

Price Fix Away?:

Does the Supreme Court's Decision in *Leegin Creative Leather Products* Strengthen the Ability of Businesses to Engage in Vertical Price Restraints with Impunity?

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Introduction

The United States Supreme Court in recent years has taken an increased interest in patent law, making a number of key decisions in the areas of injunctions¹, licensing², patentable subject matter³, and the standards of determining obviousness.⁴ In the current 2007-2008 term, the Court has already granted certiorari to consider the boundaries of the patent exhaustion doctrine; a case closely watched by legal commentators and observers.⁵ The Court's attention has also

¹ eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

² MedImmune v. Genentech, Inc., 127 S. Ct. 764 (2007).

³ LabCorp v. Metabolite Labs., Inc., 548 U.S. 124 (2006).

⁴ KSR Int'l Co. v. Teleflex, Inc., 127 S. Ct. 1727 (2007).

⁵ *Court Agrees To Consider Patent Case On Royalties*, N.Y. TIMES, Sept. 26, 2007, at C2; *Supreme Court to Decide Patent Exhaustion Case*, <http://www.patentlyo.com/patent/2007/09/supreme-court-t.html> (September 25, 2007) (reporting on the Supreme Court's decision to review the United States Court of Appeal for the Federal Circuit's decision in *Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 28 (2007)). In another case with antitrust and intellectual property implications, the Supreme Court declined to grant the petitioner's writ of certiorari to consider another issue of patent exhaustion in *McFarling v. Monsanto, Co.*, 128 S. Ct. 871 (2008).

been drawn to the intersection of intellectual property law and antitrust law, with two cases in that legal realm having been recently decided. In *Illinois Tool Works v. Independent Ink*, the Court considered whether the presumption that patent owners have market power in the subject matter of their patents is “applicable in the antitrust context when a seller conditions its sale of a patented product . . . on the purchase of a second product.”⁶

In another decision involving antitrust law and having intellectual property ramifications, the Supreme Court held in *Leegin Creative Leather Products v. PSKS* (hereinafter “*Leegin*”) that the legality of vertical price restraints⁷ were to be determined under a rule of reason standard, thereby overturning long-standing precedents.⁸ For nearly a century, the jurisprudence regarding minimum vertical price restraints had been resoundingly in favor of a per se rule against the practice. Since the landmark U.S. Supreme Court case of *Dr. Miles Medical Company v. John D. Park & Sons Company* (hereinafter “*Dr. Miles*”), vertical minimum price fixing arrangements were held to be a per se violation of antitrust laws.⁹

This paper will explore the *Leegin* decision by discussing the history of vertical price restraints and will suggest what practical affect, if any, the Court’s holding may have on the

⁶ 547 U.S. 28, 31 (2006). In *Independent Ink*, the appellants sold and licensed patented inkjet technology to manufacturers under an agreement that the manufacturers and its customers would exclusively buy replacement ink from them, and not from any other source. *Id.* at 31-32. The respondents in that case countered allegations of infringement by alleging that the appellant’s licensing scheme amounted to an illegal tying and monopoly arrangement. *Id.* at 32. As noted in Justice Stevens’ opinion in the case, Congress “amend[ed] the Patent Act to eliminate the market power presumption in patent misuse cases,” leaving the issue of whether the same presumption remains as a matter of antitrust jurisprudence. *Id.* at 31. Ultimately, the Court concluded that “the mere fact that a tying product is patented does not support such a presumption [of market power].” *Id.*

⁷ Other synonyms for the practice include vertical price fixing and vertical price maintenance. I will use the terms interchangeably throughout this paper, but will remain consistent to the term used by the original in any cited materials where appropriate.

⁸ *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007).

⁹ 220 U.S. 373 (1911). The Court held that “agreements . . . between dealers, having for their sole purpose the destruction of competition and the fixing [of] prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer.” *Id.* at 384-85.

future of antitrust law. Part I will begin by defining and discussing what vertical price restraints are, as well as the arguments advanced by both proponents and opponents of such pricing arrangements. Part II will further discuss the prior judicial standard as announced by the *Dr. Miles* decision and the subsequent gradual chipping away of that standard by court decisions in the decades that followed that holding. Part III will discuss the *Leegin* decision itself, and will attempt to forecast the potential future impact the decision will have on suits alleging uses of intellectual property in an antitrust setting.

PART I

A. Vertical Price Fixing – What is it?

As noted by Professor Glen Robinson, vertical price fixing is one of the most controversial subjects in the field of antitrust law.¹⁰ Legal practitioners and academics have long debated whether such practices should be encouraged as a means of supporting competition, or prohibited as an unlawful restraint on fair trade.¹¹ Price fixing in general occurs where there is “an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold.”¹² Thus, “any agreement that restricts price competition,” regardless of whether the parties involved “agree to charge exactly the same price,” may justify a finding of

¹⁰ Glen Robinson, *Explaining Vertical Agreements: The Colgate Puzzle and Antitrust Method*, 80 VA. L. REV. 577, 577 (1994).

¹¹ *Id.*

¹² UNITED STATES DEPARTMENT OF JUSTICE, PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR (2005), <http://justice.gov/atr/public/guidelines/211578.htm> [hereinafter DOJ, PRICE FIXING]. Alternatively, the practice has also been defined as “agreements in which an upstream seller agrees with a buyer on the minimum price, or the exact price, at which the buyer will resell the goods.” *Id.* See also Brief for Economists as Amici Curiae Supporting Petitioner, *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 173681, at *1.

liability for violating antitrust laws.¹³ Vertical price fixing occurs most commonly with “restraints imposed by the seller on the buyer (or vice versa),” or any restraint on prices occurring among parties in a vertical relationship with each other.¹⁴

Under the Sherman Antitrust Act, a wide variety of anticompetitive behavior was outlawed in the wake of growing public discontent over the power held by trusts such as John Rockefeller’s Standard Oil.¹⁵ In its current form, § 1 of the Act makes “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . illegal.”¹⁶ Initially after the passage of the Sherman Act, the Supreme Court applied the language literally as barring *every* contract or conspiracy “in restraint of trade.”¹⁷ Later cases took into account “social and economic realit[ies]” as well as legislative intent, and consequently the Court adjusted its interpretation to hold that “§1 outlaws only unreasonable restraints” of trade.¹⁸

¹³ DOJ, PRICE FIXING, *supra* note 12, at 2. The Dept. of Justice also noted that other examples of price fixing behavior include “establish[ing] or adher[ing] to price discounts . . . [h]old[ing] prices firm . . . [a]dopt[ing] a standard formula for computing prices . . . [and adhering] to a minimum fee or price schedule.” *Id.*

¹⁴ ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 286 (4th ed. 1994) (noting the example of a car manufacturer, who produces cars for sale to dealers, who in turn sell the cars to individual consumers at retail as parties in a vertical relationship).

¹⁵ Eleanor M. Fox & Lawrence A. Sullivan, *Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY 4-5 (Harry First et al. eds., 1991).

¹⁶ 15 U.S.C. § 1 (2000 & Supp. IV 2004).

¹⁷ John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY 272 (Harry First et al. eds., 1991).

¹⁸ *Id.*; *Leegin*, 127 S. Ct. at 2712 (citing *State Oil v. Khan*, 522 U.S. 3, 10 (1997)). In *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918), the Supreme Court rejected an invitation to literally apply the Sherman Act to all contracts, noting that every “agreement concerning trade, every regulation of trade, restrains . . . [and to] bind, to restrain, is of their very essence.” Instead as the *Leegin* Court noted, “the Court has never “taken a literal approach to [section one’s] language.” 127 S. Ct. at 2712 (citing *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)).

Consequently, because agreements between manufacturers and their distributors as to the price of their goods restrain the ability of the market to freely determine the trade for those goods, vertical price restraints trigger antitrust analysis.¹⁹ The key inquiry is whether such restraints are to be determined under the rule of reason standard or the per se standard under Sherman Act case law. By virtue of the fact that some “restraints are presumed to *always* have an anticompetitive effect,” such restraints are categorized as per se offenses.²⁰ Per se rules are often preferred by the courts as a matter of jurisprudential convenience, as they seek to address actions that “always or almost always tend[s] to restrict competition and decrease output.”²¹ Thus, as soon as conduct is characterized as falling within the bounds prohibited by the per se rule, it is condemned without regard for any potential countervailing positive effects.²²

Despite the clear judicial efficiency advantages provided by a bright line per se rule, the rule of reason is favored as the governing standard in determining antitrust liability.²³ In *Business Electronics v. Sharp Electronics*, the Supreme Court noted that “there is a presumption in favor of a rule of reason standard . . . [as] departure from that standard must be justified by demonstrable economic effect . . . rather than formalistic distinctions.”²⁴ Under a rule of reason analysis, courts are required to make “an ascertainment of the facts peculiar to the particular

¹⁹ Julian von Kalinowski, Peter Sullivan, and Maureen McGuirl, ANTITRUST LAWS AND TRADE REGULATION, § 2.02 (2d ed. 2007) [hereinafter ANTITRUST LAWS].

²⁰ *Id.* (emphasis added).

²¹ ANTITRUST LAWS, *supra* note 19, at § 2.02[2] (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979)).

²² *Id.* See also *Leegin*, 127 S. Ct. at 2713 (noting that the “per se rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of the individual restraint in light of the real market forces at work... and [provides] clear guidance for certain conduct”).

²³ See *Bus. Elecs. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988).

²⁴ *Id.*

business” when determining whether a particular practice violates antitrust laws.²⁵ Later cases further shaped this rule, noting that the legality of any restraint of trade may be ascertained by considering “the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; [and] the nature of the restraint and its effect.”²⁶ Over the last 30 years, there has been a clear shift toward rejecting prior rigid per se standards in favor of a more flexible rule of reason analysis as the default standard in judging the legality of alleged Sherman Act violations.²⁷ As discussed in greater detail below, the Supreme Court in *Leegin* overturned nearly one hundred years of per se treatment of vertical price restraints in favor of a rule of reason approach.²⁸

Nonetheless, despite historical underpinnings favoring either a per se, or a rule of reason standard, other commentators have argued for yet a third standard in dealing with this issue.²⁹ Professors Flynn and Ponsoldt propose employing a rebuttable presumption of *illegality* in determining the validity of a vertical price restraint.³⁰ Under this third standard, courts would start with the presumption that vertical price restraints are anti-competitive, but may then consider relevant facts that may weigh against finding an antitrust violation.³¹ As a result, judges would be given a measure of discretion in determining whether there is a true antitrust

²⁵ *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963).

²⁶ *Board of Trade of the City of Chicago*, 246 U.S. at 238.

²⁷ See *infra* notes 199-242 and accompanying text.

²⁸ 127 S. Ct. at 2710.

²⁹ See Flynn & Ponsoldt, *supra* note 17, at 288 (arguing that courts should be allowed a certain level of discretion, such that a standard involving a rebuttable presumption would allow for efficient judicial application, while at the same time providing some leeway to take into account justifiable reasons for the price restrictions).

³⁰ *Id.* (emphasis added).

³¹ *Id.*

violation; discretion similar to that employed in the rule of reason.³² The professors further argue that “per se rules should be considered evidentiary presumptions, of varying levels of rebuttability, for determining whether there has been an unreasonable displacement of the competitive process.”³³ In their view, the rule of reason “should be used only where no presumption of illegality would apply.”³⁴ While the Supreme Court’s decision in *Leegin* gives credence to Flynn and Ponsoldt’s argument by noting the importance of allowing courts some leeway to account for the particular circumstances surrounding the vertical price restraint, the Court does not go so far as to adopt the use of evidentiary presumptions.³⁵

In yet a fourth proposed treatment for dealing with this issue, Professor Richard Posner argues that vertical price restraints should be governed under a “rule of per se *legality*.”³⁶ While this proposed standard has not yet been adopted by the courts, commentators have noted that the use of a rule of reason in cases of “non-price vertical restraints has nearly amounted to a rule of per se legality for such conduct.”³⁷ In doing so, legal scholars suggest that such vertical

³² *Id.*

³³ *Id.*

³⁴ *Id.* See also Pamela Jones Harbour, *A Tale of Two Marks, and Other Antitrust Concerns*, 20 LOY. CONSUMER L. REV. 32, 46 (2007) (acknowledging “that it makes sense to have a modified per se rule ... to allow a respondent to rebut the presumption of illegality” by proffering evidence of a pro-competitive reason for the price restraint).

³⁵ See *infra* notes 278-281 and accompanying text.

³⁶ Richard Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981) (emphasis added). See also generally Robert Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP. CT. REV. 171, 190-92 (1977); GELLHORN & KOVACIC, *supra* note 14, at 318.

³⁷ GELLHORN & KOVACIC, *supra* note 14, at 418. See also Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67 (1991). Ginsburg’s article notes that in light of the *Continental T.V.* decision (see *infra*, note 47) which adopted the rule of reason to vertical non price restraints, parties accused of antitrust law violations who do not exhibit monopolistic behavior were likely to have their activities allowed by the courts. *Id.* at 67. Furthermore, Ginsburg explicitly comments that the Court did not go as far as “to declare all vertical restraints, both price and nonprice, per se lawful,” thereby adopting the per se legality standard proposed by Posner. *Id.* at 68. He writes that the practical effect of the *Continental T.V.* decision is an uneven balancing of the various factors underlying the validity of a particular vertical restraint, as evidenced by an often

restraints are presumed to “increase [economic] efficiency and should be permitted except in extraordinary circumstances.”³⁸

Even within the general categorical division of vertical price restraints, case law has delineated different jurisprudential standards depending on whether the restraint was one setting a maximum price ceiling, or one setting a minimum price floor.³⁹ While for the time being, the *Leegin* decision creates consistency as to the standard to be applied in all cases of vertical price restraints, the fluid nature of antitrust law leads to the question of whether the rule of reason will remain the governing standard.⁴⁰

B. Reasons in Favor of and Against Vertical Price Maintenance Schemes

In many respects, the use of a vertical price restraint is counterintuitive to the main goal of most major retail manufacturers, which is to maximize profits. As explained by Professor Posner, the price difference between what “the manufacturer sells [the product] to the dealer and the dealer’s price to the consumer is the manufacturer’s cost of distribution.”⁴¹ Thus, in order to

threshold analysis and inquiry as to particular key factors. *Id.* As his case study indicated, Ginsburg argues that the ease with which parties accused of illegal vertical restraints may come up with a justifiable pro-competitive reason for the restraint indicates the difficulties in differentiating between a rule of reason and a per se rule of legality. *Id.* at 76.

³⁸ GELLHORN & KOVACIC, *supra* note 14, at 318.

³⁹ See ANTITRUST LAWS, *supra* note 19, at § 18.02. The Supreme Court had previously announced that vertical maximum price fixing was a per se violation of antitrust laws in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). There, the court noted that “agreements to fix maximum prices ‘no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.’” *Id.* at 152 (citing *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951)). Nearly thirty years later, the Court reversed itself in *State Oil Co. v. Khan* and instead held that it was “difficult to maintain that vertically-imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation.” *Khan*, 522 U.S. at 15.

⁴⁰ See *infra* notes 199-242 and accompanying text detailing the shift from the long accepted per se treatment of vertical price restraints to a new standard.

maximize profits, “any seller . . . wants to minimize that cost.”⁴² Restrictions by the manufacturer as to the minimum allowable price floor or a maximum price ceiling that the product may be sold would logically eat into the profit margin the manufacturer seeks to exploit. Yet despite the seemingly illogical rationale for such price restraints by manufacturers,⁴³ the practice has remained readily in use.⁴⁴

Commentators have argued that by its nature, vertical price fixing is not necessarily anticompetitive.⁴⁵ In support of this argument, they argue that “a manufacturer could improve its competitive position in the market and enhance interbrand competition by controlling resale prices” where the manufacturer is not vertically integrated.⁴⁶ The enhancement of interbrand competition is particularly important in light of recent Supreme Court decisions anointing interbrand competition as the “primary concern of antitrust law.”⁴⁷ Professor Robert Bork further advocates the use of vertical price restraints, noting in an influential article that “manufacturers

⁴¹ RICHARD POSNER, *ANTITRUST LAW* 171 (U. of Chicago Press, 2d ed. 2001) (hereinafter POSNER, *ANTITRUST LAW*).

