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Two Years After *Leegin*, Questions Remain on Lawfulness of Resale Price Maintenance

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In June 2007, the U.S. Supreme Court ruled that resale price maintenance is no longer illegal per se*, overruling precedent of nearly 100 years, and holding that RPM should be evaluated under the "rule of reason." Two years later, the lawfulness of RPM under the rule of reason is not at all clear. Manufacturers and retailers considering RPM should continue to proceed with caution.*

Two years after the Supreme Court ruled in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[2] that minimum resale price maintenance ("RPM") is subject to the "rule of reason" rather than *per se* condemnation, RPM's lawfulness in many factual situations remains uncertain. RPM—typically an agreement between a manufacturer and a retailer fixing a minimum retail price—is not *per se* **legal,** and some rule of reason challenges to RPM are moving forward in the courts, while others have been dismissed.

One court and the Federal Trade Commission ("FTC") have suggested that RPM might be "presumptively" unlawful, at least in certain factual situations identified by the Supreme Court as making anticompetitive effects likely. When conduct is presumed to be unlawful because it occurs in a high-risk situation—for example, RPM induced by multiple retailers or by a dominant retailer—the burden might then be placed on *defendants* to demonstrate their justifications for engaging in the challenged practice, and the plaintiff (at least preliminarily) could be excused from proving that the use of RPM in this situation had actual anticompetitive effects.

In *Leegin*, the Supreme Court pointed to several factors that could suggest that RPM is unreasonable in a specific case, including market power at the manufacture or retail level, or conspiracy or widespread adoption of RPM by competing entities. Since 2007, only a handful of cases have dealt with RPM in the rule of reason context, and some of these few cases have been dismissed on procedural grounds without valuable comment or analysis of RPM in light of *Leegin*. The Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice have only hinted at their interpretations and, at least at the FTC,

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[2] 551 U.S. 877, 127 S. Ct. 2705 (2007)

the individual opinions of Commissioners varies widely. Several state governments have suggested they would not recognize *Leegin* as controlling under their state's antitrust laws, and there has been a recent spate of federal legislative action seeking to overturn *Leegin* and return to the *per se* rule. The uncertainty and variety of opinions surrounding RPM's treatment may continue to temper *Leegin*'s short-term practical effects.

Federal Case Law

The legality of RPM remains uncertain, despite *Leegin*, because no clear articulable standards yet exist to assess RPM under the rule of reason. *Leegin* invalidated the *per se* rule and invoked the rule of reason, but did not furnish definitive criteria to judge the reasonableness of RPM. Instead, *Leegin* simply offers several factors that may warrant consideration, and invites lower courts to "devise rules ... or even develop presumptions" to evaluate the reasonableness of RPM under the rule of reason. Since *Leegin*, few lower courts have discussed, and virtually none have analyzed, RPM arrangements under the rule of reason. In fact, courts' lack of experience with RPM was part of the Supreme Court's justification for overruling the *per se* rule.

Several lower courts have simply dismissed RPM rule of reason cases under *Bell Atlantic v. Twombly*, which requires plaintiffs to plead specific facts sufficient to create a plausible basis for recovery. Before *Twombly*, lower courts generally held that a complaint could only be dismissed if the "plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."[3] *Leegin*'s reasonableness requirement makes the already heightened *Twombly* standard even more rigorous in RPM cases. Plaintiffs must allege facts that plausibly suggest not only that an RPM agreement exists, but also that it is unreasonable. This element can saddle a plaintiff with the additional burdens of pleading facts establishing a relevant market and anticompetitive effects of the RPM arrangement to avoid dismissal. Some district courts have dismissed plaintiffs' claims, finding that their conclusory allegations lacked factual support and rendered their market definition facially implausible.[4] Plaintiffs may continue to encounter challenges in meeting *Twombly*'s pleading requirements until there is some consensus as to what constitutes a plausibly unreasonable RPM agreement under *Leegin*.

Some have claimed that the interplay between *Leegin* and *Twombly* makes RPM legal *per se*.[5] Pre-*Leegin*, plaintiffs relied on liberal pleading standards to bring RPM claims. Since anticompetitive activity is often concealed, plaintiffs typically presented general allegations and depended on discovery to provide substantive proof of their allegations. *Leegin* and *Twombly* no longer permit this strategy. If plaintiffs fail to allege a plausible basis for recovery with specificity, their claims will be dismissed pre-discovery under *Twombly*. This higher pleading standard, combined with *Leegin*'s reasonableness standard, discourages litigation by making it more difficult and expensive to bring and maintain successful RPM actions.

