STATES SIGNAL ENFORCEMENT AGENDA AGAINST MINIMUM RESALE PRICE MAINTENANCE

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc. dba Kay's Closet*, 551 U.S. ___, 127 S. Ct. 2705 (2007) ("*Leegin*"), the United States Supreme Court overturned the longstanding rule that agreements between a supplier and a distributor or retailer to set minimum resale prices (a practice known as "resale price maintenance" or "RPM") were *per se* unlawful. Instead, the Court held that such agreements are to be evaluated using the rule of reason, under which the procompetitive effects of a practice are weighed against its anticompetitive effects to determine lawfulness under the federal antitrust laws.

As we and others noted at the time,[1] the change in the treatment of RPM under federal law presents the prospect that conflicting legal standards from various jurisdictions would apply to a firm's pricing policy. Potentially conflicting jurisdictions include the numerous states that have antitrust laws that apply to agreements in restraint of trade and, for companies that conduct business internationally, the increasing number of foreign jurisdictions that are implementing and enforcing competition laws.

This memorandum reviews a recent submission by numerous states in a proceeding before the Federal Trade Commission (the "FTC") involving shoe manufacturer Nine West Group Inc. ("Nine West"). In those comments, the New York attorney general, joined by the attorneys general of Alaska, Arkansas, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia ("the States"), argued strongly in favor of continued prohibitions on RPM.

In a forthcoming memorandum, we will address the treatment of RPM in certain foreign jurisdictions that differs from the rule of reason treatment outlined in *Leegin*. We also will suggest means by which a company can manage its pricing policy as it sells its products in multiple jurisdictions throughout the world.

Background

In 2000, the FTC challenged Nine West's RPM practices, alleging that Nine West had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging in "unlawful contracts, combinations, or agreements, in unreasonable restraint of interstate trade and commerce."[2] The proceedings resulted in a consent decree prohibiting Nine West from "[f]ixing,

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[1] Willkie Farr & Gallagher LLP, *Supreme Court Overturns Longstanding Precedent and Rules that Minimum Resale Price Restraints Are Subject to the Rule of Reason*, http://www.willkie.com/files/tbl_s29Publications/FileUpload5686/2464/Supreme_Court_Overturns_Longstanding_Precedent.pdf (accessed Feb. 6, 2008).

[2] Compl. at 1, *In the Matter of Nine West Group, Inc.* (Apr. 11, 2000); Decision and Order at 1, *In the Matter of Nine West Group, Inc.* (Apr. 11, 2000).

controlling, or maintaining the retail price at which any dealer may advertise, promote, offer or sell any Nine West Products" as well as prohibiting "coercing or pressuring any dealer to maintain, adopt, or adhere to any resale price."[3] Essentially, Nine West was ordered to cease and desist from taking any further actions that would maintain resale prices, other than unilaterally terminating a discounting retailer without prior notice. The FTC's 2000 decision was consistent with the then-governing Supreme Court precedent, *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911) ("*Dr. Miles*"), which declared minimum resale price maintenance to be *per se* illegal.

Nine West's Petition

Four months after *Leegin* overruled *Dr. Miles*, Nine West filed a Petition to Reopen and Modify the Commission's April 2000 order.[4] The petition asserted that the change in the law governing RPM warranted reconsideration and modification of the FTC's 2000 decision. Nine West argued that, as had been explained in *Leegin*, minimum resale price maintenance could have procompetitive effects (such as enhancing interbrand competition) and could therefore be in the public interest. Nine West also relied on considerations of fairness, emphasizing that its competitors could now engage in minimum resale price maintenance while it remained prohibited from doing so.

The States' Comments

In response to the FTC's request for comments on Nine West's petition, the States filed a lengthy and strongly worded brief urging the denial of Nine West's petition. The States' comments emphasize that they vigorously prosecute vertical price-fixing and will continue to do so notwithstanding *Leegin*. In the view of the States' attorneys general, RPM should be presumed unlawful because it tends to result in higher prices for consumers. The States emphasized that an economist retained by them in their own enforcement action against Nine West under federal and state antitrust law[5] calculated that Nine West's RPM practices had resulted in approximately $46 million in overcharges to consumers (*i.e.*, the amount exceeding prices that would have obtained in the absence of RPM).

The States further contend that *Leegin* permits manufacturers under federal law to present evidence of benefits of RPM to consumers and does not immunize RPM from legal scrutiny. The States argue that Nine West's petition identifies only *possible* procompetitive effects of RPM to consumers without offering evidence of the likelihood or magnitude of such effects. Relying on the analytical approach set out in a pre-*Leegin* case in the District of Columbia Circuit,[6] the States argue that Nine West should be obliged to prove (1) that its vertical price-fixing caused retailers to provide actual enhanced value or services to consumers; (2) that such enhanced value or services increased demand for its shoes; and (3) that the increased demand was greater than the decreased

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[3] Decision and Order at 2, *In the Matter of Nine West Group, Inc.* (Apr. 11, 2000).

[4] Petition to Reopen and Modify Order at 2, *In the Matter of Nine West Group, Inc.* (Oct. 25, 2007).

[5] This action ultimately involved forty-nine of the fifty states in addition to private plaintiffs and resulted in a settlement providing for a five-year injunction and a $34 million monetary payment by Nine West. *See Florida ex rel., et al. v. Nine West Group, Inc., et al.*, 7:00-cv-01707-CLB (S.D.N.Y. Dec. 14, 2000); *see also In re Nine West Shoes Antitrust Litig.*, 80 F. Supp. 2d 181 (S.D.N.Y. 2000).

[6] *In re PolyGram Holding, Inc.*, 416 F.3d 29 (D.C. Cir. 2005).

demand caused by the higher price that consumers paid. The States contend that Nine West would be unable to meet those requirements.

Implications

The States' comments in *Nine West* confirm that *Leegin*'s elimination of the *per se* prohibition on RPM under federal law does not amount to a permission slip for companies to impose RPM in the sale of their products. The States' attorneys general reaffirmed their skepticism concerning the benefits of RPM and their intent to enforce their own state antitrust laws against RPM arrangements. The States' attorneys general also articulated a demanding test for assessing RPM even under federal law, which they would likely assert in their respective jurisdictions even if the state courts of those jurisdictions choose to follow *Leegin*.

In a forthcoming memorandum, we will survey the treatment of RPM in certain foreign jurisdictions and suggest a means for companies to manage their pricing policy for the sale of products in numerous jurisdictions.

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For further information regarding this memorandum or antitrust or competition issues generally, please contact our practitioners in our U.S. or European offices: Bernard A. Nigro, Jr. (202-303-1125, bnigro@willkie.com) or Theodore C. Whitehouse (202-303-1118, twhitehouse@willkie.com) in our Washington, D.C. office, William H. Rooney (212-728-8259, wrooney@willkie.com) or David K. Park (212-728-8760, dpark@willkie.com) in our New York office, Jacques-Philippe Gunther (33-1-53-43-4538, jgunther@willkie.com) or David Tayar (33-1-53-43-4690, dtayar@willkie.com) in our Paris office, or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

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