

Overruling a Nearly Century-Old Precedent: Why *Leegin* Got It Right

Julie M. Olszewski*

ABSTRACT: The Supreme Court's 1911 decision in Dr. Miles Medical Co. v. John D. Park & Sons Co. established the per se illegal standard for minimum resale price maintenance. In 2007, the Roberts Court changed the standard with its decision in Leegin Creative Leather Products, Inc. v. PSKS, Inc., replacing per se illegality with the rule of reason for minimum price restraints. This decision overruled a ninety-six-year-old precedent, and not surprisingly, some commentators have lauded this decision while others have denounced it. This Note argues that the rule of reason adopted by the Court in Leegin is the appropriate standard for minimum price restraints.

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* J.D. Candidate, The University of Iowa College of Law, 2009; B.B.A., Western Michigan University, 2001. I thank Professor Herb Hovenkamp, Scott Mendel, and Michael Lockerby for sharing their time and thoughts on the *Leegin* decision. I am grateful to the editors and writers of Volumes 93 and 94 of the *Iowa Law Review* for all of their editorial assistance. Finally, I am most grateful to my family and friends for their unending support.

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I. INTRODUCTION

The Roberts Court made its mark on the law of minimum resale price maintenance (“RPM”) in 2007 with its five–four decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹ In one landmark decision, the Court overturned ninety-six years of precedent that had condemned minimum price restraints to per se illegal status. The *Leegin* decision declared that courts should no longer judge minimum price restraints under a per se illegal standard, but instead should judge them under the typical standard for antitrust lawsuits—the rule of reason.² As one would expect in any case overturning century-old precedent, the reactions to the decision ranged across the entire spectrum of possibilities.³

This Note discusses the impact of the *Leegin* decision on the law of resale price maintenance. Part II reviews the history of minimum price restraints. Part III elaborates on this Note’s position that the Court correctly decided *Leegin* and has led the law of minimum price restraints to a standard that will prove beneficial for consumers and manufacturers. Part IV examines some practicalities associated with applying the rule of reason to minimum price restraints. Finally, Part V concludes that *Leegin* enables both thorough legal analysis of the procompetitive benefits associated with resale price maintenance and the realization of those benefits by consumers and manufacturers alike.

1. See generally *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and establishing that minimum resale price maintenance should be judged under the rule of reason).

2. *Id.* at 2710.

3. Some believe that the law for minimum price restraints in the last ninety-six years was correct and that *Leegin* represents an inappropriate departure from well-settled law. Others believe that the per se rule needed to change and that the *Leegin* decision was long overdue. Compare Press Release, Senator Herb Kohl, Kohl Introduces ‘Discount Pricing Consumer Protection Act,’ (Oct. 30, 2007), available at <http://www.senate.gov/~kohl/press/07/09/2007A30814.html> [hereinafter Kohl Press Release] (quoting Senator Kohl’s statement that the proposed law “will correct the Supreme Court’s abrupt change to antitrust law, and will ensure that today’s vibrant competitive retail marketplace and the savings gained by American consumers from discounting will not be jeopardized”), with Douglas R. Cole & J. Bruce McDonald, *Dr. Miles Receives Its Coup de Grace*, JONES DAY COMMENT., July 2007, at 1, <http://www.jonesday.com/files/Publication/00d3f345-311d-4b90-b0b8-8f27a386f77e/Presentation/PublicationAttachment/4fa828b3-0558-42af-ade5-90a2baa7586a/Dr%20Miles.pdf> (“Finally! *Dr. Miles* is dead! Perhaps not quite as important as the demise of the Wicked Witch of the West in *The Wizard of Oz*, but still a pretty significant fatality in the antitrust world.”).

II. HISTORY OF MINIMUM PRICE RESTRAINTS

A. THE SHERMAN ACT AND EARLY JUDICIAL INTERPRETATIONS

Congress passed the Sherman Act in 1890, providing in § 1 that “[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, is declared to be illegal.”⁴ Modern jurisprudence interprets the statute to prohibit only those contracts that unreasonably restrain trade because every contract, to a certain extent, restrains trade.⁵ One restraint the Sherman Act addresses is the establishment of minimum resale prices between manufacturers and distributors.⁶ Antitrust literature often refers to this restraint as minimum price fixing, minimum price restraints, minimum resale price maintenance, or RPM.⁷

In 1908, the Supreme Court had an opportunity to apply the Act to minimum price restraints in *Bobbs-Merrill Co. v. Straus*.⁸ *Bobbs-Merrill* involved a copyright owner who sold his book containing not only a standard copyright notice printed inside the book, but also a clause that purported to set a minimum resale price for future sales of the book.⁹ The copyright owner sought to enforce the minimum resale price against a retailer that sold the book at a lower price.¹⁰ In doing so, the copyright owner relied heavily on a copyright theory that borrowed extensively from patent law.¹¹ The Supreme Court decided against the copyright owner and held that a copyright does not grant the owner the right to limit future sales of a copyrighted work after it is sold by the owner.¹² While the decision laid some foundational work in copyright law, it did not shed light on the interpretation of the still relatively new antitrust statute.

4. 15 U.S.C. § 1 (2000).

5. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed . . . promotes competition or whether it . . . may suppress or even destroy competition.”); *see also Leegin*, 127 S. Ct. at 2712 (“[T]he Court has repeated time and again that § 1 ‘outlaw[s] only unreasonable restraints.’” (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997))).

6. 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1600(b) (2004) (“The classic intrabrand restriction is an agreement between a manufacturer and a dealer setting the dealer’s minimum resale price.”).

7. *See id.* (describing this “classic intrabrand restriction” as “vertical ‘price fixing’” and “minimum resale price maintenance”).

8. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

9. *Id.* at 341 (“The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.” (quoting the notice at issue)).

10. *Id.* at 342.

11. *Id.* at 350.

12. *Id.*

1. *Dr. Miles's* Per Se Illegal Standard for Minimum Price Restraints

In 1911, the Supreme Court decided *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,¹³ establishing a precedent that would last for nearly a century.¹⁴ Dr. Miles Medical Company (“Dr. Miles”) developed and manufactured medicines.¹⁵ The company had contracts with both wholesalers and retailers that purported to establish minimum resale prices.¹⁶ Dr. Miles asserted two grounds for the validity of these contracts.¹⁷ The first argument was that trade-secret holders should have similar rights as patent holders to control the distribution of products.¹⁸ The Court found no such parallel statutory right for trade secrets.¹⁹ The second argument addressed the right of a manufacturer to control the sales of its products.²⁰ The Court again found no such right and condemned Dr. Miles’s contracts that established minimum resale prices because they “create[d] a combination for . . . prohibited purposes.”²¹ Over time, courts have interpreted *Dr. Miles* as the authority for per se illegal treatment of minimum price restraints.²²

2. The *Colgate* Doctrine: An Exception to the Per Se Illegal Standard for Minimum Price Restraints

Less than ten years later, in 1918, the Court handed down *United States v. Colgate*,²³ a case that seemed to pull back on the position taken in *Dr. Miles*. In *Colgate*, the Court held that a manufacturer has the right to do

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

14. *See Leegin*, 127 S. Ct. at 2710 (overruling *Dr. Miles* and establishing that a court should judge minimum resale price maintenance under the rule of reason).

15. *Dr. Miles Med. Co.*, 220 U.S. at 394.

16. *Id.*

17. *Id.* at 400.

18. *Id.* at 403–04. Since the Court had not yet spoken on the validity of minimum resale prices under the Sherman Act and had decided *Bobbs-Merrill* on copyright grounds, *see Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908), it should not be surprising that Dr. Miles partially based its argument on another form of intellectual property—trade secret.

19. *Dr. Miles Med. Co.*, 220 U.S. at 403–04.

20. *Id.* at 404.

21. *Id.* at 408. To reach this conclusion, the Court examined restraints on alienation and the effects of such contracts on the public. Regarding restraints on alienation, the Court explained that “restraint[s] in the alienation of articles, things, chattels . . . have been generally held void,” and concluded that “the manufacturer [cannot] . . . fix prices for future sales.” *Id.* at 404–05 (quoting *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 42 (6th Cir. 1907)). The Court also described agreements that fix prices as “injurious to the public interest and void.” *Id.* at 408.

22. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2713 (2007) (explaining that the Court has interpreted *Dr. Miles* “as establishing a *per se* rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices”).

23. *See generally* *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (establishing the *Colgate* doctrine).

business with those that it sees fit and the right to “announce in advance the circumstances under which he will refuse to sell.”²⁴ Instead of finding such behavior per se illegal, *Colgate* established that a manufacturer may take *unilateral* action in establishing a minimum resale price and may cease selling its products to a retailer that sells below that minimum price.²⁵ The Court further illuminated the distinction between *Colgate* and *Dr. Miles* in a case two years later after a lower court had incorrectly interpreted *Colgate*:

We had no intention [in *Colgate*] to overrule or modify the doctrine of [*Dr. Miles*.] It seems unnecessary to dwell upon the obvious difference In [*Colgate*,] the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In [*Dr. Miles*,] the parties are combined through agreements designed to . . . destroy competition and restrain the free and natural flow of trade amongst the states.²⁶

Colgate carved out a path for manufacturers to achieve legally the benefits of a minimum RPM program through unilateral action. Unilateral action can include setting a minimum resale price, which is legal unless the manufacturer and distributor agree to the condition.²⁷ The progeny of *Colgate* focused on how courts could distinguish between unilateral action and an agreement. Within five years of *Colgate*, the Court explained that courts could imply such an agreement based on the parties’ actions or by mere cooperation between them.²⁸ Approximately twenty years later, courts could find such an agreement by drawing inferences from a manufacturer’s actions taken to secure adherence to minimum prices if those actions went beyond just stopping sales to a retailer.²⁹ In recent history, the Court addressed the doctrine again, requiring direct or circumstantial evidence—

24. *Id.* at 307.

25. *Id.*; see also *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) (interpreting *Colgate* to mean that “the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply”).

26. *United States v. A. Schrader’s Son, Inc.*, 252 U.S. 85, 99 (1920). The Court also explained that in *Colgate* it was bound to adopt the lower court’s interpretation of the indictment against the manufacturer. *Id.* That indictment had not charged the manufacturer with making either express or implied contracts that would have required its retailers to abide by minimum price restraints. *Id.*

27. *Id.* (“[T]he manufacturer. . . exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser.”).

28. See *United States v. Parke, Davis & Co.*, 362 U.S. 29, 39–42 (1960) (citing *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208, 210 (1921); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 455 (1922)) (describing the evolution of case law on how courts can find agreements between a manufacturer and a retailer).

29. *Id.* at 42–44 (citing *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723–24 (1944)).

“something more”—to show that there was an agreement and that the manufacturer’s actions were not merely unilateral.³⁰

The legal framework of the *Colgate* doctrine has persevered for almost ninety years. Manufacturers have retained the right to choose with whom they will do business and under what conditions, including the establishment of a minimum price, so long as courts cannot infer an implied agreement between the manufacturer and the retailer. This has provided manufacturers with a workable—albeit cumbersome and risky—alternative to explicit minimum RPM agreements. Although the Court altered the treatment of other forms of vertical restraints over the next thirty years,³¹ its treatment of minimum RPM as per se illegal—notwithstanding the *Colgate* doctrine—remained static, until *Leegin*’s reinvention of RPM jurisprudence in 2007.

