THE FUTURE OF RESALE PRICE MAINTENANCE, NOW THAT *DOCTOR MILES* IS DEAD

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INTRODUCTION

A long-simmering controversy in antitrust law appeared to have been resolved in June 2007, when the Supreme Court overturned a precedent that had stood for almost a century. The decision in the *Leegin* case[1] overruled the Court's 1911 decision in the *Dr. Miles* case,[2] which had held that it violated both the "common law" and the Sherman Act[3] for a seller and a buyer to agree on the resale prices that the buyer would charge. Later decisions had made it clear that this was a per se prohibition, which is to say that illegality was conclusively presumed from the mere fact of agreement on resale prices, regardless of the surrounding circumstances.[4]

The Court's action in *Leegin* was not unexpected; intervening decisions of the Court had narrowed the reach of *Dr. Miles* and undermined its basic rationale. Nevertheless, there still was some support for the *Dr. Miles* rule[5] and *Leegin* itself was decided by the narrowest of margins (5-4). In these circumstances, it is appropriate to consider what the practical effect of *Leegin* is likely to be.

In order to speculate intelligently about the future, however, it is necessary to have an understanding of the past. The

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

2. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 409 (1911).

3. 15 U.S.C. §1 (2000 & Supp. 2004).

4. *E.g.*, United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 719-20 (1944) (establishing resale price fixing as unlawful per se, whether reasonable or unreasonable).

5. For a recent point/counterpoint discussion of *Dr. Miles* published just before the *Leegin* decision, *see* Robert Pitofsky, *Are Retailers Who Offer Discounts Really "Knaves"?: The Coming Challenge to the* Dr. Miles *Rule*, 21 ANTITRUST 61 (Spring 2007); *see also* Thomas B. Leary & Janet L. McDavid, *Should* Leegin *Finally Bury Old Man* Miles?, 21 ANTITRUST 66 (Spring 2007).

battle is not over, and the transition to a new legal regime will not be easy. Significant areas are still unsettled, and some lower-court judges may be inclined to read *Leegin* as narrowly as possible. Many prosecutors in state governments still have a significant attachment to the old *Dr. Miles* rule, and many state antitrust laws do not track the federal statutes. The historical arguments about *Dr. Miles*, pro and con, provide an indication of where future battles may be joined.

This article will consider some history in Part I; analyze the *Leegin* decision itself in Part II; and attempt to predict some future developments in Part III.

I. THE HISTORY AND THE LINGERING IMPACT OF THE LONGSTANDING PER SE PROHIBITION ON RESALE-PRICE MAINTENANCE ("RPM")

A. Dr. Miles *and the Per se Rule*

The *Dr. Miles* Medical Company, a manufacturer of proprietary medicines, had contracts with four hundred direct customers at the wholesale level, which specified the prices at which these customers were authorized to sell and the customers to whom they could sell. *Dr. Miles* also had a so-called "Retail Agency Contract" with 25,000 retail dealers in the United States, which prohibited the retailers from selling at "less than the [specified] full retail price."[6]

The defendant, John D. Park & Sons Company, was a wholesale drug company that had refused to enter into a restrictive contract but was "charged with procuring medicines for sale at 'cut prices' by inducing those who have made the contracts to violate the restrictions."[7] *Dr. Miles* sued Park for malicious interference with its extensive contractual relations, and the "principal question" before the Court was "the validity of the restrictive agreements."[8] There was a dispute about whether the wholesale contracts established an agency relationship, but the Court found that the standard retail contract,

6. *Dr. Miles*, 220 U.S. at 380, 394.

7. *Id.* at 394. The fact that *Dr. Miles* was an action by the manufacturer for tortious interference with contracts may help to explain why Justice Holmes referred to price cutting dealers as "knaves" in his famous dissent. *Id.* at 412.

8. *Id.* at 395.

despite the word "Agency" in the title, "is clearly an agreement looking to sale, and not to agency."[9] The question of whether a seller and a buyer could legally agree on minimum resale prices was thus squarely presented.

The Court first disposed of an argument that the restriction was immunized by the fact that *Dr. Miles'* medicines were produced under a secret process[10] and moved to the question that has stimulated so much comment for so long: "whether the complainant. . . is entitled to maintain the restrictions by virtue of the fact that they relate to products of its own manufacture."[11] The Court was able to arrive at a negative answer in short order, but a close reading of the opinion discloses something that seems to have been forgotten over time: the opinion *purported to apply a rule of reason*!

It is true that the Court launched first into a discussion of the centuries-old prohibition of restraints on alienation, which would seem to apply to any resale restrictions.[12] This common-law reference was not made in passing, and it was echoed by the Court in near-contemporaneous opinions.[13] In fact, however, the *Dr. Miles* Court immediately qualified the common-law rationale:

> With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. . . To sustain the restraint, it must be found to be *reasonable* both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case. . . ."[14]

9. *Id.* at 398.

10. *Id.* at 400-04.

11. *Id.* at 404.

12. *Id.* at 404-05.

13. Strauss v. Victor Talking Mach. Co., 243 U.S. 490, 498, 501 (1917) (describing Victor's standard license contract as "in substance, the one dealt with by this court (sic) in *Dr. Miles*," and going on to say, that when property has been sold "restraints upon its further alienation . . . have been hateful to the law from Lord Coke's day to ours"). Just one year later, the Court was equally vehement in Boston Store of Chicago v. Am. Graphophone Co., 246 U.S. 8, 21-22 (1918) (stating that *Dr. Miles* is based on the idea that it is not permissible "at one and the same time to sell and retain").

14. *Dr. Miles*, 220 U.S. at 406 (emphasis supplied). The Court goes on to quote English authority for the proposition that "restraints of trade and in-

The reference to a test of reasonableness is particularly significant because *Dr. Miles* was decided just six weeks before the Court decided the landmark *Standard Oil* case,[15] which first firmly established the rule-of-reason standard and the two cases were argued almost simultaneously.[16]

The *Dr. Miles* Court then went on to distinguish the case before it from other exceptions to the general prohibition on post-sale restraints, like sales of "good will, or of an interest in a business, or of the grant of a right to use a process of manufacture." It stated that the myriad of contracts in issue are not "a single transaction, conceivably unrelated to the public interest,"[17] which looks like a rough equivalent of the more modern distinction between impacts on individual competitors and impacts on the competitive process.

The Court took note of *Dr. Miles*' claim that "confusion and damage have resulted from sale at less than the prices fixed." But, the opinion goes on to say that "the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant."[18] Because the Court was unable to discern any significant benefit for the manufacturer in these circumstances (notwithstanding the fact that *Dr. Miles* itself signed—and presumably drafted—thousands of the restrictive agreements), it is not surprising that the Court concluded:

> the complainant [Dr. Miles] can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions. . . . But 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.[19]

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terference with individual liberty of action may be justified by the special circumstances of a particular case." *Id.* at 406-07.

15. Standard Oil Co. v. United States, 221 U.S. 1, 61-62 (1911).

16. *Dr. Miles* was argued on January 4-5, 1911. *Standard Oil* was first argued in March of 1910, but reargued on January 12-13, 16-17, 1911.

17. *Dr. Miles,* 220 U.S. at 407.

18. *Id.*

19. *Id.* at 408.

Properly understood, then, the *Dr. Miles* opinion, really does not represent a conscious choice to apply the per se rule rather than the rule of reason. It could be described as a rule of reason case with a built-in presumption of illegality, which could have been overcome by affirmative justifications. Because *Dr. Miles* was unable to supply an adequate reason to explain why a manufacturer would support a minimum resale-price restraint, the Court simply concluded that its RPM contracts were "invalid both at common law and under. . . [the Sherman Act]."[20]

In the intervening time, of course, *Dr. Miles* has been routinely and universally cited for the proposition that RPM contracts are per se illegal. And, in the intervening time, there also have been advances in economic knowledge and universal recognition that manufacturers can have independent reasons for favoring both price and non-price resale restrictions. It is interesting to speculate on whether the entire RPM debate would have been framed differently if *Dr. Miles* had been properly understood as a case that erected a rebuttable, rather than an irrebuttable, presumption against the practice. This is not entirely idle speculation because, as shall appear, the issue of appropriate presumptions is a live one for the future.

B. *The* Colgate *Exception for Unilateral Decisions*

Unlike most modern disputes over the legality of particular resale restrictions, the *Dr. Miles* case was not triggered by the termination of a non-compliant customer; it was an action against an outsider, which had induced *Dr. Miles*' customers to breach the agreements that contained the restrictions. The *Colgate*[21] case, which followed only seven years later, addressed the more delicate question of whether a manufacturer has the right "freely to exercise his own independent discretion as to parties with whom he will deal." The *Colgate* case also differed from *Dr. Miles* because it involved *Colgate*'s demurrer to a criminal indictment brought by the Government, and the Court stated that its job was "to ascertain. . . what interpretation the trial court placed upon the indictment, not to interpret it ourselves. . ." Within this constraint, the Court concluded that "the indictment does not charge Colgate & Company with sell-

20. *Id.* at 409.
21. United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

ing its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company." Absent such an agreement, and absent a purpose to create a monopoly, the Court could not find a violation by the Sherman Act.

The *Colgate* case would not have had such a longstanding influence if the opinion had been limited to a conclusory statement of the Supreme Court's interpretation of a trial court's interpretation of a single indictment. However, the Court's opinion also quoted at length from the indictment itself which, in the opinion of the trial court, did not adequately plead an agreement. Included in the indictment were provocative descriptions of extensive communications by the manufacturer of "uniform prices to be charged"; exhortations that dealers "adhere to such prices" and warnings that "no sales would be made to those who did not"; requests to dealers "for information concerning dealers who had departed from specified prices"; and even "requests to offending dealers for assurances and promises of future adherence to prices, which were often given." The indictment goes on to say that dealers "with few exceptions, resold, at uniform prices fixed by the defendants."[22]

Leaving aside the overt reference to "promises of future adherence" and the attempt to solicit the active assistance of compliant dealers to inform on the mavericks,[23] which both would likely evidence an illegal agreement today in any court, it seems that the near-uniform compliance with the manufacturer's exhortations should also have been enough to evidence an agreement. After all, it is a longstanding principle of general contract law that an agreement can be proved by conduct as well as by words of assent.[24]

However, the opinion of the Supreme Court, as well as the opinion of the trial court, is obviously influenced by a strong view that people should not be forced to continue business relationships against their will. The persistence of this view, whether overtly expressed or not, provides the most

22. *Id.* at 303.