⁴² *Id.* (further explaining that “since a higher retail price reduces demand for the manufacturer’s good, and hence his sales revenues, one might expect the manufacturer always to encourage rather than restrict competition among his dealers in order to minimize the retail price of his product”).

⁴³ To clarify this seemingly specious argument, consider Professor Robert Bork’s explanation that vertical price restraints “causes output to expand and the higher [resulting] margins promote enhanced consumer welfare and efficiency.” Mark D. Bauer, *Whither Dr. Miles?*, 20 LOY. CONSUMER L. REV. 1, 15 (2007) (citing ROBERT BORK, *THE ANTITRUST PARADOX* 296 (Free Press 1978)). Bork assumes that businesses will reinvest the increased revenue caused by vertical price restraints in a manner benefiting the consumer, such as improved “décor and ambience of the retail establishment” where its products are sold. *See id.* Commentators argue that Bork’s theory is flawed in believing that all customers are drawn to stores based on ambience, as opposed to prices. *Id.* at 16 n.82.

⁴⁴ Recent cases involving vertical price fixing arrangements include: *Lotus Bus. Group v. Flying J Inc.*, 2007 U.S. Dist. LEXIS 86931 (E.D. Wis. November 27, 2007) (where plaintiffs alleged that a minimum markup statute on resale prices was a violation of antitrust laws); *Arista Records, L.L.C. v. Lime Group, L.L.C.*, 2007 U.S. Dist. LEXIS 88449 (S.D.N.Y. December 3, 2007) (where defendants argued that the plaintiff’s music distribution system amounted to an anticompetitive monopoly on internet music services).

⁴⁵ ANTITRUST LAWS, *supra* note 19, at § 18.01[3].

⁴⁶ *Id.*

⁴⁷ *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 52 n.19 (1977).

will adopt vertical restraints only if profits are increased,” thereby supporting the inference that such price fixing schemes are “necessarily procompetitive.”⁴⁸ Since its writing, Bork’s argument has become “the conventional economic wisdom on the efficiency [and therefore competition based] implications of vertical restraints.”⁴⁹

Among the most commonly espoused reasons for a vertical price restraint scheme is what is known as the ‘dealer-service theory of resale price maintenance.’⁵⁰ Under this reasoning, vertical price restraints are put in place to increase non-price competition among retail dealers by the manufacturer.⁵¹ For example, in order to motivate dealers to “maintain a large well stocked showroom, [deploy] a highly trained and motivated sales force, [advertise] the product extensively, or [provide] other costly presale services,” a manufacturer may seek to impose a minimum price restraint.⁵² This may be the result of a manufacturer deciding that the product is best sold by means of a particular combination of prices and services.⁵³ In doing so, the manufacturer hopes to ensure that customers will not take advantage of those dealers who take the initiative to provide extra services.⁵⁴ In other words, proponents of vertical price restraints

⁴⁸ WILLIAM S. COMANOR, *Economics of Vertical Arrangements* in REVITALIZING ANTITRUST IN ITS SECOND CENTURY 314 (Harry First et al. eds. 1991) (citing Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 375, 398 (1966)).

⁴⁹ *Id.*

⁵⁰ See POSNER, ANTITRUST LAW, *supra* note 41, at 172-76. See *cf.* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY – THE LAW OF COMPETITION AND ITS PRACTICE 241 (2d ed. West Group 1999) (arguing that in the context of intellectual property rights, the problem of a “free rider” is particularly significant, and, as “intellectual property rights can easily be appropriated if they are not given greater legal protection,” there is a danger that innovation may be stymied if licensing of intellectual property rights is not granted to competitors)

⁵¹ See POSNER, ANTITRUST LAW, *supra* note 41, at 172.

⁵² *Id.* at 172-73.

⁵³ Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1492 (1983).

⁵⁴ POSNER, ANTITRUST LAW *supra* note 41, at 173.

argue that such pricing schemes are necessary to prevent the situation of customers availing themselves of the presale services offered by the first dealer, only to then turn around and buy “the same product [from] a no-frills discount operation” run by a competing dealer.⁵⁵ In its brief to the Supreme Court, Leegin argued that creating dealer incentives “to provide service and promote the manufacturer’s product . . . [also] fosters interbrand competition” since it allows “the manufacturer to achieve certain efficiencies in the distribution of his products . . . to compete more effectively against other manufacturers.”⁵⁶

Critics of this position argue that the existence of “no frills” dealers is something that should be encouraged as being at the “very heart of a free market competitive system.”⁵⁷ Such dealers, in the absence of any price restraints, take advantage of their low overhead costs to pass those savings on to consumers in the form of lowered prices.⁵⁸ Professor Robert Pitofsky argues that vertical price restraints would thus unduly prevent no frills dealers from passing on those savings and would be a disservice to consumers and the competitive free market process.⁵⁹ He further contends that the notion that manufacturers employ vertical price restraints in order to encourage dealers to provide extra services is unfounded, since there is no guarantee that such

⁵⁵ Pitofsky, *supra* note 53, at 1492. As noted in the District Court’s decision in *Leegin*, resale price maintenance may promote competition by assuring “to the full-service retailer that it will be compensated for providing services at the point of sale and promoting the product by a guaranteed margin on the actual sale of the product itself.” *PSKS, Inc. v. Leegin Creative Leather Prod., Inc.*, 2004 U.S. Dist. LEXIS 30414, *2 n.2 (E.D. Tex. March 26, 2004). Thus, “such assurance[s] incents the full-service retailer to continue to promote the product.” *Id.*

⁵⁶ Brief for Petitioner, *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.* 127 S. Ct. 2705 (No. 06-480) (January 22, 2007), 2007 WL 160780, *15 (citing *Continental T.V.*, 433 U.S. at 54-55).

⁵⁷ Pitofsky, *supra* note 53, at 1493.

⁵⁸ *Id.*

⁵⁹ *Id.* This argument is echoed by Professors Gellhorn and Kovacic, who argue that the retail price maintenance may act to unfairly “deny customers a broader desired array of price-quality options, including the option of buying the product at a lower price through foregoing service or advertising.” GELLHORN & KOVACIC, *supra* note 14, at 297. They note the example of a consumer who is well versed in the product, who would consider “presentations by a knowledgeable sales staff” and other “point of sale services as superfluous.” *Id.* at 297-98.

price restraints will adequately inform dealers of “exactly what kind and what amount of service[s] the manufacturer has in mind.”⁶⁰ Pitofsky thus asserts that the market, and not manufacturers via vertical price restraints, should be the primary means of determining the right mix of prices and services available to consumers.⁶¹ In doing so, the basic principles of a free flowing, competitive market may be best realized.⁶²

Professor Posner also criticizes the dealer services theory as flawed, since the only situation where a competing dealer would be allowed to “free ride” on the services of another dealer is where both retailers are selling essentially identical products.⁶³ Where the retailer’s products do not have “the complete identity of the competing products’ characteristics,” then the manufacturer’s rationale for imposing resale restraints is consequently lost.⁶⁴ Other critics argue that the procompetitive effects of preventing free riding retailers is “merely theoretical,” with the “anticompetitive effects . . . more pernicious than vertical price fixing proponents indicate.”⁶⁵ This conclusion was also reached by the Federal Trade Commission in a study which found “little evidence that [vertical price restraints were] imposed to prevent free-riding on product-specific dealer services.”⁶⁶

⁶⁰ Pitofsky, *supra* note 53, at 1493 (pointing out the situation of a dealer acting as a “multiproduct outlet” with “hundreds or even thousands of items” available for sale as an unrealistic situation where vertical price restraints would likely have an effect on dealer services).

⁶¹ *Id.*

⁶² *Id.*

⁶³ POSNER, ANTITRUST LAW, *supra* note 41, at 174.

⁶⁴ *Id.*

⁶⁵ Dennis O. Doherty, *Business Electronics Corp. v. Sharp Electronics Corp.: Monsanto’s Progeny and the Congressional Proposal to Codify the Per Se Rule Against Vertical Price Fixing*, 38 CATH. U. L. REV. 963, 992 (1989). See also Harbour, *supra* note 34, at 44-45 (noting skepticism of the free-riding problem as a genuine problem solvable with vertical price restraints).

⁶⁶ COMANOR, *supra* note 48, at 308 n.18.

Proponents of vertical price restraints have also proposed other justifications for the practice, including that it allows for the maintenance of a uniform product image.⁶⁷ The same FTC study that found little empirical evidence supporting the free-rider theory concluded that “vertical restraints were being used to protect the signal of high quality created by the retailers’ general method of doing business.”⁶⁸ Thus, the use of vertical price restraints may allow manufacturers to ensure an excellent product reputation.⁶⁹ Similarly, vertical price restraints have also been argued to help facilitate national advertising campaigns.⁷⁰ As noted by the Supreme Court, “established manufacturers can use [vertical restraints] to induce retailers to engage in promotional activities which provide service and repair facilities necessary to the efficient marketing of their products.”⁷¹ Commentators have argued that such inducements “stimulate demand for the manufacturer’s product,” thereby leading to increased profits brought on by the “positive effect of these services on demand.”⁷²

Resale price maintenance may also be used to provide incentives to retailers to stock and promote the manufacturer’s products.⁷³ As noted by Professor Posner, the use of such price restraints works to “guarantee . . . [retailers] a profit greater than pure competition,” thus

⁶⁷ ANTITRUST LAWS, *supra* note 19, at §18.01[3].

⁶⁸ COMANOR, *supra* note 48, at 308.

⁶⁹ *Id.*

⁷⁰ ANTITRUST LAWS, *supra* note 19, at §18.01[3].

⁷¹ See Shawn D. Parrish, LexisNexis Expert Commentaries, *Parrish on Leegin Creative Leather Products v. PSKS, Inc.* (citing *Continental T.V.*, 433 U.S. at 54) (on file with author).

⁷² COMANOR, *supra* note 48, at 307 (noting Professor Lester Telser as one of the “first to offer a detailed account of how manufacturers benefit from resale price maintenance.”). *Id.*

⁷³ Brief for Petitioner, *supra* note 56, at *19. See also Victor Goldberg, *The Free Rider Problem, Imperfect Pricing and the Economics of Retailing Services*, 79 NW. U.L. REV. 736, 749 (1984) (arguing that vertical price restraints may be used to “enhance the value of continued future dealing with the manufacturer . . . [by] influenc[ing] the expected future earnings” that the retailer may receive thereby providing a reason for continued business collaboration).

ensuring loyalty and honesty by members within the distribution chain.⁷⁴ Vertical price restraints may also help manufacturers ensure that retailers will carry and stock new products, by dangling a generous minimum profit margin in front of them as an incentive.⁷⁵ Thus, new products which often “face difficulty in persuading store owners to allocate scarce shelf space and inventory capacity” may potentially have a greater chance of success with the use of vertical price restraints.⁷⁶ From a competition standpoint, the practice induces “competent and aggressive retailers to make the kind of investment of capital and labor as often required in the distribution of products unknown to the consumer.”⁷⁷

Besides arguing that vertical price restraints are an illogical solution to the free-rider problem, opponents of the practice also contend that price fixing can preclude intrabrand price competition.⁷⁸ As noted by Professor Pitofsky, “minimum vertical price agreements [can generally] lead to higher, and usually uniform, resale prices . . . [and] completely eliminate price flexibility at the dealer level and may stabilize higher prices at the manufacturer level.”⁷⁹ In other words, many critics argue that the practice leads to cartel behavior by dealers, who may “somehow coerce, or otherwise enlist, the manufacturer . . . to act as their agent in administering a cartel . . . by fixing a uniform retail price for his goods.”⁸⁰ Other commentators have noted the “possibility that a reduction or elimination of intrabrand price competition has led to a

⁷⁴ POSNER, ANTITRUST LAW, *supra* note 41, at 172.

⁷⁵ GELLHORN & KOVACIC, *supra* note 14, at 297.

⁷⁶ *Id.*

⁷⁷ Parrish, *supra* note 71.

⁷⁸ ANTITRUST LAWS, *supra* note 19, at §18.02.

⁷⁹ Pitofsky, *supra* note 53, at 1488.

⁸⁰ POSNER, ANTITRUST LAW, *supra* note 41, at 172. *See also* GELLHORN & KOVACIC, *supra* note 14, at 294.

stabilization of prices in the interbrand market, thereby facilitating interdependent pricing by competing manufacturers (cartelization).”⁸¹ A corollary problem is the potential that vertical price restraints will “lead to higher prices for consumers.”⁸² Whether vertical price restraints are actually used to facilitate cartel like behavior amongst parties in the manufacturing chain is a questionable proposition that has yet to be dispositively proven.⁸³

C. Does Licensing of IP Rights Trigger Antitrust Liability?

In a published series of guidelines, the Department of Justice and the Federal Trade Commission noted that for the most part, “the intellectual property laws and antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare.”⁸⁴ However, it is not to say that the exploitation of one’s intellectual property can never lead to antitrust liability.⁸⁵ Antitrust concerns may be prompted in situations where businesses license their intellectual property rights to another company for exploitation, or where the businesses combine

⁸¹ ANTITRUST LAWS, *supra* note 19, at §18.02 (noting that such facilitation may lead to cartelization in that particular market, with the resulting resale price fixing functioning as a “means to police the participants and to prevent ‘cheating’”).

⁸² Harbour, *supra* note 34, at 45.

⁸³ COMANOR, *supra* note 48, at 307 (noting that studies have indicated that while it is possible that vertical price restraints are used to facilitate cartel behavior, the majority of instances studied indicate that it is not the primary reason for employing a price fixing scheme).

⁸⁴ UNITED STATES DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR LICENSING OF INTELLECTUAL PROPERTY § 1 (1995), <http://www.usdoj.gov/atr/public/guidelines/0558.htm> [hereinafter DOJ/FTC ANTITRUST GUIDELINES]. The agencies noted that “[t]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odd . . . [but] the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition” (citing Atari Games Corp. v. Nintendo of America Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990)).

⁸⁵ See, e.g., JEANNE CLARK ET. AL., UNITED STATES PATENT AND TRADEMARK OFFICE, PATENT POOLS: A SOLUTION TO THE PROBLEM OF ACCESS IN BIOTECHNOLOGY PATENTS? 4-6 (2000), <http://www.uspto.gov/web/offices/pac/dapp/opla/patentpool.pdf> (summarizing the treatment of patent pooling agreements and whether such agreements violated antitrust laws).

their intellectual property in patent pooling arrangements.⁸⁶ In many cases, a licensing company with greater leverage may impose upon the licensee restrictions as to the scope and use of the license.⁸⁷ In situations where the restrictions are particularly demanding, the licensing agreement may be challenged as an illegal restraint on trade, thereby implicating antitrust laws.⁸⁸

As it specifically pertains to patents, the licensing of patent rights is seen as an arrangement promoting competition in the market, since it “encourages people to innovate.”⁸⁹ Licensing of patent rights often allows the patent holder to increase the efficiency of the production of the patented good, as it typically provides for increased productivity.⁹⁰ Furthermore, licensing practices are also favored “as methods of exploiting intellectual property which may benefit consumers by reducing costs and introducing new products.”⁹¹ Supporting the notion that licensing may be inherently pro competitive, federal agencies in charge of enforcing antitrust laws have stated that “[i]n the vast majority of cases, restraints in intellectual

⁸⁶ *Id.* at 4. Clark’s article defines a patent pool as “the aggregation of intellectual property rights which are the subject of cross-licensing, whether they are transferred directly by patentee to licensee or through some medium, such as a joint venture, set up specifically to administer the patent pool” (quoting Joel I. Klein, *An Address to the American Intellectual Property Association, on the Subject of Cross Licensing and Antitrust Law*, May 2, 1997, <http://www.usdoj.gov/atr/public/speeches/1118.htm>).

