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Articles

VERTICAL PRICE AGREEMENTS IN THE WAKE OF LEEGIN V. PSKS: WHERE DO WE STAND NOW? [a1]

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I. Introductory Remarks

For nearly a century, agreements between retailers and suppliers stipulating a minimum retail price were considered per se violations of the Sherman Act. [1] Resale price maintenance ("RPM") agreements are contracts in which a manufacturer and a downstream distributor ("retailer") agree to a minimum or maximum retail price that consumers will pay. [2] Antitrust violations are viewed either under a rule of reason, where evidence of a defendant's conduct is admissible to explain away the conduct, or as per se illegal, where the government or plaintiff need only prove that the conduct existed for the defendant to be liable. [3]

Until 2007, the U.S. Supreme Court's nearly century-old opinion in Dr. Miles Medical Co. v. John D. Park & Sons Co. held RPM to be a ***230** per se violation [4] of the Sherman Act. [5] In a departure from its century-old legacy of analyzing vertical price restraints as per se illegal, the U.S. Supreme held in Leegin Creative Leather Products v. PSKS, Inc. that manufacturers may lawfully set specified retail prices. [6] While antitrust issues do not frequently generate widespread public interest, Leegin warrants particular attention because it transforms the entire nature of retail marketing and pricing nationwide.

PSKS argued for stare decisis, noting the reliance by courts, industry, and consumers on Dr. Miles and acknowledging that Congress had explicitly strayed over the decades from modifying the per se rule. [7] The company also suggested that lower courts may find it difficult to apply a rule of reason analysis. [8] Leegin Creative Leather Products, on the other hand, contended that the Court should consider the progress in economic research since Dr. Miles was decided and that most economists now support a rule of reason analysis to promote consumer welfare, increase interbrand competition, encourage new entry to the market, and overcome free riding. [9]

This article discusses the jurisprudence leading up to Leegin and the adoption of a rule of reason analysis. Further, it provides analysis on the manner in which the U.S. district and circuit courts have interpreted Leegin. This article explores the current state of RPM and thwarts the argument that the nation's federal courts are unable to handle rule of reason analysis in the RPM context.

We proceed as follows: Part II describes resale price maintenance and the progeny of Supreme Court cases relating to RPM. Part III provides the underlying facts in Leegin. Part IV presents the arguments of both parties. Part V discusses the Court's decision, beginning with the majority opinion and concluding with the dissent. Part VI discusses the current state of the law on vertical price agreements. Part VII offers thoughts for future research and concluding remarks.

II. Background to Resale Price Maintenance

Resale price maintenance ("RPM"), also known as a "restriction[ ] on distribution," is a contractual agreement between vertically related ***231** firms. [10] It is often described as "supplier control of the price at which merchandise is resold by the dealer." [11] For example, an upstream party, such as a manufacturer, may restrict the conduct of the downstream party, such as a distributor or retailer. [12] RPM can take the form of either subtle coercion imposed by a supplier on the downstream retailer, or an explicit contract in which a manufacturer sets the price at which the downstream party can resell merchandise. [13] The Supreme Court first confronted RPM nearly 100 years ago in Dr. Miles. [14]

A. Dr. Miles Medical Co.

Dr. Miles Medical Company ("Miles") manufactured and sold proprietary medicines that were prepared by way of secret formulas and that were identified by distinctive trademarks. [15] Miles had established significant business throughout the United States and abroad. [16] The company wholesaled medicines at or above set prices to jobbers and wholesale druggists, who in turn distributed them to retail druggists, who were advised of the price above which the merchandise was to be sold. [17] John D. Park & Sons, Co. ("Park") was a wholesaler of medicines and refused to enter into the required contract with Miles. [18] Instead, Park attempted to purchase Miles's medicines for sale at "cut prices" by inducing contracting wholesalers to sell at a discounted price. [19] Miles filed suit to enjoin Park from attempting to obtain a discount. [20]

The Dr. Miles Court focused on the legality of the contracts between Miles and the downstream distributors in which the retailers agreed to sell merchandise at prices set by Miles. [21] Writing over the dissent by Justice Holmes, Justice Hughes opined that the contracts were not valid. [22] The Court rejected Miles's contention that minimum resale ***232** prices were needed to prevent attrition of its dealer organization as a result of price discounting. [23] Acknowledging that restraints upon alienation were typically analyzed under a rule of reason, [24] the majority stated that "agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void." [25] Antitrust policy played a minor role in the majority's decision, [26] as the court ultimately based its opinion on the common law regarding restraints against alienation. [27] Notwithstanding the Court's orientation, Dr. Miles signified that resale price maintenance fell under the ambit of the Sherman Act as a per se violation. [28]

B. The Colgate Doctrine

Supreme Court decisions following Dr. Miles attempted to determine what type of conduct satisfied the concerted action requirement under the Sherman Act. Eight years after opining in Dr. Miles, the Supreme Court issued an exception to the per se rule in United States v. Colgate & Co. [29] Colgate & Company ("Colgate") manufactured soap and toiletry items, which were sold across the country. [30] The United States government alleged that Colgate had unlawfully engaged in a combination with retailers for the purpose of preventing discounting by forcing retailers to maintain specified prices. [31] However, the government never charged Colgate with entering into a contract with retailers to restrain trade or fix retail prices. [32] The salient facts merely provided that Colgate refused to sell to retailers who would not adhere to indicated prices. [33]

The Court examined the issue under the Sherman Act. [34] The Colgate majority held that "[i]n the absence of any purpose to create or maintain a monopoly, the [A]ct does not restrict the long recognized ***233** right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." [35] By extension, a manufacturer may announce in advance the circumstances under which the company will refuse to sell. [36] "'A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade."' [37] Colgate came to stand for the proposition that "a nonmonopolistic manufacturer [may] refuse to deal with retailers who do not comply with an announced resale price maintenance (RPM) policy under which a manufacturer sets the price at which retailers must sell its goods." [38]

C. The Progeny Following Colgate

Just a few years after carving out the Colgate exception, the Supreme Court again confronted antitrust concerns among manufacturers. In United States v. General Electric Co., the Court created an exception for consignment sales made through suppliers' "agents." [39] Between 1963 and 1977, the Court granted certiorari to a series of cases to determine whether the Dr. Miles per se rule should apply to nonprice restraints, such as territorial divisions. [40] The Court yielded three different answers: [41] maybe, [42] yes, [43] and no. [44] The last answer provided "a ***234** new dimension to the growing confusion over vertical restraints law" as the Court's rationales for failing to apply the per se rule to nonprice restraints were "virtually identical" to those it rejected for applying a rule of reason analysis to price restraints. [45]

In 1984, the Court once again reexamined nonprice vertical restraints in Monsanto Co. v. Spray-Rite Service Corp. [46] In spite of a divide among the circuits [47] and an invitation by the Justice Department to overturn the per se rule against vertical price restraints, [48] the Monsanto Court continued to honor the precedent established in Dr. Miles. [49]

Monsanto terminated a discount distributor after implementing new criteria for awarding distributorships [50] and after other distributors had complained about the terminated distributor's resale prices. [51] The Court held that the correct standard for determining whether a Sherman Act violation occurred was whether direct or circumstantial evidence existed that "reasonably tend[ed] to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." [52] Citing Dr. Miles, the Court distinguished price and nonprice restrictions, noting that the former are per se illegal, while the latter are judged under the rule of reason. [53]

Four years after changing the standard in Monsanto, the Supreme Court reexamined vertical price restraints in Business Electronics Corp. v. Sharp Electronics Corp. [54] An electronics retailer filed suit against a manufacturer under the Sherman Act, alleging a conspiracy to terminate ***235** the retailer for discounting products below the prices charged by neighboring retail vendors. [55] Grounding its rationale on the GTE Sylvania doctrine, the Sharp Court held for a presumption in favor of a rule of reason analysis in matters involving vertical restraints [56] and found such practices to be per se illegal only where they include some agreement as to price. [57] Taken together, "Monsanto and Sharp permit a finding that a manufacturer's announced policy of refusing to deal with discounters, terminations of discounters, and complaints by retailers to the manufacturer about discounters are not sufficient evidence from which to infer a price fixing agreement." [58]

III. Leegin Creative Leather Products v. PSKS, Inc. [59]

A. Background Facts

Leegin Creative Leather Products, Inc. ("Leegin"), a creator and distributor of leather goods, sold belts under the brand name Brighton. [60] "The Brighton brand [soon] expanded into a variety of women's fashion accessories." [61] PSKS, Inc. ("PSKS") operated Kay's Kloset, a women's apparel store that purchased Brighton products. [62] At one point, Brighton sales accounted for forty to fifty percent of Kay's Kloset's profits. [63] "[B]y 1999, Brighton was PSKS' best-selling and most profitable line." [64]

Brighton products were sold across the United States in over 5,000 retail establishments, mostly in small boutiques and specialty stores. [65] ***236** To distinguish itself from competitors, Leegin sold its goods primarily through smaller retailers. [66] The company claimed that boutique retailers generally treated customers better, provided greater quality customer service, and made the experience more satisfactory compared to shopping in large, chain stores. [67]

In 1997, Leegin instituted the "Brighton Retail Pricing and Promotion Policy" under which the company "refused to sell to retailers that discounted Brighton goods below suggested prices." [68] Leegin claimed that the policy provided retailers with the margins required to maintain high customer service and eradicated the growing use of discounting that "harmed Brighton's brand image and reputation." [69] The following year, Leegin introduced the "Heart Store Program," a marketing strategy under which a retailer agreed to "follow the Brighton Suggested Pricing Policy at all times." [70]

"In December 2002, Leegin discovered Kay's Kloset had been marking down Brighton's entire line by [twenty] percent . . . to compete with nearby retailers who also were undercutting Leegin's suggested prices." [71] After learning of PSKS's pricing, "Leegin suspended all shipments of Brighton products to PSKS." [72] Kay's Kloset's revenues fell considerably with the loss of the Brighton brand. [73] An antitrust action soon followed. [74]

B. Procedure Below

PSKS sued Leegin in the United States District Court for the Eastern District of Texas under § 1 of the Sherman Antitrust Act, claiming that Leegin "entered into illegal agreements with retailers to fix Brighton products' prices and terminated PSKS as a result of those agreements." [75] PSKS alleged that Leegin "had violated the antitrust laws by entering into agreements with retailers to charge [retail] prices fixed by Leegin." [76] Leegin attempted to utilize Professor Kenneth Elzinga of the University of Virginia as an expert witness to describe the procompetitive ***237** effects of its pricing policy. [77] The district court excluded the testimony, relying on the per se rule of Dr. Miles. [78] In a jury trial, PSKS argued that Leegin and its retailers had agreed to fix prices. [79] Over Leegin's argument that its pricing policy fell within the Colgate exception, [80] the jury agreed with PSKS and awarded it a judgment of $1.2 million. [81] The district court trebled the damages and added attorney's fees, resulting in judgment against Leegin in the amount of $3,975,000.80. [82]

Leegin appealed to the United States Court of Appeals for the Fifth Circuit, challenging the application of the per se rule to resale price maintenance and instead arguing for the application of the rule of reason. [83] The Fifth Circuit rejected Leegin's argument and affirmed the district court's exclusion of Elzinga's testimony because "the per se rule rendered irrelevant any procompetitive justifications for Leegin's pricing policy." [84] The Supreme Court "granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as per se unlawful." [85]

IV. Two Sides of a Coin: Arguments by the Parties

A. Leegin's Argument

Leegin framed the issue before the Court as whether vertical minimum resale price maintenance should be held per se illegal or evaluated under the rule of reason. [86] The company contended that while the per se rule was premised on an "antiquated common-law rule against 'restraints on alienation,"' it "squarely conflict[ed] with . . . modern economic understanding" that resale price agreements have procompetitive effects. [87] The prevailing view among economists that the per se rule of ***238** Dr.