23. Efforts to secure the assistance of compliant dealers were held illegal in the subsequent case of United States v. Parke, Davis & Co., 362 U.S. 29, 45 (1960).

24. RESTATEMENT (SECOND) of Contracts § 19, cmt. a (1981).

likely explanation for the artificial distinctions that have prevailed throughout most of the last century.

As stated above, the majority of RPM cases have been brought by terminated dealers. Because of the expansive per se reading of *Dr. Miles*, courts could not focus on the competitive effects either of the manufacturer's overall distribution scheme or of the termination itself. If the terminated dealer could prove an "agreement", the per se rule meant the case was over. If the terminated dealer could not prove an "agreement", it would have to surmount the high hurdles for proof of a monopolization claim under the statutory provision that governs unilateral conduct,[25] and the stakes would rarely be high enough to justify the effort.

As a result, the outcome of the litigation could turn on trivial nuances of communication. The obstinate reluctance to recognize an agreement exhibited by the trial court in *Colgate* (and accepted by the Supreme Court on appeal) was tempered in some subsequent cases,[26] but some lower courts still seemed to stubbornly resist the obvious.[27] At the other ex-

25. Sherman Act, 15 U.S.C. §2 (1997).

26. *E.g., Parke, Davis & Co.*, 362 U.S. at 46-47. This case makes a curious distinction between coerced and "voluntary" acquiescence. In other words, evidence of disagreement helps to prove an "agreement."

27. *See, e.g.*, Ctr. Video Indus. Co. v. United Media, Inc., 995 F.2d 735, 736 (7th Cir. 1993) (no concerted activity where video editing equipment dealer complained to manufacturer about discounting dealer, manufacturer requested discounting dealer to "raise the company's prices," manufacturer later terminated the discounting dealer and, on its termination, complaining dealer raised its prices "higher than the prices that it was charging while in competition" with discounter); *see also* Parkway Gallery Furniture, Inc. v. Kittenger/Pa. House Group, 878 F.2d 801, 801-03, 805 (4th Cir. 1989) (no concerted activity where furniture manufacturer adopted policy "prohibit[ing] its dealers from soliciting or selling its furniture by mail or by telephone to consumers residing outside specified areas of retail responsibility" in consultation with its dealers and in response to their complaints about discount dealers, manufacturer solicited dealer reactions to its policy, some dealers expressed agreement with policy and indicated they would abide by it, and one dealer notified manufacturer of "a violation [of the policy] and sought enforcement"); *see also* Glacier Optical, Inc. v. Optique Du Monde, 46 F.3d 1141 (9th Cir. 1995) (insufficient evidence of concerted action where dealers complained to supplier about discounters, supplier threatened to terminate discounters and monitored and investigated sales to discounters); *see also* Holabird Sports Discounters v. Tennis Tutor, Inc., 993 F.2d 228 (4th Cir. 1993) (insufficient evidence of concerted action where manufacturer had policy against selling to dealers that advertised product for less than

treme, cautious manufacturers would go to extraordinary lengths to avoid anything that looked like a threat to a non-compliant dealer coupled with a promise to reform. The ludicrous consequences of one manufacturer's efforts to comply with the *Colgate* rule were summarized in an amicus brief by a supplier of golfing equipment, submitted to the Court in *Leegin:* "[t]o minimize the risks created by *Colgate,* PING drastically restricts employees' communications with the retailers to whom they sell and, worse, summarily terminates retailers for even the smallest policy violations."[28] The brief goes on to state that, as a consequence, "[s]ince 2004, PING has terminated summarily nearly 1000 accounts that have violated the policy even though this 'zero tolerance' approach has meant the loss of some of its most successful and popular retailers, with a consequent reduction in the number of outlets at which consumers can obtain PING products."[29]

In short, *Dr. Miles* and *Colgate* have in combination led to perverse results. The courts continue to resist the notion that an offer can be accepted by actions as well as by words. The focus has been entirely on communications with non-compliant dealers while the pro- or anti- competitive effects of performance by a much larger number of compliant dealers have been ignored entirely.

C. *Expansion of the Per se Rule in the 1960s*

Absent the narrow and sometimes quixotic exception sanctioned by the *Colgate* case, the broad per se reading of the 1911 *Dr. Miles* case persisted – and was, in fact, extended— over the following sixty-five years. For example, the 1960 *Parke, Davis* case[30] could be read narrowly to find an illegal agreement only if a manufacturer enlisted the assistance of

suggested retail price, monitored violations of the policy, and terminated non-complying dealer); *see also* Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988) (insufficient evidence of a conspiracy even though the defendant-manufacturer made it clear to its dealers that it expected them to charge a "keystone" retail price for its jeans and that it would either terminate or deal less favorably with dealers that refused to charge the "keystone" price).

28. Brief for PING, Inc. as Amicus Curiae Supporting Petitioner, *Leegin,* 127 S. Ct. 2705 (No. 06-480), at 10.

29. *Id.* at 4.

30. *Parke, Davis & Co.,* 362 U.S. at 29. For example, the Court stated:

compliant dealers to enforce its *Colgate* program, but also more broadly to condemn any method that effectively secured compliance. The 1964 *Simpson* case[31] undercut a distinction, recognized in *Dr. Miles*, between agency contracts and sale/resale contracts, and condemned agency contracts if they are part of a widespread marketing plan—as they were in *Dr. Miles*, and almost always would be. (A dealer subject to an agency contract that specified minimum resale prices could hardly survive if competitive dealers were free to price lower.)

The expanding reach of the per se rule against RPM was consistent with the general direction of antitrust law in other areas during this period. In the 1949 *Standard Stations* case,[32] for example, the Court announced that "tying agreements serve hardly any purpose beyond the suppression of competition," a statement which is reminiscent of the pronouncement in *Dr. Miles* that RPM could only be of substantial benefit to dealers.

The high-water marks of the application of per se standards to vertical restraints generally were probably the Supreme Court's 1967 decision in *Schwinn*[33] and its 1968 decision in *Albrecht*.[34] Although the Court in *Schwinn* did purport to acknowledge some mitigating efficiencies in territorial restrictions on resale of the manufacturer's products – as the *Dr.*

> Thus, whatever uncertainty previously existed as to the scope of the Colgate doctrine, Bausch & Lomb and Beech-Nut plainly fashioned its dimensions as meaning no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. In other words, an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

Id. at 43.

As to the case at hand, the Court noted: "In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act." *Id.* at 45.

31. Simpson v. Union Oil Co., 377 U.S. 13 (1964).
32. Standard Oil Co., 337 U.S. at 305.
33. United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967).
34. Albrecht v. Herald Co., 390 U.S. 145 (1968).

Miles Court also purported to address reasonableness—it effectively condemned this non-price restraint per se, with even firmer reliance on the ancient common-law rule:

> But to allow this freedom [to impose a vertical restraint] where the manufacturer has parted with dominion over goods—the usual marketing situation—would violate the ancient rule against restraints on alienation and open the door to exclusivity of outlets and limitation of territory further than prudence permits.[35]

In the *Albrecht* case, the Court held that it was per se illegal for a newspaper publisher to contract for maximum prices that independent distributors could charge, notwithstanding the publisher's obvious concern that distributors would otherwise exploit the local monopolies that are inherent if papers are to be delivered efficiently to the home. In this case, it was obviously the publishers rather than the dealers that would benefit financially from the restraint—a situation exactly opposite to the one that drove the *Dr. Miles* decision—but it made no difference.

During the 1960s, however, rumblings of change were beginning to be heard in the academic community, if not yet in the courts. The growing acceptance of academic theories by policy makers in the next decade had a profound and immediate influence on some aspects of antitrust law, and began to undermine the foundations of *Dr. Miles* in a way that portended the ultimate repudiation of the decision.

D. Sylvania *and the Antitrust Revolution*

Commentators with widely varying viewpoints agree that there were dramatic changes in the judicial approach to antitrust law shortly after pro-enforcement decisions peaked in the late 1960s;[36] what had been a rather obscure academic critique was translated into policy almost overnight.

Some would say that the revolution began as early as 1968, when Donald Turner, then Assistant Attorney General at the

35. *Schwinn*, 388 U.S. at 380.

36. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 382-84 (and articles cited therein) (2003).

head of the Antitrust Division, published a set of merger guidelines[37] that were highly restrictive by present-day standards but actually more tolerant of mergers than existing Supreme Court jurisprudence would suggest.[38] Some would date the revolution from 1974, with the Supreme Court's decision in *General Dynamics*,[39] in which the Court looked beyond facially high market shares and approved the merger because of specific industry facts that indicated these shares did not reflect future competitive significance. Some would say that the triggering event was not a government action at all, but the publication of the proceedings of an academic conference, in which proponents of the so-called "New Learning" forcefully attacked existing antitrust jurisprudence in an open debate.[40]

Whatever the date of origin, the antitrust revolution exploded on the scene in 1977, when the Supreme Court issued four significant decisions that favored antitrust defendants. The *Brunswick* case[41] held that a private antitrust plaintiff could only recover for so-called "*antitrust* injury;" the *Fortner II* case[42] raised the bar for proof of a tying claim; the *Illinois Brick* case[43] held that only direct purchasers from an antitrust defendant could recover for overcharges; and, most significant for this article, the *Sylvania* case[44] not only overruled the *Schwinn* case's[45] per se approach to non-price vertical restraints but

37. Merger Guidelines, U.S. Dep't of Justice, 4 Trade Reg. Rep. (CCH) ¶13,101 (1968).

38. During this same period of time, merger-law violations were so persistently found that a dissenting Justice observed in the *Von's Grocery* merger case, "The sole consistency that I can find is that in litigation under §7, the Government always wins." United States v. Von Grocery Co., 384 U.S. 270, 301 (1966) (Stewart J., dissenting).

