
The Rule of Reason After *Leegin*: Reconsidering the Use of Economic Analysis in the Antitrust Arena

“The rule of reason is designed and used to eliminate anti-competitive transactions from the market. This standard principle applies to vertical price restraints. A party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation. As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anti-competitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anti-competitive restraints and to promote pro-competitive ones.”¹

I. INTRODUCTION

The United States Supreme Court has long distinguished between horizontal and vertical price restrictions in assessing their legality under the Sherman Antitrust Act (the Act).² Traditionally, courts use the “rule of reason” standard to determine whether a given price restraint violates the Act.³ According to this rule, the fact-finder must determine whether the restraint’s anti-competitive effects unreasonably outweigh its potentially pro-competitive effects.⁴ This

1. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

2. *Compare* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911) (subjecting vertical price restraint to rule of reason analysis), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), *with* *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (holding horizontal price restraints per se illegal under Sherman Act).

3. *See* *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (describing rule of reason as essential tool to assess reasonableness of price restraint). It is important to note that, despite the Act’s precise language, only “unreasonable” restraints on trade are unlawful. *See infra* note 24 and accompanying text (quoting pertinent language of Section I of the Sherman Act); *see also* *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1910) (noting Act not intended to prohibit all contracts or agreements in restraint of trade).

4. *See* *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (describing rule of reason balancing test). Proper rule of reason analysis takes into account several factors including specific information about the relevant business, the business’s condition before and after it imposed the restraint, and the restraint’s history, nature, and effect. *Id.* An additional factor to consider when assessing the potential economic impact of a vertical price restraint is the market share of the entity employing the restraint. *Id.*; *see also* Albert A. Foer, *Mr. Magoo Visits Wal-Mart: Finding the Right Lens for Antitrust*, 39 CONN. L. REV. 1307, 1313 (2006) [hereinafter

standard, however, does not govern all price restraints.⁵

For example, courts deem horizontal price restraints—those occurring between market participants at the same level of production or distribution—per se illegal in recognition of their consistent anti-competitive purpose and effect.⁶ Additionally, beginning in 1911 with the Supreme Court’s landmark decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*⁷ until 2007, courts deemed minimum resale price maintenance schemes per se illegal under the Act.⁸ Minimum resale price maintenance is a type of vertical price restraint ordinarily employed by manufacturers to enhance a product or products.⁹

The Court’s rejection of the per se rule as applied to resale price maintenance schemes in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹⁰ signaled a dramatic shift in the Court’s ability to recognize and interpret economic data and its effect.¹¹ Furthermore, applying the rule of reason standard to resale price maintenance schemes will certainly have lasting effects on producers and other corporate entities likely to employ such schemes.¹² The Court’s rejection of decades of case law is not surprising, though, given its longstanding distaste for the overbroad characterizations inherent in per se analysis.¹³ Although the Court initially established the per se rule for vertical

Magoo] (describing ability of firm with large market share to manipulate price); cf. Roger G. Noll, “Buyer” Power and Economic Policy, 72 ANTITRUST L.J. 589, 589 (2005) [hereinafter *Buyer Power*] (describing consumer-based monopoly capable of reducing prices by same mechanism as corporate monopoly).

5. See *Khan*, 522 U.S. at 10 (noting not all price restraints assessed according to rule of reason).

6. See *N. Pac. Ry. Co.*, 356 U.S. at 5 (holding all horizontal price restraints per se illegal under Sherman Act); see also *Khan*, 522 U.S. at 10 (stating not all price restraints judged according to rule of reason analysis). The proper standard for determining whether courts should analyze a particular restraint under the rule of reason is whether the restraint “always or almost always tend[s] to restrict competition and decrease output.” See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing, Co.*, 472 U.S. 284, 289-90 (1985)). The per se standard, unlike the rule of reason, is often lauded because it is a bright-line test. See *Leegin*, 127 S. Ct. at 2736 (Breyer, J., dissenting) (characterizing per se rule as bright-line standard); cf. Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 238-47 (1960) [hereinafter *Section 7*] (describing Court’s futile effort to apply complex economic principles in merger case).

7. 220 U.S. 373 (1911), overruled by *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

8. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007) (holding vertical price restraints analyzed according to rule of reason), overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Dr. Miles Med. Co.*, 220 U.S. at 408 (holding vertical price restraints subject to rule of reason analysis).

9. See *Leegin*, 127 S. Ct. at 2715-16 (describing resale price maintenance schemes).

10. 127 S. Ct. 2705 (2007), overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

11. See *infra* note 16 and accompanying text (suggesting rule of reason provides a more exact assessment of economic impact).

12. See *The Doctor Is Out, but Is Resale Price Maintenance In?*, DECHERT ON POINT (Dechert LLP, New York, NY), July 2007, at 2-3 [hereinafter *The Doctor Is Out*] (describing potential impact on manufacturers); Michael J. Lockerby, *Franchising After Leegin: A License to Fix Prices?*, 27 FRANCHISE L.J. 112, 115 (2007) [hereinafter *License to Fix*] (describing *Leegin*’s likely effect on franchisors and manufacturers).

13. See *Leegin*, 127 S. Ct. at 2713 (describing Court’s reluctance to apply per se rule absent considerable experience with restraint). The Court notes that the per se rule cannot apply unless practical experience

price restraints in *Dr. Miles*, subsequent Supreme Court decisions have largely dismantled this holding.¹⁴ In fact, these changes are the result of the Court's measured yet consistent willingness to recognize the pro-competitive effects of vertical price restraints.¹⁵ Indeed, rule of reason analysis may avoid overbroad characterizations and allow the Court to assess the actual effect of a given restraint on private entities and the market as a whole.¹⁶

This Note examines some of the practical effects of the Court's *Leegin* decision, particularly on the lower federal courts and the judiciary in general.¹⁷ As a preliminary matter, this Note will describe the general policy concerns that led Congress to enact Section I of the Sherman Act in order to later determine if the Court's current use of the rule of reason best diminishes these concerns.¹⁸ This Note will also generally discuss potential effects of the Court's application of the rule of reason to resale price maintenance on the producer-dealer relationship.¹⁹

Part II examines the history of the Supreme Court's use of both the per se rule and the rule of reason to scrutinize both horizontal and vertical price restraints.²⁰ Part II also addresses the main policy concerns that caused Congress to enact Section I of the Sherman Act, as well as the Supreme Court's

demonstrates that the restraint in question will almost always adversely affect competition. *Id.* That is, where the restraint may have pro-competitive effects, the rule of reason is better equipped to determine reasonableness. *See id.*; *see also supra* text accompanying note 6 (describing proper standard to determine whether restraint is per se unlawful); *infra* note 14 and accompanying text (noting Court's formalistic view of per se rule).

14. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007) (holding courts shall assess legality of vertical price restraints according to rule of reason), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (holding vertical maximum retail price fixing not a per se violation of Sherman Act); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-58 (1977) (holding non-price vertical restraints subject to rule of reason due to pro-competitive effects); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911) (holding restrictive vertical price agreements per se illegal under the Sherman Act), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

15. *See Leegin*, 127 S. Ct. at 2714-17 (noting pro- and anti-competitive effects of resale price maintenance). The dissenting justices note that the mere possibility of pro-competitive justifications for resale price maintenance is insufficient to validate application of the rule of reason. *See id.* at 2728-31 (Breyer, J., dissenting). According to the dissent, the rule of reason is only as effective as the court's ability to properly decipher the pro-competitive effects. *See id.* (noting difficulty in identifying actual effects of price restraints).

16. *See Khan*, 522 U.S. at 10 (noting rule of reason necessary when restraint's economic impact requires investigation); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) (refusing to apply per se rule because economic impact of restraint not obvious).

17. *Infra* Part III.A (discussing potential impact of *Leegin* holding).