B. INITIAL CONGRESSIONAL INTERPRETATIONS AFFECTING
RESALE PRICE MAINTENANCE

Congress made its first mark on the evolution of RPM in 1937 with the Miller-Tydings Fair Trade Act.³² It allowed states to opt out of the *Dr. Miles* rule of per se illegality for minimum RPM by enacting their own fair-trade laws.³³ Those states that passed fair-trade laws made minimum RPM legal.³⁴ Those that did not pass such laws held manufacturers subject to the existing *Dr. Miles* rule of per se illegality.³⁵

In 1952, Congress passed the McGuire Act to complement the Miller-Tydings Fair Trade Act.³⁶ This allowed courts to enforce RPM agreements against retailers that were not a party to the agreement.³⁷ Over the life of these Acts, thirty-six states took advantage of the opportunity and legalized minimum RPM.³⁸ Resale prices in those states rose by at least nineteen percent.³⁹ However, this ended when Congress repealed both Acts in 1975

30. *Monsanto Co.*, 465 U.S. at 764.

31. See *infra* Part II.D (describing the Court’s treatment of other vertical restraints).

32. Miller-Tydings Fair Trade Act, Ch. 690, 50 Stat. 693 (1937); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2723 (2007) (describing Congress’s role in the Miller-Tydings Fair Trade Act).

33. See *Leegin*, 127 S. Ct. at 2727 (Breyer, J., dissenting) (indicating that states could pass a fair-trade law “authorizing minimum resale price maintenance”).

34. *Id.*

35. *Id.* (stating that thirty-six states legalized minimum RPM through fair-trade laws and that it remained illegal in the remaining fourteen states).

36. McGuire Act, Ch. 745, 66 Stat. 632 (1952); see also *Leegin*, 127 S. Ct. at 2723 (describing Congress’s role with the McGuire Act).

37. *Leegin*, 127 S. Ct. at 2723.

38. *Id.* at 2727 (Breyer, J., dissenting).

39. *Id.* at 2728. But see *infra* text accompanying notes 141–42 (discussing the difference between per se legal and rule-of-reason treatment of RPM).

with the passage of the Consumer Goods Pricing Act.⁴⁰ Although some have argued that this action indicates congressional intent to establish per se illegality for minimum RPM,⁴¹ others point out that the Consumer Goods Pricing Act merely repealed the legality of RPM and did not codify per se illegality.⁴²

Congress made clear its position on the issue in the mid-1980s when it passed the Baxter Amendment, an appropriations rider that prevented the use of federal funds to advocate for the overruling of *Dr. Miles*.⁴³ The rider was a response to the Antitrust Division's position, often articulated in amicus briefs, that the Court should overrule the *Dr. Miles* per se standard.⁴⁴ Although the constitutional validity of the Baxter Amendment is questionable given separation-of-powers concerns,⁴⁵ it provides a clear view of Congress's position at that time.

C. OVERRULING A NEARLY CENTURY-OLD PRECEDENT:
LEEGIN CREATIVE LEATHER PRODUCTS, INC. V. PSKS, INC.

The Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* overturned ninety-six years of per se illegal status for minimum resale-price restraints by announcing that courts should judge such restraints under the rule of reason.⁴⁶ Leegin, the defendant, manufactured women's fashion products including purses and belts under the brand name "Brighton."⁴⁷ The plaintiff, PSKS, owned and operated Kay's Kloset, an establishment in Lewisville, Texas that sold Brighton products.⁴⁸ Kay's Kloset was a "destination retailer" of Brighton products.⁴⁹ In 1997, Leegin developed a

40. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975); see also *Leegin*, 127 S. Ct. at 2723–24 (describing Congress's role with the Consumer Goods Pricing Act).

41. See *Leegin*, 127 S. Ct. at 2723 (indicating that PSKS had argued that the Consumer Goods Pricing Act had ratified per se illegality).

42. *Id.* at 2724 ("[T]he Consumer Goods Pricing Act did not codify the rule of per se illegality for vertical price restraints. It rescinded statutory provisions that made them per se legal.").

43. See Jennifer Mason McAward, *Congress's Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. 1319, 1340 (2008) (describing the Antitrust Division's desire for the Court to overrule *Dr. Miles* and Congress's resulting reaction in the Baxter Amendment, which prevented the Division from advocating for that position).

44. *Id.*

45. *Id.* at 1340–41 ("[T]he Baxter Amendment arguably ran afoul of the principle of separation of powers . . . [However] the constitutionality of the Baxter Amendment was never litigated or tested.").

46. *Leegin*, 127 S. Ct. at 2710 ("We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason.").

47. *Id.*

48. *Id.* at 2711.

49. *Id.* Kay's Kloset gained this classification because Brighton was the store's most important brand and, at one time, Brighton products had represented forty to fifty percent of the store's profits. *Id.*

“Brighton Retail Pricing and Promotion Policy” that announced the manufacturer’s intent to stop selling to retailers that sold products below Leegin’s suggested retail prices.⁵⁰ Leegin justified its policy on multiple grounds: (1) to provide retailers with sufficient margins; (2) to provide customers with sufficient customer service; and (3) to prevent harm to the Brighton brand that could otherwise occur through price discounts.⁵¹

In 1998, Leegin created the “Heart Store Program” for its retailers, under which Leegin required retailers seeking status as a Heart Store to agree to sell the products at Leegin’s suggested prices.⁵² Kay’s Kloset had been a Heart Store for less than one year when Leegin determined that the store was not attractive enough to maintain its status as a Heart Store.⁵³

In 2002, Leegin learned that Kay’s Kloset had been selling Brighton products at prices twenty percent below Leegin’s suggested prices.⁵⁴ Leegin contacted Kay’s Kloset regarding this practice, but Kay’s Kloset refused to cease its discounting practice.⁵⁵ As a result of this refusal, Leegin stopped selling its products to Kay’s Kloset.⁵⁶

PSKS, the owner and operator of Kay’s Kloset, filed an antitrust suit in federal court alleging that Leegin had created agreements to fix prices with its retailers in violation of the Sherman Act.⁵⁷ At trial, after the exclusion of Leegin’s expert who would have testified to the procompetitive benefits of its pricing policy, Leegin defended itself by claiming that it took unilateral actions that *Colgate* and its progeny allowed.⁵⁸ The jury sided with the retailer, however, and awarded \$1.2 million in damages; the court trebled the damages, added attorney’s fees and costs, and entered judgment totaling \$3.975 million against Leegin.⁵⁹ On appeal, Leegin argued that the trial court should have judged the RPM agreement under the rule of reason, but the Fifth Circuit affirmed the trial court’s judgment.⁶⁰ The Supreme Court then granted certiorari to determine whether the long-standing rule of per se illegality for minimum RPM should continue.⁶¹

50. *Id.* Leegin’s policy stated its desire to “break away from the pack” by using specialty stores as retailers “that can offer the customer great quality merchandise, superb service, and support the Brighton product 365 days a year on a consistent basis.” *Id.*

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

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

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

57. *Id.* at 2711–12 (stating that the complaint alleged that “Leegin had violated the antitrust laws by ‘enter[ing] into agreements with retailers to charge only those prices fixed by Leegin”).

58. *Id.* at 2712.

59. *Id.*

60. *Id.*

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

The Supreme Court's decision in *Leegin* detailed multiple justifications for overturning the *Dr. Miles* rule of per se illegality for minimum RPM. First, the Court explained that the "rule of reason is the accepted standard"⁶² for antitrust violations under the Sherman Act, and that the Court reserves per se illegal treatment for those restraints "that would always or almost always tend to restrict competition and decrease output."⁶³ In that vein, the Court reviewed the reasons cited in *Dr. Miles* and concluded that those justifications did not, and never had, supported a per se illegal rule.⁶⁴

Second, the Court reviewed the procompetitive economic justifications for minimum RPM.⁶⁵ Broadly categorized, the procompetitive effects include (1) decreased intrabrand price competition between retailers of the same manufacturer; (2) increased interbrand competition between retailers of competing manufacturers; and (3) elimination of free-riding retailers that steal sales and cause retailers to provide consumers with an inefficient level of services.⁶⁶ Since minimum RPM removes price competition between intrabrand retailers, the first procompetitive effect provides incentives for those retailers to compete against each other and other brands by providing consumers with desired value-added services.⁶⁷ The second procompetitive effect aids market entry of new retailers due to the manufacturer's ability to guarantee margins to retailers through RPM.⁶⁸ Interbrand competition may also increase through a manufacturer's RPM agreement requiring retailers to provide certain services to consumers beyond those that the retailer may choose to provide on its own.⁶⁹ The third procompetitive effect helps keep service-oriented retailers from having to decrease those services by ensuring they do not lose sales to discounting competitors that undercut prices because of lower overhead costs.⁷⁰

62. *Id.*

63. *Id.* at 2713 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

64. *Id.* at 2714. The Court further explained its concern over the justifications set out in the *Dr. Miles* decision: "[t]he Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance." *Id.*

65. *See id.* at 2714–16 (describing the economic arguments behind the procompetitive effects of resale price maintenance).

66. *Leegin*, 127 S. Ct. at 2714–16.

67. *See id.* at 2715 (describing how the elimination of intrabrand competition leads to retailers providing "tangible or intangible services or promotional efforts").

68. *See id.* at 2716 (explaining that manufacturers can set minimum prices "to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required").

69. *See id.* (explaining that RPM agreements that require retailers to provide certain services "may be the most efficient way to expand the manufacturer's market share").

70. *See id.* at 2715–16 (describing how retailers that discount a product's price "can free ride on retailers who furnish services and then capture some of the increased demand those services generate," forcing the service-providing retailer to limit the services it provides to a level lower than that which consumers would prefer).

The Court also acknowledged the alleged anticompetitive economic effects that condemn the use of minimum RPM. First, a manufacturer cartel could monopolize profits or a retailer cartel could force a manufacturer to set a minimum resale price to drive prices upwards.⁷¹ Second, a dominant retailer may force a manufacturer into fixing minimum prices to prevent innovation and preserve inefficient business practices.⁷² Likewise, a dominant manufacturer may seek to preserve inefficient business practices by persuading retailers not to sell rival products.⁷³

The Court's third reason for overruling *Dr. Miles* involved the rebuttal of a number of arguments that the Court had previously used in support of the *per se* rule of illegality. First, the Court pointed out that, although minimum RPM can involve anticompetitive effects, those effects did not motivate recent uses of minimum RPM.⁷⁴ Next, the Court explained that despite the seemingly efficient nature of *per se* rules, they can be "counterproductive . . . by prohibiting procompetitive conduct [that] the antitrust laws should encourage."⁷⁵ The Court also pointed out that higher prices do not always indicate anticompetitive conduct and that RPM could actually decrease prices "if manufacturers have resorted to costlier alternatives of controlling resale prices that are not *per se* unlawful."⁷⁶ Additionally, a manufacturer's interests concerning its retailers' profits are in line with consumers' interests since the manufacturer—and not the retailer—would lose sales if the retailers' profit margins were excessive.⁷⁷ Finally, antitrust laws do not condemn manufacturers' actions simply because they may result in increased prices to consumers.⁷⁸

The Court then addressed *stare decisis*, arguing that it was not a reason to reaffirm *Dr. Miles*.⁷⁹ The case required application of the Sherman Act, which "the Court has treated . . . as a common-law statute."⁸⁰ The Court reasoned that the application of common-law statutes should evolve over time.⁸¹ Additionally, over the course of ninety-six years, economic literature

71. *Leegin*, 127 S. Ct. at 2716–17.

72. *Id.* at 2717.