Miles should be overturned was underscored by the amicus curiae brief submitted on behalf of over two dozen distinguished economists, who urged the Court to review RPM under the rule of reason. [88]

To further support extending the rule of reason to RPM, Leegin raised the issue of interbrand competition, which is the "primary concern of antitrust law." [89] It noted the Court's prior opinion that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." [90] Leegin argued that its marketing strategy fostered interbrand competition by requiring stores to provide a high degree of customer service and an attractive presentation, which forces manufacturers to compete on more than mere price. [91] As a result of the increased competition, companies must continuously innovate and improve products, thereby benefiting consumers.

According to Leegin, manufacturers can utilize RPM to enhance interbrand competition through advertising and improved retail services. ***239** [92] For example, "a manufacturer could use resale price maintenance to provide incentives for retailers to engage in promotional activities that are necessary to the efficient marketing of its products . . . ." [93] That is, by selling its brand to stores on the condition that each retailer's price does not fall below some minimum level, the manufacturer prevents any retailer from hindering other vendors by charging a lower price. [94] RPM thereby enables the manufacturer to provide a sufficient retail markup to achieve the requisite level of retail service. [95] In summary, consumers benefit because once prices settle to the minimum level specified in the RPM agreement, retailers compete with each other for sales by offering valuable retail services to consumers. [96]

Leegin posited that its legal argument was consistent with the Court's relatively recent opinions that overturned the per se treatment of vertical agreements that do not invariably produce anticompetitive effects. [97] In Continental T.V., Inc. v. GTE Sylvania, Inc., the Supreme Court explained that "[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." [98] The Court clarified that interbrand competition "is the primary concern of antitrust law" [99] and further explained that vertical restrictions have the "potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition." [100] Leegin noted, "In light of potential procompetitive effects on interbrand competition, the [Sylvania] Court concluded that . . . vertical nonprice agreements should be [analyzed] under the rule of reason." [101]

Leegin further argued that per se rules ignore competitive effects of vertical price restraints. [102] According to Leegin, empirical studies find that it is "far more common" for RPM to generate procompetitive effects than to facilitate a cartel. [103] Further, the Supreme Court has previously ***240** recognized the import of vertical price restraints on promoting competition, particularly by small, new entrants. [104] Therefore, Leegin asserted, "There [was] neither an empirical nor a theoretical basis" to justify a per se ban on RPM. [105]

In Leegin's view, there was also no legal argument to justify a per se rule against RPM because the Supreme Court previously held that per se rules are only appropriate "where a practice always, or almost always, results in anticompetitive effects." [106] The Court previously found a per se rule to be appropriate "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." [107] Leegin argued, based on the findings of its economic expert, "[t]here [was] simply no plausible scenario in which Leegin's pricing policy [would] have a substantial adverse effect in any relevant market." [108]

Leegin contended that a rule of reason analysis would be just as forceful as a per se rule at curtailing anticonsumer practices. [109] If Leegin were to utilize RPM to maintain retail prices above the market rate, consumers could punish the manufacturer by buying fashion accessories from competitors. [110] The market would efficiently correct prices, and Leegin would then need to immediately lower its price or lose business to other manufacturers. [111]

Leegin argued that stare decisis is not a valid basis to leave the nearly century-old per se rule of Dr. Miles untouched. [112] In particular, "[i]n the area of antitrust law, there is a competing interest, well represented in th[e] Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience." [113] This is ***241** reflective of Justice White's opinion in the landmark antitrust case Standard Oil Co. of New Jersey v. United States, noting that unlawful restraints of trade should be "determined by the light of reason." [114]

Leegin's final argument rested on the abiding principle that "lower courts are fully capable of applying the rule of reason" analysis. [115] Leegin argued that a transition from per se illegality to a rule of reason analysis would promote consumer welfare because a per se regime enables downstream retailers to file suit even when they are unable to demonstrate anticompetitive behavior. [116] According to Leegin, if distributors were required to evidence an adverse effect on competition, there would likely be "fewer economically groundless lawsuits attacking vertical pricing practices," thus "easing any burden on the courts" from RPM cases. [117]

B. PSKS's Arguments

PSKS framed the issue as a matter of price fixing. [118] The company cited the trial record testimony of Jerry Kohl, Leegin's president and owner: "[W]e require every one of our customers . . . to charge the same price." [119] PSKS also introduced portions of the record to show that Leegin paid for the travel expenses of retail corporate representatives to attend meetings regarding practicing strategies, [120] as well as evidence that Leegin orchestrated prices and discounting between competing retailers. [121]

On a legal front, PSKS based its argument on stare decisis, [122] specifically noting the doctrine to be at its height when dealing with interpretation of statutes, such as the Sherman Act. [123] "[T]he doctrine carries such persuasive force that [the Court] has always required a departure ***242** from precedent to be supported by some special justification." [124] PSLS noted that a special justification was "especially necessary where, as here, the principle has become settled through iteration and reiteration over a long period of time." [125]

PSKS contended that the nearly century-long precedent of Dr. Miles should suppress any transition to a rule of reason analysis. [126] PSKS argued that the Leegin Court should not now overturn a well-established legal principle. [127] For example, in Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, the Supreme Court held that baseball was not subject to challenge under the Sherman Act. [128] Despite significant question from later cases, the Court has yet to overturn the decision and has effectively held antitrust laws to apply to every business except baseball. [129]

PSKS argued that Congress had directly and indirectly endorsed the per se rule by revisiting the area of RPM "almost in clockwork [twenty]-year cycles," consistently recognizing the standard created in Dr. Miles. [130] According to PSKS, Congress crystallized its intent in 1975 by passing "[a]n act to amend the Sherman Antitrust Act to provide lower prices for consumers," [131] which repealed previous legislation that permitted manufacturers to set retail prices in certain circumstances. [132] Further, after the Department of Justice (DOJ) filed an amicus brief in Monsanto Co. v. Spray-Rite Service Corp. [133] in support of overturning Dr. Miles, Congress passed an appropriation measure that discontinued all funds to the DOJ that would have been used "to overturn or alter the per se prohibition on resale price maintenance." [134] PSKS concluded that ***243** the Court, Congress, industry, and consumers have relied on Dr. Miles to decide cases, draft laws, and conduct business, especially in the development of large discount retailers. [135]

Finally, PSKS claimed that consumer well-being would be adversely affected by replacing the per se rule with a rule of reason. [136] The company suggested that antitrust policy is about promoting low prices and that resale price maintenance reduces price competition between rival brands. [137] According to PSKS, replacing the Dr. Miles precedent with a rule of reason could cloud the distinction between “cartels formed by retailers and restrictions imposed by manufacturers,” thereby further diminishing consumer welfare. [138]

V. The Supreme Court's Opinion

A. Justice Kennedy's Majority Opinion

Writing for a five-member majority, [139] Justice Kennedy framed the issue as whether the per se rule against vertical price restraints should be abandoned in the face of “[r]espected economic analysts” who “conclude that [such] restraints can have procompetitive effects.” [140] Contrary to a per se rule, the rule of reason is the “accepted standard for testing whether a practice restrains trade in violation” of the Sherman Act. [141] Under such an analysis, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” [142] While a per se rule can provide clear guidance for the legality of certain conduct, the rules are only appropriate where courts have significant familiarity with the restraint in question and can reasonably expect that it will most likely yield an economic outcome adverse to consumers. [143] A per se rule is therefore not appropriate when it is simply premised on “formalistic ***244** line drawing.” [144] The rule of reason distinguishes between restraints that are harmful to the consumer and those in the consumer's best interest that stimulate competition. [145]

The Leegin Court opined that Dr. Miles was premised on the common-law rule that a “general restraint upon alienation is ordinarily invalid” [146] rather than on business and economic reasoning. [147] The Court also cautioned against putting concrete weight on antiquated doctrines and reaffirmed the “effect of the antitrust laws upon vertical distributional restraints in the American economy today.” [148] Dr. Miles was further flawed because it incorrectly treated vertical agreements that a manufacturer makes with its distributors as similar to horizontal combinations between competing distributors; [149] however, as the Court pointed out in Leegin, horizontal and vertical restraints carry different legal defenses. [150]

After concluding that “the reasons upon which Dr. Miles relied [no longer] justif[ied] a per se rule,” the Court turned to the economic effects of vertical price agreements. [151] It first established that manufacturers have ample procompetitive justifications for engaging in RPM agreements, such as stimulating interbrand competition. [152] The majority next turned to free-riding, noting that without vertical price restraints, retailers might underprovide retail services that enhance interbrand competition. ***245** [153] To learn about products, consumers may seek out a retailer that “invests in fine showrooms, offers product demonstrations, [and] . . . trains knowledgeable employees.” [154] Alternatively, the consumers could be lured to purchase a product after “see[ing] it in a retail establishment that has a reputation for selling high-quality merchandise.” [155] Either way, the consumer may purchase the item from a discount store. Such stores are able to maintain smaller margins because they do not expend as much capital to provide high-quality services, train employees, maintain their reputation, or provide demonstrations. [156]

The Court noted that RPM can assuage the free-rider problem by inhibiting the discounter from undercutting the high-quality retailer. [157] This in turn forces retailers to “compete among themselves over services.” [158] RPM can further induce competition between brands by encouraging market entry. [159] In the absence of RPM, it is difficult for new entrants to emerge; however, RPM helps late entrants facilitate marketing, since those without a market presence can contract with retailers to provide point-of-sale marketing. [160]

The Court also recognized that RPM is not devoid of the potential to create unlawful conduct. [161] For example, it may provide a convenient disguise for manufacturer cartels or even a cartel at the retail level. [162] A horizontal cartel among competing manufacturers or retailers that reduces output or competition is unlawful under the per se rule; [163] similarly, any vertical RPM agreement that facilitates these same effects would also be unlawful under a rule of reason analysis. [164]

