Washington University Journal of Law & Policy

Volume 36 *Restorative Justice*

2011

Resale Price Maintenance After Leegin: Why Treating Vertical Price-Fixing As "Inherently Suspect" Is the Only Viable Alternative to the Traditional Rule of Reason

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INTRODUCTION

At the close of the nineteenth century, there was growing concern across the United States about the expansion of major corporations and their potential for monopolization.[1] In response, Senator John Sherman, an Ohio Republican and the chairman of the Senate Finance Committee, proposed that Congress codify English common law and protect citizens from arrangements[2] that "increase the price of articles, and . . . diminish the amount of commerce."[3]

Although the Sherman Antitrust Act was designed to alleviate these early concerns, Congress gave the judiciary little direction about how the Act was to be enforced.[4] Over the course of the last century, courts have determined that potential Sherman Act violations will either be declared illegal "per se," or examined by courts using a "rule of reason." The courts have struggled, however,

∗ J.D. (2011), Washington University School of Law; B.A. (2008), University of Mississippi. This Note is dedicated to my parents Terry and Robin for the wonderful example they set and their continued support.

1. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 492–93 (1940) (The Sherman Act "was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern."); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 346 (3d ed. 2005).

2. THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAW AND RELATED STATUTES: PART I THE ANTITRUST LAWS 19 (Earl W. Kitner ed., 1978) [hereinafter 1 THE LEGISLATIVE HISTORY].

3. 21 CONG. REC. 2462 (1890) (statement of S. John Sherman).

4. *See infra* note 12 and accompanying text.

in determining which types of restraints deserve which analysis and ultimately how the rule of reason should be applied.

In the 2007 case *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[5] the Supreme Court overturned ninety-six years of precedent and held that vertical resale price maintenance ("RPM"), or a manufacturer setting the minimum price at which a distributor can resell its product, should no longer be held *per se* unlawful.[6] Rather than instruct courts to examine RPM under the rule of reason as they have traditionally, however, the *Leegin* Court invited lower courts to establish a more "fair and efficient" litigation structure for examining RPM.[7] Although numerous litigation structures have been proposed since *Leegin*, this Note will argue that treating RPM as "inherently suspect" is the only alternative that has a realistic possibility of affecting future adjudication.

After giving a brief history of the Sherman Act, Part I of this Note will chronicle the birth of the rule of reason in the early 1900s, detail the rise of the per se rule in the mid-twentieth century, and describe how the rule of reason has been applied since the late 1970s.[8] Part I will conclude by examining the language and rationale behind the *Leegin* decision. Parts II and III will discuss some of the inherent problems found in the traditional rule of reason and present the two post-*Leegin* standards that have the greatest possibility of influencing future judicial application of the rule of reason to RPM.[9] Finally, Part IV will propose that the only alternative able to correct these problems and stand a realistic chance of being adopted by courts is treating RPM as "inherently suspect."[10]

I. HISTORY

The Sherman Antitrust Act passed in 1890 with near unanimous support.[11] Even with a motivated Congress, Senator Sherman

5. 551 U.S. 877 (2007).
6. *Id.* at 881.
7. *Id*. at 898–99.
8. *See infra* Part I.
9. *See infra* Parts II–III.
10. *See infra* Part IV.
11. The Sherman Act passed the Senate by a vote of 52–1 on April 8, 1890, and the House

recognized that successful implementation of the Act would require significant judicial interpretation and involvement.[12] This was especially true for section 1 of the Act, prohibiting "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."[13]

It is no surprise, therefore, that the Supreme Court's varying interpretations of section 1 and adoption of different methods to examine section 1 claims over the past century has played a significant role in how the Act has been enforced. In 1890, for example, the Supreme Court adopted a strict, literal interpretation of the Sherman Act in *United States v. Trans-Missouri Freight Ass'n*.[14]

In a 5–4 decision, the Court held that the regulation of transportation charges by an association of eighteen railroad companies violated section 1 of the Sherman Act.[15] Rejecting the association's argument that section 1 applies only to those contracts found unreasonable at common law,[16] the Court held that the plain

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of Representatives by a unanimous vote of 242–0 on June 20, 1890. *See* 21 CONG. REC. 3153, 6314 (1890). President Benjamin Harrison signed the bill into law on July 2, 1890. *See also* 1 THE LEGISLATIVE HISTORY, *supra* note 2, at 30.

12. In addressing fellow members of Congress, Senator Sherman stated, "All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . . ." 21 CONG. REC. 2460 (1890) (statement of S. John Sherman).

13. Sherman Antitrust Act, 15 U.S.C. § 1 (2006). Congress has continually increased the fines and criminal penalties for Sherman Act violations over the past century. Originally those found guilty of a Sherman Act violation received a misdemeanor and faced up to a year in prison and/or a fine of up to $5,000. Pub. L. No. 51-647, § 1, 26 Stat. 209 (1890). Currently, the criminal penalties stand as a felony with up to ten years imprisonment and a fine up to $100 million for corporations and $1 million for individuals. *See* 15 U.S.C § 1, amended by Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004).

14. 166 U.S. 290 (1896).

15. *See id*. at 340–42.

16. *Id.* at 327–28. In rejecting this argument, the Court noted that:

> Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. . . . A contract may be in restraint of trade and still be valid at common law.

Id. at 328. The Court also rejected the railroad association's argument that the Sherman Act was not meant to apply to railroads because of the substantial number of railroad regulations already in place. *Id.* at 326–27.

language of the Act expressly prohibits *every* restraint of trade, regardless of the restraint's treatment historically.[17]

In a vigorous dissent, Justice White argued that because the prices agreed upon by the railroads were reasonable, the agreement satisfied the common law "rule of reason" standard and should not be subject to section 1 condemnation.[18] Although the Court backed off its strict interpretation in the years following *Trans-Missouri*,[19] the Court did not officially overturn the decision until over a decade later.[20]

Federal circuit courts also distanced themselves from the harshness of the *Trans-Missouri* decision. In *United States v. Addyston Pipe & Steel Co.*,[21] the Sixth Circuit condemned a cartel of pipe manufacturers whose members intentionally overbid for municipality contracts to guarantee that the lowest bidder, also a member of the cartel, would receive the business at an inflated rate.[22]

Although the arrangement did not violate the literal language of section 1, then-Judge (and future President and Supreme Court Chief Justice) William Howard Taft invoked common law principles to declare the cartel unlawful.[23] Judge Taft distinguished between

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17. *Id.* at 328. The Court concluded that "[w]hen . . . the body of an act pronounces as illegal every contract or combination in restraint of trade . . . the plain and ordinary meaning of such language is not limited to that kind of contract alone which is . . . unreasonable." *Id.*

18. *Id.* at 350–52 (White, J., dissenting). Although Justice White specifically used the phrase "rule of reason" in his dissent, at least one commentator observed that at that time the phrase had a meaning entirely different from the modern standard. *See* ROBERT BORK, THE ANTITRUST PARADOX 24 (1978) (noting that White's use of rule of reason language was an "unfortunate choice of words"). Justice White was particularly troubled by the effect the decision could have on freedom of contract:

> If the rule of reason no longer determines the right of the individual to contract, or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade? Secured no longer by the law of reason, all these rights become subject, when questioned, to the mere caprice of judicial authority.

Trans-Missouri, 166 U.S. at 355 (White, J., dissenting).

19. *See, e.g.*, United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898) (noting that "[t]o suppose . . . that the effect of the decision in the *Trans-Missouri Case* is to render illegal most business contracts or combinations . . . is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court").

20. *See* Standard Oil Co. v. United States, 221 U.S. 1, 64–65 (1911).

21. 85 F. 271 (6th Cir. 1898).

22. *Id.* at 292–94.

23. *Id*. at 286–92. The court noted that the common law had two concerns about restraints on trade: depriving a family and the public of a "useful member," and excluding others from

"ancillary" restraints, those that serve a legitimate function and are essential to the purpose of the agreement,[24] and "naked" restraints, those with the "sole object . . . to restrain trade in order to avoid . . . competition."[25] Although the Supreme Court subsequently granted certiorari and affirmed *Addyston*,[26] the majority made no mention of Judge Taft's "ancillary restraints doctrine."[27]

A. Birth of the Rule of Reason

By 1911, newly-appointed Chief Justice White determined that under his watch the strict *Trans-Missouri* standard would no longer control Sherman Act adjudication.[28] In *Standard Oil Co. v. United States*,[29] the United States government charged John D. Rockefeller and his Standard Oil Company with a laundry list of discriminatory practices including forming contracts in restraint of trade, local price-cutting, and espionage of competitors.[30] The Court considered whether these practices, many considered legal at common law, fell within the purview of sections 1 and 2 of the Sherman Act. Answering in the affirmative, the Court determined that it was the intent of Congress to prohibit not only those restraints illegal at

competing. *Id.* at 279.

24. *Id*. at 282. The ancillary restraints doctrine, penned by Judge Taft, argued that a restraint can be upheld only if it has a reasonable justification:

> Before such agreements are upheld . . . the court must find that the restraints attempted thereby are reasonably necessary . . . to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; . . . to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or . . . to protection from the danger of loss to the employer's business caused by the unjust use on the part of the [employee] of the confidential knowledge acquired in such business.

