**LEEGIN: A YEAR IN REVIEW**

It has been a year since the Supreme Court issued its controversial decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), reversing a 96-year old per se prohibition against minimum resale price maintenance (RPM) in favor of the rule of reason. After *Leegin*, speculation abounded as to how the antitrust enforcement agencies and courts would interpret the decision—particularly at the state level since 37 state attorneys general (AGs) filed an amicus brief in *Leegin* opposing efforts to overturn per se treatment of RPM.¹

Since *Leegin*, the AGs, the federal agencies, and the lower federal courts have had an opportunity to interpret and apply (or not) *Leegin* principles to RPM cases. At the state level, there continues to be active resistance to *Leegin*, evidenced in part by the AGs' apparent per se approach to an alleged RPM violation in the Herman Miller case. With the federal agencies, while there is acceptance of *Leegin*'s rule of reason treatment for RPM, there appears to be some skepticism of RPM’s ability to produce consumer benefits. Finally, even though the federal courts are applying *Leegin* to RPM cases, it is not clear at this point whether they would allow a plaintiff’s RPM claim to survive even though the plaintiff cannot prove traditional rule of reason factors, such as market definition and market power so long as the plaintiff can demonstrate that RPM was implemented to facilitate a horizontal retailer or manufacturer conspiracy.

Regardless of the various approaches taken—ranging from outright refusal to follow *Leegin* by the states to cautious and/or increased scrutiny by the federal agencies and courts—RPM remains an area of high antitrust risk for firms. We discuss in greater detail below RPM developments that have occurred in the past year at the state, federal agency, and federal court level. First, however, we offer a brief recap of the principles announced in *Leegin*.

**A. BACKGROUND: THE LEEGIN DECISION**

On June 28, 2007, the Supreme Court overturned a then-96 year old per se prohibition of RPM that had been established by *Dr. Miles Med. Co. v. John D. Park*

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¹ The state attorneys general who filed the amicus brief in *Leegin* were from Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.
& Sons Co., 220 U.S. 373 (1911). Leegin, 127 S. Ct. at 2720 (overturning Dr. Miles). In Leegin, the court determined that rule of reason treatment for RPM was more appropriate than per se, because “[i]t cannot be stated with any degree of confidence that resale price maintenance ‘always or almost always tends to restrict competition and decrease output.’” Leegin, 127 S. Ct. at 2717 (quoting Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 723 (1988)).

Notwithstanding the Court’s decision to overrule per se treatment of RPM, it nevertheless cautioned the lower courts to exercise “diligence” when reviewing RPM under the rule of reason. Leegin, 127 S. Ct. at 2719. Such diligence, the Court believed, was necessary to “eliminat[e]…anticompetitive uses [of RPM] from the market.” Id. Specifically, the Court called for heightened scrutiny of RPM when it was (i) ubiquitous in a given industry (because it could be used to facilitate a manufacturer cartel), (ii) implemented at the request of retailers (because it could be used to facilitate a retailer cartel), or (iii) used by either a retailer or manufacturer with market power (because it could have harmful exclusionary effects). Id. at 2719-20.

B. STATE ATTORNEYS GENERAL’S CONTINUED TO RESISTANCE TO LEEGIN

Over the past year, the AGs have displayed a continued resistance to rule of reason treatment for RPM. They believe that their 40-year experiment with legal RPM in the form of Fair Trade laws proves that RPM leads to higher prices with “no offsetting benefits for consumers.” Robert L. Hubbard, Director of Litigation, Antitrust Bureau New York State Office of the Attorney General, Presentation at the ABA Fall Forum (Nov. 15, 2007), available at http://www.oag.state.ny.us/business/antitrust/pdfs/aba_fall_07_forum.pdf. The AGs continue to wage their battle on multiple fronts—in the courts, before the agencies, and in the federal legislature.

1. In the Courts—Herman Miller Complaint

On March 21, 2008, AGs from New York, Illinois, and Michigan filed suit under the Sherman Act and various state laws against Herman Miller for alleged RPM violations. Compl. at ¶ 1, New York. v. Herman Miller, Inc., No. 08-CV-02977 (S.D.N.Y. Mar. 21, 2008). Herman Miller, a manufacturer of office chairs, allegedly implemented a “minimum price policy” in response to retailers’ complaints that its Aeron chairs were being discounted on the Internet and eroding retailers’ margins. Compl. ¶¶ 15-18. Under Herman Miller’s “Suggested Retail Price” (SRP) policy, retailers who advertised Aeron chairs below Herman Miller’s SRP would either be terminated or suspended for one year. Compl. ¶¶ 18-19. If suspended for a year, the complaint alleged that prior to the retailer’s reinstatement, Herman Miller would caution the retailer that “this time [they should] follow HMH’s SRP policy.” Compl. ¶ 24. The AGs claimed that Herman Miller’s policy “unlawfully stabilize[d] and artificially raise[d] retail prices and retail levels” through “an illegal resale price maintenance scheme[.]” Compl. ¶¶ 1-3.

