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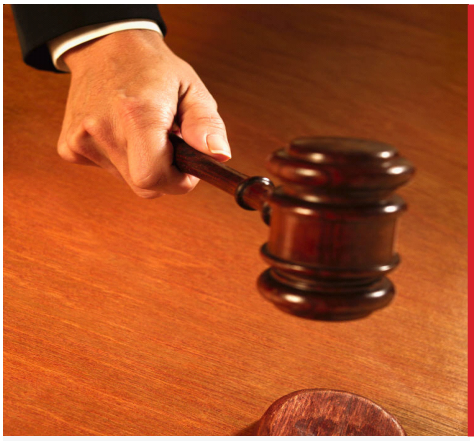

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After *Leegin*: Will Resale Price Maintenance Revert Back to the *Per Se* Rule?

Now more than a year old, the U.S. Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), faces continued and renewed resistance from a coalition of retailers and consumer advocates. They argue that the decision, which allows manufacturers to set minimum resale prices, has led to higher prices for consumers. As a result, the coalition has urged Congress and regulators to take action to negate the decision.

In 2007, the Supreme Court ruled that agreements requiring retailers to adhere to a manufacturer's minimum resale prices are no longer *per se* illegal and, instead, should be evaluated under the rule of reason. *Id.* In so doing, the Court overturned its almost century-old precedent in *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 272 (1911), which held that minimum resale price agreements were unlawful on their face.

The Consumer Federation of America and retailers — including Ebay, Inc., BabyAge.com, Inc., and Costco Wholesale Corp. — recently formed a coalition to oppose minimum-price policies by manufacturers under the Supreme Court's ruling in *Leegin*. On December 4, 2008, the coalition convened in Washington, D.C. for a meeting sponsored by the American Antitrust Institute to announce its agenda. The coalition plans to lobby Congress in support of a corrective bill previously introduced by Senator Herb Kohl (D-WI) and commission a study that would show that allowing manufacturers to set minimum resale prices has led to higher prices for consumers.

The legislation introduced by Senator Kohl, which first floundered in committee but will be re-introduced in 2009, would overturn the Supreme Court decision in *Leegin* and make minimum resale price setting a *per se* violation under the Sherman Act. Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (2008). The bill is designed "to restore the rule that agreements between manufacturers and retailers, distributors, or wholesalers to set the minimum price below which the manufacturer's product or service cannot be sold violates the Sherman Act." *Id*. The bill states that abandonment of the *per se* rule against resale price maintenance

would "likely lead to higher prices paid by consumers and substantially harm the ability of discount retail stores to compete." *Id*. at §2(a).

The Federal Trade Commission's (FTC) most significant action post-*Leegin* has been to allow the women's footwear company Nine West Group Inc. to use resale price maintenance (RPM) agreements via modification of a previous consent order prohibiting them from imposing such agreements. *In the Matter of Nine West Group, Inc.*, Docket No. C-3937 (F.T.C. May 6, 2008). However, the *Nine West* ruling offered little guidance on interpreting the *Leegin* decision, failing to comment on the company's future use of RPM agreements. Instead, the decision concluded only that Nine West's current use of RPM agreements did not pose any potential competitive concerns because the company lacked the market power to harm consumers through the use of such agreements. At the American Antitrust Institute conference, however, FTC Commissioner Pamela Jones Harbour criticized the Supreme Court's *Leegin* decision and urged legislation to overturn it. She also announced that the FTC plans in January 2009 to host a series of workshops that will help the public gain a better understanding of RPM agreements.

At the time of the *Leegin* decision, 37 state attorneys general joined in an amicus brief arguing that the *per se* rule should be maintained. Since then, states have continued to be wary of RPM agreements and have not, for the most part, lined up in support of *Leegin*'s holding. Many state antitrust and unfair competition laws either by statute or case precedent require that state law follow or comport with federal antitrust law precedent. However, there are a number of states that will, in all likelihood, continue to apply a *per se* unlawful approach to price maintenance notwithstanding contrary federal precedent.

The *Leegin* decision has not thus far led to a series of guidelines that would provide a clear path to devising RPM programs that are without risk of being challenged as anticompetitive. Until appropriate guidelines emanate from court interpretation or antitrust enforcement agency initiatives, RPM programs likely will have limited utilization. Substantial opposition, including legislative initiatives, against RPM agreements also make it unlikely that these programs will be used more widely.

Until this issue is clarified, suggested resale price programs may provide a useful alternative to minimum resale price maintenance programs. Guidelines for suggested resale price programs are readily available, and the *Leegin* decision provides much more flexibility in the implementation of such programs.