⁸⁷ *See, e.g., In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 193-94 (2d Cir. 2006) (detailing the terms of a license granted by the patent holder to a prospective manufacturer).

⁸⁸ *See, e.g., Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912).

⁸⁹ Robert M. Buchanan, Jr. & Andrew W. Feinberg, *The 1995 DOJ and FTC Antitrust Guidelines for the Licensing of Intellectual Property*, in ALI-ABA COURSE OF STUDY MATERIALS: ANTITRUST/INTELLECTUAL PROPERTY CLAIMS IN HIGH TECHNOLOGY MARKETS: LITIGATING AND ADVISING IN AN ERA OF UNCERTAINTY (1997) [hereinafter ALI-ABA ANTITRUST COURSE]. *See also* DOJ/FTC ANTITRUST GUIDELINES, *supra* note 84, § 2.3 (“By potentially increasing the expected returns from intellectual property, licensing also can increase the incentive for its creation and thus promote greater investment in research and development. Sometimes the use of one item of intellectual property requires access to another. An item of intellectual property ‘blocks’ another when the second cannot be practiced without using the first. For example, an improvement on a patented machine can be blocked by the patent on the machine. Licensing may promote the coordinated development of technologies that are in a blocking relationship.”).

⁹⁰ DOJ/FTC ANTITRUST GUIDELINES, *supra* note 84, at § 2.3.

⁹¹ Buchanan, *supra* note 89.

property licensing arrangements are evaluated under the rule of reason,” thus not falling into the category of practices which “always or almost always tend[] to restrict competition.”⁹²

Those who oppose the use of patent licensing argue that the practice invariably triggers concerns about patent misuse.⁹³ Under the intellectual property clause in the United States Constitution, patent owners are provided with a limited monopoly on their inventions and discoveries.⁹⁴ This monopoly right is not unlimited, as the patent owner must still nonetheless comport his conduct in exploiting his patent rights in a manner that does not violate antitrust principles.⁹⁵

As case law has delineated, there are often instances when licensing agreements result in antitrust liability. For the most part, a patent owner may place price restraints on a licensee’s sales outside of a few limited exceptions. These price restraints are often the result of the patentee’s desire for increased royalties, or for greater protection of the patentee’s “competitive position harmed or its profits reduced,” where the licensee would otherwise be able to sell the goods at prices below those of the patentee.⁹⁶

In *Bement v. National Harrow Company*, Justice Peckham on behalf of the majority noted that a patentee’s monopoly rights allow him to impose “any conditions which are not in

⁹² DOJ/FTC ANTITRUST GUIDELINES, *supra* note 84, at § 3.4. *See also* *Bus. Elecs. v. Sharp Elecs. Corp.*, 485 U.S. at 723.

⁹³ *See* HOVENKAMP, *supra* note 50, at 240.

⁹⁴ U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power ... [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”). *See also* 35 U.S.C. § 154(a)(2) (2000) (providing that the patent monopoly may be held for up to twenty years from the date the patent application was filed).

⁹⁵ *See, e.g.*, *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942) (Noting that while public policy seeks to reward innovation with a patent, it also “forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant”). *Id.* at 492.

⁹⁶ ANTITRUST LAWS, *supra* note 19, at § 18.06[1].

their very nature illegal with regard to . . . [agreements with] the licensee for the right to manufacturer or use or sell the article.”⁹⁷ Furthermore, the “fact that the conditions in the [licensing] contract keep up the monopoly or fix prices does not render them illegal.”⁹⁸ In *General Electric*, the Court held that a patent owner who “manufactures and sells its patented product may establish the price at which a manufacturing licensee sells that product.”⁹⁹ So long as price restraints “are normally and reasonably adapted to secure pecuniary reward for the patentee’s monopoly,” such restrictions are deemed corollary to the benefits normally awarded to the patent owner.¹⁰⁰ However, despite the seemingly broad right granted to patentees as to price restraints on their licensee’s sales, courts have limited the *General Electric* holding to primarily those situations where the patentee is a manufacturer in competition with the licensee.¹⁰¹ The Court’s holding did nothing to disturb prior established limitations which prevented the patent owner from setting the “resale price of the patented merchandise once those goods have been sold.”¹⁰² The ability of manufacturing patent owners to impose price restraints on their licensees is also limited by procedural requirements, such as the presence of a valid patent.¹⁰³

⁹⁷ *Bement v. Nat’l Harrow Co.*, 186 U.S. 70, 91 (1902).

⁹⁸ *Id.*

⁹⁹ *General Electric*, 272 U.S. at 488; ANTITRUST LAWS, *supra* note 19, at § 18.06[1].

¹⁰⁰ *General Electric*, 272 U.S. at 490.

¹⁰¹ ANTITRUST LAWS, *supra* note 19, at § 18.06[1]. *See, e.g.*, *United States v. New Wrinkle*, 342 U.S. 371 (1952). The Court in *New Wrinkle* refused to apply the holding in *General Electric* to any situation where the patent holder did not personally manufacture the product which it imposed price restraints on its licensee. *Id.* at 378. Similarly in *United States v. Line Material*, 333 U.S. 287, 310 (1948), the Court reaffirmed the ability of a patentee to “validly license a *competitor* to make and vend with a price limitation under the *General Electric* case” (emphasis added).

¹⁰² ANTITRUST LAWS, *supra* note 19, at § 18.06[1]. In fact, the *General Electric* court reaffirmed this conclusion when it noted that “it is well settled . . . that where a patentee makes the patented article and sells it, he can exercise no future control over what the purchaser may wish to do with the article after his purchase.” *General Electric*, 272 U.S. at 489.

In *United States v. United States Gypsum*, licensing agreements as to U.S. Gypsum's patents for an improved gypsum board and the associated manufacturing process were challenged as violating antitrust laws.¹⁰⁴ These new gypsum boards were an improvement to the extent that they had closed edges, allowing for increase in quality, cheaper production costs, and increased durability compared to existing gypsum boards.¹⁰⁵ Licensing arrangements containing resale price restraints were soon instituted, partly due to the pending expiration of the patent for the improved boards.¹⁰⁶ The Supreme Court reversed the trial court's determination that the "common plan [between the parties in the licensing agreement] to organize the gypsum industry and stabilize prices through a network of patent licenses was legally permissible."¹⁰⁷ Noting that it was irrelevant whether the parties knew that they entered into a licensing agreement to control resale prices, the Court held that the patent licenses here were barred by the Sherman Act.¹⁰⁸ The Court invalidated the licensing scheme, holding that price restraints on licensee sales of the

¹⁰³ Clearly, a prerequisite to allowing a patent owner to place price restraints on licensee's sale of the patented goods is the presence of a valid patent. For example, the court in *Robert H. Ingersoll & Bro. v. McColl*, 204 F. 147, 149 (D. Minn. 1913) refused to allow a watch manufacturer from imposing price restraints where the restriction was not done for "the purpose of protecting the patent or for securing its benefits." There, the manufacturer's license restrictions were not the result of a desire to protect his patent rights (since no patent had been granted), but an attempt to protect the company's trademarks. *Id.* at 151. Similarly in *Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394, 398 (1947), the Court held that in a patent licensing scheme, "if the patent was invalid, the price-fixing provision violated the federal anti-trust laws." Finally, any protections from antitrust laws the *General Electric* holding provides to the patent holder in its licensing agreements ends upon the expiration of the patent itself. *Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 279 (8th Cir. 1973).

¹⁰⁴ 333 U.S. 364, 369-72 (1948).

¹⁰⁵ *Id.* at 370.

¹⁰⁶ *Id.* at 375-76.

¹⁰⁷ *Id.* at 392.

¹⁰⁸ *Id.* at 392-93.

product were valid only where “[t]he price relates to the patented product only, and to the entire product, not simply a part of it.”¹⁰⁹

On the other hand, vertical price restraints involving licensing arrangements have been upheld where the “patentee establishes and enforces the price independently of the licensee.”¹¹⁰ This was not the case in *United States v. Krasnov*, where a manufacturer of furniture slip covers entered into a number of unlawful cross-licensing arrangements with other competitors.¹¹¹ After discussing the relevant standard as announced by the Supreme Court in *General Electric*, the court held that the licensing arrangement violated antitrust laws.¹¹² Whereas *General Electric* was primarily concerned with the patent owner’s right to exploit their patent rights by placing price restrictions on a licensee, “the price arrangement [in *Krasnov*] was not executed in a manner so that its purpose can be said to have been the protection of the patentee’s monopoly.”¹¹³ Instead, the arrangement sought to benefit both the patent owner and licensee equally, as both would take active measures to ensure that retailers were not selling the patented goods at below the set retail price.¹¹⁴ Both parties “had an interest in maintaining a set retail

¹⁰⁹ *Id.* at 398-99; ANTITRUST LAWS, *supra* note 19, at § 18.06[1]. The Court in *U.S. Gypsum* noted that the trial court erred in finding that the “provision prohibiting the reduction of price on unpatented products was designed to protect the price of patented board, and was not used to stabilize the price of unpatented materials... as clearly erroneous.” *U.S. Gypsum*, 333 U.S. at 399.

¹¹⁰ ANTITRUST LAWS, *supra* note 19, at § 18.06[1].

¹¹¹ 143 F. Supp. 184, 188-189 (E.D. Pa. 1956). Among the more contentious clauses in the licensing agreement at issue was one dictating that the manufacturer “would not grant licenses to others under the... patent without [the licensee’s] consent” and one allowing the manufacturer to “to set the price to be maintained for slip covers manufactured under the... patent.” *Id.* at 189.

¹¹² *Id.* at 198.

¹¹³ *Id.*

¹¹⁴ *Id.* The court noted that the “[patent owner] complained to [the licensee] when one of the latter’s customers failed to maintain the retail price... [leading the licensee to send] out a salesman to adjust the matter.” *Id.* Of course, the licensee “in like manner and with apparent equal right watched [the patent owner’s] customers. *Id.*

price and they each took action towards that end.”¹¹⁵ Thus, joint agreements between the licensee and patent owner to set retail prices at a mutually advantageous level extend beyond the allowable patent rights provided to the patent owner, and impart antitrust liability.¹¹⁶

PART II

A. The Previous Standard – *Dr. Miles* and Establishing the Per Se Rule

As commentators have noted, early Sherman Act jurisprudence ran the gamut from literal prohibition of any contract or conspiracy in restraint of trade, to a rule of reason allowing judges to make their own interpretations, to a per se standard and “defined categories of illegality.”¹¹⁷

In *Montague & Co. v. Lowry*,¹¹⁸ an early case holding vertical price fixing as a per se violation of the Sherman Antitrust Act, the Court laid the groundwork for the analysis seen in *Dr. Miles*.¹¹⁹ There, the Supreme Court found an arrangement limiting the sale of tiles in San Francisco to only distributors who were members of a trade association to be an illegal “restraint of interstate trade or commerce” in violation of antitrust laws.¹²⁰ Unlike in later decisions as discussed below, the Court did not find that the amount of commerce at issue or the fact that the price fixing was an integral part of an overall scheme would avoid the imposition of antitrust

¹¹⁵ *Id.*

¹¹⁶ ANTITRUST LAWS, *supra* note 19, at § 18.06 n.3.

¹¹⁷ FLYNN & PONSOLDT, *supra* note 17, at 272.

¹¹⁸ 193 U.S. 38 (1904).

¹¹⁹ While the Supreme Court in *Montague* did not explicitly refer to the “attempted resale price maintenance as ‘per se’ illegal,” commentators have noted that the conduct was nonetheless violative of antitrust laws. William T. Goglia, Annotation, *Supreme Court’s Views as to What Constitutes Per Se Illegal Price Fixing Under the Sherman Act*, 64 L. ED. 2D 997, § 19(a) (2006).

¹²⁰ *Montague*, 193 U.S. at 46.

liability.¹²¹ Thus, any agreement between vertical parties to fix the prices of goods was treated akin to a per se violation.¹²²

Seven years later, again without explicitly stating so, the Supreme Court in *Dr. Miles* reaffirmed earlier decisions that vertical minimum price maintenance was a per se violation of antitrust laws.¹²³ There, a manufacturer of medicines established a system whereby contracted distributors were required to sell the potions at minimum delineated prices established by the manufacturer.¹²⁴ The company forced its hundreds of distributors and thousands of retail partners to sign one of “two forms of restrictive agreements limiting trade” in its medicinal formulas.¹²⁵ These agreements were quite specific and included clauses limiting the distribution and resale of its formulas, dictating the prices that they would be sold for and permitting the manufacturer to repossess the medicines upon cancellation of the contracts.¹²⁶ One particular distributor refused to enter into any agreement with Dr. Miles, and instead sought to acquire the

¹²¹ *Id.* The appellants in *Montague* argued that “the sale of unset tiles [was] so small ... as to be a negligible quantity; that it [did] not amount to one per cent of the business of the dealers in tiles in that city.” *Id.* The court rejected this argument, noting that these price restrictions still had the effect of either increasing the amount of trade between member distributors or forcing non member distributors to go out of business; which in either case was an unlawful restraint of trade. *Id.*

¹²² *Id.* at 46, 48 (noting that the “agreement directly affected and restrained interstate commerce” in this case, contrary to provisions of the Sherman Antitrust Act).

¹²³ See Goglia, *supra* note 119, at § 19(b).

¹²⁴ *Dr. Miles*, 220 U.S. at 394. For example, as noted by the Sixth Circuit’s opinion, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 164 F. 803, 808 (6th Cir. 1908), agreements between Dr. Miles Medical Co. and its distributors specifically dictated that:

It is agreed that the goods of [Dr. Miles Medical Co.] shall be sold by said consignee only to the said retail or wholesale agents of said proprietor, as per list furnished, at not less than the following prices, to-wit:

Medicines, of which the retail price is \$1.00; \$8.00 per dozen.

Medicines (if any), of which the retail price is 50 cents; \$4.00 per dozen.

Medicines, of which the retail price is 25 cents; \$2.00 per dozen.

¹²⁵ *Dr. Miles*, 220 U.S. at 394.

¹²⁶ *Id.* at 394, 396.

medicines at lower prices by inducing contracted parties to violate their covenants.¹²⁷ As a result, Dr. Miles sued for equitable relief under a theory of interference with contractual obligations.¹²⁸ Thus, this cornerstone case of American antitrust jurisprudence began interestingly enough, as a complaint alleging a violation of a common business tort.¹²⁹

In discussing the merits and legality of the agreements in *Dr. Miles*, the Supreme Court began by noting that the agreements Dr. Miles sought to enforce had the effect of “govern[ing] directly the entire trade in the medicines it manufactures, embracing interstate commerce as well as commerce within the state respectively.”¹³⁰ The system employed by Dr. Miles in this case had the effect of destroying competition between retailers, since retailers could only acquire the company’s products upon agreeing to the strict sales and price requirements dictated by the manufacturer.¹³¹ The Court noted that consequently “all room for competition between retailers, who supply the public, [was] made impossible.”¹³²

Nonetheless, in defense of its practices Dr. Miles asserted that its restrictive agreements were valid since “they relate to proprietary medicines manufactured under a secret process” and because “a manufacturer is entitled to control the prices on all sales of his own products.”¹³³ In making its first argument, Dr. Miles analogized to the principle that patent holders may restrict

¹²⁷ *Id.* at 394.

¹²⁸ *Id.* at 394 (stating specifically that “an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other”).