Id. at 281.

25. *Id.* at 283.

26. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

27. The Court did, however, reference its *Joint Traffic* decision in noting that interstate commerce "must not be affected only indirectly or incidentally" for the Sherman Act to apply. *Id*. at 228–29; *see also supra* note 19 and accompanying text.

28. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911) (applying a "standard of reason" to judge Sherman Act claims); United States v. Am. Tobacco Co., 221 U.S. 106 (1911) (reaffirming *Standard Oil* rationale).

29. 221 U.S. 1 (1911).

30. *Id*. at 42–43. The government also charged Standard Oil with monopolistic behavior that resulted in "enormous and unreasonable profits." *Id.*

common law, but also the "many new forms of contracts and combinations . . . being evolved from existing economic conditions."[31]

The Court proposed the use of a "standard of reason," similar to that used at common law,[32] to condemn as unreasonable those arrangements resulting in "undue restraint[s] of interstate or foreign commerce."[33] Justice Harlan, dissenting in part, expressed concern that this new standard would bring substantial uncertainty into the business community.[34] Despite this concern, the majority concluded that it was the function of the judiciary, not the legislature, to make such interpretive decisions.[35]

Questions still remained, however, about how courts should apply the new standard.[36] It was not until seven years later in *Chicago Board of Trade v. United States*[37] that the Supreme Court took on the

31. *Id.* at 59.

32. *Id.* at 60. Chief Justice White explained:

> [T]he standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.

Id.

33. *Id.* at 59–60.

34. *Id.* at 102–03 (Harlan, J., concurring in part and dissenting in part). Justice Harlan was the only member of the Court to express concern about adopting the standard of reason:

> I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited *every* contract, combination, or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry-difficult to solve by proof-whether the particular contract, combination, or trust involved in each case is or is not an 'unreasonable' or 'undue' restraint of trade.

Id.

35. *See id.* at 69–70 (majority opinion); *see also* ABA ANTITRUST SECTION, MONOGRAPH NO. 23, THE RULE OF REASON 47 (1999) ("Chief Justice White's view in *Standard Oil* was that the Court's interpretive task of analyzing the effects of a given practice was a judicial function, not a legislative or administrative one.").

36. *See* MILTON HANDLER, ANTITRUST IN PERSPECTIVE: THE COMPLEMENTARY ROLES OF RULE AND DISCRETION 9 (1957) (noting that with regards to the standard of reason, Justice White was "more concerned with having the rule recognized than in defining its content").

37. 246 U.S. 231 (1918).

task of providing relevant factors for courts to consider under the standard of reason.

The *Chicago Board of Trade* case involved a restraint imposed by the Chicago Board of Trade (CBOT) that prevented grain exchange members from purchasing grain below the closing price of each day's last call session.[38] The Court noted that because every business agreement regulates trade to some degree, "[t]he true test of legality is whether the restraint imposed . . . merely regulates and . . . promotes competition or whether it . . . may suppress or even destroy competition."[39]

The Court listed a number of factors that could be considered in making this determination, including: (1) the conditions before and after the restraint is imposed; (2) the nature of the restraint and its effect; (3) the history of the restraint and the harm that is believed to cause; and (4) the party's reasons or purpose for adopting the restraint.[40] Considering these factors in light of the facts of the case, the Court held that CBOT's "call rule" restraint served a legitimate business purpose that was ultimately procompetitive both in purpose and in effect.[41]

Although the *Chicago Board of Trade* Court never specifically used the term, Justice Brandeis's list of relevant factors later became "[o]ne of the most frequently cited statements" in support of the "rule of reason."[42] The Court's desire to bring more clarity, however, ultimately had the opposite effect as the analysis contained little guidance or structure.[43] *Chicago Board of Trade*'s use of general

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38. *Id.* at 235–38. This practice was known as the "call rule." *Id.* at 237.

39. *Id.* at 238. CBOT contended that the call rule was not an attempt to set prices, but rather an attempt to prevent the unfair practice of agents selling cheaper grain to buyers after hours. *Id.* at 240.

40. *Id.* at 238. Justice Brandeis's reasonableness analysis is commonly invoked by modern proponents of the rule of reason.

41. *Id.* at 239–41. To arrive at this decision, the Court focused on the nature, scope and effect of the call rule. *Id.* The Court held that the nature of the rule was generally designed to shorten work days, the scope of the restraint applied only to a small number of exchange members and "only to a small part of the grain shipped from day to day" and the restraint had several procompetitive purposes in effect. *Id.*

42. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 n.15 (1977).

43. *See* Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 347 (2000) ("Brandeis combined elements of all three common law tests to justify the Board's call rule."); Maurice E. Stucke, *Does the Rule*

language and apparent departure from common law is widely-attributed as the source for many complexities found in the modern rule of reason analysis.[44]

B. The Rise of Per Se Illegality

In response to complexities that arose in applying the standard of reason, courts also began using a bright-line "per se" rule to summarily condemn clearly anticompetitive practices.[45] The Supreme Court's first application of the per se rule arose in the context of a vertical restraint, or an "attempt by a manufacturer to control the activities of wholesalers, distributors, or retailers."[46]

In *Dr. Miles Medical Co. v. John D. Park & Sons Co*.,[47] the Court held that it was unlawful for a manufacturer to set the minimum prices at which an independent reseller can resell its products.[48] The

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of Reason Violate the Rule of Law?, 42 U.C. DAVIS L. REV. 1375, 1398 (2009) ("Under Chief Justice White's logic in *Standard Oil*, Congress implicitly endorsed the common law's rule of reason in enacting the Sherman Act. . . . [However,] *CBOT*'s open-ended rule of reason significantly differed from its common law counterpart. *CBOT*'s rule of reason neither identified categories of conduct that were presumptively anticompetitive or socially undesirable nor contained any other presumption of illegality.").

44. The fact that *Chicago Board of Trade* failed to identify which party has the burden of proof or how much weight should be given to each factor has been heavily criticized by commentators. *See, e.g.*, Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The* Chicago Board of Trade *Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, 15 RES. L. & ECON. 1, 4 (1992) ("[O]pen-ended listing of possibly relevant factors is hardly illuminating as to their analytic inter-relationship, nor does it inform a decision maker of what weights to ascribe to different factual conclusions."); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act,* 74 CAL. L. REV. 263, 303–04 (1986) (discussing the failure of Brandeis to indicate the relative significance of any particular factor); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 252 (2d ed. 1999) ("Justice Brandeis' statement of the rule of reason . . . has been one of the most damaging in . . . antitrust" as it "has suggested to many courts that . . . nearly everything is relevant.").

45. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

46. Richard O. Zerbe, Jr., *Justice and the Evolution of the Common Law*, 3 J.L. ECON. & POL'Y 81, 99 (2006).

47. 220 U.S. 373 (1911).

48. *Id.* at 408–09. Dr. Miles Medical Company manufactured and sold proprietary medicines, prepared by means of "secret methods and formulas" to retail druggists. *Id.* at 374. The company entered into consignment agreements prohibiting the consignee from selling to

Court noted that the price-fixing arrangement imposed by the manufacturer, known as minimum RPM, was unlawful under section 1 of the Sherman Act because its purpose was to "prevent competition among those who trade."[49] For the next ninety-six years,[50] the 1911 *Dr. Miles* decision was construed by courts as a per se ban on all types of vertical RPM.[51]

Sixteen years later in *United States v. Trenton Potteries Co.*,[52] the Court extended the *per se* rationale to horizontal price-fixing arrangements among competitors.[53] Although the *per se* rule did not become the prevailing standard in Sherman Act adjudication until the 1940s, some commentators believe that its rapid expansion was a direct result of the complexities found in *Chicago Board of Trade*.[54]

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anyone but designated retailers and wholesalers, as well as agency agreements with retail druggists prohibiting them from selling their products below a set price. *Id*. Dr. Miles subsequently sued John D. Parks & Co., a drug wholesaler that refused to enter into a consignment agreement but acquired Dr. Miles' medicines from others in Dr. Miles' distribution chain with the intent to reduce prices. *Id*. at 381–82. The Court held that because Dr. Miles' contracts restrained trade, they were "injurious to the public" and should thus be voided. *Id.* at 408.

49. *Id*.

50. *Dr. Miles* was overturned by the Supreme Court's decision in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

51. *See Leegin*, 551 U.S. at 881 ("In *Dr. Miles* . . . the Court established the rule that it is *per se* illegal under § 1 of the Sherman Act . . . for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods.").

52. 273 U.S. 392 (1927). *Trenton Potteries* involved a price-fixing agreement between twenty-three suppliers of pottery fixtures. *Id.* at 393–94. Shunning *Chicago Board of Trade*, the trial court submitted the case to a jury upon the instruction that if it found the agreements at issue to have occurred, it should return a guilty verdict. *Id.* at 395. In affirming the defendants' convictions under the Sherman Act, the Court limited *Chicago Board of Trade* to its facts noting that the decision dealt "with a regulation of a board of trade, [and] does not sanction a price agreement among competitors in an open market." *Id.* at 401.