RPM can create equally compelling procompetitive effects. [165] ***246** Nonetheless, PSKS argued that "vertical price restraints should be per se unlawful because of the administrative convenience of per se rules." [166] However, the Leegin Court noted that upholding a per se rule simply out of concern for administrative costs "misinterprets our antitrust law." [167] According to the Court, per se rules can diminish consumer welfare by "prohibiting procompetitive conduct [that] antitrust laws should encourage." [168] Such rules may also "increase litigation costs by promoting frivolous suits against legitimate practices." [169] Therefore, "[a]ny possible reduction in administrative costs [could not] alone justify the Dr. Miles rule." [170]

The Court also considered the impact of its decision on lower courts. "As courts gain experience considering the effects of [vertical prices] restraints by applying the rule of reason over the course of decisions," they can better cope with means "to eliminate anticompetitive restraints from the market and to provide more guidance to businesses." [171] In fact, the Leegin Court emphasized that courts may "devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive" business practices. [172]

The Court next turned to stare decisis. [173] The claims made in Leegin were based on the Sherman Act, which has always been treated as common law [174] and was intended as a flexible standard that would change and evolve with "new circumstances and new wisdom." [175] Dr. ***247** Miles was decided not long after the passage of the Sherman Act when there was little collective knowledge on the administration of the Act's then-precedent-setting doctrine. [176] Subsequent history has eroded the per se rule. [177] Further, the agencies responsible for enforcing antitrust laws and studying the long-term impact of RPM have recommended replacing the per se rule with the rule of reason. [178] In light of this history, the Court determined that stare decisis did not require "continued adherence to the per se rule against vertical price restraints." [179]

Finally the Court dismissed PSKS's claim of alleged congressional support against RPM. PSKS argued that Congress ratified the per se rule of Dr. Miles with the 1975 congressional repeal [180] of two prior enactments [181] that provided certain exemptions for vertical price restraints. [182] The Court found that this repeal did not codify Dr. Miles, but rather changed the statutory provisions that made certain exceptions per se legal and provided courts with the power "'to develop governing principles of law' in the common-law tradition." [183] Further, the prior enactments were prompted out of a concern to "protect small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters," [184] not for concerns governed by the Sherman Act, like fostering competition and protecting consumer welfare. [185]

***248** B. Justice Breyer's Dissent

Writing for the four-member minority, [186] Justice Breyer opined that it would be "difficult" to determine whether to apply a rule of reason analysis or per se rule to RPM in the absence of controlling precedent. [187] However, to the dissenting Justices, the 100-year-old legend of Dr. Miles made a considerable legal difference. [188] RPM can have serious anticompetitive consequences, such as diminishing or eliminating lower prices that many customers prefer, “inhibit[ing] expansion by more efficient dealers whose lower prices might otherwise attract more customers,” curtailing the development of “more efficient modes of retailing,” and encouraging tacit collusion in concentrated industries. [189] In fact, the dissent noted DOJ findings that prior to the 1975 congressional repeal of the Miller-Tydings Act and McGuire Act, states that permitted minimum RPM experienced price increases between nineteen and twenty-seven percent. [190] At the same time, the dissent recognized that RPM can provide important consumer benefits, such as encouraging new entry to the market and enticing retailers to provide services, like advertisements, high-quality displays, and knowledgeable employees. [191]

Despite these potential benefits, the dissent argued that while economists may recommend the adoption of a rule of reason:

> [A]ntitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. [192]

After citing several studies finding that RPM may benefit consumer welfare, [193] the dissent underscored that the studies may, at most, “offer some mild support for the majority's position.” [194] However, for the dissenters, these studies did not constitute the “major change” required to “abandon[ ] a well-established antitrust rule.” [195]

***249** The dissent also confronted State Oil Co. v. Khan, decided just ten years earlier, where the Court overruled an earlier decision [196] holding maximum resale price agreements to be per se unlawful. Justice Breyer distinguished the majority's reversal of Dr. Miles from Khan's reversal of Albrecht v. Herald Co., arguing the latter's overruling of a twenty-nine-year-old decision was “still a significant period, but nowhere close to the century Dr. Miles ha[d] stood.” [197] The dissent further distinguished Khan by contending that Albrecht “had far less support in traditional antitrust principles than did Dr. Miles.” [198] The minority predicted that the Leegin majority's opinion would likely lead to higher prices for goods at the retail level and “create considerable legal turbulence as lower courts seek to develop workable principles.” [199]

VI. The Current State of Resale Price Maintenance Jurisprudence

Among its many arguments against overturning the per se rule established in Dr. Miles, PSKS contended that the Court should give credence to stare decisis. [200] Although PSKS did not outright argue that lower courts are intellectually incapable of applying a rule of reason analysis, PSKS made the contention in a more passive manner. The company claimed that Dr. Miles “is clear and easily followed by the courts,” [201] effectively suggesting that the lower courts may be unable to follow a rule of reason analysis but could easily apply a per se rule.

Practitioners have also expressed concern with the current state of the law. [202] Some attorneys are so uncertain as to how Leegin will be interpreted by the lower courts that they have even counseled their clients against including price restraints from licensing agreements. [203] ***250** Even a federal agency has taken a wait-and-see approach, noting that it intends to monitor the implications of a “seemingly permissible vertical RPM policy.” [204]

In the nearly two years since the Supreme Court first heard Leegin, numerous alleged violations of the Sherman Act involving vertical price agreements have traveled through the doors of the courts of appeals and district courts of the United States. The decisions indicate that Leegin's holding will be applied case by case based upon the overall circumstances, but antitrust plaintiffs alleging vertical price fixing certainly have a substantial additional burden in establishing a prima facie violation. Several substantial decisions to date are surveyed below. [205]

A. Circuit Court Decisions

The Second Circuit explained the rule of reason analysis post-Leegin in Major League Baseball Properties, Inc. v. Salvino, Inc. [206] In Salvino, a marketing corporation appealed the district court's dismissal of its antitrust claims stemming from Major League Baseball's ("MLB") exclusive licensing agent's refusal to grant the corporation a license to sell plush animals embroidered with team logos. [207] Citing Leegin, the Salvino court stated that horizontal price fixing is per se illegal, whereas the rule of reason applies to vertical price agreements. [208] Rule of reason analysis is appropriate, the court explained, "where the economic and competitive effects of [a] challenged practice are unclear" and may have a redeeming virtue. [209] The court also rejected the application of a "quick look" rule of reason analysis, essentially reasoning that the defendants' procompetitive justifications and effects were sufficient to preclude an abbreviated examination. [210]

Applying the rule of reason, the Second Circuit affirmed the district court's finding that no Sherman Act infraction occurred. [211] The court ***251** found the licensing agent's structure was not an illegal economic cartel because the licensing agent was a joint venture with procompetitive effects, such as reduced transaction costs, efficient quality control, and protection of MLB trademarks. [212] Furthermore, the agent's blanket licensing agreement resulted in increased licensees to market MLB teams and equal profit sharing among the MLB teams, which were not violations of the Sherman Act under the rule of reason. [213]

The Third Circuit explained its application of the rule of reason post-Leegin in Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc. [214] There, a Mack Truck franchisee sued its franchisor for restraining trade by conspiring to deny sales assistance to franchisees that sold Mack Trucks outside of their geographically allocated areas of responsibility ("AORs"). [215] Sales assistance heavily affected the overall price at which the franchisor sold a truck to a franchisee. [216] The plaintiff franchisee implemented a low-price sales strategy to compete with other Mack Truck dealers outside its sales area. [217] As a result of the franchisee's aggressive sales tactics, the franchisor allegedly "entered into an agreement with its dealers that it would delay or deny sales assistance to any dealer who sought to make an out-of-AOR sale." [218] The franchisee alleged that this agreement was part of an unlawful conspiracy between the franchisor and the dealers to sell Mack products at artificially high prices. [219]

The franchisee presented evidence demonstrating horizontal agreements that Mack dealers (the franchisees) would not compete against each other. [220] "A horizontal cartel among . . . competing retailers that . . . reduces competition in order to increase price is, and ought to be, per se unlawful." [221] In considering the franchisee's evidence, the court concluded that enough evidence existed for a jury to decide whether a per se unlawful horizontal agreement existed between the franchisees. [222]

The franchisee also presented evidence demonstrating an illegal vertical agreement between the manufacturer and the dealers to illegally control prices by not providing sales assistance to franchisees that ***252** sought to compete with one another on price. [223] Unlike horizontal price agreements, which are per se illegal, "the legality of a vertical agreement that imposes a restriction on the dealer's ability to sell the manufacturer's product is governed by the rule of reason." [224] The court found that sufficient evidence was presented to show that the purpose of the vertical agreement between the manufacturer and its franchisees was to support illegal horizontal agreements among multiple dealers. [225] Such vertical agreements that facilitate horizontal cartels, the court explained, were unlawful under the rule of reason. [226] Ruling that the franchisee presented enough evidence for the claim to go to a jury, the Third Circuit vacated the district court's judgment as a matter of law for the franchisee. [227]

Just a few months after having its decision in Leegin reversed, the Fifth Circuit again confronted an issue involving § 1 of the Sherman Act. In Tunica Web Advertising v. Tunica Casino Operators Ass'n, [228] plaintiff Tunica Web Advertising ("TWA"), an internet advertising company, sued casino operators located in Tunica, Mississippi, alleging that the casinos refused to deal with the company and that its conduct was a per se violation of the Sherman Antitrust Act. [229] TWA owned the domain name "tunica.com" and offered to lease it to Tunica casinos so that Internet users would be automatically redirected to the Tunica County Tourism Commission's website, which contained information about all of the county's casinos. [230] The Tunica Casino Operators Association held a meeting to discuss the matter, and the member casinos apparently reached an agreement not to use the "tunica.com" domain name. [231] TWA presented evidence that the Association refused to deal with TWA in any capacity with the intention that the website would lose value, allowing the casinos to eventually purchase the name. [232] The district court granted summary judgment in favor of the casinos, holding that "the [Association's] alleged conduct could not amount to a per se violation of section 1 of the Sherman Act." [233]

***253** On appeal, the Fifth Circuit addressed TWA's argument that the casinos' refusal to do business was a horizontal agreement to boycott, and therefore a per se violation. [234] The court explained that generally the rule of reason is used to determine whether a particular agreement is in fact operating as an unreasonable restraint on competition. [235] "Under the rule of reason, an agreement will be found unlawful only if the plaintiff shows that it actually had an adverse effect on competition." [236] However, the court further explained that certain agreements are inherently anticompetitive and do not require the plaintiff to show the adverse effect. [237] These agreements are considered per se unlawful. [238] A court's "decision to apply the per se rule turns on whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." [239]

