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Antitrust Law Alert

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Update: Resale Price Maintenance After *Leegin*

Recap

In 2007, the U.S. Supreme Court ruled that agreements requiring retailers to adhere to manufacturer's minimum resale prices were no longer *per se* illegal under the antitrust laws and, instead, should be evaluated under the rule of reason. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). In so doing, the Court overturned its almost century-old precedent in *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, which held such agreements unlawful on their face. 220 U.S. 272 (1911). The Court emphasized that the lower courts would, over time, have to develop rule-of-reason guidelines to differentiate between lawful and unlawful resale price maintenance (RPM) programs.

Subsequent developments

Since the Court's decision in *Leegin*, both federal courts and federal agencies have issued decisions citing the case for its holding on RPMs. On May 6, 2008, the Federal Trade Commission (FTC), relying on the Supreme Court's decision in *Leegin*, modified, in part, a 2000 FTC order prohibiting the women's footwear company, Nine West, from engaging in RPM agreements. Applying the rule of reason, the FTC concluded that, because Nine West lacked market power, had the stated purpose of incentivizing its retailers to improve services, and presented no danger of the use of collective market power, its proposed use of RPM did not pose any harm to consumers or competitive concerns. The FTC therefore allowed Nine West to establish a proposed RPM program but required the company to file periodic reports so that the Commission could evaluate the effects of the RPM agreements. The FTC did not, however, provide any clear guidelines on how businesses could structure RPM programs without running into significant antitrust risks in the process.

In a federal court case, the Third Circuit Court of Appeals vacated and remanded the district court's grant of summary judgment on Toledo Mack Truck Sales & Service, Inc.'s (Toledo) claim that Mack Trucks, Inc. (Mack Trucks) allegedly participated in an unlawful conspiracy to fix minimum resale prices. *Toledo Mack Truck Sales & Service, Inc., v. Mack Trucks, Inc.*, 530 F.3d 204 (3rd Cir. 2008). The court found that there was sufficient evidence that Mack Trucks had entered into a vertical agreement with its dealers to support the dealers' horizontal agreement not to compete against one another on prices. In light of *Leegin*, the court concluded that the rule of reason, not *per se* analysis, applied and, under that rubric, the evidence deserved to be presented to a jury. *Toledo Mack Truck Sales & Service, Inc.,* 530 F.3d at 225, note 15.

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In *BabyAge.com Inc., v. Toys R Us, Inc. d/b/a Babies R Us*, BabyAge, a smaller rival of Babies R Us, alleged that Babies R Us conspired with baby products manufacturers to require smaller retailers to sell their products at minimum-pricing established by the manufacturers. 2008 WL 2746302 (E.D. Pa. Jul. 15, 2008). It was alleged that the manufacturers began enforcing minimum-pricing agreements at the behest of Babies R Us because the smaller retailers were undercutting the Babies R Us prices. The district court denied the motion to dismiss filed by Babies R Us, holding that "harm to intrabrand competition is cognizable when brought about by the demands of a 'dominant' retailer, one that has market power in the retail sales market and one upon whom each manufacturer depends for a large portion of its sales." *Id.* at *3.

Several other cases after *Leegin* have referenced its holding without any evaluation of the RPM programs at issue under the rule of reason.

Despite the absence of clear guidelines from court decisions and the FTC, a recent *Wall Street Journal* article suggested that RPM programs were gaining traction in certain business segments. Joseph Pereira, *Price-Fixing Makes Comeback After Supreme Court Ruling*, Wall St. J., Aug. 18, 2008, at A1. However, because of the absence of clear guidelines, establishing RPM programs continues to have significant antitrust risks due to the difficulty of applying the complex rule-of-reason analysis, which requires an assessment of the overall impact of a proposed program in a particular market setting.

Combined with the difficulty of applying rule-of-reason analysis, there is the uncertain treatment of RPM programs by the states, many of which—37—opposed relaxing the *per se* rule as *amici curiae* before the Supreme Court in *Leegin*. A number of states also opposed the FTC's modification of the *Nine West* consent decree. Indeed, some states, such as New York, New Jersey, and California, have specific statutes or case law that outlaw RPM programs making it difficult to implement a nationwide program. *See, e.g.*, N.Y. Gen. Bus. Law § 369-a (2002) (forbidding "[a]ny contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer."). In addition, proposed legislation is pending in Congress to reinstate the *per se* rule despite the *Leegin* decision, thus effectively overruling *Leegin* by statute. Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. 1st Sess. (Oct. 30, 2007).

These practical pitfalls suggest caution in pursuing RPM programs in the short run. Common sense supports a wait-and-see approach with respect to future developments in the courts and Congress. In the interim, a well-constructed "suggested" resale pricing or "minimum advertised pricing" program might provide the best practical alternatives and can readily be developed with the assistance of experienced counsel.

For additional information regarding the *Leegin* decision and its progeny, please visit http://www.porterwright.com/publications/documents/645_AntitrustMinPriceMaintJuly07.pdf and http://www.porterwright.com/publications/documents/829_AntitrustFTCLeeginMay08pmd.pdf.

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