39. United States v. General Dynamics Corp., 415 U.S. 486 (1974).

40. INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid, et al. eds. 1974).

41. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89 (1977).

42. U.S. Steel Corp. v. Fortner Enter., Inc., 429 U.S. 610 (1977). Although this decision purported to be fact-bound, it actually abandoned the method of analysis that had been applied on the same case at the summary judgment stage eight years before, Fortner Enter., Inc. v. U.S. Steel Corp., 394 U.S. 495 (1960).

43. Ill. Brick v. Illinois, 433 U.S. 720 (1977).

44. Con't. T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

45. *Schwinn*, 388 U.S. at 365.

also embraced the "New Learning's" approach to antitrust law generally.

The plaintiff respondent in the case was GTE Sylvania, a manufacturer of television sets, Sylvania had revamped its sales strategy to phase out wholesale distributors and concentrate in direct sales to a relatively small number of franchised retailers. The reduction in competing retailers was intended to attract "the more aggressive and competent retailers thought necessary to the improvement of the company's market position."[46] To implement the strategy, "Sylvania limited the number of franchises granted for any given area and required each franchise to sell his Sylvania products only from the location or locations at which he was franchised."[47] The strategy appeared to have been successful because Sylvania's share of natural television sales increased from between one and two percent to approximately five percent.[48]

The defendant petitioner Continental T.V. Inc., was once a successful franchise dealer but had became embroiled in various disputes with Sylvania, including disagreements over the restrictive distribution policy. Sylvania terminated Continental and sued for money owed; Continental defended with a number of counterclaims, including an assertion that Sylvania's distribution policy violated the antitrust laws. It was "undisputed that title to the television sets passed from Sylvania to Continental."[49] Sylvania's non-price resale restriction was therefore clearly a "restraint on alienation," as the term was used in both *Dr. Miles* and *Schwinn.*

The Court decisively repudiated this rationale for per se antitrust liability. It found that the rule-of-reason is the "prevailing standard" for antitrust analysis and that departures from that standard "must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing."[50] Consistent with this approach, the Court then cited and summarized the reasons why "[t]he great weight of

46. *Sylvania,* 433 U.S. at 38.
47. *Id.*
48. *Id.*
49. *Id.* at 45.
50. *Id.* at 49, 59. There is no doubt about the "formalistic line drawing" that the Court had in mind. It quoted with approval Justice Stewart's dissenting opinion in *Schwinn,* which said that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the

scholarly opinion has been critical of the [*Schwinn*] decision."[51]

The opinion noted, for example, that a manufacturer could achieve "certain efficiencies in the distribution of his products" by restrictions that reduce intrabrand competition among retailers. The restrictions can be used to induce "competent and aggressive retailers to make the investment of capital and labor that is often required;" and to induce "promotional activities or provide service and repair facilities." The Court explained that this service might not be provided "in a purely competitive situation" because of a so-called "free rider" effect, which arises because retailers that did not invest in these expensive services could sell more cheaply to customers who had already been educated about the products in full-service outlets. The opinion concludes that "*Schwinn's* distinction between sale and non-sale transactions is essentially unrelated to any relevant economic impact."[52]

Because the formalistic distinctions in *Schwinn* are not justified either by their antiquity or by economic effects, the decision was simply overruled. The same arguments could have been used to overturn *Dr. Miles* as well. Recall that, in addition to reliance on ancient property principles, *Dr. Miles* was driven by the Court's perception that vertical resale restraints primarily served dealer interests and therefore should "fare no better" than horizontal restraints agreed among the dealers themselves.[53] However, the *Sylvania* opinion supplied a number of cogent reasons why a manufacturer would, purely in its own interest, impose a resale restriction—and thus undermined the second rationale for the result in *Dr. Miles*. The Court acknowledged that "[t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."[54]

The opinion goes on to criticize *Schwinn* for focusing exclusively on intrabrand harm and ignoring interbrand bene-

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antitrust laws upon distributional restraints in the American economy today." *Id.* at 53 n.21 (quoting Justice Stewart's dissent in *Schwinn*).

51. *Id.* at 48, 54-57.

52. *Id.* at 54-56.

53. *See supra* pp. 306-07.

54. *Sylvania,* 433 U.S. at 51.

fits. The obvious suggestion is that an appropriate rule-of-reason inquiry would attempt to balance the two offsetting factors. This, facially, would appear to be an extraordinarily difficult inquiry,[55] and we are unaware of any decision that has attempted to do so in a rigorous way.

In a famous footnote,[56] *Sylvania* asserted the primacy of interbrand competition in antitrust analysis—a view endorsed by the later Supreme Court decisions in *Sharp* and *Khan*,[57] which will be discussed below. In light of this strong signal from the Court, the majority of post-*Sylvania* decisions have upheld resale restrictions on territories and customers under the rule of reason,[58] In order to do so, they have employed various shortcut methods, such as market share screens or scrutiny of the evident connection between the resale non-price restraint and pro-consumer objectives. It is not at all clear, however, that these same shortcut methods will be applied in the case of resale price restraints, in a post-*Leegin* world.

Justice White concurred in the *Sylvania* opinion but would have distinguished *Schwinn* rather than overruling it.[59] He clearly saw the connection between *Schwinn* and *Dr. Miles*, and perceived that the total repudiation of *Schwinn* would undercut *Dr. Miles* and its progeny. He went on to observe that "[i]t is common ground among the leading advocates of a purely economic approach to the question of distribution re-

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55. *See, e.g.*, New York *ex rel.* Abrams v. Anheuser-Busch, Inc., 811 F. Supp. 848, 871 (E.D.N.Y. 1993) (*Sylvania* "did not perform a rule of reason analysis, and offered little guidance as to how the analysis functions").

56. *Sylvania*, 433 U.S. at 52 n.19.

57. Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 724, 726 (1988); State Oil Co. v. Khan, 522 U.S. 3, 15 (1997).

58. *See* cases cited in 2007 A.B.A. SEC. ANTITRUST 154-157; Warren Grimes, *The Life Cycle of a Venerable Precedent*: GTE Sylvania *and the Future of Vertical Restraints Law*, 17 ANTITRUST 27, 28 & 31 n.9 (Fall 2002).

59. *Sylvania*, 433 U.S. at 59 (White, J., concurring). To support his view that both *Dr. Miles* and *Schwinn* had continuing validity, Justice White would jettison the ancient rule against restraints on alienation and substitute a principle with a more contemporary appeal, namely, "the freedom of the businessman to dispose of his goods as he sees fit." The problem with this rationale is that also could justify a manufacturer's right, in its own interest, to contract for resale restrictions that buyers are willing to accept. *See* Thomas B. Leary, *Freedom as the Core Value of Antitrust in the New Millennium*, 68 ANTITRUST L.J. 545, 551 (2000).

straints that the economic arguments in favor of allowing vertical non-price restraints generally apply to vertical price restraints as well."[60]

Notwithstanding the fact that the prior competitive rationales for non-price resale restraints cited in the *Sylvania* opinion would also apply to resale restraints on price, the Court refused to question the continued viability of *Dr. Miles.* In another famous footnote,[61] the Court noted: "The per se illegality of price restrictions has been established for many years and involves significantly different questions of analysis and policy." The footnote went on to say that these "significant differences" included the likelihood that RPM could also reduce intrabrand competition and facilitate the operation of cartels. The footnote further noted that just two years before, Congress "has expressed its approval of a per se analysis of vertical price restraints by repealing [federal laws]. . . allowing fair-trade pricing at the options of various states."

The question of whether these distinctions between price and non-price resale restraints were really sufficient to justify per se illegality for the former and near-presumptive per se legality for many of the latter would remain a subject of lively controversy in the thirty years that intervened between *Sylvania* and *Leegin.* One scholar with access to the papers of Justice Powell, author of the majority opinion in *Sylvania,* has noted that there were widely divergent views in the Court, and it may be that an explicit endorsement of *Dr. Miles* was necessary to secure a majority to overrule *Schwinn.*[62]

Scholars have also noted the powerful influence of economic arguments in an amicus brief filed by the Motor Vehicle Manufacturers Association (MVMA).[63] What has not been previously noted is that this influential MVMA brief also contained a footnote that explicitly acknowledged the continuing vitality of *Dr. Miles,* despite an overall message that undermined the basic premises of that decision.[64] Thomas Leary,

60. *Sylvania,* 433 U.S. at 69 (White J., concurring).

61. *Id.* at 51, n.18.

62. Andrew Gavil, *A First Look at the Powell Papers:* Sylvania *and the Process of Change in the Supreme Court,* 17 ANTITRUST 8 (Fall 2002).

63. *Id.* at 11-12. *See also* Stephen Calkins, *The Antitrust Conversation,* 68 ANTITRUST L.J. 625, 640-41 (2001).

64. Brief for Motor Vehicle Mfrs. Ass'n as Amici Curiae Supporting Petitioner at 5-6 n.1, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)

one of the authors of this article, was at that time Attorney in Charge of Antitrust on the Legal Staff of General Motors Corporation, which had played a leading role in the preparation of the MVMA brief. He recalls that the footnote on *Dr. Miles* was included at the insistence of Donald Turner, the former head of the Antitrust Division, who had been retained for the project. The footnote was strongly opposed by the General Motors' economists who also had worked on the brief, but in the end Turner's view that the *Dr. Miles* issue should be postponed for another day overcame the economists' preference for academic purity.[65]

Whatever the source, the Court's decision to proceed incrementally in *Sylvania* and to avoid a frontal assault on *Dr. Miles* survived for thirty years. And, ironically, this restraint provided ammunition in 2007 for those who dissented when *Dr. Miles* was finally overruled in *Leegin.*[66]

E. *The Per se Rule Is Further Confined*

The distinction between price and non-price resale restraints, which was preserved in *Sylvania,* became increasingly tenuous because of three cases decided by the Supreme Court in the two decades that followed. As discussed above, a per se rule closes off any consideration of actual competitive effects in the real world, and the litigation focuses instead on whether or not there was an "agreement." Two of the three cases addressed the standards for proof of an illegal agreement.

