The American Consumer Is Not Well: Where Is *Dr. Miles*? [*Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007)]

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I. INTRODUCTION

Nearly all consumers recognize the ubiquitous acronym "MSRP" as the retail price *suggested* by the product's manufacturer. Until recently, the manufacturer's suggested retail price provided the legal limit for a manufacturer's influence over the resale price of its goods. When a manufacturer crossed the boundary of suggesting, and instead agreed with a retailer to set the resale price of the goods, there was a 100% chance that the manufacturer violated antitrust law.

The United States Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[1] reversed this longstanding tradition. It enables manufacturers, under certain circumstances, to go beyond suggesting the resale price of their goods.[2] This opinion overturned nearly 100 years of Supreme Court precedent and replaced *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[3] which long served to prevent manufacturers, with no exceptions, from agreeing on resale prices with retailers.[4] As a result of *Leegin*, antitrust law no longer forbids manufacturers from entering into an agreement with retailers to fix resale prices. While the Court's decision does not always authorize the "resale price maintenance" (RPM) agreements, it provides significant leeway for manufacturers legally entering into such agreements under antitrust law.

Leegin will have broad economic effects on all the participants of the American economy, from large manufacturers to small-town con-

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1. 127 S. Ct. 2705 (2007).
2. *Id.* at 2725.
3. 220 U.S. 373 (1911).
4. *Compare Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2725 (2007), *with Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 409 (1911).

sumers. To the extent that *Leegin* allows manufacturers to control their resale prices, consumers will pay higher prices for their goods and their ability to comparison shop among different retailers will be substantially impaired. In *Leegin*, the Supreme Court relied on speculative and unproven theories to overturn *Dr. Miles*, rather than deferring to the concrete empirical data that demonstrates that RPM is infectious to consumer welfare. Because of the high stakes of a miscalculated judgment, the Court should not have overturned *Dr. Miles* without a more thorough consideration of the actual costs to American consumers. In due time, it will be evident that the ailing American consumer needed *Dr. Miles* to protect the marketplace from anti-competitive conduct and to provide a logical framework to govern the legal treatment of RPM. As a result of *Leegin*, retail prices will increase and consumers will receive no countervailing benefits to offset their pain.

II. CASE DESCRIPTION

Leegin Creative Leather Products, Inc. (Leegin) designed, manufactured, and distributed leather goods and accessories.[5] In 1991, Leegin launched its "Brighton" brand of products, which consisted of a line of fashionable women's belts.[6] As the Brighton brand's popularity grew, Leegin expanded it to include a wider array of women's fashion accessories.[7] By 2000, Leegin sold Brighton products in over 5000 retail locations throughout the country, most of which were independently owned boutique or specialty stores.[8]

PSKS, Inc. (PSKS) operated Kay's Kloset, a specialty store in Lewisville, Texas that sold women's fashion accessories.[9] In 1995, Kay's Kloset began selling Brighton products and added Leegin to its approximately seventy-five other suppliers.[10] Kay's Kloset expended its own resources to advertise and promote the Brighton products that it carried.[11] The Brighton brand became enormously popular among Kay's Kloset's customers and Brighton products accounted for nearly half of Kay's Kloset's annual profit by 1999.[12] As a result, Brighton became Kay's Kloset's most profitable brand.[13]

In 1997, Leegin initiated the "Brighton Retail Pricing and Promo-

5. *Leegin*, 127 S. Ct. at 2710.
6. *Id.*
7. *Id.*
8. *Id.* Leegin's president had an ownership interest in approximately seventy of these stores. *Id.*
9. *Id.* at 2711.
10. *Id.*
11. Brief of Respondent at 4, *Leegin*, 127 S. Ct. 2705 (No. 06-480). PSKS spent "tens of thousands of dollars on television, newspaper and direct mail ads." *Id.*
12. *Leegin*, 127 S. Ct. at 2711.
13. *Id.*

tion Policy."[14] Under the policy, Leegin set the resale prices for its Brighton line and refused to sell to retailers that resold the products below the suggested prices.[15] Because of Leegin's belief that the policy increased its profitability, Leegin instituted the "Heart Store Program" in 1998.[16] The "Heart Store Program," as distinguished from the "Brighton Retail Pricing and Promotion Policy," took the latter one step further by requiring Leegin's resellers to enter into contracts and agree upon the resale prices for Brighton products.[17] To become a Heart Store and receive the incentives offered, retailers pledged to sell Brighton products at Leegin's set prices.[18] Kay's Kloset became a Heart Store and agreed to sell the Brighton products at the set prices.[19]

In 2002, Leegin discovered that Kay's Kloset was discounting its entire Brighton line by twenty percent.[20] When Kay's Kloset refused to stop discounting the Brighton line, Leegin stopped shipping Brighton products to Kay's Kloset.[21] PSKS filed suit, alleging that Leegin's "Heart Store Program" violated antitrust law.[22]

A. United States District Court for the Eastern District of Texas

On April 25, 2003, PSKS sued Leegin in the district court.[23] PSKS specifically alleged that Leegin "enter[ed] into agreements with retailers to charge only those prices fixed by Leegin,"[24] which violated the Sherman Antitrust Act's[25] (Sherman Act) per se rule against RPM.[26] Despite Leegin's assertion that it had merely suggested its resale prices, the jury found that Leegin's policy constituted an "agreement," and thus

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14. *Id.*

15. *Id.* Leegin proffered several reasons for adopting the policy, including to prevent customers from feeling "cheated when they buy at the wrong moment" and also to ensure "a sufficient margin to retailers to give them the incentive to focus on Brighton products and to provide high-quality service." Brief for Petitioner at 3-4, *Leegin*, 127 S. Ct. 2705 (No. 06-480). Leegin also wanted to prevent discounting, which it perceived to damage the Brighton brand's image. *Leegin*, 127 S. Ct. at 2711. Leegin created an exception to the policy, which allowed retailers to discount certain products when the retailer was unable to sell the products and did not plan on re-ordering the products. *Id.*

16. *See Leegin*, 127 S. Ct. at 2711. For example, Leegin sold 125,609 Brighton handbags in 1996 and 375,480 handbags in 2003. *See* Brief for Petitioner, *supra* note 15, at 4.

17. *Leegin*, 127 S. Ct. at 2711.

18. *Id.* Participating retailers were required to sign the "Brighton Pledge" form every year, under which they pledged to "[f]ollow the Brighton Suggested Pricing Policy at all times." Brief of Respondent, *supra* note 11, at 1.

19. *Leegin*, 127 S. Ct. at 2711.

20. *Id.* PSKS contended that Kay's Kloset discounted its Brighton products to compete with other retailers in the area that were selling below Leegin's suggested prices. *Id.* Additionally, PSKS explained that it "provided services and charged less simply because it was more efficient in doing so." Brief of Respondent, *supra* note 11, at 25.

21. *Leegin*, 127 S. Ct. at 2711. "Leegin's enforcement efforts took the form of threats to stop shipment, [and] suspensions of shipment pending agreement to raise prices . . . ." Brief of Respondent, *supra* note 11, at 2.

22. *Leegin*, 127 S. Ct. at 2712.

23. *Id.*

24. *Id.*

25. 15 U.S.C. § 1 (Supp. 2004).