18. *Infra* Parts II, III (recapping history of Sherman Act and Supreme Court's efforts to preserve Act's purpose).

19. *Infra* Part III.B (assessing likely use of resale price maintenance by producers in light of *Leegin* holding); *see also* Brief for Economists as Amici Curiae Supporting Petitioner at 4-5, *Leegin*, 127 S. Ct. 2705 (No. 06-480) [hereinafter Brief for Economists] (noting "upstream" seller often manufacturer and reseller usually retailer). Because manufacturers often impose resale price maintenance schemes on their dealers, this Note will focus exclusively on this business relationship. *See id.*; *see also infra* Parts III.B.1, III.B.2 (assessing producer-dealer relationship).

20. *Infra* Part II.C (describing establishment and use of rule of reason and per se rule by Supreme Court).

role in defining precisely what conduct the Act proscribes.²¹ Part III cautions lower federal courts against using purely economic analysis when applying the rule of reason and advocates for courts to use important circumstantial evidence indicative of unlawful intent.²² Part III also examines problems courts may encounter when applying the rule of reason to resale price maintenance agreements.²³

II. HISTORY

A. Early “Antitrust” Law

Congress enacted the Sherman Antitrust Act in 1890, and it remains the most preeminent piece of American antitrust legislation today.²⁴ Despite its name, Congress did not intend the Act to target trusts in particular, but rather any mechanism used to artificially curtail trade and competition in the marketplace.²⁵ Though lawmakers doubted if common law governed antitrust issues, the decision to enact antitrust legislation grew mainly from concerns surrounding enormous corporate organization and the ensuing accumulation of corporate wealth in the late nineteenth century.²⁶ Legislators suspected that

21. *Infra* Parts II.A, II.B (describing enactment and evolution of Sherman Act).

22. *Infra* Part III.A (cautioning against extensive reliance on economic analysis by courts).

23. *Infra* Part III.B (describing likely application of rule of reason to producers).

24. *See* 15 U.S.C. §§ 1-2 (2004). Congress first enacted the Sherman Act on July 2, 1890. *Id.* The Act, consisting of only two sections, states in pertinent part,

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony

Id. The Clayton Act, enacted in 1914, extended the right to sue under the antitrust laws to “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.” *Id.* § 15. This portion of the Clayton Act allows private parties to sue in federal district court for violations of the Sherman Act where they may receive treble damages and the cost of suit, including reasonable attorney’s fees. *Id.*

25. *See* William L. Letwin, *Congress and the Sherman Antitrust Act: 1887-1890*, 23 U. CHI. L. REV. 221, 222-23 (1956) (recognizing trusts as main vehicle of monopolistic power during nineteenth century). Around the time Congress enacted the Sherman Act, the word “trust” was synonymous with monopolistic practices. *Id.* Although today the term “antitrust law” is somewhat anachronistic, the term is appropriate to describe a law designed to promote economic competition at the end of the nineteenth century. *Id.*

26. *See* *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1910) (describing chief concerns leading to enactment of Sherman Act). *See generally* Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359 (1993) (describing consumer-welfare and producer-welfare theories of antitrust regulation). Scholars often debate whether the original intent of the Sherman Act was to benefit producers or consumers. *Id.* at 359. On one hand, the Act serves to control prices and limit market manipulation thus benefiting the consumer. *Id.* Likewise, these controls benefit producers by increasing competition and limiting the potential for corporate dominance in any given market. *Id.*

these wealthy corporations were beginning to use their power, financial and otherwise, to stifle competition and artificially increase prices.²⁷ Congress premised the Act on the theory that the unrestrained interaction of competitive forces yields the best allocation of economic resources, the lowest prices, and the best quality goods.²⁸ This theory, however, continues to garner significant criticism by both legal and economic scholars.²⁹

In 1910, John D. Rockefeller's Standard Oil Company became one of the first trusts regulated under the Act.³⁰ The Standard Oil Company had grown so large that by 1900, the company controlled almost 90 percent of all refined oil flows in the continental United States.³¹ The Supreme Court held that Rockefeller violated Section I of the Act by constructing a type of horizontal monopoly, a corporate enterprise designed to control and manipulate supply in a particular market.³² Despite realizing incredible profits for Rockefeller and Standard Oil, this level of horizontal integration resulted in a monopolization of the United States oil market that stifled competition and spawned unfair price manipulation.³³ In 1911, as a result of the Supreme Court's holding, the Standard Oil Company dissolved.³⁴

27. See *Standard Oil*, 221 U.S. at 50 (articulating economic concerns regarding monopoly corporations and trusts).

28. See 10A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4981 (perm. ed. 1999) (describing United States antitrust law generally). *But see generally* Alan Greenspan, *Antitrust*, in CAPITALISM: THE UNKNOWN IDEAL (Signet 1986) (arguing monopoly power often necessary and superior result of competitive unregulated markets).

29. See *generally* Greenspan, *supra* note 28 (arguing against necessity for antitrust legislation). Greenspan suggests that, historically speaking, trusts are a necessary part of an open market leading to more efficient production and lower prices than a regulated market can provide. *Id.* Greenspan argues, for example, that the Standard Oil monopoly, although especially dominant and formidable for its time, benefited society simply by providing a service more efficiently and at a lower cost than its competitors. *Id.*

30. See *id.* (naming Standard Oil as first regulated trust under Sherman Act); see also *Standard Oil*, 221 U.S. at 30 (stating allegedly unlawful conduct occurred between 1870 and 1882). The government charged Standard Oil with violating the Sherman Act and alleged the following:

[T]he said individual defendants, in connection with the Standard Oil Company . . . entered into agreements with, various persons, firms, corporations, and limited partnerships . . . for the purpose of fixing the price of crude and refined oil and the products thereof, limiting the production thereof, and controlling the transportation therein, and thereby restraining trade and commerce among the several states, and monopolizing the said commerce.

Standard Oil, 221 U.S. at 32.

31. See *Standard Oil*, 221 U.S. at 33 (detailing extent of Standard Oil's control over oil production). Owning over 90 percent of the refined oil flows in the United States effectively allowed Standard Oil to control the production, shipment, refinement, and sale of all petroleum and its products. *Id.* Standard Oil was therefore able to fix the price of crude and refined petroleum and restrain and monopolize all interstate commerce in those products. *Id.*

32. See *Standard Oil v. United States*, 221 U.S. 1, 32-33 (1910) (describing characteristics of Standard Oil Company's horizontal monopoly).

33. See *id.* at 72-75 (holding Standard Oil trust violated Sherman Act by stifling competition); *supra* text accompanying note 29 (describing method used to artificially manipulate prices).

34. See *id.* at 78 (affirming dissolution of Standard Oil trust).

B. The United States Supreme Court and the Sherman Act

Even though the Standard Oil litigation targeted a particular monopoly, the main concern voiced by both the plaintiffs and the Court was the general anti-competitive effects of artificial price restrictions.³⁵ Although the Court in *Standard Oil* ultimately held that the Sherman Act proscribed horizontally integrated monopolies, the language of the Act itself still provides little guidance as to what specific conduct is prohibited.³⁶ Accordingly, courts have the difficult task of determining on a case-by-case basis what conduct the Act proscribes.³⁷ After the Act's inception, for example, a district court interpreted the meaning of "restraint on trade" as used in Section I of the Act.³⁸ Based on this early interpretation, the word "trade" is synonymous with "competition" when considering what conduct violates the Act.³⁹

Early interpretations of the Act proscribed all transactions and contracts that restrained trade whether reasonable or unreasonable based on the plain language of the Act.⁴⁰ The Court first adopted the rule of reason in 1911 effectively reading the word "unreasonable" into the statute and providing the most comprehensive interpretation of the Act to date.⁴¹ In limited circumstances, however, certain anti-trade and anti-competitive restraints remained per se illegal under the Sherman Act in recognition of their limited or non-existent pro-competitive effects.⁴² Despite these restraints, the

35. See *supra* text accompanying note 30 (quoting alleged conduct violating Sherman Act).

36. See *Standard Oil Co.*, 221 U.S. at 49-62 (interpreting meaning of Sherman Act based on common law of antitrust). The Court determined its precise meaning in light of the common law of antitrust in recognition of the vague language employed by the statute. *Id.* at 51. The Court determined that the Act proscribed all unreasonable restraints on trade or commerce and that the rule of reason is the appropriate standard assessing a restraint's legality under the Act. *Id.* at 59-60; see also FLETCHER, *supra* note 28, § 4982 (detailing vague language contained in Sherman Act).