The most interesting aspects of the AGs’ complaint, however, were not the facts alleged but rather the facts that were not alleged. For instance, the complaint failed to allege facts that one would typically associate with a rule of reason case, such as market definition, market shares, and market power. The absence of these allegations suggests that the AGs believed they were prosecuting a case under the per se rule. However, because the case was settled and the complaint and proposed consent decree were filed simultaneously, the AGs knew that Herman Miller would not be challenging the sufficiency of the allegations in a motion to dismiss. See Herman Miller Press Release, Herman Miller, Inc., Announces Settlement with New York Attorney General.

See, e.g., United States v. Columbia Steel Co., 334 U.S. 495, 527 (1948) (stating that in a rule of reason case, “[i]t is first necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in competition in that market.”); Sanderson v. Culligan, Int’l Co., 415 F.3d 620, 622 (7th Cir. 2005) (stating that plaintiff’s claim “fails at the threshold because [plaintiff] does not contend (in the complaint or anywhere else) that [the defendant]…possesses[d] the sort of market power that would lead to condemnation under the Rule of Reason”); Gordon v. Lewistown Hosp., 423 F.3d 184, 211 (3d Cir. 2005) (stating that “we must determine whether the Hospital possessed market power in the relevant markets in order to determine if we may presume anticompetitive effects from the Conditions under the rule of reason test”).

LEEGIN: A YEAR IN REVIEW
In light of the fact that RPM was no longer per se unlawful, Nine West petitioned the FTC to modify the decree. The FTC sought public comments on the issue and received comments on behalf of 27 AGs opposing modification. No. C-3937 (F.T.C. May 6, 2008) (FTC Modification Order).


In 2000, the FTC and 56 state AGs filed unlawful RPM claims against Nine West Group (Nine West). At the time, RPM was per se unlawful and Nine West entered into a consent decree with the FTC that barred Nine West from “fixing, controlling, or maintaining the resale price” for 10 years, and settled the states’ claims for US$34 million. In re Nine West Group, Inc., No. C-3937 (Apr. 11, 2000) (“FTC Nine West 2000 Order”); FTC Nine West Press Release, No. C-3937 (Mar. 6, 2000), at http://www.ftc.gov/opa/2000/03/ninewest.shtm.

The AGs suggested that, because RPM typically results in higher prices (in itself an anticompetitive effect) that full-blown rule of reason analysis is not necessary. States Comments Opposing Modification, at 6-8; see Robert L. Hubbard, Protecting Consumers Post-Leegin, ANTITRUST, at 42 (Fall 2007). Instead, courts should employ a truncated method of review reserved for “inherently suspect” agreements, such as the method used by the FTC in Polygram Holding, Inc., v. FTC, 416 F.3d 29, 36 (D.C. 2005) (Three Tenors). In such cases, the defendant would have “the burden of providing a plausible and cognizable justification,” which it presumably could meet “by referring to theoretical benefits gleaned from the economic literature.” Protecting Consumers Post-Leegin, ANTITRUST, at 42.

Ultimately, the FTC did modify the decree (see infra, Part C) but not before the AGs had voiced their strong opposition.

3. Before the Congress

On October 30, 2007, Senators Kohl, Biden, and Clinton introduced legislation that would overturn Leegin. The Discount Pricing Consumer Protection Act, S. 2261, 110th Congress (2007). On May 14, 2008, thirty-five AGs sent a letter to both the Senate and House Judiciary Committees urging Congress to “immediatel[y] consider and approve” the pending legislation.7 In the letter, the AGs stated that federal legislation was needed notwithstanding the fact that RPM was already per se unlawful in certain states.

4. Other State RPM Developments

Robert Hubbard, the Director of Litigation for the Office of the New York Attorney General’s Antitrust Bureau and the Chair of the Multistate Antitrust Task Force of the National

4 This number includes AGs from the U.S.’s “states, territories, commonwealths, and possessions.” FTC Nine West March 2000 Press Release.

5 The state attorneys general who opposed the modification of the Nine West decree were from Alaska, Arkansas, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia.

