RESALE PRICE MAINTENANCE AND LEEGIN: OPENING KAY'S KLOSET OPENED THE LID ON PANDORA'S BOX IN GLOBAL COMPETITION LAW

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"So, one conclusion in regard to globalization is that the traditional U.S. view of antitrust, with all the complexity of its historical development, is not necessarily exportable to the rest of the world; one must take account of the political and social context of other countries' competition laws."[1]

—Honorable Christopher Bellamy, Judge of the Court of First Instance of the European Communities

"More than any other single force, the interaction of the competition policy systems of the EU and US deeply influences the convergence process within all of the multinational and regional networks. . . .What happens in the EU and the US does not stay there."[2]

—William E. Kovacic, Chairman, Federal Trade Commission

1. Christopher Bellamy, *Some Reflections on Competition Law in the Global Market*, 34 NEW ENG. L. REV. 15, 18 (1999).

2. William E. Kovacic, Chairman, Fed. Trade Comm'n, Presentation at the Bates White Fifth Annual Antitrust Conference: Competition Policy in the European Union and the United States: Convergence or Divergence? (June 2, 2008) (transcript *available at* http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf).

"I, for one, do not think that there is currently any 'right' way to resolve antitrust cases regardless whether they arise on this side or the other side of the Atlantic. As I have said on another occasion, it may be that it is best to let the 'competition' between our 'differentiated products' play itself out."[3]

—J. Thomas Rosch, Commissioner, Federal Trade Commission

I. INTRODUCTION

In June 2007, the U.S. Supreme Court turned almost 100 years of competition law on its head with its decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[4] In addition to its dismissal of the near-century-old application of a *per se* rule to resale price maintenance (RPM), the decision drove a deep wedge between the manner in which vertical price fixing is treated in the United States and under the rest of the world's competition law regimes. The divergence between the postures of the European Community and the United States may be approached only by the internal divergence between the U.S. Supreme Court and federal enforcement officials[5] on the one hand, and the state attorneys general on the other.

The path through the tangled branches of the vertical price fixing thicket was a torturous one for the so-called *per se* rule in antitrust analysis of vertical arrangements. It wended its way from the birth of the application of *per se* treatment of vertical

3. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks at the Bates White Fourth Annual Antitrust Conference: Has the Pendulum Swung Too Far? Some Reflections on U.S. and EC Jurisprudence (June 25, 2007), (transcript *available at* http://www.ftc.gov/speeches/rosch/070625 pendulum.pdf).

4. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2720, 2722 (2007).

5. *See generally* Brief for the United States as Amicus Curiae Supporting Petitioner, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480) (describing the position of the Federal Trade Commission and the Antitrust Division of the United States Department of Justice).

price fixing in *Dr. Miles Medical Co. v. Park & Sons Co.*[6] involving "patent medicines" through the antitrust exemptions for state "Fair Trade" laws provided by the Miller-Tydings Act[7] and the McGuire Act[8] and their eventual repeal. It continued on through the condemnation of consignment arrangements in the sale of motor fuel in *Simpson v. Union Oil Co.*[9] and finally of maximum resale price maintenance in *Albrecht v. Herald*[10] in 1968, which eventually led to the 1997 decision in *State Oil Co. v. Kahn*,[11] in which the Supreme Court removed the *per se* label from maximum vertical price fixing, but stated that "arrangements to fix minimum prices . . . remain illegal *per se*."[12]

Minimum resale price maintenance persisted as a *per se* antitrust offense in the U.S. antitrust jurisprudence for a scant ten more years until the Supreme Court concluded in 2007 in *Leegin* that "the Court's more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based"[13] and that "the rule of reason, not a per se rule of unlawfulness . . . [is] the appropriate standard to judge vertical price restraints."[14] The Court noted some factors relevant to a rule of reason inquiry into situations involving vertical price restraint. These include the pervasiveness of the retail price restraint in an industry, the source of the restraint, and the market dominance of the manufacturer and/or the retailer(s).[15] The Court specifically

6. Dr. Miles Med. Co. v. Park & Sons Co., 220 U.S. 373, 408 (1911).

7. Miller-Tydings Fair Trade Act, ch. 390, 50 Stat. 693 (1937) (repealed 1975).

8. McGuire Act, ch. 745, 66 Stat. 632 (1952) (repealed 1975); *see also* Pamela J. Harbour, Comm'r, Fed. Trade Comm'n, Opening Remarks at the Federal Trade Commission Resale Price Maintenance Workshop (Feb. 17, 2009).