37. See *Standard Oil*, 221 U.S. at 49 (interpreting Sherman Act in light of common law).

38. See *United States v. Nat'l Retail Lumber Dealers Ass'n*, 40 F. Supp. 448, 455 (D. Colo. 1941) (acknowledging "restraint of competition" synonymous with "restraint of trade").

39. See *id.* (holding "restraint of competition" term synonymous with "restraint of trade"). In reaching this decision, the court noted that restraints on trade are the primary mechanisms that large monopoly corporations use to eliminate competition within their market. *Id.* But see *United States v. Eastman Kodak Co.*, 226 F. 62, 66 (W.D.N.Y. 1915) (asserting "restraint of trade" not inherently synonymous with "restraint of competition").

40. See FLETCHER, *supra* note 28, § 4983 (noting strict adherence to language of Sherman Act).

41. See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 406 (1911) (using reasonable standard to assess contracts in restraint of trade), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). The analysis described in *Dr. Miles* is really an antiquated form of the rule of reason test employed by the Court today. *Id.*; see also *supra* note 4 and accompanying text (describing modern rule of reason analysis). To establish the rule, the *Dr. Miles* Court relied on the common-law notion that sale of goods contracts that restrict a vendee's ability to subsequently trade or bargain (e.g., a restraint on alienation) infringe upon individual liberty and are void as contrary to public policy. See *Dr. Miles*, 220 U.S. at 404-07; see also *State Oil v. Khan*, 522 U.S. 3, 10 (1997) (recognizing Act's prohibition against unreasonable restraints).

42. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (holding all horizontal price restraints per se illegal under Sherman Act); see also *Khan*, 522 U.S. at 10 (stating not all price restraints assessed according

contemporary trend has been to limit those instances where the per se rule is used; the Court instead relies on a more holistic assessment under the rule of reason.⁴³ This reliance is easily traced to the Court's increased ability to accurately predict and theorize a given restraint's economic and competitive effects on the market.⁴⁴

C. The Per Se Rule and the Rule of Reason: A Case History

For much of the twentieth century, the Court applied the per se rule to vertical price and non-price restraints, but after years of reducing its strict application the Court suddenly shifted to a rule of reason standard.⁴⁵ Although the Court has long considered horizontal price restrictions per se illegal under the Sherman Act, the per se regime began in 1911 when the Court applied the per se rule to vertical price restrictions in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*⁴⁶ The *Dr. Miles* holding was significant because the Court likened minimum retail price maintenance schemes to horizontal price restraints in light of their overwhelmingly negative effect on competition; the Court also moved toward extending the per se rule to vertical price restraints generally.⁴⁷ Interestingly, the Court's *Dr. Miles* opinion appears more

to rule of reason). The Court further notes the determination of whether a given restraint lacks pro-competitive effects is not merely theoretical, but deemed unlawful per se. 522 U.S. at 10. Per se treatment is appropriate "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Id.* (quoting *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 344 (1982)) (internal quotations omitted).

43. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007) (holding legality of vertical price restraints assessed according to rule of reason), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Khan*, 522 U.S. at 7 (holding vertical maximum retail price fixing not a per se violation of Act); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-58 (1977) (holding non-price vertical restraints subject to rule of reason due to pro-competitive effects).

44. See *Khan*, 522 U.S. at 22 (describing limited use of per se rule to familiar price restraints); see also *Cont'l T.V.*, 433 U.S. at 54-57 (reviewing scholarly works describing economic effects of vertical price restraints). In *Cont'l T.V.*, the Court elected to assess vertical non-price restraints under the rule of reason in light of their potentially pro-competitive effects. 433 U.S. at 54-58.

45. See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145, 152-54 (1968) (holding maximum retail price scheme per se unlawful under Act); *United States v. Arnold, Schwinn and Co.*, 388 U.S. 365, 379 (1967) (holding non-price vertical restraint per se illegal); *Dr. Miles*, 220 U.S. at 408 (holding minimum price maintenance scheme per se illegal under Act). But see *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) (declining to extend per se rule to non-price vertical restraint). The Court demonstrated a clear affinity for the rule of reason in several landmark cases subsequent to the *Albrecht* decision in 1968. See *supra* note 14 (listing Supreme Court cases extending application of rule of reason after 1968).

46. See *Dr. Miles*, 220 U.S. at 408 (holding minimum retail price maintenance scheme per se illegal under the Sherman Act); see also *N. Pac. Ry. Co.*, 356 U.S. at 5 (holding all horizontal price restraints per se illegal under Sherman Act).

47. See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408-09 (1911) (likening restraint to agreement between dealers designed to destroy competition), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). The defendant in *Dr. Miles* was a wholesale drug concern involved in the manufacturing of exclusive pharmaceuticals. *Id.* at 394. The defendant established minimum prices at which all vendees and distributors (also known as dealers) were required to sell *Dr. Miles's* products. *Id.* This scheme is known generally as a minimum retail price maintenance scheme. *Id.*

objective than most others that consider vertical price and non-price restraints because of the Court's comprehensive discussion of the rule of reason and the per se rule.⁴⁸ Despite its objectivity, however, the Court concluded that the defendant's restraint was per se illegal under Section I of the Sherman Act.⁴⁹

In 1967, in *United States v. Arnold, Schwinn & Co.*,⁵⁰ the Court held certain vertical non-price restrictions per se illegal under the Sherman Act, further expanding the notion of per se illegality.⁵¹ The Court based its conclusion on an analogy between the "territorial" restraint in question and restraints on alienation generally, like those examined in *Dr. Miles*.⁵² The Court disregarded the defendant's proper motive in establishing the restraint and any possibility of assessing its legality under the rule of reason because the restraint fundamentally restricted trade in violation of Section I of the Act.⁵³

The Supreme Court continued its expansion of the per se rule in 1968 with its decision in *Albrecht v. Herald Co.*⁵⁴ Relying largely on reasoning articulated in the *Schwinn* decision a year earlier, the Court held that Section I

48. See *id.* at 406-09 (defining rule of reason standard and per se exception). The Court took care to characterize the Sherman Act as prohibiting only unreasonable restraints on trade or commerce. *Id.* at 406-07. The Court also recognized, however, the predictable results achieved by the rule of reason when assessing horizontal price restraints because of their consistent economic impact. *Id.* at 408. Ultimately, the Court determined minimum retail price maintenance schemes have similar economic impacts as horizontal schemes, thus triggering the per se rule. *Id.* at 408-09.

49. See *id.* at 409 (holding minimum retail price maintenance scheme per se illegal).

50. 388 U.S. 365 (1967).