6 Hubbard stated that perhaps, in RPM cases, courts should require defendants to prove “actual procompetitive benefits before permitting a restraint designed to raise prices for consumers.” Protecting Consumers Post-Leegin, Antitrust, at 41 (emphasis in original).

7 The state attorneys general who sent the May 14, 2008 letter to Congress were from Arkansas, Hawaii, Oregon, Arizona, California, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Utah, Vermont, West Virginia, and Wyoming.
Association of Attorneys General, raised questions about the practical difficulties involved in balancing RPM under the rule of reason. Protecting Consumers Post-Leegin, Antitrust. For instance, Hubbard asked “how will courts resolve disputes about whether the vertical price fixing has procompetitive benefits?” Id. at 42. Or, if the parties were to dispute whether RPM resulted in enhanced services or whether such services sufficiently increased demand, how would the courts weigh such competing positions? Id. Furthermore, “[w]hat happens if the increased demand from enhanced services does not exceed the decreased demand from the higher price?” Id.


C. FTC’S NINE WEST DEGREE MODIFICATION

Unlike the states’ apparent per se approach to RPM in Herman Miller, the FTC (which joined in the Solicitor General’s amicus brief in Leegin urging that the per se rule against RPM be abandoned) applied the rule of reason to Nine West’s RPM. FTC Modification Order.

As noted above, Nine West petitioned the FTC to reopen and modify the 2000 Order shortly after the Court’s decision in Leegin. In its consideration of Nine West’s request, the FTC relied on those principles announced by the Court. First (and in stark contrast to the AGs’ complaint in Herman Miller), the FTC considered issues including the relevant market, market share, and Nine West’s ability to exercise market power. FTC Modification Order, at 15. It found that “Nine West ha[d] only a modest market share in any putative relevant product market in which it compete[d]” and that “there [was] no reason to believe that there [was] collective market power in any putative market.” Id.

Second, the FTC also considered whether Nine West had engaged in RPM at the request of retailers. Id. In Leegin, the Supreme Court cautioned lower courts to apply greater scrutiny to RPM that had been initiated at the request of retailers, because RPM in such instances could be used to facilitate a retailer cartel. Leegin, 127 S. Ct. at 2719. Nine West assured the FTC, however, that its decision to engage in RPM was wholly its own.

Finally, the FTC inquired into whether services and brand promotion would improve as a result of Nine West’s RPM. But because Nine West had been prohibited from engaging in RPM for the past eight years, it had no empirical data by which to show the FTC that RPM had improved brand promotion and services.

The four sitting Commissioners—including Pamela Jones Harbour, who had opposed overturning the per se rule for RPM—unanimously agreed to modify the 2000 Order. The unanimous decision to modify the Order, however, should not be construed as the agency’s ready embrace of RPM. To the contrary, it appears that the FTC harbors some skepticism of RPM and its purported benefits to consumers.

As the 27 AGs had suggested in their letter opposing modification of the Nine West decree, the FTC stated that it might be appropriate to classify RPM as “inherently suspect” and thus subject it to a truncated rule of reason review, such as the one performed in the Three Tenors. Nine West Modification Order, at 9, 12 (citing Three Tenors, 416 F.3d at 36). In the Three Tenors, the FTC condemned an agreement between two competing companies not to advertise or discount specific products without first engaging in a full-blown market analysis on the agreement’s market effects. Instead, under a truncated rule of reason review, the agency stated that “conduct that…appears likely, absent an efficiency
justification, to restrict competition and decrease output—is to be presumed unreasonable." Three Tenors, 416 F.3d at 32-33 (internal quotations omitted); see NCAA v. Bd. of Regents, 468 U.S. 85, 99 (1984) (using an abbreviated rule of reason review because it became "undeniably" apparent that the challenged "practices share[d] characteristics of restraints...previously held unreasonable"); FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 459 (1986) ("While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."). In the Three Tenors, once the FTC determined that the agreement was "inherently suspect," the burden shifted to the respondents to proffer "some plausible (and legally cognizable) competitive justification for the restraint," which the respondents apparently had failed to do. Three Tenors, 416 F.3d at 36, 38 ("PolyGram has failed to identify any competitive justification for its agreement with Warner[.]").

In the Nine West matter, the FTC stated that "[t]he Leegin decision may be read to suggest [that] a truncated analysis ... might be suitable for analyzing minimum resale maintenance agreements." Id. at 12. The agency noted that, as with other "inherently suspect" agreements, RPM bears a "close family resemblance...[to] another practice that already stands convicted in the court of consumer welfare"—horizontal price fixing." FTC Modification Order, at 13 (quoting the D.C. Circuit in Three Tenors, 416 F.3d at 37).