The narrow question in the 1984 *Monsanto* case[67] was whether a terminated dealer could prove an agreement solely

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(No. 76-15) ("Moreover, unlike limitations on the number of dealers or even territorial restrictions, minimum resale price maintenance cannot serve the purpose of promoting economies of scale in distribution; indeed, it promotes sales of low-volume, high-markup retailers at the expense of more efficient competitors. Accordingly, this Court need have no concern that upholding location clauses would in any way impair the validity of the per se rule against minimum resale price maintenance, and we explicitly disavow any such position in this brief.").

65. The leading spokesman for the economists' view was Brent Upson, General Director of Economic Analysis for GM, and an influential figure in the development of the so-called "New Learning" in antitrust. *See* Henry G. Manne, *Preface* to HAROLD DEMSETZ, 100 YEARS OF ANTITRUST: SHOULD WE CELEBRATE? (1991).

66. *See infra* pp. 328-33.

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

by the fact that the dealer's competitors had complained to the manufacturer about its low resale prices. The court below had found that "proof of termination following competitor complaints is sufficient to support an inference of concerted action."[68] The Supreme Court held that this standard was too broad, but ultimately affirmed a judgment against Monsanto because there was other evidence to support the inference.

If the *Monsanto* opinion had simply expressed disagreement with an alternative ground for decision, it would hardly be of lasting significance. In fact, one might wonder why the Court bothered to hear the case in the first place. The Court obviously had larger issues in mind, and the opinion makes it clear what they are.

The *Monsanto* opinion goes out of its way to express disquiet with *Dr. Miles*. The opinion says that the economic and non-economic effects of price and non-price restraints are "in many, but not all, cases similar or identical."[69] And, then the opinion made the startling statement that the same is true of "unilateral and concerted vertical price setting"[70]—which is to say that the contractual issues, which the case was ostensibly all about, do not amount to much either. (They did matter, of course, but only because the combination of *Dr. Miles* and *Colgate* made them matter.)

In the *Sharp* case[71] which followed four years after *Monsanto*, it was clear that the termination of a price-cutting retailer was directly responsive to a demand by the retailer's competitor. The Court assumed there was an agreement—but was the agreement per se illegal or subject to a rule of reason? The opinion pointed out the obvious anomaly that per se condemnation of an agreement to terminate *one* competitive retailer would be inconsistent with existing precedents on exclusive dealing, which would apply the rule of reason if there had been an initial agreement not to deal with *any* competitive retailers.[72] Although the language was not as clear as it might be, the *Sharp* opinion fundamentally stood for the proposition that per se condemnation was appropriate only if, in addition

68. *Id.* at 758.
69. *Id.* at 762.
70. *Id.*
71. Bus. Elecs. Corp. v. Sharp Elecs. Co., 485 U.S. 717 (1988).
72. *Id.* at 727-28.

to the agreement to terminate, there was also an agreement on resale prices between the supplier and surviving retailers that had complained. The *Sharp* Court thus implicitly recognized that a manufacturer with no concern whatever about resale prices might legitimately agree with one retailer to terminate another presumably less valuable retailer, in circumstances where it could not keep both.

The *Sharp* Court may also have been struck by the anomaly that a resale-price agreement with both retailers might actually have been less anticompetitive than the termination. This may explain why the Court went out of its way to address the subject of per se rules more generally. It reiterated the strictures in *Sylvania* about the limited application of per se rules to conduct that is "manifestly anticompetitive," which "would always or almost always tend to restrict competition and decrease output. . . ."[73] And, then, in a passage that almost seems to anticipate a frontal attack on *Dr. Miles*, the *Sharp* Court stated that it makes no sense to have a legal regime "in which the 'rule of reason' evolves with new circumstances and new wisdom, but a line of per se illegality remains forever fixed where it was."[74]

One unstated issue looming in the background of *Sharp* was the question of whether a retailer's right to select its suppliers should be coextensive with a manufacturer's right to select its customers. In other words, does the *Colgate* principle apply symmetrically to sellers and to buyers, so that a full-service retailer has a recognized right to "unilaterally" refuse to deal with a manufacturer that sells to discount retailers (which presumably have a lower cost structure)? The Court did not address the roots of *Colgate* because there was, after all, an agreement to terminate, but the issue of symmetry could became important in a post-*Leegin* would, when the existence of an express agreement may no longer be outcome-determinative.

The third case that further eroded the foundations of *Dr. Miles* was the 1997 opinion in *Khan*,[75] in which the Court held

73. *Id.* at 723 (quoting Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289-90 (1985)).

74. *Id.* at 732.

75. *Khan*, 522 U.S. at 3.

that a resale agreement establishing *maximum* resale prices was not subject to per se condemnation.

Khan, a gasoline station operator threatened with eviction, challenged the legality of its contract with State Oil. The agreement provided that Khan would buy from State Oil at "a price equal to the suggested retail price set by State Oil, less a margin at 3.25 cents per gallon."[76] Khan could resell the gasoline for more or for less than the suggested price, but any excess was rebated to State Oil and any decrease would reduce Khan's margin. The court below held that the agreement "did indeed fix maximum gasoline prices by making it 'worthless' for respondents to exceed the suggested retail prices."[77] The lower court stated that it was constrained to find the agreement per se illegal under the authority of the Supreme Court's 1968 opinion in *Albrecht*,[78] even though the court believed that *Albrecht* was "unsound when decided" and "inconsistent with later" Supreme Court opinions.[79] The lower court's conclusion was also arguably compelled by the view that *Dr. Miles* had condemned *all* resale price agreements and by the suggestion in *Arizona v. Maricopa Medical Society*[80] that maximum and minimum price fixing (at a horizontal level) were equally pernicious.

On the other hand, as noted above, the *Dr. Miles* opinion on minimum resale price-fixing was in large part driven by the notion that it could only serve dealer interests and was therefore as anti-competitive as a cartel among the dealers themselves. This equivalence would hardly apply to a case of maximum resale price-fixing, which is facially contrary to dealer interests. Moreover, establishment of maximum prices does, after all, result in lower prices to consumers, and precedent in other areas of antitrust suggests that courts should be particu-

76. *Id.* at 8.

77. *Id.* at 9.

78. *See* discussion *supra* p. 312.

79. The lower court opinion, which essentially threw down the gauntlet and invited Supreme Court review, was written by a judge with strong antitrust credentials. *See* Khan v. State Oil Co., 93 F.3d 1358 (7th Cir. 1996) (Posner, J.)

80. 457 U.S. 332, 348 (1982).

larly careful to avoid condemnation of practices that result in lower prices.[81]

One author of this article, at least, would like to think that the Supreme Court was perhaps influenced by an amicus brief for The Business Roundtable:

> The fundamental flaw in *Albrecht* is illuminated if you view vertical relationships as the purchase of services by the manufacturer rather than the purchase of goods by the retailer. It then becomes obvious, first, that vertical restrictions are highly unlikely to be in aid of horizontal ones, since a buyer (here the manufacturer) normally has no interest in facilitating a supplier cartel.
>
> In addition, if you say that a manufacturer can never specify the maximum dealer margin, you are saying that a buyer can never put a limit on what it is willing to pay for services it buys. The fact that a dealer might like to sell an enhanced package of services, and even thinks it has customer demand for those services, does not mean it should be per se illegal for a manufacturer to decide it does not want to pay for that enhanced package.[82]

The Supreme Court accepted the invitation extended in the opinion below and reversed unanimously, stating that "[a]fter reconsidering *Albrecht's* rationale and the substantial criticism the decision has received, however, we conclude that there is insufficient economic justification for per se invalidation of vertical maximum price fixing."[83]

The Court then went on to consider "the question whether *Albrecht* deserves continuing respect under the doctrine of stare decisis."[84]

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81. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986). This case was specifically relied upon by the Court in *Khan*. 522 U.S. at 15. This does not mean, of course, that a practice that can lead to higher prices for some products should be condemned as per se illegal. *See* discussion *infra* p. 326.

82. Brief for Bus. Roundtable as Amicus Curiae in Support of Petitioner, 522 U.S. 3 (No. 96-871).

83. *Khan*, 522 U.S. at 18.

84. *Id.* at 20.

The Court recognized that stare decisis is supported by a policy preference for settled legal principles and the advantages of predictability and consistency. It acknowledged a reluctance to override decisions that involve statutory interpretation. The Court went on to say, however, that "[I]n the area of antitrust law, there is a competing interest. . . in recognizing and adapting to changed circumstances and the lessons of accumulated experience."[85] It quoted the observation in *Sylvania* that it makes no sense to apply a rule of reason that evolves but still maintain fixed per se boundaries.[86] The opinion concluded the discussion of stare decisis with the observation that "[w]ith the views underlying *Albrecht* eroded by this Court's precedent, there is not much of that decision to salvage."[87]

In light of *Khan*'s view of stare decisis and the other precedents that had accumulated in almost thirty years between the opinion in *Sylvania* and in *Leegin*, the outcome of the *Leegin* case is not at all surprising. What is surprising, however, is that four Justices who had joined in the *Khan* opinion, without comment, later dissented in *Leegin*, largely on stare decisis grounds.[88]

II.
THE *LEEGIN* DECISION ITSELF

For three decades, the Supreme Court had chipped away at the foundations of the *Dr. Miles* decision, without specifically overruling it. Non-price resale restraints were upheld in most cases that were litigated to a conclusion.[89] Restraints on resale prices were also permissible if manufacturers were careful to stay within the boundaries of the *Colgate* exception for unilateral conduct. It is difficult to determine the extent to which *Colgate*-compliant programs have been in place; there are not many court decisions, but litigation is unlikely in the first place if *all* the dealers quietly adhere to the manufacturer's wishes.

