the law can best be addressed by modifying *Colgate* rather than overruling *Dr. Miles*.

Other possible arguments

An alternative disposition has been proposed by two economists who filed a brief in support of neither party, and a similar fallback position has been endorsed by one amicus for the respondent.

Rebuttable presumption of illegality

These alternatives would rely on a rebuttable presumption of illegality, draw a clear distinction between RPM that is *manufacturer induced* and RPM that is *retailer induced*, mandate a closer scrutiny of market facts and require more specific affirmative demonstrations that RPM was necessary to achieve certain pro-consumer objectives.

There is a consensus that manufacturer-driven RPM is more likely to be pro-consumer than dealer-driven RPM, and there is a consensus that courts should focus more than they do today on specific competitive facts rather than nuances of agreement.

If the Supreme Court decides to overrule *Dr. Miles*, it is unlikely that any opinion will outline the appropriate presumptions for some other case, with different facts. *Leegin* may thus mark the end of one era, but starts in-depth judicial examination of minimum RPM.

DOCUMENT DESTRUCTION IN THE BUSINESS ENVIRONMENT

by Sally Ramage

Being deeply involved with the figures as accountants are, can often lead us to miss the importance of the very documents we use to get to the accounts we deal with. When things go wrong, contemporary documents are of the utmost value. It is to documents that the lawyers look with special care when there is any issue with accounts. Oral testimony alone is less reliable. Documents are the means of tracing a contemporary record going to the thing in issue. That is why no document should be destroyed.

- (1) In certain cases, the destruction of documents is illegal. For example, a company officer who destroys or falsifies a document affecting the company's property or affairs is liable to prosecution under the Companies Act unless he can prove that he did not intend to deceive by doing so. Such a person as above mentioned who fraudulently either parts with, alters or makes an omission in any such document or is privy to fraudulent parting with, fraudulent making of an omission in any such document, is guilty of an offence. A person guilty of an offence under this section is liable to imprisonment or a fine, or both.

If a dispute has already arisen, it is very dangerous to destroy any document as was seen in the Australian case of *BAT v McCabe*, in which the Australian High Court identified that a company, by having a *document destruction policy*, illustrated that it could manage its own documents .

In the case of *Douglas v Hello*, the Douglas' objected to their photograph being taken by the magazine "Hello!". During this privacy issue, the Douglas' alleged that Hello had destroyed documents, this interfering with the course of justice. The English court, adopting the reasoning in *BAT v McCabe*, accepted Hello's document destruction as persuasive authority, having proved the facts. The court, however,

could not agree with the Douglas' that this document destruction was indeed an attempt to pervert the course of justice.

In some cases a deliberate decision to destroy documents, if it is extremely likely that a dispute is soon to arise, or after a dispute has arisen could make one liable under the criminal offence of obstructing or perverting the course of justice.

Anyway, missing documents usually leave tell-tale indications of their existence because they are often referred to in surviving documents. If the case goes to court, one has to list not only documents in one's possession, custody or power, but also those which were but are no longer.

Destruction of documents can lead to the case being found against you by inference. Such a case was the 1985 case of *Infabrics v Jaytex*, a case of copyright infringement of prints for shirts. It was discovered that after the case commenced, most of the invoices, stock records and similar documents had been destroyed.

The judge said :

' I am not prepared to give the defendants the benefit of any doubt or to draw an inference in their favour where a document, if not destroyed, would have established the matter beyond doubt.'

It speaks for itself.

A similar case was *Logicrose v Southend United Football Club*. The judge considered the application to strike out the case. He said that it was not always necessary to strike out such a case if a fair trial was still possible without that document. But if the destroyed documents were key to the case, as in *Landauer Ltd v Comins and Co*. the case would have to be struck off, since the absence of such documents was going to impede the case.

Companies should have document retention policies and should not be haphazard as to what they keep and what they decide not to keep. It used to be the case that we could look to the Limitation Act 1980 for how long we should keep files, most professions keeping papers for at least six years. But the recent case of *Brocklesby v*

Armitage makes it possible now for someone to bring a case in respect of say, a bad piece of accounting advice, long after the six year limit. There is no excuse for destroying documents, especially as case after case illustrates that the Limitation Act is not a simple matter. Just recently, in the judgment on 18th March 2005 *In Re Loftus (deceased)*, it was held that the twelve year limitation period in respect of any claim to the personal estate of a deceased person, ran, not from the date of death, but from the date of the executor's year: the time during which a personal representative was not bound to distribute.