In response, plaintiffs have modified their strategies and arguments. Plaintiffs are now attacking manufacturers' RPM agreements indirectly through associated retailers in an attempt to bootstrap RPM claims

[3] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007); *Conley v. Gibson*, 355 U.S. 41 (1957). The Supreme Court has recently made clear that *Twombly* applies to all elements of all civil cases, not just the "agreement" element of cases under Sherman Act § 1. *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2009).

[4] *Spahr v. Leegin Creative Leather Products, Inc.*, 2008 WL 3914461 (E.D. Tenn. 2008); *PSKS, Inc. v. Leegin Creative Leather Prods.*, 03-CV-00107 (E.D. Tex. April 6, 2009) (dismissing claim as insufficiently defining a relevant market); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 2007 WL 4373980 (N.D. Ga. Dec. 11, 2007) (rejecting the Plaintiff's implausible market definition and granting dismissal under *Leegin* and *Twombly*).

[5] *See* Statement of Richard M. Brunell, *Bye Bye Bargain? Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices,* Subcommittee on Courts and Competition Policy, House Judiciary Committee (April 28, 2009) at 2.

to *per se* cases.[6] This strategy has two steps. First, plaintiffs allege that conspiring retailers are engaged in horizontal price-fixing. Horizontal price-fixing is unaffected by *Leegin* and remains *per se* illegal, and alleging horizontal price-fixing satisfies plaintiffs' burden of demonstrating that the restraint is unreasonable.[7] Next, plaintiffs allege that the manufacturers' RPM agreements facilitate and support the *per se* illegal horizontal price-fixing. Although RPM likely remains subject to the rule of reason even where it supports illegal horizontal restraints, *Leegin* itself stated that facilitating *per se* illegal horizontal restraints could plausibly make RPM unreasonable under the rule of reason.

Plaintiff in *Toledo Mack Sales & Services, Inc. v. Mack Trucks, Inc.* defeated summary judgment using this argument. Using the hypothetical fact pattern outlined *Leegin*, the Third Circuit held that an RPM agreement adopted at the behest of dealers to support dealer price-fixing could be unreasonable where the manufacturer possesses significant market power. The Third Circuit noted that the retailers' impetus for RPM was significant because it made the RPM agreement less justifiable from the manufacturer's perspective.[8] The court of appeals remanded the case to the district court, where a jury ultimately ruled in favor of defendant Mack Truck.

Plaintiffs in *McDonough v. Toys "R" Us* successfully employed the same argument against a single, allegedly dominant retailer. Applying the Third Circuit's burden-shifting rule of reason analysis to RPM, the district court was satisfied that the plaintiffs met their initial burden of proving the arrangement's anticompetitive effects.[9] The court reasoned that while RPM agreements are not inherently anticompetitive, and evidence of their mere existence is insufficient to shift the burden, RPM initiated or coerced by a dominant retailer is categorically anticompetitive. Thus, evidence that RPM was initiated or coerced by a dominant retailer could be sufficient to shift the burden to the defendants. Presumably a plaintiff would still need to prove that the retailer was "dominant," *i.e.*, had significant market power in a properly defined market.[10]

However, the availability and success of this strategy is limited, mainly because plaintiffs must plausibly establish that the RPM agreement was initiated by the retailers. Several plaintiffs have unsuccessfully argued that manufacturers who also distribute or retail their products subject to self-imposed RPM arrangements are engaged in illegal price-fixing schemes. The *Spahr* court found that a manufacturer's participation in the retail market alone does not make an RPM agreement a *per se* illegal horizontal restraint, and is insufficient to demonstrate anticompetitive effects. And establishing a relevant market can be difficult since, among other reasons, "absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market," as the *PSKS* court ruled.

Plaintiffs may encounter similar hurdles even when RPM agreements exist between manufacturers and unrelated distributors or retailers. The Fourth Circuit rejected the plaintiff's contention that *Leegin* implicitly overruled the Supreme Court's holdings in *General Electric* and *Simpson v. Union Oil*[11] that genuine

[6] *See e.g.*, *PSKS*, 03-CV-00107, at 3.

[7] *See Spahr* (noting that "plaintiffs need not establish or plead a relevant market or anti-competitive effects").

