Can Franchisors Control Franchisee Prices?

QUENTIN R. WITTROCK AND JEREMY L. JOHNSON

Quentin R. Wittrock

Jeremy L. Johnson

The initial response to the U.S. Supreme Court's decision on June 28, 2007, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[1] was that the ruling makes it legal for a manufacturer or franchisor to control the resale pricing of its distributors, dealers, or franchisees. Some lawyers, including franchise lawyers, quickly advised at least some caution, however, because (1) state antitrust statutes still could apply and be enforced differently, and (2) it was unclear how federal courts would apply the rule of reason to vertical price controls. There also was some concern that Congress could pass new legislation to make such controls per se illegal under federal law. Others worried about the application of foreign laws when international sales are involved. Little of this analysis focused on business format franchising and the impact of *Leegin* on franchise systems (as opposed to manufacturer-distributor-dealer relations). Franchisors were left wondering, "What can we really do now?" Indeed, what does control of resale prices mean in the franchise context? Moreover, for the first time, businesspeople in franchising and other contexts are faced with the question, "Even if it is legal for us to control resale prices, do we want to do so?"

Now, approximately two years later, is a good time to evaluate how *Leegin* has been applied, limited, or used as an impetus for change and to discuss what franchisors can do and are doing now. This article will offer practical advice, discuss best practices from the marketplace, and provide an update on post-*Leegin* decisions and legislation.

Leegin and Business Format Franchisors

The *Leegin* case itself was not set in the franchise context. Leegin Creative Leather Products, Inc., defendant, is not a franchisor but instead "designs, manufactures, and distributes leather goods and accessories."[2] Plaintiff, PSKS, Inc., doing business as Kay's Kloset, is not a business format franchisee and instead independently "operates a women's apparel store . . . that buys from about 75 different manufacturers," including Leegin's Brighton line of products. This lack of a franchise context has been part of the difficulty franchise lawyers have had in determining how the Supreme Court's decision applies to pricing in business format franchise systems.

One thought, presented at the ABA's 31st Annual Forum on Franchising in October 2008, was that the *Leegin* decision could have the biggest impact on franchising when the franchisor both operates some company-owned units and franchises other units.[3] This practice is a form of dual distribution. The importance of the *Leegin* decision in the dual distribution context was said to be that a franchisor attempting to control the retail prices of franchisees, perhaps emboldened by perceived new freedom under *Leegin*, still could run afoul of horizontal price-fixing prohibitions to the extent that the company-owned units are deemed to be competitors of the franchised units.[4] This is because price fixing among competitors remains per se illegal under federal and state antitrust laws.

The type of horizontal price-fixing claim that could arise through franchisor control of pricing in the business format franchising context is that company-owned stores and franchised outlets have in effect agreed on prices at which they each will sell to customers. Although there is some precedent that says the franchisor and franchisees in a system are all one economic entity such that § 1 of the Sherman Act does not prohibit them from agreeing among themselves on competitive restraints, it still would be dangerous to rely on those cases given the extreme disfavor shown to horizontal price fixing. Excessive reliance on *Leegin* could arguably plunge some franchisors headlong into existing rules against horizontal price fixing, especially if dual distribution rules take on new emphasis to prevent price restraints in reaction to *Leegin*.

The dual distribution context concern, however, although a valid consideration for some franchise systems, does not address the general issue of whether a franchisor can control the prices at which its franchisees sell products or services to the public. Simply put, outside the dual distribution context, can a business format franchisor take steps to reduce discounting and unauthorized low-cost advertising and promotional practices by its franchisees? Can a franchisor call a halt to price gouging by franchisees? These are the questions related to *Leegin* that come up most often for lawyers representing franchisors and franchisees alike.

The *Leegin* Decision

Federal antitrust law has long prohibited suppliers from setting minimum resale prices,[5] and it has been viewed as preventing franchisors from putting floors under their franchisees' prices as well. In June 2007, the Supreme Court in *Leegin* reversed century-old precedent, ruling that all such agreements are now

Quentin R. Wittrock is a principal and Jeremy L. Johnson is an associate in the Minneapolis office of Gray Plant Mooty.

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subject to the rule of reason, a method of analysis under which the claimant must make the difficult showing that the arrangement substantially harms competition in the market as a whole.

The facts of the *Leegin* case are simple: Leegin is a small start-up manufacturer of leather accessories such as handbags and belts under the Brighton brand name. Leegin wanted to compete with larger, better-known suppliers of similar products and the large department stores that sell those products. Leegin therefore adopted a retail policy that required stores to pledge that they would sell the Brighton line only at the suggested resale prices. PSKS, which operates a specialty store near Dallas, was cut off as a Leegin dealer because PSKS discounted Leegin's products. With a strong case under the prevailing per se rule of antitrust liability, PSKS won a substantial jury verdict, which was upheld on appeal by the Fifth Circuit.[6]

In its five-to-four[7] decision in *Leegin*, the Supreme Court found resale price maintenance to be generally procompetitive such that the rule of reason should apply in analyzing whether vertical pricing controls unreasonably restrain trade and are illegal. The Court recognized that price controls can help ensure that retail services that enhance interbrand competition will not be underprovided (e.g., because of free riding).[8] Also, resale price maintenance may facilitate market entry for new companies and brands.[9] As the Court itself noted, similar economic justifications have supported rule of reason analysis for nonprice vertical agreements, such as exclusive territories, for decades.[10]

To see where these findings fit into the development of antitrust law requires a quick overview, beginning with the enactment of the Sherman Act in 1890. The Sherman Act famously made illegal every "contract, combination . . . or conspiracy, in restraint of trade." That prohibition is so broadly worded that it has taken 119 years of what in reality are common law antitrust decisions to clarify what restraints are unlawful because they are deemed to be unreasonable restraints. The 1911 decision *Dr. Miles Medical Co. v. John D. Park & Sons*, which was expressly overruled in *Leegin*, is not much newer than the Sherman Act. *Dr. Miles* made all vertical price restraints per se unreasonable and thus illegal. The Supreme Court's *United States v. Colgate & Co.* decision in 1919 did allow a seller to announce in advance its resale price policies and to refuse to deal with retailers that violated those policies.[11] That was permitted because the original seller was deemed to be acting unilaterally rather than by contract, combination, or conspiracy with the retailer. In the more than seventy-five years that followed *Colgate*, however, it was generally regarded as illegal to control resale prices in any way; franchisors, like manufacturers, went out of their way to avoid even the perception of directing the prices that could be charged by their franchisees at retail. This fear of antitrust liability was justified: the Supreme Court as recently as 1983 declined an invitation to overrule *Dr. Miles*, which remained the prevailing law.[12]