26. *Leegin*, 127 S. Ct. at 2712.

the rule established by *Dr. Miles* made it per se unlawful.[27] The district court trebled the $1.2 million jury award and awarded PSKS nearly $4 million.[28]

B. United States Court of Appeals for the Fifth Circuit

Leegin appealed the district court's decision to the Fifth Circuit.[29] On appeal, Leegin did not contest the jury's conclusion that Leegin's pricing policy constituted a RPM policy.[30] Instead, Leegin argued that the district court should have applied the rule of reason, rather than the per se rule of *Dr. Miles*, to assess the legality of its pricing policy.[31] Accordingly, Leegin reasoned that the district court should have allowed it to introduce evidence and economic testimony describing the pro-competitive justifications for implementing the "Heart Store Program."[32]

The Fifth Circuit rejected Leegin's argument and affirmed the district court decision, reasoning that it was bound to apply the per se rule because "the Court ha[d] consistently applied" *Dr. Miles* to RPM agreements.[33] The court dismissed Leegin's contention that the district court should have allowed Leegin to introduce evidence to show the pro-competitive effects of Leegin's pricing policy, stating that under *Dr. Miles*, "[E]xpert testimony regarding economic conditions and the pricing policy's pro-competitive effects is *not* relevant."[34]

III. BACKGROUND

A. The Sherman Act and the Reasonableness Inquiry

In 1890, Congress enacted the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[35]

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27. *Id.*
28. *Id.* The district court trebled the damages pursuant to 15 U.S.C. § 15(a). *Id.* Title 15 U.S.C. § 15(a) provides that a plaintiff "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a) (2000).
29. PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 F. App'x. 464 (5th Cir. 2006).
30. *Id.* at 466.
31. *Id.*
32. *Id.* at 467.
33. *Id.* at 466.
34. *Id.* at 467.
35. 15 U.S.C. § 1 (Supp. 2004). Section 1 provides in full:

> 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

It passed the Sherman Act for the primary purpose of preserving free competition, which it believed would ultimately lower prices for consumers.[36] While the Supreme Court could literally read the Sherman Act to prevent all contracts, the Court interprets it "to outlaw only unreasonable restraints."[37] Under modern antitrust jurisprudence, the Court conducts a reasonableness inquiry to determine whether a given behavior violates the Sherman Act.[38] The reasonableness inquiry focuses on the competitive effects of an actor's behavior by analyzing how the behavior might impair competition, how the behavior could help competition, and whether there are suitable alternatives to the behavior.[39]

Courts employ two methods to assess the reasonableness of a challenged practice.[40] The most accepted standard for assessing the reasonableness of a challenged practice is on a case-by-case basis, known as the rule of reason.[41] Under the rule of reason, a plaintiff must demonstrate that a restraint is "in fact unreasonable and anti-competitive before it will be found unlawful."[42] When a court employs the rule of reason, the jury "tak[es] into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect."[43]

Id. Prior to the enactment of the Sherman Act, state common law dealt with issues involving competition policy. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 11 (2d. ed. 2000). However, in the late 1800s, a number of industrial mergers occurred within the United States. *Id.* at 12. The primary purpose of these mergers was to create economies of scale to take advantage of the expanding marketplace brought upon by the railroad. *Id.* Congress responded to the wave of mergers by passing the Sherman Act. *See id.*

36. *See, e.g.*, Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538 (1983) (explaining that "the Sherman Act was enacted to assure customers the benefits of price competition"); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (noting that the Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, [and] the lowest prices"); Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940) (suggesting that the end sought by the enactment of the Sherman Act "was the prevention of restraints to free competition").

37. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (stating that "this Court has long recognized that Congress intended to outlaw only unreasonable restraints").

38. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712-13 (2007); 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 335-38 (2d ed. 2003).

39. 7 AREEDA & HOVENKAMP, *supra* note 38, at 336-37.

40. *See id.* at 335.

41. *Leegin*, 127 S. Ct. at 2712 (explaining that "[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1"); Texaco Inc. v. Dagher, 547 U.S. 1, 3 (2006) (stating that "this Court presumptively applies the rule of reason analysis"); 7 AREEDA & HOVENKAMP, *supra* note 38, at 335 (arguing that "reasonableness is usually judged case by case"). The Supreme Court first discussed the reasonableness inquiry in *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911), stating that "the standard of reason . . . was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which [Sherman Act section 1] provided." *Id.* at 60.

42. *Dagher*, 547 U.S. at 3.

43. State Oil Co. v. Khan, 522 U.S. 3, 11 (1997). Justice Brandeis set forth the classic definition of the rule of reason in *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the

Under the rule of reason, a challenged practice is only unlawful if the anti-competitive effects outweigh the pro-competitive effects.[44] Courts, however, do not always apply the rule of reason. Courts often determine the reasonableness of a challenged practice based on the type of conduct involved, called a rule of per se unreasonableness.[45] Under the per se rule, courts deem certain types of conduct necessarily illegal without any inquiry into the reasonableness of the conduct in light of its actual purpose or effects.[46] Generally, courts only apply the per se rule to restraints that invariably have anti-competitive effects and would always be condemned under the rule of reason.[47]

B. Vertical Restraints and Their Treatment Under Antitrust Law

Manufacturers, for numerous economically valid reasons, often desire to impose restrictions on buyers.[48] When a seller attaches conditions to its products, the seller has created a "vertical restraint."[49] Generally speaking, a seller may employ either price or non-price vertical restraints to impose conditions on its buyers.[50] A brief discussion of the various types of vertical restraints and how the Court has assessed the reasonableness of each type will be helpful at this point.

1. Resale Price Maintenance Agreements

An RPM agreement is an agreement between a seller and a buyer in which the parties agree to fix the price at which the seller will resell the goods.[51] In 1911, the Supreme Court held in *Dr. Miles* that RPM agreements are per se unlawful under the Sherman Act.[52] In 1919, the

> restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 238.

44. *See Leegin*, 127 S. Ct. at 2713 (explaining that the rule of reason "distinguishes between restraints with anticompetitive effect[s] . . . and restraints stimulating competition").

45. 7 AREEDA & HOVENKAMP, *supra* note 38, at 335.

46. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988).

47. *See Khan*, 522 U.S. at 11 ("Per se treatment is 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.'" (quoting Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982)) (emphasis omitted)). Restraints that are deemed per se illegal include horizontal price-fixing agreements and horizontal agreements to divide markets. *See Leegin*, 127 S. Ct. at 2713.

48. *See* 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 306-13 (2d ed. 2004) (explaining the traditional justifications for implementing RPM agreements).

49. *Id.* at 1-2.

50. *See id.* at 3-4.

51. *Leegin*, 127 S. Ct. at 2710.

52. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 408-09 (1911). Dr. Miles Medical Corporation, the plaintiff and an Indiana Corporation, manufactured and sold proprietary medicines to distributors across the United States, who in turn sold the medicines to retail druggists to sell to consumers. *Id.* at 374. Dr. Miles fixed the wholesale price and the retail price of its medicines, and only sold to distributors that agreed to resell the medicines at the set price. *Id.*

Supreme Court established the *Colgate* doctrine, which limited the extent to which courts would infer an "agreement."[53] Under the *Colgate* doctrine, the Supreme Court created an exception to *Dr. Miles* by allowing a manufacturer to unilaterally suggest the resale prices for its products and refuse to deal with retailers that do not sell the products at the suggested prices.[54] The *Colgate* doctrine is consistent with the Sherman Act, because the requisite "agreement" for a Sherman Act violation is absent.[55]

In 1937, in response to "pressure from small retailers that felt threatened by the rise of discount houses and chain stores,"[56] Congress passed the Miller-Tydings Act,[57] commonly known as the "fair trade" law.[58] The Act allowed states to overturn *Dr. Miles* and legalize RPM within their borders.[59] During the fair trade era, thirty-six states enacted laws to allow RPM within their borders.[60] Congress, however, repealed the Act when it passed the Consumer Goods Pricing Act (CGPA) of 1975.[61] The CGPA effectively restored the *Dr. Miles* rule of per se illegality.[62] The legislative history of the CGPA shows that Congress mustered its nearly unanimous support for the repeal due to its view that RPM was anti-competitive and increased consumer prices.[63] During this time, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) favored the repeal and urged Congress to reject the arguments in favor of maintaining the fair trade law.[64] In 1977, the Supreme Court expressly recognized that Congress intended RPM to be per se unlawful when it repealed the fair trade laws.[65]

Despite their hostility to the fair trade laws during the 1970s, the DOJ and the FTC reversed course in the early 1980s and began to oppose the *Dr. Miles* rule.[66] The DOJ announced that it would not en-

53. *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

54. *Id.* For an overview of the *Colgate* doctrine and its legal limitations, see 7 AREEDA & HOVENKAMP, *supra* note 38, at 60-63.

55. *See Colgate & Co.*, 250 U.S. at 307. Although there have been a number of challenges to the *Colgate* doctrine on grounds that it is identical to RPM, courts continue to uphold the doctrine. *See, e.g.*, Russell Stover Candies, Inc. v. FTC, 718 F.2d 256, 260 (8th Cir. 1983).

56. 8 AREEDA & HOVENKAMP, *supra* note 48, at 296.

57. Miller-Tydings Act, Pub. L. No. 314, 50 Stat. 693 (1937) (repealed 1975).

58. 8 AREEDA & HOVENKAMP, *supra* note 48, at 296.