73. *Id.*

74. *See id.* (explaining that anticompetitive effects did not motivate the use of minimum resale prices in most of the cases pursued by the FTC between 1965 and 1982).

75. *Id.* at 2718.

76. *Leegin*, 127 S. Ct. at 2718.

77. *Id.* at 2718–19 ("A manufacturer has no incentive to overcompensate retailers with unjustified margins.")

78. *Id.* at 2719 (reasoning that because a manufacturer has free reign to purchase higher-quality supplies that would drive prices upward without violating antitrust laws, a manufacturer's decisions regarding resale price maintenance should be treated the same way).

79. *Id.* at 2720 ("*Stare decisis* is not as significant in this case, however, because the issue before us is the scope of the Sherman Act.")

80. *Id.*

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

had called *Dr. Miles* “into serious question,”⁸² as had the Court’s jurisprudence, which chipped away at the decision by providing manufacturers with inefficient workarounds to RPM.⁸³ The Court also overruled per se rules for vertical nonprice restraints and maximum RPM.⁸⁴ The Court did not see *stare decisis* as a reason to uphold *Dr. Miles*, which had created inefficiencies and had become outdated and undermined.

Finally, the Court addressed two remaining concerns. First, to the argument that congressional intent demanded that the per se rule remain, the Court pointed out that when Congress repealed the Miller-Tydings Fair Trade Act and the McGuire Act, it merely repealed the per se *legal* rule rather than codifying the standard as per se *illegal*.⁸⁵ Second, reliance interests could not justify keeping the per se illegal rule, “especially because the narrowness of the rule has allowed manufacturers to set minimum resale prices in other ways.”⁸⁶ In the end, *Leegin* replaced the per se illegal rule with the rule of reason for minimum RPM.⁸⁷

D. THE COURT’S ADOPTION OF THE RULE OF REASON FOR
OTHER VERTICAL RESTRAINTS

Despite the fact that *Leegin* overruled a ninety-six-year-old precedent, the Court’s adoption of the rule of reason as the standard for minimum RPM is not surprising—the Court had adopted the rule of reason for other vertical restraints, foreshadowing this decision. Rule of reason is the standard governing most antitrust lawsuits.⁸⁸ However, the Court has adopted per se illegal rules for restraints “that would always or almost always tend to restrict competition and decrease output.”⁸⁹ Notably, in the last thirty years, the Court has replaced the per se illegal standard with the rule of reason⁹⁰ for two other forms of vertical restraints: (1) nonprice restraints, and (2) maximum RPM.

82. *Id.* at 2721 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997)).

83. *Id.* at 2721–23 (referring to the *Colgate* doctrine and its inefficiency for manufacturers).

84. *Id.* at 2721–22 (referring to the Court’s overruling of per se illegal rules for maximum vertical price restraints and vertical nonprice restraints).

85. *Id.* at 2724 (explaining that Congress “did not codify the rule of *per se* illegality It rescinded statutory provisions that made them *per se* legal”).

86. *Leegin*, 127 S. Ct. at 2724–25.

87. *Id.* at 2725.

88. *Id.* at 2712 (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.”).

89. *Id.* at 2713 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

90. *See Cole & McDonald*, *supra* note 3, at 1 (“During these last three decades, antitrust jurisprudence has seen a steady march away from analysis by anecdote and slogans to more detailed fact-based efforts to discern the actual effects of a challenged practice, often through sophisticated economic analysis.”).

In 1967, the Court adopted a *per se* rule of illegality for nonprice restraints, which includes a corporation's imposition of exclusive territories or franchise agreements to sell only from specific stores.⁹¹ In *United States v. Arnold, Schwinn & Co.*,⁹² the Court departed from its then-recent refusal⁹³ to declare nonprice restraints *per se* illegal by doing just that.⁹⁴ Only ten years later, in *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court expressly overruled that proclamation of *per se* illegality because of the case's "continuing controversy and confusion."⁹⁵ The Court concluded that the rule of reason was the appropriate standard for nonprice restraints.⁹⁶

In 1968, the Court adopted a *per se* illegal rule for maximum RPM.⁹⁷ The case, *Albrecht v. Herald Co.*, involved a newspaper that provided exclusive territories to its carriers as long as they did not charge customers more than the maximum retail price for the paper.⁹⁸ The Court concluded that "forc[ing the carrier] to maintain a specified price for the resale of the newspapers which he had purchased . . . constituted . . . an illegal restraint of trade."⁹⁹ In its 1997 decision, *State Oil Co. v. Khan*,¹⁰⁰ the Court expressly overruled *Albrecht* and held that the rule of reason is the appropriate standard for maximum RPM.¹⁰¹ In its decision, the Court reviewed its vertical-restraint jurisprudence and concluded that "it [is] difficult to maintain that vertically imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation."¹⁰²

E. CONGRESS'S RECENT ATTEMPT TO REINSTATE PER SE ILLEGALITY
FOR MINIMUM PRICE RESTRAINTS

Despite the Court's actions regarding other vertical restraints and the continued existence of the *Colgate* doctrine, not everyone welcomed the demise of *Dr. Miles*. In anticipation of the Court's consideration of *Leegin*, Pamela Jones Harbour, a Federal Trade Commissioner, wrote an open letter

91. See generally *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (adopting a *per se* rule of illegality for nonprice restraints), overruled by *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 (1977).

92. *Id.*

93. See *White Motor Co. v. United States*, 372 U.S. 253, 263–64 (1963) (declining to find nonprice restraints *per se* illegal).

94. *Arnold, Schwinn & Co.*, 388 U.S. at 382 ("Once the manufacturer has parted with title [to the goods] . . . his effort . . . to restrict territory [of his retailer] is a *per se* violation . . .").

95. *Cont'l T.V., Inc.*, 433 U.S. at 47.

96. *Id.* at 59.

97. *Albrecht v. Herald Co.*, 390 U.S. 145, 152–53 (1968), overruled by *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

98. *Id.* at 147.

99. *Id.* at 153.

100. *State Oil Co.*, 522 U.S. at 3.

101. *Id.* at 22.

102. *Id.* at 4.

to the Court sharing her personal view that *Dr. Miles* should not be overruled,¹⁰³ which was contrary to the FTC's official position in the case. Only one month after the Court's decision, Commissioner Harbour again shared her personal view—this time at a meeting of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights—that the Senate should introduce legislation to challenge *Leegin*.¹⁰⁴ The Commissioner feared that the decision would raise retail prices.¹⁰⁵ In response, Senator Kohl¹⁰⁶ introduced the Discount Pricing Consumer Protection Act on October 30, 2007—nearly four months to the day after the Court handed down the *Leegin* decision.¹⁰⁷ The proposed bill, co-sponsored by Senator Joe Biden¹⁰⁸ and Senator Hillary Clinton,¹⁰⁹ proposes codification of *Dr. Miles*'s per se rule for minimum price restraints.¹¹⁰ The introduction of the Discount Pricing Consumer Protection Act is just another indication of the level of disagreement over which legal standard should apply to minimum price restraints.

103. Letter from Pamela Jones Harbour, Fed. Trade Comm'r, to the Supreme Court of the United States 1 (Feb. 26, 2007), available at <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf> ("A decision by this Court to overrule *Dr. Miles Medical Co.* would wrongly eliminate *per se* illegality for vertical minimum price fixing.").

104. See Pamela Jones Harbour, Fed. Trade Comm'r, Testimony Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights Senate Judiciary Committee 1 (July 31, 2007), available at <http://www.ftc.gov/speeches/harbour/070731test.pdf> [hereinafter Jones Harbour Testimony] (describing the views in her address to the subcommittee as "entirely [her] own"); see also Jen Haberkorn, *Law Urged Against Price Floors—Trade Commissioner Calls Court Ruling a Hit to Discount Retailers*, WASH. TIMES, Aug. 1, 2007, at C09 (describing Jones Harbour's argument that *Leegin* would raise retail prices).

105. Haberkorn, *supra* note 104, at C09 (explaining that the Commissioner "argued that the *Leegin* ruling would raise retail prices because it allows manufacturers to force discounters . . . to raise prices"). The Commissioner argued that "subject[ing] all American consumers to higher prices . . . is virtually certain to be the outcome of *Leegin*" if Congress did not act. Jones Harbour Testimony, *supra* note 104, at 6; see also *infra* text accompanying notes 130–44.

106. Senator Herb Kohl is a Democrat representing Wisconsin in the U.S. Senate. See generally U.S. Senator Herb Kohl, Wisconsin, <http://kohl.senate.gov> (last visited Sept. 25, 2008).

107. Kohl Press Release, *supra* note 3.

108. Senator Joe Biden has been a Democrat representing Delaware in the U.S. Senate and at present is the Vice President-elect of the United States. See generally U.S. Senator Joseph R. Biden, Jr., Delaware, <http://biden.senate.gov> (last visited Sept. 25, 2008).

109. Senator Hillary Clinton is a Democrat representing New York in the U.S. Senate. See generally U.S. Senator Hillary Rodham Clinton, New York, <http://clinton.senate.gov> (last visited Sept. 25, 2008).

110. Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. § 3 (2007). The Act proposes the addition of the following sentence after the first sentence of section 1 of the Sherman Act: "Any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act." *Id.*

III. THE RULE OF REASON IS THE APPROPRIATE STANDARD FOR MINIMUM PRICE RESTRAINTS

There are many reasons why the rule of reason is the correct standard to judge whether a minimum price restraint violates the Sherman Act. First, courts have reserved the per se illegal standard for restraints where experience demonstrates that the restraint should be subject to a per se standard.¹¹¹ Second, the strength of the primary arguments made against the adoption of the rule of reason for minimum price restraints diminish in light of antitrust laws and the anticipated application of the rule of reason.¹¹² Third, the rule of reason allows courts to analyze the procompetitive effects that result from minimum price restraints and to avoid the litigation inconsistencies that resulted from the arbitrary application of the per se illegal standard and its focus on the existence of an agreement.¹¹³ Fourth, the new standard enables markets to benefit from the procompetitive effects that flow from the use of minimum price restraints.¹¹⁴ Fifth, the rule of reason allows manufacturers with *Colgate*-compliant pricing programs to abandon their inefficient business practices that were necessary to avoid the inference of an agreement and potential per se illegal condemnation.¹¹⁵

A. THE PER SE ILLEGAL STANDARD IS RESERVED FOR RESTRAINTS THAT ARE “ALWAYS OR ALMOST ALWAYS” ANTICOMPETITIVE

The starting point for an analysis of an alleged antitrust violation is the rule of reason. It is “the accepted standard for testing whether a practice restrains trade in violation of § 1.”¹¹⁶ In a traditional rule-of-reason analysis, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”¹¹⁷ Courts should review all aspects of a given restraint, including its circumstances, history, and effects in the market, to

111. See *infra* Part III.A (describing how the Court has reserved per se illegality for restraints that are “always or almost always” anticompetitive).

112. See *infra* Part III.B (reviewing the arguments made against *Leegin* and the rule of reason).

113. See *infra* Part III.C (discussing the arbitrary application, and inconsistent results, of the per se illegal standard).

114. See *infra* Part III.D (reviewing some of the procompetitive benefits that markets may experience as a result of minimum price restraints).

115. See *infra* Part III.E (discussing the widely inefficient business practices that companies have undertaken in an attempt to comply with *Colgate* and to avoid per se illegal condemnation).

116. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007).