¹²⁹ *Id.*

¹³⁰ *Id.* at 394.

¹³¹ *Id.* at 400.

¹³² *Id.* (noting that in the absence of any evidence indicating “any room at any point of the line for the usual play of competition between the dealers ... a combination [in the distribution chain] to maintain prices and stifle competition has been brought about”).

¹³³ *Id.* at 400.

the resale price of their patented inventions,¹³⁴ and sought to extend that principle to cover the secret process in this case.¹³⁵ The Court rejected this argument, noting that Congress granted patent holders certain rights in exchange for public disclosure of the patented invention, including the “exclusive right to make, use, and sell the things discovered for a limited time.”¹³⁶ Here the Court noted that “there [were] no letters patent relating to the remedies in question,” such that Dr. Miles was not entitled to “secure the privileges [the Patent Act] confers.”¹³⁷ While the agreements in this case would have been valid had Dr. Miles fulfilled the public disclosure requirements to receive a patent for the medicine, no analogous right exists to monopolize the product of a trade secret.¹³⁸ A cause of action and subsequent appropriate remedy would have been possible under trade secret law since a “secret process may be the subject of confidential communication and of sale or license to use with restrictions as to territory and prices.”¹³⁹ However, because Dr. Miles sought to limit the sale and distribution of the end *product*, rather than restrict the use of the manufacturing *process*, the Court held that the injury alleged in the complaint could not be remedied in the manner desired.¹⁴⁰

¹³⁴ Dr. Miles Medical argued that *Bement v. National Harrow Co.* was controlling, where the Supreme Court allowed patent owners to impose “restraint[s] of interstate commerce which may arise from reasonable and legal conditions ... [that restrict] the terms upon which the article may be used and the price to be demanded.” *Dr. Miles*, 220 U.S. at 401 (quoting *Bement*, 186 U.S. at 92). See also *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992) (affirming the holding in *Bement* by allowing a patent holder to make restrictions on the sale of their goods as long as those restrictions do not violate antitrust laws).

¹³⁵ See *Dr. Miles*, 220 U.S. at 400-04.

¹³⁶ *Id.* at 402 (quoting *Grant v. Raymond*, 31 U.S. 218, 243 (1832)). The Patent Act grants a cause of action by a patent owner against anyone who “without authority makes, uses, offers to sell, or sells any patented invention.” 35 U.S.C. § 271(a) (2000).

¹³⁷ *Dr. Miles*, 220 U.S. at 402.

¹³⁸ *Id.* at 402-03.

¹³⁹ *Id.* at 402 (citing *Fowle v. Park*, 131 U.S. 88 (1889)).

Alternatively, Dr. Miles argued that price restrictions on the sale of the medicinal formulas were allowed “by virtue of the fact that they relate to products of [their] own manufacture.”¹⁴¹ The Court also summarily rejected this contention, noting that while manufacturers may make the decision as to whether to sell their products, they may not “impose upon purchasers every sort of restriction . . . [and] a general restraint upon alienation is ordinarily invalid.”¹⁴² Furthermore, the Court held that even if restrictions on sales of Dr. Miles’ products were known to purchasers, in the absence of a contractual or statutory grant, such restrictions to fix prices for future sales were impermissible.¹⁴³ Having found no authority supporting the expansive privilege Dr. Miles sought to exercise, the Court rejected the contention that the company had “the authority to control all future retail sales by a notice that such sales must be made at a fixed sum.”¹⁴⁴

Although *Dr. Miles* is ultimately best known as establishing a per se rule against vertical minimum price fixing,¹⁴⁵ the Court's analysis implicitly acknowledged that the reasonableness of the alleged restraint was a major consideration as to whether such restraints were valid.¹⁴⁶

¹⁴⁰ *Dr. Miles*, 220 U.S. at 404 (emphasis added) (“[T]he maker of so-called proprietary medicines, unpatented, stands on no different footing from that of other manufacturers.”).

¹⁴¹ *Id.* (noting that the “basis of the argument appears that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it”).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 405.

¹⁴⁵ Robert J. Larner, *Vertical Price Restraints: Per se or Rule of Reason?*, in *ECONOMICS & ANTITRUST POLICY* 123, 138 n.2 (Robert J. Larner & James W. Meehan ed. 1989) (emphasis added) (noting that “[a]lthough the Supreme Court . . . did not explicitly hold that vertical price-fixing agreements are per se illegal, its reasoning *clearly supported* such a position and later decisions made it explicit”) (emphasis added).

Adopting the rationale in an influential English decision, the Court noted that the public interest in free trade is the primary factor in determining the propriety of a restraint of trade.¹⁴⁷ In the absence of a valid and overriding exception, price fixing for the sole purpose of interfering with the ability of others to engage in free trade, is void.¹⁴⁸ In other words, the *Dr. Miles* opinion left open the possibility that a vertical price restraint could be valid where there is sufficient justification brought forth by “the special circumstances of a particular case.”¹⁴⁹ While not a strong endorsement of the rule of reason, the Court suggests that simply creating a per se rule against price restraints in *all* cases was not the correct standard, and that some leeway should be given to judges in order to consider and balance the interests of the public with those of the manufacturer.¹⁵⁰

Such language cannot be disregarded as mere dicta. The Supreme Court ultimately came to the conclusion, in effect, that the price restraint sought to be employed by Dr. Miles Medical was anti-competitive in nature without a valid justification.¹⁵¹ The Court rejected the procompetitive arguments advanced by the manufacturer as being insufficient to overcome the restraint's anti-competitive tendencies, particularly in light of the far reaching effects of the price

¹⁴⁶ *Dr. Miles*, 220 U.S. at 406 (holding that “the public interest is still the first consideration,” and that restraints “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”).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citing the general rule espoused by Lord McNaghten in *Nordenfelt v. Maxim-Nordenfelt & Co.*, [1904] A.C. 565 (H.L.), that “all interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void”).

¹⁴⁹ *Dr. Miles*, 220 U.S. at 406-407.

¹⁵⁰ *Id.* at 407. In fact, the Court citing as an example for a valid exception to the general rule, focused on the reasonableness of the price restriction, “in reference to the interests of the parties concerned and ... in reference to the interests of the public ... [so that the restriction affords] adequate protection to the party in whose favor it is imposed while at the same time it is in no way injurious to the public.” *Id.*

¹⁵¹ *Id.* at 407-08.

restraint scheme employed.¹⁵² Consequently, the price fixing system involved in this particular case was invalidated as one which “create[d] a combination for [a] prohibited purpose,” with no reason existing to entitle Dr. Miles to any “special privilege or immunity” from the general rule.¹⁵³ The judgment of the lower court was subsequently affirmed, holding that the specific pricing scheme in this case was invalid.¹⁵⁴

B. Steady Affirmation of the Per Se Standard

A number of major court decisions in the decades following *Dr. Miles* affirmed the holding that vertical minimum price fixing is a per se offense.¹⁵⁵ In *United States v. Socony Vacuum Oil*,¹⁵⁶ the United States government charged a number of gasoline production companies with violations of antitrust laws stemming from an alleged conspiracy to artificially raise and fix “tank car prices of gasoline in the spot markets in the East Texas and Mid-Continent

¹⁵² *Id.* at 408. The stated benefit of standard retail pricing and avoidance of confusing different prices was deemed an insufficient justification for the price restriction system since the benefit of increased profits ran to the manufacturers only. *Id.* at 407. Thus the “asserted ulterior benefit to the [public] cannot be regarded as sufficient to support [the price restraint] system.” *Id.* at 408.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 409. In a dissent by Justice Holmes, he argued that court intervention in this area of public policy is not necessary but that a free market system would effectively counter any problems of price fixing. *Id.* at 411 (The majority Court’s conclusion “is reached by extending a certain conception of public policy to a new sphere... the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear.”). Advocating a laissez faire market economy, Holmes reasoned that the Court “greatly exaggerate[ed] the value and importance to the public of competition in the production or distribution of an article... [and] fixing a fair price.” *Id.* at 412. In other words, as people must make choices between purchasing what they want with what they need, as “soon as the price of something that [people] want goes above the point at which [they] are willing to give up other things to have that, [they will] cease to buy it and buy something else.” *Id.* Especially with cases involving non essential goods such as the medicinal formulas here, the dissent asserted that the Court should not be concerned with price fixing unless such schemes involve necessities. *Id.* Rather a determination of whether a price restraint was fair would be best considered by the price at which the manufacturer will make the most profit, as that point marks the equilibrium of social desires and fair prices. *Id.*

¹⁵⁵ See LARNER, *supra* note 145, at 138 nn.2-4 (citing *Continental T.V.*, 433 U.S. 36; *California Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97 (1980); and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) as examples of explicit adaptation and reaffirmation of the per se standard).

¹⁵⁶ 310 U.S. 150 (1940).

field.”¹⁵⁷ There, gasoline production companies entered into agreements with refineries in spot markets to purchase “large quantities of gasoline . . . at uniform, high, and at times progressively increased prices.”¹⁵⁸ The indictment charged by the government alleged that these purchases “were in excess of the amounts which defendants would have purchased but for” the agreements at elevated prices.¹⁵⁹ In turn, these practices led to artificially raised and fixed prices that were charged to retail gasoline dealers in the network.¹⁶⁰

The Seventh Circuit reversed the district court’s determination that the arrangement in *Socony-Vacuum Oil* was a per se violation of antitrust laws, leading the Supreme Court to grant certiorari to review the case.¹⁶¹ On appeal, the Court affirmed that “price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”¹⁶² Despite arguments to the contrary, the Court held that the government had sufficiently proven the presence of an illicit agreement between gasoline producers and their

¹⁵⁷ *Id.* at 166.

¹⁵⁸ *Id.* at 167.

¹⁵⁹ *Id.* at 167-68.

¹⁶⁰ *Id.* at 168-69 (noting that the “defendants by raising and fixing the tank car prices of gasoline in these spot markets could and did increase the tank car prices and retail prices of gasoline sold”).

¹⁶¹ *See generally id.* at 210-12. The district court’s jury instruction as to the Sherman Act violations charged that “where the members of a combination had the power to raise prices and acted together for that purpose, the combination was illegal; and it was immaterial how reasonable or unreasonable those prices were or to what extent they had been affected by the combination.” *Id.* at 210. On appeal, the Seventh Circuit held that the district court’s decision was in error, “since it was based upon the theory that such a combination was illegal per se.” *Id.* at 211.

¹⁶² *Socony-Vacuum*, 310 U.S. at 218. The Court noted prior case law reaffirming the “well-established rule in clear and unequivocal terms,” that “agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition.” *Id.* (citing *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 458 (1940)). The Court further summarized its treatment of vertical price restraints later in the opinion, where it wrote that “[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.” *Socony-Vacuum*, 310 U.S. at 223.

purchasing partners, and consequently that § 1 of the Sherman Act had been violated.¹⁶³ The Court refused to entertain any argument that the price fixing scheme in this case was necessary to eliminate “so-called competitive evils” for fear of adopting a rule of reason test.¹⁶⁴ Broadly ruling that “[a]ny combination which tampers with price structures is engaged in an unlawful activity,” the court disregarded any extenuating circumstances or well intentions on the part of the proponent of the price fixing activity.¹⁶⁵

In a case factually similar to *Dr. Miles* decided nearly twenty years after *Socony-Vacuum*, the Supreme Court in *United States v. Parke, Davis & Co.*¹⁶⁶ again held that a resale price maintenance scheme between a drug manufacturer and its distributors was a per se violation of the Sherman Act.¹⁶⁷ There, a drug manufacturer refused to supply its products to distributors that resold the goods at prices below the respective suggested minimum retail price.¹⁶⁸ Complaints regarding the resale price maintenance arrangement were lodged to the Department of Justice’s Antitrust Division, leading the United States to later sue for antitrust violations.¹⁶⁹ In

¹⁶³ *Socony-Vacuum*, 310 U.S. at 219-20. The Court cited “abundant evidence that the combination had the purpose to raise prices ... [and] ample evidence that the buying programs at least contributed to the price rise ... of the spot markets, and to increases in the price of gasoline sold.” *Id.* at 219. Furthermore, the Court held that the fact that these agreements were designed to, and had the effect of, restricting competition through the decrease supply of gasoline in the area also indicated the presence of an illegal vertical restraint justifying per se treatment. *Id.* at 219-20.

¹⁶⁴ *Id.* at 220. Specifically, the Supreme Court held that “[i]f the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price fixing case ... [and] the Sherman Act would soon be emasculated.” *Id.* at 221.

¹⁶⁵ *Id.* at 221 (“The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. . . . Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.”).

¹⁶⁶ 362 U.S. 29 (1960).

¹⁶⁷ *Id.* at 47.

¹⁶⁸ *See generally id.* at 31-34.

¹⁶⁹ *Id.* at 30.

considering the merits of the United States’ request for an injunction against Parke, Davis’ practice, the district court held that the defendant’s actions fell into an exception to the per se rule against resale price restraints and was “properly unilateral and sanctioned by law.”¹⁷⁰ On appeal, the Supreme Court held that the price maintenance provisions in Parke, Davis’ agreements exceeded the scope of the limited exception announced in *United States v. Colgate*.¹⁷¹ As a result, where the manufacturer does more than just announce a resale price restraint and refuse to deal with distributors who decline to abide by that policy, but rather actually uses that resale price restraint policy as a means of forcing compliance or risk loss of business relations, the latter course of action is not protected activity.¹⁷² Consequently, the Court held that the resale price restraint agreements with distributors here was an illegal “combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity,” justifying a finding of per se illegality under *Dr. Miles*.¹⁷³

In *Albrecht v. Herald Co.*, the Supreme Court reversed lower court decisions holding that vertical maximum price restraints were not per se violations of antitrust laws.¹⁷⁴ There, a newspaper publisher entered into distribution agreements with independent carriers to sell newspapers at a “suggested retail price,” while also terminating such agreements where the

¹⁷⁰ *Id.* at 36 (citing *United States v. Parke, Davis & Co.*, 164 F.Supp. 827, 829 (D.C. Cir. 1958)). The district court based its holding on the Supreme Court’s decision in *United States v. Colgate & Co.*, 250 U.S. 300 (1919), which carved out an exception to per se treatment of vertical price restraints to allow a manufacturer to selectively choose distributors based on whether those distributors agree to observe announced retail price maintenance. *Id.* See also *infra* notes 200-205 and accompanying text for a more detailed discussion on the Supreme Court’s limited antitrust exception announced in *Colgate*.

¹⁷¹ *United States v. Parke, Davis & Co.*, 362 U.S. at 45.

¹⁷² *Id.*

¹⁷³ *Id.* at 47 (citing *Socony-Vacuum*, 310 U.S. at 223).

¹⁷⁴ 390 U.S. 145, 148-49, 154 (1968).

carriers sold in excess of the stated prices.¹⁷⁵ The Eighth Circuit affirmed the district court's rejection of the carrier's argument that the "combination to fix resale prices of newspapers was per se illegal under the Sherman Act."¹⁷⁶ Instead, the Eighth Circuit held that "the undisputed evidence failed to show a Sherman Act violation" since the publisher's activity was wholly unilateral and not a restraint of trade sufficient to trigger antitrust liability.¹⁷⁷ On appeal, the Supreme Court noted that "schemes to fix maximum prices . . . may severely intrude upon the ability of buyers to compete and survive in the market," and are arrangements justifying a finding of "an illegal restraint of trade under §1 of the Sherman Act."¹⁷⁸ In doing so, the Court affirmed prior case law finding agreements to fix maximum prices "no less than those to fix minimum prices, cripple the freedom of traders and thereby retrain their ability to sell in accordance with their own judgment."¹⁷⁹ Thus, per se treatment of vertical maximum price fixing was preserved and affirmed in light of the opinion in *Albrecht*.¹⁸⁰

¹⁷⁵ *Id.* at 147.