85. *Id.*

86. *See* discussion *supra* pp. 314-15.

87. *Khan*, 522 U.S. at 21.

88. Justices Stevens, Souter, Ginsburg and Breyer joined in *Khan*, 522 U.S. at 6, and dissented in *Leegin*, 127 S. Ct. at 2725.

89. *See* 2007 A.B.A. SEC. ANTITRUST, 154-157, nn. 873-84 (6th ed. 2007). This does not mean that the claims had no settlement value, but obviously it is not possible to know how many non-price cases were settled.

(In other words, universal *agreement* with the policy has been the best insurance against a challenge to the unilateral character of the program!) In any event, the focus in litigation and in compliance counseling has been the content of manufacturer/retailer communications, not on competitive effects.

Then came the perfect case to test *Dr. Miles.* Leegin is a relatively small manufacturer of women's fashion accessories, which differentiates its product from other manufacturers by focusing on boutique stores which offer a high level of customer service. The services attendant on the sale of fashion accessories are, of course, very different from the services that may be required to sell a high-tech product, but other amenities – like attentive sales people, a wide variety of selections, pleasant surroundings and convenient locations – can also be expensive and subject to "free-riding". Leegin's policies on resale prices were embodied in written agreements with its dealers. The company was, however subject to competition from hundreds of manufacturers of women's accessories, and the 5000 plus specialty stores that carried the Leegin brand were subject to competition from thousands more.[90]

The *Leegin* case thus presented the per se issue in its most pristine form. At the trial, the jury had found that there was an overt agreement on resale prices between Leegin and multiple retailers, and Leegin did not challenge the finding on appeal. However, Leegin and its dealers were all competing in a near-atomistic market setting. If the plaintiff PSKS—a terminated non-compliant retailer – were not able to plead a per se case,[91] it would have been difficult to prove anticompetitive effects. The Fifth Circuit Court of Appeals had, somewhat reluctantly, upheld the verdict for plaintiff, based on this per se theory.[92] There was no particular reason why the Supreme Court would be interested in this case, other than the fact that it provided an ideal opportunity to reconsider *Dr. Miles.* Therefore, when the Court granted certiorari late in 2006, it had to be assumed that there were at least four Justices who

90. Brief of Petitioner-Appellant, *Leegin*, 127 S. Ct. 2705 (No. 06-480), at 3.

91. PSKS v. Leegin Creative Leather Prods., Inc., 2004 WL 5254322, at *1 (E.D. Tex. 2004), *rev'd*, 127 S. Ct. 2705 (2007).

92. PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 498 F.3d 486, 486 (5th Cir. 2007).

wanted to take a fresh look at *Dr. Miles.* The question was how many more there would be. As it turned out, only one.

The majority opinion of Justice Kennedy and the minority opinion of Justice Breyer are in some ways similar. Both opinions almost entirely ignore the facts of the actual case before them, and speak of hypothetical situations. Both opinions acknowledge that resale price maintenance could be either pro-competitive or anti-competitive in some situations. Both opinions assume that *Colgate* will remain in place, no matter what happens to *Dr. Miles.* The opinions do take different positions on the relative frequency and likelihood of anticompetitive effects, but the major dispute does not seem to concern substance at all. It rather concerns the scope of the stare decisis principle and the burden of proof required to overturn a precedent.

A. *The Majority Opinion for the Court*

The majority opinion for the Court states in summary form that both prongs of the *Dr. Miles* rule have been rejected by more recent authority. *Sylvania* rejected the rationale based on the common law prohibition of restraints on alienation, and both *Sylvania* and *Sharp* rejected the rationale that horizontal and vertical restraints had similar effects. Since these rationales do not support a per se rule, the opinion states that it is necessary to look at economic effects. And, on that score, there is virtual unanimity that there can be "procompetitive justifications" for resale price maintenance.[93]

The opinion then proceeds to summarize the possible pro-competitive and the possible anti-competitive consequences, in a way that is restrained and gives nearly equal prominence to arguments pro and con. It says, for example, that RPM can stimulate interbrand competition, but does not repeat the assertions in *Sylvania* and *Sharp* that interbrand competition is the principal concern of the antitrust laws. It says that it may be "difficult and inefficient" for a manufacturer to contract for specific services directly, but does not point out that specific agreements also leave less scope for dealer initiative.[94]

93. *Leegin,* 127 S. Ct. at 2714-15.
94. *Id.* at 2715-16.

On the other side, the Court notes the argument that RPM could facilitate a cartel at either the manufacturer or the dealer level, but does not point out that this is highly unlikely if the participants at either level face substantial interbrand competition. The opinion speculates that RPM could be forced on suppliers by a dominant retailer to forestall lower-cost competition, but does not explain why this would be more anti-competitive than a simple refusal to buy from a supplier that sells to a lower-cost competitor – a tactic that could be deemed reasonable following the *Sharp* case.[95]

After this demonstration of an even-handed approach, the majority opinion concludes that resale price maintenance is not a practice that "always or almost always tends to restrict competition and decrease output," the high standard for application of the per se rule that was also established in *Sharp*.[96] In this connection, the opinion specifically notes and responds to the argument that RPM "can lead to higher prices for the manufacturer's goods." In response, the Court explicitly notes that the manufacturer is a buyer of services as well as a seller of a product, and says that the manufacturer "has no incentive to overcompensate retailers with unjustified margins [which are]. . . part of the manufacturer's cost of distribution." The manufacturer will do so only if there is an "increase in demand resulting from enhanced service."[97]

The Court might have added that the effort to draft and to enforce specific contracts for the desired retail services or amenities—contracts that had not previously been subject to per se condemnation[98]—could be more expensive for both manufacturer and retailers, and thus likely to lead to even higher prices. They also could intrude more on dealer sovereignty, if that is an issue.

One aspect of the Court's opinion with perhaps the greatest future importance, is the fact that this time the Court expressly sets out the indicia to separate troublesome from benign resale price maintenance: Has the practice been adopted

95. *Id.* at 2717.

96. *Id.* at 2717 (quoting *Sharp,* 485 U.S. at 723).

97. *Id.* at 2718-19.

98. *See* Robert Pitofsky, *Are Retailers Who Offer Discounts Really "Knaves"?: The Coming Challenge to the* Dr. Miles *Rule,* 21 ANTITRUST L.J. 61, 63 (Spring 2007). The author, one of the most thoughtful advocates for the per se rule, cites this as a realistic and less restrictive alternative.

by one manufacturer or by many in an industry; does the restraint appear to have been initiated by manufacturers or by retailers; and is there or is there not market power at any level? (The agreements of Leegin, the party actually before the Court, would appear to be benign under any of these tests.) The opinion concludes that courts "can establish the litigation structure" and can "devise rules over time for offering proof, or even presumptions where justified."[99]

If the moderate tone of the Court's opinion, and the open invitation for lower courts to fashion a structured rule of reason in the future,[100] was intended to win over the dissenters, the strategy did not work. Perhaps in response to the principal thrust of the dissenting opinion the Court's opinion concludes with the reasons why stare decisis principles do not compel continued adherence to the per se rule, derived from the *Dr. Miles* case. Most of the reasons were foreshadowed in the earlier cases, discussed above.

Thus, the Court relies on *Khan* and other cases for the proposition that stare decisis is "not as significant" in Sherman Act cases.[101] It refers to the awkward measures required if manufacturers want to take advantage of their *Colgate* right to choose their customers. It reiterates that price and non-price restraints raise similar issues. And, finally, it explains why the repeal of a federal statute that authorized so-called "Fair-Trade" laws at the state level did not constitute a binding obstacle to a judicial repeal of *Dr. Miles.*

The Court mentions that its abandonment of the per se rule, unlike the repeal of the Fair Trade laws, does not create a regime of per se legality. It might also have pointed out that, under Fair Trade, many states authorized so-called 'non-

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

100. The second *Leegin* amicus brief signed by Frederic M. Scherer, an economist cited frequently in the dissent, argued that if the Court overturns the per se rule, "it is essential that the Court articulate guidelines for implementation by the lower courts." Brief of William S. Comanor and Frederick M. Scherer as Amici Curiae Supporting Neither Party at 3, *Leegin*, 127 S.Ct. 2705 (2007) (No. 06-480). Scherer was among the 25 economists who had previously submitted a brief "urging that the per se rule be overturned," but apparently believed that "clarification" of his views was needed because the earlier brief, while acknowledging "disagreement within the economics literature," failed to cite his [Scherer's] work. *Id.* at 2-3.

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

signer' clauses, which permitted a manufacturer that had one RPM agreement with a retailer to bind every other retailer that sold its products.[102] The repeal of that authorization is obviously very different from an express endorsement of *Dr. Miles.*

These stare decisis issues will be further addressed immediately below because they are given such prominence in the dissent. This article will not dwell on them at great length, however, because the focus is on antitrust law, not on Supreme Court jurisprudence generally, and because they are not likely to be of primary concern to the lower courts that will deal with resale price issues in the future. However, the stare decisis question cannot be ignored entirely because it may have an impact in the way either the Congress or the various states respond to the *Leegin* decision.

B. *The Dissenting Opinion*

The dissenting opinion of Justice Breyer starts off with a candid admission that he would find the policy choice between a per se or a rule of reason approach to resale price maintenance difficult "were the Court writing in a blank slate." However, he concluded that the legal arguments presented do not "warrant the Court's now overturning so well-established a legal precedent."[103]

The dissenting opinion does address the question of "how often are harms or benefits are likely to occur," and concludes that the economic studies that identify harm are more solidly grounded and less speculative than the studies that identify the benefits of RPM.[104] It refers to studies that show products subject to RPM, when it was legal under existing Fair Trade

102. *See, e.g.,* John T. Woolley and Gerhard Peters, Statement by the President Upon Signing the "Fair Trade Laws" Bill, (July 14, 1952), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=14200; Philip L. Hersch, *The Effects of Resale Price Maintenance on Shareholder Wealth: The Consequences of* Schwegmann, 42 J. INDUS. ECON. 205 (1994); Carl H. Fulda, RESALE PRICE MAINTENANCE, 21 U. CHI. L. REV. 175 (1954); Howard P. Marvel & Stephen McCafferty, *The Political Economy of Resale Price Maintenance,* 94 J. POL. ECON. 1074, 1076-77 (1986); Pauline M. Ippolito & Thomas R. Overstreet, Jr., *Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case against the Corning Glass Works,* 39 J.L. ECON. 285, 287 (1996).