59. *See id.*

60. S. REP. NO. 94-466, at 2 (1975).

61. Pub L. No. 94-175, 89 Stat. 801 (1975).

62. *See id.*

63. *See* S. REP. NO. 94-466, at 1 (1975) ("Repeal of the fair trade laws should result in a lowering of consumer prices."). In addition, statistics indicated that states with fair trade laws had a fifty-five percent higher rate of business failure than states without fair trade laws. *Id.* at 3.

64. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2731 (2007) (Breyer, J., dissenting).

65. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977) (stating, "Congress recently has expressed its approval of a per se analysis of vertical price restrictions" by passing the Consumer Goods Pricing Act (emphasis omitted)).

66. H.R. REP. NO. 237, at 4 (1991). For at least three years after the Department of Justice and the Federal Trade Commission took this position, neither agency challenged a single manufacturer's

force the per se rule and began to intervene on behalf of defendant manufacturers in lawsuits involving alleged RPM agreements.[67] In 1983, the DOJ filed an amicus brief on behalf of one such defendant in the Supreme Court case *Monsanto Co. v. Spray-Rite Service Corp.*[68] In response, Congress passed a measure restricting any funding to the DOJ used "to overturn or alter the per se prohibition on [RPM]."[69] Congress relaxed the funding restrictions the following year, but reenacted these appropriation restrictions for the years of 1985, 1986, and 1987.[70]

The Supreme Court's 1984 decision in *Monsanto* reaffirmed the *Colgate* doctrine and simultaneously broadened the shelter provided by the doctrine.[71] In *Monsanto*, the Court held that a plaintiff must present evidence that excludes the possibility of unilateral action by a manufacturer to prove that an agreement violates the Sherman Act.[72] Four years later, the Supreme Court's decision in *Business Electronics Corp. v. Sharp Electronics Corp.*[73] further limited the extent to which the Court would infer an agreement.[74] In *Business Electronics*, the Court held that the termination of a price-cutting retailer at the request of another retailer would not reflect an unlawful agreement unless the plaintiff could show that an actual agreement to fix prices existed between the parties.[75] In 2003, the bipartisan Antitrust Modernization Commission convened to examine and evaluate proposals to modernize antitrust law, and concluded that RPM did not need to be studied, due in part to "[c]ongressional support year in, year out for maintenance of the per se rule."[76] Before *Leegin*, the United States treated RPM in a manner similar to most other developed countries, including Canada,[77] the United Kingdom,[78] the European Union,[79] and Australia,[80] all of which

pricing policy as unlawful. *See* Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1489-90 (1983).

67. *See* H.R. REP. NO. 237, at 4.

68. 465 U.S. 752, 753 (1984).

69. Pub. L. No. 98-166, 97 Stat. 1071 (1983).

70. Pub. L. No. 99-180, 99 Stat. 1169 (1985); Pub. L. No. 99-500, 100 Stat. 1783-73 (1986); Pub. L. No. 100-202, 101 Stat. 1329-38 (1987).

71. *Monsanto*, 465 U.S. at 764 (holding that courts would not infer agreements from evidence of retailer complaints to the manufacturer about a price-cutting competitor).

72. *See id.* (reasoning that "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently").

73. 485 U.S. 717 (1988).

74. *Id.* at 726, 735-36.

75. *Id.*

76. Antitrust Modernization Commission, Transcript of Meeting of Jan. 13, 2005, at 129-30, *available at* http://www.amc.gov/pdf/meetings/050113_Meeting_Transcript_reform.pdf (emphasis omitted). Congress appropriated $4 million to the Commission to carry out its various assigned duties, which included examining whether antitrust laws need to be modernized, soliciting views from those concerned with antitrust laws, evaluating proposals and current arrangements, and submitting a report to Congress and the President. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, 116 Stat. 1856, 1856, 1859 (2002).

77. The Competition Act, R.S.C., ch. C-34 (1985).

78. Ittai Paldor, *The Vertical Restraints' Paradox: Justifying the Different Legal Treatment of Price and Non-price Vertical Restraints* 18, *available at* http://ssrn.com/abstract-951609 (citing Resale Price Act, 1964, c. 58. (Eng.)).

had adopted some version of the per se rule.

2. Non-Price Restraints

In addition to RPM policies, manufacturers sometimes impose non-price restraints on the purchasers of their products.[81] Non-price restraints generally take the form of territorial or customer restraints.[82] Territorial restraints usually assign retailers a specific geographic area to resell the goods.[83] Customer restraints usually prevent the retailer from reselling to customers not falling within a certain category.[84]

In 1963, the Supreme Court declared that courts should evaluate territorial and non-price restraints under the rule of reason.[85] Only four years later, it abruptly changed its approach and declared that non-price vertical restraints were per se unlawful.[86] Finally, in 1977, the Court changed course for the final time in *Continental T.V., Inc. v. GTE Sylvania Inc.*[87] and adapted the rule of reason as the standard for assessing the reasonableness of non-price vertical restraints.[88] Thus, modern antitrust jurisprudence has afforded more lenience to non-price restraints than to price restraints, which are subject to a heightened degree of intolerance under the per se rule.[89]

IV. COURT'S DECISION

In a five to four decision, the *Leegin* Court overturned the longstanding precedent of *Dr. Miles* and adapted the rule of reason as the standard for assessing the reasonableness of RPM agreements.[90] Writing for the majority, Justice Kennedy examined the economic effects of RPM and determined that *Dr. Miles* was no longer in accord with the Court's modern antitrust jurisprudence.[91] As a result, a manufacturer

79. Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 64.

80. Trade Practices Act, 1974, c. 48 (Austl.).

81. *See* 8 AREEDA & HOVENKAMP, *supra* note 48, at 376-81.

82. *See id.* at 377. In addition to territorial and customer restraints, sellers may implement vertical restraints relating to "showrooms, inventories, service facilities, advertising and promotion, product quality, hours of operation, and management procedures." *Id.* at 376 n.27.

83. *See id.* at 378-80.

84. *See id.* at 380-81. For example, a manufacturer of salon products may charge salons lower prices and, at the same time, charge a higher price for regular dealers such as Walgreens. *See id.* at 188. In this instance, the manufacturer may place a customer restraint on the products to prevent the salons from selling to Walgreens for a price below the manufacturer's wholesale price. *See id.*

85. White Motor Co. v. United States, 372 U.S. 253, 263-64 (1963).

86. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967).

87. 433 U.S. 36 (1977).

88. *Id.* at 59.

89. *See* 8 AREEDA & HOVENKAMP, *supra* note 48, at 303 ("It is . . . entirely reasonable to regard [RPM] as a more pervasive threat to competition than nonprice restraints.").

90. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2710 (2007).

91. *See id.* at 2710, 2714. Justices Roberts, Scalia, Thomas, and Alito joined in the majority opinion. *Id.* at 2710.

no longer commits a per se violation of antitrust law when it agrees with a retailer to fix the resale price of its goods.

The Court began by asserting that under modern antitrust jurisprudence, per se categorizations were appropriate only for conduct "that would always or almost always tend to restrict competition and decrease output."[92] The Court explained that when it decided *Dr. Miles* in 1911, it relied on the "formalistic" common-law rule against restraints on alienation, and the holding was not based on the actual economic effects of RPM.[93] Since the Court in *Dr. Miles* did not assess whether RPM always restricts competition, *Dr. Miles* was not in accord with the Court's modern antitrust jurisprudence.[94] Thus, the Court decided to reexamine the actual economic effects of RPM to determine if the per se rule was nonetheless appropriate.[95]

After it decided to reexamine the economic effects of RPM, the Court explained that "economics literature is replete with procompetitive justifications for a manufacturer's use of [RPM]."[96] First, a manufacturer could use RPM to ensure that retailers provide demand-creating services, such as informed sales staff or product demonstrations.[97] Justice Kennedy explained that RPM prevents retailers from competing on price and "encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers."[98] By encouraging retailers to compete on the basis of service, the Court reasoned that RPM furthers the primary purpose of antitrust law, which is to increase interbrand competition.[99] The Court articulated that these demand-creating services might be underprovided without RPM because of "free-riding," which occurs when discounting retailers provide little or no demand-creating services, yet capture the demand created by other retailers that invest in costly services or promotional efforts.[100] Free-riding adversely affects interbrand competition because it diminishes a retailer's incentive to provide demand-creating services, which harms the manufacturer's competitive stance against interbrand rivals.[101]