51. See *id.* at 379-80 (holding non-price vertical restraints per se illegal). The defendant in *Schwinn* was one of nine major manufacturers of bicycles and bicycle parts in the United States during the 1960s. *Id.* at 368-69. The restraint at issue concerned the placement of various limitations on wholesale distributors of Schwinn products. *Id.* at 371. In particular, Schwinn instructed wholesalers to sell Schwinn products "only to franchised Schwinn accounts" within a specified territory, which were "specifically described and allocated on an exclusive basis." *Id.*

52. See *id.* at 375-77 (comparing Schwinn non-price restraint to price restraints on alienation generally). The Court concluded that where the distributor purchases goods from a manufacturer, and owns them outright, the seller cannot place restrictions on the distributor's ability to subsequently market or sell those goods. *Id.* at 377. The Court determined this conduct violates Section I of the Sherman Act because it directly restricts the trade and commerce of those goods. *Id.* at 377-78. The Court based this holding largely on its prior ruling in *Dr. Miles*, which likened the defendant's price restriction to an unlawful restraint on alienation. Compare *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 377 (1967) (describing anti-trade effect of non-price restriction), with *Dr. Miles*, 220 U.S. at 404-07 (comparing defendant's price restriction with common-law restraint on alienation).

53. See *Schwinn*, 388 U.S. at 375 (disregarding defendant's lawful business-motive defense). Schwinn apparently instituted this distribution policy to advance sales, improve distributor and dealer stability, and raise profits. *Id.* According to the Court, "[T]he antitrust outcome does not turn merely on the presence of sound business reason or motive Our inquiry is whether . . . the effect upon competition in the marketplace is substantially adverse." *Id.*

54. 390 U.S. 145 (1968). The defendant, The Herald Co., published a daily newspaper in the St. Louis area. *Id.* at 147. Independent carriers purchased large quantities of newspapers at wholesale prices from the defendant and sold them at retail prices to subscribers. *Id.* The Herald required each retail distributor to sell each paper at or below a designated maximum retail price, or else face termination of its wholesale agreement with Herald. *Id.* After the plaintiff carrier raised the retail price above the stipulated maximum, Herald notified subscribers along the plaintiff's route that Herald could deliver the paper directly at a lower cost. *Id.* As a result, over 300 of the plaintiff's 1,200 existing customers switched to Herald's direct delivery. *Id.*

of the Sherman Act prohibited the maximum retail price maintenance scheme employed by the Herald Company.⁵⁵ According to the Court, this agreement precluded the “natural” establishment of price through bargaining by buyers and sellers, an essential market component often restricted by maximum price schemes.⁵⁶ Restricting bargaining in order to influence price adversely affects competition and trade in the market and is thus per se illegal under Section I of the Act.⁵⁷

The Supreme Court’s transition to a rule of reason regime began with the Court’s decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.* in 1977.⁵⁸ The United States District Court for the Northern District of California relied heavily on the Supreme Court’s *Schwinn* decision and instructed the jury that it must find the restriction per se unlawful if it determined that the defendant, by contract or agreement with its dealers, restricted the resale of products to specific outlets or retail stores.⁵⁹ The Ninth Circuit Court of Appeals distinguished the defendant’s restraint from the unlawful restraint at issue in *Schwinn* and reversed the district court’s prior ruling.⁶⁰ Ultimately, the appeals court determined the rule of reason should apply because the defendant’s non-price, territorial restriction had less potential for competitive harm.⁶¹ Although the Supreme Court affirmed the Ninth Circuit’s ruling, the Court based its

55. See *id.* at 153 (holding defendant’s price restriction per se illegal). Like the Eighth Circuit Court of Appeals, the Supreme Court found little distinction between the defendant’s maximum price scheme and minimum price schemes, like that employed by *Schwinn*. *Id.* at 152. According to the Court, to substitute the “perhaps erroneous judgment of a seller for the forces of the competitive market may severely intrude upon the ability of buyers to compete and survive in that market.” *Id.*

56. Compare *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968) (rejecting maximum price scheme under Section I of Sherman Act), with *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) (likening maximum price maintenance scheme to minimum price scheme), and *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911) (holding minimum retail price scheme per se illegal), *overruled by Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

57. See *Albrecht*, 390 U.S. at 152-53 (describing adverse effects of maximum retail price scheme). The Court notes that the stipulation of a maximum retail price may actually be too low for dealers to furnish essential “services and conveniences which consumers desire and for which they are willing to pay.” *Id.* at 153. Furthermore, maximum price fixing may limit distribution to large firms capable of withstanding lower profit margins, while limiting or even eliminating the non-price competition they face. *Id.* In addition to receiving similar treatment under the Sherman Act, maximum price schemes essentially mimic minimum price schemes as the price consistently charged by dealers typically approaches the maximum stipulated price. *Id.*

58. 433 U.S. 36 (1977). The defendant, GTE Sylvania Inc., manufactured and sold television sets through its Home Entertainment Products Division. *Id.* at 38. The restraint employed by GTE Sylvania required that dealers, who could also purchase products directly from the defendant, resell those products only to specified retailers. *Id.* at 40.

59. See *id.* at 40. The defendant’s proposed instruction would have had the jury find the restriction unlawful “only if it unreasonably restrained or suppressed competition.” *Id.* The Court recognized the similarities between the restriction in question and the restriction at issue in *Schwinn* and instructed the jury that it must find the restriction per se unlawful if the defendant restricted the plaintiff’s ability to freely market purchased goods. *Id.*

60. See *GTE Sylvania, Inc. v. Cont’l T.V., Inc.*, 537 F.2d 980, 988 (9th Cir. 1976) (applying rule of reason to defendant’s non-price restriction), *aff’d*, 433 U.S. 36 (1977).

61. See *id.* at 988 (stating rule of reason necessary to assess given restraint).

decision on a prior Supreme Court holding that assessed the policy rationale and requirements underlying the per se rule itself.⁶² Regardless of its reasoning, the Court overruled the *Schwinn* holding and refused to characterize all vertical non-price restraints as per se unlawful.⁶³

The Court's reasoning in *Continental T.V.*, and specifically its reliance on *Northern Pacific Railway Co.* and *White Motor Co.*, paved the way for a second significant rejection of the stare decisis doctrine in *State Oil v. Kahn*.⁶⁴ The Seventh Circuit Court of Appeals relied on the Supreme Court's *Albrecht* ruling and initially characterized the defendant's restriction as a de facto maximum retail price scheme in violation of Section I of the Sherman Act.⁶⁵ The Supreme Court, on the other hand, declined to apply per se treatment to the defendant's price scheme in recognition of *Albrecht's* faulty reasoning.⁶⁶ The

62. See *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50-52 (1977) (assessing application of per se rule in light of *N. Pac. Ry. Co.*). The Court elected to re-examine their *Schwinn* holding to determine if use of the per se rule was warranted because the district court's original holding relied on their application of the per se rule to non-price restrictions in *Schwinn*. *Id.* at 50. According to the Court, *N. Pac. Ry. Co.* established the standard for determining the proper application of the per se rule. *Id.* at 49-50. The Court determined in *N. Pac. Ry. Co.* that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused." See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Application of the per se rule therefore requires a determination that anti-competitive consequences will result from a particular practice, and the severity of those consequences largely outweigh any pro-competitive consequences. *Id.* Thus, use of the rule reflects the general policy that cases may arise that do not fit the general determination; however, such cases are not sufficiently common or significant to warrant using excessive time and money necessary to identify them. *Id.* The Court in *Cont'l T.V.* notes proper adherence to these principles in *White Motor Co. v. United States*, 372 U.S. 253 (1963). See *Cont'l T.V.*, 433 U.S. at 50. In reference to the restraint at issue, the Court in *White Motor* noted, "We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' and therefore should be classified as per se violations of the Sherman Act." *White Motor Co.*, 372 U.S. at 263. This analysis, coupled with the demonstrable economic utility of the vertical non-price restriction in question, led the Court to abandon the formalistic line drawing exhibited in *Schwinn* (and by the district court in this case) in favor of an application of the rule of reason. See *Cont'l T.V.*, 433 U.S. at 57-58.