The court stated that "a necessary precondition for a per se unlawful group boycott is that it must be [a] 'horizontal"' agreement. [240] Here, the court found the agreement among the casino operators to indeed be horizontal because the operators were direct competitors of one another. [241] The district court found that the group boycott could be per se unlawful only if the agreement was horizontal and at least one of the conspirators was in direct competition with the victim. [242] The Fifth Circuit determined that no such direct competition requirement was needed. [243] According to the court, other factors were more relevant to the determination of a per se unlawful agreement, including: whether there were "joint efforts 'to disadvantage competitors"' or control access by persuading or forcing suppliers to deny relationships with them; whether the boycotting firms "'possessed a dominant position in the relevant market"'; and whether the practices could be "'justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive."' [244]

***254** The Fifth Circuit explained that just because an agreement is horizontal in nature does not necessarily mean that it is always per se unlawful. [245] The court interpreted Leegin as follows:

The Supreme Court has reiterated that "[t]o justify a per se prohibition a restraint must have manifestly anticompetitive effects and lack any redeeming virtue." In Leegin, the Supreme Court emphasized its general reluctance to apply the per se rule unless "the courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." [246]

Based on these precedents, the Fifth Circuit reversed and remanded the case to the district court to apply the previously discussed principles in determining whether the per se rule applies. [247]

The Fifth Circuit again confronted the application of the per se rule in Golden Bridge Technology, Inc. v. Motorola, Inc. [248] There, the plaintiff Golden Bridge Technology, Inc. ("GBT") owned a patent for certain wireless technology. [249] The defendants and GBT were members of a nonprofit organization formed to institute uniform technology standards and equipment for compatibility of cellular devices and systems. [250] GBT claimed that members of the organization conspired not to use its technology, thereby shutting GBT out of the market. [251] The district court granted summary judgment in favor of the defendants, holding that GBT had not made the threshold showing that an agreement or conspiracy existed among the defendants to restrain trade. [252]

In affirming the district court's holding, the Fifth Circuit discussed when courts should apply the rule of reason or the per se rule. The court explained that once a plaintiff has proven a conspiracy, Leegin will guide courts to determine whether the defendant's conduct "would always or almost always tend to restrict competition and decrease output." [253] If so, the per se rule is applicable and no further inquiry is needed by the court. [254] If, on the other hand, the conduct would not necessarily restrict competition, the rule of reason applies and the plaintiff also must prove that the conduct "unreasonably restrains trade in ***255** light of actual market forces." [255]

The Fourth Circuit has also recently addressed the issues raised in Leegin and appears to be setting some parameters on its holding. First, in TFWS, Inc. v. Franchot, [256] the defendant (the State of Maryland) [257] asked the court to revisit its earlier holding that the state's liquor and wine regulatory scheme was a form of horizontal price fixing and a per se violation of the Sherman Act. [258] Maryland pointed to the Leegin decision [259] and argued that RPM "is no longer subject to per se analysis under federal antitrust law, but must instead be judged under [the] rule of reason." [260] The Fourth Circuit rejected Maryland's contention and explained that Leegin only addressed vertical resale price maintenance, not horizontal price fixing. [261] In fact, the opinion found Leegin to buttress the position that horizontal price fixing is per se illegal, quoting Leegin: "The same legal standard (per se unlawfulness) applies to horizontal market division and horizontal price fixing because both have similar economic effect." [262]

Next, in Valuepest.com of Charlotte, Inc. v. Bayer Corp., the Fourth Circuit again addressed the Leegin holding and its effect. [263] Valuepest, pest control service providers, filed a class-action lawsuit against defendants, manufacturers of pesticides. [264] Valuepest alleged that the defendants "illegally conspired with their distributors to set minimum resale prices of certain [pest]icide products." [265] The defendants (collectively referred to as Bayer) countered that Supreme Court precedent--United States v. General Electric Co. [266]--held that a manufacturer could set minimum prices for its products where there is "a genuine principal-agent relationship between the manufacturer and its distributors." [267] Valuepest countered that Leegin implicitly overruled this precedent. [268]

***256** Bayer sold its termite pesticide through a series of distributors and used distribution arrangements whereby the distributors purchased the pesticide from Bayer and then resold it to pest control services such as Valuepest. [269] In 2001, Bayer began selling its pesticide through an agency relationship arrangement. [270] Under these agreements, Bayer was the seller of the product, and the agent/distributor merely facilitated the sale. [271] The agreements specified that Bayer retained title to the product and set the retail prices, and the distributors received a fixed commission for each sale. [272] In 2005, Valuepest filed suit in the Western District of North Carolina, alleging vertical price fixing by Bayer pursuant to its arrangement with the distributors. [273] Both sides filed motions for summary judgment. [274] While the district court was considering the motions, the Supreme Court heard arguments in the Leegin case. [275] The district court issued an order stating it would wait to rule on Valupest's summary judgment motion until after Leegin was decided but would continue considering Bayer's motion. [276] After the Supreme Court decided Leegin, the district court granted summary judgment for Bayer on the grounds that there was a genuine agency relationship and therefore no liability under § 1 of the Sherman Act. [277]

The agency defense is premised on the reasoning that a manufacturer has the right to sell its products on the terms of its choosing. [278] When it uses bona fide agents, the manufacturer is essentially selling its products directly to consumers and there is no conspiracy involved. [279] However, on appeal Valuepest claimed that the General Electric agency defense was no longer viable after Leegin. [280] The Fourth Circuit rejected Valuepest's argument, stating that the two cases dealt with two separate elements of a § 1 violation. [281] In the Fourth Circuit's view, General Electric dealt with the first element of § 1, namely whether there was a contract, combination, or conspiracy. [282] Leegin, on the other hand, addressed the second element, whether the contract, combination, or ***257** conspiracy imposed an unreasonable restraint of trade. [283] The court stated that "only alleged [RPM] that actually involves an agreement between two parties [falls] within the scope of § 1." [284] Here, because the court found that a genuine principal-agency relationship precluded the existence of an agreement, [285] it was not necessary to look to the second element and Leegin. [286] According to the court, Valuepest blurred the distinction between the two elements of liability under § 1 by arguing that Leegin overruled General Electric even if a genuine agency relationship existed. [287] Leegin addressed an entirely different issue than General Electric, namely whether a proven agreement should be considered per se unlawful or analyzed under the rule of reason. [288]

The Fourth Circuit explained that Leegin abolished the per se rule for vertical price restraints and transitioned to the rule of reason. [289] "Under the rule of reason, a factfinder examines all of the circumstances to determine whether a practice unreasonably restrains competition," [290] looking at factors such as "the restraint's history, nature, and effect, as well as [w]hether the businesses involved have market power." [291] The court stated that Leegin would only have relevance to the case "if plaintiffs [could] prove the agency relationships . . . were a sham" and, therefore, an agreement for antitrust purposes existed. [292] However, the court reiterated that the Leegin and General Electric holdings are independent of one another: "Quite simply, Leegin has no bearing on the continued vitality of General Electric." [293]

B. District Court Decisions

Although circuit courts have provided the most in-depth analysis of the rule of reason, district courts have also applied the Leegin rule in several contexts, indicating its practical impact. For example, in Spahr v. Leegin Creative Leather Products, Inc., the Eastern District of Tennessee dismissed the proposed purchaser's class-action claims because the ***258** complaint failed to allege the appropriate relevant market. [294] In a decision following the Supreme Court's mandate in Leegin, the district court copied much of the Leegin opinion in finding that Leegin's refusal to sell to retailers who discounted Brighton brand products below Leegin's suggest price was a vertical restraint, governed by the rule of reason. [295] "The threshold question in any rule of reason antitrust case is definition of the relevant market." [296] The court refused to accept the plaintiffs' proposed relevant product market as the "market for the manufacture, distribution and/or sale of Brighton brand products" because the product line of women's accessories made by other manufacturers are reasonably interchangeable. [297]

In Babyage.com, Inc. v. Toys "R" Us, Inc., smaller retailers sued a larger retailer after the manufacturers of baby goods required the retailers to sell the baby goods at or above a certain price. [298] The smaller retailers alleged that the dominant retailer conspired with the manufacturers to set the prices of baby goods. [299] The large retailer moved for an interlocutory appeal after the court denied its motion to dismiss. [300] The motion for an interlocutory appeal was denied because in the nonfinal order denying the motion, the plaintiffs set forth the relevant legal market and harm to competition. [301] In explaining the "harm to competition" legal standard, the district court stated that "harm to intrabrand competition is cognizable when brought about by the demands of a 'dominant' retailer, one that has market power in the retail sales market and one upon whom each manufacturer depends for a large portion of its sales." [302] The court explained that Leegin signified that abuse of minimum resale prices set by dominant retailers is the type of conduct the Sherman Act was designed to prohibit. [303]

In Flying J, Inc. v. Van Hollen, a gasoline retailer sued the Wisconsin Attorney General to prevent the State from enforcing its statute requiring a minimum markup on gasoline prices. [304] The court found that ***259** the statute, which forbade gasoline retailers from selling their fuel below a 9.18% markup of the average posted terminal price, [305] was a per se restraint because it authorized and enforced a horizontal pricing policy. [306] The court cited Leegin because the State argued that the statute should be analyzed under the rule of reason, presumably because it believed the statute was a vertical restraint. [307] The court disagreed with the State's classification, finding that the statute was also horizontal because it affected competing gasoline retailers in Wisconsin. [308] "Leegin reaffirmed that a 'horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful."' [309]

The precursor to Flying J, Inc. v. Van Hollen was Lotus Business Group LLC v. Flying J Inc., in which a gasoline retailer alleged that another gasoline retailer had violated the same Wisconsin statute at issue in Flying J, Inc. v. Van Hollen. [310] The Lotus court found that the statute was inconsistent with and preempted by § 1 of the Sherman Act because it fixed resale prices industrywide. [311] The Supreme Court issued the Leegin decision shortly after the Lotus court's initial decision finding the statute unconstitutional under the Supremacy Clause. The plaintiff accordingly requested a rehearing, arguing that the rule of reason was the standard to judge the alleged vertical restraint. [312] The court explained that the rule of reason requires "the factfinder [to weigh] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." [313] In analyzing a case under the rule of reason, courts consider "specific information about the relevant business and the restraint's history, nature, and effect." [314] The court concluded that the statute was inconsistent with the Sherman Act as a per se violation that involved horizontal pricing because the statute fixed prices industrywide and was ***260** "virtually certain to reduce interbrand competition." [315]

District courts frequently apply the rule of reason in class actions alleging Sherman Act violations. For example, in Stand Energy Corp. v. Columbia Gas Transmission Corp., the court denied the proposed class of plaintiffs' motion for class certification in a suit alleging an "illegal scheme involving the transportation and storage of natural gas." [316] The court relied upon Leegin to deny class certification. [317] Per se unlawful horizontal agreements exist, the court reasoned, when competitors agree "to fix prices or to divide markets." [318] However, "where the economic impact of certain practices is not immediately obvious," courts are "reluctant to adopt per se rules." [319] According to the court, the rule of reason is applied to vertical price restraints because they may benefit competition in some ways. [320] Under the rule of reason, fact finders "weigh[ ] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." [321]