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92. *Id.* at 2713 (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).
93. *See id.* at 2714 (citing Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-05 (1911) (stating that "a general restraint upon alienation is ordinarily invalid")).
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 2715-16.
98. *Id.* at 2715.
99. *See id.*
100. *Id.* at 2715-16. For example, consumers might become aware of a manufacturer's product as a result of a retailer that spends large amounts of capital to provide quality services and create demand for the product. *See id.* If another retailer subsequently sells the same product to these consumers at a discount without spending any capital to provide services or create demand, the discounting retailer is called a "free-rider," because it is benefiting from the efforts of the other retailer that induced the consumer to purchase the product. *See id.*
101. *Id.*

Second, the Court explained how RPM "facilitat[es] market entry for new firms and brands," which in turn creates greater interbrand competition.[102] The Court maintained that RPM ensures retailers a guaranteed margin, which creates a greater likelihood that retailers will invest in new products, thus enabling new entrants with innovative products to obtain distributors.[103] Because "[n]ew products and new brands are essential to a dynamic economy," RPM could have a pro-competitive effect by making it easier for new entrants to obtain distributors.[104]

Notwithstanding the pro-competitive effects of RPM, the Court acknowledged that manufacturers could also use RPM anti-competitively.[105] For example, RPM could facilitate manufacturer cartels.[106] If manufacturers collude to fix prices, RPM would enable the cartel to detect if a manufacturer was selling below the cartel's set prices.[107] Justice Kennedy further explained that a dominant manufacturer could use RPM to incentivize retailers not to carry the products of rival brands.[108] In addition, he described how a dominant retailer could request an RPM policy to thwart price competition from innovative or more efficient retailers.[109]

In light of the pro-competitive and anti-competitive effects of RPM, the Court concluded that, it could not "be stated with any degree of confidence that [RPM] 'always or almost always tend[s] to restrict competition or restrict output.'"[110] Since the continued per se treatment under *Dr. Miles* "would proscribe a significant amount of pro-competitive conduct," the Court held that RPM was not fit for per se illegality.[111] Because of the risk of anti-competitive conduct, however, the Court reasoned that lower courts would have to thoroughly examine RPM to eliminate its anti-competitive use.[112] Nonetheless, PSKS argued that courts would struggle to apply the rule of reason and the administrative ease of the per se rule justified upholding *Dr. Miles*.[113] The Court acknowledged the legitimacy of PSKS's administrative concerns, but reasoned that these concerns did not outweigh the pro-competitive effects of RPM.[114] Furthermore, the Court expressed its confidence that

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102. *Id.* at 2716.
103. *Id.*
104. *Id.*
105. *See id.*
106. *Id.* (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725 (1988)).
107. *Id.*
108. *Id.* at 2717.
109. *See id.*
110. *Id.* (quoting *Bus. Elecs. Corp.*, 485 U.S. at 723) (second alteration in original).
111. *Id.* at 2718.
112. *Id.* at 2719.
113. Brief of Respondent, *supra* note 11, at 27-29.
114. *Leegin*, 127 S. Ct. at 2718; *see also* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977) (describing how "per se rules tend to provide guidance to the business community and to

lower courts could successfully apply the rule of reason and would develop efficient approaches that would provide guidance to businesses.[115] When assessing RPM and its effects on competition, the Court instructed lower courts to specifically consider the number of manufacturers using RPM, the impetus of the RPM policy, and the manufacturer's market power.[116]

Next, the Court addressed PSKS's argument that overturning *Dr. Miles* would be detrimental to consumer welfare, because RPM would increase consumer prices and eliminate the ability of consumers to comparison shop for goods.[117] The Court acknowledged that RPM could increase retail prices, but reasoned that, without "a further showing of anti-competitive conduct," *Dr. Miles* could not be upheld solely on the grounds that RPM increases prices.[118] Justice Kennedy indicated that higher prices alone were inconclusive as to whether RPM adversely affected consumer welfare, since increased service levels that consumers desire could offset the higher prices.[119]

Finally, in dismissing PSKS's argument for upholding *Dr. Miles* on stare decisis grounds, the Court reasoned that stare decisis was not as significant when addressing the Sherman Act and stated that the Sherman Act must "evolve to meet the dynamics of present economic conditions."[120] Notwithstanding the diminished importance of stare decisis in antitrust law, PSKS reasoned that Congress had "consistently and unambiguously" endorsed the per se rule, particularly when it passed the CGPA, which repealed legislation that allowed states to legalize RPM.[121] The Court rejected PSKS's interpretation of the CGPA and explained that the Act did not codify the per se rule of *Dr. Miles*, but it merely rescinded the prior enactments that made RPM per se lawful.[122] After the Court rejected stare decisis as the remaining basis for upholding *Dr. Miles*, the Court declared that lower courts were to judge RPM under the rule of reason.[123]

In dissent, Justice Breyer expressed concern over the consumer welfare implications of the majority's holding and disagreed with the

minimize the burdens on litigants and the judicial system" (emphasis omitted)).

115. *Leegin*, 127 S. Ct. at 2720.

116. *Id.* at 2719-20.

117. *See id.* at 2718-19.

118. *Id.* at 2718.

119. *See id.* (quoting THOMAS R. OVERSTREET, JR., RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 106 (1983) (explaining that increases in price "do not necessarily tell us anything conclusive about the welfare effects of [RPM] because the results are generally consistent with both pro-competitive and anticompetitive theories")).

120. *Id.* at 2720-25 (explaining that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act") (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

121. *See* Brief of Respondent, *supra* note 11, at 10-14.

122. *Leegin*, 127 S. Ct. at 2724.

123. *Id.* at 2725.

majority's failure to adhere to the doctrine of stare decisis.[124] He questioned the majority's acceptance of the pro-competitive theories for RPM and discussed the absence of any justifiable reason to disregard the doctrine of stare decisis to overturn *Dr. Miles*.[125]

Justice Breyer did not dispute the pro-competitive or anti-competitive effects discussed by the majority, but he was concerned that it would be difficult for courts to apply the rule of reason to RPM.[126] Particularly with respect to the "free riding" problem, he asked, "How easily can courts identify instances in which the benefits are likely to outweigh potential harms?"[127] Believing the answer was "*not very easily*," he reasoned that "[o]ne cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs."[128] He reasoned that the administrative difficulties plaintiffs will encounter under the rule of reason might tempt manufacturers to implement borderline anti-competitive RPM policies.[129]

Next, Justice Breyer asserted that the doctrine of stare decisis counseled against overturning *Dr. Miles*.[130] First, he discussed the absence of any relevant changed circumstances and the lack of any new studies to merit the majority's disposal of *Dr. Miles*.[131] Not only did he find insufficient changes to the American economy to justify the majority's position, to the contrary, he deferred to the CGPA.[132] While acknowledging that the Act did not codify the per se rule of *Dr. Miles*, Justice Breyer reasoned that legislation "premised upon the existence of that rule constitutes important public reliance upon that rule."[133] Furthermore, he rationalized that neither Leegin nor its amici presented any new arguments in favor of overturning *Dr. Miles*, but merely resurrected the same contentions that Congress weighed heavily prior to repealing the fair trade laws.[134]

Next, Justice Breyer relied on factors the Court traditionally con-

124. *See id.* at 2725-37 (Breyer, J., dissenting). Justices Stevens, Souter, and Ginsburg joined Justice Breyer in the dissent. *Id.* at 2725.

125. *Id.* at 2725-37.

126. *See id.* at 2729-31.

127. *Id.* at 2730.

128. *Id.*

129. *Id.* at 2731. In particular, Justice Breyer maintained that the expensive and time consuming trials associated with rule of reason cases, combined with the limited enforcement resources available to bring criminal proceedings, will cause manufacturers to be less concerned about violating the law. *Id.*

130. *Id.* at 2731-37.

131. *See id.* at 2731-34. Justice Breyer also addressed the increased concentration among manufacturers and retailers since the fair trade era. *Id.* at 2733-34. He reasoned that the increased concentration created more market power, which increased the likelihood of manufacturers using RPM anti-competitively. *Id.*

132. *Id.* at 2731-32.