53. *Id.* at 406–07. Horizontal price-fixing occurs when two or more parties at the same level of market structure agree on prices they will charge customers. *See* WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK 134 (1995). Courts are especially wary of these types of arrangements. *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (noting that horizontal restraints frequently are "naked restraints of trade with no purpose except stifling of competition").

54. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 7 (1978). The Court did, however, apply a *Chicago Board of Trade* analysis in one Depression-era case. *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) (using a rule of reason analysis to approve restraints employed by a cartel of coal producers designed to stabilize prices through the use of an exclusive selling agency). The *Appalachian Coals* decision is generally understood to be an aberration, however, brought about by the Great Depression. *See* PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 190 (5th ed. 1997) ("*Appalachian Coals* is

The 1940 Supreme Court decision *United States v. Socony Vacuum Oil Co.*[55] expanded the *per se* rule to include horizontal arrangements that directly *affect* prices without necessarily fixing them.[56] The *Socony* Court rejected many of the popular justifications for price-fixing,[57] forcefully declaring that, "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."[58]

Over the next two decades, the *per se* rule was expanded to condemn tying arrangements (arrangements whereby a party agrees to sell a product on the condition that the buyer also purchases a different product),[59] horizontal customer and territorial allocations (agreements among competitors to solicit customers only within a certain geographic area),[60] vertical non-price restraints (restrictions imposed on dealers with regards to matters other than price such as territorial exclusions or customer allocation),[61] group boycotts (concerted refusals by traders to deal with other traders),[62] and maximum RPM (capping the price distributors can charge for goods).[63] The underlying rationale for the rapid expansion of the *per*

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often regarded today as an aberration of the 1930s, when competition was often deemphasized."); RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST 126 (2d ed. 1981) (explaining that the outcome in *Appalachian Coals* was because faith in policy of competition during the Depression era was "deeply shaken").

55. 310 U.S. 150 (1940).

56. *Id.* at 228. Invoking *Trenton Potteries*, the *Socony* Court condemned a joint program among major oil companies to maintain gasoline prices at an artificially high level. *Id.*

57. The Court listed "[r]uinous competition," "financial disaster," and "evils of price cutting" as all "ostensible justifications for price-fixing." *Id.* at 221.

58. *Id.* at 223. Although *Socony* was one of the many smaller companies that the Standard Oil Company was split into following the Court's decision in *Standard Oil*, the Court opted not to apply the standard of reason. For further discussion on this topic, see Daniel A. Crane, *The Story of* United States v. Socony-Vacuum*: Hot Oil and Antitrust in the Two New Deals*, *in* ANTITRUST STORIES 91–119 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

59. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

60. *See* United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Topco Assocs., 405 U.S. 596 (1972).

61. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967) ("Under the Sherman Act, it is unreasonable . . . to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it.").

62. *See* Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959).

63. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968).

se rule was perhaps best described by Justice Black in *Northern Pacific Railway. Co. v. United States*[64]:

> This principle of *per se* unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[65]

This language embodies the general feeling that courts at the time were unwilling to spend judicial time and resources analyzing the effects of different restraints on the market.

C. Emergence of the Rule of Reason

Despite its dominance in Sherman Act adjudication for nearly thirty years, by the mid-1960s the *per se* rule came under heavy criticism from businesses and legal commentators alike.[66] Although the *per se* rule promoted consistent application and judicial efficiency, the rule was chastised by economists concerned with "false positives," or courts condemning practices that in reality had few anticompetitive effects.[67] Mindful of these concerns, the Supreme Court in a series of three 1970s court decisions reinstated the newly-coined "rule of reason" as the dominant form of antitrust adjudication.

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64. 356 U.S. 1 (1958).

65. *Id.* at 5.

66. *See* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (II)*, 75 YALE L.J. 373, 403 (1966); Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283–88 (1975). Much of the criticism came from proponents of the burgeoning Chicago School Efficiency Model. The Chicago School assumes that the sole goal of antitrust enforcement should be economic efficiency and that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products.

67. *See* Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 350–51 (2000) (noting that while the Department of Justice was effective in prosecuting cartels, application of the per se rules in the private sector produced an "intolerable level of false positives").

In *Continental T.V. v. GTE Sylvania*,[68] the Court expressly overruled a ten-year-old precedent in holding that vertical non-price restraints should be judged under the rule of reason.[69] The Court acknowledged that there is "substantial scholarly and judicial authority" supporting the procompetitive benefits of non-price restraints and that "departure from the rule-of-reason standard must be based upon demonstrable economic effect . . . rather than . . . formalistic line drawing."[70]

The following year in *National Society of Professional Engineers v. United States*,[71] the Court considered whether an engineering society's ethical canon banning competitive bidding for services should be condemned as an unlawful price-fixing arrangement.[72] While under a traditional *per se* analysis the horizontal restriction would have been invalid on its face, the Court opted to apply a rule of reason to examine the restraint.[73] Although the Court condemned the restriction, *National Society* demonstrated the Court's willingness to consider economic justifications for even obvious price-fixing arrangements.[74]

In the 1979 case *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[75] ("*BMI*"), the Court went one step further and upheld a price-fixing agreement among potential competitors because of the restraint's practical effects.[76] In *BMI*, thousands of authors and composers joined together with publishing agencies to issue blanket

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68. 433 U.S. 36 (1977). The question posed to the Court was whether Sylvania violated section 1 of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of Sylvania products other than from specified locations. *Id.* at 40.

69. *Id.* at 60. The Court overruled *United States v. Arnold, Schwinn & Co*., 388 U.S. 365 (1967). The *Sylvania* Court noted, "Although *Schwinn* is supported by the principle of stare decisis . . . we are convinced that the need for clarification of the law in this area justifies reconsideration." *Sylvania*, 433 U.S. at 47 (citation omitted).

70. *Id.* at 58–59. The *Sylvania* Court went as far as to assert that "[s]ince the early years of this century a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis." *Id.* at 49.

71. 435 U.S. 679 (1978).

72. *Id.* at 683–84.

73. *Id.* at 688–89.

74. *Id.* at 693–95. The Court disagreed with the Society's argument that the restraint was justified because bidding on engineering services would lead to lower quality of work, thus risking the health and safety of the public. *Id.*

75. 441 U.S. 1 (1979).

76. *Id.* at 20.

licenses for the use of all of their musical compositions.[77] Using a threshold inquiry to determine which standard to apply,[78] the Court invoked *Addyston Pipe's* ancillary restraints doctrine to ultimately approve of the arrangement under the rule of reason.[79] The Court concluded that the blanket license was not a naked restraint of trade with no purpose except stifling of competition, but rather a useful tool for the "integration of sales, monitoring, and enforcement against unauthorized copyright use."[80]

Despite a dramatic increase in the use of the rule of reason, courts still struggled on occasion to determine when borderline restraints warranted a *per se* analysis. As a result, some courts began applying a truncated rule of reason analysis that gave the restraint a "quick look" before its condemnation.[81]

In the 1984 case *NCAA v. Board of Regents of the University of Oklahoma*,[82] for example, the Court considered whether the NCAA's imposition of price and output restraints on television contracts for college football teams should be considered *per se* unlawful.[83] Despite the television plan's apparent restraint on trade,[84] the Court opted to take a "quick look" at the procompetitive justifications for the plan without first requiring the plaintiff prove the NCAA's market share.[85] Although the "quick look" test was applied by courts

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77. *Id.* at 5–7. BMI was an association that represented approximately 20,000 music copyright owners and provided licenses to licensees who wanted to play the copyright owners' works. *Id.* at 5. BMI would receive fees directly from the licensees, and then distribute the fees to the copyright owners. *Id.* at 8–9. Columbia Broadcasting System, Inc. (CBS) challenged the association as a clear price-fixing arrangement: composers and publishing houses joining together to set prices. *Id.* at 8. The Court upheld the blanket license because of its practical justification in the marketplace. *Id.* at 20.

78. *Id.* at 19–20. In deciding which test to apply, the *BMI* Court noted, "[I]n characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and . . . purpose of the practice . . . facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Id.*

79. *Id.* at 20–21.

80. *Id.* at 20.

81. *See infra* notes 82–87 and accompanying text.

82. 468 U.S. 85 (1984).

83. *Id.* at 89–91.

84. *Id.* at 106–07. The Court recognized that by its very nature the television plan reduced output, raised price and created a price structure "unresponsive to consumer preference." *Id.* at 106–07.

85. The Court noted, "[W]hen there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character

and the Federal Trade Commission (FTC) on several more occasions,[86] it eventually fell out of favor after the Supreme Court failed to definitively define its scope.[87]

Throughout the 1980s, the Court continued to use efficiency justifications to extend rule of reason examination to both horizontal and vertical arrangements.[88] The Court refused, however, to eliminate the *per se* rule altogether,[89] especially with regards to RPM.[90] Despite inconsistent and varying applications throughout jurisdictions, the rule of reason continued to maintain popularity over the next twenty years.[91]

D. The Leegin *Decision*

On December 7, 2006, the Supreme Court granted certiorari to determine whether *Dr. Miles*, the longstanding pillar of the *per se* rule, should be overturned in favor of applying the rule of reason to

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of such an agreement.'" *Id.* at 109 (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

86. *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) (applying "quick look" to an agreement among dentists to hold x-rays from insurance companies); *In re* Mass. Bd. of Registration on Optometry, 110 F.T.C. 549, 605 (1988) ("Restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects.").

87. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780-81 (1999) (holding that courts may choose when to apply quick-look based on their own assessment of the restraint).

88. *See, e.g.*, *NCAA*, 468 U.S. 85; Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988) (applying the rule of reason to a vertical agreement that had the purpose and effect of increasing retail prices, but without specifying the price to be charged). On other occasions, the Court modified existing *per se* rules. *See* Jefferson Parish Hosp. District No. 2 v. Hyde, 466 U.S. 2 (1984) (modifying the *per se* rule for tying arrangements to make the plaintiff show defendant possessed significant market share).

89. In fact, the term after *BMI* was decided, the Court considered two similar horizontal cases without even referencing the threshold analysis used in *BMI*. *See* Catalano, Inc. v. Target Sales, Inc. 446 U.S. 643 (1980) (per curiam) (finding that beer wholesalers who agreed to stop extending credit to beer retailers was a per se violation of Section 1); Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332 (1982) (disregarding procompetitive justifications of agreement among physicians to set the maximum fees under certain insurance plans in finding arrangement *per se* unlawful).

90. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980) (reaffirming *per se* rule for RPM); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (declining to apply the rule of reason to RPM despite asserting that vertical price and nonprice restraints are indistinguishable).

91. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3 (1997) (overruling *Albrecht* and holding that maximum RPM should be examined under the rule of reason).

judge minimum RPM (also referred to as vertical price-fixing).[92] The case, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[93] involved a manufacturer of high-end women's accessories that suspended shipments to a profitable retailer for discounting its products below a suggested retail price.[94] In a 5-4 decision, the Court held that the procompetitive justifications for RPM were sufficient to overturn ninety-six years of precedent and examine RPM agreements under the rule of reason.[95]

To support this conclusion, Justice Kennedy, writing for the majority, attacked the rationale used by the *Dr. Miles* Court.[96] The majority next referenced the vast number of commentators arguing that the benefits of vertical RPM are similar to those of other vertical restraints.[97] Relying on this rationale, Justice Kennedy recited many of the same justifications used by the *Sylvania* Court in applying the rule of reason to non-price restraints.[98] Specifically, the Court contended that vertical RPM alleviates the "free-rider" problem by

92. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881 (2007).

93. *Id.*

94. *Id.* at 884. Leegin Creative Leather Products was a designer, manufacturer, and distributer of leather goods and accessories under the brand name "Brighton." Leegin adopted a policy that it would do business only with retailers that followed its suggested retail prices. *Id.* at 882–83. When Leegin discovered that PSKS, Inc. (operator of a women's apparel store named Kay's Kloset) was discounting its products, it suspended product shipments to PSKS, ultimately putting the store out of business. *Id.* at 884. PSKS then filed suit, alleging that Leegin's pricing policy was unlawful RPM. At trial, Leegin admitted that it had entered into price-fixing agreements with its retailers, but sought to introduce expert testimony that the policy was ultimately procompetitive. *Id.* Relying on *Dr. Miles*, the District Court refused to admit the proffered evidence and the jury found awarded PSKS $3.6 million in damages. The Fifth Circuit affirmed the ruling. *Id.* at 884–85.

95. *Id*. at 900.

96. *Id.* at 888–89. Justice Kennedy argued that the *Dr. Miles* Court never considered the procompetitive effects of vertical RPM, erroneously relied on a treatise published in 1628, and wrongfully analogized vertical RPM with horizontal agreements. *Id.* at 888.

97. *See, e.g.*, HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 184–91 (2005); BORK, *supra* note 54, at 288–91. The Court also relied heavily on the Amicus Briefs submitted on behalf of Leegin. *See Leegin*, 551 U.S. at 889–90.

98. At least one commentator has argued that the *Sylvania* "maxims" have been incorrectly offered as immutable proof that vertical RPM is procompetitive. *See* Warren S. Grimes, *The Path Forward after* Leegin*: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L.J. 467 (2008).

preventing "the discounter from undercutting the service provider,"[99] encourages retailer services that would not otherwise be provided,[100] and increases interbrand competition by facilitating market entry for new firms and brands.[101]

The Court rejected PSKS's primary arguments that the *per se* rule should be affirmed for "administrative convenience,"[102] that vertical RPM inherently leads to higher consumer prices,[103] and that *stare decisis* required the upholding of *Dr. Miles*.[104] The majority

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99. *Leegin*, 551 U.S. at 891. An example of "free-riding" was given in the Brief for Economists:

> A customer may take advantage of one retailer's informed sales staff, hands-on demonstrations, and convenient shopping locations and hours. Having received the value of those services, the customer may then purchase the product from another retailer that does not provide the same level of service and, therefore, can afford to sell the product for less.

Brief of Amici Curiae Economists in Support of Petitioner at 7, Leegin Creative Leather Prods, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (No. 06-480), 2007 WL 173681; *see also* Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960) (describing phenomenon of free-riding); G. Franklin Mathewson & Ralph A. Winter, *The Incentives for Resale Price Maintenance Under Imperfect Information*, 21 ECON. INQUIRY 337 (1983) (providing a description of the free-riding problem). *But see* Grimes, *supra* note 98 (offering support that no free-riding took place in *Leegin*).

100. The Court explained, "Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services." *Leegin*, 551 U.S. at 892.

101. *Id.* at 891. The Court noted that "[n]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." *Id.* (quoting Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55 (1977)).

102. PSKS argued that a bright-line *per se* rule allows manufacturers and distributors to efficiently conduct business by knowing what is permissible: "[D]espite the theoretical possibility of finding instances in which horizontal price fixing, or vertical price fixing, are economically justified, the courts have held them unlawful per se, concluding that the administrative virtues of simplicity outweigh the occasional 'economic' loss." Brief of Respondent at 28, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (No. 06-480), 2007 WL 621855.

103. *See id.* at 6 ("The only uniform and demonstrable effect of RPM is higher consumer prices."). This argument was rejected by the Court, which stated that "[r]espondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct." *Leegin*, 551 U.S. at 895.

104. *Id.* at 899–903. Justice Kennedy argued that stare decisis is not as "significant" in Sherman Act cases. *Id.* at 899. He noted that because the Sherman Act is treated as a common-law statute, its "prohibition on 'restraint[s] of trade' evolve[s] to meet the dynamics of present economic conditions." *Id*.

acknowledged, however, that RPM can have anticompetitive effects "depending upon the circumstances in which . . . [it is] formed."[105] To ensure that manufacturers will not use RPM solely as a means of increasing profit margin, Justice Kennedy recommended that lower courts use rules and presumptions to design a new litigation structure that separates good RPM from bad:

> 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.[106]

Justice Kennedy also provided courts several factors that could be relevant to the inquiry. Specifically, Justice Kennedy noted that courts may consider the number of competitors in the market that have adopted RPM agreements,[107] whether the RPM originated with the manufacturer or the retailer,[108] and whether the manufacturer or retailer party to the RPM agreement possesses market power.[109]

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105. *Id.* at 894. Among the Court's chief concerns was the formation of cartels on both the manufacturer and the retail level, as well as problems RPM agreements can create when retailers with considerable market power use RPM to incentivize retailers not to sell the products of smaller rivals or new entrants. *Id.* at 892–94.

106. *Id*. at 898–99.

107. The Court noted that the possibility RPM agreements are facilitating cartels is less likely when few competitors employ such agreements, but "[r]esale price maintenance should be subject to more careful scrutiny . . . if many competing manufacturers adopt the practice." *Id.* at 897.

108. The Court explained: "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." *Id.* at 898–99.

109. The Court stated that "[i]f a retailer lacks market power, manufacturers likely can sell their goods through rival retailers . . . [a]nd if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets." *Id.* at 898.

In his dissent, Justice Breyer questioned the ability of judges and juries to make these types of complex inquiries.[110] With regards to market power, for example, Justice Breyer noted that "[t]he Court's invitation to consider the existence of 'market power,' . . . invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets."[111] Justice Breyer's dissent embodied many of the concerns commentators have had with the traditional, unstructured rule of reason since its inception in *Chicago Board of Trade*.[112]

II. ANALYSIS

The inherent problems found in the traditional rule of reason have necessitated the need for a new litigation structure to examine RPM.[113] Although the *Leegin* Court did not specifically endorse a new analytical framework, the majority certainly did not advocate for the rule of reason as it has been applied in the past. The burden-shifting framework used under the traditional, unstructured rule of reason highlights some of the standard's inherent flaws.[114]

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110. *Id.* at 916 (Breyer, J., dissenting). Justice Breyer noted:

> How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*. For one thing, it is often difficult to identify *who*—producer or dealer—is the moving force behind any given resale price maintenance agreement. . . . For another thing . . . it is difficult to determine just when, and where, the "free riding" problem is serious enough to warrant legal protection.

Id.

111. *Id.* at 917.

112. *See, e.g.*, Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 14 (1977) (noting that content of rule of reason is largely unknown and the *Sylvania* Court "was deceived if it thought it was subjecting those restrictions to scrutiny under a well-understood legal standard").