Meanwhile, however, changes in the makeup and thinking of the Supreme Court, reflecting changes in economic theory, began to foreshadow *Leegin*. In 1977, in a decision crucial to franchisors, the Supreme Court in *Continental T.V. v. GTE Sylvania, Inc.*[13] ruled that exclusive territories imposed from the top down by a manufacturer were not illegal. That decision has allowed business format franchisors to feel comfortable if they choose to issue exclusive franchise rights through various forms of protected territories. In what now appears to be an obvious precursor of the *Leegin* result, the Court in 1997 (ten years before *Leegin*) ruled that a seller of products would not be acting illegally per se if it set maximum prices at which its dealer could sell.[14] Maximum price setting, therefore, became subject to the rule of reason, further giving comfort to franchisors that saw an advantage to restraining retail prices in their franchise systems.

The Court's grant of certiorari from a short unpublished decision of the Fifth Circuit in *Leegin* was seen as a signal that the Court was going to do exactly what it did, i.e., extend the rule of reason to cover minimum resale price constraints as well. Some commentators even believed that the Supreme Court might be ready to go so far as to eliminate the rule of per se antitrust liability entirely, meaning that even horizontal price fixing (among competitors) might be subject only to the rule of reason. A large number of groups and entities sought to submit briefs. Most notably, thirty-seven states submitted a joint amicus brief on behalf of plaintiff. Briefs supporting the manufacturer came in from a broad range of entities, including the U.S. Department of Justice; the Federal Trade Commission (FTC); the maker of Ping golf clubs (the resale price of which is controlled by the manufacturer); and a group of twenty-five leading economists, all of whom argued that resale price maintenance is not terribly harmful and may actually have salutary qualities.

Viewed against this background, the decision in *Leegin* does not seem quite as revolutionary. In fact, the *Leegin* decision came in the midst of a streak of defense victories in antitrust cases, a streak that has climbed into double digits of consecutive prodefendant decisions as of early 2009.

Nevertheless, in deciding to switch from the per se rule to the rule of reason in analyzing minimum resale price maintenance, the Supreme Court cautioned in *Leegin* that "the potential anticompetitive consequences of vertical restraints must not be ignored or underestimated."[15] The Court noted that "depending on the circumstances in which they are formed," vertical agreements can still be regarded as anticompetitive.[16] For example, if the vertical arrangement is really the product of an agreement among competitors at either the supplier or the dealer level, liability still will be found under federal antitrust law. Or, if the vertical restraint does not produce truly procompetitive results, such as greater availability of product or services or increased market share, the rule of reason will not protect it. The Court wrote that the rule of reason must remain a "fair and efficient way to prohibit anticompetitive restraints and to promote competitive ones."[17]

Reaction to *Leegin*

The *Leegin* decision triggered a range of immediate reactions. Some analysts heralded the decision as huge,[18] all but predicting a shutdown of discount retailers nationwide. Justice Breyer, in delivering his dissenting opinion, stated that "[t]he only safe predictions to make about today's decision are that it will likely raise the price of goods at retail and that it will create considerable legal turbulence."[19] Others suggested that

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the decision would give producers significantly more power to dictate retail prices and restrict the flexibility of discounters.[20] But others concluded that the decision was limited, especially because minimum price setting could continue to be attacked in court under the rule of reason standard.[21] Still others, concerned about potential actions of Congress and the states,[22] expressed a wait-and-see[23] approach. But all have noted *Leegin*'s part in the dramatic ongoing change in the law governing vertical distribution relationships,[24] relationships that have moved over the past five decades from being governed almost exclusively by the per se rule to being governed now (at least under federal law, as discussed below) by the rule of reason in all respects except possibly as to tying arrangements.[25]

One intriguing reaction on the part of a few commentators to *Leegin* is that the outcome was not even as close as the five-to-four vote would indicate and that the Supreme Court's approval of pricing controls today is even stronger than it appears. This theory turns on the belief that the four Justices who voted against the *Leegin* decision were more concerned about the doctrine of stare decisis than antitrust. The direct overruling of *Dr. Miles*, according to this speculation, is most significant for what it says about the Supreme Court's willingness to overturn previous decisions. Thus, Justices voting to uphold the rule of *Dr. Miles* actually may have been concerned primarily about future battles to uphold *Roe v. Wade* or other existing law.

With *Leegin*, franchisors are faced with the possibility that setting minimum prices might be legal.

In the marketplace and legislatures, the reaction of some was to fight. A lengthy December 2008 article on the front page of the *Wall Street Journal* was headlined "Discounters, Monitors Face Battles on Minimum Pricing,"[26] referring to attempts by discount retailers to block minimum price setting and to thwart the companies that have sprung up to monitor resale pricing for manufacturers, as well as the monitoring of prices at which products are advertised.

The mixed reaction to *Leegin* left some companies uncertain as to what they could and should do. It used to be easier to know what to do and what not to do, and most companies pre-*Leegin* reacted by doing the safe thing: they made no attempt to control pricing after the initial sale. With *Leegin*, however, franchisors were faced with the prospect that setting minimum prices might actually be legal. Should they try, or should they leave existing policies and procedures in place?

Subsequent History of *Leegin* Litigation

Following the Supreme Court's decision, the Fifth Circuit remanded the *Leegin* case to the U.S. District Court for the Eastern District of Texas for proceedings consistent with the Supreme Court's holding that vertical price restraints are to be adjudged according to the rule of reason. PSKS then filed a second amended complaint, realleging monopolization and recasting its vertical price-fixing claim as one subject to the rule of reason. Further, PSKS asserted a new claim for per se horizontal price fixing between Leegin-owned Brighton product retailers and independent Brighton retailers. PSKS's second amended complaint sets forth additional factual detail and contains allegations (namely, that the products at issue do not require service, instruction, or other post-sale aspects that would be likely to be underprovided in the absence of a pricing restriction) designed to undercut any legitimate business justifications that Leegin may offer to support its minimum retail pricing policy.