117. *Id.* (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).

determine whether its procompetitive effects outweigh its anticompetitive effects.¹¹⁸

Courts abandon this standard and replace it with a per se illegal standard when restraints “always or almost always tend to restrict competition and decrease output.”¹¹⁹ A court’s decision to adopt the per se standard is made *after* experience with the restraint demonstrates that the anticompetitive economic effects of the restraint exceed any procompetitive effects.¹²⁰ In the case of minimum price restraints, courts have not yet had any such experience because the *Dr. Miles* decision had subjected minimum price restraints to the per se illegal rule since 1911.¹²¹ The practical result of this is that any litigation involving an agreed-upon minimum price restraint has resulted in a court finding the restraint per se illegal. Judges have been required to exclude experts who would have testified to the economic effects of a restraint, just as the trial court did in *Leegin*.¹²² There is no case law analyzing the economic effects that would render a minimum price restraint “always or almost always” anticompetitive and illegal.¹²³ Therefore, the traditional support for deeming a restraint per se illegal has never existed for minimum price restraints. The rule of reason is therefore the appropriate standard for minimum price restraints.

B. THE STRENGTH OF THE ARGUMENTS AGAINST LEEGIN DIMINISH
WHEN VIEWED IN THE CONTEXT OF THE ANTITRUST LAWS
AND THE APPLICATION OF THE RULE OF REASON

Although per se illegality should apply only to restraints that are “always or almost always” anticompetitive, many believe that the Court should not have reverted to the rule of reason for minimum price restraints.¹²⁴ The primary arguments against the rule of reason for minimum price restraints include stare decisis, concern about consumer prices, the impact on discount retailers, and the litigation burden for plaintiffs.

First, Justice Breyer pointed out in his dissenting opinion in *Leegin* that the Court was writing “not on a blank slate, but on a slate that begins with

118. Scott Martin, *A Rule of Reason for Vertical Price Fixing—Part I*, METROPOLITAN CORP. COUNS., NORTHEAST EDITION, Oct. 2007, at 32.

119. *Leegin*, 127 S. Ct. at 2713 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

120. *See id.* (describing when the per se rule is appropriate for a given restraint).

121. *Id.*

122. *Supra* text accompanying note 58.

123. *See infra* note 249 (describing why there is no case law since the per se illegal standard has prevented courts’ review of the economic effects of minimum price restraints).

124. Antitrust practitioners pointed out in a roundtable discussion that *Leegin*’s dissent left out any discussion of the normal requirement for per se illegal rules—that per se rules are to apply only after the restraint is shown to “always or almost always tend to restrict competition.” *Roundtable Discussion: Antitrust and the Roberts Court*, ANTITRUST, Fall 2007, at 8, 11 (comments of C. Scott Hemphill).

Dr. Miles and goes on to list a century's worth of similar cases."¹²⁵ In other words, he disagreed with the Court's decision to part from *stare decisis* and settled precedent. To that end, he reviewed factors that had led the Court to depart from *stare decisis* on other occasions.¹²⁶ Justice Breyer concluded that "every *stare decisis* concern this Court has ever mentioned counsels against overruling [*Dr. Miles*]."¹²⁷ The majority opinion, in response, reasoned that the interpretation of the Sherman Act should evolve over time because it is a common-law statute.¹²⁸ The Court's antitrust jurisprudence relating to maximum-price restraints and nonprice restraints demonstrates this evolution.¹²⁹

Second, many have argued against the rule of reason for RPM because it may increase prices. The threat of increased prices was a primary motivator in the Senate hearings regarding *Leegin*.¹³⁰ The media also highlighted this point; one of the most blatant articulations of this argument encouraged consumers to "enjoy the last days of falling prices" for electronic equipment since it would cost more in a year because of how the "radical activist Gang of Five on the U.S. Supreme Court" decided *Leegin*.¹³¹ The article described pricing "schemes" as protective of margins for retailers and manufacturers but preventative of price competition—without which internet stores would have never started—resulting in "more slimy ripoffs."¹³² Almost halfway through the article, the author acknowledged that "the Bush court didn't [actually] legalize minimum price agreements . . . [just] that their legality should be decided on a case-by-case basis."¹³³

Although the urgency expressed in the article might make one think otherwise, the Sherman Act does not protect low prices for consumers; it protects consumer welfare, which is not synonymous with low prices.¹³⁴ A

125. *Leegin*, 127 S. Ct. at 2731 (Breyer, J., dissenting).

126. *See id.* at 2734–36 (describing the six scenarios in which the Court overrules its own precedent and disregards *stare decisis*: (1) constitutional issues; (2) recent decisions that turned out to be wrong; (3) recent decisions that created unworkable tests; (4) areas of unsettled law; (5) areas of law with limited or no reliance interests; or (6) decisions that are not "embedded" in the culture).

127. *Id.* at 2737.

128. *Id.* at 2720 (majority opinion).

129. *See supra* text accompanying notes 91–102 (describing how the Court has adopted the rule of reason for other vertical restraints).

130. Haberkorn, *supra* note 104, at C09 (explaining that the Federal Trade Commissioner "argued that [*Leegin*] would raise retail prices because it allows manufacturers to force discounters . . . to raise prices").

131. Michael Himowitz, *Electronic Bargains of Today Will Be Gone by This Time Next Year*, BALT. SUN, July 5, 2007, at 7D.

132. *Id.*

133. *Id.*

134. *See* Transcript of Oral Argument at 15, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-480.pdf (recording Justice Scalia's statement that the

higher price because of RPM does not demonstrate anticompetitive conduct.¹³⁵ The prevalence of luxury brands in consumer products, from women's handbags to MP3 players, and consumer preferences for those brands, indicates that "many people are willing to pay a premium for a brand, irrespective of quality and other tangible benefits."¹³⁶ Therefore, luxury brands—and the higher prices that accompany them—serve the welfare of certain consumers.¹³⁷ Minimum RPM programs may, therefore, be most appropriate for the luxury-good manufacturer with consumers that are willing to purchase its products regardless of the cost.

Additionally, the concern about increased prices may stem from when Congress enabled states to declare RPM per se legal.¹³⁸ The findings laid out in Senator Kohl's proposed legislation announced that *Leegin* "will likely lead to higher prices paid by consumers,"¹³⁹ and that consumers experienced retail prices "between 18 and 27 percent higher" in states that had enacted fair trade laws prior to 1975.¹⁴⁰ However, in *Leegin's* majority opinion, Justice Kennedy pointed out that those findings of higher retail prices were tied to periods of legislative per se legality for minimum price restraints.¹⁴¹ Since the rule of reason is not the same as, and does not go as far as, a per se legal status for minimum RPM, one should not expect the impact on consumer prices to be the same.¹⁴² In addition, only one percent of manufacturers adopted minimum price restraints during that period of per se legality.¹⁴³ Since the rule of reason requires manufacturers to defend minimum price restraints when challenged, one could expect an even smaller percentage of manufacturers to adopt RPM programs under the rule of reason than under a per se legal framework. A manufacturer will not adopt minimum price restraints unless an RPM program is appropriate for

"mere fact that [RPM] would increase prices doesn't prove anything" and the attorney's agreement with this statement).

135. *Id.*

136. Barak Y. Orbach, *Antitrust Vertical Myopia: The Allure of High Prices*, 50 ARIZ. L. REV. 261, 277 (2008).

137. *See id.* (noting that people who buy the luxury brands do so for a variety of reasons, from "keep[ing] up with the Joneses" to "signal[ing] their wealth in ways others cannot").

138. *See supra* notes 32–39 and accompanying text (discussing the Miller-Tydings Fair Trade Act, the McGuire Act, and the impact they had on consumer prices).

139. Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. § 2(a)(4) (2007).

140. *Id.*; *see also supra* text accompanying notes 32–42 (reviewing Congress's role in the history of minimum price restraints).

141. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2723 (2007) (explaining that the state fair trade laws "made vertical price restraints legal").

142. *Id.* at 2724 ("The rule of reason . . . does not treat vertical price restraints as *per se* legal.").

143. *Id.* at 2725.

its business model¹⁴⁴ and it is prepared to defend the RPM program with procompetitive effects that outweigh anticompetitive effects.

The third argument against *Leegin* is that it creates uncertainty for discount retailers because it removes the legal framework—per se illegal treatment of RPM—that has enabled the industry’s success.¹⁴⁵ Senator Kohl described this concern by stating that the rule of reason “threatens the very existence of . . . discount stores and would lead to higher prices for consumers.”¹⁴⁶ It is, however, not likely that all manufacturers of products sold at discount stores will set minimum resale prices because (1) RPM programs conflict with their business model and (2) the rule of reason requires that the manufacturer justify the restraint with procompetitive effects. First, manufacturers selling goods through discount stores will only set minimum prices if it is good for their business, meaning they will have to be convinced that the potential profits the manufacturer will gain through the minimum price will offset the sales it anticipates it will lose at its discount retailers. That is not likely given the extremely high sales volumes of the large discount retailers.¹⁴⁷ Second, the manufacturer will need to be able to justify the RPM program with procompetitive effects. This is not likely as a practical matter since the discount-retailer business model relies on low prices instead of added services, therefore, subjecting minimum price restraints to the rule of reason will not threaten to destroy the discount-retailer industry. Consequently, the demise of the discount retailer is not

144. See *infra* text accompanying notes 145–49 (describing how manufacturers of products sold at discount retailers are not the type of manufacturers that are likely to adopt RPM programs).

145. Senator Kohl, Chairman of the Subcommittee on Antitrust, Competition Policy and Consumer Rights, opened a committee hearing in July 2007 by stating that *Dr. Miles* has been credited for the rise of the discount retailers like Wal-Mart, Target, and Amazon.com. *The Leegin Decision: The End of Consumer Discounts or Good Antitrust Policy?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Herbert Kohl, Chair, Subcommittee on Antitrust, Competition Policy and Consumer Rights). He also spoke of his own negative experience with vertical price fixing through his family’s business, Kohl’s, before it was sold. *Id.* Additionally, Pamela Jones Harbour, a Federal Trade Commissioner who met with a Senate panel to encourage legislation to counter the *Leegin* decision, argued that “consumers respond strongly to aggressive price competition, because we all prefer a bargain,” and mentioned Wal-Mart and Home Depot as the types of retailers at risk. Jones Harbour Testimony, *supra* note 104, at 3.

146. Kohl Introduces Measure to Restore Per Se Illegality Rule for Minimum RPM, [July–Dec. Transfer Binder] Antitrust & Trade Reg. Rep. (BNA) 561 (Nov. 2, 2007).