¹⁷⁶ *Id.* at 148. The petitioner in *Albrecht* argued that under the *Parke Davis* line of cases, "any combination to fix resale prices . . . was per se illegal under the Sherman Act." *Id.*

¹⁷⁷ *Id.* at 148-49 (citing *Albrecht v. Herald Co.*, 367 F.2d 517, 526 (8th Cir. 1966)).

¹⁷⁸ *Id.* at 152-53.

¹⁷⁹ *Id.* at 152 (citing *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213 (1951)). The illegal arrangement in *Kiefer-Stewart* dealt with an analogous situation as *Albrecht*, where liquor companies "agreed or conspired to sell liquor only to those . . . wholesalers who would resell at prices fixed by" the producers. *Kiefer-Stewart*, 340 U.S. at 212. Ultimately, the arrangement was found to be a per se violation of the antitrust laws, but it is unclear whether the Court arrived at this conclusion on the basis of categorizing the arrangement as horizontal or vertical in nature. *See generally id.* at 212-15.

¹⁸⁰ In a separate concurrence, Justice Douglas argues that the "fixing of prices for resale is conspicuously unreasonable, because of the great leverage that price has over the market." *Albrecht*, 390 U.S. at 154 (Douglas, J. concurring). The concurrence further differentiates the practices in this case noting that while vertical price fixing was to be adjudged by a per se illegal standard, vertical territorial restrictions were to be judged by a rule of reason. *Id.* at 156. As such, Justice Douglas cites to the Court's decision in *White Motor Co. v. United States*, 372 U.S. 253 (1963), where an analysis of "the actual impact of [vertical territorial restraints] on competition" was required before any liability under antitrust laws. *Id.*

In the years following *Albrecht*, the Supreme Court was generally consistent in its treatment of vertical price restraints and affirming the *Dr. Miles* per se standard.¹⁸¹ In *Monsanto v. Spray Rite Service Corp.*, the Supreme Court reiterated that price fixing schemes between manufacturers and distributors are and “have been per se illegal since the early years of national antitrust enforcement.”¹⁸² In that case, a manufacturer of chemical products (Monsanto) terminated the distribution agreement of one of its wholesale retailers on the grounds that the retailer failed to have “trained salesmen and promote sales adequately.”¹⁸³ The distributor responded by arguing that Monsanto’s distribution agreements¹⁸⁴ amounted to an illegal restraint of trade subject to antitrust liability under § 1 of the Sherman Act.¹⁸⁵ While the Court ultimately found no antitrust violation in *Monsanto*, it nonetheless affirmed the general premise that vertical price restraints were a per se violation.¹⁸⁶ The Court’s opinion in *Monsanto* is additionally noteworthy for Justice Brennan’s concurrence noting the difficulties in overcoming stare decisis in antitrust cases, a problem also addressed in *Leegin*.¹⁸⁷ Due to the absence of any

¹⁸¹ See, e.g., *Monsanto*, 465 U.S. 752; *White Motor Co.*, 372 U.S. 253; *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1970).

¹⁸² *Monsanto*, 465 U.S. at 761.

¹⁸³ *Id.* at 757.

¹⁸⁴ The District Court determined that Monsanto’s distribution plan was based on 1 year renewable terms with retailers, with renewal based on a number of set criteria. *Id.* at 756. Specifically, “whether the distributor’s primary activity was soliciting sales to retail dealers... whether the distributor employed trained salesmen capable of educating customers on the technical aspects of Monsanto’s herbicides . . . and whether the distributor could be expected to exploit fully the market in its geographical area of primary responsibility.” *Id.*

¹⁸⁵ *Monsanto*, 465 U.S. at 757. The termination of Spray Rite’s distribution agreement did not preclude them from continuing to sell Monsanto’s products, as it was still able to procure a limited amount of herbicides from other distributors later in the season. *Id.* at 756-58.

¹⁸⁶ *Id.* at 761. Ultimately, the Supreme Court was asked to consider the evidentiary standards necessary to sustain a cause of action for violation of antitrust laws. *Id.* at 759. See also *infra* notes 231-37 and accompanying text for a more detailed discussion of the ramifications of the Court’s opinion in *Monsanto*.

¹⁸⁷ *Monsanto*, 465 U.S. at 769 (Brennan, J., concurring).

congressional action addressing the issues raised by *Dr. Miles* in modern antitrust law, Justice Brennan noted his apprehension in undertaking the dramatic step of overruling seventy three years of precedent.¹⁸⁸

In 1970, the United States government alleged that a bicycle manufacturer's franchise sales plan amounted to both price fixing and an illegal restraint of trade in *United States v. Arnold, Schwinn & Co.*¹⁸⁹ In that case, Schwinn contracted with specific retail outlets to sell their bicycles so long as the retailers abided by certain conditions.¹⁹⁰ Retailers who did not sell bicycles according to Schwinn's directives risked having their exclusive franchise agreements terminated.¹⁹¹ The government consequently instituted suit alleging that Schwinn violated antitrust laws when it terminated franchise agreements because retailers made "sales to unfranchised retailers or [in] violation of territorial limitations."¹⁹² While the Supreme Court's holding involved primarily a discussion of per se treatment of vertical non-price territorial restraints, the Court in dicta nonetheless affirmed the validity of per se treatment of vertical price fixing arrangements.¹⁹³

¹⁸⁸ *Id.* (Brennan, J., concurring). The concurrence specifically noted that because "Congress has never enacted legislation to overrule the [*Dr. Miles*] interpretation of the Sherman Act . . . [there is] no reason for us to depart from our longstanding interpretation of the Act." *Id.*

¹⁸⁹ 388 U.S. 365, 367-70 (1967), *overruled by* *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

¹⁹⁰ *Id.* at 370-71. Among the conditions imposed on franchised retailers by Schwinn include: the requirement to "promote Schwinn bicycles and to give them at least equal prominence with competing brands;" to sell in only the "franchised . . . designated location or locations;" and the requirement "to purchase only from or through the distributor authorized to serve that particular area." *Id.*

¹⁹¹ *Id.* at 371.

¹⁹² *Id.* at 372.

¹⁹³ *Id.* at 373. Because Schwinn did not appeal as to the district court's finding that there was an unlawful price restraint, the Supreme Court declined to address whether the district court erred in making its conclusion. *Id.* at 373. However, the Court did note that "if there were here a finding that the restrictions were part of a scheme involving unlawful price fixing, the result would be a *per se* violation of the Sherman Act." *Id.* Furthermore, the failure by

In *White Motor Co. v. United States*, the Supreme Court reaffirmed explicitly that “[p]rice fixing arrangements, both vertical and horizontal, have . . . been held to be *per se* violations of the antitrust laws.”¹⁹⁴ There, White Motor contracted with dealers and distributors to sell trucks and truck parts to end users pursuant to licensing agreements that limited both the price of the goods and the territory of the purchasers.¹⁹⁵ Interestingly, despite noting that vertical price restraint practices were *per se* violations of antitrust laws, the Court refused to find a violation in *White Motor Co.* on the grounds that there was insufficient evidence that the price fixing was integral to the business.¹⁹⁶ The Court rejected as unconvincing assertions that vertical price restraints were necessary in order to give certain “classes of customers their proper discounts,” that they affected “only spare and repair parts and accessories” for these special customers, and that they were necessary to preserve the company’s future sales.¹⁹⁷ Upon the finding that there was price fixing present, the Court held that any “restrictive practices ancillary to the price-fixing scheme [were] also quite properly restrained” without any inquiry as to the reasonableness of either the core price restraint or related activities.¹⁹⁸

the government to argue anything to the contrary other than *per se* treatment of the practice in this case led the Court to remand for further considerations as to the competitive effects of the price restriction. *Id.* at 382.

¹⁹⁴ 372 U.S. 253, 260 (1963) (citations omitted).

¹⁹⁵ *Id.* at 255, 257. For example, *White Motor Co.* inserted territorial clauses in their agreements with dealers, which bound dealers and distributors to “develop the [particular] territory to the satisfaction of Company, and not to sell any trucks purchased hereunder except in accordance with this agreement . . . except to individuals, firms, or corporations having a place of business and/or purchasing headquarters in said territory.” *Id.* at 255-56.

¹⁹⁶ *Id.* at 260-61. Justice Douglas writing for the majority noted that there were clearly two types of price fixing schemes in *White Motor Co.* and that such agreements involved a relatively small amount of commerce. *Id.* at 260. Nonetheless, despite holding that price fixing arrangements were *per se* illegal, the Court declined to impose liability absent “more detailed findings” of whether the arrangements were “an integral part of the whole distribution system.” *Id.* at 260-61.

¹⁹⁷ *Id.* at 257-58. The Court rejects the invitation to consider whether the price restraint was “an integral part of the whole distribution system” that would require *per se* antitrust violation treatment of ancillary activities. *Id.* at 260 (quoting *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 720 (1944)).

¹⁹⁸ *White Motor Co.*, 372 U.S. at 260.

C. The Gradual Road Toward a New Standard

Regardless of the breadth of case law affirming the use of per se treatment of vertical price restraints, the Supreme Court has not been wholly consistent during the ninety six year period that *Dr. Miles* was the law of the land. Antitrust scholars have argued in favor of limiting the per se standard, noting that “support for the rule of *Dr. Miles* is slowly slipping away” as the “erosion of the [per se] rule goes on.”¹⁹⁹ A number of cases after *Dr. Miles* slowly carved out exceptions and gradually broke down what had been uniform application of antitrust laws, culminating with the Court’s decision in *Leegin*. For example, only eight years after the *Dr. Miles* decision, the Court in *United States v. Colgate* created a sizeable exception to per se invalidation of vertical price restraints.²⁰⁰ There, the United States government sued Colgate, alleging not an unlawful monopoly, but an unlawful combination with distributors preventing them from reselling Colgate’s products at less than fixed prices.²⁰¹ The Court reiterated that the “purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of . . . trade and commerce.”²⁰² Thus, “in the absence of any purpose to create or maintain a monopoly,” the Court held that “the Act does not restrict the long recognized right of . . . [a manufacturer to] freely to exercise his own independent discretion as to parties with whom he will deal,” including announcing in advance any restrictions on such deals.²⁰³ As such, under *Colgate* manufacturers have a limited right to

¹⁹⁹ Thomas E. Kauper, *Vertical Restraints: Flynn, Ponsoldt, Comanor and the Sea of Doubt*, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY 318, 319 (Harry First et al. eds., 1991).

²⁰⁰ *Colgate*, 250 U.S. at 307.

²⁰¹ See generally *id.* at 302-03.

²⁰² *Id.* at 307.

both dictate at what prices they want subsequent distributors to sell the items for, and to refuse to sell to distributors who do not agree to the restrictions.²⁰⁴ This limited right protects manufacturers from antitrust liability provided that such prescriptions are known at the establishment of the manufacturer-distributor relationship.²⁰⁵

Legal scholars have further argued that modern antitrust law has moved toward “finding conduct per se lawful without regard for the values embodied in antitrust laws or for the facts of particular disputes.”²⁰⁶ Whether that conclusion has been truly realized is still a point of contention, but there is little dispute that the per se illegality standard for vertical restraints has seen a gradual breakdown in modern times.²⁰⁷ For example, the Supreme Court in *Continental T.V. v. GTE Sylvania*²⁰⁸ allowed for consideration of the “reason for the restraint and its effect in an idealized market of perfect competition” in determining the propriety of an antitrust action.²⁰⁹ In that case, a television manufacturer sought to increase its market share by entering into agreements with individual franchise retailers.²¹⁰ Sylvania “retained sole discretion to [dictate] the number of retailers in an area in light of the success or failure of existing retailers in

²⁰³ *Id.*

²⁰⁴ *Id.* at 304-05

²⁰⁵ *Id.*

²⁰⁶ See FLYNN & PONSOLDT, *supra* note 17.

²⁰⁷ See, e.g., GELLHORN & KOVACIC, *supra* note 14, at 299 (listing a number of sources noting how “modern empirical studies and theoretical research have raised grave doubts about the wisdom of a rule that categorically forbids [price restraints]”).

²⁰⁸ See generally *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

²⁰⁹ See FLYNN & PONSOLDT, *supra* note 17, at 273. Professors Flynn and Ponsoldt argue that all the Supreme Court did in *Continental T.V.* was to “shift from one rigid and mechanical test to another,” thereby “preclude[ing] in both instances a full inquiry” as to that individualized case. Thus, in lieu of bright line rules, the professors argue that courts should undergo a factual analysis of antitrust liability, looking to see whether “vertical price and nonprice restraints should be permitted or prohibited in all cases, or in some cases but not others.” *Id.*

²¹⁰ *Continental T.V.*, 433 U.S. at 38.

developing their market.”²¹¹ Continental T.V. objected to Sylvania’s plans to add an additional retailer to their particular area, and also to Sylvania’s refusal to grant permission to open an additional retail outlet in a neighboring area.²¹² The franchise relationship further deteriorated, leading the parties to eventually sue.²¹³ The trial court found that Sylvania’s licensing agreements violated § 1 of the Sherman Act since they had engaged “in a contract, combination or conspiracy in restraint of trade in violation of the antitrust laws with respect to location restrictions alone.”²¹⁴ After the Ninth Circuit reversed, the Supreme Court granted Continental T.V.’s writ of certiorari to decide whether vertical territorial restrictions should be determined under a rule of reason as opposed to a per se rule.²¹⁵

After discussing the prior per se standards in vertical restraints cases, the Court in *Continental T.V.* ultimately held that past judicial treatments were incorrect, and “that the appropriate decision is to return to the [prior] rule of reason that governed vertical restrictions.”²¹⁶ Taking into account the broad spectrum of “scholarly and judicial authority”

²¹¹ *Id.*

²¹² *Id.* at 39.

²¹³ *Id.* at 40. Sylvania’s finance company, John P. Maguire & Co., Inc., sued Continental T.V., seeking money owed over credit extended to purchase merchandise from Sylvania. Continental T.V. countersued both Sylvania and Maguire for antitrust law violations. *Id.*

²¹⁴ *Id.* at 41.

²¹⁵ *Id.* at 41-42.

²¹⁶ *Id.* at 59. A large portion of the *Continental T.V.* decision was spent discussing the Supreme Court’s reasoning in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). See generally *id.* at 42-47. In *Schwinn*, the manufacturer limited distributors to supplying its bicycles to only those retailers in defined geographic areas, similar to the restrictions enforced by GTE Sylvania. 388 U.S. at 370-71. Despite noting that resolution of the case required “an examination of ‘the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not reasonable,’” the *Schwinn* court nonetheless articulated a “bright line per se rule of illegality for vertical restrictions.” *Id.* at 374. However, the application of this bright line rule was anything but clear; as the *Schwinn* court underwent a fractured analysis of the legality of the company’s business methods depending on how the activities were characterized. *Continental T.V.*, 433 U.S. at 45. Where the retailers acted as part of the vertical distribution chain of Schwinn’s products, such conduct was deemed to be

advocating the potential advantages of vertical price restraints, the Court articulated that the validity of such restraints should be upheld unless they can be “conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”²¹⁷ Explicitly overruling the per se standard in *United States v. Arnold, Schwinn & Co.*, the *Continental T.V.* Court made “clear that departure from the rule of reason standard must be based on demonstrable economic effect rather than . . . formalistic line drawing.”²¹⁸ In other words, the prior categorical treatment of all vertical restraints on trade as per se violations of antitrust laws was now held to be an improper application of § 1 of the Sherman Act.²¹⁹ The Court acknowledged that the *Schwinn* decision had been the subject of tremendous criticism from both legal commentators and federal court judges, with both groups advocating, at a minimum, for a limitation of the holding of that case.²²⁰ In light of the criticism espoused by legal scholars, the Court affirmed that the rule of reason best comports with the intended means of applying §1 of the Sherman Act.²²¹

governed by the per se illegal standard. *Id.* However, where the retailer’s conduct was more akin to a consignment or agent arrangement, the Court held that such restrictions were subject to the rule of reason. *Id.*

²¹⁷ *Continental T.V.*, 433 U.S. at 57 (citing *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)). As Justice Powell writing for the majority noted in *Continental T.V.*, this standard was later reiterated in the *White Motor Co.* case decided five years after *Northern Pacific*. *Id.*

²¹⁸ *Id.* at 58-59.