63. See *Cont'l T.V.*, 433 U.S. at 57-58 (abandoning the *Schwinn* holding).

64. 522 U.S. 3 (1997). The defendant in *Khan* was State Oil Company, a supplier of petroleum products and owner of gas stations nationwide. *Id.* at 7-8. The plaintiff and his corporation agreed to lease and operate a gas station and convenience store owned by the defendant. *Id.* Pursuant to this agreement, the plaintiff obtained the station's gasoline supply at a retail price set by the defendant less a margin of 3.25 cents per gallon. *Id.* Although the plaintiff could charge its customers any amount for gasoline, an amount in excess of the defendant's retail price had to be rebated to State Oil pursuant to their agreement. *Id.* at 7-8. Likewise, any price less than the defendant's retail price would reduce the plaintiff's price margin of 3.25 cents per gallon. *Id.*

65. See *Khan v. State Oil Co.*, 93 F.3d 1358, 1360 (7th Cir. 1996) (holding price restriction per se violation of Sherman Act), *vacated*, 522 U.S. 3 (1997). According to the Court, the restriction amounted to a maximum retail maintenance scheme because the plaintiff had no incentive to exceed the suggested retail price. *Id.* at 1361.

66. See *Khan*, 522 U.S. at 15-18 (overruling *Albrecht* decision). The Court's disagreement with the underlying theory of the *Albrecht* holding can be categorized in two ways: (1) a failure to recognize the favorable impact maximum retail price schemes may have on trade and competition, and (2) a failure to recognize self-protection mechanisms amongst manufacturers and retailers that limit the use of such schemes to

Court reasoned that “[t]here is insufficient economic justification for per se invalidation of vertical maximum price fixing,” which signaled the Court’s unwillingness to accept the economic assumptions underlying *Albrecht*.⁶⁷

The Court’s 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* is the final and perhaps most significant ruling in the Supreme Court’s latest antitrust regime.⁶⁸ In 1997, the defendant Leegin Creative Leather Products, Inc., a national manufacturer of leather clothing and apparel, instituted a “Retail Pricing and Promotion Policy” discouraging all distributors of Leegin products from discounting Leegin products below certain stipulated prices.⁶⁹ The plaintiff PSKS, Inc. owned and operated Kay’s Kloset (Kay’s), a small clothing boutique that carried a variety of Leegin-manufactured products.⁷⁰ Leegin refused to sell additional items to Kay’s when the company learned that Kay’s discounted many Leegin-manufactured products below prices stipulated in its retail price agreement.⁷¹ PSKS, Inc., and Kay’s subsequently sued Leegin in federal district court alleging Leegin’s retail pricing policy artificially fixed prices in violation of Section I of the Sherman Act.⁷²

Applying the Supreme Court’s *Dr. Miles* holding, the United States District

adversely affect price and/or competition. *Id.* For example, a manufacturer would likely refrain from “squeezing” a retailer’s margins beyond competitive levels for risk of losing the retailer to another manufacturer. *Id.* at 15-16 (quoting Chief Judge Posner of Seventh Circuit Court of Appeals). The *Albrecht* majority also failed to recognize that manufacturers may resist setting maximum retail prices sufficiently low to prevent dealers from providing essential services to customers because of the risk of customer loss and decreased demand for their products. *Id.*

67. See *Khan*, 522 U.S. at 18 (discarding per se rule as applied in *Albrecht*).

68. 127 S. Ct. 2705 (2007), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

69. See *id.* at 2711 (describing Leegin price policy). According to Leegin, the company adopted the price policy to enhance their brand name because discount prices offered at large corporate stores often confuse customers. *Id.* According to the policy, “In this age of mega stores . . . consumers are perplexed by promises of product quality and support of product which we believe is lacking in these large stores. Consumers are further confused by the ever popular sale, sale, sale, etc.” *Id.* Leegin claimed it set price levels to allow retailers appropriate margins to support Leegin’s marketing strategy, while maintaining Leegin’s status as an upscale manufacturer. *Id.*

70. See *id.* (describing plaintiff’s business). Kay’s Kloset purchased products from about 75 manufacturers, including Leegin. *Id.* In particular, Kay’s carried the Brighton brand of Leegin products. *Id.* at 2710. Originally found exclusively on leather belts, the Brighton brand name eventually expanded into a variety of women’s fashion accessories, many of which Kay’s sold. *Id.* Brighton eventually became Kay’s most important brand and once accounted for nearly 50 percent of the store’s profits. *Id.*

71. See *id.* at 2711 (depicting plaintiff’s violation of retail price agreement). Beginning in December 2002, Leegin discovered that Kay’s discounted all Brighton brand-name products by 20 percent. *Id.* Despite several warnings by Leegin, Kay’s continued its practice of discounting items for several additional months. *Id.* Although the retail price agreement allowed for temporary discounts of Leegin products below stipulated price levels for products that the retailer did not intend to reorder, Kay’s conceded this was not the case. *Id.* According to PSKS, Inc. and Kay’s, the stores placed Brighton products on sale to compete with nearby retailers who were also discounting Brighton products. *Id.*

72. See *Leegin*, 127 S. Ct. at 2712 (naming PSKS, Inc. plaintiff versus Leegin, Inc.). According to the plaintiff’s original complaint, Leegin violated antitrust law by “enter[ing] into agreements with retailers to charge only those prices fixed by Leegin.” *Id.* (internal quotations omitted).

Court for the Eastern District of Texas found for PSKS and awarded nearly \$4 million in damages and attorney's fees.⁷³ On appeal, Leegin did not argue that the company's pricing policy did not constitute an unlawful vertical price restraint; rather, Leegin urged the Court to assess the agreement under the less stringent rule of reason standard.⁷⁴ Although rejected by the Fifth Circuit Court of Appeals, this argument served as the basis for review by the Supreme Court and ultimately the demise of *Dr. Miles*.⁷⁵

The United States Supreme Court granted certiorari to determine whether vertical minimum resale price maintenance schemes, such as those employed by Leegin Creative Products, Inc., should continue to be treated as a per se violation of the Sherman Act.⁷⁶ Although the Court acknowledged the rule of reason as the accepted standard to determine whether a practice violates the Act, it recognized that some restraints are per se unlawful because of their manifestly anti-competitive effect.⁷⁷ The Court, however, was not persuaded by the justification for applying the per se rule to vertical minimum resale price schemes articulated by the majority in *Dr. Miles*.⁷⁸ Furthermore, based upon its

73. See *id.* (reciting federal district court's holding in favor of plaintiff). Leegin intended to introduce expert testimony concerning the pro-competitive effects of the retail pricing policy; however, the district court judge relied exclusively on the per se rule for vertical restraints established in *Dr. Miles* and elected to exclude the testimony. *Id.* The judgment entered against Leegin amounted to \$3,975,000. *Id.*; see also 15 U.S.C. § 15(a) (2004) (providing for treble damages and reasonable attorney's fees for antitrust violations).

74. See *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 171 Fed. App'x. 464, 466-67 (5th Cir. 2006) (articulating petitioner's argument in favor of remand). According to Leegin, the trial judge committed reversible error by excluding testimony regarding the pro-competitive effects of the retail pricing policy. *Id.* The court should have used the rule of reason to weigh the pro and anti-competitive effects of the restraint at issue. *Id.*

75. See *id.* (affirming district court's ruling); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007) (presenting issue considered by United States Supreme Court), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

76. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 549 U.S. 1092 (2006) (granting certiorari). According to Justice Kennedy's majority opinion, "[W]e granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as per se unlawful." See *Leegin*, 127 S. Ct. at 2712 (describing central issue considered by Court).