147. See Cole & McDonald, *supra* note 3 (stating that RPM will not appeal to all manufacturers because minimum price restraints may cut off a discount retailer and all of its customers, who may be attractive customers to the manufacturers). The authors went on to argue that “there is no reason to conclude that RPM will become the standard operating procedure . . . or that it will have widespread price effects.” *Id.*

likely to materialize as a result of *Leegin*,¹⁴⁸ and some have even characterized such accusations as “spectacularly wrong.”¹⁴⁹

The fourth argument against *Leegin* is that the rule of reason increases the plaintiff’s burden. The recurring theme is that *Leegin* “makes it harder for a plaintiff to prove its case.”¹⁵⁰ One can expect that “proving that a restraint of trade is unreasonable under the rule of reason is more difficult for a plaintiff than establishing a per se violation”¹⁵¹ because the rule of reason requires a plaintiff to prove that the anticompetitive effects outweigh any procompetitive benefits of the restraint. As a result, “the risk of liability [for a manufacturer] has been reduced because the potential antitrust plaintiff now has the additional burden of showing—on the merits—that a particular arrangement is anticompetitive.”¹⁵²

It is also true, however, that antitrust plaintiffs in lawsuits challenging minimum-RPM programs are typically retailers of manufacturers with the restraint.¹⁵³ Retailers typically have copies of manufacturers’ pricing policies, communications that are relevant to the existence of agreements, and market knowledge that is critical to exploring the procompetitive and anticompetitive effects of the minimum price restraint.¹⁵⁴ Although the plaintiff’s burden is heavier under the rule of reason than under the per se standard, it is a reasonable burden since it ensures that minimum price

148. See Erich M. Fabricius, Recent Development, *The Death of Discount Online Retailing? Resale Price Maintenance After Leegin v. PSKS*, 9 N.C. J.L. & TECH. 87, 106, 111 (2007). Even commentators who assert that “[i]f enough manufacturers elect to implement these policies, online discounting [and] online retailing in general stand to be greatly reduced,” conclude that “[f]ears that [*Leegin*] signals the death of online discounting are premature.” *Id.*

149. Thomas B. Leary & Janet L. McDavid, *Should Leegin Finally Bury Old Man Miles?*, ANTITRUST, Spring 2007, at 66, 69. In an article published after the Supreme Court granted certiorari for *Leegin*, but before its decision, Thomas B. Leary and Janet L. McDavid noted that this argument was raised in support of Congress’s attempt to overrule the *GTE Sylvania* decision, stating that “[i]t is obvious now that the dire predictions about the demise of discount alternatives were spectacularly wrong.” *Id.*

150. Gregory William, *U.S. Supreme Court Ends “Per Se” Illegality of Minimum Resale Price Holders of Maintenance Agreements, Manufacturers and Licensors Should Have Cautious Optimism*, MONDAQ BUS. BRIEFING, Aug. 13, 2007, available at Westlaw, 2007 WLNR 15625213; see also Ed Christman, *Retail Track: Why Labels Should Set Minimum-Price Restraints*, BILLBOARD, Sept. 1, 2007, at 14 (explaining that *Leegin* “make[s] antitrust pricing practices harder to prove”).

151. Michael J. Lockerby, *Franchising After Leegin: A License to Fix Prices?*, 27 FRANCHISE L.J. 112, 114 (2007).

152. Beth L. Fancsali & Paul Olszowka, Commentary, *How Wide Did the Supreme Court Open the Door to Minimum Resale Pricing?*, 15 No. 6 ANDREWS ANTITRUST LITIG. REP. 2, 5 (2007).

153. See, e.g., *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 13 (1st Cir. 2004) (where a retailer of the manufacturer’s goods brought the action); *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1150 (9th Cir. 1988) (same); *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1532 (11th Cir. 1987) (same).

154. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007) (“A party alleging injury from a vertical agreement setting minimum resale prices will have . . . the information and resources available to show the existence of the agreement and its scope of operation.”).

restraints that courts condemn under the Sherman Act are anticompetitive and not just condemned under a per se illegal standard—without regard for their procompetitive effects. Additionally, the per se standard has not been a sure thing for plaintiffs; there have been multiple cases where plaintiffs have not succeeded because courts did not find the requisite agreement.¹⁵⁵

Additionally, the new burden on a plaintiff in a rule-of-reason suit may not be as insurmountable as the critics assert. In early 2008, at the American Bar Association's Antitrust Section meeting, experienced practitioners conducted a mock trial of an alleged minimum-RPM violation with a jury pulled from the Washington, D.C. area.¹⁵⁶ The mock trial lasted only the length of one afternoon, but the attorneys attempted to make it realistic by using experienced attorneys as trial counsel and witnesses, and economists where appropriate.¹⁵⁷ The results of the mock trial countered the assumption about typical antitrust outcomes, which is that per se standards typically lead to verdicts for the plaintiff and rule-of-reason standards typically lead to defense verdicts.¹⁵⁸ The jury latched on to the plaintiff's theory that the higher price for consumers was anticompetitive and found unanimously for the plaintiff, disregarding the procompetitive effects that the defense attempted to illustrate.¹⁵⁹ The "eye-open[ing]" jury verdict in the mock trial taught antitrust practitioners a lesson: juries will consider higher prices and other direct effects on consumers "to the exclusion of almost all other market effects."¹⁶⁰ Therefore, a plaintiff's showing of increased prices in RPM suits will resonate strongly with juries by virtue of each juror's perceived familiarity with the subject matter as consumers.¹⁶¹ In order to overcome this built-in bias, defendants will have to broaden the focus of the case and look not only to price but to the market and actual competitive effects, such as increased output and services.¹⁶² Since a company's RPM program will almost inevitably involve increased prices, plaintiffs challenging any such program will have a strong tool at their disposal to satisfy the new burden under the rule of reason.

155. See *infra* note 178 (describing cases where plaintiffs have not succeeded).

156. Telephone Interview with Scott M. Mendel, Partner, Bell, Boyd & Lloyd (Aug. 19, 2008); see also Joel M. Mitnick et al., *On Life Support from Leeginaire's Disease: Can the States Resuscitate Dr. Miles?*, ANTITRUST, Summer 2008, at 63, 66–67 (describing the mock rule-of-reason trial).

157. Telephone Interview with Scott M. Mendel, *supra* note 156.

158. *Id.*

159. *Id.*

160. Mitnick et al., *supra* note 156, at 66–67.

161. Telephone Interview with Michael J. Lockerby, Partner, Foley & Lardner (Aug. 22, 2008) (explaining how increased prices will resonate with juries since jurors are consumers who typically focus on buying products cheaper).

162. Mitnick et al., *supra* note 156, at 67 ("[D]efense counsel must emphasize the notion of competitive harm within a more broadly defined market.").

C. *THE RULE OF REASON ENABLES THE ANALYSIS OF PROCOMPETITIVE EFFECTS AND AVOIDS THE INCONSISTENCIES THAT HAVE RESULTED UNDER THE PER SE ILLEGAL STANDARD*

When a legal standard changes, it nearly always affects future litigation. The adoption of the rule of reason for minimum price restraints will refocus the litigation on the economic effects of a particular restraint instead of on the existence of an agreement, which was the core of the plaintiff's case under the per se standard.¹⁶³ A plaintiff previously had the burden to prove an express agreement or an implied agreement inferred from direct or circumstantial evidence.¹⁶⁴ This framework led to seemingly inconsistent results.¹⁶⁵ Despite manufacturers' attempts to stay within the boundaries of the *Colgate* doctrine, circuit courts found enough evidence in some cases for the trier of fact to infer an agreement about a price restraint, thereby subjecting manufacturers to the per se rule and condemning what otherwise could have been procompetitive minimum price restraints.

In one such case, *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.*, the Eleventh Circuit reversed the district court's grant of summary judgment for the defendant manufacturer because it found that "inferences can be drawn that tend to exclude the possibility that [the manufacturer] was acting independently when it terminated [the distributor]."¹⁶⁶ The alleged agreement involved minimum price restraints on the sale of helicopter parts.¹⁶⁷ Helicopter Support Systems ("HSS") was the price-cutting distributor of parts manufactured by Hughes Helicopter ("Hughes").¹⁶⁸ Hughes eventually terminated HSS as a distributor; HSS relied on this act, combined with communications between Hughes and other distributors, in its lawsuit against Hughes.¹⁶⁹

163. This focus was to rule out the possibility that a manufacturer took unilateral action. See *supra* text accompanying notes 27–30 (describing the evolution and requirements of the *Colgate* doctrine).

164. See *supra* text accompanying notes 27–30 (describing the evolution and requirements of the *Colgate* doctrine).

165. See Ira S. Sacks & Hillel R. Silvera, *A Return to Reason for Price Restraints*, 24 HOFSTRA L. REV. 1069, 1112 (1996) (comparing the circuit court's treatment of *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987), where the court "chose not to find a way to . . . avoid the *per se* rule," to another Seventh Circuit case where the court "re-characterize[d] [the defendant's] conduct as something other than price fixing"); see also *Roundtable Discussion, supra* note 124, at 17 (comments of Janet L. McDavid) ("One of the ironies of the [per se illegal standard] was that it led to courts twisting themselves into pretzels to avoid finding an agreement on resale prices because that was outcome-dispositive.").

166. *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1537 (11th Cir. 1987).

167. See *id.* at 1532 (describing the alleged "resale price support agreement between Hughes and its international distributors").

168. *Id.* at 1531.

169. *Id.* at 1532.

The Eleventh Circuit used a two-part test to evaluate whether the grant of summary judgment to Hughes was in error: (1) HSS must have shown that the alleged conspiracy was economically viable; and (2) HSS must have shown evidence that “tend[ed] to exclude the possibility that [Hughes] was acting independently” in its decision to terminate HSS as a distributor.¹⁷⁰ The Eleventh Circuit found sufficient evidence for both, warranting its reversal of the summary-judgment order.¹⁷¹ The relevant evidence for the second step consisted of communications between Hughes and another distributor complaining about HSS’s pricing practices.¹⁷² Hughes informed the complaining distributor that “corrective action ha[d] been taken [and] the problem [was] resolved but should it recur please advise.”¹⁷³ The Eleventh Circuit found this statement to be enough for a jury to infer Hughes’s commitment to respond affirmatively to distributor complaints in the future.¹⁷⁴ The distributor thanked Hughes for the “prompt action,” and the Eleventh Circuit likewise thought that this would have allowed a jury to infer the distributor’s agreement to continue reporting pricing issues.¹⁷⁵ These communications, coupled with “suggested price lists [that were] binding on [d]istributor[s],” provided evidence from which a jury could have inferred an agreement between Hughes and its distributors to fix minimum prices.¹⁷⁶

Strikingly similar evidence in other cases, however, was not enough to support a reversal of summary judgment. The Eleventh Circuit construed simple words like “thank you” and “please advise” into the possibility of an agreement,¹⁷⁷ whereas the First Circuit and Ninth Circuit refused to construe such a possibility from the manufacturers’ statements that they would “take care of” the situation.¹⁷⁸ The *Helicopter Support Systems* case demonstrates how subjective and nuanced the analysis can be under the per

170. *Id.* at 1534.

171. *Helicopter Support Sys.*, 818 F.2d at 1535.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Helicopter Support Sys.*, 818 F.2d at 1536.

177. *Id.* at 1533 n.3 (stating that it was required to apply the per se illegal standard even though it serves no benefit to consumers in vertical relationships with goods that have “interbrand competitiveness [which] overwhelms any detrimental effects”).

178. *See* *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 19 (1st Cir. 2004) (explaining that communications between a manufacturer and complaining distributor, including the manufacturer’s assurance to “take care of” the situation, was nothing other than an “acknowledgement of its unilateral decision”). The Ninth Circuit affirmed a grant of judgment notwithstanding the verdict for the manufacturer based in part on similar evidence. *See* *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1158 (9th Cir. 1988) (explaining that a manufacturer’s statement to a complaining distributor that it would “take care of things” was an effort “to calm an angry customer” and not enough to show an agreement to fix prices).

se standard with the litigation so narrowly focused on whether an agreement existed between the manufacturer and a distributor.