[8] 530 F.3d 204, 226 (3rd Cir. 2008); *see also BabyAge.com, Inc v Toys "R" Us Inc.*, 558 F. Supp. 2d 575 (E.D. Pa. 2008) (analyzing a retailer's market power and determining that retailer-driven RPM acts as a horizontal restraint).

[9] *McDonough v. Toys "R" Us, Inc.*, 2009 WL 2055168, at *16-17 (E.D. Pa. July 15, 2009) (granting class certification), citing *U.S. v. Brown University*, 5 F.3d 658 (3d Cir. 1993). Under this approach, if plaintiffs meet their initial burden of showing that the conduct has adverse or anticompetitive effects, the burden shifts to defendants to prove the pro-competitive effects.

[10] The *Leegin* Court had noted that retailer-initiated RPM that "supports a dominant, inefficient retailer" might be a matter of concern if the dominant retailer has market power. 127 S. Ct. at 2719-20.

[11] *Valuepest.com v. Bayer Corp.*, 561 F.3d 282, 287-88 (4th Cir. 2009), discussing *United States v. General Elec. Co.*, 272 U.S. 476 (1926) and *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

agency agreements are not subject to attack as RPM. The Fourth Circuit held that a true agency agreement did not constitute an agreement under Section 1 of the Sherman Act, the first element of a Sherman Act claim, and therefore could not be challenged as unreasonable.

Lower courts have also struggled with technical questions concerning how the rule of reason should be applied. For example, the *Spahr* court interpreted *Leegin* to require plaintiffs to allege a plausible market definition as part of plaintiffs' *prima facie* case. By contrast, the *McDonough* court has suggested that RPM claims may be subject to a "quick look" analysis if the plaintiffs' allegations create an "obvious inference of anticompetitive effect." The "quick look" allows courts to strike down facially anticompetitive agreements that are not otherwise subject to a *per se* rule with little analysis.[12]

Federal Trade Commission

The FTC has indicated more explicitly how it interprets and might enforce *Leegin*. Although individual Commissioners disagreed on *Leegin* itself, the FTC has accepted the Supreme Court's invitation to develop rules and presumptions with respect to RPM under the rule of reason.

Shortly after the Court handed down *Leegin*, the FTC received a petition from Nine West Group to amend a 2000 order that prevented the company from entering into RPM agreements. In its opinion granting Nine West's petition, the Commission unanimously agreed that *Leegin*, while rejecting *per se* condemnation of RPM, provides "an admonition, not only to the lower courts, but also to enforcement agencies, to take careful account of possible anticompetitive harms in the treatment of RPM matters under a rule of reason framework." The FTC suggested that a truncated rule of reason analysis, rather than an elaborate, comprehensive inquiry, might be appropriate, noting that the Supreme Court "has invited efforts by the lower courts, and this Commission, after *Leegin* to devise rules 'for offering proof, *or even presumptions where justified*, to assess the reasonableness of RPM.'"[13]

The use of a presumption of anticompetitive effect, rather than *per se* condemnation, would in the FTC's view be in keeping with the truncated or "quick look" analysis relied on in FTC cases such as *Indiana Federation of Dentists* and *Polygram*, under which (as the FTC argued in *Polygram*) specific activities may be deemed "inherently suspect" based on a "close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare."[14] The burden of proving the reasonability of "inherently suspect" activity then shifts from plaintiff to defendant.

While the Commission in *Nine West* did not determine whether RPM is "inherently suspect" activity in any or all circumstances, it hinted that use of RPM by "a manufacturer with market power" might indeed give rise to an "inherently suspect" presumption—"when RPM might be subjected to closer analytic scrutiny, such as that anticipated in *Polygram Holdings* or other truncated rule of reason analysis." Since Nine West did not appear to have market power and there was no evidence of retailer insistence on RPM, the Commission found that the use of RPM by Nine West "is not likely to harm consumers at this time." Nonetheless the FTC required Nine West to file reports describing its future use of RPM "and its effects on prices and output."

[12] *New England Carpenters Health Benefits Fund v. McKesson Corp.*, 573 F. Supp. 2d 431 (D. Mass. 2008).

[13] *In re Nine West*, No. C-3937, at 10, 12 (May 6, 2008) (emphasis added), *available at* http://www.ftc.gov/os/caselist/9810386/080506order.pdf; s*ee Interview with J. Thomas Rosch, Commissioner, Federal Trade Commission*, Antitrust, Vol. 23, No. 2 (Spring 2009).