103. *Leegin,* 127 S. Ct. at 2726 (Breyer, J., dissenting).

104. *Id.* at 2727-31, 2733-35 (Breyer, J., dissenting).

laws, sold for higher prices. It refers to other studies that show RPM "and other vertical restraints lead to higher prices."[105] There are at least three problems with this argument.

First, there are a number of reasons why the impact of the Fair Trade Laws is not a good predictor of the impact of *Leegin.* As mentioned above, these Fair Trade Laws created a regime of per se legality and sanctioned "non-signer" clauses. They obviously would have had a much greater effect on the prices of the goods involved than a rule that provides rule-of-reason scrutiny for voluntary arrangements. Second, as the Court's opinion recognizes, higher prices cannot necessarily be equated with "harm." In fact, Justice Breyer himself has recognized the difference. In a famous opinion written before his elevation to the Supreme Court,[106] he pointed out that a retailer can have: "two different kinds of customers. Some want to pay the lowest possible prices; others would pay more to receive special services that. . . [the retailers] would offer only if it could change higher prices." It cannot be simply assumed that there is consumer harm, worthy of per se condemnation, just because a manufacturer wants to appeal to one kind of customer rather than another.

Finally, even if it were assumed that some products will be sold for higher prices after *Leegin,* and that higher prices can be equated with harm, recent Supreme Court authority states that the rule of reason is "the prevailing standard,"[107] and that the test for per se condemnation is whether the practice "would always or almost always tend to restrict competition and decrease output."[108] This is a high hurdle.

In an effort to demonstrate widespread harm, the dissenting opinion refers to gloomy predictions about the future of discount retailers if resale price agreements do not continue to be per se illegal.[109] The only problem is that these same gloomy predictions were voiced after the *Monsanto* and *Sharp* cases were decided twenty years ago,[110] and they have proved

105. *Id.* at 2728 (Breyer, J., dissenting).

106. Caribe BMW, Inc. v. Bayerische Motoren Werke, 19 F.3d 745, 754 (1st Cir. 1994).

107. Cont'l T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

108. Bus. Elec. Inc. v. Sharp Elec. Corp., 485 U.S. 717, 723 (1988).

109. *Leegin,* 127 S. Ct. at 2735.

110. For example, there were legislative efforts to overturn these decisions and Congressional Hearings during which this topic was debated. One of

to be spectacularly wrong. It is the traditional, full-service retailers that have disappeared.[111]

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the most vocal critics of these decisions was Senator Metzenbaum who summed up his concern as follows:

> In May of this year, the Supreme Court decided a case called *Sharp*. The *Sharp* case held that an agreement to cut off a discounter because it is charging lower prices is not automatically anticompetitive. It is hard to imagine a more anticompetitive agreement than that one. Why is it anticompetitive? The results of the agreement are that maverick businesses, discount operators, usually small businesses, are cut off, they are put out of business. The consumer's choice on where to shop is reduced. The consumer's right to shop around for the best deal is meaningless without stores that charge discount prices.

134 CONG. REC. S14582 (daily ed. Oct. 5, 1988) (statement of Sen. Metzenbaum).

Senator Simon echoed these concerns: "Mr. President, it is not simply the elderly. It is farmers in Illinois, Nebraska, North Dakota, Iowa, and other States who are facing problems. It is working men and women who want to continue to be able to buy things at the best possible price. That is what this bill is all about."

See also 134 CONG. REC. S. 8765 (daily ed. June 29. 1988) (letter of Diane P. Wood, Assistant Professor of Law, University of Chicago) ("It is worth remembering that discounters have been thriving under existing law, to the great benefit of American consumers. S. 430 seeks to assure that they will continue to do so."); *Id.* (letter of Harry First, Professor, New York University) ("The two sections of S. 430, codifying the per se rule and giving terminated discounters the opportunity to enforce this legal rule, will help insure the continuation of this type of competition.").

See also Price verdict threatens future of discounting - Supreme Court verdict on price cutting, DISCOUNT STORE NEWS, May 23, 1988, *available at* http://findarticles.com/p/articles/mi_m3092/is_n11_v27/ai_6386578/print (characterizing the *Sharp* decision as a major legal setback for discounters); Isadore Barmash, *Talking Business: with Milstein of Burlington Coat, Discounter Curbs: A Strong Protest*, N.Y. TIMES, May 24, 1988, at D2 (characterizing the *Sharp* ruling as "disastrous" and indicating that discounters "need protection when one of those [specialty] stores prevails on a producer not to sell to us because we undersell them.").

111. As the FTC explained:

> Fifty years ago, many individual department stores were freestanding in cities, rather than suburban malls, and they offered consumers the convenience of one-stop shopping, particularly for home furnishings or clothing. There were few discount department store chains of the kind we have today (like Kohl's) or vertically integrated sellers of clothing (like The Gap). There were no consumer electronics chains (like Circuit City); no mass marketers (like Wal-Mart); and of course, no Internet outlets (like Amazon.com). As

The dissenting opinion also asserts that there have been no real changes in economic learning since 1975, the year that Congress repealed the "Fair Trade" law.[112] It asserts that "studies at most may offer some mild support for the majority's position. But they cannot constitute a major change in circumstances."[113] Restated, the dissent suggests that the arguments against the per se rule have been around for over thirty years, that the Court has let the *Dr. Miles* precedent stand for all that time, and that there are no dramatic recent developments to justify a change of course today.[114]

One response is that the economic arguments may not have changed much, but the Court's jurisprudence has changed dramatically since 1975. The succession of post-1975 cases that are discussed above have progressively undercut the foundations of *Dr. Miles*. In the words of the *Khan* opinion, (referring to *Albrecht*) "there is not much of that decision to salvage."[115] It is indeed strange that the Supreme Court's restrained treatment of the *Dr. Miles* precedent before *Leegin* and its determination not to overrule a precedent when it did not need to – something that indicated a perhaps excessive respect for stare decisis, if not Article III of the Constitution – has been employed by the dissent to support an argument that the

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> alternative outlets have proliferated, the wide array of products in department stores has dwindled.
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> * * * * * * *
>
> The evidence demonstrates that the conventional department stores operated by Federated and May (and their competitors) no longer occupy the unique position they once held, even the more limited range of products that they sell. While department stores once were a distinctive niche market, they now face pressures both from "above" and "below" even in the same mall, not to mention mass market, mail order and Internet alternatives.

See Statement of the Commission Concerning *Federated Department Stores, Inc./ The May Department Stores Company, FTC File No. 051-0111*, at 2 (Aug. 31, 2005), http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf.

112. *Leegin*, 127 S. Ct. at 2732.

113. *Id.*

114. *See also* Transcript of Oral Argument at 12, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (containing Justice Breyer's remark to counsel for Leegin that he just looked at a book on resale price maintenance published in 1966 and that he did not "find in . . .[the] brief a single argument that isn't in the book. . . So I guess my question is what's changed? . . . What's new?").

115. *Khan*, 522 U.S. at 4; *see also* discussion *supra* pp. 319-23. All four dissenters in *Leegin* voted in *Khan*, a unanimous decision. *Id.*

Leegin Court did not give sufficient weight to the principle of stare decisis. It is as if the doctrine of estoppel applied to Supreme Court opinions.

It is also strange for the dissent to suggest that relatively recent precedents should be more vulnerable than longstanding ones, with citation of a case on the legality of an abortion law.[116] Whether this is sound policy or not when dealing with volatile social issues, the principle surely makes no sense in an antitrust context where it is commonly accepted that the interpretation of general statutory commands should take account of the most recent and best economic understanding.

In fact, the citation of an abortion case in an antitrust opinion suggests that something else may have been going on. The *Leegin* opinion was released along with a flurry of other 5-4 decisions just before the Court recessed in June 2007.[117] One wonders whether the discussions of stare decisis in *Leegin* were affected by the close votes on different, highly emotive issues that the Court was considering at the same time.

The dissent does however, identify one issue of particular significance for counselors and litigants in a post-*Leegin* environment, where resale price maintenance is evaluated under a role of reason. Justice Breyer poses the question: "how easily can courts identify instances in which the benefits are likely to outweigh potential harm?" He then replies to his own question: "my own answer is not very easily."[118]

This does not conclude the argument, of course, even if it is true that some cases will be difficult. A case like the one actually before the court – involving a company with hundreds of competitors who supply thousands of retailers with fashion

116. *See Leegin*, 127 S. Ct. at 2734-35 ("No one has shown how moving from the *Dr. Miles* regime to 'rule of reason' analysis would make the legal regime governing minimum resale price maintenance more 'administrable'. . .") (citing Fed. Election Comm'n v. Wisconsin Right to Life, 127 S. Ct. 2652, 2685 (2007)).

117. *See Supreme Court: Review of Term*, 76 U.S.L.W. 3052 (Aug. 7, 2007) (stating that in this term, 24 of the 72 cases, or 33%, were decided by a 5-4 margin – the highest share in at least a decade). In June 2007, five decisions were 5-4 splits. *Id. See Leegin*, 127 S. Ct. 2705; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 75 U.S.L.W. 4577 (2007); Hein v. Freedom From Religion Found., 127 S. Ct. 2553, 75 U.S.L.W. 4560 (2007); Bowles v. Russell, 127 S. Ct. 2360, 75 U.S.L.W. 4428 (2007); Uttecht v. Brown, 127 S. Ct. 2218, 75 U.S.L.W. 4373 (2007).