113. Most of the burdens in a rule of reason analysis weigh heavily against the plaintiff. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009). For example, the Eleventh Circuit requires a plaintiff to show not only the defendant's anticompetitive effect, but also that "the defendant's conduct has no pro-competitive benefit or justification." Spanish Broad. Sys. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1071 (11th Cir. 2004) (quoting Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1551 (11th Cir. 1996)) (internal quotation marks omitted).

114. While applications of the traditional rule of reason may differ slightly from circuit to circuit, all federal courts employ some type of burden-shifting framework. *See* Carrier, *supra* note 113, at 834–36.

Under a traditional rule of reason analysis, the plaintiff typically bears the initial burden of establishing that the conduct complained of "produces significant anticompetitive effects within the relevant product and geographic markets."[115] For antitrust plaintiffs, this is no simple feat. Establishing market share is a complex undertaking that typically comes at considerable time, effort and expense.[116] In fact, a showing of anticompetitive effects generally requires the "nearly impossible" task of proving that the price and supply of goods on the market is different from the levels that would be offered in a competitive market.[117]

If the plaintiff is somehow able to satisfy this burden, the burden then shifts back to the defendant to provide a procompetitive justification for the challenged restraint.[118] The obvious concern here is that an antitrust defendant will almost always be able to point to *some* procompetitive justification for imposing a restraint.[119] Preventing the phenomenon of free-riding, for example, can always be asserted by the defendant despite its difficulty to objectively measure.[120]

115. Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003).

116. *See, e.g.*, Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817, 825 (1987) (noting that the "measurement of market power, which requires the definition of relevant product and geographic markets, is the most elusive and unreliable aspect of antitrust enforcement"); MILTON HANDLER ET AL., TRADE REGULATION: CASES AND MATERIALS 210 (4th ed. 1997) ("In theory and practice, relevant market definition is as difficult an undertaking as any in antitrust.").

117. Peter Nealis, *Per Se Legality: A New Standard in Antitrust Adjudication Under the Rule of Reason*, 61 OHIO ST. L.J. 347, 367–68 (2000). Attorney Peter Nealis notes, "[D]ue to lag effects and difficulties in establishing competitive levels in the first place, this situation is nearly impossible to establish." *Id.*; *see also* Grimes, *supra* note 98, at 487 (noting that the proving anticompetitive effects can be burdensome because "plaintiff will have to present evidence not only of the defendant's use of the restraint, but also of use of the restraint by rival suppliers").

118. *See* Care Heating & Cooling, Inc. v. Am. Standard, Inc., 427 F.3d 1008, 1013 (6th Cir. 2005).

119. One study performed showed that from 1977 to 1999, only 3 percent of rule of reason cases were invalidated because the defendant failed to demonstrate a legitimate procompetitive justification. *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268.

120. *See* FREDERIC M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 551–55 (3d ed. 1990) (discussing the "severe limitations" of the free-rider justification for RPM).

If and when the defendant satisfies this burden, the plaintiff may respond by showing that the restraint's legitimate procompetitive objectives can be achieved in a substantially less restrictive manner, or that the restraint is not reasonably necessary to achieve the procompetitive objectives.[121] Again, this gives courts the unenviable task of trying to weigh seemingly independent economic factors against each other in some sort of meaningful way.[122] Only after the plaintiff satisfies this final burden will the factfinder actually balance both sides and "engage in a careful weighing of the competitive effects of the agreement."[123]

Rarely does antitrust litigation employing a rule of reason analysis ever make it to the balancing stage,[124] and if it does, it has assuredly come at considerable time and expense to the plaintiff.[125] Because "litigation under the rule of reason generally is extraordinarily expensive in relation to the size of the interests at stake," the traditional rule of reason deters even meritorious claims from being brought in the first instance.[126]

121. Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003).

122. On at least one occasion, the Court admitted its own limitations in this regard. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 610–11 (1972) (noting that the ability "to determine the respective values of competition in various sectors of the economy" was beyond the Court's competency and authority under the Sherman Act); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 917 (2007) (Breyer, J., dissenting) ("One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes.").

123. Geneva Pharm. Tech. Corp. v. Barr Lab., Inc., 386 F.3d 485, 507 (2d Cir. 2004).

124. *See* William J. Kolasky, Jr., *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, 22 ANTITRUST 85, 87 (2008) (noting that it "is now conventional wisdom for antitrust lawyers to observe that courts . . . almost never explicitly balance the procompetitive and anticompetitive effects of an alleged restraint").

125. *See* HOVENKAMP, *supra* note 97, at 105 (2005) (litigating a rule of reason case is "one of the most costly procedures in antitrust practice"); Mark Crane, *The Future Direction of Antitrust*, 56 ANTITRUST L.J. 3, 16–17 ("The rule of reason requires documents from third parties, expert testimony, and statistical data as well. The result is not only a longer trial but substantially increased discovery and pretrial expense."). Not only are antitrust trials enormously expensive, but they can also be exceedingly time-consuming. *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 367 (1967) (noting that trial took seventy days to litigate in district court).

126. 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1620.1, at 317 (Supp. 2009). As a result, "many instances of anticompetitive RPM may go unchallenged." *Id.*

Unsurprisingly, traditional application of the rule of reason has caused courts and antitrust plaintiffs a number of problems. The most glaring deficiency is that under the rule of reason, plaintiffs almost always lose.[127] One study recognized that from 1999 to 2009, defendants won cases adjudicated using a rule of reason analysis 99.5 percent of the time.[128] A staggering 97 percent of the cases were disposed of at the pleading stage on the grounds that the plaintiff could not satisfy its initial burden of showing an anticompetitive effect.[129] Only 2 percent ever reached a stage where the anticompetitive and procompetitive effects of the restraint were balanced.[130]

There are obvious concerns if courts continue to apply the traditional, unstructured rule of reason to minimum RPM post-*Leegin*. Minimum RPM is known to raise consumer prices,[131] and

127. *See, e.g.*, Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 70–71 (1991) (observing that defendants prevail in over 90 percent of nonprice vertical restraint cases studied); AREEDA & HOVENKAMP, *supra* note 126, ¶ 1620.1, at 317 ("Since the *Sylvania* decision in 1977, very few private plaintiffs have successfully challenged vertical nonprice restraints."); Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 305 (1987) (declaring that adjudication under the rule of reason "as a practical matter meant that they were declared lawful per se"); Posner, *supra* note 112, at 14 (noting that the rule of reason in practice "is little more than a euphemism for nonliability").

128. *See* Carrier, *supra* note 113, at 828. Carrier's updated survey was based on a Westlaw search of all federal cases decided between February 2, 1999 and May 5, 2009. *Id.* Out of the 222 cases that were retrieved, the defendant won in 221 of them. *Id.* at 830.

129. *Id.* at 828. Carrier concluded from his study that first, "plaintiffs almost never win under the rule of reason," and second, "courts decide almost all rule of reason cases by finding that the plaintiff failed to show an anticompetitive effect." *Id.* at 830. Carrier noted four patterns that emerged when examining 215 cases in which courts disposed of the case on the ground that the plaintiff failed to demonstrate an anticompetitive effect: First, courts in 110 cases concluded that the plaintiff did not show an anticompetitive effect *without addressing market power*. *Id.* In 66 cases, courts found a lack of market power *without discussing anticompetitive effects*. *Id.* In 32 cases, courts asserted that there was no anticompetitive effect and no market power. *Id.* Finally, in 7 cases courts found a lack of anticompetitive effect *and* a legitimate procompetitive justification for the conduct. *Id*.

130. *Id.* at 827. Only 5 cases out of 222 reached the balancing stage. *Id*. at 831. Out of those 5 cases, only one time was a plaintiff victorious. *Id.*; United States v. Visa U.S.A., Inc. 344 F.3d 229 (2d Cir. 2003).

131. Justice Breyer noted in his dissent in *Leegin*, "The only safe predictions to make about today's decision are that it will likely raise the price of goods at retail and that it will create considerable legal turbulence as lower courts seek to develop workable principles." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 929 (2007) (Breyer, J., dissenting); *see* AREEDA & HOVENKAMP, *supra* note 126, ¶ 1604b, at 40 ("[R]esale price maintenance tends

under the traditional rule of reason, even anticompetitive arrangements will likely result in *de facto per se* legality.[132]

Although a number of structured solutions have been proposed since *Leegin*,[133] this Note will focus on the two tests that are most likely to: (1) comport with the *Leegin* Court's vision for a new rule of reason; (2) correct the structural defects found in the traditional rule of reason; and (3) garner enough support to influence future judicial applications of the rule of reason to minimum RPM.

III. POST-*LEEGIN* PROPOSALS

The first test that has gained momentum post-*Leegin* is an offshoot of the quick look analysis that treats certain restraints as "inherently suspect." Borrowing from the quick look cases of the 1980s,[134] this analytical framework was revisited by the FTC pre-*Leegin* in the 2002 case *In re Polygram Holding*, *Inc*.[135] In *PolyGram Holding*, the FTC filed suit against several music distributors for allegedly restricting price competition by imposing an "advertising moratorium" on particular albums.[136] Opting to use a truncated rule of reason, the FTC noted in its final order that "[a] plaintiff may avoid full rule of reason analysis, including the pleading and proof of market power, if it demonstrates that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition."[137]

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to produce higher consumer prices than would otherwise be the case. The evidence is persuasive on this point.").