9. Simpson v. Union Oil Co., 377 U.S. 13, 24 (1964). Justice Douglas, in his inimitably virulent approach to all large corporations (and specifically any vertically integrated oil company), described the Union Oil consignment arrangement as "a clever draftsmanship," saying that it furnished "a wooden formula for administering prices on a vast scale." *Id.* at 22, 24.

10. Albrecht v. Herald Co., 390 U.S. 145 (1968).

11. State Oil Co. v. Kahn, 522 U.S. 3 (1997).

12. *Id.* at 17.

13. *Leegin*, 127 S. Ct. at 2714.

14. *Id.* at 2720.

15. *Id.* at 2719–20.

noted that "[i]f there is evidence that 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."[16] Interestingly, a retailer cartel was the underlying basis for the original decision in *Dr. Miles*.[17]

Although U.S. antitrust law has thus moved into consonance with broadly held economic theory,[18] RPM, at least minimum RPM, remains a *per se* offense and "prohibited, in one form or another, by all modern competition law regimes."[19] Most recently, in February 2008, the Office of Fair Trading in the United Kingdom released "An Evaluation of the Impact Upon Productivity of Ending Resale Price Maintenance on Books."[20] The evaluation reached mixed conclusions, finding that "RPM can have either anti-competitive or beneficial effects."[21] In 1997, the Competition Committee of the Organization for Economic Co-operation and Development (OECD) conducted Policy Roundtables debating the use of RPM for publications and cultural products (OECD RPM Roundtables).[22] The Overview to the OECD RPM Roundtables noted that "RPM was generally prohibited in almost all OECD countries, but in many an exemption permitted some form of RPM for books, newspapers, and some cultural products (and in some, for medicaments). And some countries have a procedure for authorizing RPM case by case."[23] An OECD report (OECD Franchising Report) on vertical

16. *Id.* at 2719.

17. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 394 (1994).

18. Howard P. Marvel, *Resale Price Maintenance and the Rule of Reason*, ANTITRUST SOURCE, June 2008, *available at* http://www.abanet.org/antitrust/at-source/08/06/Jun08-Marvel6=26f.pdf.

19. *See generally* Julie Brebner, *Resale Price Maintenance—The Need for Further Reform*, 9 TRADE PRAC. L.J. 19 (2001), *available at* http://www.julieclarke.info/publications/2001rpm.pdf.

20. OFFICE OF FAIR TRADING, AN EVALUATION OF THE IMPACT UPON PRODUCTIVITY OF ENDING RESALE PRICE MAINTENANCE ON BOOKS (2008).

21. *Id.* at 25.

22. Org. for Econ. Co-operation & Dev. [OECD], *Policy Roundtables: Resale Price Maintenance*, at 19, OECD Doc. OCDE/GD(97)229 (1997) [hereinafter OECD Policy Roundtable].

23. *Id.* at 1.

restraints in franchising agreements found that "[i]n contrast to the treatment of territorial and other non-price vertical restrictions, competition policy in nearly all jurisdictions considers the vertical control of retail prices by franchisors unacceptable."[24]

Part II of this Article will relate a short history of the *per se* treatment of RPM in the U.S., while Part III briefly discusses the views of economists in analyzing resale price maintenance. Part IV paints the current landscape for a post-*Leegin* era, including the divergence among federal and state positions on RPM. The competition law approach to RPM in the European Community will be examined in Part V, and the legal position of RPM in several other national jurisdictions (Canada, Mexico, Australia, France, Spain, Japan, and China, by way of example) will be outlined in Part VI. Finally, Part VII will propose avenues toward convergence and the adoption of "superior norms."[25]