77. See *Leegin*, 127 S. Ct. at 2713-14 (reaffirming rule of reason as accepted standard to assess potential Sherman Act violations); see also *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (declaring rule of reason accepted standard to determine Sherman Act violations). *But see Leegin*, 127 S. Ct. at 2726 (Breyer, J., dissenting) (disagreeing with rule of reason as dominant antitrust standard). According to the dissent, courts "often" use the rule of reason and "sometimes" apply the per se rule, thus diverging from the majority view that courts almost always apply the rule of reason. See *id.*

78. See *Leegin*, 127 S. Ct. at 2714 (rejecting majority's justification for per se rule in *Dr. Miles*). In *Dr. Miles*, the Court analogized vertical minimum price restraints to restraints on alienation, a term often associated with property law. See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-05 (1911), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). The *Leegin* majority categorized this reliance as "extraneous to the question that controls here," particularly because the doctrine developed during the seventeenth century for application in the realm of real property disputes. *Leegin*, 127 S. Ct. at 2714. Furthermore, the *Leegin* Court rejected the notion that vertical price agreements between manufacturer and distributor are analogous to horizontal price agreements because a large body of antitrust analysis suggests there are distinct economic differences between these two price agreements. *Id.* The Court noted that antitrust jurisprudence subsequent to the *Dr. Miles* decision has affirmatively established the many

own independent assessment of the economic impact of such restraints, the Court concluded, “It cannot be stated with any degree of confidence that resale price maintenance ‘always or almost always tend[s] to restrict competition and decrease output.’”⁷⁹

The *Leegin* Court acknowledged some reverence for the doctrine of stare decisis despite express disagreement with the Court’s economic assessment in *Dr. Miles*.⁸⁰ The Court opted to overturn *Dr. Miles*, however, after weighing stare decisis against those policies supporting assessment of vertical minimum price restraints under the rule of reason.⁸¹ The Court also reiterated its view that the *Dr. Miles* holding is rigid and “formalistic” rather than based on “demonstrable economic effect.”⁸² Consequently, courts assess all agreements in restraint of trade under the rule of reason, except for horizontal price fixing cartels.⁸³

III. ANALYSIS

Antitrust law is increasingly difficult to implement due to complex economic considerations inherent to rule of reason analysis.⁸⁴ While

differences between horizontal and vertical price restrictions that usually warrant application of the per se rule for horizontal restrictions and the rule of reason for vertical restrictions. *Id.*

79. See *Leegin*, 127 S. Ct. at 2714-17 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)) (noting pro-competitive and anti-competitive justifications of vertical minimum resale price agreements). The majority states one pro-competitive justification for vertical minimum price maintenance schemes is the potential for increased interbrand competition, which is an essential concern of the Sherman Act. *Id.* at 2715. Interbrand competition is the competition that ordinarily occurs between various brand-name manufacturers of the same or a similar product. See *id.*; see also *State Oil Co. v. Khan*, 522 U.S. 3, 14-15 (1997) (noting primary purpose of antitrust laws to protect and stimulate interbrand competition). The majority opines that vertical price restraints used by a single manufacturer tend to eliminate price competition among retailers and enable value-added services and promotional efforts. See *Leegin*, 127 S. Ct. at 2715. Moreover, vertical minimum price restraints may eliminate free-riding retailers who benefit from increased demand created by retailers who spend money on promotional services, thus forcing them to maintain higher prices. *Id.* at 2715-16. But see Brief in Opposition at 20, *Leegin*, 127 S. Ct. 2705 (No. 06-480) [hereinafter Brief in Opposition] (observing higher prices result from resale price maintenance).

80. See *Leegin*, 127 S. Ct. at 2720 (recognizing stare decisis as potential reason to retain per se rule).

81. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007) (adopting rule of reason for vertical minimum price restraints), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). According to the Court, “stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right.” *Id.* (quoting *Khan*, 522 U.S. at 20). These concerns are especially prevalent in statutory interpretation. *Id.* (citing *Hohn v. United States*, 524 U.S. 236, 251 (1998)). The Court, however, has long considered the Sherman Antitrust Act a common-law statute, as evidenced by the broad and ambiguous language the statute employs. *Id.*; see also *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978). Therefore, just as common-law notions evolve over time, “so too does the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions.” *Leegin*, 127 S. Ct. at 2720. According to the majority, this theory requires use of the rule of reason to account for potential pro-competitive uses of vertical minimum price restraints by manufacturers not formerly comprehended by the *Dr. Miles* Court. *Id.* at 2720-21.

82. See *Leegin*, 127 S. Ct. at 2714 (describing reliance on per se rule in *Dr. Miles* as “formalistic”).

83. See *supra* Part II.C (describing application of rule of reason and per se rule); see also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (holding horizontal price restraints per se illegal under Sherman Act).

84. See *Leegin*, 127 S. Ct. at 2729-30 (Breyer, J., dissenting) (describing lack of consensus regarding

theoretically the *Leegin* decision could have vast economic implications for manufacturers, producers, dealers, and retailers, it is difficult to predict with any significant degree of accuracy what these implications will be.⁸⁵ The following analysis will focus on two issues: (1) why the *Leegin* decision should not spawn greater economic analysis for lower federal courts when assessing alleged Sherman Act violations, and (2) how the producer-dealer relationship will evolve in light of the *Leegin* decision.⁸⁶

A. Economic Analysis and the Rule of Reason

The *Leegin* majority held that minimum retail price agreements are not worthy of per se treatment because of their potentially pro-competitive effects.⁸⁷ This holding presupposes that courts are capable of determining the precise economic effect a minimum price restraint will have on the parties involved and the market as a whole.⁸⁸ Prior antitrust jurisprudence, however, indicates and economic study suggests that minimum retail price restraints can easily be characterized two or more ways depending on the method of analysis.⁸⁹

Given this ambiguity, courts must refrain from engaging in purely economic analysis in order to properly assess the reasonableness of a given restraint.⁹⁰ Rather, the nature of the business employing the restraint and the relationship between the business and its dealers both accurately reflect the reasonableness

economic effect of resale price maintenance). According to Justice Breyer, "How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*." *Id.* at 2730. Justice Breyer also notes that scholars have developed certain criteria "that will help courts separate instances where anti-competitive harms are more likely from instances where benefits are likely to be found." *Id.* He believes, however, that the application of these criteria to a given resale price scheme is impracticable and likely to encounter fatal problems. *See id.*; see also HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 105 (2005) (noting complexity of litigating a rule of reason case).

85. *See The Doctor Is Out*, *supra* note 12, at 2-3 (describing potential impact on manufacturers); *License to Fix*, *supra* note 12, at 115-16 (describing impact of *Leegin* decision on producer-dealer dynamic).

86. *See infra* Part III.B (analyzing possible implications of *Leegin* decision).

87. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2717 (2007) (recognizing potential pro-competitive effects of resale price maintenance), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). The majority essentially precludes the application of the per se rule by suggesting various ways a minimum resale price maintenance scheme may be used to promote competition and increase output. *Id.*

88. *See id.* at 2712 (listing relevant factors considered in rule of reason analysis). According to the majority, courts must consider "'specific information about the relevant business' and 'the restraint's history, nature, and effect'" to appropriately assess the reasonableness of a resale price restraint. *Id.* (quoting *State Oil v. Khan*, 522 U.S. 3, 10 (1997)).

89. *See id.* at 2714 (conceding potential dual effect of minimum resale price maintenance); *see also id.* at 2726 (Breyer, J., dissenting) (noting difficulty of deciding between per se rule and rule of reason). According to the dissenting justices, "The difficulty arises out of the fact that the different sets of considerations point in different directions." *Id.* (referring to potential anti-competitive and benefits of minimum resale price schemes).