²¹⁹ *Id.* The Court does not preclude the possibility of per se treatment of *some* forms of vertical price fixing schemes, so long as there is sufficient economic justification for such a practice (“we do not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition . . .”). *Id.* at 58. Citing *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the Court in *Continental T.V.* noted that “[s]ince the early years of this century a judicial gloss on [the language of § 1 of the Sherman Act] has established the ‘rule of reason’ as the prevailing standard of analysis.” *Id.* at 49.

²²⁰ *Id.* at 49 nn.13-14 (listing a number of law review articles criticizing the *Schwinn* holding and a number of federal court decisions making factual distinctions as a means of justifying “upholding territorial restrictions that would seem to fall within the scope of the *Schwinn* per se rule”).

²²¹ *Id.* at 59 (White J., concurring). A concurrence written by Justice White argues that while the validity of the vertical restraint in this case should be judged by a rule of reason, he does not agree that it is necessary to overturn the *Schwinn* holding. *Id.* Instead, Justice White contends that because the practices in *Continental T.V.* indicate that

The decline of the per se treatment continued with the Supreme Court’s decision in *Business Electronics Corp. v. Sharp Electronics Corp.* where the doctrine was further limited to those vertical restraints of trade involving price only.²²² In that case, Business Electronics acquired an exclusive distribution territory to sell Sharp’s products.²²³ While Sharp had a “list of suggested minimum retail prices,” its retailer agreements with Business Electronics did not require them to abide by the set prices.²²⁴ Eventually, the retail arrangement ended acrimoniously, leading Business Electronics to allege violations of antitrust laws in its suit against Sharp.²²⁵ On review, the Supreme Court reaffirmed its holding from *Continental T.V.*, opposing per se treatment merely for line drawing purposes.²²⁶ Instead, the Court noted that the presence of a “presumption in favor of a rule of reason standard,” where any “departure from that standard must be justified by desirable economic effect. . . .”²²⁷ Thus, a vertical non-price restraint in the absence of any evidence to fix prices between the parties would not be governed by the per se standard.²²⁸ The Court opined that such non-price restraints may potentially be procompetitive and should encouraged rather than wantonly barred by per se illegality

there is less potential for both vertical and horizontal restraints on trade, and instead the possibility of stimulating greater competition among brands, allows for distinguishing between the two cases. *Id.* Thus, the presence of both “interbrand competition” among manufacturers and the “potential benefits of vertical restraints in promoting interbrand competition” provide two considerations that the majority used to as sufficient justification for overruling *Schwinn*. *Id.* at 65.

²²² 485 U.S. 717, 735-36 (1988).

²²³ *Id.* at 721.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 724 (citing *Continental T.V.*, 433 U.S. at 58-59).

²²⁷ *Id.* at 726.

²²⁸ *Id.* at 726-27.

treatment.²²⁹ Consequently, because “a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels,” the Court in *Business Electronics* carved a further exception to the previously rigid and established standards.²³⁰

As discussed above, while the Supreme Court in *Monsanto* affirmed the *per se* standard, it also provided parties accused of antitrust violations an avenue to escape liability, thereby weakening the previously near insurmountable standard.²³¹ The Court was asked to resolve a split among the various Circuit Courts of Appeal as to the necessary evidentiary showing by a plaintiff to establish the presence of a conspiracy to set resale prices, and therefore survive a defendant’s directed verdict motion.²³² The Seventh Circuit in reviewing *Monsanto*’s district court case held that a plaintiff simply needed to show “that a manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors.”²³³ In resolving the dispute, the Supreme Court reversed the Seventh Circuit, and held that the dangers of an overbroad *per se* standard cannot justify a weak showing of evidence to find antitrust liability.²³⁴ Where price fixing is alleged, “the antitrust plaintiff must present evidence sufficient to carry its burden of proving” the presence of an agreement to fix prices.²³⁵ Consequently, in light of

²²⁹ *Id.* at 731.

²³⁰ *Id.* at 735-36 (emphasis in original).

²³¹ *Monsanto*, 465 U.S. at 758, 768.

²³² *Id.* at 759. Specifically, the Supreme Court’s opinion cited decisions from the Third Circuit (*Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110-11 (3d Cir. 1980)); Second Circuit (*Schwimmer v. Sony Corp. of Am.*, 677 F.2d 946, 952-53 (2d Cir. 1982)); Sixth Circuit (*Davis-Watkins Co. v. Serv. Merch.*, 686 F.2d 1190, 1199 (6th Cir. 1982)); and Tenth Circuit (*Blankenship v. Herzfeld*, 662 F.2d 840, 845 (10th Cir. 1981)) as all being in direct conflict with the evidentiary standard announced by the Seventh Circuit. *Id.* at n.5.

²³³ *Id.* at 759.

²³⁴ *Id.* at 763. Specifically, the Court notes that to otherwise permit and inference of an agreement to price fix between a manufacturer and a distributor based solely “from the existence of complaints, or even from the fact that [the termination of the distribution arrangement] came about in response to complaints, could deter or penalize legitimate conduct.” *Id.*

Monsanto, the ability of a plaintiff to rely on per se treatment of vertical price restraints depends on that plaintiff being able to allege more than arguably anticompetitive behavior in order to meet the heightened threshold evidentiary requirements.²³⁶ Where the plaintiff is unable to provide “direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment” to the price fixing scheme, no antitrust action may be sustained.²³⁷

In the most recent major realignment of the rules governing vertical price restraints, the Court in *State Oil v. Khan* overruled nearly thirty years of judicial precedents when it held that its previous decision in *Albrecht v. Herald Co.* was erroneously decided.²³⁸ Under *Khan*, the Supreme Court reversed prior per se treatment of vertical maximum price restraints, and advocated adjudicating such price fixing regimes under the rule of reason.²³⁹ In that case, the plaintiff Khan sued an oil company for antitrust violations stemming from an agreement between the parties to sell gasoline at a set price determined by State Oil.²⁴⁰ On review, the Court cited changed circumstances as the primary rationale for overruling *Albrecht*, commenting that “the pro-competitive potential of vertical maximum price restraint is more evident . . . than it was

²³⁵ *Id.*

²³⁶ *Id.* at 764. While not completely irrelevant, the Court comments that complaints may have probative value if joined with “additional evidence sufficient to support a finding of an unlawful contract, combination or conspiracy” for Sherman Act liability. *Id.* at 764 n.8.

²³⁷ *Id.* at 768.

²³⁸ *Khan*, 522 U.S. at 22.

²³⁹ *Id.*

²⁴⁰ *Id.* at 7-8. Khan alleged in his complaint that the Sherman Act was violated since their agreement with State Oil barred them from altering the retail gas prices and forced them to return excess profits to the oil company for any increases in retail price. *Id.* The district court found no “per se violation of the Sherman Act because [the complained about activities] did not establish the sort of manifestly anticompetitive implications or pernicious effect on competition that would justify per se prohibition of State Oil’s conduct.” *Id.* at 9. On appeal to the Seventh Circuit, that decision was reversed. *Id.*

when *Albrecht* was decided.”²⁴¹ In light of the “considerable body of scholarship discussing the effects of vertical restraints,” along with newfound difficulties supporting contentions that “vertically-imposed maximum prices could harm consumers or competition to the extent necessary to justify per se invalidation,” the Court adopted the rule of reason for vertical maximum price restraints.²⁴² After the *Khan* decision, the only remaining vestige of the *Dr. Miles* per se standard for vertical restraints applied to minimum price restraints; an area soon addressed by the Supreme Court in *Leegin*.

PART III

A. The *Leegin* Decision – Establishing the Rule of Reason

Turning to the central decision of this article, the Supreme Court in *Leegin Creative Leather Products v. PSKS* once again addressed the issue of which standard to apply in dealing with vertical minimum price restraints.²⁴³ While the challenged practices in *Leegin* did not involve matters of intellectual property, the case’s holding will likely have significant ramifications for those who own or exercise intellectual property rights. As previously discussed, licensing agreements between patent holders and licensees often implicate antitrust and vertical price maintenance concerns. The underlying conclusion in *Leegin* will likely impact how future patent licensing agreements are structured.

In *Leegin*, a manufacturer of leather goods sold its “Brighton” brand belts through a retail network of 5000 stores across the United States.²⁴⁴ The stores chosen to carry the goods were

²⁴¹ *Id.* at 14-15.

²⁴² *Id.*

²⁴³ *Leegin*, 127 S. Ct. at 2710.

²⁴⁴ *Id.*

primarily “independent, small boutiques and specialty stores” due to the manufacturer’s belief that “small retailers treat customers better, provide more services and make their shopping experience more satisfactory than do larger, often impersonal retailers.”²⁴⁵ Leegin also imposed a retail price plan policy that refused to allow any retailer to sell Leegin goods below a suggested set price.²⁴⁶ The manufacturer later discovered that respondent PSKS had been marking down goods below the set minimum price in order to compete with other nearby retailers, an action that violated their agreement with Leegin.²⁴⁷ After PSKS refused to reinstate and maintain the imposed price restraints, Leegin retaliated by refusing to supply their leather goods, leading to “a considerable negative impact on the store’s revenue from sales.”²⁴⁸ PSKS consequently sued Leegin, alleging antitrust violations among other claims.²⁴⁹

The District Court, while acknowledging that the proposed testimony of Leegin’s antitrust expert presented compelling arguments for why vertical price restraints should be judged on a rule of reason standard, nonetheless decided to follow precedent and apply the per se standard.²⁵⁰ Noting that the rigidity of the per se rule makes consideration of the expert’s testimony irrelevant, the court consequently refused to allow the jury to hear testimony as to the

²⁴⁵ *Id.* at 2710-2711.

²⁴⁶ *Id.* at 2711.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *PSKS, Inc. v. Leegin Creative Leather Prod., Inc.*, 2004 U.S. Dist. LEXIS 30414, at *2. Specifically, PSKS alleged that Leegin “violated *Section 1* of the Sherman Act by agreeing with other dealers to fix the minimum retail prices of the Brighton product line.” *Id.* The additional various supplemental state law claims were later abandoned by PSKS at a pretrial conference leaving the antitrust dispute as the sole issue for adjudication by the court. *Id.* at *2-3.

²⁵⁰ *See generally id.* at *3-7. The court acknowledged that while “the Supreme Court has moved away from the per se rule in other vertical contexts . . . vertical minimum price fixing agreements . . . remain per se unlawful.” *Id.* at *6-7.

reasonableness of Leegin's price fixing arrangement.²⁵¹ Once Leegin's retail pricing plan was deemed an impermissible violation of antitrust laws, the jury awarded PSKS damages of \$1.2 million dollars.²⁵² On appeal, Leegin argued that despite the precedent announced in *Dr. Miles* regarding vertical price fixing, the Supreme Court had not applied the per se treatment consistently.²⁵³ The Fifth Circuit rejected Leegin's invitation to distinguish this case from prior precedents, noting that the Supreme Court did consistently apply the per se rule to vertical *minimum* price restraints, and only adopted a rule of reason approach to other kinds of vertical restraints.²⁵⁴ Furthermore, the Fifth Circuit also affirmed the district court's exclusion of the expert testimony, finding it to be irrelevant to the per se violation.²⁵⁵ Arguing that the "per se rule against resale price maintenance is the lone remaining vestige of an antiquated antitrust regime that cannot be reconciled with either recent antitrust decisions or economic theory," Leegin sought review by the Supreme Court.²⁵⁶

The Supreme Court "granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as per se unlawful" under the *Dr.*

²⁵¹ *Id.* at *13-15; Michael C. Smith, *Motion to Limit Expert Testimony Granted (but not so fast, say the Supremes...)*, EDTexweblog.com, http://mcsmith.blogs.com/eastern_district_of_texas/2007/08/motion-to-limit.html (last visited April 1, 2008).

²⁵² *PSKS, Inc. v. Leegin Creative Leather Prod., Inc.*, 2006 U.S. App. LEXIS 6879, at *3 (5th Cir. 2006). The court subsequently awarded PSKS treble damages and attorney fees pursuant to 15 U.S.C. § 15(a) (2000). *Id.*

²⁵³ *Id.* at *4.

²⁵⁴ *Id.* at *4-5 (emphasis added). The Fifth Circuit noted Justice Brennan's concurrence in *Monsanto*, where he argued that continued observance of the per se rule was necessary in light of Congress' long standing refusal to "enact legislation to overrule the interpretation of the Sherman Act in [the *Dr. Miles*] case." *Id.* at *6.

²⁵⁵ *Id.* at *7-8. The court cited a desire for judicial efficiency in applying the per se to avoid consideration of expert testimony, noting that such a standard "avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved." *Id.* at *8 (citing *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958)).

²⁵⁶ Brief of Appellant, *supra* n. 56, at *9; *Leegin*, 127 S. Ct. at 2712.

Miles standard.²⁵⁷ During oral arguments, the Justices pressed Leegin’s counsel as to whether there was a sufficient basis and justification for deviating from the history of per se treatment of vertical minimum price restraints.²⁵⁸ Questioning from the bench also focused on the potential negative effects to consumers posed by overturning ninety six years of judicial precedents.²⁵⁹ Justice Breyer noted studies done by an economist showing that the absence of retail price maintenance saved American consumers considerably with the pharmaceutical and blue jean industries.²⁶⁰ In that economist’s view, “uniform enforcement of resale price maintenance . . . can impose *massive* anti-consumer benefits.”²⁶¹ Chief Justice Roberts questioned whether consumers would be burdened if overruling *Dr. Miles* would disrupt “a whole industry of discount stores developed in reliance” on the per se standard.²⁶²

After discussing the general standards and applicability of both rule of reason and per se treatment of price restraints, the Court focused on its nearly 100 year old rule in *Dr. Miles*.²⁶³ Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, noted

²⁵⁷ *Leegin*, 127 S. Ct. at 2712.

²⁵⁸ See generally Transcript of Oral Argument at *1-25, *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (March 26, 2007), 2007 U.S. TRANS LEXIS 22. For example, Justice Breyer questioned whether the weight of current economics literature was a sufficient reason to adopt a rule of reason analysis, especially where there was incongruence in opinion among the cited economists. *Id.* at *5-7. Similarly, Justice Ginsburg noted whether the Court should give any weight to the Department of Justice’s Antitrust Division and the Federal Trade Commission’s opinion in favor of a rule of reason, where “it was not so long ago that the Department of Justice took a different view.” *Id.* at *7. Most poignantly, Justice Breyer asked the attorney for the United States as amicus curiae, “why should [the Court] overrule a case that’s 96 years old, in the absence of any . . . congressional indication that it’s a good idea, when it’s simply a question in a difficult area of people reaching a slightly different weight” on factors for or against resale price maintenance. *Id.* at *16.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at *6.

²⁶¹ *Id.* (emphasis added).

²⁶² *Id.* at *9.