*Isaksen v. Vermont Castings, Inc.*¹⁷⁹ provides another example of a circuit court condemning an otherwise procompetitive minimum price restraint. In *Isaksen*, the Seventh Circuit reversed the district court's grant of judgment notwithstanding the verdict for the manufacturer, which came after the jury found for the distributor and awarded \$100,000 in damages.¹⁸⁰ The Seventh Circuit found that the district court lacked evidence to support the grant of judgment notwithstanding the verdict for the manufacturer.¹⁸¹ The Seventh Circuit considered this case a "rather sorry excuse for an antitrust case" for multiple reasons that would now be relevant factors in a rule-of-reason analysis.¹⁸² The manufacturer held only ten percent of the market and used minimum price restraints to guard against free-riding since the distributors had made significant investments in customer service to sell the manufacturer's products.¹⁸³ This legitimate situation prompted the manufacturer to establish a minimum suggested price that would support the distributors' investments in customer service while remaining aware of competitive-pricing pressures.¹⁸⁴

Isaksen operated a store as a distributor for Vermont Castings, a manufacturer of woodburning stoves.¹⁸⁵ Vermont Castings had provided distributors with suggested-price lists and the proviso that distributors could sell at any price they chose.¹⁸⁶ Isaksen chose to sell the stoves "way under list price" and to free-ride on the services that other distributors of Vermont Castings's stoves provided to its customers.¹⁸⁷ Not surprisingly, the other distributors complained to Vermont Castings about this practice.¹⁸⁸ The Seventh Circuit, however, found no evidence of any price-fixing agreement between those distributors and the manufacturer.¹⁸⁹ Isaksen also alleged that Vermont Castings had harassed and threatened him to the point where he was coerced into an agreement to raise his price.¹⁹⁰ However, Isaksen did

179. See generally *Isaksen v. Vt. Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987) (reversing the defendant's judgment notwithstanding the verdict).

180. *Id.* at 1161.

181. *Id.* at 1163.

182. See *id.* at 1161 (articulating reasons that would support a procompetitive use of minimum price restraints).

183. See *id.* (describing the manufacturer's position in the market and its desire to prevent free-riding among its distributors).

184. See *Isaksen*, 825 F.2d at 1162 (describing how the manufacturer had incentives not to set a minimum price too high or too low).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Isaksen*, 825 F.2d at 1162.

190. *Id.*

not raise his prices for an entire year after the allegedly coerced agreement.¹⁹¹ The court acknowledged that this time delay created doubts about the existence of such an agreement, but, nevertheless, thought that it was enough to support the jury's decision for Isaksen.¹⁹² As a result, the Seventh Circuit reversed the judgment notwithstanding the verdict.¹⁹³ Again, similar evidence of allegedly coercive behavior in another circuit was not enough to reverse a judgment notwithstanding the verdict for the manufacturer.¹⁹⁴

The Seventh Circuit, however, agreed that the jury's verdict was excessive¹⁹⁵ and directed the district court to rule on the manufacturer's motions to set aside the verdict¹⁹⁶ and hold a new trial.¹⁹⁷ This may indicate that the Seventh Circuit thought the manufacturer should ultimately have prevailed, particularly since its decision included a clear articulation of procompetitive reasons that would explain the manufacturer's actions in setting minimum price restraints.¹⁹⁸ The Seventh Circuit made no attempt, however, to work around the per se rule because the procompetitive reasons "have not persuaded the Supreme Court to relax the judge-made rule . . . that makes resale price maintenance illegal per se."¹⁹⁹ The *Isaksen* case is further proof of the arbitrary and inconsistent decisions that result from the per se rule.

The plaintiffs' burden to prove the existence of an agreement seemed, at first glance, to be a clear-cut burden—a "bright-line rule."²⁰⁰ Minimum price restraints were per se illegal if the plaintiffs proved that an agreement existed. These cases demonstrate, though, that courts have undermined the alleged efficiency of the per se rule through their divergent interpretations of case-specific facts to find—or not find—an agreement. Such litigation has not resulted in clear-cut decisions because of the inherently arbitrary practice of implying an agreement from the parties' actions.

191. *Id.* at 1163.

192. *Id.*

193. *Id.*

194. *See* *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1158 (9th Cir. 1988) (explaining that a manufacturer's allegedly coercive statements were nothing more than an attempt to pressure distributors into compliance with a pricing policy, which was protected action under the *Colgate* doctrine).

195. *Isaksen*, 825 F.2d at 1164.

196. *Id.* at 1163.

197. *Id.* at 1165.

198. *Id.* at 1161–62; *see also supra* notes 65–70 and accompanying text (reviewing the *Leegin* Court's description of procompetitive effects of minimum price restraints).

199. *Isaksen*, 825 F.2d at 1162; *see also* *Sacks & Silvera*, *supra* note 165, at 1112 (describing "the inability of the Seventh Circuit to exercise its ingenuity in *Vermont Castings*" that it had shown in another case to work around the per se rule).

200. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2725 (2007) (Breyer, J., dissenting).

The dissent in *Leegin* highlighted this argument—that the new “circumstance-specific ‘rule of reason’” undermined the efficiency of the per se standard.²⁰¹ The rule-of-reason standard replaced a marked, clear line of illegality with uncertainty for manufacturers that must now attempt to determine the location of the line between a legal, procompetitive minimum price restraint and an illegal, anticompetitive one.²⁰² However, that bright-line rule hinged on inferring an express or implied agreement based on the minutiae of a case, which made application of that bright line very inconsistent and arbitrary. The adoption of the rule of reason refocuses antitrust litigation away from arbitrary inferences of agreements to a comprehensive review of the anticompetitive and procompetitive effects of minimum price restraints.²⁰³

*D. THE RULE OF REASON ENABLES MARKETS TO BENEFIT FROM THE
PROCOMPETITIVE ECONOMIC EFFECTS OF MINIMUM PRICE RESTRAINTS*

The rule of reason is a better legal standard for minimum price restraints because it allows manufacturers to use restraints in circumstances where the effects are procompetitive. The Court’s decision in *Leegin* described many of these procompetitive effects.²⁰⁴ Two of the most persuasive procompetitive effects are facilitating entry for new retailers and overcoming free-riding problems.

Minimum price restraints can serve to entice new retailers to invest the necessary capital to enter a market for a new product because of the guaranteed margin that a manufacturer’s minimum price restraint will provide.²⁰⁵ Retailers may not enter a market if their profit margins are not high enough to overcome their start-up costs, causing the market to lose a would-be retailer.²⁰⁶ Likewise, minimum price restraints can encourage the entry of manufacturers into a market because the new manufacturer could use those restraints—and the guaranteed margin they provide—to persuade retailers to carry its products. Without minimum price restraints, the market may not supply the product that the would-be manufacturer seeks to introduce.²⁰⁷ Minimum price restraints, therefore, allow a manufacturer to

201. *Id.*

202. *Id.*

203. See also *Roundtable Discussion*, *supra* note 124, at 9 (comments of C. Scott Hemphill) (describing how the Court gave lower courts “flexibility to exercise judgment,” which results in “an opportunity for further development of the law”).

204. See *supra* notes 65–70 and accompanying text (reviewing the procompetitive effects described by the *Leegin* majority).

205. AREEDA & HOVENKAMP, *supra* note 6, ¶ 1631b.

206. *Id.* ¶ 1617a. New retailers may also incur “‘market development’ expense[s],” which are “cost[s] borne by [the first retailers bringing a product to market] but not by later entrants.” *Id.*

207. *Id.*

give potential retailers the necessary incentive to bring new products to the market.

The free-riding justification for minimum price restraints involves two components: First, the use of a minimum price restraint moves intrabrand rivalry—competition between retailers of the same manufacturer—from price competition to nonprice competition, thus benefiting consumers with added services.²⁰⁸ Second, minimum price restraints prevent retailers from free-riding on the services provided by other retailers.²⁰⁹ A free-riding retailer typically sells products at discounted prices to consumers who gathered the services they needed to purchase the product from a full-service retailer. Preventing retailers from free-riding protects the full-service retailers that have invested in providing the value-added services.²¹⁰ Although the prevention of free-riding as a procompetitive effect of minimum price restraints is subject to certain limitations,²¹¹ it is an argument for RPM that has “considerable force.”²¹²

In addition, the market will benefit from the rule of reason since the new standard ensures that manufacturers with RPM programs can bring economic efficiencies to the market. This was not possible under the per se standard because it constituted an over-enforcement of the antitrust laws.²¹³ Under *Dr. Miles*, manufacturers were not likely to establish RPM programs, even when the economic circumstances would have benefited consumer welfare and the market due to the per se condemnation and treble damages that accompanied the finding of an agreement.²¹⁴ The rule of reason,

208. See *id.* ¶ 1631c (“Preventing price competition among dealers diverts their rivalry into nonprice channels, such as advertising, extensive testing and pre-sale advice to consumers, prompt service by knowledgeable personnel, advantageous credit terms, or delivery without extra charge.”).

209. *Id.* (“Fixed resale prices also lessen the ability of some dealers to free-ride on the expensive work of others.”).

210. See AREEDA & HOVENKAMP, *supra* note 6, ¶ 1631c (explaining that distributors providing services to consumers “cannot continue to provide such services if too many customers are diverted to the free riders”).

211. See *id.* ¶¶ 1631c2–1631c3 (stating that limitations to the free-riding argument include that the distributor services must be provided at an economically beneficial level and that the price restraint must be tied to the services provided).

212. *Id.* ¶ 1631c.

213. See *supra* text accompanying note 75 (describing how per se rules are counterproductive because they prevent the market from realizing the procompetitive benefits that would flow from the arrangement condemned by the per se rule).

214. 15 U.S.C. § 15(a) (2000). The statutory provision for treble damages for those injured by antitrust violations provides:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold

instead, allows courts to consider, on a case-by-case basis, whether the challenged RPM program passes muster as a procompetitive arrangement. This approach may lead to some underenforcement, but it actually may be less harmful to consumer welfare than the per se standard since the market will be in a position to correct inappropriate or anticompetitive uses of RPM.²¹⁵ The rule of reason enables the courts to avoid condemning otherwise procompetitive RPM programs.

E. *THE RULE OF REASON ENABLES MANUFACTURERS WITH COLGATE PRICING POLICIES TO ELIMINATE INEFFICIENT BUSINESS PRACTICES*

Adopting the rule of reason for minimum price restraints allows manufacturers with minimum-pricing policies that comply with *Colgate* to enter into minimum-pricing agreements with its retailers. As noted above, complying with the *Colgate* doctrine requires a manufacturer to take unilateral action and avoid taking any action that would enable a court to infer an implied or express agreement with retailers.²¹⁶ Entering into agreements with its retailers would allow a manufacturer to step out of the *Colgate* doctrine and into the light of inquiry for minimum price restraints. Therefore, before taking such action, a manufacturer would review its own pricing policy under a rule-of-reason analysis to ensure that the procompetitive benefits of its policy outweigh any anticompetitive effects.

The pricing policy in *Leegin* provides an example. Except for the Heart Store Program that involved agreements between Leegin and its distributors,²¹⁷ the remaining components of Leegin's pricing policy may have complied with the *Colgate* doctrine. The rule-of-reason analysis, which focuses on the procompetitive and anticompetitive economic effects of a minimum price restraint, would allow Leegin to choose to enter into express minimum-pricing agreements with its retailers. This choice benefits a manufacturer because it would no longer need to dodge questions from its retailers or take inefficient steps to avoid any appearance of an agreement.

the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id.

215. The ability of the market to react to RPM programs is illustrated by a manufacturer of dog food that was the target of a boycott because of its attempt to enforce an RPM program. Joseph Pereira, *Price-Fixing Makes Comeback After Supreme Court Ruling*, WALL ST. J., Aug. 18, 2008, at A1. The retailer that preferred to discount the price of the dog food by twenty cents led the boycott and persuaded its customers to buy other brands of dog food. *Id.*

216. See *supra* text accompanying notes 27–30 (describing the requirements of the *Colgate* doctrine).

217. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2711 (2007) (explaining that as part of the Heart Store Program, “retailers pledged . . . to sell at Leegin’s suggested prices”).