Leegin moved to dismiss PSKS's second amended complaint, arguing that the rule of reason vertical price-fixing claim fails to state a tenable relevant market, facts demonstrating that the Brighton brand has market power, or that Leegin's minimum pricing policy has had any adverse effect on competition. Leegin further argued that PSKS's new per se horizontal price-fixing claim is barred because PSKS did not assert that claim in the previous trial. Regardless, Leegin described itself as a dual distributor (i.e., operating as both a manufacturer and a retailer), and it argued that the conduct of dual distributors is judged as a vertical restraint subject to rule of reason analysis.[27] On April 6, the district court granted Leegin's motion to dismiss, holding that PSKS's amended complaint had failed to establish the relevant market required to conduct the rule of reason analysis and had tried too late to plead a horizontal restraint case. Specifically, the court rejected PSKS's proposed relevant markets of the retail market for Brighton women's accessories and the wholesale of brand-name women's accessories to independent retailers. These "markets" were too vague, and the law does not allow a single-brand market, the court held.

In a separate class action filed against Leegin one month after the Supreme Court's decision, the U.S. District Court for the Eastern District of Tennessee in August 2008 determined that a class of purchasers of Brighton retail products failed to state claims against Leegin for violations of § 1 of the Sherman Act state law.[28] Plaintiffs, representing a class of retail purchasers throughout the United States, alleged that Leegin's pricing policy constituted minimum vertical price fixing and horizontal price fixing in that Leegin conspired with other Brighton retailers to maintain supracompetitive prices for Leegin's products. The district court dismissed plaintiffs' federal and state antitrust claims on several grounds. First, relying on the Supreme Court's decision, the court rejected plaintiffs' theory that a horizontal cartel existed and the per se rule should apply because Leegin was a distributor of its own Brighton brand goods and entered into minimum resale pricing agreements with independent dealers of Brighton goods.[29] The court agreed with the defense argument that because Leegin operated in a dual distribution situation, application of per se analysis "would be inappropriate as a matter of law."[30] Second, the court found plaintiffs' definition of the relevant market—"the market for the manufacture, distribution and/or sale of Brighton-brand

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ADVISING COMPANIES IN THE WAKE OF *LEEGIN*

Franchisors

In the two years since *Leegin* was decided, numerous franchisors have raised questions about what they can do about particular practices of franchisees in the area of pricing. As has always been the case in advising franchisors (and probably franchisees), the first look still should be at the franchise agreement to see if there is anything in that agreement to prohibit or require a particular practice. Statements made in the franchisor's Franchise Disclosure Document or previously made in a Uniform Franchise Offering Circular about what the franchisee can or must do also need to be reviewed. These case-specific contract and disclosure document analyses are the first step because they can render antitrust law immaterial if the franchisor's own documents preclude it from controlling the franchisee's pricing practices.

An analysis of the antitrust issues is the next step. But whereas the old answer was that a franchisor generally could not control franchisee pricing, now the antitrust lawyer's answer to a franchisor or franchisee is less likely to produce a definite yes or definite no answer. That is because what a franchisor can do is now governed by (1) the federal rule of reason, which alone is inherently indefinite in that it relies on analysis of such factors as the "impact on competition in the relevant market" in order to determine the "reasonableness" of the restraint in question, and/or (2) state laws and enforcement practices that are yet to be developed in a post-*Leegin* world. Further, antitrust advising always is as much about determining the client's tolerance for legal risk as it is about pronouncing what will happen if a certain practice is followed. The common law and ever-evolving nature of antitrust law under the Sherman Act make it difficult to state with certainty whether a practice will be challenged or how a court would rule if a challenge were made.

Still, clients want and deserve answers, and there are some answers that can be given in the area of controlling resale prices:

Franchise agreements and disclosure documents must be honored. This advice has not been changed by *Leegin* or any of the cases that preceded that decision.

If the control exercised by the franchisor will keep the franchisee's prices down, that is safe. Fundamentally, antitrust law is designed and enforced to protect consumer welfare by promoting competition. Practices that directly produce lower consumer prices or increase competition that likely will result in driving down prices are very rarely challenged or found to violate any antitrust law, state or federal.[1]

Strong proof that the franchisor's price control will actually promote competition (even through a requirement to maintain pricing at or above a certain level) will suffice under federal law, which should be followed in most states. This is the hard part. Under federal law, the legality of a franchisor's practices should be established through a showing that the viability of the franchisees themselves will be enhanced by keeping prices up. The best time to try to make this showing of procompetitiveness is when the health of the franchise system depends on the profitability of its franchisees and when that profitability only can be accomplished if all franchisees maintain a decent gross margin on the sale of products. This can be shown, in turn, when the products sold by the system are best sold by full-service outlets that provide presale selection of inventory, well-trained sales staff to demonstrate product features, investment in marketing and promotion, attractive facilities at good locations, showrooms or displays that will enhance the sale of the products, and adequate open hours for consumer convenience. These are all positive elements that enhance the consumer's experience and may be necessary for the franchise system as a whole to survive as a competitor in the marketplace. When these procompetitive enhancements could be lost or undercut if retail units cannot survive or cannot provide the items due to low profitability, the franchisor should be able to justify its actions to maintain retail prices at or above a certain level. Other factors that can help the franchisor justify its pricing controls are present when the system relies on providing services after the sale of its products or when the products or services sold by the system are marketed as high-end or luxury products or services such that a quality image is more important than price.

products"—facially implausible.[31] The court held that it was "just as obvious that other product lines of women's accessories made by other manufacturers are reasonably interchangeable substitutes for Brighton-brands."[32] Finally, the court held that plaintiffs failed to establish any anticompetitive effects resulting from Leegin's resale pricing policy because higher prices alone, absent a further showing of anticompetitive conduct, are insufficient evidence of anticompetitive effect in the resale price maintenance context.[33]

The decisions in *PSKS v. Leegin* and *Spahr v. Leegin Creative Leather Products, Inc.* highlight two significant hurdles for plaintiffs asserting minimum resale pricing antitrust violations post-*Leegin*. The first hurdle is that most courts do not view dual distribution as presenting a horizontal relationship subject to per se treatment. The second is the strenuous relevant market pleading requirement under the rule of reason and the inability of plaintiffs successfully to plead a one-brand product market.

Policies and Practices After *Leegin*

Although one commentator wrote early on that "the U.S. Supreme Court has invited businesses to reconsider their distribution policies,"[34] many companies have done little more than just "reconsidering," if even that. Some commentators warn of the remaining risks, as discussed above, and sometimes list a choice like "maintain the status quo" as the first option even

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If the proposed practice would increase pricing and the particular state in which the price control would be effective is likely to disregard* Leegin*, the legal risk is much greater. When this question comes up, the up-to-date legal developments in the state in question should be reviewed. As discussed elsewhere in this article, those state-specific developments are likely to occur with increasing frequency as the various states continue to react to the political, economic, legal, and enforcement issues involved in deciding not to follow federal law.