90. *See infra* note 91 and accompanying text (noting inherent ambiguity of retail price maintenance schemes).

of a minimum price restraint without significant economic investigation.⁹¹ Courts must use this information to infer the restraint's purpose and its intended effect on each party's market segment.⁹² Indeed, this evidence is circumstantial at best and does not embody the essential element of the rule of reason: an objective comparison of the constructive and detrimental economic effects of a given price restraint.⁹³ Given society's interest in consistent and predictable adjudications, an approach that significantly values the non-economic considerations inherent in the rule of reason will best avoid the many problems sure to accompany judicial decision-making based on a purely economic assessment.⁹⁴

Lower federal courts already have guidance in determining what constitutes an unlawful minimum price restraint; the *Leegin* opinion outlined situations in which businesses instituted a vertical price restraint for an improper and illegal purpose.⁹⁵ While often difficult to identify, these unique situations are

91. See *Leegin*, 127 S. Ct. at 2720 (noting courts may rely on presumptions in rule of reason cases). Generally speaking, the *Leegin* Court characterized the rule of reason the same as prior Supreme Court opinions utilizing the rule. See *id.* at 2712 (adopting rule of reason standard articulated in *Cont'l T.V.*). Both the majority and the dissent in *Leegin*, however, painstakingly review the pro-competitive and anti-competitive justifications of minimum retail price maintenance schemes from economic study in an attempt to determine the likely result. *Id.* at 2714-17 (discussing economic effect of minimum retail price maintenance schemes); see also *id.* at 2727-30 (Breyer, J., dissenting) (summarizing theoretical effects of resale price maintenance schemes). In doing so, the justices place too much emphasis on generally characterizing resale price schemes, rather than simply noting that an accurate assessment of their economic effect can only be achieved on a case-by-case basis due to their diverse and ambiguous nature.

92. See *Leegin*, 127 S. Ct. at 2720 (describing possibility of establishing presumptions in rule of reason cases). The idea of using circumstantial evidence to establish presumptions is not necessarily novel and is even recognized by the Court in *Leegin* as a way to provide structure to antitrust litigation. *Id.*

93. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) (describing use of circumstantial evidence in applying rule of reason). The Court recognized that, in addition to hard economic data regarding the effect of a given restraint on competition, the fact-finder may use circumstantial evidence to infer reasonableness. *Id.*

94. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2729 (2007) (Breyer, J., dissenting) (discussing administrative impact of applying rule of reason), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). According to the dissent, "[L]aw, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers . . ." *Id.* In other words, while economic analysis may be an effective tool in many respects, it does not necessarily produce timely or consistent results in a legal setting when applied by non-economists. See *id.* at 2730; see also HOVENKAMP, *supra* note 84, at 105 (describing difficulty of litigating rule of reason case); Section 7, *supra* note 6, at 238-47 (describing difficulty applying complex economic principles in merger cases).

95. See *Leegin*, 127 S. Ct. at 2716-17 (describing common uses of resale price maintenance schemes). According to the Court, "Resale price maintenance could assist the [manufacturer] cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer." *Id.* at 2716. While this first example indicates how individual manufacturers or producers use resale price maintenance schemes, cartels of retailers and dealers may also use them to lock in higher profits for themselves. *Id.* Finally, a manufacturer or retailer with above-average market share may use resale price maintenance to maintain or increase their market share, thus ensuring elevated profits. *Id.* at 2717. According to the *Leegin* majority, "A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's distribution network." *Id.*

typically discovered by looking to circumstantial evidence.⁹⁶ Moreover, federal district courts must begin to operate on the premise that businesses consistently act in their own best interests when instituting price policies.⁹⁷ For example, manufacturers must compete for the business of dealers and will only institute a minimum price policy if it benefits their bottom line.⁹⁸ Courts must use this assumption to infer the purpose of a given vertical price policy, which the producer can then rebut with evidence of a proper or lawful purpose.⁹⁹

B. Implementation of the Rule of Reason: Practical Concerns

The likelihood that vertical minimum price restraints might inundate industry will undoubtedly influence the way businesses interact and will provide courts with an incentive to examine their use more critically.¹⁰⁰ For purposes of this analysis, those employing vertical restraints are referred to as manufacturers or producers, while those subject to them are referred to as dealers or retailers.¹⁰¹ The most commonly cited examples of vertical minimum price restraints employed by dealers are those designed to organize or enhance a retailer-based cartel.¹⁰² Aside from constituting a per se violation of the Sherman Act, these restraints are easily identifiable because they are often accompanied by pressure on a manufacturer to employ a similar vertical minimum price scheme.¹⁰³ On the other hand, in a variety of instances a

96. See *License to Fix*, *supra* note 12, at 114-15 (describing improper dealer actions after *Leegin*). According to Lockerby, a request for minimum resale price maintenance by a dealer, in this case a franchisee, to a producer is indicative of collusion among dealers (per se illegal horizontal integration) and an effort by dealers to manipulate profits. *Id.* at 116. Lockerby also notes that courts must be aware of non-price vertical restraints in lieu of minimum resale price restraints because courts often overlook the improper implications of non-price restraints. *Id.* at 116.

97. See *Leegin*, 127 S. Ct. at 2718-19 (describing manufacturer's preference to institute policies in own best interest).

98. See *id.* at 2719 (describing interbrand competition dynamic). According to the Court, "The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses; interbrand competition reduces its competitiveness and market share because consumers will 'substitute a different brand of the same product.'" *Id.* (quoting *Cont'l T.V.*, 433 U.S. at 52 n.19).

99. Cf. *Leegin*, 127 S. Ct. at 2719-20 (suggesting increased scrutiny necessary where producers have incentive to act unlawfully).

100. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2719 (2007) (recognizing diligence required to prevent unlawful use of vertical price restraints), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

101. See Brief for Economists, *supra* note 19, at 5 (noting upstream seller often manufacturer and reseller usually retailer). As is most often the case, manufacturers employ vertical minimum price restraints to obtain the benefits of increased interbrand competition among their retailers and dealers. *Id.*; see also *supra* notes 96-97 and accompanying text (predicting likely use of vertical minimum price restraints by producers and dealers).

102. See *Leegin*, 127 S. Ct. at 2715-17 (describing common use of vertical price restraints by retailers); see also *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 725 (1988) (examining common use of vertical price restraints by retailer cartels).

103. See Howard P. Marvel & Stephen McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J.L. & ECON. 363, 373-74 (1985) (describing power of retail cartel to compel resale price maintenance by manufacturer). Compelled by the power of the retail cartel, the manufacturer will institute a resale price policy

producer may employ a vertical minimum price scheme without running afoul of the Sherman Act.¹⁰⁴ Courts will undoubtedly encounter these producer-based vertical restraints in the majority of cases, and the preceding analysis is thus limited to such restraints.¹⁰⁵

1. Monopoly Producers

Monopoly-like producers familiar with antitrust regulation are unlikely to employ resale price maintenance schemes designed to exploit their monopoly power for two reasons.¹⁰⁶ First, courts are inherently suspicious of price schemes employed by entities with a large market share because of the abundance of Supreme Court antitrust jurisprudence, including the *Leegin* decision.¹⁰⁷ Second, any scheme designed to exploit monopoly power will undoubtedly set minimum price levels above competitive rates, which is a clear indication of improper intent easily recognized by courts.¹⁰⁸ Consequently, resale price schemes designed with an improper purpose are more notable when employed by monopoly entities.¹⁰⁹ This becomes even more evident after examining non-monopoly producers.¹¹⁰

As a result, the *Leegin* decision is unlikely to prompt an increase in the use of minimum price restraints by monopoly enterprises.¹¹¹ Non-price restraints are just as likely to be used because large-scale producers generally use price restraints to promote product quality, brand name image, and interbrand

to eliminate interbrand competition on the basis of price while increasing the profit margins of inefficient retailers. *Id.*; see also RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 172-73 (2d ed. 2001) (1976).

104. See *Leegin*, 127 S. Ct. at 2715-16 (listing common pro-competitive uses of resale price maintenance by producers). *But see id.* at 2717 (suggesting producer cartel may employ unlawful resale price maintenance scheme); *but see also Leegin*, 127 S. Ct. at 2727-30 (Breyer, J., dissenting) and accompanying text (noting anti-competitive effects of resale price maintenance).