The court denied class certification because the plaintiffs asserted that each individual defendant entered into a separate contract with the gas shipper, which in the court's view was not a single conspiracy. [322] Applying the rule of reason test, the court looked to each agreement individually and not as a whole to determine whether an unlawful vertical price restraint existed. [323]

In another class-action case, the District Court for the District of Columbia partially denied summary judgment for the defendant manufacturer in Meijer, Inc. v. Barr Pharmaceuticals, Inc. [324] There, the class of direct purchasers of brand-name oral contraceptives brought an antitrust suit alleging that the manufacturer of a generic oral contraceptive entered into an illegal agreement with the brand manufacturer to delay the introduction of the generic brand. [325] The court analyzed the agreement between the manufacturers under the rule of reason. [326] Reasonableness depends on "a broad range of considerations, including specific ***261** information about the relevant product market, the history, nature, and effect of the particular restraint, and whether the companies involved have market or monopoly power." [327] The court focused on the market realities of the entire agreement in ultimately refusing to apply the per se rule. [328] Departures from the rule of reason "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." [329] In analyzing the economic effects on the relevant market, the court found that the anticompetitive effects of the agreement were unclear because they arose in the context of an exclusive supply relationship. [330]

In Champagne Metals v. Ken-Mac Metals, Inc., the court reaffirmed that Leegin applies to the second element of § 1 Sherman Act violations. [331] The court considered a motion for summary judgment by the defendants, who claimed that an agreement did not exist. [332] The plaintiff aluminum distributor sued other distributors, claiming that the defendants acted in concert to pressure the mills against supplying the plaintiff with aluminum. [333]

The court found sufficient evidence of an agreement for summary judgment purposes, and then moved to the second element of whether the alleged restraint of trade was unreasonable. [334] The court explained that "[t]wo main analytical approaches are used to determine whether a defendant's conduct unreasonably restrains trade--the per se rule and the rule of reason." [335] The per se rule "treats certain categories of restraints as necessarily illegal." [336] By contrast, the rule of reason requires the fact finder to "weigh[ ] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." [337] The court found that the agreement was subject to per se review. [338] An important factor in the court's decision, specifically supported by Leegin, was the fact there was ***262** a horizontal agreement among the defendant distributors. [339] However, the existence of the horizontal agreement was not, in and of itself, enough. [340] The court also found that the defendant's market power, "combined with the lack of a plausible argument justifying the alleged boycott," contributed to the need for per se review. [341]

In New England Carpenters Health Benefits Fund v. McKesson Corp., the district court addressed a motion to dismiss a class-action lawsuit brought on behalf of third-party payors and consumers who alleged that a drug wholesaler engaged in illegal price-fixing by entering into an agreement with a drug-pricing publisher to inflate the average wholesale price of certain pharmaceuticals. [342] The defendant's motion to dismiss was premised on the grounds that the plaintiffs "fail[ed] to allege any anticompetitive effects from the conspiracy to increase prices." [343]

The district court used Leegin to guide its analysis in determining whether to apply the per se rule or the rule of reason. The plaintiffs contended the alleged conspiracy qualified as per se unreasonable. [344] The district court explained that application of this standard is "only appropriate where 'courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason."' [345] The court agreed with the plaintiffs' concession that the alleged conspiracy was a "unique case," that rested on a "novel theory that ha[d] not yet been brought before the courts." [346] Therefore, the per se rule would be inappropriate. [347]

After quickly dismissing the plaintiffs' alternative request to apply the "quick-look" analysis, the court turned to the rule of reason. [348] The district court noted that the rule of reason requires "an onerous multi-part showing: (1) that the alleged agreement involved the exercise of power in a relevant economic market; (2) that this exercise had anti-competitive consequences; (3) and that those detriments outweighed ***263** efficiencies or other economic benefits." [349] Additionally, quoting Leegin, the district court explained that the rule of reason "distinguishes between restraints with anticompetitive effect . . . and restraints stimulating competition . . . ." [350] The court found that the plaintiffs were making blanket assertions of higher prices but failed to show any anticompetitive conduct. [351] Thus, the court granted the defendant's motion to dismiss. [352]

In Leegin, the Supreme Court warned of anticompetitive effects that may arise from vertical resale price maintenance. [353] One specific example the Supreme Court counseled lower courts to watch for was a dominant retailer in the market that abuses its power and requests RPM "to forestall innovation in distribution that decreases costs." [354] A manufacturer could find that it had "little choice but to accommodate the [dominant] retailer's demands . . . if the manufacturer believe[d] it need[ed] access to the retailer's distribution network" to sell its product. [355]

In McDonough v. Toys "R" Us, Inc., the district court confronted just such a situation. [356] The court was deciding whether to certify a class in a suit against a dominant retailer in the market. [357] The case involved the rise of Babies "R" Us ("BRU") in the baby-product retail market. Small specialty stores dominated the market during the early 1990s; but by the end of the decade, BRU had come to dominate the market, and the number of specialty stores had dwindled greatly. [358] In the late 1990s and into the early 2000s, however, BRU began to face stiff competition from internet providers of baby products that could offer price discounts due to their low overhead. [359]

The plaintiffs, [360] seeking class-action certification, offered evidence that BRU responded to this competition by "coerc[ing] manufacturers ***264** of baby products into preventing internet retailers from offering discounts." [361] Specifically, they claimed that BRU would threaten not to carry the manufacturers' products unless they agreed to prevent the online retailers from discounting the products. [362] In turn, the manufacturers used various methods to prevent discounting, including the use of resale price maintenance (vertical price restraints). [363] In negotiations with various manufacturers of baby products, BRU would provide the manufacturers with distribution agreements to use for the online retailers, which included vertical price restraints. [364] Plaintiffs offered evidence that one manufacturer told an online retailer that if the decision was between doing what BRU asks or supporting the online retailer's right to discount, "[t]he very important customer wins every time." [365]

In deciding whether to certify the class, the court examined the antitrust claim of unreasonable restraint, guided especially by the Leegin opinion. [366] The court began by noting that in the wake of Leegin, "vertical price restraints should be analyzed under the rule of reason" rather than the per se rule. [367] It also pointed out the factors to consider under the rule of reason, including "[w]hether the businesses involved have market power." [368] The court examined the three situations noted in Leegin where vertical price restraints may benefit interbrand competition: [369]

First, a manufacturer might use resale price maintenance to eliminate intrabrand price competition . . . . Second, vertical price restraints may promote interbrand competition by facilitating market entry for new brands. . . . [Finally], [the] restraints may promote interbrand competition by helping manufacturers induce retailers to perform services [that may have been absent before]. [370]

The court took seriously the Supreme Court's instruction to "be diligent in eliminating [vertical price restraints'] anticompetitive uses ***265** from the market." [371] It noted the anticompetitive effects that were pointed out in Leegin, including where a dominant retailer requests price maintenance not to stimulate services or to promote the manufacturer's brand, but rather to "give [the] inefficient retailer[ ] higher profits" and prevent the more efficient retailers from charging lower prices. [372] It then noted other factors discussed in Leegin, specifically pointing out the language related to where the source of the restraint originated and noting that "[i]f there is evidence [that] retailers were the impetus for [the] vertical price restraint," the likelihood is greater that the restraint "supports a dominant, inefficient retailer." [373]

The district court employed a burden-shifting analysis under the rule of reason, where the plaintiff bears an initial burden to show that the agreement "produced adverse, anti-competitive effects within the relevant product and geographic markets." [374] If the plaintiff meets this burden, the burden is shifted to the defendant "to show that the challenged conduct promotes a sufficiently pro-competitive objective." [375] The district court concluded by finding that "the § 1 elements of concerted action and unreasonable restraint [were] both 'capable of proof at trial"' and that the predominance element of class-action certification had been satisfied. [376]

As these cases reveal, although the courts have begun to apply the rule of reason in the wake of Leegin, it is still too soon to draw any hard-and-fast rules about the impact of the Supreme Court's decision. Certainly, with the end of per se violations based on vertical price maintenance, plaintiffs' cases in that context are more problematic, and defendants are concurrently less likely to suffer liability. As cases like Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc. [377] show, the rule of reason analysis itself is sufficiently broad to allow a plaintiff with sufficient documentation and expert analysis to survive to trial. The contours of the analysis, however, will take years of precedent to emerge.

VII. Conclusion

The waves created by the majority opinion in Leegin are certain to wash ashore and slowly erode the sand castles erected by corporate antitrust ***266** counsel over the past century. The tales of Dr. Miles and the per se rule against vertical price restraints have been forever banished to the fiction novels, as Leegin ushers in an emerging new day in antitrust jurisprudence. The Court grounded its opinion in a wealth of economic literature that radiates the potential procompetitive effects of vertical price agreements and validates reliance upon the rule of reason. Leegin invites manufacturers to rethink minimum price restraints to advance procompetitive purposes.

Over the subtle suggestion by PSKS that lower federal courts may find it difficult to apply the rule of reason, circuit and district judges across the nation have applied Leegin in a seemingly effortless manner. The cases in the two years following Leegin have revealed that as courts gain more experience with reasonable business customs, jurists are willing to consider a broad range of evidence to ensure that U.S. antitrust laws safeguard consumer welfare and promote competition. As the dust continues to settle, corporate executives and counsel alike will consider the opportunities that the rule of reason provides to innovate marketing and resale practices beyond rivalry on mere price points.

Footnotes

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1 Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911), overruled by Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

2 See Terry Calvani & Andrew G. Berg, Resale Price Maintenance after Monsanto: A Doctrine Still at War with Itself, 1984 Duke L.J. 1163, 1163 n.1 (1984).

3 See generally Daniel A. Crane, Rules Versus Standards in Antitrust Adjudication, 64 Wash. & Lee L. Rev. 49 (2007); Gary Minda, Antitrust at Century's End, 48 SMU L. Rev. 1749 (1995); Rudolph J. Peritz, The "Rule of Reason" in Antitrust Law: Property Logic

in Restraint of Competition, 40 Hastings L.J. 285, 321-22 (1989) (discussing the rise of the rule of reason in N. Secs. Co. v. United States, 193 U.S. 197 (1904)). An intermediate mode of examination, called the "abbreviated" or "quick-look" rule of reason analysis, also applies "to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability." Texaco Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006); see also Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (explaining the application of the "abbreviated" or "quick-look" analysis).

4 Dr. Miles, 220 U.S. at 408.

5 Sherman Act, 15 U.S.C. §§1-7 (2006). This article is limited to § 1 of the Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

6 551 U.S. 877, 882 (2007).