Control of advertising is even less risky than control of selling prices. Many franchisors ask their lawyers whether they can dictate the prices at which franchisees advertise their products as opposed to setting the actual prices at which products are sold to the public. Even in the pre-*Leegin* time frame, some franchisors and other companies maintained minimum advertised price (MAP) policies. MAP policies imposed unilaterally by a franchisor generally were allowed and still are allowed if the franchisee retains freedom to set its prices and the advertising restrictions are justified as enhancing competition against other brands.

Go about it the right way. Any franchisor considering whether to control franchisee pricing should ask itself whether it is prepared to do so with the proper documentation, transparency, consistency, and fairness. Pricing controls should not be reactive, ad hoc, or sporadic. They should not be accomplished through an unwritten policy, especially if the policy did not even exist until a particular problem situation arose. And, as with almost any practice, the best way to avoid legal claims is to treat all franchisees equitably in implementing and enforcing the policy.

Manufacturers

Manufacturers that distribute their products through dealers, as opposed to business format franchise systems, also have options for controlling resale prices. This was the context in which the *Leegin* case itself arose, and it provides the setting for most resale price maintenance law. The most common situations in which manufacturers like Leegin or Ping desire to establish minimum pricing is when their products are designed to be high-quality products sold through full-service dealers that maintain trained staffs, keep large inventories, and operate in relatively expensive real estate. In these situations, often the competition within the brand comes in the form of Internet sellers who free ride on the efforts and investments of brick-and-mortar dealers.

A manufacturing company that does not have a no-discounting resale policy certainly should consider whether that would be helpful and procompetitive in its industry. If so, one option would be to adopt a policy under which the manufacturer unilaterally announces in advance that it will not sell to discounters. Such *Colgate* policies have been avoided by some because of the risk that the policy would be wrongly implemented or enforced and would inadvertently create an illegal agreement in restraint of trade. That concern is reduced today. Another option would be to go boldly to a *Leegin* policy by which the manufacturer asks dealers to commit to resell only at the prices set by the manufacturer.

The other type of program that some manufacturers have used for years has been enforcement of a MAP policy. Under a MAP program, the manufacturer does not control the resale price but only the price at which the product can be advertised. MAP policies can be the best bet to control rampant reselling at rock-bottom prices over the Internet by free-riding entities that provide little or no presale support or postsale service. A variation is through cooperative advertising programs under which the manufacturer will reimburse only for ads that promote the manufacturer's suggested resale price. It follows from *Leegin* that MAP and cooperative advertising controls that were previously deemed sufficiently safe would be even safer now.

Endnote

1. The exception is predatory below-cost pricing that is designed to drive competitors out of business, after which the seller could recoup its losses by charging monopoly prices. That is almost never the situation and is seldom even possible.

for companies that are reconsidering their policies. Perhaps it is simply because change is difficult and can come slowly that most companies have been reluctant to implement new policies and procedures to date.

Case Law Update

The lower federal courts that have had reason to apply the *Leegin* decision have treated it as a turning point with respect to minimum resale price maintenance and have analyzed such claims using the rule of reason. Additionally, lower federal courts have not confined the holding in *Leegin* to matters involving challenged vertical price restraints but have also considered *Leegin* in the context of alleged horizontal agreements.

Leegin most recently was addressed by the Fourth Circuit in *Valuepest v. Bayer*.[35] Defendants in *Valuepest* sold through what they called agency relationships: written agreements provided that the distributors/agents merely facilitated sales to the ultimate purchasers.[36] The agreements specified that defendants retained title to the product until it was sold to an end user.[37] The resale price maintenance claim arose out of the further contractual right of manufacturer defendants to set the price at which the product was sold to the end users.[38] Valuepest, which was one of the end users, filed a class action lawsuit alleging vertical price fixing by the manufacturers.[39] The U.S. District Court for the Western District of North Carolina initially did not rule on the parties' summary judgment motions because of the pending

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Supreme Court appeal in *Leegin*.[40] Two weeks after the *Leegin* decision was issued, the district court granted defendants' motions for summary judgment, holding that their contracts with distributors represented genuine agency relationships that did not support liability under § 1 of the Sherman Act.[41]

On appeal to the Fourth Circuit in *Valuepest*, plaintiffs argued that *Leegin* implicitly overruled the agency defense established eight decades ago in *United States v. General Electric Co.*[42] In *General Electric*, the Supreme Court had held that a manufacturer may lawfully set minimum prices for its products when there is a genuine principal-agent relationship between the manufacturer and its distributors and that such relationships existed here. The agency defense is premised on the requirement that a plaintiff prove concerted action between at least two legally distinct entities to support a claim under § 1 of the Sherman Act. In upholding summary judgment for defendants, the Fourth Circuit held that "*Leegin* did not eliminate the agency defense to a claim of resale price maintenance."[43]

Earlier, in *Trane U.S. Inc. v. Meehan*, the U.S. District Court for the Northern District of Ohio dismissed federal antitrust counterclaims brought by a heating and cooling systems dealer against its supplier.[44] The events giving rise to the suit began when Trane audited its dealer, Toledo Trane, and discovered significant noncompliance with the company's manual of policies and procedures (MOPP).[45] The MOPP largely affected bundled sales, which are sales of products that combine Trane and non-Trane components.[46] Specifically, the MOPP required that all Trane dealers report sales of non-Trane products to Trane and pay Trane a percentage of those sales; and, through a complicated incentive structure, it set minimums on the sale price of all Trane products and maximums on a Trane dealer's sale price of all non-Trane products. Trane terminated Toledo Trane's dealership and filed suit seeking damages for fraud.[47] Toledo Trane counterclaimed that the MOPP violated federal antitrust law.[48] Toledo Trane contended, among other things, that through the MOPP Trane engaged in illegal resale price maintenance designed to maximize Trane's return on bundled sales.[49]

The district court cited *Leegin* for the proposition that minimum resale price maintenance programs are analyzed under the rule of reason and dismissed Toledo Trane's minimum resale pricing claim. The dismissal was based not on failure to plead a plausible relevant market but on Toledo Trane's failure to make the requisite showing of resale (the fourth element of a resale price maintenance claim) because Toledo conceded that with regard to bundled sales, Trane, not Toledo Trane, billed the customer.[50] With little analysis, the court found in dicta that Toledo Trane had sufficiently pleaded its resale price maintenance claim regarding non-Trane ancillary products in bundled sales, but the court ultimately dismissed this claim for failure to bring it within the applicable statute of limitations period.[51]