II. RPM IN THE UNITED STATES FROM *DR. MILES* TO *LEEGIN*

The emergence of RPM as a point of legal and social contention dates back to the late 1800s with "the rise of branding and advertising that facilitated product differentiation."[26] Not unlike much of the early Sherman Act cases involving vertical arrangements, *Dr. Miles* "followed the traditional common law rule that agreements in restraint of trade, although not affirmatively illegal, were unenforceable among the parties."[27] Failing to find any benefit to the manufacturer from the RPM imposition, the Court concluded that "the advantage of established retail prices primarily

24. OECD, COMPETITION POLICY AND VERTICAL RESTRAINTS: FRANCHISING AGREEMENTS 13 (1994).

25. *See* Kovacic, *supra* note 2. Chairman Kovacic describes such "norms" as "consensus views within a group about how members of the group—such as jurisdictions with competition laws—ought to behave." *Id.*

26. Barak Y. Orbach, *Antitrust Myopia: The Allure of High Prices*, 50 ARIZ. L. REV. 261, 262 (2008). In fact, "[a]necdotal evidence shows that medicine distribution contracts already contained RPM clauses in the first half of the nineteenth century." *Id.* at 263.

27. HOVENKAMP, *supra* note 17, at 472. Professor Hovenkamp points out that there were only two references to the Sherman Act in the opinion in *Dr. Miles*, and "then only to observe that its meaning and that of the common law were probably the same." *Id.*

concerns the dealers," who would receive "enlarged profits" as a result.[28]

In 1919, the Supreme Court gave birth to the legendary "Colgate Doctrine,"[29] in a decision paying homage to the common law antecedents of U.S. antitrust law by "equating" the agreement requirement of section 1 of the Sherman Act with common law contract doctrine.[30] The formalistic approach thus taken became embedded in the antitrust embroidery although, as one commentator points out, "*Colgate* tends to approve RPM only when the level of vertical integration between manufacturer and retailer is very small. The result is that RPM is most available in those situations where it is least valuable—where there is no organized 'distribution system at all.'"[31] In a 1926 case involving consignment agreements, the Supreme Court ruled that the *per se* rule arising from *Dr. Miles* did not cover such arrangements on the basis that there was no sale coupled to a limitation on a resale price.[32]

Beginning in 1931 with the enactment of the first state fair trade law in California and followed by as many as forty other states, a new regime arose of effectively regarding RPM as *per se* legal. It was essentially part and parcel of a perceived legislative effort (which included the enactment of the Robinson-Patman Act and numerous below-cost selling statutes at the state level) to preserve the mom-and-pop businesses that were in peril from the Depression and the increasing prominence of chain retailers and supermarkets such as the Great Atlantic and Pacific Tea Company, A&P.[33] To support the state legislation, Congress enacted the Miller-Tydings Act in 1937[34] and the McGuire Act in 1952.[35] The two federal enactments amended the Sherman Act to, respectively, exempt state fair trade laws from the

28. *Id.* at 418 (quoting from the opinion in *Dr. Miles*).

29. United States v. Colgate & Co., 250 U.S. 300 (1919).

30. *See* HOVENKAMP, *supra* note 17, at 411.

31. *Id.* at 412.

32. United States v. Gen. Elec. Co., 272 U.S. 476, 487–88 (1926).

33. Robinson-Patman Act, 15 U.S.C. § 13 (1932); *see, e.g.*, TENN. CODE ANN. § 53-3-202 (West 2005).

34. Miller-Tydings Fair Trade Act, ch. 390, 50 Stat. 693 (1937) (repealed 1975).

35. McGuire Act, ch. 745, 66 Stat. 632 (1952) (repealed 1975).

prohibitions of section 1 of the Sherman Act with respect to RPM, and to permit state fair trade laws to be enforced against retailers who had not signed RPM agreements in a state with an exempt fair trade law.[36] The latter legislation had been enacted in order to overcome a Supreme Court decision in 1951[37] holding that the Miller-Tydings Act did not insulate state statutes that purported to permit enforcement of RPM agreements against non-signers.[38] The McGuire Act was reluctantly upheld by the Supreme Court in 1964.[39]