7 Brief of Respondent at 7-21, Leegin, 551 U.S. 877 (No. 06-480).

8 See infra Part IV.

9 Brief for Petitioner at 13-14, Leegin, 551 U.S. 877 (No. 06-480).

10 Herbert Hovenkamp, Antitrust 215 (4th ed. 2005).

11 Id.

12 Id.

13 Id. See generally Frank H. Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L.J. 135, 140-53 (1984); Benjamin Klein & Kevin M. Murphy, Vertical Restraints as Contract Enforcement Mechanisms, 31 J.L. & Econ. 265 (1988); Howard P. Marvel, The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom, 63 Antitrust L.J. 59 (1994).

14 See Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), overruled by Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

15 Id. at 394.

16 See id.

17 See id. at 395.

18 Id. at 394.

19 Id.

20 Id. at 394-95.

21 Id. at 395.

22 Id. at 408-09.

23 Id. at 407-08.

24 Id. at 406.

25 Id. at 408.

26 Calvani & Berg, supra note 2, at 1168.

27 Dr. Miles, 220 U.S. at 406, 408-09.

28 Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386 (1951) ("Resale price maintenance was indeed struck down in Dr. Miles Medical Co. v. Park & Sons Co."); Yentsch v. Texaco, Inc., 630 F.2d 46, 51 (2d Cir. 1980) ("The Supreme Court originally

made this position clear in Dr. Miles Medical Co. v. Park & Sons Co. when it proscribed written contracts between the manufacturer and dealers fixing retail prices." (citation omitted)).

29 250 U.S. 300 (1919).

30 Id. at 302.

31 Id. at 302-03.

32 Id. at 304-05.

33 Id. at 305.

34 Id. at 306.

35 Id. at 307.

36 Id. ("'The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases."' (quoting United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 320 (1897))).

37 Id. (quoting E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 614 (1914); citing Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 56 (1911); United States v. Am. Tobacco Co., 221 U.S. 106, 180 (1911); Boston Store v. Am. Graphophone Co., 246 U.S. 8 (1918)).

38 Kathryn A. Kusske, Note, Refusal to Deal as a Per Se Violation of the Sherman Act: Russell Stover Attacks the Colgate Doctrine, 33 Am. U. L. Rev. 463, 463-64 (1984).

39 See United States v. Gen. Elec. Co., 272 U.S. 476, 483-84, 488 (1926).

40 See Glen O. Robinson, Explaining Vertical Agreements: The Colgate Puzzle and Antitrust Method, 80 Va. L. Rev., 577, 578 (1994) (citing White Motor Co. v. United States, 372 U.S. 253 (1963); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), overruled by Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)).

41 Id.

42 See White Motor Co., 372 U.S. at 263-64 (holding that summary judgment was not appropriate where a manufacturer allegedly instituted a vertical arrangement restricting its dealers' territory). The Court noted that more information about the actual impact of the arrangements on competition was needed for a ruling on whether they had a pernicious impact on competition and lacked "'any redeeming virtue' and therefore should be classified as per se violations of the Sherman Act." Id. (citation omitted)

43 See Arnold, Schwinn & Co., 388 U.S. at 379 (holding that a manufacturer's sale of merchandise to a distributor, subject to a territorial restriction upon resale, was a per se violation of the Sherman Act). "If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale." Id.

44 See Sylvania, 433 U.S. at 57-59 (holding that because such vertical territorial restrictions were widely used, and because there was no showing that the restrictions had a pernicious effect on competition or that the restrictions lacked any redeeming virtue, the per se rule was the incorrect standard under which to analyze the restrictions). Instead, the rule of reason should be the standard in matters involving nonprice vertical restraints, because such business conduct could be adequately policed under the rule of reason Id.

45 Robinson, supra note 40, at 578; see also Robert Pitofsky, The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Colum. L. Rev. 1, 18-22 (1978); Richard A. Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U. Chi. L. Rev. 1, 7-9 (1977).

46 465 U.S. 752 (1984).

47 Id. at 759 n.5.

48 Id. at 761 n.7.

49 Robinson, supra note 40, at 578.

50 Monsanto, 466 U.S. at 756-57.

51 Id. at 758-59.

52 Id. at 768.

53 Id. at 761 (An "important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been per se illegal since the early years of national antitrust enforcement. The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition." (citing Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-09 (1911), overruled by Leegin Creative Leather Prods., Inc. v. PSKS, Inc. 551 U.S. 877 (2007))).

54 485 U.S. 717 (1988).

55 Id. at 721.

56 Id. at 726.

Our approach to the question presented in the present case is guided by the premises of GTE Sylvania and Monsanto: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of GTE Sylvania. These premises lead us to conclude that the line drawn by the Fifth Circuit [holding that only vertical price restrictions are per se illegal] is the most appropriate one.

Id.

57 Id. at 735-36.

58 Jayma M. Meyer, Relaxation of the Per Se Mantra in the Vertical Price Fixing Arena, 68 S. Cal. L. Rev. 73, 80-81 (1994).

59 551 U.S. 877 (2007).

60 Id. at 882.

61 Id.

62 Id.

63 Id. at 883.

64 PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 F. App'x 464, 465 (5th Cir. 2006) (per curiam), rev'd, 551 U.S. 877 (2007).

65 Leegin, 551 U.S. at 882.

66 See id. at 882-83.

67 Id. at 882.

68 Id. at 883.

69 Id.

70 PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 F. App'x 464, 465 (5th Cir. 2006) (internal quotation marks omitted), rev'd 551 U.S. 877 (2007).

71 Leegin, 551 U.S. at 884.

72 PSKS, 171 F. App'x at 466.

73 Leegin, 551 U.S. at 884.

74 Id.

75 PSKS, 171 F. App'x at 466.

76 Leegin, 551 U.S. at 884 (internal quotation marks omitted).

77 See id.; see also Leegin's Response to Plaintiffs' Motion to Limit Testimony of Kenneth G. Elzinga, Ph.D. at 2-3, PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 2004 WL 5254322 (E.D. Tex. Aug. 17, 2004) (No. 2:03-CV-107).

78 Leegin, 551 U.S. at 884.

79 Id.

80 Id. (citing United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

81 Id.

82 Id.

83 Id. at 884-85

84 Id. at 885 (citing PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 F. App'x 464, 46667 (5th Cir. 2006), rev'd, 551 U.S. 877 (2007)).

85 Id. at 885.

86 Brief for Petitioner, supra note 9, at i.

87 Id. at 2; see, e.g., id. at 13 (The "bulk of the economic literature on RPM ... suggests that RPM is more likely to be used to enhance efficiency than for anticompetitive purposes." (alteration in original) (quoting ABA Section of Antitrust Law, Antitrust Law and Economics of Product Distribution 76 (2006))); Thomas R. Overstreet, Jr., Fed. Trade. Comm'n, Resale Price Maintenance: Economic Theories and Empirical Evidence 164 (1983) ("[T]he economic theories and the available empirical evidence rather clearly suggest that the rigid application of a strict standard of per se illegality for RPM is inappropriate.").

88 See Brief for Petitioner, supra note 9, at 13-14 & n.5 (citing Brief of Amici Curiae Economists in Support of Petitioner at 3-4 & app. 1a-4a, Leegin, 551 U.S. 877 (No. 06-480)) ("The amici economists included members of ... leading academic institutions, as well as nine economists who ha[d] served as either the Director of the Bureau of Economics of the Federal Trade Commission or Deputy Assistant Attorney General for Economic Analysis at the Antitrust Division of the Department of Justice (the highest-ranking economist at each agency).").

89 Id. at 15 (quoting Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19 (1977)) (internal quotation marks omitted).

90 Id. (quoting Sylvania, 433 U.S. at 54) (internal quotation marks omitted).

91 See id. at 19-20. This presupposes that the retailer earns a profit substantial enough to provide quality customer service and an upscale presentation while minimizing free riding. See Benjamin Klein, Distribution Restrictions Operate By Creating Dealer Profits: Explaining the Use of Maximum Resale Price Maintenance in State Oil v. Khan, 7 Sup. Ct. Econ. Rev. 1, 6 (1999) ("When dealers are competing with one another, each dealer's point-of-sale promotional activities (such as product demonstrations by a salesperson or shelf space displays) may increase not only the dealer's own sales, but also other dealers' sales. Because of this 'externality,' dealers receive only a fraction of the return from their promotional efforts and, therefore, each dealer has a reduced incentive to promote the manufacturer's product. This positive promotional externality between dealers creates the potential for what can be labeled 'classic dealer free-riding,' where a dealer supplies less promotion than desired by the manufacturer and 'free rides' on the promotional efforts of other dealers. The most common formulation of this 'classic dealer free riding' problem concerns a consumer's first visiting a full service dealer, who creates a demand for the manufacturer's product by supplying the desired point-of-sale promotional services, and then visiting a competing low service (and hence low cost) dealer to purchase the product at a lower price." (citing Lester G. Telser, Why Should Manufacturers Want Fair Trade?, 3 J.L. & Econ. 86 (1960)). Leegin argued that in the presence of the free rider problem,

the Supreme Court has recognized that "dealers lose the incentive to make investments that are valuable to consumers and enhance the competitiveness of the manufacturer's product because the free rider siphons off so many sales that the other retailers are not able to recover their investments in promotional services." Brief for Petitioner, supra note 9, at 16 (citing Sylvania, 433 U.S. at 55).

92 See Brief for Petitioner, supra note 9, at 3, 19-21.

93 Id. at 6-7.

94 See Telser, supra note 91, at 91-92.

95 See id.

96 See id.

97 Brief for Petitioner, supra note 9, at 6. Specifically, Leegin cited State Oil Co. v. Khan, 522 U.S. 3, 18 (1997), which "unanimously overturn[ed] the per se rule against vertical maximum price-fixing because there was 'insufficient economic justification' for the rule" and Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47-48 (1977), which "reject [ed] the per se rule against vertical nonprice restraints." Id.

98 Sylvania, 433 U.S. at 49-50.

99 Id. at 52 n.19.

100 Id. at 51-52.

101 Brief for Petitioner, supra note 9, at 11 (citing Sylvania, 433 U.S. at 59).

102 See id. at 8.

103 Id. at 21 (citing Pauline M. Ippolito, Resale Price Maintenance: Empirical Evidence from Litigation, 34 J.L. & Econ. 263, 282 (1991)).

104 See, e.g., Sylvania, 433 U.S. at 65 (White, J., concurring) ("[T]he potential benefits of vertical restraints in promoting interbrand competition are particularly strong where the manufacturer imposing the restraints is seeking to enter a new market or to expand a small market share.").

105 Brief for Petitioner, supra note 9, at 21.

106 Id. at 22 (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

107 State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (alteration in original) (quoting Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982) (internal quotation marks omitted).