[14] *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

The Commissioners continue to express their individual views regarding RPM. Commissioner Harbour continues to lobby Congress for immediate legislative action overturning *Leegin*.[15] By contrast, Commissioner Rosch believes that Congressional action is unwarranted, and that the case law and the presumptions the Commission developed in *Nine West* should be given time to mature.

In May 2009, the FTC convened a workshop to discuss competitive harms, economic justifications, policy implications, and enforcement priorities for RPM post-*Leegin*.[16] The findings of this workshop are expected in fall 2009.

State and Federal Legislative Action

The considerable amount of federal and state legislative activity occurring over the past two years has generated much of the uncertainty concerning RPM's legal status. On July 30, 2009, the House Judiciary Committee's Courts and Competition Policy Subcommittee approved H.R. 3190, which would make minimum RPM unlawful. Wisconsin Senator Herb Kohl earlier introduced S. 148, the Discount Pricing Consumer Protection Act, to reestablish the *per se* illegality of RPM, effectively overruling *Leegin*. S. 140 is identical in name and substance to S. 2261, which Senator Kohl introduced in 2007, shortly after the Court decided *Leegin*. Both the House and Senate recently convened hearings to discuss RPM.[17]

President Obama's antitrust agency appointees, including FTC Chairman Leibowitz and DOJ Antitrust Division Assistant Attorney General Christine Varney, have expressed their support for a legislative response to *Leegin*.[18] It is not known whether or when the Administration or Congress will move forward on this or other antitrust legislation.

The states are also a source of uncertainty about RPM. In 2007, 35 state attorneys general supported S. 2261[19] and had opposed overturning the *per se* rule in *Leegin*. Since then, New York antitrust enforcers have released informal statements declaring RPM *per se* illegal under state antitrust law despite *Leegin*.[20] On April 14, 2009, Maryland became the first and (so far) only state to pass legislation expressly overruling the *Leegin* decision in state law contexts.[21] The remaining states continue the *per se* treatment of RPM through enforcement actions. For example, in March 2008, the attorneys general of New York, Michigan, and Illinois settled consolidated RPM claims with Herman Miller, Inc. for $750,000.[22]

[15] Commissioner Pamela Jones Harbour, *Bye Bye Bargain? Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices,* Subcommittee on Courts and Competition Policy, House Judiciary Committee (April 28, 2009) at 6.

[16] Federal Trade Commission, *Resale Price Maintenance Under the Sherman Act and the Federal Trade Commission* (May 20-21, 2009) (conference summary and agenda), *available at* http://www.ftc.gov/opp/workshops/rpm/.

[17] *See Bye Bye Bargains? Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices*, Subcommittee on Courts and Competition Policy, House Judiciary Committee (April 29, 2008); *see also The Discount Pricing Consumer Protection Act: Do We Need to Restore the Ban on Vertical Price Fixing?*, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Senate Judiciary Committee (May 19, 2009).

[18] *See Executive Nominations*, Senate Judiciary Committee (March 10, 2009) (confirmation hearing for Christine Varney), *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=3700.

[19] See Letter from State Attorneys General, to Senators Patrick Leahy, Spector, Kohl, et. al., *Re: Support for the Discount Pricing Consumer Protection Act (S. 2261)* (May 14, 2008).

[20] Alan M. Barr, *State Challenges to Vertical Price Fixing in the Post Leegin World*, FTC Hearings on Resale Price Maintenance, Federal Trade Commission (May 21, 2009) at 3, *available at* http://www.ftc.gov/opp/workshops/rpm/may09/docs/abarr.pdf.

[21] Md. Code Ann., Com. Law. § 11-204 (2009).

[22] *See New York v. Herman Miller, Inc.*, 08-CV-02977 (S.D.N.Y. March 25, 2008) (Stipulated Final Judgment and Consent Decree), *available at* http://www.oag.state.ny.us/bureaus/antitrust/pdfs/Signed_FJ.pdf.

RPM activity at the state level raises interesting questions concerning the interpretation and preemption of state antitrust law. While all states have enacted their own antitrust laws, many states' laws are interpreted consistent with federal antitrust laws. *Leegin* naturally is binding precedent in these states. Some states, such as New York and California, may interpret their state antitrust laws differently than federal law.[24] The Supreme Court has held that the Sherman Act does not preempt state law.[25] Hence, *Leegin* may not affect these states' or private plaintiffs' ability to bring *per se* RPM claims under state law.

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[24] Barr, *supra* at 3.
[25] *See California v. ARC, Inc.*, 490 U.S. 93 (1989).