Norris Legal Consulting – American Law Specialists

In partnership with the Chamber, our objective is to provide Chamber members with information on the complex US legal landscape, which might assist in US-NZ business relationships, and to assist NZ businesses expanding into the lucrative US markets. In our monthly column, we write about legal issues which we deal with in our representation of NZ businesses doing business in and with the US, however, we are also open to suggestions on topics about which members are interested in learning. So, please feel free to email us with your comments, questions and any suggested topics at [info@nz-uslegal.co.nz](mailto:info@nz-uslegal.co.nz)

**RETAIL PRICE PROTECTION WHEN ENTERING THE US’**

**COMMERCIAL MARKETS**

It’s always a good idea to create and maintain a unified pricing strategy when taking your goods to market in the United States. However, protecting your retail price is more difficult than one might imagine. Unless you are acting as the actual retailer yourself, it is very difficult to dictate the retail price at which independent distributors or retailers (ie “stockists”) will sell your goods.

Anti-trust laws often prohibit a manufacturer and/or distributor from setting a Required Minimum Retail Price. It appears that in New Zealand, resale price maintenance is illegal under the Commerce Act. It also appears that in Australia, it is illegal under the Competition and Consumer Act of 2010. The policy theory behind these laws is that the end-user consumer’s interest in purchasing low prices exceeds the manufacturer’s interest in setting a minimum price, and that, therefore elimination of these so-called “vertical restraints” will promote competition and efficiency.

However, in the United States, the US Supreme Court (which has ultimate authority to interpret US law) has issued an opinion finding that Retail Price Protection as a vertical restraint is not in fact anti-competitive and does not violate the US’ Federal anti-trust laws. See *Leegin Creative Leather Products Inc v PSKS, Inc*, 551 US 877 (2007). Prior to *Leegin*, all price restraints were held to be illegal per se. This change in interpretation of US anti-trust law by the US Supreme Court came about by the influence of the “law and economics” theory of the Chicago School of Law on several of the more conservative members of the Court.

Essentially, the US Supreme Court found that a manufacturer’s and/or distributor’s contractual requirement for its retailers to sell goods above a required minimum retail price did not always affect competition negatively. In fact, it sometimes protected the consumer by allowing manufacturers of competing goods to continue manufacturing those goods, because retail price restraints prevent deep discounts by uninterested retailers which hampered the manufacturer’s ability to continue production. Accordingly, the US Supreme Court applied a “rule of reason” test for all such vertical price restraints (basically asking whether the retail price restrain is reasonable given a totality of the circumstances).

Intriguingly, the US Supreme Court’s decision only applied to US Federal anti-trust law, leaving untouched the US states’ rights to create their own anti-trust legislation. In reaction to the *Leegin* decision, several major states (including but not limited to California, Texas and New York), enacted legislation which reaffirmed the prohibition against retail price restraints. The enactment of this sort of anti-trust legislation in these states that are the major population centers in the US effectively limits the application of the *Leegin* doctrine. This makes for a confusing legal landscape.

What does this mean for Kiwi businesses selling their products in the US? It means that you are only allowed to have a Required Minimum Retail Price in specific states. It also means that you will need to develop some specific business and legal *work-arounds* to maintain limited control over the retail price of your goods in those US states which prohibit retail price control. This can be achieved through the use of contractual provisions which incorporate specific legal terms known as the *Colgate* clause as well as the Minimum Advertised Pricing clause. These strategic contractual provisions must be artfully and carefully drafted by experienced US legal counsel.

- Zachary D. Norris, JD, LL.M. and Ada Echetebu, JD, LL.M.

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