

# ANTITRUST & TRADE PRACTICES

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## **Federal Trade Commission Modifies Order To Allow Nine West to Engage in Resale Price Maintenance Agreements**

**May 22, 2008**

### **Key Takeaways**

- Given the change in the antitrust treatment of resale price maintenance agreements after the Supreme Court's 2007 ruling in *Leegin Creative Leather Products v. PSKS, Inc.*, the Federal Trade Commission (FTC) modified a 2000 consent order to allow Nine West Group, Inc. (Nine West) to engage in resale price maintenance (RPM) agreements.<sup>1</sup>
- In looking at RPM agreements, the FTC may apply an "inherently suspect" analysis if certain factors are present, such as the possession of market power and the fact that the RPM agreements were initiated by resellers. More burdensome than a *per se* analysis, the inherently suspect analysis is less difficult for the FTC than a full-blown rule of reason analysis.
- While the opinion gives some guidance on how the FTC views RPM agreements, caution must be exercised by companies considering such agreements because the federal law is still evolving and a number of states strongly opposed modification of the consent decree.

### **Summary**

Nine West sells women's footwear to retail outlets throughout the United States. In 2000, the FTC filed a complaint against Nine West alleging that its retailer agreements amounted to resale price maintenance, a *per se* unlawful practice. In response, Nine West agreed to a consent order that prohibited Nine West from engaging in certain conduct that would maintain minimum resale prices.

In October 2007, Nine West petitioned the FTC to modify the 2000 Order, arguing that it was no longer necessary or appropriate in light of the Supreme Court's recent decision in *Leegin*.

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<sup>1</sup> A copy of the Order may be accessed at: <http://www.ftc.gov/os/caselist/9810386/080506order.pdf>

*Leegin* overturned 96 years of precedent that strictly forbade companies from setting minimum resale prices for dealers. *Leegin* held that RPM agreements are not always unlawful and must be reviewed under the more flexible “rule of reason” analysis. Nine West argued that the use of RPM agreements would allow it to maintain favorable brand equity, counter free-riding by noncompliant dealers and level the playing field with competitors who could now enter into RPM agreements. It further asserted that RPM agreements would increase demand for its products, enhance competition and increase services offered by its retailers.

On May 6, 2008, the FTC granted Nine West’s request to modify the 2000 Order and permit it to engage in RPM agreements. The FTC first concluded that *Leegin* had sufficiently changed the law to justify reconsidering the 2000 Order. It then analyzed the *Leegin* opinion to determine what level of scrutiny should be applied to Nine West’s proposed RPM program. The FTC found that *Leegin* foreclosed *per se* treatment, but did not require a full-blown rule of reason analysis either. The FTC opined that an “inherently suspect” analysis would be suitable in some cases. This truncated analysis poses less of a burden on the FTC than does a full rule of reason analysis.

To determine which level of scrutiny is appropriate, the FTC considered factors set out in *Leegin* that point to a greater likelihood of competitive harm. Specifically, if retailers are the source of the RPM agreements, there may be evidence of a dealer cartel or a dominant retailer. If the use of RPM agreements is common in the industry, there may be an anticompetitive foreclosure of independent retailer pricing. If a manufacturer or retailer has market power, the practice may result in an increase in prices.

The FTC ultimately concluded that Nine West’s use of RPM agreements was not likely to harm consumers because: (1) Nine West had only modest market share; (2) there was no evidence of a dominant, inefficient retailer in the market; and (3) Nine West was responsible for its desire to engage in RPM, not its dealers. Had the FTC found that Nine West’s desire for RPM agreements posed competitive concerns, Nine West could still have had the 2000 Order modified by showing that the RPM agreements would be procompetitive. For example, a company might justify RPM agreements by presenting evidence that output increased in spite of higher prices, suggesting that consumers place a higher value on non-price factors (such as service).

### **What's next?**

Modification of the 2000 Order is not a free pass for Nine West to use RPM agreements. The FTC did not rule that RPM agreements by Nine West were *per se* lawful. Rather, the FTC is requiring Nine West to provide periodic reports that document its use of RPM agreements and the effects of those agreements on output and prices. The FTC reserved the right to challenge any Nine West RPM agreements that it believes are anticompetitive. The FTC will likely keep an attentive eye on RPM agreements, especially in those cases where a company has market power or the agreements are at the behest of dealers.

Notably, 27 states filed comments strongly urging the FTC to deny Nine West’s petition. The states argued that the anticompetitive nature of the proposed RPM agreements is obvious and that Nine West failed to provide any plausible procompetitive justification. The filing of the

comments foreshadows that a number of states may aggressively challenge RPM agreements, especially under state laws, notwithstanding the federal change in course.

As an example, state attorney generals for New York, Illinois and Michigan filed a complaint alleging RPM against Herman Miller, Inc. under Section 1 of the Sherman Act and state antitrust laws on March 21, 2008. A proposed Stipulated Final Judgment and Consent Decree was filed in the United States District Court for the Southern District of New York on March 24, 2008, in which Herman Miller, Inc. agreed among other things to refrain from engaging in RPM agreements and to pay \$750,000 to the states involved.

*Feel free to contact any of our attorneys listed below regarding these developments.*

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