In *Jacobs v. Tempur-Pedic International, Inc.*, plaintiffs filed suit against a mattress manufacturer on behalf of a putative class of consumers, alleging that Tempur-Pedic's minimum resale price agreements with distributors artificially inflated the prices of Tempur-Pedic's mattresses and, thus, violated the Sherman Act.[52] In granting Tempur-Pedic's motion to dismiss based on plaintiffs' failure to plead sufficient facts showing an anticompetitive effect in the relevant market, the district court relied on *Leegin* in holding that minimum resale price agreements are to be reviewed under the rule of reason.[53]

In *Alaska Rent-A-Car, Inc. v. Cendant Corp.*, plaintiff licensee sued the owner of the Avis and Budget Rent A Car franchise systems, alleging, among other things, violation of the Sherman Act by control over minimum licensee pricing through a corporate account program.[54] In granting summary judgment for defendant, the district court held that nothing in the record supported plaintiff's assertion that defendant's national account program constituted minimum resale price setting, and the court added that *Leegin* abolished per se treatment of minimum resale price maintenance in any event.[55]

Finally, in *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, plaintiff insurance agency alleged that defendants were part of an agreement on the amount of commissions to be paid in connection with the sale of health insurance and the price to be charged to the consumer.[56] Although the district court held that the record did not support a finding of minimum resale price maintenance, it noted that *Leegin* established that the appropriate standard to judge vertical price restraints is the rule of reason.[57]

Other lower federal courts have considered *Leegin* in other contexts, including to reiterate the per se standard in the context of horizontal agreements.[58] A few additional post-*Leegin* resale price maintenance cases are worth noting because the courts did not rest their rule of reason analysis solely on proof, or lack thereof, of market power and evidence of anticompetitive effects but also closely weighed several additional factors. Although the results vary, these cases raise the question of whether traditional rule of reason factors may not be dispositive in a rule of reason resale price maintenance case.

In *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*,[59] the Third Circuit reversed the lower court's judgment as a matter of law in favor of a truck manufacturer on a dealer's claims that other dealers had conspired among each other and with the manufacturer through a minimum resale price maintenance program in violation of § 1 of the Sherman Act. Mack Trucks manufactures a variety of heavy-duty trucks that it distributes and services primarily through a nationwide network of authorized dealers, each of which is assigned a nonexclusive area of responsibility (AOR).[60] Until its termination, Toledo was an authorized Mack Truck dealer with an AOR in the Toledo area.[61] An important part of each Mack Truck dealer's price offering to customers is a transaction-specific discount known as sales assistance.[62] The amount of sales assistance that Mack Trucks offers a dealer on a particular transaction varies based on multiple factors.[63] Potential customers often solicit bids from multiple Mack dealers as well as non-Mack Truck dealers.[64] Until Mack Trucks terminated Toledo's status as an authorized dealer, Toledo aggressively pursued a low-price sales strategy throughout the country, competing on prices against other Mack Truck dealers for sales in other dealers' AORs.[65] After its termination, Toledo sued Mack Trucks, alleging in part that Mack Truck dealers horizontally colluded by entering into gentlemen's agreements not to compete with each other on price and that Mack Trucks vertically colluded with its dealers by entering into agreements

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that it would delay or deny sales assistance to any dealer that sought to make an out-of-AOR sale, thus violating the Sherman Act by preventing Mack Truck dealers from competing with one another.[66] At the close of evidence at trial, the district court granted judgment as a matter of law in favor of Mack Trucks on Toledo's Sherman Act claim, finding that the evidence provided by Toledo was insufficient to go to a jury.[67]

The Third Circuit reversed, finding that Toledo had offered sufficient evidence of a horizontal agreement among the Mack Truck dealers to create a question of fact for the jury. With respect to the vertical collusion claim, the Third Circuit found that Toledo had presented sufficient evidence that the pricing program was initiated at the request of the dealers, which, pursuant to the analysis in *Leegin*, supported a claim that the program was in fact being used to support a dealer cartel. Although the Third Circuit analyzed traditional rule of reason factors such as market power, it is unclear whether the court's decision to uphold Toledo's Sherman Act claim was based on these factors or on the evidence that Mack Trucks' resale pricing program was being used to support a dealer cartel, a per se violation.

In *Babyage.com, Inc. v. Toys "R" Us, Inc.*, a group of retailers and consumers brought suit against retailer Toys "R" Us and various baby product manufacturers, alleging that the manufacturers' minimum pricing policies caused consumers to pay more for baby products than they otherwise would have and that such policies harmed competition among retailers of the baby products.[68] Plaintiffs claimed that Toys "R" Us used its dominant position in the market to coerce manufacturers into forcing resale price maintenance arrangements on retailers in violation of the Sherman Act.[69] The court ultimately upheld plaintiffs' claims under a rule of reason analysis, holding that plaintiffs had sufficiently pleaded both relevant market and harm to competition. The court also carefully scrutinized defendants' resale price maintenance scheme in light of the Supreme Court's observation in *Leegin* that a resale price maintenance scheme instigated at the request of a "dominant retailer" should be treated as suspect.[70]

Finally, in *Lotus Business Group, LLC v. Flying J, Inc.*, Lotus, a competitor of Flying J, claimed that Flying J was setting motor fuel prices too low, in violation of a state minimum pricing law.[71] The court granted Flying J's motion for summary judgment on the basis that Wisconsin's minimum markup statute requiring gasoline retailers to impose a minimum 9.18 percent markup over the average posted terminal price violated the Sherman Act because it "fix[ed] resale prices industrywide, and mandatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition because it prevents manufacturers and wholesalers from allowing or requiring retail price competition." The court noted that *Leegin* mandates that "resale price maintenance should be subject to more careful scrutiny . . . if many competing manufacturers adopt the practice."[72] The court held that the statute violated § 1 of the Sherman Act under both per se and rule of reason analysis, noting that "a horizontal cartel among competing manufacturers or competing retailers that decrease[d] or reduce[d] competition in order to increase price is, and ought to be, per se unlawful" under *Leegin*.[73]

