

BEER BUSINESS DAILY & BEER DISTRIBUTOR MONTHLY

More on Supreme Court Ruling

July 1, 2007



Dear Client:

As reported Friday, U.S. Supreme Court overturned almost 100 years of antitrust law and ruled that manufacturers can sometimes contractually set the resale pricing of their products if the procompetitive benefits outweigh the anticompetitive aspects.

In 1980, the U.S. Supreme Court reiterated the Sherman Act's complete ban of vertical price fixing, and that even the 21st Amendment could not shield California's liquor resale price maintenance regime from the reach of the Sherman Act. Thus resale price maintenance was declared per se illegal in the United States.

On June 28, the Supreme Court overruled this notion, holding that such vertical price restraints are not per se unlawful but, rather, must be judged under the "rule of reason." The rule of reason states that only agreements unreasonably restraining trade are subject to actions under the antitrust laws.

The particular case in question pits accessories firm Leegin Creative Leather Products against Kay's Kloset, a boutique in Dallas. The case tested whether a brand can dictate a minimum price to retailers in a legally binding way. The practice was previously prohibited under antitrust law.

Just to be clear, the ruling does not make resale price maintenance legal in all cases -- it just says that it's not per se illegal. Setting minimum prices is only lawful if the procompetitive benefits outweigh the anticompetitive aspects. This case is significant because it overturns almost 100 years of pricing law precedent. Beer industry noted attorney Drew Jaglom points out to BBD that "rule of reason" cases are much more expensive to litigate and therefore rare, so the decision has great practical importance. But he warns against assuming that it will automatically have an influence on the Costco case, as it is difficult to see how a minimum 10% mark-up applied across the board to all sales has procompetitive benefits.

Still, there is a chance that the Ninth Circuit could remand the Costco case back to Judge Pechman based on the changed playing field in antitrust law. And not just the Costco case. There are many other cases that could be affected, such as 324 Liquor Mart, Schwegman and Miller.

But perhaps the greater legacy of this case is on the beer business is how, over time, it will change the way brewers set pricing. The case could give brewers more power over how their beer is priced at the PTR and PTC levels. This ruling conceivably allows them to set both minimum and maximum resale pricing. Suppliers could initiate minimum pricing in order to induce distributors to increase service levels and marketing without increased risk of transshipping, although exclusive territories already takes care of that problem in most cases.

Either way, this ruling in general could lead to a strengthening of the 21st Amendment, we think. NBWA president Craig Purser told BBD over the weekend that "*This decision and its implications reinforce the need for solid, state-based regulation for beverage alcohol. In a world with consolidating retailer and supplier power, controlled by multinational corporations working for shareholder value, the public needs an independent distributor tier to help level the playing field. We think this decision can help make the case for the three-tier system.*" **BEER BRIEFS.** There seems to be a lot good press regarding beer lately, particularly as it relates to food. Check out this article in Cigar Aficionado where a beer dinner is featured. Death of beer certainly isn't evident in this piece:

<http://tinyurl.com/28dqz7>

Also, New Belgium's Greg Owsley pens an interesting article on marketing in Ad Age. From it:

"The abundance of both formal research and over-a-beer conversations with customers makes it blue-sky clear that the cautious, casual dating between core values and brand leaves both short of their optimal potential. Hence, companies are, now more than ever, charging the branding team with coming up with an effective marketing strategy by which the brand veneer can be firmly laminated to a wood core of actual practices."

Check it out here: <http://tinyurl.com/yrstmv>

CAPITAL BREWERY IN MIDDLETON, Wisconsin has always called itself "America's Number One Rated Brewery", and now it wishes to trademark the phrase. However, Anheuser-Busch is protesting that effort. A-B says the term should be untrademarked so every brewer could use it.

We lost a sell day in June, and we gain it back in July.

Until tomorrow, Harry

"There are no secrets to success. It is the result of preparation, hard work, learning from failure." — Colin Powell -----

Sell Day Calendar -----

Today's Sell Day: 1

Sell days this month: 22

Sell days this month last year: 21

This month ends on a: Tue

This month last year ended on a: Mon

YTD sell days Over/Under: +0

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