The challenges of operating a *Colgate* pricing program influence the decision of manufacturers considering such a program.²¹⁸ Manufacturers that have a marketing or sales department of any reasonable size must consider the difficulty of preventing those employees from taking any steps that a court could construe as an agreement.²¹⁹ Imagine a sales representative visits its retailer and the retailer expresses its desire to discount the product in violation of the policy. The sales representative must decide between two ill-fated options. First, he can say nothing, and if the retailer discounts the product, the manufacturer loses the retailer (and the sales representative loses the commission) since the manufacturer must not sell to customers that violate the policy to avoid the inference of an agreement. Second, he could mention the policy in hopes of preventing the discount. If he succeeds at preventing the retailer from discounting, their interaction might be enough for a jury to infer an agreement. Even if he fails to prevent the discount, the sales representative's reminder might still be enough to suggest an agreement. In any case, the sales representative is not likely to think through these legal consequences. The decision to say something becomes "almost irresistible"—especially when future commissions are on the line.²²⁰ These challenges create a risk that is too high for many manufacturers to accept, even if there are legitimate procompetitive reasons for implementing a policy.

PING, a golf-equipment manufacturer, described these challenges and the benefits of the rule of reason in its amicus brief in support of Leegin.²²¹ PING stated that it "unilaterally adopted, and has since unilaterally administered, a vertical minimum resale advertising and pricing policy, referred to as the PING 'FIT Pricing Policy.'"²²² To ensure that it complied with the *Colgate* doctrine, PING had up to twelve full-time employees in its legal department to manage the "numerous, detailed internal procedures" associated with the program.²²³ PING's internal policy made "all but a very small group of PING's employees . . . subject to termination if they communicate[d] in any way with retailers or others about the [FIT Pricing] Policy."²²⁴ This internal policy, which was a part of PING's attempt to comply with the requirements of the *Colgate* doctrine, demonstrates the inefficiencies that accompany a *Colgate* pricing policy.

218. Telephone Interview with Scott M. Mendel, *supra* note 156.

219. *Id.*

220. *Id.*

221. See generally Brief of PING, Inc. as Amicus Curiae Supporting Petitioner, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 173680 (advocating for Leegin Creative Leather Products in *Leegin*).

222. *Id.* at 1.

223. *Id.* at 1, 3.

224. *Id.* at 3. The company has terminated five employees because they violated the prohibition on discussing the policy with retailers. *Id.*

One of the practical effects of complying with *Colgate* is the harsh limit on manufacturers' communications with retailers. For example, PING's marketing personnel did not communicate with retailers about the policy. PING forwarded all questions about the policy to attorneys and paralegals.²²⁵ If retailers asked questions of marketing employees, the marketing employees were required to provide the retailer with a pre-printed card listing a toll-free number and the statement, "I am prohibited from discussing this with you."²²⁶ This cold, impersonal mode of communication was necessary only because of the *Colgate* doctrine. Even more cold and impersonal were the form letters that PING's attorneys forwarded to retailers upon receipt of any communication that a court could possibly construe to be an agreement with the pricing policy.²²⁷ PING provided similar letters to retailers who shared information about other retailer's pricing practices.²²⁸

Another practical effect of *Colgate*'s focus on unilateral action is that a manufacturer is required to take drastic action when a retailer violates its pricing policy, even for accidental violations. PING had to stop selling to retailers that violated its pricing policy.²²⁹ Otherwise, any discussion with the retailer could have led to the appearance of an agreement, which would have condemned the pricing policy under the *per se* rule. Because it could not take steps that would allow one to infer an agreement, PING could not discuss any violations—even accidental or one-time occurrences—with a retailer.²³⁰ As a result, PING has terminated "nearly *one thousand* PING retailers during the past 30 months," representing millions of dollars of sales in the prior year.²³¹ PING even closed the account of the country club where its CEO was a member, attracting negative media attention.²³² Retailers that did not fully appreciate PING's precarious legal position felt left out to dry

225. *Id.* at 12.

226. Brief of PING, *supra* note 221, at 12.

227. The text of a PING form letter provides:

I recognize that the questions you asked, and the information you provided, in your email are not in any way intended to indicate any approval, agreement or any other assurance of compliance with respect to the *iFIT* Pricing Policy. However, if that was in any way your intent, please note that it is, and always will be, expressly rejected by PING. PING specifically provides at Section II of the *iFIT* Pricing Policy that: "PING does not seek, and will not accept, any account's approval, agreement or any other assurance of compliance with respect to this *iFIT* Pricing Policy and/or the Orange & Blue List." You need to decide on your own what you charge for the PING products you sell.

Id. at 13–14.

228. *Id.* at 14–15.

229. *Id.* at 15.

230. *Id.* at 15.

231. Brief of PING, *supra* note 221, at 15.

232. *Id.* at 16.

after they made an inadvertent choice to sell a product in violation of the pricing policy.²³³ One retailer compared PING's actions to "having your driver's license taken away for life because you got a parking ticket."²³⁴ This analogy quite accurately described the predicament of PING and other manufacturers with *Colgate* pricing policies.

Leegin's rule-of-reason standard for minimum price restraints will free manufacturers like PING from this awkward, impersonal, and overly legalistic situation. PING's experience is likely characteristic of other luxury-goods manufacturers that may also be utilizing the *Colgate* framework.²³⁵ Instead, manufacturers that can justify pricing policies with procompetitive economic effects can be forthright about the pricing policies and eliminate the wholly inefficient and illogical business practices that accompany a *Colgate*-compliant program.

IV. PRACTICAL IMPACT OF THE RULE OF REASON

Since minimum price restraints have been per se illegal for nearly the last century, two principal considerations affect how the rule of reason will apply to minimum price restraints. The first is how state courts and legislatures will react to *Leegin* and the impact those reactions will have on state antitrust laws and the number of manufacturers that choose to adopt minimum price restraints. The second consideration involves the application of the rule of reason in antitrust lawsuits alleging minimum price restraint violations.

A. THE PREVALENCE OF MINIMUM PRICE RESTRAINTS DEPENDS ON LEEGIN'S IMPACT ON STATE ANTITRUST LAWS

Although *Leegin* established the rule-of-reason standard for suits challenging minimum price restraints brought under federal law, the impact it will have on state antitrust law is not yet clear. Most states have antitrust laws similar to the Sherman Act.²³⁶ Further, the majority of states have either

233. *Id.* at 17.

234. The retailer also stated, "We would never do anything intentionally and knowingly to hurt the PING brand." *Id.* at 17. Another retailer's response provided, "I am still shocked that your company would end a 17 year relationship so easily and in such a 'flippant' manner." *Id.* at 17.

235. Traditional consumer experience leads one to believe that many manufacturers are using some sort of legal framework to maintain minimum prices, since it is rarely possible to purchase certain products at anything other than the manufacturer's suggested retail price. Manufacturers, like Apple and Bose, have been reported to use some legal framework to "stabilize uniform levels of prices" for their products. Orbach, *supra* note 136, at 279.

236. See M. Russell Wofford, Jr. & Kristen C. Limarzi, *The Reach of Leegin: Will the States Resuscitate Dr. Miles?*, ANTITRUST SOURCE, Oct. 2007, at 1, available at <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Wofford10-18f.pdf> (describing how private actions are allowed under state antitrust laws in fifty-one jurisdictions); Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 FRANCHISE L.J. 172, 172 (2008), available at http://www.faegre.com/webfiles/Leegin_Article.pdf (explaining

statutory language or judicial interpretations indicating some intention to apply the state laws consistent with federal interpretations.²³⁷ One study has categorized states by their anticipated level of adherence to federal interpretations.²³⁸ Thirty-six states “adhere strongly” to federal interpretations, while five states plus D.C. have some level of permissive adherence to federal interpretations, and eight states have “limited adherence” based in large part on the lack of existing guidance from the courts or legislatures on the topic.²³⁹

There are, however, indications that the states may not adopt the federal interpretation. Some states have statutes that prohibit the use of minimum price restraints on their face, while two others—New York and New Jersey—modified their fair-trade laws to make agreements regarding minimum price restraints unenforceable.²⁴⁰ In some states, case law provides for per se illegal treatment of minimum price restraints, but the context of those decisions indicates that the motivation was the then-current federal interpretation of *Dr. Miles*.²⁴¹ In addition to the existing interpretations, thirty-seven state attorneys general joined an amicus brief to support PSKS and advocated for upholding the per se rule.²⁴² The position of these attorneys general, though, may not reflect the positions of the states’ legislatures and judiciaries.²⁴³

that all but four states have antitrust statutes that mirror, in some fashion, section 1 of the Sherman Act).

237. See Wofford & Limarzi, *supra* note 236, at 6 (explaining that forty-eight jurisdictions have statutes or judicial interpretations consistent with federal law).

238. Duncan & Guernsey, *supra* note 236, at 174.

239. *Id.* at 177.

240. *Id.* at 174; see also Wofford & Limarzi, *supra* note 236, at 7–8 (explaining that California and New Jersey prohibit minimum resale price maintenance and that New York judges minimum resale-price agreements under a per se illegal standard).

241. See, e.g., Duncan & Guernsey, *supra* note 236, at 175 (“[I]t appears that the [Minnesota Court of Appeals] aversion to RPM was closely tied to the former federal disdain for the practice.”); *Leading Cases: Federal Statutes and Regulations—Sherman Act—Minimum Resale Price Maintenance*, 121 HARV. L. REV. 425, 426 (2007) (describing how states have generally tried to “harmonize state antitrust law with federal law,” and in doing so, many states have “modeled their minimum-RPM laws on *Dr. Miles*,” resulting in a conflict with *Leegin*); Michael A. Lindsay, *Resale Price Maintenance and the World After Leegin*, ANTITRUST, Fall 2007, at 32, 34 (describing how California’s case law declares minimum price restraints to be per se illegal, but that the decisions were “based at least in part on *Dr. Miles*”).

242. Brief for the States of New York, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, & Wyoming as Amici Curiae Supporting Respondent, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 621851.

243. See Wofford & Limarzi, *supra* note 236, at 3 (explaining that “amicus participation might not indicate an interest or ability to pursue per se treatment of minimum resale price agreements following *Leegin*”).

Each state will face a decision on its standard for minimum price restraints: follow the old per se rule of illegality, adopt the new federal interpretation of rule of reason, adopt a truncated version of the rule of reason, or legislate a new standard. In making this decision, states should “focus on the general welfare effects of . . . enhance[d] competition” and other benefits of RPM, including the efficiency of the rule of reason for manufacturers.²⁴⁴ Until states determine the status of their individual antitrust laws after *Leegin*, manufacturers will continue to “face substantial uncertainty” when they make decisions regarding whether to adopt an RPM program.²⁴⁵

B. APPLYING THE RULE OF REASON IN LAWSUITS CHALLENGING
MINIMUM PRICE RESTRAINTS

The second consideration is how courts will apply the rule of reason to minimum price restraints. Under the per se illegal standard, courts focused on the existence of an agreement.²⁴⁶ Under the rule of reason, courts’ focus will shift to the economic effects of the restraint. After the Supreme Court granted certiorari for *Leegin*, commentators viewed the case as a way to make this shift: “perhaps there is a common consensus that antitrust should focus on competitive realities rather than nuances of communication and ‘agreement.’ The long-deferred burial of *Dr. Miles* is a necessary first step.”²⁴⁷

Under the rule of reason, a plaintiff alleging a minimum price restraint as a violation of the Sherman Act will have to show that the agreement to the restraint created anticompetitive effects that outweighed any procompetitive effects of the restraint.²⁴⁸ Since there has been no case law applying the rule of reason to minimum price restraints,²⁴⁹ the majority in *Leegin* expected lower courts to develop the appropriate procedural rules:

244. *Leading Cases*, *supra* note 241, at 426; *see also supra* Part III.E (discussing the inefficiencies of manufacturers with *Colgate* pricing policies).