In addition to the federal courts, the FTC also appears to have embraced the holding in *Leegin* that minimum resale price restraints must be analyzed under the rule of reason. There is evidence, however, that even the FTC may be inclined to scrutinize resale price maintenance under a stricter rule of reason review given the inherently suspect nature of price maintenance agreements.[74] Four months after the Supreme Court's *Leegin* decision, Nine West Footwear Corp. petitioned the FTC to reopen and modify a 2000 consent decree that barred Nine West from "fixing, controlling, or maintaining the resale price" for ten years.[75] The decree was entered into after the FTC and the attorneys general from every state filed unlawful resale price maintenance claims against Nine West. At the time, seven years prior to *Leegin*, price controls were per se unlawful. As part of Nine West's modification petition process, the FTC sought public input and received comments on behalf of twenty-seven attorneys general opposing Nine West's petition. Although the FTC ultimately agreed to modify the consent decree, it noted its willingness to apply closer scrutiny to resale price maintenance. Specifically, the FTC noted that it might be appropriate to classify resale price maintenance as inherently suspect and treated to a truncated rule of reason review that would require defendant to "either identify some reason the restraint is unlikely to harm consumers, or identify some competitive benefit that plausibly offsets the apparent or anticipated harm."[76]

Although the federal courts and the FTC are bound by *Leegin*'s rule of reason approach to analyzing minimum resale pricing policies and appear to be following it, some states that are not bound by the decision when applying their own antitrust statutes appear to be reluctant to follow *Leegin*. This reluctance is evidenced by the complaint brought by the attorneys general of New York, Illinois, and Michigan against Herman Miller, Inc. in March 2008, as discussed in the next section.

State Actions After *Leegin*

To date, there appear to be no published state court decisions addressing *Leegin*. There are methods, however, of predicting whether individual states will continue to follow the per se treatment of minimum resale price maintenance as established by *Dr. Miles* or whether they will adopt *Leegin*'s case-by-case rule of reason analysis.[77] At the outset, we know that 37 states argued as amici in *Leegin* to retain the *Dr. Miles* rule.[78] Like the repealer statutes passed in many states after *Illinois Brick Co. v. Illinois*[79] case to allow antitrust claims by indirect purchasers, states could, of course, legislate a repeal of *Leegin*, statutorily preserving per se treatment of minimum resale price agreements. On April 27, 2009, a bill was passed in Maryland that does precisely that.[80] Of more immediate import is that state courts can simply refuse to follow *Leegin*.[81] It has been suggested that the likelihood of this happening in any given state would depend upon several factors: amicus participation in *Leegin*, state court precedent on resale price maintenance, the language of a state's antitrust statute, and the degree of deference that a state accords federal antitrust precedent.[82]

We also know that state enforcement officials and legislators, with some of their constituents in mind, will continue to react strongly against any practice that restricts price discounting by

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retailers. One top antitrust enforcer stated at an ABA Antitrust Section seminar in 2008 that *Leegin* is "not a get out of jail free card" for companies that want to control the pricing of others.[83] At the same conference the following year, in March 2009, the head of the multistate antitrust enforcement group echoed those comments and added that he thinks resale price maintenance is nothing more than an illegal agreement between two companies that could raise prices that consumers pay.[84] And, as mentioned above, in states such as Maryland, bills have been introduced to modify state antitrust laws to prohibit resale price maintenance.

Within a year following *Leegin*, an announcement was made that three states had obtained a consent decree and $750,000 settlement based on a resale price maintenance investigation that had been ongoing prior to and since the *Leegin* ruling. On March 21, 2008, simultaneously with the announcement that they had settled the case through a consent decree, the attorneys general of New York, Illinois, and Michigan filed suit in New York under the Sherman Act and various state laws against Herman Miller, Inc. for alleged resale price maintenance violations.[85] The complaint alleged that Herman Miller, the manufacturer of the Aeron high-end office chair, implemented a minimum price policy in response to brick-and-mortar retailers' complaints that their margins were being eroded by Internet retailers' discounting.[86] Pursuant to Herman Miller's suggested retail policy (SRP), retailers would either be terminated or suspended for one year if they advertised Aeron chairs below the SRP.[87] The complaint further alleged that Herman Miller's SRP "unlawfully stabilize[d] and artificially raise[d] retail prices and retail levels" through "an illegal resale price maintenance scheme[.]"[88]

The complaint against Herman Miller was interestingly devoid of facts relating to market definition, market share, market power, and anticompetitive impact on the market. Because the lawsuit was not filed until the settlement was reached, perhaps the states did not think they needed to bother to plead a rule of reason case in order to survive a motion to dismiss as the case was literally over before it started. The lack of such pleading, however, more likely reflects the hostility of the states to *Leegin*, suggesting once again that the state enforcers will pursue a per se violation without regard to *Leegin*'s rule of reason holding. That clearly indicates the states' position on the legality of minimum resale pricing policies.[89] Specifically, Herman Miller is prohibited from "enter[ing] into any Agreement with any Dealer to fix, raise, peg, maintain, or stabilize the Resale Price at which HMH Furniture is advertised, promoted, offered for sale, or sold to end-user consumers."[90] In addition, the decree required Herman Miller to "notify Dealers that it is their right to determine independently the prices at which they will advertise and sell HMH Furniture to end-user consumers" by affixing a notice[91] of disclosure to every list of manufacturer's SRP for any HMH Furniture. The case is a cautionary reminder that per se risks remain under state law. Understandably, the states remain the primary source of worry for franchisors that are considering taking steps to control pricing of franchisees.

Federal Legislation and Agency Enforcement

President Obama has made clear that he intends to reinvigorate antitrust enforcement, particularly in the area of mergers and acquisitions in specific industries, such as the health care, insurance, media, energy, and pharmaceutical industries. In addition, the recent economic meltdown has created an outcry for more corporate regulation. Whether the appetite for increased regulation, coupled with an administration that appears to be open to more active antitrust enforcement, will manifest itself in support for a legislative effort to overturn *Leegin* remains to be seen. Jon Leibowitz, the newly appointed chair of the FTC, recently stated publicly that he favors per se treatment for resale price maintenance and that he would support congressional attempts to repeal the *Leegin* decision.[92]

Even before the 2008 elections, national politicians were among those who took notice of the *Leegin* decision, as could be expected with a high-profile Supreme Court decision. Senator Kohl and then Senators Biden and Clinton introduced a bill in the Senate to overturn the essential holding of *Leegin* on October 30, 2007.[93] If passed, Senate Bill 2261 would have added the following to § 1 of the Sherman Act: "Any contract, combination, conspiracy, or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act." In other words, per se illegality would be reinstated by statute. Kohl's remarks accompanying the proposed bill drew upon his family's experience in the moderately priced retail sales business (i.e., Kohl's Department Stores) and demonstrated his commitment to protecting the freedom of dealers to set their own (discount) prices. "Allowing manufacturers to set minimum retail prices will threaten the very existence of discounting and discount stores, and lead to higher prices for consumers," Kohl proclaimed in introducing the bill. Senate Bill 2261 was not immediately passed, and no counterpart bill has been introduced in the House of Representatives. In late March 2009, however, Senate hearings were scheduled on the bill. With the general support of the Obama administration, and particularly in light of FTC Chair Leibowitz's recent comment that he favors the legislation, it is increasingly likely that such a bill will be passed.