What are the documents that the Companies Act mentions? Well, documents can include text messages and emails. In *Guinness v Saunders* [1986], Mr Saunders was charged with destroying a jottings book, some correspondence, some pages from an address book and a 1986 diary, among other things. They were seen to be documents. In this case the judge said

'Section 450 is the part of the heavy artillery of the Companies Act. It carries a maximum of a seven year sentence.'

The judge went on to decide that Mr Saunders' diary, etc. were documents as per section 450. He went on to say :

'Those words "affecting or relating to the company's property or affairs" show that the embargo against destruction goes beyond the formal documents that are the company's documents, to the officer's private documents, provided they affect or relate to the company's property or affairs. In my judgement, the ordinary literal construction of the word 'document' is the correct one, it being the intention of the legislature to forbid all unjustifiable destruction of documents or other less formal documents, whether the company's documents or not, and whether in the company's possession or not. The onus is then on the defendant to show that he had no intention to conceal the state of affairs of the company or to defeat the law.'

No other Companies Act offence carries a higher maximum sentence. This section (450) (of the 1985 Act) is also unusual in that it places the burden of making out the statutory defence- on the defence. Under this section, the prosecution need merely

prove that the documents destroyed affected or related to the company's property or affairs.

In any case, even if documents are alleged to have disappeared, they can be reconstructed and retrieved. For example, a lawyer had lost email that was critical to the case and needed it to recover this to prove that an exchange of emails had taken place. There were no back-ups of the system. Forensic examination recovered the metadata of the file as well as that of the operating system and this supported the claim.

It couldn't have been stated more clearly. More recent cases in the United States, especially since the Sarbanes Oxley Act, illustrate what a dim view the US Federal court takes of destruction of documents.

Nowadays with advanced technology at our hands, it would be wise to preserve files using scanners and other electronic storage means rather than destroy them. A written policy on document destruction and retention, to be applied consistently, is a wise move.

Developments in the US Federal Rules of Evidence

Developments in the Federal Rules of Evidence have had a major impact on evidence rules in many states in the US, especially as a result of the US Supreme Court's decision in *Crawford v Washington* which may unleash new hearsay rules and due to new criminal case decisions, brought about by new evidence technology such as electronic trace evidence

Prosecutors are careful to explain to jurors the dispositive proof that modern technology can show to exist. There were important new changes in the type of evidence offered and the way it is evaluated.

Progress to the Federal Rules of Evidence- enacted in 1975

The Model Code did become the basis of the effort by the Commissioners of National Conference on Uniform State Laws to draft Uniform State Laws on Evidence. Significantly, however, the Commissioners redirected the goal toward acceptability and uniformity rather than reform.

The first set of Uniform Evidence Rules was issued in 1953, but only Kansas, New Jersey, and Utah adopted them and the call to national uniformity by itself had little appeal. In 1963, the Judicial Conference of the Federal Courts recommended the creation of Federal Rules of Evidence. The preliminary draft was created and was made public in 1969, and revised in 1970 before reaching the Supreme Court which returned the document to the Judicial Conference to be published for comment, after which event it was sent to Congress in 1972.

In 1973 Congress passed a law that the rules of evidence could not take effect until expressly approved by Congress. These rules of evidence did not include privilege rules but instead included Rule 501 which left the rules of privilege to legislation or common law development. Some of the concern was that the federal rules had the substantive effect of altering state privilege law in diversity cases. Rule 501 accommodated that concern by deferring generally to state privileges in such cases.

In January 1975, Congress enacted the Federal Rules of Evidence and forty-two

states have adopted rules of evidence based generally on the federal rules and the Uniform Rules, which largely track the then-existing federal model since the initial federal draft in 1969, although most American lawyers do not have multi-state practices and so care little about cross-state uniformity.

‘Plain meaning’ analysis

However, the federal rules codified in a usable form the familiar doctrines and procedures developed under the common law. While the federal rules may have been largely a statement of the progressive common law at the time, the fact is that codified rules enacted by the legislature, rather than judge-made rules of common law origin, makes the concept of ‘plain meaning’ analysis very important. Plain meaning analysis states that the language is to be followed without examination of legislative history or policy unless the result is absurd or inconsistent with other provisions of the same statute. Under plain meaning analysis, the Supreme Court ruled in *Huddleston v United State*, 485 U.S. 681 (1988), that ‘other crimes evidence’ under Rule 404(b) need only be proved by sufficient evidence such that the jury could find the fact, not a determination of clear and convincing evidence by the trial judge, which most federal circuits and many states had required prior to the enactment of codified rules.

The effect of ‘plain meaning’ analysis has been to reduce the impact of policy on judicial interpretation of the rules of evidence.

There are no codified federal privilege rules and thus ‘plain meaning’ analysis *does not apply*, the federal trial and appellate courts are much freer to use policy to correct what they perceive would otherwise be inappropriate outcomes.