118. *Leegin*, 127 S. Ct. at 2730.

accessories – should be easy to decide. (There is not much risk that Leegin's program will facilitate a manufacturer or a dealer cartel.) It can be further said that resale price cases should not be any harder than the non-price cases, which have been subject to the rule-of-reason for thirty years. As discussed above, courts do not weigh the pros and cons in any rigorous way, but find various short-cut methods to arrive at a result. And, finally, the per se rule of *Dr. Miles* is not necessarily easy to administer. It may be easier for courts because they do not have to weigh competitive consequences. But, because *Dr. Miles* coupled with *Colgate* shifted the emphasis from the merits to the minutia of communications between manufacturers and retailers, courts have wasted a lot of time. And it has assuredly not been easier for counselors to provide practical advice or for business people to comprehend the advice and administer their dealer relations.

Nevertheless, the affected business communities may have to treat resale price maintenance as something special for a considerable time to come – because both the majority and the minority in *Leegin* have said that it is in some ways special. There is bound to be a period of uncertainty. The last section of this article will discuss some of these uncertainties and suggest some practical consequences.

III.
A Look at the Future

Any attempt to predict the future of resale price maintenance after *Leegin* is necessarily speculative. The *Leegin* case itself has still not been concluded because the Fifth Circuit has not yet acted on the remand from the Supreme Court,[119] and the *Leegin* company is a defendant in another plenary action in Tennessee based on both state and federal law.[120] It is also apparent from a review of history and a study of the majority and dissenting opinions in *Leegin,* that a number of issues are still unresolved. This concluding Part III will deal first with some unsettled legal issues, and then address some other practical uncertainties that counselors also need to take into account.

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119. As of Feb. 14, 2008, the date this article went to press.

120. Spahr v. Leegin Creative Leather Prods., Inc., No. 2:07-cv-00187 (E.D. Tenn. 2007). On October 22, 2007 Leegin filed a motion to dismiss this action.

A. *Outstanding Legal Issues in Federal Courts*

There are a number of alternative legal scenarios to consider, each of which could be supported by holdings or by dicta in the Supreme Court cases discussed. The fact that *Leegin* was a 5-4 decision means that changes in the composition of the Court could possibly change the outcome, but it is more likely that decisions of lower courts will be significant in the near future.

Under one scenario, the pre-*Leegin* legal regime would be preserved almost intact. Resale price maintenance would no longer be per se illegal, but subject to a rebuttable presumption of illegality. The term "inherently suspect" has been used in other contexts,[121] to express this concept. Once the existence of an agreement has been shown in the traditional way, the burden would be on a defendant to justify the arrangement under one or more of the cognizable rationales recognized by *Sylvania* and its progeny—such as the need to provide incentives for special retail services and the risk of "free-riding." The burden under this scenario could, in turn, be slight or heavy depending on the specificity that a particular court might require. At one extreme, it might be enough to show that there is a plausible rationale for the restriction; at the other extreme, the defendant might be required to quantify its pro-competitive justifications with some specificity and show that they outweigh any anticompetitive effects.[122]

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121. *See* In the Matter of Polygram Holding, Inc. F.T.C. Docket No. 9298 (July 28, 2003), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf (stating that if the practice is "inherently suspect" and the efficiency defense is "not valid, then the practice is unreasonable and unlawful under the rule of reason . . ."); Thomas B. Leary, Commissioner, Fed. Trade Comm'n, Paper Prepared for Distribution at The Conference Board 2004 Antitrust Conference: A Structured Outline For The Analysis Of Horizontal Agreements (Mar. 3-4, 2004) at 9-10, *available at* http://www.ftc.gov/speeches/leary/chairsshowcasetalk.pdf ("Restraints in this category involve conduct that is sometimes called 'inherently suspect' or 'presumptively anticompetitive,' and sometimes described as subject to a 'quick look' or analysis under a 'truncated' rule of reason.").

122. *C.f.*, 1982 Merger Guidelines, U.S. Dep't of Justice, 4 Trade Reg. Rep. (CCH) ¶ 13,102, *available at* http://www.usdoj.gov/atr/hmerger/11248.htm (indicating that the Government can state a prima facie case based on concentration ratios but requiring the merging parties to prove the efficiencies with specificity).

The authors believe that some lower courts are likely to be attracted to a "presumption" scenario, in one form or another—influenced by what appears to be an open invitation in the *Leegin* decision. The decision to apply a presumption in the first place may be based on a market-share screen. Thereafter, the strength of the presumption and the burden of rebuttal are also likely to be influenced by market characteristics at both the manufacturer and the retailer levels. In other words, the existence of RPM agreements in near-atomistic markets, like those in the *Leegin* case, would give rise to weak presumptions and easy rebuttals (if they are not initially screened out altogether). There is little risk of cartel behavior at any level; price increases for the products involved are harmless when there are so many alternative choices; it is understandable that manufacturers would want to distinguish their products by rewarding retailers for special sales efforts; and the burden of securing compliance with specific retail obligations would be considerable. On the other hand, the presumption could be a lot stronger if the RPM agreements arose in far more concentrated market settings; if multiple manufacturers adopted them; or if there were some indication that the agreements were dealer-driven or capable of facilitating coordination at the manufacturer level.

Under a second, alternative scenario, with *Dr. Miles* out of the way, a court might conclude that there really is no good reason to treat price and non-price agreements differently—a position that again would find support in the Supreme Court authorities that have been discussed above. Specifically, a Court might pay more attention to the parallels between the two kinds of restraint, relying more on the language in a case like *Monsanto*, than it does on the distinctions highlighted in *Leegin*. Or, it might revive the *Sylvania* and *Sharp* emphasis on the primacy of interbrand competition. The question is whether the outcome in any specific case is likely to differ that much under legal scenarios one and two. An invitation to erase the distinction between price and non-price restraints could, perhaps perversely, cause some courts to scrutinize non-price restraints more closely in some situations. Price and non-price restraints in a market setting like *Leegin* would continue to be safe, but both could be subject to similar close scrutiny if they affect substantial shares of the affected markets.

If the post-*Sylvania* rigid distinction between price and non-price restraints becomes blurred, it is possible that the courts will focus more closely and in a more discriminating way on the real issue in any vertical restraint case, namely, the effect on horizontal competition at either the seller or the buyer level. William Baxter, a noted scholar and one time head of the Antitrust Division, once said: "A vertical problem is either a horizontal problem in disguise or no problem at all."[123] This should not be taken to mean that all vertical restraints are benign, but rather as an indication of where to look for the harm, if any.

Consider for example, the statement in the *Leegin* opinion that it could make a difference whether the vertical restraint appears to have been initiated at the manufacturer or the dealer level.[124] This is one way to differentiate restraints driven by legitimate manufacturer objectives from horizontal dealer cartels presumably still subject to the per se rule—a distinction that even the *Dr. Miles* Court probably would have recognized if there had been available learning to support it.[125] But, this distinction is only the first step in the analysis. It is also important to inquire whether the vertical restraint has a material effect on interbrand competition. For example, there may have been some evidence that some dealers sought the resale restrictions in *Leegin*, but that could hardly affect competition in a market with myriad other suppliers and dealers.[126]

Finally, if courts became accustomed to the idea that the focus should be on the nature of the interbrand effects, not just the nature of the intrabrand restraints, it is possible that the artificial definition of "agreement" enshrined in *Colgate* and its progeny will no longer be necessary. When there are communications between competitors at a horizontal level, discussions followed by actions consistent with the discussions

123. Edward Meadows, *Bold Departures in Antitrust*, FORTUNE, Oct. 5, 1981 at 180, 182.

124. *Leegin*, 127 S. Ct. at 2719-20.

125. *See* discussion *supra* pp. 306-07.

126. It is also possible that a dealer-driven restraint could ignite and facilitate a horizontal combination at the manufacturer level. *See* Toys "R" Us v. F.T.C., 221 F.3d 928, 932-33 (7th Cir. 2000) (stating that non-price restriction is per se illegal when each individual manufacturer's compliance was obtained by assurances that its competitors would also comply).

are sufficient to raise an inference of agreement.[127] Express words of assent are not necessary. Vertical agreements obviously have very different effects than horizontal agreements, and these differences need to be taken into account. But, this would not require a different definition of "agreement" if courts were free to explore the full range of competitive effects both in price and non-price vertical agreements. In the case of a manufacturer that has put together a *Colgate* compliance program, the competitive effects (if any) of acquiescence by many compliant dealers should surely be of greater concern than the content of communications with the few dealers who do not comply. A small, new entrant like Leegin should be able to implement a *Colgate* program in a sensible way, without concern about whether a resistant dealer did or did not overtly "promise" to reform.

These multiple alternative approaches to vertical restraints in a post *Leegin* world, however, suggest that prompt and widespread adoption of resale price maintenance agreements are unlikely—at least, by substantial companies in relatively concentrated industries. There is still too much legal uncertainty. There are other factors, as well, that will prompt a cautious response.

B. *Possible Resistance in the States or Federal Legislation*

Perhaps the biggest wildcard will be the response of state authorities to the Supreme Court's ruling. States traditionally have been more aggressive than federal authorities in prosecuting vertical agreements, and it is clear that the majority of state governments would have preferred a different outcome. In fact, thirty-seven states signed an amicus brief in *Leegin*, which urged the Supreme Court to retain the rule of per se illegality.[128] The states argued that "[m]inimum RPM agree-

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127. *See, e.g.*, In re Petroleum Prods, 906 F.2d 432, 446-47 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991) ("[E]vidence concerning the purpose and effect of price announcements, when considered together with the evidence concerning the parallel pattern of price restorations, is sufficient to support a reasonable and permissible inference of an agreement, whether express or tacit, to raise or stabilize prices.").