²⁶³ See generally *id.* at 2712-14.

that “the Court’s more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based.”²⁶⁴ Foreshadowing later analysis in the decision, Justice Kennedy warned of the folly of adhering to past precedents solely for the sake of stare decisis reasons, especially in light of changing circumstances that make the rationale underlying those decisions inapplicable in modern times.²⁶⁵ Noting that the “rule of reason is the accepted standard for testing whether a practice restrains trade” in violation of the Sherman Antitrust Act, the Court addressed whether the factors in this case justify the imposition of the per se standard.²⁶⁶

Citing the fact that “economics literature is replete with pro-competitive justifications for a manufacturer’s use of resale price maintenance,” the Court ultimately concluded that vertical price restraints should not be subject to per se treatment.²⁶⁷ After considering both the pro and anti-competitive effects of vertical price restraints, the majority held that “it cannot be stated with any degree of confidence that resale price maintenance ‘always or almost always tends to restrict competition and decrease output.’”²⁶⁸ The Court acknowledged that the propriety of vertical price maintenance agreements were subject to “the circumstances in which they are formed,” since both pro and anti-competitive effects were possible.²⁶⁹

²⁶⁴ *Id.* at 2714. The Supreme Court criticized its own rationale in *Dr. Miles*, noting that its analysis there “relied on a treatise published in 1628,” whose applicability was more appropriate for restraints “associated with land, not chattels.” *Id.* As a result, J. Kennedy warned the Court to “be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance.” *Id.*

²⁶⁵ *Id.* (noting that “the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of antitrust laws upon vertical distributional restraints in the American economy today”) (citing *Continental T.V.*, 433 U.S. at 53 n.21).

²⁶⁶ *Leegin*, 127 S. Ct. at 2712, 2714. As noted above, per se treatment of price restraints is reserved for those “that would always or almost always tend to restrict competition and decrease output.” *Business Electronics*, 485 U.S. at 723. In other words, per se prohibition is reserved for those manifestly anticompetitive effects. *Continental T.V.*, 433 U.S. at 50.

²⁶⁷ See generally *Leegin*, 127 S. Ct. at 2714-20.

²⁶⁸ *Id.* at 2717 (citing *Business Electronics*, 485 U.S. at 723).

The *Leegin* Court further rejected arguments by PSKS that the per se rule would be appropriate on judicial efficiency grounds.²⁷⁰ As to this argument, the majority held that any suggestion that “per se illegality [of vertical price restraints] is the rule rather than the exception . . . misinterprets our antitrust laws.”²⁷¹ While per se treatment “may decrease administrative costs,” the Court asserted that such rules may have the counter effect of increasing “the total cost of the antitrust system by prohibiting pro competitive conduct the antitrust laws should encourage.”²⁷² Noting prior decisions as to this matter, the proffered judicial efficiency arguments in favor of per se treatment were deemed by the Court to be insufficient to arise to the “manifestly anticompetitive” standard governing the imposition of per se rules.²⁷³

As for its justification for overturning ninety six years of precedent, the Court downplayed the role of stare decisis in questions implicating the Sherman Antitrust Act.²⁷⁴ Historically, “the Court has treated the Sherman Act as a common law statute,” not subject to the “general presumption that legislative changes should be left to Congress.”²⁷⁵ Arguing that the “common law adapts to modern understanding and greater experience,” Justice Kennedy

²⁶⁹ *Leegin*, 127 S. Ct. at 2717.

²⁷⁰ *See generally id.* at 2718-2719.

²⁷¹ *Id.* at 2718.

²⁷² *Id.*

²⁷³ *Id.* (citing *Continental T.V.*, 433 U.S. at 49-50).

²⁷⁴ *Leegin*, 127 S. Ct. at 2720 (“Stare decisis is not as significant in this case . . . because the issue before [the Court] is the scope of the Sherman Act.”).

²⁷⁵ Commentators have long embraced the idea that “antitrust violations are a kind of “common law” offense, where judicial precedent,” and not Congressional statutory language or legislative intent, “defines the substance of the legal rules to be applied.” HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 50, at 51-52. Professor Hovenkamp argues that the Sherman Act was written with the intention of allowing antitrust jurisprudence to become “an ongoing, ever changing body of rules” and providing federal courts with the opportunity to “learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways.” *Id.*

contended that accordingly, the Sherman Act's prohibition on restraints of trade must also be similarly changed in light of the modern economic environment.²⁷⁶ Citing as persuasive the volumes of economic literature suggesting that per se treatment of vertical price restraints is inappropriate, the changing viewpoint that vertical price maintenance can be promote competition, and the call for changing standards by federal antitrust enforcement agencies, the Court conceded that the argument for overruling *Dr. Miles* has merit.²⁷⁷

Furthermore, as discussed above, the number of cases chipping away at the previously bright line holding of *Dr. Miles* supported the conclusion that the Supreme Court may overrule their own ““precedents when subsequent cases have undermined their doctrinal underpinnings.””²⁷⁸ Noting how their decisions in *Khan*, *GTE Sylvania*, *Business Electronics* and *Monsanto* have indicated a “progress[ion] away from *Dr. Miles*’ strict approach . . . [and] the opinion’s rationales,” the Court emphasized its steady efforts to “temper, limit, or overrule once strict prohibitions on vertical restraints.”²⁷⁹ Additionally, the majority rejected PSKS’ contention that Congressional repealing of fair trade laws indicated a desire for the *Dr. Miles* rule to apply.²⁸⁰ Rather than codifying a “rule of per se illegality,” the Court found that Congress

²⁷⁶ *Leegin*, 127 S. Ct. at 2720. It has been argued that “federal courts [have] forged their own antitrust policy, taking advantage of the best applied economics of the day.” HOVENKAMP, *FEDERAL ANTITRUST POLICY*, *supra* note 50, at 58 (noting that *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *affirmed*, 175 U.S. 211 (1899), effectively ushered in a new methodology of addressing the issue of whether common law analysis should govern interpretations of Sherman Act).

²⁷⁷ *Id.* at 2721.

²⁷⁸ *Id.* (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)). *See also* *Lady Deborah’s v. VT Griffin Services*, 2007 U.S. Dist. LEXIS 95138, *16-17 (S.D. Ga. October 26, 2007).

²⁷⁹ *Id.* 2721-22.

²⁸⁰ *Id.* at 2723. PSKS argues that the Consumer Goods Pricing Act, Pub. L. 94-145 (1975), worked to ratify the *Dr. Miles* rule. *Id.* at 2723-24. The Consumer Goods Pricing Act effectively repealed both the Miller-Tydings Fair Trade Act, Pub. L. No. 75-314 (1937) (superseded 1975) and the McGuire Act, Pub. L. No. 82-542 (1952) (superseded 1975); statutes which sought to make “vertical price restraints legal if authorized by a fair trade law enacted by a State.” *Id.*

sought to rescind per se *legality* treatment of vertical price restraints and instead apply a rule of reason standard,²⁸¹

The dissent written by Justice Breyer on behalf of Justices Stevens, Souter, and Ginsburg acknowledged that the bright line per se standard as it pertained to vertical price restraints may have been flawed, but the Court is ultimately obliged and bound to follow its own precedents.²⁸² Although *Dr. Miles* and its progeny produced “a century’s worth of similar cases, massive amounts of advice lawyers have provided their clients, and untold numbers of business decisions those clients have taken in reliance upon that advice,” the dissent contended that those “who wish . . . to change so well established a legal precedent bear a heavy burden of proof.”²⁸³ From the dissent’s viewpoint, the evidence proffered by *Leegin* simply did not amount to a significant enough of a justification to warrant “abandoning a well established antitrust rule.”²⁸⁴

B. Interpretation of *Leegin* and Predicted Future Effects for IP Licensing

In the months following the *Leegin* decision, a number of courts have had the opportunity to apply the new standard to factual situations, thereby providing some insight into the practical

²⁸¹ *Id.* at 2724.

²⁸² *Id.* at 2731 (Breyer, J. dissenting). Justice Breyer notes that “the question before us is not what should be the rule, starting from scratch...but whether [they should] change a clear and simple price related antitrust rule that the courts have applied for nearly a century.” *Id.* The dissent seemingly ignores the flaw in their argument that stare decisis concerns are paramount in antitrust cases, in light of the contention that standards of evaluating antitrust law applicability “always have and probably always will shift as ideology, technology and the American economy changes.” HOVENKAMP, *supra* note 50, at 52. *See also* William Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 36 (1991) (noting that the use of common law terminology in the Sherman Act was an indication as to the expectation that future courts take into account the constantly shifting and evolving market conditions).

²⁸³ *Id.* (Breyer, J. dissenting).

²⁸⁴ *See generally id.* at 2731-34. The dissent argued that many of the arguments that the majority uses to justify overturning the decision were asserted unconvincingly when Congress deliberated whether to pass the Consumer Goods Pricing Act. *Id.* at 2731. Furthermore, the dissent contended that the numerous studies prepared by leading economists do not support the assertion that there has been a “major change in circumstances” necessary to overturn existing rules. *Id.* at 2732.

effects, if any, of *Leegin* to an antitrust suit. In *Lotus Business Group v. Flying J.*,²⁸⁵ the District Court for the Eastern District of Wisconsin was asked to determine the legality of a state statute seeking to provide minimum markups.²⁸⁶ The plaintiff sought reconsideration of the district court's decision to grant summary judgment for the defendant, arguing that in light of *Leegin* "a rule of reason determination is required prior to a finding of whether a vertical price restraint is a violation" of antitrust laws.²⁸⁷ The *Lotus* court held that the new standard would not change their decision as to the legality of the state's minimum markup provisions, due to fact that the original district court's decision invalidating the state law was not based on per se liability.²⁸⁸ Nonetheless hypothesizing the result under a rule of reason analysis, the judge in *Lotus* wrote that the result would not have changed since the evidence provided supported a finding that the statute was "virtually certain to reduce interbrand competition."²⁸⁹

²⁸⁵ 2007 U.S. Dist. LEXIS 86931 (E.D. Wis. November 27, 2007).

²⁸⁶ *Id.* at *5-6. In a prior court proceeding, the District Court found that the "Wisconsin minimum markup statute was inconsistent with the Sherman Act because the statute "fixes resale prices industry wide;" actions that would lead to a reduction in interbrand and intrabrand competition." *Id.*

²⁸⁷ *Id.* at *1-4.

²⁸⁸ *Id.* at *5. Interestingly, the court in *Lotus* argues that the statute was problematic since it sought to fix "resale prices industrywide" with such widespread fixation of prices deemed "virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition." *Id.* at *6. Despite contending that their decision was not based on the per se standard, the court's justification echoes a commonly espoused reason for applying a per se rule (noting that "*per se* rules is confined to restraints... that would always or almost always tend to restrict competition."). *Id.* at *5 (quoting *Business Electronics*, 485 U.S. at 723).

²⁸⁹ *Id.* at *12. The plaintiffs provided an economic study concluding that "sales below costs laws" lead to average lower prices thereby benefiting competition, in support of its cause of action. *Id.* at *7-8. On the other hand, the defendants provided a detailed report from the Federal Trade Commission criticizing the statute as "likely restrict[ing] competition and lead[ing] to higher prices for consumers." *Id.* at *8. The report also concluded that the state statute "protected competitors rather than competition, and contained provisions that directly contravened established antitrust doctrine." *Id.* at *9. In light of the evidence provided by the parties, even under the more lenient rule of reason, the court finds a violation of antitrust laws. *Id.* at *12.

In the context of intellectual property, a decision by the District Court for the Southern District of New York is illustrative of the analysis courts may undertake post-*Leegin*.²⁹⁰ In *Arista Records LLC v. Lime Group LLC*, the major record labels sued the makers and distributors of software facilitating the peer to peer transfer of digital music files for copyright infringement.²⁹¹ The defendant Lime Group counterclaimed that the major record labels were engaged in an unlawful conspiracy to restrain trade in violation of antitrust laws.²⁹² Among the complaints explicitly asserted by the defendants was that the record label sought to monopolize the market for digital music tracks by “conspir[ing] to delay and disrupt the entry and emergence of . . . alternative means [of] distribution. . . .”²⁹³ In addition to being the sole provider of licenses to allow distribution of digital tracks, the record labels also provided for “dead end licenses,” which are “one time licenses to retrieve a digital file from a server.”²⁹⁴

Ultimately, the District Court concluded that Lime Group could not sustain its cause of action for violation of antitrust laws due to its lack of standing.²⁹⁵ Despite allegations that the

²⁹⁰ See generally *Arista Records LLC v. Lime Group LLC*, 2007 U.S. Dist. LEXIS 88449 (S.D.N.Y. December 3, 2007).

²⁹¹ *Id.* at *1, *5. Lime Wire, the software at issue in this case, is the most recent in a line of programs such as Napster, Kaaza and Grokster, which allow users to search and download music files. Like with the case of Grokster, Lime Wire also does not employ the use of a centralized server, but instead allows individual users to connect and download directly from other online users. *Id.* at *5.

²⁹² *Id.* at *1-2. In summary, the defendants argued that the record labels have “engaged in an integrated conspiracy to foreclose competitors and monopolize the market for the digital distribution of copyrighted music over the internet.” *Id.* at *14.

²⁹³ *Id.* at *6. Due to the huge resources the music industry requires to exploit artist recordings, very few entities other than the major labels are able to record, manufacture, and distribute albums. *Id.* at *3-4. With the advent of the internet and digital media formats, the costs of music production became affordable to the individual artists. *Id.* at *4. In an effort to maintain their exclusive stronghold on the music distribution process, the major labels created their own websites to allow for digital distribution, thereby forcing all interested parties to seek a license through them for access. *Id.* at *7.

²⁹⁴ *Id.* at *10.

record labels engaged in an illegal conspiracy to fix prices for music licenses, the court held that the absence of any real antitrust injury to Lime Group barred the action from proceeding.²⁹⁶ The judge in *Arista* acknowledged that under the more relaxed rule of reason the record label's vertical price fixing schemes could have been unlawful, yet refused to find any violation of antitrust law in this case despite the more lenient treatment.²⁹⁷ Without adequate proof that the plaintiffs suffered an injury in fact due to the challenged agreements, the court held that the antitrust laws could provide little other recourse or remedy.²⁹⁸

A similar result was seen in *Jacobs v. Tempur-Pedic International*,²⁹⁹ where manufacturers of “visco-elastic memory foam” mattresses entered into agreements with distributors to sell the mattresses at minimum resale prices.³⁰⁰ The plaintiffs sued alleging that the price charged by the manufacturer was artificially inflated as a result of the various agreements and lack of retail price competition set forth by vertical price restraints.³⁰¹ While acknowledging that *Leegin* “changed the standard for deciding a minimum resale price claim,”

²⁹⁵ *Id.* at *41-42. The District Court noted that Lime Group failed to adequately allege “an adverse effect on competition marketwide,” or any specific “cognizable harm” to them. *Id.* at *42.

²⁹⁶ *Id.* at *24-25.

²⁹⁷ *Id.* at *25-26.

²⁹⁸ *Id.* at *26. Lime Group's failure to seek and obtain licenses from the record labels led the District Court to categorize them as prospective intrabrand competitors only. *Id.* at *27. Even if it sought to assert a claim on behalf of other intrabrand competitors who had suffered harm, Lime Group inability to “claim that it suffered any actual injury, much less that it suffered the kind of direct, non speculative injury that would make it an ‘efficient enforcer’ to remedy such a scheme” proved to be fatal in its case. *Id.* at *27-28 (citing *Paycom Billing Servs. v. Mastercard International*, 467 F.3d 283, 290 (2d Cir. 2006)). See also *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 122 (2d Cir. 2007).

²⁹⁹ 2007 U.S. Dist. LEXIS 91241 (N.D. Ga. December 11, 2007).

³⁰⁰ *Id.* at *2-3.