133. *Id.* at 2732.

134. *See id.* at 2731.

sidered to determine whether to overrule a case and concluded that "every stare decisis concern this Court has ever mentioned counsels against overruling here."[135] Particularly, he expressed dissatisfaction with the majority's limited stare decisis considerations, noting that the only stare decisis consideration the majority made consisted of explaining that stare decisis was less relevant in antitrust law.[136] While not entirely disagreeing with this notion, Justice Breyer distinguished *Dr. Miles* from other antitrust cases the Court overturned, reasoning that the duration of *Dr. Miles* and the public's reliance on the per se rule was greater than in other antitrust areas.[137] He concluded that the only "safe prediction" emerging from the majority's decision was that "it will likely raise the price of goods at retail and that it will create considerable legal turbulence as lower courts seek to develop workable principles."[138]

V. COMMENTARY

In *Leegin*, the Court placed its faith and the fate of consumer welfare in the hands of economic theorists, rather than deferring to the empirical data and proven anti-competitive effects of RPM. The Court displaced the American consumer's interest in lower prices by underemphasizing the role that *Dr. Miles* held in ensuring free-market competition among retailers. As a result, consumers will pay significantly more for goods in retail establishments nationwide, with no countervailing benefits. Moreover, the *Leegin* decision will deter lawsuits and cause plaintiffs to endure expensive and protracted litigation.

A. Leegin Will Adversely Affect Consumer Welfare More Than the Court Recognized

RPM increases the prices of goods.[139] The available empirical data overwhelmingly shows that *Leegin* will cause consumers to spend more money for the same goods.[140] During the fair trade era, consumer prices

135. *Id.* at 2734-37 (emphasis omitted). There are a number of factors that the Court takes into account when considering whether to overrule a prior case. *Id.* First, the Court is more likely to adhere to stare decisis in statutory cases. *Id.* at 2734. Second, stare decisis is less important when the case was decided "only a reasonably short time ago." *Id.* Third, a decision is more likely to be overruled if it "creates an 'unworkable' legal regime." *Id.* Fourth, a rule of law that is well-settled is less likely to be overruled. *Id.* at 2735. Fifth, cases that involve property rights or contract rights are less likely to be overruled. *Id.*

136. *Id.* at 2736.

137. *See id.*

138. *Id.* at 2737.

139. *See, e.g.*, 8 AREEDA & HOVENKAMP, *supra* note 48, at 40 (stating that RPM "tends to produce higher consumer prices than would otherwise be the case. The evidence is persuasive on this point."); Pitofsky, *supra* note 66, at 1488 (RPM "agreements lead to higher, and usually uniform, resale prices."); H.R. REP. NO. 94-341, at 3 (1975) (noting that "[f]rom the consumers' point of view, 'fair trade' laws have one effect – higher prices").

140. *See, e.g.*, S. REP. NO. 94-466, at 6 (1975) (describing that in fair trade states, "[A] set of golf clubs that lists for $220 can be purchased in non-fair trade areas for $136; a $49 electric shaver for

increased as much as twenty-seven to thirty-seven percent because of legalized RPM during the period.[141] For example, purchasers of men's jeans saved over $200 million a year when Levi Strauss ended its RPM policy in 1976.[142] Recent attempts by five record companies to engage in RPM cost consumers an estimated $480 million from 1997 to 2000.[143] Studies have quantified the congressional economic experiment, otherwise known as the fair trade era, as costing consumers as much $6.5 billion a year.[144] If an equal pricing effect occurred in today's retail environment, the average family of four would incur additional retail bills of $750 to $1000 annually and create a total cost of nearly $300 billion for American consumers.[145] Notwithstanding the potential cost to consumers—$300 billion a year—the *Leegin* Court assumed that the theoretical and unquantifiable benefits of overturning *Dr. Miles* would offset the increase in consumer prices.[146] Instead of devoting the majority of its opinion to assessing the validity of "theoretical literature," the Court should have demanded more proof that overturning *Dr. Miles* would somehow mitigate the severe threat that RPM poses to consumer welfare.[147]

In a post-*Leegin* world, several factors in the American economy will increase the likelihood of anti-competitive RPM and exacerbate the accompanying increase in consumer prices. First, as the Court recognized, manufacturers are more likely to abuse RPM if they have market power.[148] The Court noted that powerful manufacturers might use RPM to give retailers an incentive not to sell the products of competing brands or new entrants.[149] Today, manufacturers have more market power than ever before because of increased concentration among

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$32; a $1,360 stereo system for $915 and a $560 19-inch color television for $483.").

141. *See Leegin*, 127 S. Ct. at 2728 (Breyer, J., dissenting) (citing *Hearing on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., 122 (1975) (statement of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division)).

142. F.M. Sherer, *Comment on Cooper et al.'s "Vertical Restrictions and Antitrust Policy*," 1 COMPETITION POL'Y INT'L 65, 73-74 (2005). Likewise, the end of the free trade era is associated with the decline in drug store margins from forty percent levels to approximately twenty percent levels. *Id.* at 73.

143. F.T.C., *Record Companies Settle FTC Charges of Restraining Competition in CD Music Market*, May 10, 2000, http://www.ftc.gov/opa/2000/05/cdpres.shtm.

144. H.R. REP. NO. 94-341, at 3 (1975) (compared to prices in non-fair trade states, consumers in fair trade states paid in excess of approximately $3 billion according to one study; $6.5 billion according to another).

145. *Leegin*, 127 S. Ct. at 2735-36 (Breyer, J., dissenting).

146. *See id.* at 2718 (reasoning that PSKS "is mistaken in relying on pricing effects absent a further showing of anti-competitive conduct").

147. *See id.* at 2714-15 ("[I]t suffices to say here that economics literature is replete with procompetitive justifications . . . ."); 8 AREEDA & HOVENKAMP, *supra* note 48, at 292 (stating that "even if [RPM] often supports dealer services that increase consumer welfare . . . we must still ask whether such incremental gains are large enough to overcome the detriments that consumers may suffer").

148. *Leegin*, 127 S. Ct. at 2719-20 (explaining that the use of "[RPM] for anti-competitive purposes may not be a serious concern unless the relevant entity has market power").

149. *Id.* at 2717.

manufacturers.[150] This increased concentration, particularly among manufacturers that used RPM during the fair trade era, increases the likelihood that anti-competitive RPM "will prove more prevalent today than in years past, and more harmful."[151] In addition to increased concentration among manufacturers, retail market power has also increased.[152] Since the end of the fair trade era, the number of retailers in the United States has dropped significantly, creating more dominant retailers to account for the total retail sales volume.[153] This increased retail market power creates a greater likelihood that a manufacturer will, at the behest of a large volume retailer, implement an RPM policy to prevent innovation and new entry by more efficient retailers.[154] Because it failed to account for changes in the American economy that are conducive to manufacturer and retailer market power, the Court underemphasized the anti-competitive effects of RPM, which could subject consumers to greater price increases than those that occurred during the fair trade era.[155]

In addition to the enhanced market power among manufacturers and retailers, another characteristic of the American economy will further increase the likelihood that manufacturers will use RPM anti-competitively. With the advent of the Internet, retailers can operate at a fraction of the costs of traditional retailers and consumers can conveniently comparison shop for low-cost goods.[156] In all likelihood, the Internet is one of the most efficient forms of retailing ever developed. The Internet could be analogized to the department store, the mail or-

150. *See id.* at 2733-34 (Breyer, J., dissenting). During the fair trade era, major household appliances and kitchenware were among the most common products subject to RPM. *See* S. REP. NO. 94-466, at 2 (1975). Concentration among the major domestic manufacturers of these products has increased since the fair trade era, for example, "The top eight domestic manufacturers of household laundry equipment accounted for 95% of the domestic market in 1963 (90% in 1958) compared with 99% in 2002." *Leegin*, 127 S. Ct. at 2734 (Breyer, J., dissenting). Similarly, "the top eight domestic manufacturers of household cooking appliances accounted for 68% of the domestic market (measured by value of shipments) in 1963 . . . compared with 77% in 2002." *Id.* at 2733-34.

151. *Id.* at 2734.

152. *Id.* at 2733-34.

