

ANTITRUST ALERT

ANTITRUST CHIEF TAKES AIM AT RPM

In remarks given October 7, 2009, at Columbia Law School before the National Association of Attorneys General, Christine Varney, head of the U.S. Justice Department's (DOJ) Antitrust Division, signaled a fundamental change in the Division's approach to vertical minimum resale price maintenance (RPM) agreements and recommended this approach to state enforcers.¹ The result will likely be increasingly aggressive RPM antitrust enforcement, especially in the retailer-driven context. At the conclusion of her talk, Ms. Varney welcomed "reports of potential cases that may be appropriate for federal enforcement."

The legality of manufacturer/retailer agreements fixing resale prices (RPM) has been a subject of recent, significant debate. In the earliest days of the Sherman Act, in the 1911 case of *Dr. Miles Medical Co. v. John D. Park and Sons*,² the U.S. Supreme Court set a strict barrier to the use of minimum RPM, ruling it per se illegal. The *Dr. Miles* precedent, though often criticized and subject to "work-around" strategies, remained the law for more than 90 years. The Court overruled *Dr. Miles* in 2007 in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,³ holding that RPM was no longer per se unlawful but, instead, should be subject to the antitrust rule of reason. The Court's 5-4 opinion left great uncertainty as to how the federal and state antitrust enforcement authorities would approach RPM in making enforcement decisions going forward.

The Federal Trade Commission (FTC), for example, has actively responded to *Leegin* by sponsoring public workshops on the subject of RPM and issuing two orders that pertain to RPM in a post-*Leegin* world.⁴ By contrast, until Ms. Varney's recent speech, DOJ—which had filed a

¹ Christine A. Varney, Assistant Attorney General – Antitrust Division, U.S. Department of Justice, Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks as Prepared for the National Association of Attorneys General, (October 7, 2009), available at <http://www.usdoj.gov/atr/public/speeches/250635.htm>.

² 220 U.S. 373 (1911).

³ 551 U.S. 877 (2007).

⁴ Following *Leegin*, the FTC, in May 2008, modified a pre-existing order to allow shoe and clothing retailer Nine West "to engage in resale price maintenance (RPM) agreements with dealers and requires the company to provide periodic reports on its use of RPM agreements so the FTC can analyze the effects of such agreements on competition." FTC Press Release, *FTC Modifies Order in Nine West Resale Price Maintenance Case* (May 6, 2008), available at <http://www.ftc.gov/opa/2008/05/ninewest.shtm>. In the FTC's March 2009 consent decree in the matter of National Association of Music Merchants (NAMM), the FTC prohibited NAMM from, among other things, "aiding musical instrument manufacturers or retailers to form an anticompetitive agreement, such as agreements among competitors relating to price, minimum advertised price, and terms of dealing." FTC Press Release, *National Association of Music Merchants Settles FTC Charges of Illegally Restraining Competition* (March 4, 2009), available at <http://www.ftc.gov/opa/2009/03/namm.shtm>.

brief in *Leegin* on behalf of the United States as amicus curiae supporting abolition of the per se rule as applied to RPM—was largely silent in *Leegin*'s aftermath. Many states have postured aggressively following *Leegin*, with Maryland even passing legislation restricting the use of RPM.

Ms. Varney's October 2009 speech before the NAAG was decidedly pro-enforcement. Ms. Varney recommended an approach under which the government would be required to make only a preliminary showing of "the existence of the agreement and scope of its operation"⁵ as well as the presence of structural conditions under which RPM is likely to be anticompetitive . . . to establish a *prima facie* case that RPM is unlawful. Under such an approach, the burden would then shift to the defendant to demonstrate either that its RPM policy is actually—not merely theoretically—procompetitive, or that the plaintiff's characterizations of the marketplace were erroneous." Ms. Varney further noted that the burden on the party using RPM would vary with the strength of the initial showing. At a minimum, the response "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 its procompetitive purposes."

Discussing the approach in further detail, Ms. Varney also distinguished between RPM agreements that are driven by manufacturers and RPM agreements driven by retailers. While Ms. Varney commented that all RPM agreements should be subject to the burden shifting rules, she nonetheless took a tougher stance towards retailer-driven RPM. Noting that "[t]he greater concern with RPM for the *Leegin* Court and many economists is when RPM results from retailer coercion," Ms. Varney suggested "a plaintiff presenting substantial evidence that retailer coercion was responsible for RPM has gone a long way toward making a *prima facie* showing of anticompetitive effects." Notably, Ms. Varney did not discuss how defendants could justify a retailer-driven RPM arrangement once plaintiffs have established their *prima facie* case.

Ms. Varney was careful not to overcommit the Antitrust Division. Nonetheless, her speech clearly serves as a warning to companies who are parties to RPM agreements fixing minimum prices that the Supreme Court's *Leegin* decision overturning the per se rule does not mean that such agreements will have an automatic free pass at the Division.

Advisors at Akin Gump Strauss Hauer & Feld LLP have extensive experience advising companies on business practices such as resale price maintenance and representing companies in government investigations of alleged anticompetitive conduct.

CONTACT INFORMATION

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⁵ *Leegin*, 551 U.S. at 898.