³⁰¹ *Id.* at *3.

the court noted that it “did not change the standard for pleading a rule of reason violation.”³⁰² As such, a plaintiff alleging a private antitrust violation could potentially recover only if they could successfully prove “actual harm to competition” or “potential for genuine adverse effects on competition.”³⁰³ In considering the facts at hand, the court determined that the plaintiffs did not meet the evidentiary standard necessary to sustain an antitrust violation cause of action, and so the case was dismissed.³⁰⁴

Future treatment and analysis of vertical price restraints under § 1 of the Sherman Act may be seen in *Lady Deborah’s, Inc. v. VT Griffin Services*.³⁰⁵ There, the District Court for the Southern District of Georgia analyzed whether a contractor’s subcontracting of construction work was done in a manner that violated antitrust laws.³⁰⁶ After reiterating the rule of reason standard announced by *Leegin* for all vertical restraints, the court addressed the plaintiff’s claim that there was an illegal conspiracy to restrain trade.³⁰⁷ In addition to dismissing the plaintiff’s claim under the *Colgate/Monsanto* line of cases, the court further held that that the plaintiff also

³⁰² *Id.* at *7.

³⁰³ *Id.* at *8. The District Court cited the recent Supreme Court case of *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007), which held that plaintiffs must “allege sufficient facts” that would show “‘plausible grounds’ from which to infer an anti-trust violation.” *Id.* at *7.

³⁰⁴ *Id.* at *12-13. *See also generally* Port Dock & Stone Corp., 507 F.3d 117, 122 (2d Cir. 2007); Wellnx Life Sciences Inc. v. Iovate Health Scis. Research Inc., 516 F. Supp. 2d 270, 292-96 (S.D.N.Y. 2007) (both cases barring the plaintiff from proceeding with an antitrust claim based on failure to prove adequate standing).

³⁰⁵ 2007 U.S. Dist. LEXIS 95138 (S.D. Ga. October 26, 2007).

³⁰⁶ *Id.* at *2, *18. In *Lady Deborah’s*, in response to government changes in the manner of awarding of prime contracting services to favor those contractors who “subcontracted work to socially and economically disadvantaged businesses,” a general contractor came up with a plan to subrogate the new restrictions by using disadvantaged subcontractor as a straw man for a preferred company. *Id.* at *2-4. In other words, the contractor would condition the award of a subcontract on that party’s agreement to further subcontract a substantial portion of the project to the preferred contractor. *Id.* at *3. After the disadvantaged subcontractor was terminated after attempting to assert its right’s under federal laws, they sued under a multitude of claims including antitrust laws. *Id.* at *5-6.

³⁰⁷ *Id.* at *15, *19.

failed to meet the threshold evidentiary burden necessary to sustain the cause of action.³⁰⁸

Despite a more lenient standard where the plaintiff need not spell out every alleged fact necessary to establish a claim for antitrust law violations, the court in *Lady Deborah's* nonetheless held that the failure to provide “factual allegations supporting its conclusory antitrust claims” barred any relief.³⁰⁹ As other courts have similarly held, failure by the plaintiff to “allege a viable claim under § 1 of the Sherman Act by [simply] making a bare assertion of a conspiracy to restraint trade” was insufficient to allow the judge to then consider competition concerns under the rule of reason.³¹⁰

Legal commentators have taken a number of stances regarding the potential effects of the *Leegin* decision. For example, they note that businesses and manufacturers who have spent resources devising ways to legally impose vertical price restraints now face the prospect of increased revenues if they no longer need to invest in such programs.³¹¹ Consequently, observers argue that such resources may be funneled toward “research and development to the benefit of consumers, distributors and producers, thereby eliminating unnecessary deadweight

³⁰⁸ *Id.* at *17, *23. Under *Colgate* and *Monsanto*, a party may “unilateral[ly] refuse to deal, which is not *per se* illegal under the Sherman Act.” *Id.* at *17 (citing *Colgate*, 250 U.S. at 307-08; *Monsanto*, 465 U.S. at 760-61). Thus, the defendant’s subsequent termination of the subcontracting arrangement with the plaintiff in this case was consequently characterized as conduct not violating antitrust policy as there was no “actual competitive injury to the marketplace in general.” *Id.* at *18.

³⁰⁹ *Id.* at *22. In holding that the plaintiff did not sufficiently plead sufficient facts to sustain their cause of action, the court commented that even “an act of pure malice by one business competitor against another does not, without more, state a claim under federal antitrust laws.” *Id.* (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993)).

³¹⁰ *Id.*

³¹¹ See generally *The Supreme Court, 2006 Term: Leading Case: Federal Statutes and Regulations – Sherman Act – Minimum Resale Price Maintenance*, 121 HARV. L. REV. 425, 432-34 (2007) [hereinafter *2006 Term: Leading Case*]. For example, in an amicus brief filed by golf equipment manufacturer PING, the company details a number of measures implemented in order to circumvent the *per se* ban on vertical price restraints. *Id.* (citing Brief of PING, Inc. as Amici Curiae Supporting Petitioner, *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480), 2006 U.S. Briefs 480). Thus, by “holding that the legality of a [vertical price restraint] . . . should turn on its actual effects on competition, and not on whether the manufacturer engaged in [anticompetitive behavior], *Leegin* removed the need for these . . . compliance programs.” *Id.* at 434.

losses.”³¹² With increased revenues available for research and design, they argue that manufacturers may focus on and spur innovation with new products developed for consumers.³¹³

The editors of the *Harvard Law Review* further predict that the case will have a sizable effect on state legislatures since parties engaged in vertical price fixing will need to persuade individual states to adopt the lenient rule of reason announced by the Supreme Court.³¹⁴ The Court’s holding in *Leegin* applies and changes solely federal antitrust law, as prior judicial decisions have held that “state antitrust laws are generally not preempted by their federal counterparts.”³¹⁵ Those states containing antitrust laws mirroring the strict per se rule of *Dr. Miles* must be convinced that the rule of reason is superior.³¹⁶

Recent news reports indicate that Congress has also recently sought to weigh in on the debate by introducing new legislation intended to directly counter the Court’s decision in *Leegin*.³¹⁷ Under the proposed *Discount Pricing Consumer Protection Act*, the prior *Dr. Miles* rule “that agreements between manufacturers and retailers, distributors, or wholesalers to set the

³¹² *Id.*

³¹³ *Id.* at 433-34.

³¹⁴ *See id.* at 430.

³¹⁵ *Id.* at 430 n.51 (noting that federal antitrust laws will be preempted only if state laws interfere with Congressional directives, and “state antitrust law[s] governing minimum RPM is consistent with . . . ‘detering anticompetitive conduct and ensuring the compensation of victims of that conduct.’” *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989)).

³¹⁶ *Id.* at 430. The editors of the *Harvard Law Review* further note that while many states have provisions directing “state courts to construe the state’s antitrust laws in a manner consistent with the federal courts’ interpretation of the federal laws,” some of these very same states also contain express provisions in the laws outlawing the use of the minimum price restraints. *Id.* While thirty seven states filed an amicus brief in the *Leegin* case asking the court to uphold the per se rule based on concerns of higher retail prices for consumers, the editors argue that there is a countervailing argument that “manufacturers were nonetheless able to achieve the procompetitive gains associated with controlling resale prices through second best alternatives to minimum RPM.” *Id.* at 431-432.

³¹⁷ *Proposed Legislation Would Overrule Leegin*, 2-8 LexisNexis Antitrust Reporter 17 (November 13, 2007). The proposed bill is not be the first time that Congress has sought to limit attempts to abrogate *Dr. Miles*’ per se rule. In several years during the 1980s, Congress passed “appropriation bills . . . that specifically prohibited the DOJ from using any funds to advocate against *Dr. Miles*.” Bauer, *supra* note 43, at 22-23 n.119.

minimum price below which manufacturer's product or service cannot be sold violates the Sherman Act.”³¹⁸ The bill authored by Senator Herb Kohl (D-WI), argues that the Supreme Court “incorrectly interpreted the Sherman Act and improperly disregarded 96 years of antitrust law precedent,” and thus seeks to address concerns by the Court as to the legislature's failure to provide any guidance on the issue.³¹⁹ To further the efficacy of banning vertical price restraints, the proposed bill also seeks to insert a sentence into § 1 of the Sherman Act explicitly noting that “any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor” as a violation of the Act.³²⁰ As of this article's writing, the proposed law has been referred to the Senate Committee on the Judiciary, with no further action taken to date.³²¹ Other commentators have noted that many states may follow Congress' lead and attempt to pass legislation of their own codifying the rule of *Dr. Miles*.³²² Nonetheless, whether Senator Kohl's bill will pass, let alone have any practical effect on the field, remains unclear.

Practically, perhaps *Leegin*'s ultimate legacy on antitrust jurisprudence is a shift as to what courts will focus on in analyzing the facts for a violation of antitrust law. Whereas pre-*Leegin* per se standards provided courts with clear cut rules that were favored for judicial efficiency reasons, changing to a more flexible and fact intensive rule of reason standard would require a discussion and hearing as to the “circumstances, details, and logic of a [particular]

³¹⁸ *Discount Pricing Consumer Protection Act*, 110 S. 2261 § 2 (b)(2) (introduced October 30, 2007). The bill was introduced by Senator Herb Kohl (D-WI) and co-sponsored by Senators Joseph Biden (D-DE) and Hilary Clinton (D-NY). *Id.* at Preamble.

³¹⁹ *Id.* at § 2 (a)(5). *See also Leegin*, 127 S. Ct. at 2720-21, 2724-25.

³²⁰ *Discount Pricing Consumer Protection Act*, *supra* note 318, at § 3 (a).

³²¹ 2007 Bill Tracker S. 2261.

³²² Bauer, *supra* note 40, at 29.

restraint.”³²³ The relevant market and possible effects on competition must also be considered. Economic reasoning, not formalistic-line drawing, becomes the primary factor in a court’s analysis.³²⁴ The adoption of the rule of reason as the governing standard in vertical restraint cases will likely lead future court decisions to favor antitrust defendants, as recent economic literature liberally supports the use of such price restraints as a means to promote competition. The adoption of the rule of reason supports other efforts to limit the use of antitrust laws in today’s economic environment.³²⁵ The Supreme Court’s decision in *Twombly* necessitating higher evidentiary burdens of proof to show the presence of an antitrust injury also creates additional requirements before allowing a plaintiff to proceed with an antitrust suit.³²⁶ As previously noted, courts have been quick to apply the *Twombly* holding in addition to *Leegin* to severely limit attempts to charge parties for antitrust suits.³²⁷

As a result, individuals considering the use of vertical price restraints would be best served to take actions to ensure that a plaintiff would not be able to prove the existence of an antitrust injury. However, even if a plaintiff is able to meet that evidentiary burden, a vertical price restraint may still nonetheless be upheld if there are sufficiently compelling reasons that would justify the restraint under the rule of reason. This defendant-favored treatment is consistent with recent studies indicating a shift toward limiting plaintiff recovery under antitrust

³²³ *Lady Deborah’s*, 2007 U.S. Dist. LEXIS 95138, at *16 (citing *California Dental Association v. FTC*, 526 U.S. 756, 790-81 (1999)).

³²⁴ 2006 Term: *Leading Case*, *supra* note 311, at 430.

³²⁵ See, e.g., *Twombly*, 127 S. Ct. 1955.

³²⁶ *Id.*

³²⁷ See, e.g., *supra* notes 305-310 and accompanying text.

laws.³²⁸ Per se treatment of vertical non-price restraints led to a “plaintiff’s picnic” and a “voluminous amount of meritless antitrust litigation.”³²⁹ In the wake of *Continental T.V.* adopting a rule of reason for vertical non-price restraints, plaintiffs have rarely won on antitrust grounds in the few cited cases alleging an anticompetitive effect.³³⁰ Commentators predict that the *Leegin* opinion will likewise lead to similar results in the vertical price restraint regime making plaintiffs succeeding on antitrust claims less likely in the future.³³¹

In the field of patent licensing, parties conditioning resale price maintenance schemes as part of licensing agreements may particularly look forward to the seemingly relaxed antitrust enforcement standards. Commentators have often argued that licensing of intellectual property is inherently pro-competitive since the combination of various patents “will increase the ability of the economy to make use of an idea.”³³² The exploitation of intellectual property by “licensing, cross-licensing, and other technology transfers” seeks to “benefit consumers by reducing costs and helping to introduce new products.”³³³ Consequently, a party engaging in patent licensing is provided an innate pro-competitive justification for any vertical price restraint scheme that under the rule of reason, would most likely suffice to avoid antitrust liability. If a patent licensing scheme “as a whole promotes competition, then the license may include

³²⁸ 2006 Term: *Leading Case*, *supra* note 311, at 434.

³²⁹ *Id.* (quoting Douglas Ginsburg & Leah Brannon, *Determinations of Private Antitrust Enforcement in the United States*, 1 COMPETITION POLICY INTERNATIONAL 29, 37-39 (2005) [hereinafter Ginsburg & Brannon]).

³³⁰ *Id.*

³³¹ 2006 Term: *Leading Case*, *supra* note 311, at 434-35.

³³² See, e.g., *ALI-ABA Antitrust Course*, *supra* note 89.

³³³ *Id.*

restrictions that limit the scope of the license,” such as a price restraint.³³⁴ In essence, in light of *Leegin*, not only is plaintiff success on a private antitrust suit increasingly difficult and unlikely, but there is also a high probability that government enforcement agencies will not prosecute for Sherman Act violations. To further elaborate, despite being a per se violation of the Sherman Act for decades, the Department of Justice’s Antitrust Division filed only a single complaint for a vertical price restraint in the period between 1974-1993.³³⁵ On the contrary, criminal complaints alleging horizontal price restraints numbered over one thousand during the same period of time.³³⁶ The near absence of any case filings provide some insight as to whether vertical price restraints are as anticompetitive a practice as asserted by proponents of the per se standard. As argued by observers, it is likely that the DOJ “presumably would have mounted a far more aggressive effort to fine or imprison vertical price fixers” if the practice were as destructive to competition as alleged.³³⁷ A single filing in nearly twenty years of antitrust law enforcement provides a persuasive basis for the argument that the use of vertical price restraints is not such an unreasonable restraint to justify categorical proscription. It also indicates the propriety of a more flexible rule of reason standard. As such, substantial deviation from the now accepted rule of reason will likely not arise in the near future barring a major undermining of the rationale underlying the court’s decision in *Leegin*. As it pertains to licensing of intellectual

³³⁴ *Id.* at 82. As commentators have remarked, guidelines promulgated by the Department of Justice note that as part of the rule of reason analysis, they will “not second-guess parties [in a patent licensing arrangement] by asking whether another licensing arrangement would have been even more pro-competitive than the one the parties adopted.” *Id.* (citing DOJ/FTC ANTITRUST GUIDELINES, *supra* note 84, at § 4.2).

³³⁵ See GELLHORN & KOVACIC, *supra* note 14, at 299-300. In 1974, the Sherman Act was amended such that violations would be classified as a felony rather than a misdemeanor. *Id.* at 299. See *cf.* Harbour, *supra* note 34, at 34-35 (noting how the Supreme Court has “affirmed a judgment on the merits for a private antitrust plaintiff in a vertical price fixing case” *only once* in the past 23 years (emphasis added)).

³³⁶ See GELLHORN & KOVACIC, *supra* note 14, at 300.

³³⁷ *Id.*

property rights, the use of vertical price restraints should be freely encouraged where such a policy is economically advantageous for the particular business.

Conclusion

As evidenced by the last century of antitrust jurisprudence, the fluid nature of this field indicates that the current standard of dealing with vertical price restraints may not necessarily stand the test of time. Under the Supreme Court's current reasoning in *Leegin*, the door remains open for future economists and judges to change their view as to the usefulness of vertical price maintenance schemes to promoting competition in the market. In the meantime, in light of the advantages offered to an antitrust defendant with a rule of reason standard, the use of vertical price restraints may be advocated and employed by businesses and manufacturers with a fair degree of impunity. Whether the Court will revisit this issue again in order to change the relevant standard back to a per se unlawfulness one, or to adopt a new standard as proposed by prominent antitrust scholars, remains to be seen.