153. *See, e.g.*, *id.* (noting that, since the end of the fair trade era, "[c]oncentration in retailing has increased"); Deloitte, 2007 Global Powers of Retailing, Stores, Jan. 2007, 6 http://www.deloitte.com/dtt/cda/doc/content/Global%20Powers%20of%20Retailing_07(3).pdf (explaining that the ten largest retailers in the world account for nearly thirty percent of the total retail sales of the top 250 retailers); *Globalisation of Grocery Retailing Accelerates as International Giants Explore Emerging Markets, According to Planet Retail*, Planetretail.net (Oct. 16, 2006), http://planetfoodservice.com/Home/PressReleases/PressRelease.aspx?PressReleaseID=49578 (noting that "large international and regional grocers are acquiring market share across the world at a remarkable rate with the top 100 retailers already capturing 45% of the world's modern grocery distribution").

154. *See Leegin*, 127 S. Ct. at 2733 (Breyer, J., dissenting) (explaining how the increased market power among retailers will make "it more difficult for price-cutting competitors . . . to obtain market share").

155. *See id.*

156. The typical brick-and-mortar store has an operating profit margin between three percent and ten percent, while the typical online retail shop has a margin of twenty-one percent. Anne D'Innocenzio, *A first: Online retailers collectively make profit*, USATODAY.COM, May 25, 2004, *available at* http://www.usatoday.com/tech/techinvestor/2004-05-25-online-sales_x.htm.

der house, or the supermarket, all of which were retail formats developed in the early twentieth century that used their lower operating costs to undersell the competitors of their day.[157] An FTC study, conducted around 1930, indicates that manufacturers unanimously favored RPM to thwart price competition caused by department stores, mail order houses, and supermarkets.[158] If history repeats itself, manufacturers in the post-*Leegin* marketplace will use RPM to thwart price competition generated by highly efficient and technologically-enabled retailers, particularly Internet retailers.

Praising the free-riding theory, the *Leegin* Court reasoned that without RPM, discounting retailers would free-ride on retailers that perform demand-creating services.[159] The Court also recognized, however, that RPM could prevent "[r]etailers with better distribution systems and lower cost structures" from charging lower prices.[160] The danger of *Leegin* in the Internet context is that Internet retailers are particularly susceptible to the free-riding defense, because by their very nature they offer different forms of service than their fully-staffed brick-and-mortar counterparts.[161] Courts must recognize, however, that consumers can obtain large amounts of pre-sale information and services on the Internet, and thus should not presume Internet retailers to be free-riders.[162] If courts decide to classify Internet retailers as free-riders, then RPM could penalize well-informed Internet purchasers by forcing them to pay for unneeded services that they could have acquired on the Internet for a reduced cost.[163] Because of the fact that "superior efficiency, rather

157. *See* Robert L. Steiner, *How Manufacturers Deal With the Price Cutting Retailer: When are Vertical Restraints Efficient?*, 65 ANTITRUST L.J. 407, 420-22 (1997). For example, the department store model, introduced in the late 1800s, enabled department stores to profitably operate at half the gross margins of their traditional dry goods competitors. *Id.* at 420-21. Likewise, innovative supermarkets introduced the cash register check-out procedure in the 1930s and operated profitably at nearly half the margins of competitors. *Id.* at 421-22.

158. *See* 8 AREEDA & HOVENKAMP, *supra* note 48, at 38 (citing Federal Trade Commission, *Report on Resale Price Maintenance* (Part I 1929; Part II 1931)).

159. *See Leegin*, 127 S. Ct. at 2715-16. However, many commentators have criticized the free-riding theory and argued that it is fundamentally flawed. *See, e.g.*, Paldor, *supra* note 78, at 18. As Paldor explains, the free-riding theory "implicitly assumes that there are only two possible dimensions of competition at the retail level: price competition (which RPM prevents) and providing the special services that the manufacturer desires." *Id.* However, RPM will not prevent a retailer from providing other forms of non-price competition than the manufacturer desired and still free-riding on the service providers. *Id.* at 18-19.

160. *Leegin*, 127 S. Ct. at 2717.

161. *See, e.g.*, *id.* at 2733 (Breyer, J., dissenting) (noting that retailers may request RPM to prevent Internet retailers from obtaining market share).

162. Sixty-nine percent of shoppers research products online before going to a store to make a purchase; sixty-two percent of shoppers have looked at an online peer review before making a purchase; and thirty-nine percent of shoppers have compared a product's feature and price across online stores before making a purchase. Nanette Byrnes, *More Clicks at the Bricks*, BUSINESSWEEK, Dec. 17, 2007, at 50-52. In 2007, online shoppers researched digital gadgets more than any other type of products. *Id.* at 52. As a result of consumers' zealous online research of digital gadgets, one Best Buy manager said that her employees "were having a hard time keeping up with increasingly savvy customers." *Id.*

163. *See* William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 992 (1985) (criticizing RPM and explaining that if consumers

than inferior services" might explain an Internet retailer's ability to cut prices, "courts should not cavalierly accept the assumption that a manufacturer's vertical restraints were adopted to cure a free-rider problem or to obtain retailers' services."[164]

By adopting the rule of reason and endorsing the free-riding defense, *Leegin* gives manufacturers a strong weapon to dampen price competition and align Internet prices with those of other retail formats. Given the Internet's potential to deliver lower costs to consumers, courts need to ensure that the prevention of free-riding is not a pretext to prevent efficient retailers from gaining market share.[165] To do so, courts must scrutinize the manufacturer's true intent and examine its alternatives when faced with situations involving RPM against Internet retailers.[166] More favorable than the rule of reason, the per se rule of *Dr. Miles* furthered the purpose of the Sherman Act by allowing innovative retailers to compete on the basis of price in a free and unfettered manner, which delivered substantial cost savings to consumers. Without *Dr. Miles*, RPM will provide a disservice to consumers that prefer to hunt for Internet bargains.

B. Leegin *Distorts Competitive Forces*

In overturning *Dr. Miles*, the Supreme Court interfered with an important characteristic of the American economy: a consumer-friendly concept known as free-market competition. The principle of free-market competition is based on the idea that consumers will respond to various price and service levels by buying desirable products and avoiding undesirable products.[167] As a result, sellers will compete to provide the preferred level of both price and non-price competition.[168] Consumers will respond to this competition by "voting with their wallets," driving sellers that provide undesirable services out of business.[169] The Sherman Act embodies the concept of free-market competition, which "reflects a legislative judgment that ultimately competition will produce

are well informed, the harm caused by making them pay for services may exceed the gain to the customers that are not so well-informed).

164. Steiner, *supra* note 157, at 446.

165. *See id.*

166. *See, e.g.*, Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905 (4th Cir. 1986). In *Garment District*, the defendant manufacturer refused to deal with a price-cutting retailer on the grounds that the retailer was free riding. *Id.* at 907. The court determined, however, that the manufacturer's free-riding defense was a pretext and, in actuality, the manufacturer was under pressure from a larger and more profitable retailer that felt threatened by the discounting retailer's efficiencies and ability to cut prices. *Id.*

167. *See The* Leegin *Decision: The End of the Consumer Discounts or Good Antitrust Policy? Hearing Before the Subcomm. on Antitrust, Competition, Policy and Consumer Rights of the Sen. Comm. on the Judiciary*, 110th Cong. 3 (2007) [hereinafter *Hearings*] (statement of Pamela Jones Harbour, Commissioner of the FTC) (explaining that consumers respond to price and non-price competition and "[t]his is the essence of market-based competition").

168. *See id.*

169. *Id.*

not only lower prices, but also better goods and services."[170]

The principle of free-market competition assumes that market participants know what they want, and their desires will manifest in the form of consumer purchases.[171] To the contrary, when a manufacturer implements RPM, it implicitly assumes that it knows what is best for consumers.[172] Instead of allowing the market to decide the desired mix of price and service, a manufacturer that uses RPM substitutes the market's voice in the matter for an arbitrary value—the minimum resale price—that is the manufacturer's own perception of what services consumers want and the price they are willing to pay for them.[173] Since retail competition consists of "trying to predict what consumers want, and at what price," the ability of a manufacturer to prevent retailers from providing a combination of price and service that does not conform to the manufacturer's assigned level is inconsistent with the notion of free-market competition.[174]

In *Leegin*, the Court reasoned that RPM gives consumers more options to "choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between."[175] In effect, RPM accomplishes the opposite, because it forces retailers to sell a brand at one price and, to the extent that retailers spend the excess margin on service and promotional efforts, consumers will be forced to spend more for unnecessary services induced by manufacturers, instead of services dictated by the market. *Leegin*'s proponents, however, contend that if consumers truly desire to purchase discounted goods and forgo added services, then "market forces will prompt manufacturers" to respond and adopt such practices.[176] When the Court adopted this view in *Leegin*, it mistakenly assumed that manufacturers' interests are always aligned with those of consumers, because manufacturers have "no incentive to overcompensate retailers with unjustified margins."[177] The Court failed to recognize that the interests of manufacturers and consumers often di-

170. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978); *see also* Am. Column & Lumber Co. v. United States, 257 U.S. 377, 400 (1921) (stating that the purpose of the Sherman Act is to "maintain free competition").