See Randolph N. Jonakait, ‘The Supreme Court, plain meaning, and the changed Rules of Evidence,’ 68, *Texas Law Review*, 745 (1990).

After codification, the common law rulemaking powers of judges was restricted in a system where the creation of ‘rules’ is principally not the responsibility of judges. (See Paul R. Rice, ‘Advisory Committee on the Federal Rules of Evidence: tending to the past and pretending for the future?’ 53, *Hastings Law*

Journal, 817, 819 (2002)).

Since the Federal Rules were adopted, they have remained relatively stable and further systemic reform has not occurred, although cumulatively there have been a substantial number of amendments over the years and several rules have been added.

Additional Federal Rules: Rule 404, 407, 410, 412, 413, 414, 415, 609, 701, 702, 703, 704, 801, 803, 804, 902, etc

Rule 412 (1978): Congress adopted Rule 412, the *rape shield law*, which was not part of the original rules but developed in concept in the states.

Rule 410 (1980): Congress restricted exclusion of failed criminal plea negotiations to those involving negotiations with government attorneys, etc.

Rule 704 (1984): Congress restricted opinion on ultimate issue going to mental state in criminal cases.

Rule 801(d)(2) (1987): Congress modified proof of vicarious admissions.

Rule 609 (1989): Congress revised balancing tests for impeachment with criminal convictions. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989).

Rules 803(6), 902(11), 902(12) (1992-effective in 2006): Congress allowed admissibility of business records by certification.

Rule 807: (2006 effective): Congress consolidated the catchall exceptions into one rule and renumbered.

Rules 701-703 (1993): Congress made changes in Rules 701, 702, and 703, codifying Daubert principles (see *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S.

579 (1993) and other restrictions on expert testimony.

Rules 413-415(1995): Congress enacted rules 413-415 over the objection of the Judicial Conference and the Evidence Advisory Committee, to admit the defendant's propensity evidence shown through past criminal sexual acts.

Rule 804(b)(6) (1997): Congress added the admission of hearsay evidence through 'forfeiture by wrongdoing'.

Rule 404: Congress made in Rule 404, minor modifications of proof of the character of the accused and victim in criminal cases.

Rule 407: Congress made in Rule 407, minor modifications of restriction on use of subsequent remedial measures and application to product liability cases.

The future effect of technology on the Federal Rules of Evidence

One basic effect of electronics and technology today is that it impacts on the presentation of evidence in the courtroom. Computers, digital evidence, and computer-generated exhibits are now into the courtroom. Various new methods of displaying data electronically to juries and judges have become available. Technology also provides opportunities for video conferencing and for presenting witnesses from off-site locations and for holding hearings with some of the parties at different locations.

All of these changes present evidentiary issues and costs and benefits. There are issues of authentication, best evidence, and hearsay regarding such evidence. Nevertheless there is the commonality of issues between traditional and digital evidence. This needs new rules for computer-generated evidence, for example, and a requirement of 'notice of intent' to introduce such evidence and establishes a procedure for litigating admissibility.

Since the most important issue for judges is to let the parties prove their cases effectively using new technology without distorting the cases or unfairly favouring one side, judgment and sensitive application for Rule 403 is needed.

Increasingly, the use of technological and scientific evidence is used in criminal cases to show who the perpetrator is, for example videotapes or pictures of actual events in criminal cases. Recordings made by surveillance cameras in stores, at ATMs, and on street corners, or by pictures made by passersby who today usually have video cameras and smart phones as they walk about. Then there are evidence trails in e-mails or physical trails of travel by automobile electronic pass information.

Today, DNA analysis is possible with smaller amounts of material than earlier forms of the technology required.

Scientific detection of lies

The advances in scientific evidence have affected the process of identifying the perpetrator. New technology appears to have an enormous impact on detecting lies, with its potential to solve problems of *intent*.

Will the availability of certain proof in clear cases interfere with the necessary task in many more trials for the jurors to evaluate uncertain evidence and to make the best human judgment possible? Will it change what is meant by *proof beyond a reasonable doubt*?

The Federal Rules of Evidence have modified the law and practice in a technical, and significant way. The future of changes in evidence law will possibly occur in the area of hearsay reformulation. Proof of facts and their evaluation by juries has been changed by technological advances in science and technology. These changes are most pronounced in the expansion of dispositive trace evidence, particularly pictorial trace evidence. Trace evidence left in e-mails or on computer hard drives can show the intention of their author as well as revealing the perpetrator's identity. It is of note that *unlike many European countries, the United States does not have one set of evidence rules for civil cases and another set for criminal cases. The US has one set of rules that generally apply to all litigation.*



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