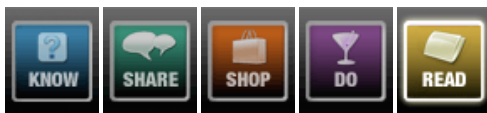


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## After 96 years, the (price) fix is in

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**MICHAEL REKSULAK** | Saturday, July 7, 2007 at 12:30 am



The Supreme Court has just made price fixing more likely again. In one of its last decisions it crossed a bright red line that had been in place for almost a century. As Justice Kennedy observed in the 28-page majority opinion, "the Court's decision in [Dr. Miles Medical Co.](#) ... (1911), is now overruled."

That landmark case had judged the Sherman Antitrust Act to make all minimum price agreements between manufacturers and distributors per se illegal.

Everybody, since then, has understood one vital rule of doing business in the [U.S.](#): Eschew price-fixing agreements.

Under the new interpretation, a 5-4 majority of the court permits fixing of minimum retail prices subject to the so-called rule of reason. Thus, contracts on such price floors will, when challenged as anticompetitive in court, in the future be evaluated on a case-by-case basis. As a result, producers will not necessarily have to rely on the ubiquitous "MSRP" stickers.

The case before the Court was unambiguous. Exclusive Brighton handbags (by Leegin Creative Leather Products) were sold by Kay's Kloset at as much as 20 percent below a price that Leegin had made its distributors pledge not to discount. When Leegin subsequently refused to sell to Kay's Kloset, its parent company PSKS sued and prevailed at every stage, except the last one.

Leegin never disputed price-fixing behavior, but rather argued that modern economic analysis and recent Supreme Court jurisprudence required a switch to the rule-of-reason test.

The briefs in the case posted on the court's Web site, together with the decision and the dissent, make for fascinating reading. One can barely wait to assign them to students as an introduction to antitrust and industrial

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organization issues.

Justice Breyer, in his 23-page dissent, clearly brought to bear his experience of teaching antitrust at [Harvard Law School](#). Both he and Justice Kennedy got the economics right. Research has demonstrated that permitting the fixing of minimum retail prices can, under well-defined conditions, have positive as well as negative welfare effects.

One of many supporting arguments is that such a price policy will enable "brick and mortar" distributors with their presumed higher investments in customer service to compete with those who "free ride."

Every reader who has ever gone to a store to "check a product out" and then ordered it cheaper online from some other merchant knows the deal. (Don't blush, you are hardly alone.)

There is also, however, ample evidence that permitting this practice increases the likelihood of anticompetitive price agreements. Furthermore, when Congress allowed states to make such behavior legal between 1937 and 1975, studies showed that consumer prices unambiguously were increased by it.

A question then is how often such methods would increase (better service, more retail competition) or decrease (collusion by distributors) consumer welfare. As Justice Breyer memorably put it, "How easy is it to separate the beneficial sheep from the antitrust goat?"

Easy enough, says the majority. It is willing to permit the lower courts to sort it out and trusts that discount retailers will not be overly hurt. As Justice Scalia, another former practitioner of antitrust law, accommodatingly phrased it when addressing Leegin's lawyer, "I thought some consumers would prefer more service at a higher price."

Time will tell if this is reduced to just a higher price.

[Michael Reksulak](#) teaches economics and public finance in [Georgia Southern University's College of Business Administration](#). He may be reached by e-mail at [mreksula@georgiasouthern.edu](mailto:mreksula@georgiasouthern.edu).

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