

# Akerman Practice Update

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## DOJ Provides New Guidance on Structuring Minimum Resale Maintenance Programs

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In late 2009, Christine Varney, Assistant Attorney General for Antitrust at the United States Department of Justice provided additional insights regarding how the Department of Justice is likely to review Resale Price Maintenance Programs in a post-*Leegin* era.

### Background

The Supreme Court's decision in *Leegin Creative Leather Products v. PSKS Inc.*<sup>1</sup> in 2007 overruled almost 100 years of precedent by finding that Minimum Resale Price Maintenance Agreements (RPMs) would no longer be held *per se* illegal under Section 1 of the Sherman Act. Rather, the Court held that RPMs would be reviewed under the so-called "Rule of Reason", which requires an analysis of the practice's benefits and anti-competitive effects. *Leegin* did not, however, describe how the Rule of Reason would be applied to RPMs. Instead, the Court instructed the lower courts to "establish the litigation structure to ensure the [Rule of Reason]...operates to eliminate anti-competitive restraints from the market...and to provide more guidance to businesses."<sup>2</sup> The Court went on to suggest that lower courts needed to "devise rules over time for offering proof... to make the rule of reason" analysis work.<sup>3</sup>

### Existing Conflicting Guidelines

Since *Leegin*, the analysis of RPMs has been in a state of flux. While the Supreme Court instructed the federal courts to apply the Rule of Reason, its ruling did



not necessary apply to state courts, state legislatures or State Attorneys General.

Two post-*Leegin* lower court decisions, applying state antitrust laws – *Spahr v. Leegin Creative Leather Products*<sup>4</sup> (interpreting Tennessee state law) and *O'Brien v. Leegin*<sup>5</sup> (interpreting Kansas state law) – rejected a *per se* analysis of minimum resale price agreements, concluding that the approach adopted by the U.S. Supreme Court should apply.

In contrast, in April 2009 the Maryland Legislature adopted what is the first (and, so far, the only) statute expressly rejecting the application of *Leegin* to state law. The new Maryland law added this definition: “[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.”<sup>6</sup> Thus Maryland has adopted at its state level a *per se* approach to minimum resale price maintenance.

Still another approach has been offered by The Federal Trade Commission. In April 2000, the FTC issued a consent order against Nine West Group, a manufacturer of footwear, prohibiting the company from entering into Resale Price Maintenance Agreements with retailers. In October 2007, Nine West filed a petition with the FTC contending that *Leegin* changed the law governing RPM agreements and asked the FTC to set aside the prohibitions in its consent decree. On October 6, 2007, the FTC granted the petition and adopted what

“I recognize that *Leegin* leaves many questions unanswered. In light of the Court’s invitation, however, I would like to provide some thoughts about how the courts might apply a structured rule of reason analysis for many RPM arrangements.”

- Christine Varney

appears to be a “truncated” rule of reason approach.<sup>7</sup>

Finally, adding to the confusion, is the recent litigation brought against *Herman Miller* by the State Attorneys General of New York, Illinois and Michigan which argued that Herman Miller’s “advertised price program” constituted a *per se* violation of the state antitrust laws. This matter was settled by consent decree in March 2008.

## **DOJ’s Approach**

Into this muddled area, is a speech

delivered in late 2009 by Christine Varney, the Assistant Attorney General for Antitrust at the United States Department of Justice. Varney’s speech<sup>8</sup> provided some insights regarding how the Department of Justice is likely to view Resale Price Maintenance Programs in light of *Leegin*. Her comments are important because they suggest not only a reinvigorated interest in antitrust enforcement against Resale Price Maintenance, but they also suggest a method to evaluate such conduct moving forward. Thus, anyone involved in the distribution chain where Resale Price Maintenance is occurring, should consider the implications of this approach offered by Varney in implementing their program.

In particular, Varney suggested a burden-shifting approach under which a plaintiff challenging a RPM program would be required to make a prima-facie showing that: (1) a Resale Price Maintenance Agreement exists; and (2) certain structural conditions are present that make the Resale Price Maintenance “likely to be anticompetitive”<sup>9</sup>.

If a plaintiff makes such a showing, the burden would then shift to the defendant to show that “its RPM policy is actually – not really theoretically – procompetitive or that plaintiff’s characterizations of the market place were erroneous.”<sup>10</sup>

This speech suggested that “at a minimum, the defendant would have to establish that it adopted RPM to enhance its success in competing with rivals and that RPM was a reasonable method for accomplishing

“...a lower court could require a plaintiff to make a preliminary showing....The burden would then shift to the defendant to demonstrate...its RPM policy is...procompetitive...”

- Christine Varney

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its procompetitive purposes.” Varney pointed out at least four different situations in which a Resale Price Maintenance might be deemed anti-competitive:

(1) manufacturer driven RPM for collusion; (2) manufacturer driven RPM for exclusion; (3) retailer driven RPM for exclusion of discounters; and (4) retailer RPM for cartelization.

Although Varney's proposal is not binding precedent, it certainly is suggestive of one way courts could evaluate Resale Price Maintenance challenges. However, Varney's approach is somewhat inconsistent with the approach used by the Federal Trade Commission in the matter of *Nine West Group*. In *Nine West*, the FTC suggested that a demonstration of lack of market power would be demonstrative of a lack of harm to competition. This lack of market power approach seems to be somewhat inconsistent with Varney's approach which, by contrast, does not suggest such a consideration.

### Implications of the Conflicting Standards

Given the current state of the law any manufacturer or retailer that participates in a resale price maintenance arrangement has to consider not only federal law, but state law, State Attorneys General's positions, the DOJ's approach and the FTC's approach. In our view though, it is most likely that the DOJ's approach will be the one looked to by the federal courts. Of significance under the DOJ's approach was the possible presence of structural conditions in the market which are conducive to price coordination. This might occur in a market that is significantly concentrated or has historic factors that enable manufacturers to anticipate each other's pricing. In light of this, a manufacturer in a concentrated market where RPM is sought should make an effort to document the rationale for implementing an RPM policy as well as any benefits actually achieved as a result of the policy. Similarly, an RPM might be deemed anti-competitive when a given manufacturer has a dominant position. Thus any dominant manufacturer should carefully consider how it would demonstrate the pro-competitive effects of RPM policy if it desired to adopt one. Finally, any manufacturer or retailer engaged in RPMs certainly must review the applicable state laws (e.g. Maryland) and the position taken by the State Attorneys General who might review the RPM.

<sup>1</sup> 551 U.S. 877 (2007)

<sup>2</sup> *Id.* at 898

<sup>3</sup> *Id.*

<sup>4</sup> 2008 WL 3914461 (E.D. Teun 2008)

<sup>5</sup> No 04-CIV-1668 (8th Jud. Dist. Sedgwick County, Kansas) July 9, 2008

<sup>6</sup> M.D. Code Ann, Com Law §11-204(a)(1) (2009)

<sup>7</sup> *In re: Nine West*, No. C-3937 (May 6, 2008)

<sup>8</sup> See Christine a. Varney, Assistant Atty Gen., U.S. Dept. of Justice, *Antitrust Federalism: Enhancing Federal State/State Cooperation*, remarks before the Nat'l Assn of Attorneys General (Oct. 7, 2009)

<sup>9</sup> *Id.* at 5

<sup>10</sup> *Id.*

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