128. Brief for New York, Alaska, et al. as Amici Curiae Supporting Respondent, Leegin v. PSKS, 127 S. Ct. 2705 (2007) (No. 06-480). *See also* National Association of Attorneys General, *Revisions to the National Association of Attorneys General Vertical Restraints Guidelines* (Mar. 26, 1995), *available at* http://

ments merit per se treatment because they have demonstrably anticompetitive effects that harm consumers. A minimum RPM agreement directly and intentionally eliminates price competition. It is by definition price-fixing."[129] State officials have also argued in different venues that the bright line rule afforded by per se treatment was efficient, provided clear business guidance, and made litigation more manageable.[130]

Some state officials have already indicated that they intend to do more than express disappointment. On the day of the *Leegin* ruling, Connecticut Attorney General Richard Blumenthal said:

> Discounters become an endangered species as a result of this misguided ruling. . . . The law has changed dramatically and historically to the detriment of consumers. The evidentiary standards for challenging vertical price-fixing are now higher and cases will be far more difficult to enforce. As a result, the retail landscape will be dramatically changed for consumers – for the worse. *If a situation arises and the facts warrant, we will still take action.*[131] [Emphasis supplied.]

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www.naag.org/assets/files/pdf/at-vrest_guidelines.pdf (treating RPM as per se illegal). The Guidelines purport to state the enforcement policy of all 50 states. *Id.*

129. Bob Hubbard and Emily Granrud, *37 States Submit Supreme Court Amicus Supporting* Per se *Rule Against Minimum RPM*, ABA ANTITRUST SECTION STATE ANTITRUST ENFORCEMENT COMMITTEE NEWSLETTER, Vol. IV., No. 8 (Spring 2007) at 3-4 *available at* www.oag.state.ny.us/business/new_antitrust/papers/LeeginSAECnewsletter03-07.pdf.

130. *C.f.*, comment of Chad Brooker, Illinois Assistant Attorney General, who noted: "separating anticompetitive from pro-competitive minimum RPM policies is both difficult and costly . . . Case-by-case litigation over minimum RPM invariably would involve a parade of experts with little certainty of reaching a correct outcome." Chad Brooker, *Point/Counterpoint: Two Views on the* Leegin *case*, ABA ANTITRUST SECTION STATE ANTITRUST ENFORCEMENT COMMITTEE NEWSLETTER, Vol. IV., No. 8 (Spring 2007) at 5, 6, *available at* www.wiggin.com/db30/cgi-bin/pubs/ABA_MAR_07_Wachsstock.pdf. Of course, implicit in this statement is the recognition that a per se rule would fail to reach the "correct outcome" in those "procompetitive" instances.

131. John O'Brien, *Blumenthal Sounds off on High Court's Pro-business Ruling*, LEGALNEWSLINE.COM, June 29, 2007, *available at* http://www.legalnewsline.com/news/197464-blumenthal-sounds-off-on-high-courts-pro-business-ruling.

Others have expressed similar displeasure with the ruling and signaled their intentions to keep a watchful eye.[132] In fact, it is notable that at least one state Attorney General has secured an RPM consent decree post-*Leegin.*[133]

The Supreme Court has held that the federal antitrust laws generally do not preempt inconsistent state laws. For example, the Court has held that only direct purchasers from antitrust violators may recover overcharges,[134] but the Court has also upheld a California state statute that permitted indirect purchasers to recover.[135] Under this precedent, any state ultimately has the power to nullify the *Leegin* result by express statute. In the short run, the treatment of RPM could vary state by state. Many state laws explicitly require that federal antitrust precedents be followed.[136] On the other hand, some state laws, like those in New York and New Jersey, explicitly prohibit RPM for commodities.[137] Many states have explicit

132. Robert Hubbard of the NY Attorney General's Office noted that RPM, having a direct impact on consumers, is very important to his office. Audio tape: Brown Bag Program on State Antitrust Enforcement after *Leegin*: The Enforcers Speak, the American Bar Association Section of Antitrust Law, Sept. 25, 2007 (on file with the author), *available at* http://www.abanet.org/antitrust/at-bb/audio/07/09-07.shtml.

133. North Carolina v. McLeod Oil Co., No 05 CVS 13975 (N.C. Super Ct., Wake Co., July 30, 2007).

134. Ill. Brick Co. v. Illinois, 431 U.S. 720, 720 (1977). *See* discussion *supra* p. 313.

135. California v. ARC Am. Corp., 490 U.S. 93, 93 (1989). Over 20 states have passed laws but nullify federal policy on indirect purchases recoveries.

136. Although most states give some deference to federal law, either by statute or through judicial decisions, only 17 states must follow federal precedent in construing their own antitrust statutes. M. Russell Wofford, Jr., et al., *Leegin: Challenge or Opportunity for Cross-Border Trade?*, THE METROPOLITAN CORPORATE COUNSEL (Oct. 2007) at 53, *available at* http://www.metrocorpcounsel.com/pdf/2007/October/53.pdf. Liz Leeds, Assistant Attorney General, Antitrust Section, Florida Attorney General's Office indicated that unfortunately she expected the Florida courts to follow *Leegin* and lower federal courts' interpretation. Audio tape: Brown Bag Program on State Antitrust Enforcement after *Leegin*: The Enforcers Speak, the American Bar Association Section of Antitrust Law, Sept. 25, 2007 (on file with the author), *available at* http://www.abanet.org/antitrust/at-bb/audio/07/09-07.shtml.

137. N.J. STAT. § 56:4-1.1 (2007). N.Y. GEN. BUS. LAW § 369-a (2007). At an ABA teleconference on the *Leegin* decision, Robert Hubbard, Assistant Attorney General, Antitrust Bureau, State of New York, noted that New York gives some deference to federal antitrust laws, unless there is a policy or statute to the contrary, and added that § 369a is an example of policy contrary to *Leegin.* Audio tape: Brown Bag Program on State Antitrust Enforce-

prohibitions on price fixing, but do not specifically distinguish between horizontal or vertical arrangements.[138] In addition to antitrust laws, a number of states have industry-specific state regulations that may limit or proscribe a supplier's ability to obtain agreement on resale prices.[139]

The risk of action by state prosecutors under state law may be mitigated by the fact that most states do not have the resources to prosecute major antitrust cases on their own. They frequently act in concert, however, and a nationwide company is often a tempting target. And, these are also the companies that might not be able to tailor resale restrictions to the laws of individual states. Moreover, as mentioned above, most of the lawsuits in this area have been brought by terminated retailers, who can in many instances continue to bring the same claims under state law rather than federal law. In fact, this has already happened.[140]

A further complication is the possibility of action to overturn *Leegin* in Congress. Shortly after the case was decided, a Senate subcommittee held a hearing on the implications of the decision,[141] and Senator Kohl, the subcommittee chairman, has since introduced a bill (S.2261) that would amend the Sherman Act to make all resale price maintenance ille-

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ment after *Leegin*: The Enforcers Speak, the American Bar Association Section of Antitrust Law, Sept. 25, 2007 (on file with the author), *available at* http://www.abanet.org/antitrust/at-bb/audio/07/09-07.shtml. It is important to remember that a number of foreign jurisdictions also prohibit resale price maintenance. For example, in Canada, "making *any* form of manufacturer coercion, or even attempted coercion, on resale prices" is a per se criminal offence." Canadian law expressly prohibits RPM, whether imposed unilaterally or by agreement (section 61 of the Canadian Competition Act). Wofford, *supra* note 136, at 53. Similarly, RPM remains illegal in the EU.

138. *See generally* ABA SECTION OF ANTITRUST, STATE ANTITRUST LAWS (1996).

139. For example, Florida has RPM prohibitions relating to the resale of motor fuel at retail. FLA. STAT. § 526.307(1) (2007). Kansas has a statute that prohibits fixing resale prices for liquor and beer. KAN. STAT. § 41-701(f) (2007).

140. Spahr v. Leegin Creative Leather Products, Inc., No. 2:07-CV-00187 (E.D. Tenn. 2007).

141. *The Leegin Decision: The End of the Consumer Discounts or Good Antitrust Policy? Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights Before the S. Comm. on the Judiciary*, 110th Cong. (2007).

gal.[142] Neither the hearing nor the bill have attracted much attention outside the close community of antitrust practitioners, and passage appears unlikely at the present time. The visibility of the issue could heighten dramatically, however, if a few major manufacturers were to implement RPM policies that had an immediate effect on prices consumers paid for some popular brands, or if there were a storm of protests from prominent discount outlets that had been terminated. On the other hand, the RPM agreements by a company like Leegin are unlikely to arouse Congressional interest.

IV.
CONCLUSION

Despite all the uncertainties about the way that resale price maintenance will be analyzed under state and federal law, it cannot be said that the antitrust counselor's job is now more difficult. Non-price resale restrictions, or *Colgate* compliant programs, that were safe last year will continue to be safe. The authors believe that large, long-established companies are likely at first to continue their present distribution practices – with less risk that a relatively minor policy deviation will jeopardize an entire program.[143] For example, manufacturers with *Colgate* programs, may be able to discuss their differences with non-compliant retailers, rather than terminating them abruptly as they heretofore have been required to do.[144]

Courts will, however, gradually get used to the idea that legality or legality under federal law should not turn on nuances of communication. The fact that there have been some "agreements" on resale price, will no longer be outcome-determinative, and courts will be able to proceed to consideration of actual competitive effects – which, in most cases are likely to

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142. 153 CONG. REC. S. 13582 (daily ed. Oct. 30, 2007) (statement of Sen. Kohl).

143. Compare the evolution of the law applicable to non-price resale restrictions in situations where the manufacturer also owns some retail outlets, a practice known as "dual distribution." Early cases held that the resale restrictions imposed by the manufacturer were per se unlawful because the manufacture engaged in horizontal competition with the restrained retailers. Later decisions have held that the resale restrictions are primarily vertical, and therefore subject to the rule of reason. *See* JONATHAN JACOBSON ET. AL., ANTITRUST LAW DEVELOPMENTS, 159-60 (6th ed. 2007).

144. *See* discussion *supra* pp. 308-10.

be minimal. It is also highly unlikely that resale restrictions of any kind will halt the ongoing proliferation of discount sellers with lower distribution costs. When these things are observed to happen, the gloomy predictions of *Leegin*'s dissenters and critics will tend to fade away – just as the similarly gloomy predictions about *Monsanto* and *Sharp* have faded away – and, the venerable *Dr. Miles* will at long last be laid to rest.