108 Brief for Petitioner, supra note 9, at 23 (citing Kenneth G. Elzinga, An Economic Analysis of the Antitrust Issues in PSKS, Inc. v. Leegin Leather Products, Inc. (Jan. 12, 2004) [hereinafter Elzinga Report], noted in Petition for a Writ of Certiorari app. D, at 43a-44a, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 887 (2007) (No. 06-480)).

109 See id. at 7.

110 Id. at 22-23 (citing Elzinga Report, supra note 108, at 36a-37a)).

111 Id. at 23 ("'A firm that has no market power is unlikely to adopt policies that disserve its consumers; it cannot afford to. And if it blunders and does adopt such a policy, market retribution will be swift."' (quoting Valley Liquors, Inc. v. Renfield Imps., Ltd., 678 F.2d 742, 745 (7th Cir. 1982))).

112 Id. at 32 (citing State Oil Co. v. Khan, 522 U.S. 3, at 20-21 (1997)).

113 Id. (alteration in original) (quoting Khan, 522 U.S. at 20).

114 Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 64 (1911).

115 Brief for Petitioner, supra note 9, at 36.

116 Id.

117 Id. (citing Brief of CTIA - the Wireless Ass'n as Amicus Curiae in Support of Petitioner at 11, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (No. 06-480)).

118 Brief of Respondent, supra note 7, at 2 ("Leegin enforced the price fixing agreements against all of its retailers.").

119 Id. (alteration in original).

120 Id. at 3.

121 See id. at 2-3.

122 Id. at 5 (citing Dickerson v. United States, 530 U.S. 428, 443 (2000)); see, e.g., Randall v. Sorrell, 548 U.S. 230, 243-44 (2006) (plurality opinion) ("[S]tare decisis 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."' (quoting United States v. Int'l Bus. Machs. Corp. (IBM), 517 U.S. 843, 856 (1996))); see also Harris v. United States, 536 U.S. 545, 556-57 (2002) (plurality opinion).

123 Brief of Respondent, supra note 7, at 8 (citing IBP, Inc. v. Alvarez, 546 U.S. 21, 32 (2005); Rasul v. Bush, 542 U.S. 466, 493, 506 (2004) (Scalia, J., dissenting)).

124 Id. at 7 (second alteration in original) (emphasis added) (quoting Dickerson, 530 U.S. at 443) (internal quotations marks omitted).

125 Id. (quoting Sorrell, 548 U.S. at 244 (plurality opinion)) (internal quotation marks omitted).

126 See id. at 8 ("Dr. Miles has been settled precedent for nearly 100 years, and experience with the per se rule has served to establish its correctness. The long-standing application of the per se rule against vertical minimum RPM has created 'settled legal expectations.' To overturn or alter the rule now would create just the 'instability and unfairness' that stare decisis is designed to avoid." (quoting Sorrell, 548 U.S. at 2444 (plurality opinion); citing IBM, 517 U.S. at 856)).

127 Id. at 7-8.

128 259 U.S. 200 (1922).

129 See Flood v. Kuhn, 407 U.S. 258, 282 (1972).

130 Brief of Respondent, supra note 7, at 10-11 (quoting H.R. Rep. No. 102-237, at 4 (1991)).

131 Id. at 12 (quoting Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (amending 15 U.S.C. § 1 (1970))).

132 Id. at 11-12.

133 465 U.S. 752 (1984).

134 Brief of Respondent, supra note 7, at 14 (quoting Pub. L. No. 98-166, 97 Stat. 1071 (1983)) (internal quotation marks omitted) (discussing congressional response to the amicus brief that the DOJ filed in Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984)).

135 Id. at 16-19; see also David W. Boyd, From "Mom and Pop" to Wal-Mart: The Impact of the Consumer Goods Pricing Act of 1975 on the Retail Sector in the United States, 31 J. Econ. Issues 223 (1997).

136 See Brief of Respondent, supra note 7, at 21-23.

137 Id. at 22 (quoting White Motor Co. v. United States, 372 U.S. 253, 268 (1963) (Brennan, J., concurring)).

138 See id. at 25.

139 The majority also included Chief Justice John Roberts, Justice Antonin Scalia, Justice Samuel Alito, and Justice Clarence Thomas.

140 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881-82 (2007).

141 Id. at 885 (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)).

142 Id. (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)) (internal quotation marks omitted); see also Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) (equating the rule of reason with "an inquiry into market power and market structure designed to assess [a restraint's] actual effect").

143 See Leegin, 551 U.S at 886-87; Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979); Sylvania, 433 U.S. at 49-50.

144 See Leegin, 551 U.S. at 887 (quoting Sylvania, 433 U.S. at 58-59) (internal quotation marks omitted).

145 Id. at 886.

146 Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404 (1911), overruled by Leegin, 551 U.S. 877.

147 See Leegin, 551 U.S. at 887-88.

148 Id. at 888 (quoting Sylvania, 433 U.S. at 53 n.21) (internal quotation marks omitted).

149 Id. (citing Dr. Miles, 220 U.S. at 407-08).

150 See id. (referencing Supreme Court precedent such as Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 734 (1988), "disclaiming the 'notion of equivalence between the scope of horizontal per se illegality and that of vertical per se illegality"' and Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 348 n.18 (1982), noting that "'horizontal restraints are generally less defensible than vertical restraints"').

151 Id. at 889.

152 Id. The Court quoted three sources in support of this proposition: "In the theoretical literature, it is essentially undisputed that minimum [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects." Id. (alteration in original) (quoting Brief of Amici Curiae Economists in Support of Petitioner, supra note 88, at 16) (internal quotation marks omitted). "[T]here is a widespread consensus that permitting a manufacturer to control the price at which its goods are sold may promote interbrand competition and consumer welfare in a variety of ways." Id. (alteration in original) (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 9, Leegin, 551 U.S. 877 (No. 06-480) (internal quotation marks omitted). "[T]he bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes." Id. (alterations in original) (quoting ABA Section of Antitrust Law, supra note 87, at 76) (internal quotation marks omitted).

153 Id. at 890.

154 Id. at 890-91 (citing Richard A. Posner, Antitrust Law 172-73 (2d ed. 2001)).

155 Id. at 891 (citing Howard P. Marvel & Stephen McCafferty, Resale Price Maintenance and Quality Certification, 15 Rand J. Econ. 346, 347-49 (1984)).

156 See id.

157 Id.

158 Id.

159 Id.

160 See id. ("[N]ew manufacturers and manufacturers entering new markets can use the [RPM] restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." (alteration in original) (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977))).

161 Id. at 892.

162 Id. (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725-26 (1988)).

163 Id. at 893 (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); Sylvania, 433 U.S. at 58 n.28).

164 Id. ("To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason.").

165 See Robert L. Steiner, How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?, 65 Antitrust L.J. 407, 446-47 (1996) ("[A]ntitrust law should recognize that the consumer interest is often better served by RPM--contrary to its per se illegality and the rule-of-reason status of vertical nonprice restraints.").

166 Leegin, 551 U.S. at 894 ("[P]er se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system." (quoting Sylvania, 433 U.S. at 50 n.16) (internal quotation marks omitted)).

167 Id. at 894-95.

168 Id. at 895 (citing Easterbrook, supra note 13, at 158).

169 Id.

170 Id.

171 Id. at 898.

172 Id. at 898-99.

173 See id. at 899.

174 Id. ("From the beginning the Court has treated the Sherman Act as a common-law statute." (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978))); Id. ("In antitrust, the federal courts ... act more as common-law courts than in other areas governed by federal statute." (alteration in original) (quoting Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO, 451 U.S. 77, 98 n.42 (1981))).

175 Id. at 899-900 ("Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on restraint[s] of trade evolve to meet the dynamics of present economic conditions." (alteration in original)); see also Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) ("It would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of per se illegality remains forever fixed where it was.").

176 Leegin, 551 U.S. at 900-01.

177 See id. at 901-02 (discussing various cases that broke from the per se doctrine including United States v. Colgate & Co., 250 U.S. 300, 307-08 (1919) (creating an exception to allow a manufacturer to refuse to deal with distributors who did not follow suggested resale prices), Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57-59 (1977) (replacing the per se rule with a rule of reason analysis for vertical nonprice restraints), Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (requiring antitrust plaintiffs to present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner), and State Oil Co. v. Khan, 522 U.S. 3, 22 (1997) (replacing the per se rule with a rule of reason for claims of vertical maximum price-fixing)).

178 Id. at 900 (citing Brief for the United States as Amicus Curiae Supporting Petitioner, supra note 152, at 6).

179 Id.

180 See Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (amending 15 U.S.C. § 1 (1970) and 15 U.S.C. § 45 (1970)).

181 See Miller-Tydings Act, ch. 690, tit. 8, 50 Stat. 693 (1937), repealed by Consumer Goods Pricing Act of 1975 § 2; McGuire Act, Pub. L. No. 542-745, §5(a)(2)-(5) 66 Stat. 631, 632 (1952), repealed by Consumer Goods Pricing Act of 1975 § 3.

182 Leegin, 551 U.S. at 904-05.

183 Id. at 905 (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 643 (1981)).

184 Id. (quoting Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102 (1980)) (internal quotations marks omitted).

185 See id. at 906 ("The purpose of the antitrust laws, by contrast, is 'the protection of competition, not competitors."' (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990))).

186 The minority also included Justice Stevens, Justice Souter, and Justice Ginsburg.

187 Leegin, 551 U.S. at 917-18 (Breyer, J., dissenting).

188 See id. at 918.

189 Id. at 910-11.

190 Id. at 912. Many economists have noted that the issue is not whether the nominal price goes up, because almost everyone expects it to, but rather what the consumer gets in terms of nonprice competitive services and potential output expansion. To cite price increases is to misunderstand the whole economic analysis of RPM. That would be similar to arguing that automobile owners are not better off with safety equipment because it raises the nominal cost of the vehicle.

191 Id. at 913.

192 Id. at 914-15.

193 Id. at 920 (noting the economic studies described in the amicus and party briefs).

194 Id.

195 Id. at 920, 923.

196 Albrecht v. Herald Co., 390 U.S. 145 (1968), overruled by State Oil v Co. v. Khan, 522 U.S. 18 (1997).

197 Leegin, 551 U.S. at 927 (Breyer. J., dissenting).

198 Id.

199 Id. at 929.

200 Brief of Respondent, supra note 7, at 17.

201 Id. (emphasis added) (citing Swift & Co. v. Wickham, 382 U.S. 111, 124 (1965); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 79 (1993) (Scalia, J., concurring)).

202 See Mark A. McCarty & Matthew D. Kent, Antitrust Primer: Licensing Intellectual Property, in 950 Practising Law Institute Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 14730, Understanding the Intellectual Property License 561, 573 (2008) [hereinafter Understanding the Intellectual Property License] ("Because this decision is relatively new, it is difficult to determine how the lower courts will interpret the Leegin decisions."); Scott D. Russell, Analytical Framework for Antitrust Counseling on Intellectual Property Licensing, in Understanding the Intellectual Property License, supra, at 501, 531 ("Lower courts and the antitrust agencies are just beginning to apply the new Leegin standard, so it's not yet clear what a rule of reason analysis may portend for antitrust counselors.").