132. *See generally* Ginsburg, *supra* note 127.

133. For a great discussion on the various tests that have arisen since *Leegin*, see Thomas A. Lambert, *Dr. Miles Is Dead. Now What?: Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance*, 50 WM. & MARY L. REV. 1937 (2009).

134. *See, e.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986); *In re* Mass. Bd. of Registration on Optometry, 110 F.T.C. 549, 605 (1988).

135. *In re* PolyGram Holding, Inc., No. 9298, 2002 WL 1422222 (F.T.C. June 20, 2002).

136. *Id*. at 987. Although the case was brought under Section 5 of the Federal Trade Commission Act, it is well-established that such cases are to be treated identically to Section 1 Sherman Act cases. *See* PolyGram Holding, Inc. v. FTC, 416 F.3d 29, 31 (D.C. Cir. 2005) ("[T]he analysis under § 5 of the FTC Act is the same in this case as it would be under § 1 of the Sherman Act . . . .").

137. *In re Polygram Holding*, 2003 WL 21770765. As explained by the FTC, "[s]uch conduct ordinarily encompasses behavior that past judicial experience and current economic

The FTC explained the framework as follows: if the plaintiff makes the initial showing that a restraint is likely to suppress competition, then the restraint is summarily condemned unless the defendant comes forward with some plausible and legally cognizable competitive justification for the restraint.[138] If the defendant successfully advances a competitive justification, the plaintiff, without necessarily inducing a full market analysis, must make a more detailed showing that the restraints at issue are indeed likely to harm competition.[139] The defendant may then introduce evidence that either refutes the plaintiff's arguments or supports its proffered justification. At this point, the factfinder must ascertain whether it can draw "a confident conclusion about the principal tendency of a restriction."[140]

Applying this framework to the facts in *PolyGram Holding*, the FTC found that the advertising moratorium was "presumptively anticompetitive" and that the defendants' proffered justifications were "not cognizable as a matter of law."[141] The music distributors subsequently appealed the FTC's order to the D.C. Circuit arguing that the FTC failed to apply the proper analytical framework in analyzing the restraint.[142] The D.C. Circuit upheld the order, however, noting that, "[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful . . . ."[143]

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learning have shown to warrant summary condemnation." *Id.*

138. *Id.* The FTC stated that justifications for the restraint "may consist of plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question; or they may consist of reasons why the practices are likely to have beneficial effects for consumers." *Id.*

139. *Id*. at 19. Depending on the type of restraint and circumstances of the case, a showing must at a minimum entail "the identification of the theoretical basis for the alleged anticompetitive effects and a showing that the effects are indeed likely to be anticompetitive." *Id*.

140. *Id*. at 17.

141. *Id.* at 26–28.

142. *See* Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

143. *Id.* at 36. To overcome the presumption, "the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm." *Id.*

A. Treating RPM as Inherently Suspect

After *Leegin* was handed down, several influential entities, including the American Antitrust Institute and the majority of the states' attorneys general, advocated that RPM be treated as inherently suspect under the *PolyGram Holdings* framework.[144] Following the *Leegin* decision in October of 2007, women's shoe seller Nine West Group Inc. petitioned the FTC to modify a Consent Order entered into in 2009, in which the company agreed to no longer undertake agreements setting minimum RPM with its retailers.[145] On behalf of twenty-seven states, the Attorney General of New York submitted comments urging the denial of Nine West's petition.[146]

The states argued that if consumers pay more because of vertical price-fixing, the restraint should be deemed "inherently suspect."[147] Therefore, under the *PolyGram Holdings* framework, Nine West had the burden of providing a plausible and cognizable justification for the restraint.[148] According to the states, this meant that Nine West was required to show: "(1) its vertical price-fixing caused retailers to provide actual enhanced value or services; (2) the enhanced value or services increased demand for its shoes; and (3) the increased demand from that value or those services was greater than the decreased demand caused by the higher prices that consumers paid."[149] If such a showing is made, the plaintiff has an opportunity to establish that a less restrictive alternative could have been used to

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144. *See* Brief for the American Antitrust Institute as Amicus Curiae in Support of Appellant and Reversal, PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412 (5th Cir. 2009) (No. 09-40506), 2009 WL 6479731; Amended States' Comments Urging Denial of Nine West's Petition, *In re* Nine West Group, Inc., No. C-3937 (F.T.C. Apr. 11, 2000) [hereinafter States' Comments], *available at* http://www.ftc.gov/os/comments/ninewestgrp/080117statesamendedcomments.pdf.

145. *See* Petition to Reopen and Modify Order, *In re* Nine West Group Inc., No. C-3937, (F.T.C. Oct. 30, 2007), *available at* http://www.ftc.gov/os/caselist/9810386/071106petition.pdf. As part of its settlement, Nine West agreed that, for ten years, it would not notify dealers in advance that violations of its resale price policy would subject them to temporary or partial interruptions in supply. *Id.* at 4.

146. *See* States' Comments, *supra* note 144.

147. *See id.* at 8. The states noted that Nine West's use of minimum RPM increased the prices consumers paid by an estimated $45.7 million. *Id.*

148. *Id.*

149. *Id.* In other words, the defendant must establish that the minimum RPM agreements increased total sales of the product(s) at issue.

achieve similar results, which could in turn be refuted by the defendant.[150]

In its final order, the FTC seemed receptive to the states' argument noting that "[t]he *Leegin* decision may be read to suggest a truncated analysis, such as the one applied in *Polygram Holdings*, might be suitable for analyzing minimum resale price maintenance agreements, at least under some circumstances."[151] The FTC went on to state, however, that two ways in which Nine West can demonstrate that its use of RPM will *not* harm competition is to show that: (1) it "lacks market power" and (2) that the "impetus from the RPM is from Nine West itself and not retailers."[152]

Since there was no evidence of retailer insistence on RPM and Nine West did not appear to have market power in women's shoes, the FTC granted Nine West's petition in part.[153] The FTC provided the additional condition, however, that Nine West produce periodic reports on its use of RPM agreements to give the FTC the opportunity to analyze the effects of such agreements on competition.[154]

B. The DOJ's Structured Rule of Reason

The second viable alternative that has arisen post-*Leegin* is the "structured rule of reason" standard proposed in October of 2009 by the Department of Justice ("DOJ").[155] This approach, suggested by the Assistant Attorney General for the Antitrust Division Christine Varney, proposed that RPM may be presumed unlawful after the plaintiff makes a *prima facie* showing that certain "structural

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150. *Id.* at 9. The states suggested that as an alternative to vertical price-fixing, the manufacturer could require its distributors to provide services as a matter of contract and even pay separately for those services. If the retailer did not live up to those obligations, then the manufacturer could terminate or threaten termination. *Id.*

151. Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, *In re* Nine West Group Inc., No. C-3937, 2008 WL 2061410, at *6 (F.T.C. May 6, 2008).

152. *Id.* at *8.

153. *Id*. at *8–9.

154. *Id*. at *9.

155. *See* Christine A. Varney, Assistant Attorney Gen. Antitrust Div., U.S. Dep't of Justice, Federalism: Enhancing Federal/State Cooperation, Remarks as Prepared for the Nat'l Ass'n of Attorneys Gen. (Oct. 7, 2009) [hereinafter Varney Speech], *available at* http://www.justice.gov/atr/public/speeches/250635.pdf.

conditions" are present that are likely to make the RPM agreement anticompetitive.[156]

The structured approach centers primarily on the four circumstances identified by the *Leegin* Court as having greater potential for anticompetitive effects.[157] Under this approach, the plaintiff must first identify which party is the impetus for the RPM agreement. If the RPM agreement is manufacturer-driven, then the court may find it to be anticompetitive in two instances. The first instance is RPM imposed by the manufacturer to facilitate collusion by providing a means by which a cartel member can police adherence to their agreement.[158]

In this situation, according to Assistant Attorney General Varney, a plaintiff can establish *prima facie* case by showing three elements: "(1) a majority of sales in the market are covered by RPM, (2) structural conditions are conducive to price coordination . . . and (3) RPM plausibly helps significantly to identify cheating, which would not be the case if wholesale prices are otherwise transparent."[159]

The second is manufacturer-driven RPM that results in "market exclusion," or a manufacturer's implementation of RPM to guarantee retailers large margins and discourage them from carrying the products of new market entrants. In this scenario, a plaintiff can establish a *prima facie* case by showing: "(1) the manufacturer has a dominant market position, (2) its RPM contracts cover a substantial

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156. *Id.* at 8.

157. *Id.* at 9–10. The four circumstances identified by the *Leegin* Court include where the use of RPM may be anticompetitive:

> (1) when used by a manufacturer cartel to identify members that are cheating on a price-fixing agreement; (2) when RPM is used to organize a retailer cartel by coercing manufacturers to eliminate price cutting; (3) when used by a dominant retailer to protect it from retailers with "better distribution systems and lower cost structures," thereby forestalling innovation in distribution; and (4) when used by a manufacturer with market power to give retailers an incentive not to sell the products of smaller rivals or new entrants.

