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BUSINESS CONNECTIONS

FTC Grants Nine West's Petition to Permit Resale Price Maintenance

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Breaking Developments In Business Law

In the aftermath of the U.S. Supreme Court's landmark ruling last June in *Leegin Creative Leather Products, Inc. v. Kay's Kloset*, 127 S. Ct. 2705 (2007), the Federal Trade Commission issued an Order last week granting shoe manufacturer Nine West's Petition to modify a March 2000 Consent Order that prohibited Nine West from engaging in resale price maintenance ("RPM")—fixing minimum resale prices with its retail dealers—for 20 years. In *Leegin*, the Court overturned its nearly century-old precedent in *Dr. Miles Medical Co. v. John D. Park & Sons Co*., 220 U.S. 373 (1911), barring RPM as per se illegal. In light of *Leegin*, the FTC modified the Consent Order to permit Nine West (now owned by Jones Apparel) to enter into RPM agreements with its dealers.

The unanimous (4-0) Order is significant because it is the FTC's first indication of its views on the impact of *Leegin* and of its new enforcement position on RPM. In 2001, Nine West agreed to the Consent Order to settle a FTC complaint alleging that Nine West had violated Section 5 of the FTC Act by agreeing with its dealers and engaging in other conduct to maintain the prices at which they sold Nine West shoes. At that time, RPM had been *per se* illegal for 90 years under *Dr. Miles*.

The Supreme Court reversed course in *Leegin* and abandoned the *per se* rule under section 1 of the Sherman Act, holding that RPM agreements should be judged instead under the much less onerous Rule of Reason. In its decision, the Court noted that "economics literature is replete with pro-competitive justifications for a manufacturer's use of resale price maintenance," including stimulating inter-brand competition among manufacturers and undermining retailer free-riding.

Nine West argued that the Consent Decree was no longer necessary or appropriate after *Leegin*, and placed Nine West at a disadvantage because its competitors were permitted to engage in RPM. According to Nine West, it needed RPM to maintain its products' resale prices and favorable brand equity, and to increase the services offered by its dealers and demand for its products. A number of State Attorneys General opposed the Petition. The FTC noted that the Supreme Court had not declared RPM to be *per se* legal in *Leegin*, and that the Court had identified a number of factors lower courts and government enforcers should consider in determining whether RPM might be anti-competitive under the Rule of Reason in some circumstances.

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One factor is whether retailers were the impetus for the manufacturer's adoption of RPM. If so, it could indicate the existence of a retailer cartel or a dominant retailer. Other factors include whether (i) such programs are "ubiquitous" in the industry and (ii) the manufacturer or a retailer is dominant in its market, because "if market power does not exist, the forces of interbrand competition will discipline any supra-competitive pricing." The FTC also observed that even if its dealers' resale prices increased, Nine West would be able to justify RPM with evidence that the practice also increased its sales output.

The FTC found that Nine West, not its dealers, was advocating an RPM program, and that it had "only a modest market share." Nor was there any evidence of a dominant, inefficient retailer in the market. On this basis, the FTC concluded that consumers would not likely be harmed if Nine West instituted RPM with its retail dealers, and granted the Petition. However, the FTC required Nine West to file periodic reports so that it could monitor the effects of Nine West's RPM program on its sales and resale prices.

Key Points

- Although RPM is not *per se* legal after the *Leegin* decision, manufacturers and suppliers are now freer to discuss, impose and enforce RPM programs with their distributors and dealers, but should keep abreast of future developments.

- RPM remains unlawful when used to facilitate a horizontal agreement or cartel among manufacturers or retailers.

- RPM will be viewed suspiciously by government enforcers and may be illegal if (i) it is imposed by a manufacturer or supplier at the request of its distributors or dealers, (ii) it is prevalent in the industry, or (iii) the manufacturer or supplier, or any distributor or dealer in the market, has a dominant market share.

- The FTC views RPM with greater suspicion than the Supreme Court, questioning, contrary to the Court's analysis in *Leegin*, whether RPM agreements are "less intrinsically dangerous" than horizontal price-fixing by competitors.

- RPM is still *per se* illegal under some states' antitrust laws, and it is uncertain whether the courts of other states or state legislatures will follow *Leegin*.

- RPM is still *per se* illegal in some foreign jurisdictions, including Canada.

- A *Colgate* policy in which the manufacturer or supplier announces in advance that it will not do business with distributors or dealers who discount from suggested resale prices, was lawful prior to *Leegin* and is still the safest course, and *Leegin* likely allows the manufacturer or supplier greater freedom to persuade distributors or dealers to adhere to the suggested resale prices.

- The law governing RPM is still in a state of flux and uncertainty, and the views of courts and government enforcers about RPM will continue to evolve.

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