On April 2, 2009, the Senate confirmed President Obama's appointment of Christine A. Varney, a former FTC commissioner, as head of the Antitrust Division of the Department of Justice. Under Varney, vertical pricing and other agreements may receive renewed DOJ focus. During Varney's tenure with the FTC, she pushed enforcement against vertical restraints. In a speech before the American Bar Association in 1996, Varney discussed resale price maintenance cases and noted that "our enforcement agenda today is that resale price maintenance agreements are unlawful per se and the Commission will enforce the law in this area."[94] During her time at the FTC, Varney joined in several important resale price maintenance challenges, including an FTC case against American Cyanamid, in which Varney joined the majority in inferring the existence of a per se illegal agreement despite the fact that defendants had never announced resale prices nor sought a commitment from distributors to sell at or above a certain price level.[95] Also, in a case against Reebok, Varney joined the commission in condemning a resale pricing policy, enjoining Reebok from using structured terminations to effect price control even though such terminations "fall[] into the 'gray' area of RPM [(resale price maintenance)] jurisprudence."[96] Given

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Varney's prior position on resale price maintenance cases, DOJ under her leadership may test the boundaries of *Leegin* through challenges to vertical price restraints.

Foreign Laws

Foreign antitrust laws also increasingly come into play when companies sell outside the United States. The European Union does not have the concept of per se versus rule of reason antitrust analysis, but resale price maintenance is generally considered to be unlawful. Canadian law also is regarded as being quite strict and criminal prosecution is allowed.

Conclusion

The prevailaing reactions to *Leegin* appear to be cautious. Although inertia also may be playing a role, it appears that franchisors and other companies do not want to control resale prices badly enough to risk being the test case for the states or to create friction within their franchise systems. Unless Congress repeals *Leegin*, however, it is expected that the impact of the *Leegin* switch to rule of reason analysis will grow as more time goes by and companies become bolder. As reflected by the impassioned dissent in *Leegin* itself, the Supreme Court's decision was meant to be significant.

Endnotes

1. 551 U.S. 877, 127 S. Ct. 2705 (2007).

2. *Id.* at 2710.

3. A. Cantor & K.L. Brumbaugh, Controlling Franchise Pricing After *Leegin*, ABA 31st Annual Forum on Franchising 26–32 (2008).

4. In the *Leegin* case itself, the president of Leegin Creative Leather Products also has an interest in approximately seventy stores that sell the Brighton products manufactured and distributed by Leegin. *Leegin*, 127 S. Ct. at 2710.

5. *See* Dr. Miles Med. Co. v. John D. Park & Sons, 220 U.S. 373 (1911).

6. *See* PSKS, Inc. v. Leegin Creative Leather Prods., No. 04-41243, 2005 U.S. App. LEXIS 6879 (5th Cir. Mar. 20, 2006).

7. Justice Kennedy delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Breyer filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined.

8. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 2716 (2007).

9. *Id.*

10. *Id.* at 2710.

11. United States v. Colgate & Co., 250 U.S. 300 (1919). Under *Colgate*, there was no antitrust violation unless there was an agreement between the supplier and its reseller, and the mere suggestion of a resale price was not an agreement for antitrust purposes. The practice of dealing only with those that honor the suggested retail prices later became known as establishing a *Colgate* policy.

12. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

13. 433 U.S. 36 (1977).

14. State Oil v. Kahn, 522 U.S. 3 (1997).

15. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 2717 (2007).

16. *Id.* at 2709.

17. *Id.* at 2720.

18. "From a legal perspective, the *Leegin* decision is huge: going forward, a practice that, for almost a century, was treated as per se illegal now will be analyzed under the rule of reason. *Leegin* will join *Sylvania* and *Brooke Group* as landmark legal decisions that have transformed the antitrust landscape." Timothy Daniel, *Assessing the Competitive Impact of Resale Price Maintenance: Practical Implications of the Supreme Court's Decision in* Leegin, NERA Econ. Consulting Antitrust Insights, Apr.–June 2007.

19. *Leegin*, 127 S. Ct. at 2737.

20. Stephen Labaton, *Century-Old Ban Lifted on Minimum Retail Pricing*, N.Y. Times, June 29, 2007, *available at* http://www.nytimes.com/2007/06/29/washington/29bizcourt.html.

21. "Harmful agreements can still be policed," and the ruling represents "a victory for sound economic analysis." Tony Mauro, *Supreme Court Overturns* Dr. Miles *Antitrust Precedent*, Legal Times, June 28, 2007, *available at* www.law.com (June 28, 2007) (quoting Alan Meese, William & Mary law professor).

22. Jay L. Himes, *New York's Prohibition on Vertical Price-Fixing*, N.Y.L.J., Jan. 29, 2008; Press Release, American Antitrust Institute, American Antitrust Institute Criticizes Supreme Court Decision Reversing Ban on Resale Price Maintenance (June 28, 2007), *available at* www.antitrustinstitute.org/archives/files/AAI_Leegin_press%20release_062820071412.pdf.

23. "Despite what others may report, this ruling does not legalize resale price maintenance. It merely puts the practice on par with other acceptable restraints that some manufacturers may impose on dealers." *Id.* (quoting Quentin Reigel, Nat'l Ass'n of Mfrs. vice president for litigation).

24. *See, e.g.*, David A. Balto & Eric L. Yaffe, *Minimum Resale Pricing Policies in the Wake of* Leegin v. Creative Leather, Franchise Law., Sept. 2007, at 1.

25. Tying is the practice of a seller requiring its buyer to purchase a second, unwanted product in order to be allowed to buy the product that the purchaser does want to buy. Application of the per se rule to make these arrangements illegal has not been expressly overruled by the Supreme Court, although it is possible such a decision will follow if the appropriate case is presented to the Court at this time.

26. Joseph Pereira, *Discounters, Monitors Face Battles on Minimum Pricing*, Wall St. J., Dec. 4, 2008, at 1, *available at* http://online.wsj.com/article/SB122835660256478297.html.