171. *See Hearings*, *supra* note 167, at 3 (statement of Pamela Jones Harbour, Commissioner of the FTC) (explaining that consumer choice "is the essence of market-based competition").

172. *See id.* at 2 (explaining that *Leegin* relies on the assumption that "manufacturers know what is best for customers—even better than retailers, or customers themselves").

173. "[RPM] begs the question of the competitive marketplace by denying the consumer the right to assign his own value to the intangible asset of a trademark or image." H.R. REP. NO. 94-341 at 5 (1975) (quoting Lewis Engman, Chairman of the FTC).

174. *See Hearings*, *supra* note 167, at 2 (statement of Pamela Jones Harbour, Commissioner of the FTC); Pitofsky, *supra* note 62, at 1493 (reasoning that "authorizing the manufacturer to decide what mix of products and services is desirable, instead of allowing the market to decide that question, is inconsistent with the nation's commitment to a competitive process").

175. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2715 (2007).

176. *See, e.g.*, Reply Brief for Petitioner at 18, *Leegin*, 127 S. Ct. 2705 (No. 06-480); Pitofsky, *supra* note 66, at 1491 (explaining that opponents of the per se rule argue that "a manufacturer enjoys maximum profits if its dealers sell a large number of its items at a relatively low markup").

177. *See Leegin*, 127 S. Ct. at 2719.

verge.[178] For Robert Pitofsky, the Court's assumption that a manufacturer's interests are always aligned with the interests of consumers "is a short-run and rather impractical view of the distribution process."[179]

For example, suppose a manufacturer with a wholesale price of four dollars receives a large portion of its profits from large, traditional retailers that comfortably resell the products for ten dollars.[180] Now suppose the same manufacturer begins to sell the goods to a new retailer that possesses a tiny portion of the relevant market share that, due to its unique and innovative efficiencies, resells the manufacturer's product for five dollars.[181] The larger and less efficient traditional retailers that comprise the majority of the manufacturer's sales volume will demand lower wholesale prices in order to compete with the more efficient new entrant.[182] As shown by this example, the manufacturer has a financial incentive to implement an RPM policy, because it will prevent aggressive price competition and preserve the higher wholesale price for the large volume retailer, which in turn will increase the manufacturer's profits.[183] In this example, the manufacturer's interest in profitability conflicts with the consumer's desire to purchase the product for five dollars from the new retailer. This type of divergence in consumer and manufacturer interest occurs more often than the Court recognized.[184] For example, Senator Kohl, whose family started Kohl's department stores, recently explained how Kohl's lost several lines of merchandise because of its innovative low-cost efficiencies.[185] When Kohl's entered the retail market in 1962, it could not obtain several lines of clothing, because, Senator Kohl explained, "[T]raditional department stores demanded that the manufacturer not sell to us unless we would agree to maintain a certain minimum price."[186] In this instance, the manufac-

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178. *See* 8 AREEDA & HOVENKAMP, *supra* note 48, at 85-86 (explaining that manufacturers may implement RPM to avoid the destabilizing pressure of retail competition on their own wholesale prices); Steiner, *supra* note 157, at 424; Pitofsky, *supra* note 66, at 1491 (explaining that a manufacturer's interest is not always aligned with consumers' interest in lower prices).

179. Ptifosky, *supra* note 66, at 1491.

180. *See id.* at 1492 (providing a similar example).

181. *See id.*

182. *See id.*

183. *See id.* (explaining that "over the long haul, it is likely that the profits from a high retail price will be shared by both the manufacturer and the dealer"); 8 AREEDA & HOVENKAMP, *supra* note 48, at 86 (stating instances in which gasoline price wars led to lower wholesale prices at the manufacturing level).

184. *See, e.g.*, S. Robson Walton, *Antitrust, RPM, and the Big Brands: Discounting in Small-Town America (II)*, 15 ANTITRUST L. & ECON. REV. 11, 15-16 (1983). Wal-Mart's Senior Vice President S. Robson Walton stated, "I think it's probably true that manufacturers would get higher factory prices under [RPM]—especially where you have a limited number of manufacturers—and even if you rule out collusion." *Id.* Mr. Walton explained that manufacturers might implement an RPM policy to prevent price competition among retailers, which would enable the manufacturers to sell their products at higher wholesale prices. *Id.* In *Leegin*, the Court did not recognize this divergence, but dismissed it when it reasoned that "in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins." *Leegin*, 127 S. Ct. 2705, 2718 (2007).

185. *See Hearings, supra* note 167, at1 (statement of Sen. Herb Kohl).

186. *Id.* Senator Kohl explained,

turer's acquiescence dampened market forces, because the manufacturer's interest conflicted with the consumers' desire to purchase low-cost goods from Kohl's.

RPM gives consumers what manufacturers want, instead of what retailers or consumers want. In fact, American consumers have demonstrated that they do not want to sacrifice low prices for higher service levels.[187] *Leegin* will allow manufacturers to silence the American consumer's voice, which loudly indicates that Americans prefer bargains to higher levels of customer service. The interference with consumer choice will cause retailers to seek out other forms of non-price competition, such as free delivery, rebates or gifts, which consumers will find unnecessary and less desirable than flat-out low prices.[188] If the Court believed that a segment of consumers were willing to pay more for increased services, it should have depended upon retail competition and entrepreneurs to recognize the unexploited niche and seize the opportunity, thus filling the void of a preferred service level. Only when laws allow market forces to work will consumers truly be able to "choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between."[189] Because of *Leegin*, manufacturers will substitute the judgment of markets for that of their own, precluding consumers from choosing among a desired spectrum of price and service levels. More favorably, *Dr. Miles* allowed competition, not manufacturers, to be the ultimate arbiter of the correct price and service levels.

C. The Rule of Reason Burdens Plaintiffs, Businesses, and Courts

In addition to adversely affecting consumer welfare, *Leegin* will substantially impair plaintiffs' ability to prove an unlawful RPM agreement. Although the Supreme Court dismissed PSKS's argument that RPM "should be per se unlawful because of the administrative conven-

> [W]hen we started Kohl's and were just a small competitor to the established retail giants, we had serious difficulties obtaining the leading brand name jeans. . . . Because [a jeans manufacturer] didn't want to lose the business of their biggest customers, that jeans manufacturer acquiesced in the demands of the department stores—at least until our lawyers told them that they were violating the rule against vertical price fixing.

Id.

187. *See* Margaret Webb Pressler, *Big-Box Stores Rule Top-10 List: Wal-Mart's No. 1 Rank Shows U.S. Goes for Price*, WASHINGTONPOST.COM, July 11, 2004, http://www.washingtonpost.com/wp-dyn/articles/A41925-2004Jul11.html. ("Despite everything that we might say about how much we value customer service, look at this list . . . . When push comes to shove, people are going to choose low prices over service."); *Top 100 Retailers*, http://www.stores.org/pdf/07TOP100Chart.pdf (last visited Jan. 19, 2008) (showing that the top five retailers in the United States consist of the discount retailers Wal-Mart, Home Depot, Kroger, Costco, and Target).

188. *See* 8 AREEDA & HOVENKAMP, *supra* note 48, at 87-88 (explaining that RPM will lead to indirect price cutting in a variety of forms); Paldor, *supra* note 78, at 19. This is precisely what occurred during the fair trade era as retailers sought new forms of non-price competition due to RPM. *Id.* Other unique forms of non-price competition that occurred during the fair trade era included: free alcoholic beverages, donations to charities, and under the table discounts. *Id.* at 19 n.77.