203 See McCarty & Kent, supra note 202, at 573. ("Thus, from an antitrust compliance and risk assessment perspective, it is preferable to exclude price restrictions from licensing agreements.").

204 Russell, supra note 202, at 531 (noting a recent acknowledgment by the Federal Trade Commission).

205 Several decisions cite Leegin in passing or fail to provide significant analysis. See, e.g., Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 122 n.5 (2d Cir. 2007) (mentioning Leegin in a footnote but not applying any analysis under the rule of reason). Such decisions have been omitted.

206 542 F.3d 290 (2d Cir. 2008). Former Circuit Judge Sotomayor filed a separate opinion concurring in the judgment. See id. at 334-41 (Sotomayor, J., concurring).

207 Id. at 293-95 (majority opinion).

208 Id. at 315 (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 894-95 (2007)).

209 See id. at 316.

210 Id. at 334.

211 Id.

212 See id. at 327-31.

213 Id. at 319-20.

214 530 F.3d 204 (3d Cir. 2008).

215 Id. at 210.

216 Id. at 209.

217 Id. at 210.

218 Id.

219 Id.

220 Id. at 220.

221 Id. at 221 (alterations in original) (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007)) (internal quotation marks omitted).

222 Id. at 220-21.

223 Id. at 221-22.

224 Id. at 225 (citing Leegin, 551 U.S. at 907).

225 Id. at 226.

226 See id. (citing Leegin, 551 U.S. at 893). "To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it too, would need to be held unlawful under the rule of reason." Leegin, 551 U.S. at 893.

227 Toledo Mack Sales, 530 F.3d at 226.

228 496 F.3d 403, 406 (5th Cir. 2007).

229 Id. at 406.

230 Id. at 407. This proposal would have theoretically been done for the casinos' benefit, given that the commission's website contained advertising and information about the casinos.

231 Id.

232 Id. at 407-08.

233 Id. at 408. Although not relevant for the purposes of this paper, the district court also found that the casino association's refusal to deal with TWA was not an unreasonable agreement in restraint of trade, and that TWA did not show that the casinos' refusal to deal with TWA was the result of concerted action. Id.

234 Id. at 411-14.

235 Id. at 411-12.

236 Id. at 412 (citing Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 292-93 (5th Cir. 1988)).

237 Id.

238 Id.

239 Id. (quoting Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289-90 (1985)) (internal quotation marks omitted).

240 Id. (citing NYNEX Corp v. Discon, Inc., 525 U.S. 128, 135 (1998)).

241 Id.

242 Id.

243 Id. at 413-14.

244 Id. (quoting Nw. Wholesale Stationers, 472 U.S. at 294).

245 Id. at 414 (citing Nw. Wholesale Stationers, 472 U.S. at 295).

246 Id. (citation omitted) (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007)).

247 Id. at 414-15.

248 547 F.3d 266 (5th Cir. 2008), cert. denied, 129 S. Ct. 2055 (2009).

249 Id. at 269.

250 Id.

251 Id. at 270.

252 Id.

253 Id. at 271 (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007)) (internal quotation marks omitted).

254 Id.

255 Id. (citing Leegin, 551 U.S. at 886).

256 572 F.3d 186 (4th Cir. 2009).

257 Defendant Franchot is the Comptroller of the State of Maryland and was named along with other various Maryland officials in the suit.

258 TFWS, 572 F.3d at 188.

259 Leegin was decided during the course of the numerous trial procedures involved in this case.

260 TFWS, at 191.

261 Id. at 188, 192.

262 Id. (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 904 (2007)) (internal quotation marks omitted).

263 561 F.3d 282 (4th Cir. 2009).

264 Id. at 284.

265 Id.

266 272 U.S. 476 (1926).

267 Valupest.com, 561 F.3d at 284 (citing General Electric, 272 U.S. 476).

268 Id.

269 Id

270 Id. at 285.

271 See id.

272 Id.

273 Id.

274 Id.

275 Id.at 285-86.

276 Id. at 286.

277 Id.

278 Id. at 287 (citing United States v. Gen. Elec. Co., 272 U.S. 476, 485 (1926)).

279 See id. (explaining the holding in General Electric).

280 Id. at 286.

281 Id.

282 Id.

283 Id.

284 Id.

285 See id. at 294.

286 See id. at 288.

287 Id. at 287-88.

288 Id. at 288.

289 Id. at 287.

290 Id. (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007)).

291 Id. (alteration in original) (citation omitted) (quoting Leegin, 551 U.S. at 885-86; State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)) (internal quotation marks omitted).

292 Id. at 288.

293 Id.

294 Spahr v. Leegin Creative Leather Prods., Inc., No. 2:07-CV-187, 2008 WL 3914461, at *11 (E.D. Tenn. Aug. 20, 2008).

295 See id. at *3-7.

296 Id. at *8.

297 Id. at *8-9.

298 Babyage.com, Inc. v. Toys "R" Us, Inc., Nos. 05-6792, 06-242, 2008 WL 2746302, at *1 (E.D. Pa. July 15, 2008).

299 Id.

300 Id.

301 See id. at *3-4.

302 Id. at *3 (quoting Babyage.com, Inc. v. Toys "R" Us, Inc.. 558 F.Supp.2d 575, 583 (E.D. Pa 2008) (internal quotation marks omitted) and citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893-94, 897-98 (2007)).

303 Id. at *4 (citing Leegin, 551 U.S. at 893-94).

304 597 F. Supp. 2d 848, 851 (E.D. Wis. 2009). The Eastern District of Wisconsin had ruled the statute unconstitutional in a previous proceeding. Id. at 853 (citing Lotus Bus. Group LLC v. Flying J Inc., 532 F. Supp. 2d 1011 (E.D. Wis. 2007)). Despite this ruling, the State continued its attempt to enforce the statute against the plaintiff gas station. Id.

305 Id. at 851.

306 Id. at 856.

307 Id. at 857 (citing Leegin Creative Leather Prods., Inc., v. PSKS, Inc., 551 U.S. 877 (2007)).

308 Id. (citing Lotus, 532 F. Supp. 2d at 1028).

309 Id. (quoting Leegin, 551 U.S. at 893).

310 See Lotus, 532 F. Supp. 2d at 1012.

311 Id. at 1028.

312 Id. at 1026.

313 Id. at 1026 (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007)) (internal quotation marks omitted).

314 Id. (quoting Leegin, 551 U.S. 877, 885) (internal quotation marks omitted).

315 Id. at 1028.

316 Stand Energy Corp. v. Columbia Gas Transmission Corp., No. 2:04-0867, 2008 WL 3891219, at *1 (S.D.W. Va. Aug. 19, 2008).

317 See id. at *14.

318 Id. (quoting Leegin, 551 U.S. at 886) (internal quotation marks omitted).

319 Id. (quoting Leegin, 551 U.S. at 887) (internal quotation marks omitted).

320 Id. (citing Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1294 (4th Cir. 1987)).

321 Id. (quoting Leegin, 551 U.S. at 885) (internal quotation marks omitted).

322 Id. at *15.

323 Id. at *16-17.

324 572 F. Supp. 2d 38, 65 (D.D.C. 2008).

325 Id. at 44.

326 See id. at 52.

327 Id. at 47 (citing Leegin Creative Leather Prods. Inc. v. PSKS, Inc., 551 U.S. 877, 885-86 (2007)).

328 Id. at 49-50.

329 Id. at 49 (alteration in original) (quoting Leegin, 551 U.S. at 887) (internal quotation marks omitted).

330 Id. at 51.

331 See Champagne Metals v. Ken-Mac Metals, Inc., No. CIV-02-0528-HE, 2007 WL 4115994, at *2 (W.D. Okla. July 27, 2007).

332 Id. at *1.

333 Id. at *1 & n.4.

334 Id. at *2.

335 Id. (citing FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 457-58 (1986)).

336 Id.

337 Id. (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007)) (internal quotation marks omitted).

338 Id. at *4.

339 Id. at *2 (explaining that "horizontal agreements among competitors to fix prices or to divide markets" are per se unlawful (citing Leegin, 551 U.S. at 886)).

340 See id. at *3 (noting that not all horizontal restraints of trade are per se illegal).

341 Id. at *4.

342 New England Carpenters Health Benefits Fund v. McKesson Corp., 573 F. Supp. 2d 431, 432-33 (D. Mass. 2008).

343 Id. at 433.

344 Id. at 434.

345 Id. (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886-87 (2007)).

346 Id. (internal quotation marks omitted).

347 Id.

348 Id. at 435-36.

349 Id. at 435 (quoting Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 373 F.3d 57, 61 (1st Cir. 2004)).

350 Id. (quoting Leegin, 551 U.S. at 886) (internal quotation marks omitted).

351 Id. at 435-36.

352 Id. at 436.

353 Leegin, 551 U.S. at 892-93.

354 Id. at 893.

355 Id. at 893-94.

356 See McDonough v. Toys "R" Us, Inc., No. 06-0242, 2009 WL 2055168, at *1 (E.D. Pa. July 15, 2009) (noting that a dominant retailer "allegedly coerced manufacturers into adopting vertical price restraints").

357 Id.

358 Id. at *2.

359 Id.

360 Plaintiffs were actual customers of Babies "R" Us who alleged that they paid higher prices for the products they bought due to the defendants' conduct in imposing price restraints. Id. at *1.

361 Id. at *2.

362 Id.

363 Id.

364 Id. at *3-6.

365 Id. at *4.

366 See id. at *14-17.

367 Id. at *15 (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007)).

368 Id. (alteration in original) (quoting Leegin, 551 U.S. at 885-86 (2007)) (internal quotation marks omitted).

369 Id. McDonough deals with interbrand competition, where "manufacturers [are] competing to sell different brands of the same type of product." Id. (citing Leegin, 551 U.S. at 890). Intrabrand competition "refers to retailers competing to sell the same brand." Id. "[A]ntitrust law gives priority to interbrand competition." Id. (citing Leegin, 551 U.S. at 890).

370 Id. (citing Leegin, 551 U.S. at 891-92).

371 Id. at *15 (quoting Leegin, 551 U.S. at 897) (internal quotation marks omitted).

372 Id. (second alteration in original) (quoting Leegin, 551 U.S. at 893) (internal quotation marks omitted).

373 Id. (quoting Leegin, 551 U.S. at 897-98) (internal quotation marks omitted).

374 Id. at *16 (quoting United States v. Brown Univ., 5 F.3d 658, 668-69 (3d Cir. 1993)) (internal quotation marks omitted).

375 Id. (quoting Brown Univ., 5 F.3d at 669) (internal quotation marks omitted).

376 Id. at *17.

377 530 F.3d 204 (3d Cir. 2008).

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