27. In *Leegin*, the Supreme Court noted that vertical price restraints also "might be used to organize cartels at the retailer level." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 2716 (2007) (citing Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 725–26 (1988)). In that situation, the Court noted that a "group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance." *Id.* Such a horizontal cartel among "competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful." *Id.*

28. Spahr v. Leegin Creative Leather Prods., Inc., No. 07-00187, 2008 U.S. Dist. LEXIS (E.D. Tenn. Aug. 20, 2008).

29. *Id.* at *21.

30. *Id.*

31. *Id.* at *34–35.

32. *Id.* at *26.

33. *Id.* at *38.

34. Michael A. Lindsay, *Resale Price Maintenance and the World After* Leegin, 22:1 Antitrust 22 (2007).

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35. Valuepest v. Bayer Corp., Case No. 07-1760, 2009 U.S. App. LEXIS 6111 (4th Cir. Mar. 24, 2009).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at *7.

41. *Id.*

42. 272 U.S. 476 (1926).

43. Valuepest v. Bayer Corp., Case No. 07-1760, 2009 U.S. App. LEXIS 6111 at *2–3 (4th Cir. Mar. 24, 2009).

44. 563 F. Supp. 2d 743 (N.D. Ohio 2008).

45. *Id.* at 747.

46. *Id.* at 746–47.

47. *Id.* at 747.

48. *Id.* at 745.

49. *Id.* at 749.

50. *Id.* at 751.

51. *Id.* at 752.

52. No. 4:07-CV-02, 2007 WL 4373980, at *1 (N.D. Ga. Dec. 11, 2007).

53. *Id.*

54. No. 3:03-CV-00029, 2007 WL 2206784, at *25 (D. Alaska July 27, 2007).

55. *Id.* at *23 n.70.

56. No. 1:05cv519, 2007 WL 2156657, at *1 (S.D. Ohio July 25, 2007).

57. *Id.* at *5.

58. *See* Tokarz v. LOT Polish Airlines, No. 06-5574-cv, 2007 WL 4480701, at *2 (2d Cir. Dec. 21, 2007) (citing *Leegin* in connection with the argument that supplier's coerced refusal to deal could be "impermissible refusal to deal in aid of a horizontal conspiracy by the non-terminated agents"); Tunica Web Adver. v. Tunica Casino Operators Ass'n, Inc., 496 F.3d 403, 414–15 (5th Cir. 2007) (citing *Leegin* for justification of per se rule (i.e., manifestly anticompetitive effects and no redeeming virtue) and holding that per se treatment of group boycott can rest on proof other than targeting of rival); Champagne Metals v. Ken-Mac Metals, Inc., No. CIV-02-0528, 2007 WL 4115994, at *4 (W.D. Okla. July 27, 2007) (citing *Leegin* in connection with per se treatment of group boycott).

59. 530 F.3d 204 (3d Cir. 2008).

60. *Id.*

61. *Id.* at 210.

62. *Id.* at 209.

63. *Id.*

64. *Id.* at 210.

65. *Id.*

66. *Id.*

67. *Id.* at 208.

68. 558 F. Supp. 2d 575 (E.D. Pa. 2008).

69. *Id.* at 579.

70. *Id.* at 583 (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 2717, 2719–20 (2007)).

71. 532 F. Supp. 2d 1011 (E.D. Wis. 2007).

72. *Id.* at 1027 (quoting *Leegin*, 127 S. Ct. at 2719).

73. *Id.*

74. *See In re* Nine W. Group, Inc., 2008 FTC LEXIS 53, at *21 (May 6, 2008) [hereinafter FTC Order].

75. Fed. Trade Comm'n, Nine West Settles State and Federal Price Fixing Charges (Mar. 6, 2000), *at* www.ftc.gov/opa/2000/03/ninewest.shtm.

76. FTC Order, *supra* note 74, at *21–24 (citing Polygram Holdings, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 36 (D.C. Cir. 2005)).

77. For a thorough description of the state-law issues, *see* Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow* Leegin*?*, 27:3 Franchise L.J. 173 (2008).

78. 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.

79. 431 U.S. 720 (1977).

80. S.B. 239, Reg. Sess. 2009 (Md. Jan. 23, 2009).

81. Because *Leegin* did not hold minimum resale price maintenance (RPM) agreements per se legal, state and private enforcers might be expected to argue that contrary state laws are not preempted. Lindsay, *supra* note 34.

82. M. Russell Wofford Jr. & Kristen C. Limarzi, *The Reach of* Leegin*: Will the States Resuscitate* Dr. Miles*?*, Antitrust Source, Oct. 2007, *available at* www.antitrustsource.com. For an excellent overview of state RPM law, see Lindsay, *supra* note 34.

83. Lizabeth A. Leeds, Chief of Multistate Enforcement, Antitrust Div., Office of the Attorney Gen. of Florida, Remarks at the 56th Annual Antitrust Law Spring Meeting, ABA (Mar. 26, 2008).

84. Robert L. Hubbard, Assistant Attorney Gen., N.Y. State Dep't of Law, Remarks at the 57th Annual Antitrust Law Spring Meeting, ABA (Mar. 27, 2009).

85. New York v. Herman Miller, Inc., No. 08-CV-02977 (S.D.N.Y. Mar. 21, 2008).

86. Complaint ¶¶ 15–18.

87. Complaint ¶¶ 18–19.

88. Complaint ¶¶ 1–3.

89. Proposed Stipulated Final Judgment and Consent Decree (Mar. 21, 2008).

90. Decree, *supra* note 89, § IV, ¶ A.

91. The notice must state as follows: "RETAILERS ARE ALWAYS FREE, HOWEVER, TO ADVERTISE AND SELL HERMAN MILLER FOR THE HOME PRODUCTS AT WHATEVER PRICE YOU WANT." *Id.*, § IV, ¶ K.

92. Jon Leibowitz, Chairman, Fed. Trade Comm'n, Remarks at the 57th Annual Antitrust Law Spring Meeting, ABA (Mar. 27, 2009).

93. S.B. 2261 was introduced on October 30, 2007.

94. Christine Varney, Vertical Restraints Enforcement at the FTC, Remarks before the ALI-ABA Eleventh Annual Advanced Course on "Product Distribution and Marketing" (Jan. 16, 1996), *available at* www.ftc.gov/speeches/varney/varnmg.shtm.

95. Am. Cyanamid Co., 123 F.T.C. 1257 (1997).

96. Varney, *supra* note 94.

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