

## CLIENT ALERT

### Nine West Steps into Leegin's Shoes: FTC Modifies 2000 Consent Order

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Shoe seller Nine West Group Inc. has successfully petitioned the FTC to modify a 2000 consent order in which the company agreed not to undertake agreements with its retailers setting minimum resale prices. The case provides a significant guidepost for U.S. manufacturers who have been searching for direction on what resale price maintenance ("RPM") practices might be considered acceptable since the Supreme Court abandoned its strict prohibition of minimum RPM agreements in 2007's *Leegin Creative Leather Products vs. PSKS Inc.*

In 2000, with the *per se* ban on minimum resale price maintenance still well-recognized, the FTC sued Nine West for enforcing its minimum resale price program by securing agreement from its retailers not to sell below prescribed prices. In some cases, Nine West suspended sales to offending resellers, reinstating them only when the resellers agreed to abide by the pricing policy; in other cases, Nine West threatened to withhold discounts or other consideration if resellers ran afoul of the policies.

As part of its settlement in that litigation, Nine West agreed not to "secure or attempt to secure commitments or assurances from any dealer concerning resale prices." In addition, Nine West agreed that, for ten years, it would not notify dealers in advance that violations of its resale price policy would subject them to temporary or partial interruptions in supply.

After the Supreme Court in *Leegin* made clear that minimum resale price agreements would be evaluated under the more forgiving rule of reason legal standard, Nine West filed a petition to reopen and modify the consent order. Nine West argued that its minimum RPM practices were pro-competitive because 1) they contributed to Nine West's brand equity; 2) they prevented free-riding by discounting resellers; and 3) these practices would be generally available to Nine West's competitors.

Nine West's application was opposed by the American Antitrust Institute and a number of states' attorneys general, who supported a strict requirement that Nine West prove its pricing policy would be pro-competitive.

Ultimately, however, the FTC agreed in part with Nine West, providing important insights for other manufacturers facing the issue of what types of minimum RPM programs might pass muster post-*Leegin*. The FTC found that Nine West could provide two key types of evidence that its implementation of minimum RPM would not be anticompetitive: first, Nine West could show that it lacked market power, and second, that the impetus for its pricing program came, not from its retailers as a mechanism to reduce intra-brand competition, but from Nine West as a mechanism to promote the company's brand and increase its inter-brand competitiveness.

The FTC went on to find that Nine West enjoys "only a modest market share," and that "[t]here is also no evidence of a dominant, inefficient retailer in this market," allaying fears that minimum resale price maintenance was being used by such a retailer to facilitate a retail cartel. It thus modified the existing consent order, permitting Nine West to implement agreements with its retailers concerning minimum resale price, but required that Nine West report periodically to the FTC on its use of such agreements so that it can monitor the effects of Nine West's use of such agreements.

The FTC's action does not, however, address one key source of uncertainty for the future of minimum RPM: state enforcement. In 2000, Nine West also settled lawsuits over its minimum RPM practices with 56 attorneys general for various states, commonwealths and territories, and other public jurisdictions, paying \$34 million in damages. The agreement contained additional injunctive relief, requiring Nine West not to coerce adherence to its resale prices through 2005. The FTC action does not affect Nine West's obligations under its settlement with the states.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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