105. See *infra* Parts III.B.1, III.B.2 (analyzing producer use of resale price maintenance in response to *Leegin* holding).

106. See *infra* notes 107-08 (discussing increased awareness of antitrust laws by business leaders).

107. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)) (noting importance of market share in rule of reason analysis), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). According to basic economic theory, a producer with ample market power is able to manipulate demand while maintaining artificially high price levels because they are able to control market supply. See *Magoo*, *supra* note 4, at 1313; *cf. Buyer Power*, *supra* note 4, at 589 (describing consumer-based monopoly designed to lower prices as opposite of producer-based monopoly).

108. *Cf. Brief in Opposition*, *supra* note 79, at 21-22 (suggesting higher prices ultimate consequence of resale price maintenance). Higher prices can be accomplished directly by entities with large market share or as an anti-competitive consequence of price fixing by a producer subject to interbrand competition. *Id.* at 8.

109. See *Leegin*, 127 S. Ct. at 2712 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)) (stressing importance of market share to rule of reason analysis); see also *License to Fix*, *supra* note 12, at 114 (describing common use of resale price maintenance by monopoly corporations).

110. See *infra* Part III.B.2 (discussing impact of *Leegin* decision on non-monopoly producers).

111. See *infra* Part III.B.1 (discussing *Leegin*'s impact on monopoly producers).

competition on a basis other than price.¹¹² In fact, many economic scholars and jurists maintain price and non-price restraints deserve similar treatment under the antitrust laws because they have similar overall economic impact.¹¹³

2. *Non-Monopoly Producers*

The unlawful use of resale price maintenance schemes by non-monopoly producers does not provide the same precursors as the use of similar restraints by large-scale producers.¹¹⁴ These producers do not exhibit dominant market power, and courts thus must look elsewhere to infer the reasonableness of their restraints.¹¹⁵ Determining intent absent excessive market share, however, may prove ambiguous and largely indeterminate in court.¹¹⁶ As described previously, there are several potential uses for resale price maintenance by producers regardless of market share or the ability to control supply and manipulate price.¹¹⁷ More importantly, the federal courts' analyses of both price and non-price restraints demonstrate that factors aside from market share

112. See Brief for Economists, *supra* note 19, at 3-4 (noting price and non-price restraints "substantially identical in effect"); see also *Leegin*, 127 S. Ct. at 2715-17 (highlighting use of resale price maintenance to diminish free riding). All retailers subject to producer-mandated prices are unable to discount so they must compete for business on a basis other than price, such as promotional efforts or other tangible services. *Id.*

113. See Brief for Economists, *supra* note 19, at 3-4 (indicating similar economic impact of vertical price and non-price restraints). Although the amici argue that the restraints are identical in effect and should receive similar treatment under the Sherman Act, this premise may easily be used to argue adherence to *stare decisis*. *Id.* Producers can merely employ a non-price restraint to obtain the same result as resale price maintenance. *Id.* at 3-4.

114. See *supra* note 73 and accompanying text (outlining potential pro-competitive uses of resale price maintenance); see also *supra* note 91 and accompanying text (describing anti-competitive uses of resale price maintenance). Generally, non-monopoly producers cannot manipulate prices beyond competitive levels because they must compete for the business of dealers. See Brief for Economists, *supra* note 19, at 3. Thus, if a manufacturer sells goods at a non-competitive price, dealers will look to alternate dealers for similar goods at a lower price. *Id.*

115. See Brief for Economists, *supra* note 19, at 3 (describing incentive for non-monopoly producers to maintain lower prices). Not only must non-monopoly producers compete with dealers on the basis of price, but their incentive is to maintain competitive prices amongst dealers that will encourage buyers to purchase their goods. *Id.* Price is not typically indicative of unlawful intent by non-monopoly producers because of this natural mechanism and because producers generally act in their own best interest. *Id.* Aside from market share and price, the Supreme Court has not expressly identified which factors the rule of reason requires to establish intent. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Instead, the Court states, "Appropriate factors to take into account include 'specific information about the relevant business' and 'the restraint's history, nature, and effect.'" See *id.* (quoting *Khan v. State Oil*, 522 U.S. 3, 10 (1997)).

116. See *Leegin*, 127 S. Ct. at 2712 (noting relevant factors defining rule of reason). The "history, nature and effect" of resale price maintenance schemes is admittedly ambiguous and unrevealing according to both economic literature and Supreme Court commentary. See *supra* note 75 and accompanying text (reviewing district court's application of per se rule due to uncertain impact of price maintenance). Compare Brief for Economists, *supra* note 19, at 4-16 (advocating rule of reason because of potential pro-competitive effect of resale price maintenance), with Brief in Opposition, *supra* note 79, at 15-20 (arguing resale price maintenance inhibits competition and trade).

117. See *supra* text accompanying note 105 (assessing pro-competitive and anti-competitive incentives for resale price maintenance).

and ability to manipulate price do not effectively indicate intent.¹¹⁸ As a result, courts are faced with a difficult, if not fundamentally flawed, approach to enforcing Sherman Act violations.¹¹⁹

III. CONCLUSION

The Sherman Act is the most important and influential mainstay in antitrust law. As a common-law statute, the Act continues to evolve in light of shifting economic notions and enhanced economic analysis. The United States Supreme Court continues to define precisely what conduct the Act prohibits in light of the vague language employed in Section I. Perhaps not surprisingly, these interpretations have changed significantly over time, particularly in regard to vertical price and non-price restraints.

The Court deemed many restraints per se unlawful early in the Act's enforcement, and the rule of reason governed few restraints. In addition to consistent application to horizontal agreements, the Supreme Court first applied the per se rule to resale price maintenance schemes in *Dr. Miles Medical Co. v. John. D. Park & Sons Co.* in 1911. Subsequent courts extended the *Dr. Miles* rule to both price and non-price vertical restraints, leading ultimately to the Supreme Court's expansion of the per se rule. Beginning in the late twentieth century, however, the per se rule gave way to the rule of reason as courts questioned whether certain restraints were consistently anti-competitive in nature.

Although the Court previously departed from the per se rule in other cases, its most significant departure occurred in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* in 2007. The *Leegin* decision limited the per se approach to horizontal price restraints in addition to overruling long-standing antitrust law precedent. The *Leegin* decision simultaneously created a more liberal application of the rule of reason by recognizing the pro-competitive benefits of vertical price restraints once disregarded by the Court. The implications of this holding, although not yet fully understood, will be significant for both producers and dealers.

The rule of reason standard might prove difficult in its application to retail price maintenance schemes, particularly where the entity employing the restraint does not exhibit large market share or the ability to manipulate price. Accurately determining the precise economic implications of a given retail price maintenance scheme is a challenge for any court. Not only are courts ill-equipped to separate economic fact from fiction, but the nature of retail price maintenance requires extensive case-by-case analysis that federal courts are

118. See *supra* text accompanying note 105 (evidencing multiple arguments applicable to resale price maintenance schemes).

119. See *supra* Part III.B (discussing difficulty of applying rule of reason to resale price maintenance schemes).

admittedly reluctant to conduct. Furthermore, market share serves as one of the key pieces of circumstantial evidence indicative of improper intent and is not present where small-scale market players employ restraints. In sum, application of the rule of reason to vertical minimum price restraints employed by producers without notable market share presents a fundamentally flawed task for lower federal courts.

There is strong argument, therefore, to suggest that vertical minimum price restraints continue to constitute a per se violation of the Sherman Act. Although resale price maintenance does not necessarily exhibit manifestly anti-competitive effects as the Supreme Court suggests are required for per se violations, the mere possibility of pro-competitive effects may prove insufficient to warrant use of the rule of reason. Furthermore, other price and non-price restraints already assessed under the rule of reason may be used to achieve the same results as vertical minimum price restraints. The Court could have avoided potential confusion by maintaining the status quo and applying a bright-line test of per se illegality.

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