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FTC Approves Resale Price Maintenance Agreements under Rule of Reason
But State AG's Appear Undeterred

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On May 6, the Federal Trade Commission (FTC) issued an order *In the Matter of Nine West Group, Inc.* (*Nine West*) that brings federal enforcement of resale price maintenance (RPM) into line with the Supreme Court's recent decision in *Leegin Creative Leather Products, Inc. v. PSKS*, 127 S. Ct. 2705 (2007) (*Leegin*).

Leegin held that RPM is to be evaluated under the rule of reason, and invited lower courts and enforcement agencies to flesh out the framework applicable to these sorts of agreements: "Courts can . . . devise rules over time for offering proof, or even presumptions where justified."[1] This decision has elicited considerable objection from state Attorneys General who have continued to argue in their post-*Leegin* enforcement activity (including *Nine West* and *State of New York, et al. v. Herman Miller, Inc*., No. 08-CV-02977 (S.D.N.Y. March 21, 2008) (*Herman Miller*)) that RPM remains *per se* illegal under state law, and that it should be presumed to be illegal under federal law. In the *Nine West* decision, the FTC rejected the states' positions and adopted a relatively accommodating rule of reason framework for evaluating RPM schemes under federal law.

Following *Leegin*, Nine West, a popular manufacturer of women's shoes, filed a petition to reopen and modify a 2000 FTC consent order promulgated under the old *per se* rule that prohibited Nine West from entering into RPM agreements with retailers that sold its shoes. Nine West argued that the decision in *Leegin* required modification of the FTC order, which permitted Nine West to enter into RPM agreements with its retailers where doing so would not be contrary to the rule of reason.

Twenty-six states objected to this decision. They urged the FTC to deny Nine West's petition because Nine West's prior RPM scheme, which both the states' Attorneys General and the FTC had condemned in 2000, had increased prices to consumers by approximately $45 million. In light of this proven past "anticompetitive" harm, the states argued that the FTC should presume that RPM is anticompetitive and require evidence of procompetitive benefits that outweigh the anticompetitive effects before modifying the Nine West consent order.

Nine West responded that it was incapable of presenting evidence of actual procompetitive benefits

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1 *Leegin*, 127 S. Ct. at 2720.

because it had been prohibited since 2000 from engaging in RPM schemes. It further argued that since its competitors were not similarly prohibited from engaging in RPM practices, Nine West was at a competitive disadvantage, because those competitors would be able to point to actual procompetitive benefits under the rule of reason if their RPM schemes were ever challenged.

The FTC sided with Nine West. It noted that the *Leegin* majority counseled against drawing conclusions based solely on evidence of higher prices from an RPM agreement.[2] It therefore rejected an automatic presumption of illegality. The FTC instead decided that the starting pointing in evaluating the legality of a contested RPM scheme should be whether or not the contested RPM scheme—in its appropriate competitive context—appears inherently suspect, i.e., appears to pose an anticompetitive concern. Then even if the RPM scheme is "suspect," it may still withstand challenge if the defendant is able to show procompetitive benefits that plausibly offset the apparent or actual anticompetitive harm.

Two factors were particularly relevant to the FTC's conclusion that Nine West's RPM scheme was not inherently suspect under the rule of reason: (1) Nine West lacked market power in a relevant market (women's shoes) where its market share was less than 12.5%, and (2) Nine West was itself the driving force behind the RPM scheme it sought to implement, not its retailers.

The FTC reasoned that because Nine West lacked market power, any attempt on its part to charge supracompetitive prices over a sustained period of time would be rendered unsuccessful by interbrand competition. Furthermore, the fact that Nine West was the impetus behind its proposed RPM scheme—as opposed to a dominant retailer or a retailer cartel—indicated to the FTC that the RPM scheme really was intended to provide an incentive to retailers to offer more or better services to purchasers of Nine West's products. Accordingly, even if Nine West's RPM agreements raised prices, the FTC was inclined to accept Nine West's assertions that its RPM practices would increase consumer demand for its products and thereby enhance competition.

It appears that the FTC adopted a "truncated rule of reason" approach to RPM. Where there is (1) a "modest" market share in a "relevant product market" that suggests a *prima facie* lack of market power, (2) no evidence of "collective market power," and (3) no evidence of a "dominant inefficient retailer in the market," then RPM "is not likely to harm consumers."

Nine West confirms that post-*Leegin* RPM schemes will be scrutinized for legality by the FTC within a relatively accommodating rule of reason framework. The FTC's approach ought to be persuasive in the federal courts as it is taken straight from the *Leegin* decision.

The states' Attorneys General's participation in *Nine West* also confirms that for the time being, they are taking the enforcement position that RPM schemes remain *per se* unlawful under state law.[3] Judging from the views expressed in their comments to the FTC, the states' Attorneys General are likely to continue prosecuting RPM schemes in their respective jurisdictions under a *per se* standard. In fact, after submitting comments in *Nine West* in January 2008, the New York State Attorney General

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[2] *Leegin*, 127 S. Ct. at 2714–16.

[3] Forty-nine of the 50 states were party to the 2000 enforcement proceedings against Nine West for its RPM practices, which resulted in a settlement providing for a $34 million monetary payment and a five-year injunction. It remains to be seen how many of these states that, although not party to the New York Attorney General's comments in *Nine West*, still consider RPM schemes to be *per se* unlawful under State law.

together with the Illinois and Michigan Attorneys General filed *Herman Miller* in the United States District Court for the Southern District of New York against Herman Miller, Inc. for alleged resale price maintenance violations in the distribution of its ergonomic desk chairs. Although filed post-*Leegin,* in keeping with the New York Attorney General's *per se* stance, the complaint pled only *per se* violations of Section 1 of the Sherman Act and the New York, Illinois, and Michigan antitrust statutes. The matter was settled with a consent decree enjoining Herman Miller from engaging in RPM practices until 2010 and levying a fine of $750,000.

The state courts have yet to substantively weigh in on the debate, and it is uncertain whether they will agree with their own Attorneys General's interpretation of the law. State courts pay varied levels of deference to federal antitrust precedent, and the experience of *Illinois Brick*[4] suggests that if a state court is inclined not to follow *Leegin* it could find support in, for example, differences in the language, legislative intent, and history of the federal and state statues and state precedents. With the prospect of aggressive enforcement by states' Attorneys General and potential private litigation[5] under state laws, manufacturers would be well advised to proceed with caution and comply with the *Colgate* doctrine, which permits them to unilaterally terminate discounting retailers but prohibits them from requiring retailers to agree to adhere to minimum resale prices as a condition for receiving further shipments.

The *Nine West* order and related submissions to the FTC can be viewed online at the following link: http://www.ftc.gov/os/caselist/c3937.shtm. The Supreme Court's decision in *Leegin* can be viewed online at: http://www.supremecourtus.gov/opinions/06pdf/06-480.pdf.

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4 *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)

5 As of December 2007, 51 U.S. jurisdictions allow private antitrust actions. Forty jurisdictions provide for the automatic recovery of reasonable attorney fees. Forty-seven jurisdictions provide for enhanced damages, and the majority of this 47 have automatic treble damages provisions akin to the Clayton Act.

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