D. FEDERAL COURT RPM DECISIONS

Like the FTC, the federal courts are applying the rule of reason to RPM post-Leegin. Unlike traditional rule of reason cases, however, where a plaintiff’s entire case depends on proof of market power and evidence of anticompetitive effects, the courts in the following three RPM cases8 heavily weighed factors in addition to market power, thus raising the question of whether, under a rule of reason RPM case, traditional rule of reason factors may not be dispositive.


In Toledo Mack, the defendant, Mack Trucks, Inc. (Mack), distributed and serviced heavy duty trucks through a nationwide network of authorized dealers. Mack assigned each authorized dealer a geographic region called an “Area of Responsibility” (AOR). Id. at *2. Under Mack’s official policy, a dealer’s AOR is not exclusive and dealers are free to compete anywhere in the country. Id.

Mack offered discounts to authorized dealers in the form of “sales assistance.” Id. at *1. The amount of the sales assistance offered depended on multiple factors, such as the nature of the dealers’ relationship with the customer, the number of trucks being ordered, and potential competition that the dealers might face. Id. The plaintiff, Toledo Mack Sales and Service, Inc. (Toledo), was one of Mack’s authorized dealers and had a nationwide sales strategy to compete on price, even against other Mack dealers in their assigned AORs. Id. at *2. Toledo claimed that its sales strategy caused Mack dealers and Mack to conspire to prevent it from undercutting Mack dealers’ prices in their AORs.

Toledo alleged that the dealers themselves entered into an alleged “gentleman’s agreement” with each other not to compete with each other on price in their respective AORs; and that Mack agreed not to provide sales assistance to dealers who competed outside their AOR. Id. Toledo claimed that these schemes amounted to unlawful horizontal collusion among the dealers and vertical collusion between Mack and the dealers in the form of RPM in violation of the Sherman Act. Id. at *3-6.

The court found that Toledo had offered sufficient evidence of a horizontal agreement between the Mack dealers to create a question of fact for the jury. Id. at *11. In regard to the vertical collusion claim, the court found that Toledo had come forward with sufficient evidence that RPM was initiated.

at the request of the dealers, which, under the reasoning in *Leegin*, created a likelihood that RPM was in fact being used to facilitate a dealer cartel. *Id.* at *15-16. The court also considered, however, more traditional rule of reason factors, such as market definition and market power, and found that Toledo had presented sufficient evidence of both. But it is not clear whether the court’s decision to uphold Toledo’s claims turned on proof of these traditional rule of reason factors, or on the evidence that RPM likely was being used to support a horizontal conspiracy among dealers that remains *per se* illegal. See *id.* at *16 (stating that plaintiff’s proof of defendant’s substantial market power made it more likely that RPM had anticompetitive effects).


*Babyage.com* involved claims against an alleged monopsonist—i.e., a dominant retailer of manufacturers’ products. In *Babyage.com*, retailers of baby products and consumers (plaintiffs) filed suit against Babies ‘R’ Us (BRU), a large retailer of baby products, and against baby products manufacturers. *Id.* at *1. The plaintiffs alleged that, because smaller retailers competed against BRU on price, BRU used its dominant position to coerce manufacturers into entering RPM arrangements with retailers to sell the manufacturers’ goods at or above a certain price. *Id.* The plaintiffs alleged violations of §§ 1 and 2 of the Sherman Act. *Id.*

The court upheld the plaintiffs’ claims for the following four reasons. First, plaintiffs had adequately defined the relevant market for baby products taking into account reasonably interchangeable and economically substitutable products. Second, they had sufficiently alleged concerted action both between BRU and each manufacturer, and between each manufacturer and various retailers in the form of an agreement on RPM. Third, plaintiffs showed the anticompetitive effect of the defendants’ conduct on the relevant market. And fourth, plaintiffs showed a causal nexus between the defendants’ actions and the plaintiffs’ decreased sales and higher prices in the market. *Id.* at *2-5. The court justified its close scrutiny of the defendants’ RPM in this case on the basis that, under *Leegin*, RPM instigated at the request of a “dominant retailer” (i.e., where the manufacturers were dependant on the retailer for a large portion of their sales) should be treated as suspect. *Id.* at *4 (citing *Leegin*, 127 S.Ct. at 2717, 2719-2720).