189. *Leegin*, 127 S. Ct. at 2715.

ience of per se rules," it inadequately considered the effects that the rule of reason will have on future litigants.[190] Prior to *Leegin*, many commentators criticized the Court's modern RPM jurisprudence for placing too great of a burden on plaintiffs attempting to show an agreement.[191] As a result of *Leegin*, a plaintiff that alleges an unlawful RPM policy must not only overcome the difficult task of proving that an agreement exists, but must also show that the alleged agreement is anti-competitive.[192] The Court offered little guidance on how to determine whether an arrangement is anti-competitive, but suggested that relevant factors in the determination include the impetus of the restraint and the manufacturer's market power.[193] As Justice Breyer explained, "[I]t is often difficult to identify *who*—producer or dealer—is the moving force behind any given [RPM] agreement."[194] Likewise, proving market power will require plaintiffs to incur expensive and complex litigation, which will require expert economists' testimony "to apply abstract, highly technical, criteria to often ill-defined markets."[195] In addition to plaintiffs' burdens, judges and juries are ill equipped to correctly and consistently assess the economic data that will inevitably arise in rule of reason cases.[196] As Robert Pitofsky explained, the result is that "rule of reason cases often take years to litigate and are extremely expensive" and "it is very difficult for a plaintiff (either the government or a private party) to win a rule of reason case."[197] The effects of this enormous cost and burden on plaintiffs have allowed defendants to prevail in over ninety percent of the non-price rule of reason cases filed in lower courts.[198] This lack of enforcement under the rule of reason effectively

190. *See id.* at 2718 (reasoning that "[p]er se rules may decrease administrative costs, but that is only part of the equation" (emphasis omitted)) (emphasis omitted).

191. *See, e.g.*, Open Letter from Pamela Jones Harbour, Commissioner of the FTC, to the United States Supreme Court 5-6 (Feb. 26, 2007), http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf (reasoning that "an agreement inferred from a course of business conduct between vertical actors faces virtually insurmountable hurdles of proof"); 8 AREEDA & HOVENKAMP, *supra* note 48, at 291 (explaining "because of great uncertainty over the dividing line between concerted and unilateral action . . . the great majority of challenges alleging RPM have failed, often on very technical grounds").

192. *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967) (under the rule of reason, "Our inquiry is whether . . . the effect upon competition in the marketplace is substantially adverse.").

193. *See Leegin*, 127 S. Ct. at 2719-20.

194. *Id.* at 2730 (Breyer, J., dissenting).

195. *Id.; see also* Arizona v. Maricopa County. Med. Soc'y, 457 U.S. 332, 343 (1982).

196. *See Maricopa County Med. Soc'y*, 457 U.S. at 343-44 (explaining that "[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition") (citation omitted).

197. Pitofsky, *supra* note 66, at 1489; N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (rationalizing that the per se rule "avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, . . . an inquiry so often wholly fruitless when undertaken").

198. Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 71 (1991). In 1991, Ginsburg studied a universe of forty-five non-price restraints in which courts applied the rule of reason, as articulated in *GTE Sylvania*. *Id.* at 70-71. Ginsburg found that defendants prevailed in forty-one out of the forty-five cases. *Id.* at 71. Ginsburg con-

creates a rule of per se legality that frees manufacturers from antitrust regulation.[199] Because of the time, expense, and uncertainty associated with the rule of reason, *Leegin* will deter lawsuits, which could effectively create a rule of per se legality and free manufacturers from antitrust regulation.[200] The costly effect of deterring these lawsuits is that manufacturers will be less concerned about the legal consequences of implementing anti-competitive RPM policies.[201] Accordingly, *Leegin* could tip the scales of a manufacturer's cost-benefit analysis in favor adopting anti-competitive RPM, whereas the per se rule of *Dr. Miles* may have prevented this decision.

In *Leegin*, the Court acknowledged that the rule of reason will deter lawsuits, but explained that this could lead to efficiency in the judicial system, because plaintiffs would file fewer "frivolous suits against legitimate practices."[202] While lawsuits against theoretical "legitimate practices" could burden the courts and defendants, the failure to bring a non-frivolous lawsuit would impose higher costs on all consumers by virtue of higher prices. To justify its reasoning, the Court should have balanced the supposed costs of frivolous suits against the costs to consumers created by anti-competitive conduct that *Leegin* will foster. Because even the most avid proponents for a rule of reason approach admit to anti-competitive uses for RPM, the Court should not have adopted a rule that will discourage plaintiffs from challenging the practice.[203]

In *Leegin*, the Court reasoned that, over time, courts would develop structures and presumptions to consistently apply the rule of reason to prevent anti-competitive conduct.[204] Doing so, however, will take a considerable amount of time.[205] In the meantime, businesses will

cluded that the rule of reason favored defendants, not because the non-price restraints were never detrimental to consumer welfare, but because courts limit "their inquiry to whether the market in question seems to be competitive," instead of balancing the gains to consumer welfare. *Id.* at 76.

199. *Id.* at 67 ("[N]on-monopolists have been effectively freed from antitrust regulation of vertical non-price restraints.").

200. *See id.*

201. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2731 (2007) (Breyer, J., dissenting).

202. *Id.* at 2718 (reasoning that per se rules "may increase litigation costs by promoting frivolous suits against legitimate practices"). Although the Court rationalized that its decision might lead to greater judicial efficiency, it did not recognize that overturning *Dr. Miles* could create tortious interference claims against parties not privy to an RPM agreement. *See* Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1236-38 (10th Cir. 2006) (upholding judgment against Internet reseller for tortious interference with a non-price restraint). After *Leegin*, if a retailer signs an RPM agreement, someone who buys below the fixed price and subsequently resells the product below the fixed price could be liable to the manufacturer for tortious interference with the contract. *See id.* Since a manufacturer could not sue a third party for tortious interference with an RPM agreement before *Leegin*, the availability of this claim could potentially reduce judicial efficiency by fostering more lawsuits.

203. *See Leegin*, 127 S. Ct. at 2716-17 (explaining the anti-competitive uses for RPM).

204. *See id.* at 2720 (stating that "[a]s courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anti-competitive restraints from the market and to provide more guidance to businesses").

205. *See* Pitofsky, *supra* note 66, at 1489 (noting that "rule of reason cases often take years to litigate").

speculate about what boundaries exist under *Leegin*.[206] Moreover, this speculation is likely to persist even after courts develop approaches to assess RPM because rule of reason cases "provide little certainty or guidance about the legality of a practice in another context."[207] These cases are extremely fact oriented and tend to focus on complex economic issues, the resolution of which bears little relevance to parties outside of the specific case.[208] The speculation on behalf of the business community will replace the bright-line rule of *Dr. Miles* and add confusion to a formerly sound rule of law. More favorably, the per se rule of *Dr. Miles* provides clear guidance to the market about the legal limits of influencing resale prices.

VI. CONCLUSION

While the Supreme Court purported to act in the interest of consumer welfare, its decision in *Leegin* will ultimately harm the American consumer. Against the backdrop of rising consumer prices, businesses will speculate and courts will engage in protracted efforts to apply the rule of reason, encountering great difficulty trying to determine the actual economic effects of RPM policies. In the interest of consumer welfare, Congress should take action to ensure that the spirit of the Sherman Act is embodied in the judicial treatment of RPM.[209] Accordingly, Congress should resurrect *Dr. Miles* to heal the ailing American consumer and immunize the American marketplace from the anticompetitive effects of RPM.

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206. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977) (stating that "per se rules tend to provide guidance to the business community" (emphasis omitted)); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982) (indicating that the Court has tolerated certain agreements "[f]or the sake of business certainty").

207. *Maricopa County Med. Soc'y*, 457 U.S. at 343.

208. *See id.*

209. On October 30, 2007, Senator Kohl introduced the Discount Pricing Consumer Protection Act, which would amend the Sherman Act by adding after the first sentence the following: "Any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act." Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (2007). The stated purposes of the Act include, "to correct the Supreme Court's mistaken interpretation of the Sherman Act in the *Leegin* decision; and to restore the rule that agreements between manufacturers and retailers, distributors or wholesalers to set the minimum price below which the manufacturer's product or service cannot be sold violates the Sherman Act." *Id.* Although the future of the Discount Pricing Consumer Protection Act is uncertain, Congress should support the Act and correct the *Leegin* decision.