245. *Roundtable Discussion*, *supra* note 124, at 16 (comments of Janet L. McDavid). Additionally, manufacturers who sell products internationally face even more uncertainty because minimum price restraints are illegal in other countries around the world. *Id.*

246. This focus was to rule out the possibility that a manufacturer took unilateral action. *See supra* text accompanying notes 27–30 (describing the evolution and requirements of the *Colgate* doctrine).

247. Leary & McDavid, *supra* note 149, at 71.

248. In a traditional rule-of-reason analysis, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (quoting *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).

249. The courts could not develop case law about the procompetitive or anticompetitive effects of minimum price restraints after *Dr. Miles* declared them per se illegal. This dearth of case law has left commentators to rely on economic and theoretical arguments. The rule of reason finally opens the door to the development of case law. *See* Leary & McDavid, *supra* note 149, at 69 (describing how litigation can now explore the economic effects of minimum price restraints).

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 anticompetitive 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 anticompetitive restraints and to promote procompetitive ones.²⁵⁰

Such rules or presumptions for use with litigation of minimum price restraints could hinge on characteristics that courts find to be associated with anticompetitive conduct.²⁵¹

The *Leegin* Court explained three indicators of the economic effects of minimum price restraints that a court can evaluate under the rule of reason.²⁵² The first indicator relates to the number of manufacturers in the relevant industry that have established minimum-RPM programs.²⁵³ A minimum price restraint is less likely to be evidence of an anticompetitive manufacturer cartel when a small number of manufacturers without market power adopt the restraint.²⁵⁴ Similarly, a restraint is less likely to be evidence of an anticompetitive retailer cartel when one manufacturer adopts a minimum price restraint in a competitive market.²⁵⁵ On the other hand, minimum price restraints are more likely to produce anticompetitive effects when a large number of manufacturers in a given industry use them.²⁵⁶

The second indicator that can help determine whether a restraint is procompetitive or anticompetitive is the source or impetus of the restraint.²⁵⁷ As commentators have explained:

Resale price maintenance agreements are likely to survive antitrust scrutiny . . . where [manufacturers initiate the restraint and] investments are made to support the sale or service of the product,

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

251. One theory that practitioners have discussed—but which lower courts have yet to develop—is using a showing of market power as a basis for a presumption in the litigation structure. *Roundtable Discussion, supra* note 124, at 16 (comments of Janet L. McDavid).

252. *Leegin*, 127 S. Ct. at 2719–20.

253. *Id.* at 2719 (“For example, the number of manufacturers that make use of the practice in a given industry can provide important instruction.”).

254. *Id.* (“When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers.”).

255. *Id.* (“Likewise, a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance.”).

256. *Id.* (“Resale price maintenance should be subject to more careful scrutiny, by contrast, if many competing manufacturers adopt the practice.”).

257. *Leegin*, 127 S. Ct. at 2719.

or where consumer choice is somehow enhanced. On the other hand, such arrangements may be illegal . . . where the arrangement is a cover for cartel behavior by manufacturers or retailers, or where retailers jointly encourage the manufacturer to adopt a scheme whose only purpose is to increase the price that all the retailers must charge.²⁵⁸

If retailers in an industry have pressured a manufacturer into adopting a minimum price restraint, it would be more likely that a retailer cartel was artificially inflating profits.²⁵⁹ A restraint originating from a retailer may also indicate that a dominant retailer has forced the manufacturer to adopt the minimum price restraint to increase the retailer's own profits.²⁶⁰ On the other hand, it is more likely that a manufacturer that acts unilaterally in adopting a minimum price restraint does so to provide sufficient profits to retailers to encourage the development of consumer services or to enhance the brand's position in the market.²⁶¹ In those circumstances, the restraint is less likely anticompetitive.²⁶²

The third indicator of whether the economic effects of a restraint are procompetitive or anticompetitive is whether the manufacturer or the retailer has market power.²⁶³ A retailer without market power involved in a pricing restraint is less likely to create anticompetitive effects since the manufacturer has other retailers to sell its products.²⁶⁴ A manufacturer without market power involved in a pricing restraint is also less likely to be anticompetitive because its competitors will provide ample products to consumers.²⁶⁵ As commentators have explained, minimum price restraints

258. Phillip C. Zane & Joel R. Buckberg, *Supreme Court Overturns Rule Forbidding Vertical Price Fixing*, BAKER DONELSON LITIG. PUBLICATIONS, July 2, 2007, <http://www.bakerdonelson.com/ContentWide.aspx?NodeID=200&PublicationID=312>; see also Cole & McDonald, *supra* note 3, at 3 (“[U]se of such agreements to facilitate horizontal price fixing, among either manufacturers or retailers, could be challenged under the rule of reason approach.”); Leary & McDavid, *supra* note 149, at 71 (“[R]elevant factors [to the rule of reason inquiry] would include ‘extreme free rider problems’ or the needs of a ‘new entrant’ . . . [and it] would be relevant if the proven facts showed that a company like Leegin competes in nearly atomistic environment.”).

259. *Leegin*, 127 S. Ct. at 2719 (“If there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer.”).

260. *Id.*

261. *Id.*

262. *Id.* (“If, by contrast, a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct.”).

263. *Id.* at 2720 (“[T]hat a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power.”).

264. *Leegin*, 127 S. Ct. at 2720 (“If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers.”).

265. *Id.* (“And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.”).

are “likely to survive antitrust scrutiny . . . where the products have only a modest share of the relevant market [and RPM] may be illegal . . . where the product has a large market share.”²⁶⁶

Besides evaluating the economic indicators in a traditional rule-of-reason analysis, courts may apply a truncated rule-of-reason analysis. The FTC suggested this approach in its recent order, which modified one of its previous orders that precluded Nine West from establishing an RPM program.²⁶⁷ According to the FTC, since *Leegin* “did not spell out which variation of the rule of reason should be applied to RPM going forward” and left open the possibility for courts to “establish the litigation structure,” a truncated rule-of-reason approach may be appropriate.²⁶⁸ Such a truncated analysis may take the form of a quick-look analysis, which presumes that “inherently suspect” conduct is anticompetitive and shifts the burden to the defendant at the outset of litigation to demonstrate a plausible procompetitive justification.²⁶⁹ The plaintiff would then weigh its anticompetitive effects against the justification, or would prevail if the defendant could not demonstrate a justification.²⁷⁰ However, the Court may not have contemplated the adoption of a truncated analysis for minimum RPM since the truncated analysis involves labeling all RPM programs “inherently suspect” while the Court’s holding does not consider all RPM programs anticompetitive or “suspect.”²⁷¹

Even with the explicit guidance from the *Leegin* majority on indicators of economic effects, it may still prove difficult for judges and juries to weigh the economic effects in each case.²⁷² A lay jury may not understand an expert’s explanation of the in-depth, procompetitive economic effects that

266. *Zane & Buckberg*, *supra* note 258. Likewise:

If . . . the manufacturer faces few real substitutes, then its use of RPM could . . . raise antitrust concerns If a manufacturer with market power were attempting to use such agreements to stymie innovation in distribution that decreases costs or to create barriers to entry for smaller manufacturers or new entrants to the market, such uses would be subject to attack under the rule of reason.

Cole & McDonald, *supra* note 3, at 3.

267. *In re Nine West Group Inc.*, No. C-3937, 2008 WL 2061410 (F.T.C. May 6, 2008).

268. *Id.*

269. *See id.* (discussing the truncated rule-of-reason framework articulated in *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005)).

270. *Id.*

271. *Mitnick et al.*, *supra* note 156, at 63–64 (“To apply quick look analysis in all RPM cases . . . would be to abandon *Leegin*’s central point—that RPM is not automatically suspect because it often has procompetitive effects.”).

272. *Lockerby*, *supra* note 151, at 115 (“Regardless of what the economic literature cited by the *Leegin* majority has to say, the potential benefits of minimum resale price maintenance may not be intuitively obvious to the jurors, judges, and/or arbitrators called upon to decide its legality.”).

result from a minimum price restraint.²⁷³ Jurors will tend to focus on the increased prices that accompany RPM programs and may not give credence to the relevant procompetitive justifications of an RPM program, such as increased output.²⁷⁴

The development of the litigation structure for applying the rule of reason to minimum price restraints will be challenging, particularly given the involvement of lay juries that are unfamiliar with complex economic indicators. *Leegin* and the FTC decision, however, provide resources to aid courts in this venture. Additionally, since the rule of reason is the standard used in litigation of other vertical restraints,²⁷⁵ courts may look to its application in those restraints for support. The benefit derived by including economic realities in decisions, instead of basing outcomes on the mere existence of an agreement,²⁷⁶ will overcome the challenges associated with applying the rule of reason to minimum price restraints.

V. THE RULE OF REASON OPENS THE DOOR TO THOROUGH LEGAL ANALYSIS AND THE PROCOMPETITIVE ECONOMIC EFFECTS OF MINIMUM PRICE RESTRAINTS

By replacing the per se illegal rule with the rule-of-reason standard, *Leegin* has unlocked a jurisprudential door that the *Dr. Miles* Court locked nearly a century ago. This door leads to the thorough legal analysis of minimum price restraints. It also enables courts to develop a body of case law that will carve out the distinguishing characteristics that make a minimum price restraint legally permissible and those that make one anticompetitive and therefore illegal. As courts work through these, they may develop legal presumptions such as market-share presumptions that shift the burden at the outset of litigation. In practice, these presumptions could trigger shortened applications of the rule-of-reason standard in cases involving minimum price restraints.

By lifting the condemnation of the per se rule, the Court has given a “proceed with caution” light to manufacturers that believe minimum price restraints would serve procompetitive purposes in their industry. Without the rule of reason, many manufacturers would not approach such a restraint due to the costs associated with attempting to adhere to the *Colgate* doctrine

273. See *supra* text accompanying notes 156–62 (discussing the verdict for the plaintiff that resulted primarily from the jurors’ fixation on the increased price at the ABA Antitrust Section’s mock trial in Washington, D.C.). As Justice Breyer stated in his dissent, “[h]ow easy is it to separate the beneficial sheep from the antitrust goats?” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2729 (2007) (Breyer, J., dissenting).

274. See *supra* text accompanying notes 156–62 (discussing the verdict for the plaintiff that resulted primarily from the jurors’ fixation on the increased price at the ABA Antitrust Section’s mock trial in Washington, D.C.).

275. See *supra* text accompanying notes 91–102 (describing the Court’s adoption of the rule of reason for other vertical restraints).

276. See *supra* Part III.C (discussing the arbitrary application and inconsistent results of the per se illegal standard).

and the threat of per se illegal treatment if they fail in those attempts. Therefore, the rule of reason for minimum price restraints has not only opened the door to the analysis of minimum price restraints, but also to the procompetitive economic effects that accompany the restraints and benefit the market and consumers.