

**MARYLAND PROHIBITS MINIMUM RESALE PRICE MAINTENANCE --  
OTHER JURISDICTIONS MAY FOLLOW**

Recent legislative and state enforcement initiatives have called into question the legal status of minimum resale price maintenance, or “RPM,” agreements in which suppliers and distributors or retailers agree to set minimum resale prices. Under new laws, such agreements may trigger civil and criminal penalties, including treble damages.

Two years ago, the United States Supreme Court held in *Leegin Creative Leather Products, Inc. v. PSKS, Inc. dba Kay’s Closet*, 551 U.S. 877 (2007), that minimum RPM agreements would no longer be deemed to be unlawful *per se* under federal antitrust law but rather would be evaluated under the “rule of reason.” This means that a plaintiff has the burden of proving that the practice harmed competition. The finder of fact weighs the pro- and anticompetitive effects of such an agreement to determine whether, on balance, it unreasonably restrains trade. *Leegin* overturned the longstanding rule established in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), that minimum RPM was *per se* unlawful under Section 1 of the Sherman Act.

The use of minimum RPM agreements has reportedly surged since the *Leegin* decision. However, some policymakers who criticized the decision at the time are now seeking to restore, through new federal and state legislation and litigation under state antitrust laws, the rule that such agreements are *per se* unlawful.

**Some States Are Actively Opposing Minimum RPM**

Most recently, the State of Maryland enacted a statute prohibiting manufacturers and retailers from entering into minimum RPM agreements. The statute, effective October 1, 2009, declares that “a contract, combination or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce.” Maryland law already provides for treble damages and states that willfully violating the sections prohibiting unreasonable restraints on trade or commerce constitutes a misdemeanor offense punishable by a \$500,000 fine and six months’ incarceration.

Some state enforcement officials also take a hard line against minimum RPM. The Attorney General of the State of New York, for example, takes the position that New York’s law prohibits minimum RPM. Twenty-seven states recently argued to the Federal Trade Commission (the “FTC”) that minimum RPM should be at least presumptively unlawful under federal law. The question arose when shoe manufacturer Nine West Group Inc. petitioned the FTC, soon after the Supreme Court decided *Leegin*, to re-open and modify an order prohibiting the company from engaging in minimum RPM. In unsuccessfully opposing the petition, the participating states reaffirmed their skepticism of the procompetitive benefits of minimum RPM.

### Changes on the Federal Level

*Leegin* faces pressure from the federal enforcement agencies as well. Christine Varney, whom the Senate recently confirmed to lead the Antitrust Division of the Department of Justice, joined several opinions as an FTC Commissioner with which the *Leegin* decision is now at odds. Jon Leibowitz, the new Chairman of the FTC, also argues that the *Leegin* decision permits anticompetitive behavior, and FTC Commissioner Pamela Harbour agrees. President Obama may well fill the open Democratic seat on the Commission with someone who holds similar views regarding *Leegin*.

Finally, efforts in Congress to overturn *Leegin* continue. Prior to the 2008 election, Senator Herb Kohl, Chairman of the Antitrust Subcommittee of the Senate Judiciary Committee, introduced a bill to overturn the *Leegin* decision, co-sponsored by then-Senators Joe Biden and Hillary Clinton. Senator Kohl's reintroduced bill is now pending on the Subcommittee's agenda.

### Implications

While the *Leegin* decision continues to define the legal status of minimum RPM under federal antitrust laws, significant consequences may result from running afoul of state laws such as the one recently enacted in Maryland prohibiting minimum RPM. Identifying the state laws that are implicated by a firm's sales practices is thus becoming increasingly important. Still more complications may arise if Congress enacts Senator Kohl's bill, or if Assistant Attorney General Varney and Chairman Leibowitz pursue litigation to further their policy objectives.

Firms should also keep in mind that *Leegin* did not declare minimum RPM agreements *per se* lawful. Rather, it provides only an opportunity to defend such arrangements as reasonable. Companies should assess policies designed to set or influence minimum resale prices in light of the legislative and enforcement initiatives reviewed above.

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