*Lotus* involved a claim by a competitor that the defendant was setting its prices *too low* in contravention of a state minimum pricing law. The plaintiff, Lotus, claimed that on numerous occasions the defendant, Flying J, sold motor vehicle fuel in violation of Wis. Stat. § 100.30, which imposed a floor on the price of motor fuel and mandated a minimum markup of 9.18 percent above the “average terminal price.” *Id.* at 1013. Flying J argued, however, that the state statute created an illegal vertical price restraint in violation of § 1 of the Sherman Act. *Id.* at 1017.

The court agreed with Flying J. It stated that Wisconsin’s statute violated the Sherman Act, because the statute “fix[ed] resale prices industry wide, and [that] mandatory industry wide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition.” *Id.* at 1026 (internal citations and quotations omitted). The court stated that, under *Leegin*, “‘resale price maintenance should be subject to more careful scrutiny...if many competing manufacturers adopt the practice.’” *Id.* at 1027 (quoting *Leegin*, 127 S.Ct. at 2719) (emphasis added). Even under *Leegin*, the court recognized, “a horizontal cartel among competing manufacturers or competing retailers that decrease[d] output or reduce[d] competition in order to increase price is, and ought to be, *per se* unlawful.” *Id.* at 1028 (quoting *Leegin*, 127 S. Ct. at 2717). Thus, the court held that Wisconsin’s minimum pricing statute was inconsistent with § 1 of the Sherman Act under both rule of reason and *per se* analysis. *Id.*

**ANALYSIS**

1. **Risks Under State Law**

   Significant risks remain at the state level for firms that engage in RPM. The AGs have not abandoned their efforts to subject...
RPM to *per se* treatment and continue to wage a battle against *Leegin* on multiple fronts. The states’ continued resistance to changes in RPM law, including their attack on RPM in the *Herman Miller* case and their statements regarding the continued *per se* illegality of RPM under some state laws, suggest that they will go the *Illinois Brick* route should *Leegin* remain good law at the federal level. When the Supreme Court in *Illinois Brick* held that indirect purchasers could not recover for antitrust violations under federal law, approximately 30 states, either by statute or by court order, created a right of action for indirect purchasers under their respective state laws. This would mean that even though RPM is no longer *per se* illegal under federal law, firms may need to deal with a patchwork of state laws applying different tests to RPM should the states’ resistance to *Leegin* continue.

### 2. Risks Under Federal Law

In addition to the risk of *per se* treatment under state law, firms that engage in RPM continue to face substantial risks under federal law.

First, among the federal agencies, the FTC has expressed an inclination toward treating RPM as “inherently suspect”—a classification that would condemn RPM unless the defendant could offer a plausible and cognizable procompetitive justification. Only if the justification were cognizable (i.e., not high prices for the sake of high prices) and plausible would the FTC engage in a full-fledged balancing. And second, the federal courts are applying traditional rule of reason analysis to RPM but they are also paying close attention to non-traditional rule of reason factors, such as whether RPM was implemented to facilitate a retailer cartel\(^9\) and whether the use of RPM at the manufacturer level is widespread. Even under *Leegin*, a complaint can survive a motion to dismiss if it alleges that (i) the defendant has market power (i.e., a traditional rule of reason claim); (ii) there have been actual anticompetitive effects; (iii) that the RPM program was implemented at the request of dealers; or (iv) that use of RPM is widespread.

### F. CONCLUSION

In the past year, the states, the FTC, and the courts have taken somewhat divergent approaches to RPM post-*Leegin*. While the federal courts and the FTC—which are bound to follow *Leegin*—are following it, the states—which are not bound to apply *Leegin*’s rule of reason treatment of RPM to their own antitrust laws—show no signs of wavering in their opposition to it. One year later, RPM remains an area of high risk for firms and firms should continue to tread very carefully should they choose to engage in such practices.

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\(^9\) The Supreme Court’s decision in *Twombly*, however, which calls for more than mere conclusory pleadings of conspiracy in antitrust cases, might prevent plaintiffs from raising unmeritorious claims of retailer conspiracy in RPM cases. For a fuller discussion of *Twombly*, please see our May 2007 client advisory, *Supreme Court Clarifies Standards for Pleading an Antitrust Conspiracy* (May 2007), at [http://www.arnoldporter.com/resources/documents/A&PCA_Supreme-CourtClarifiesStandardsForPleadingAntitrustConspiracy_052507.pdf](http://www.arnoldporter.com/resources/documents/A&PCA_Supreme-CourtClarifiesStandardsForPleadingAntitrustConspiracy_052507.pdf).