Id. at 10; *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–92 (2007).

158. Varney Speech, *supra* note 155, at 11.

159. *Id.* In this scenario, according to Varney, "the first two requirements provide evidence that the market is structured such that collusion would be feasible because a few manufacturers control a majority of the market; and the third requirement would show that RPM is a plausible method for policing the cartel." *Id.* at 12.

portion of distribution outlets, and (3) RPM plausibly has significant foreclosure effect that impacted an actual rival."[160] The last requirement is to ensure that the alleged harm "is not merely theoretical."[161]

If, on the other hand, the RPM agreement is retailer-driven, Assistant Attorney General Varney suggests that courts be particularly wary of the restraint.[162] The first concern is with "retailer exclusion" where a retailer, or group of retailers with market power, "coerce[s] important manufacturers to institute RPM and thereby frustrate price competition from discount or internet retailers."[163] In this scenario, Assistant Attorney General Varney proposed that the plaintiff could shift the burden to the defendant by establishing three elements: "(1) that the retailers involved had sufficient market power, (2) that coercion by retailers resulted in RPM covering much of the market, and (3) RPM plausibly has a significant exclusionary effect that impacted an actual rival."[164]

The second concern with retailer-driven RPM is possible collusion resulting in a cartel.[165] According to Assistant Attorney General Varney, a plaintiff proceeding on a retailer collusion theory needs to show: "(1) that RPM is used pervasively (e.g., at least 50 percent of the sales in the market), (2) that RPM was instituted by retailer coercion (not merely persuasion), and (3) retailer collusion could not be thwarted by manufacturers" (such as by integrating into retailing or sponsoring new retailers).[166]

160. *Id.*

161. *Id.*

162. *Id.* at 12–13.

163. *Id.* at 13.

164. *Id.* An example of retailer exclusion is presented in the 2009 federal district court case *McDonough v. Toys "R" Us, Inc.*, 638 F. Supp. 2d 461 (E.D. Pa. 2009). In *McDonough*, a group of class action plaintiffs brought suit alleging that Babies "R" Us ("BRU") threatened not to carry certain manufacturers' products unless the manufacturer agreed to prevent internet retailers from discounting them, ultimately forcing consumers to pay higher prices. *Id.* at 466–67. In granting the plaintiffs' motion for class certification, the court found that BRU's alleged conduct preventing internet discounting, taken as true, would support a finding that BRU unreasonably restrained competition in light of *Leegin*. *Id.* at 491.

165. In other words, where retailers coerce manufacturers to use RPM to help implement and police a retailer cartel.

166. Varney Speech, *supra* note 155, at 13.

Assistant Attorney General Varney concluded by stating that in regulating RPM, the DOJ was "not seeking to disrupt the traditional preeminent role of the FTC and the States," but instead was interested in "supporting a jurisprudential effort to aid the development of federal law under *Leegin*."[167]

IV. PROPOSAL

The *Leegin* Court recognized that minimum RPM can have procompetitive or anticompetitive effects depending on the circumstances in which it is employed. As such, the Court invited lower courts to "establish the litigation structure to ensure the rule [of reason] operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[168] To accomplish this, the Court advised that lower courts "devise rules . . . 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 precompetitive ones."[169]

While both the DOJ's proposed "structured rule of reason" and treating RPM as "inherently suspect" under the *PolyGram Holdings* framework appear to satisfy the *Leegin* Court's vision, treating RPM as inherently suspect is the preferable alternative because of its greater potential to influence future judicial application. Not only does the "inherently suspect" test have the benefit of over thirty years of "quick-look" case law, but its application of the framework to vertical price-fixing fixes inherent structural defects in the traditional analysis. Additionally, it has the support of states, legislators, foreign trade partners and possibly government agencies.

A. State and Lawmaker Support

Perhaps the biggest supporter of treating RPM as inherently suspect is the states. It is no secret that the vast majority of states have long been in favor of keeping minimum RPM *per se* illegal.[170]

167. *Id.* at 14.
168. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 898 (2007).
169. *Id.* at 898–99.
170. *See* Brief for the States of New York et al. as Amici Curiae Supporting Respondent at

While states are concerned with consumer welfare, they are equally apprehensive about the uncertainty of prosecuting RPM claims under the traditional rule of reason.[171]

Legislators have also joined the states' cause with Congressional members in both the House of Representatives and the Senate introducing legislation that would effectively overturn *Leegin*.[172] In support of this legislation, Attorneys General from forty-one states sent a letter to Congress contending that they "are not aware of any empirical study that shows enhanced consumer welfare in the form of services or other consumer benefits" and "reiterat[ing] the opposition of Attorneys General to minimum resale price-fixing."[173]

As noted in its comments urging denial of the Nine West's petition, the states "have a strong interest in preserving adequate remedies for the practice [of] . . . vertical price fixing."[174] Absent the passing of legislation overturning *Leegin*,[175] the states understand that many of their concerns can be alleviated by treating RPM as inherently suspect under the *PolyGram Holdings* framework.[176]

2, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (No. 06-480), 2007 WL 621851 ("*Dr. Miles* was correct when it was decided, and remains sound today, because minimum RPM agreements are direct agreements to raise retail prices, and there is no evidence that they offer any offsetting consumer benefits.").

171. *See infra* note 173.

172. On January 6, 2009, Sen. Herb Kohl (D-WI), whose family started the Kohl's department store chain, introduced the "Discount Pricing Consumer Protection Act" which would amend Section 1 of the Sherman Act to include: "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." *See* Discount Pricing Consumer Protection Act, S. 148, 111th Cong. (2009–2010), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s111-148. On July 13, 2009, Rep. Henry Johnson (D-GA) introduced a similar bill in the House of Representatives. *See* Discount Pricing Consumer Protection Act of 2009, H.R. 3190, 111th Cong. (2009-2010), *available at* http://www.govtrack.us/ congress/billtext.xpd?bill=h111-3190.

173. Letter from Nat'l Ass'n of Attorneys Gen. to Members of House Judiciary Comm., Support for the Discount Pricing Consumer Protection Act of 2009 (H.R. 3190) (Oct. 27, 2009), *available at* http://antitrustcommentary.com/wp-content/uploads/2009/10/letter-supporting-hr-31901.pdf.

174. *See* States' Comments, *supra* note 144, at 2.

175. To date, Maryland is the only state to amend its antitrust statute to reinstate the *per se* rule of illegality for minimum RPM under state law. *See* MD. CODE ANN., COM LAW § 11-204(a)(1). It is still an open question, however, as to whether Maryland's law is preempted by the Sherman Act.

176. *See, e.g.*, States' Comments, *supra* note 144, at 5.

B. Supreme Court Precedent

One primary reason why the states want to treat RPM as inherently suspect under the *PolyGram Holdings* framework is because the framework is consistent with the "quick-look" rule of reason analyses that have already gained approval of the Supreme Court.[177] While the Supreme Court has never definitively stated *which* restraints are appropriate for a quick look, the Court has instructed that lower courts may apply the truncated analysis based on their own examination of the "circumstances, details, and logic of a restraint."[178]

The ultimate goal, according to the Court, is to determine "whether the experience of the market has been so clear . . . that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one."[179]

A strong argument can be made that regardless of any procompetitive benefits, there is a principle tendency of RPM to raise consumer prices.[180] As such, it is not difficult to imagine a court

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177. *See, e.g.*, Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (no elaborate industry analysis is required to demonstrate the anticompetitive character of "horizontal agreements among competitors to refuse to discuss prices"); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109–10 (1984) (holding that "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis"); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 461 (1986) (holding that the "finding of actual, sustained adverse effects on competition . . . is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis"); Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998) (explaining that quick-look analysis applies "where a practice has obvious anticompetitive effects"); Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n., 961 F.2d 667, 674–76 (7th Cir. 1992) (finding quick-look analysis adequate after assessing and rejecting logic of proffered procompetitive justifications).

178. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999).

179. *Id.*

180. The *Leegin* Court recognized as much noting that economic literature fundamentally agrees that vertical price fixing raises consumer prices. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 895 (2007) (higher consumer prices "are generally consistent with both procompetitive and anticompetitive theories"); *see also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 11 (1984) ("If we assembled twelve economists and gave them all the available data about a business practice, plus an unlimited computer budget, we would not get agreement about whether the practice promoted consumers' welfare or economic efficiency more broadly defined.").

concluding that due to this tendency, a quick-look analysis putting the initial burden on the defendant is appropriate in cases of vertical price-fixing.[181]

Because the FTC has already crafted a structured quick-look analysis that treats certain restraints as "inherently suspect," the states recognize that including vertical price-fixing in this category creates a convenient method of adjudication that comports not only with *Leegin*, but also with existing Supreme Court precedent. As the Supreme Court noted, certain restraints are more likely to be treated a certain way if "rule-of-reason analyses in case after case reach identical conclusions."[182] Many influential entities, including the states, therefore, would like to see vertical price-fixing consistently treated as inherently suspect.

C. Governmental Agencies

Since its re-introduction in *PolyGram Holdings*,[183] the FTC has expanded application of the inherently suspect framework to new types of restraints.[184] The D.C. Circuit's oft-cited instruction for determining which restraints warrant this type of treatment states the following: "[T]he rebuttable presumption of illegality arises not necessarily from anything 'inherent' in a business practice but from the *close family resemblance* between the suspect practice and another practice that already stands convicted in the court of consumer welfare."[185] Taking this as true, it is hard to imagine any restraint possibly having a closer family resemblance to a convicted

181. That being said, courts have been more reluctant to take a "quick-look" in recent years because of the Supreme Court's failure to definitely define the test's scope. The Court's vague proclamation that a quick-look analysis is only appropriate "when the great likelihood of anticompetitive effects can easily be ascertained," did little to instruct lower courts. *California Dental*, 526 U.S. at 770.

182. *Id.* at 781.

183. The framework is widely considered to have been established in the FTC's 1988 order *In re* Mass. Bd. of Registration in Optometry, 110 F.T.C. 549 (1988).

184. *See, e.g.*, *In re* N. Tex. Specialty Physicians, 140 F.T.C. 715 (2005) (treating horizontal price-fixing arrangement as inherently suspect), *aff'd*, N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008); Realcomp II Ltd., No. 9320, 2007 WL 6936319 (F.T.C. 2009) (applying inherently suspect framework to joint decisions by venturers regarding criteria for admission to their venture and resources).

185. PolyGram Holding, Inc. v. FTC, 416 F.3d 29, 37 (D.C. Cir. 2005) (emphasis added).

practice than a restraint that was *itself* a convicted practice for ninety-six years.

Coupled with the fact that the FTC seems receptive to expanding the framework beyond horizontal restraints, it may only be a matter of time before the FTC treats vertical price-fixing as inherently suspect as well.[186] This could go a very long way in influencing future judicial adjudication of minimum RPM as the courts have historically been willing to uphold the FTC's rulings on such matters.[187]

Additionally, the DOJ's apparent willingness to work in accordance with, and defer to if necessary, the FTC may provide the states another influential ally.[188] This is especially true if, as predicted, the DOJ's structured rule of reason is never adopted in practice and the DOJ's analyses of data tracking the effects of "RPM practices implemented in the wake of *Leegin*" show a substantial increase in consumer prices.[189]

D. Foreign Trade Partners

Furthermore, it should not be overlooked that many influential trade partners of the United States, including Canada and Europe, continue to treat RPM as *per se* or presumptively unlawful.[190] As

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186. *See* Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, *In re* Nine West Group Inc., No. C-3937, 2008 WL 2061410, at *5 (F.T.C. May 6, 2008) ("The *Leegin* decision may be read to suggest a truncated analysis, such as the one applied in *PolyGram Holdings*, might be suitable for analyzing minimum resale price maintenance agreements, at least under some circumstances.").

187. *See, e.g.*, *Specialty Physicians*, 528 F.3d (upholding FTC's inherently suspect framework for horizontal restraint); PolyGram Holding, 416 F.3d at 36 (upholding FTC's inherently suspect framework for horizontal restraints).

188. Varney Speech, *supra* note 155, at 14. Varney noted the DOJ's willingness to defer to other entities in Section 1 adjudication. She concluded that "we are not seeking to disrupt the traditional preeminent role of the FTC and the States in this area. Rather, our interest is in supporting a jurisprudential effort to aid the development of federal law under *Leegin*." *Id.*

189. *Id.*

190. In Canada, for example, Section 61 of the Canadian Competition Act expressly prohibits discrimination or refusal to supply a product because of the buyer's low pricing policy. *See* Canadian Competition Act, R.S.C. 1985 c.34, § 61(1) (Can.). In the European Union, RPM is considered a "hard-core" restraint that is presumed to be unlawful when certain conditions are met. *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 101–2, 106, Sept. 5, 2008, 2008 O.J. (c 115) 47 (formerly Articles 81, 82, and 86 of the EC Treaty). Under a hard-core rule of reason analysis, "the order of bringing forward

such, courts may be willing to take into consideration the fact that substantive differences in competition policies of foreign trade partners can discourage international commerce.[191]

Treating vertical price-fixing as inherently suspect would have two-pronged effect of: (1) providing a sense of certainty around implementing minimum price restrictions internationally;[192] and (2) bringing American RPM policies closer in line with those international RPM policies already in place.[193] In fact, the *Leegin* decision led one European Commission (EC) spokesman to publish that "the EC hardcore approach is in a way an application of what is described . . . by the US Supreme Court."[194]

Most international trade partners support convergence with American policies to provide a degree of certainty when trading internationally. Convergence remains difficult, however, if American courts continue to consider RPM under the traditional, unstructured rule of reason.[195] As such, it would not be a surprise to see more influential foreign entities, such as the European Commission, come out in support of treating vertical price-fixing as inherently suspect.

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evidence and showing effects is reversed" to make the defendant first show "positive effects." Lucas Peeperkorn, DG Competition, European Comm'n, Address at the Conference on Vertical Restraints in Comparative Competition Law, The Law and Economics of Resale Price Maintenance: A Comparative Perspective (May 23, 2008) (slides from the presentation are available at http://www.ucl.ac.uk/laws/clge/paris-23may08/03_Peeperkorn_23may.pdf).

191. *See* Kevin J. O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 ANTITRUST L.J. 413 (2002) (asserting that the interconnection of global economy necessitates consistent worldwide competition policies).

192. In other words, businesses will know that in order to implement RPM, they will have the burden of proving its actual, procompetitive benefits.

193. *See generally* Luc Peeperkorn, *Resale Price Maintenance and Its Alleged Efficiencies*, 4 EUR. COMP. J. 201 (2008).

194. *Id.* at 204.

195. For example, after *Leegin* was remanded by the Supreme Court, the U.S. District Court for the Eastern District of Texas dismissed PSKS's Second Amended Complaint on the grounds that PSKS failed to state a claim under the rule of reason because it did not allege a tenable relevant market. *See* PSKS, Inc. v. Leegin Creative Leather Prods., Inc., No. CV 2:03 107, 2009 WL 938561, at *3 (E.D. Tex. Apr. 6, 2009). PSKS unsuccessfully appealed, arguing that to "simply state a claim for vertical price-fixing pursuant to the Supreme Court's statement of the rule of reason in *Leegin*, the plaintiff must only plead the existence of the agreement and the scope of its operation," not any additional pleading or proof requirements. Brief of Appellant at 21–22, PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 2009 WL 938561 (E.D. Tex. Apr. 6, 2009) (No. 09-40506), 2009 WL 6479730.

E. Structural Defects

Finally, while the DOJ's structured rule of reason does a fine job of setting forth the requirements necessary for a plaintiff to establish a *prima facie* case, the framework still provides courts the opportunity to summarily dispose of a plaintiff's claim from the outset by putting the initial burden on the plaintiff to prove the defendant's market share. Because the defendant is in a better position to make this showing, the DOJ's structured approach fails to correct a fundamental flaw of the traditional rule of reason analysis. In this regard, it is questionable whether results under the DOJ's structured approach would differ significantly from the defendant-friendly results of a traditional rule of reason analysis.

Under the *PolyGram Holdings* framework, on the other hand, vertical price-fixing need only be alleged before the burden shifts to the defendant to offer a legally cognizable competitive justification for the restraint. The defendant also carries the burden of showing it *does not* hold market share. This puts a greater onus on those imposing RPM to consider procompetitive effects and market share *prior* to implementing RPM. This could, in turn, reduce the number of manufacturers implementing RPM solely to increase profit margins and ultimately decrease litigation on the issue.

CONCLUSION

While the DOJ's structured rule of reason proposal comports with *Leegin* in theory, the proposal suffers from the same limitations as the vast majority of post-*Leegin* proposals: it is very unlikely to be adopted in practice. As we have seen repeatedly since *Chicago Board of Trade*, courts are not going to adopt a framework for adjudicating Sherman Act claims on their own accord, even if the potential solution is proposed by an agency as influential as the DOJ. Absent new guidelines from the Supreme Court or legislation overturning *Leegin*, vertical price-fixing will continue to be judged under the traditional, unstructured rule of reason with antitrust defendants prevailing in an overwhelming majority of cases.

The only viable alternative to this outcome is to treat vertical price-fixing as inherently suspect under the *PolyGram Holdings* framework. This is because the framework carries several unique advantages which allow it to quickly move from being considered in theory to being implemented in practice. First, the *PolyGram Holdings* framework has the benefit of qualifying as a "quick-look" rule of reason analysis that has already gained approval of the Supreme Court. Second, multiple federal circuit courts have upheld the framework as applied to other types of restraints, often citing quick look case law as support. Third, the FTC appears open to treating vertical price-fixing as inherently suspect and the DOJ appears open to working in accordance with the FTC. Finally, treating vertical price-fixing as inherently suspect already has the support of the vast majority of the states, many influential members of Congress and major international trade partners.

The combination of these factors, coupled with the fact that the framework provides a structured approach that fixes the fundamental flaws found in the traditional rule of reason, makes treating vertical price-fixing as inherently suspect the most viable alternative for examining RPM post-*Leegin*.