In several decisions in the 1960s, the Supreme Court clearly evidenced a hostility to vertical restrictions, whether of the price or non-price type. In *United States v. Parke, Davis & Co.*,[40] the Court undermined the Colgate Doctrine, finding that a pharmaceutical firm had gone beyond merely announcing its policy not to deal with discounters of its products, and declined to deal with them by using wholesalers and other retailers to actively induce unwilling retailers to comply with its RPM policy.[41] The Court, while recognizing that there was no contract or agreement involved, nonetheless found offensive concerted action to maintain resale prices in violation of the Sherman Act.[42] In short order, the Court in 1964[43] found a "consignment" agreement between a refiner and its retail dealers to be a violation of the *per se* rule against RPM: "To allow Union Oil to achieve price fixing in this vast distribution system through this 'consignment' device would be to make legality for antitrust

36. MICHAEL A. UTTON, MARKET DOMINANCE AND ANTITRUST POLICY 247 (2d ed. 2003) ("Together, the Miller-Tydings and McGuire Acts allowed for the enforcement of price maintenance in those states which had passed a fair trade law.").

37. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); *see* Lenox, Inc. v. F.T.C., 417 F.2d 126, 127 (1st Cir. 1969) (explaining that the purpose of the McGuire Act was to reverse the *Schwegmann* decision).

38. *Id.* at 397.

39. Hudson Distribs., Inc. v. Eli Lilly & Co., 377 U.S. 386, 395 (1964). The Court observed that "[w]hether it is good policy to permit such laws is a matter for Congress to decide." *Id.*

40. United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

41. *Id.* at 45–46.

42. *Id.*

43. Simpson v. Union Oil Co. of California, 377 U.S. 13 (1964).

purposes turn on clever draftsmanship."[44] Justice Stewart dissented, believing that the premature termination of the lawsuit by summary judgment failed to address relevant facts and amounted to an overruling of the *General Electric* decision.[45]

The growth of discount chain retailers, the beginnings of the inflationary spiral of the late 1970s, and the resulting consumer pressure led to the repeal of the state fair trade legislation in fifteen states in 1975[46] and, ultimately, to the Consumer Goods Pricing Act, which repealed the Miller-Tydings and McGuire Acts.[47]

The ultimate height of the *per se* era was reached with the decisions in *United States v. Arnold, Schwinn & Co.* (condemning, as *per se* violations, territorial restrictions in sales transactions)[48] and in *Albrecht v. Herald Co.* (condemning, as a *per se* violation, maximum RPM).[49]

Within a decade, the *per se* tide turned and spent two decades receding from shore in the vertical sea, beginning with the Supreme Court's decision in *Continental T.V., Inc. v. GTE*

44. *Id.* at 24. Underlying Justice Douglas's decision was his fondness for attacking big business, illustrated by his reference to a 1962 New York Times Magazine article written by A.A. Berle, saying: "Are these behemoths good at making goods— or merely good at making money? Do they come out better because they manufacture more efficiently— or because they 'control the market' and collect unduly high prices from the long-suffering American consumer?" *Id.* at 22, n. 9; *see* A.A. Berle, *Bigness: Curse or Opportunity?*, N.Y. TIMES, Feb. 18, 1962 (Magazine), at 55.

45. *Simpson*, 377 U.S. at 27 (Stewart, J., dissenting).

46. *See* President Gerald Ford, *Remarks Upon Signing the Consumer Goods Pricing Act of 1975*, Dec. 12, 1975, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=5431; *see, e.g.*, Jay L. Himes, *New York's Prohibition of Vertical Price-Fixing*, N.Y. L.J., Jan. 29, 2008, *available at* http://www.oag.state.ny.us/bureaus/antitrust/pdfs/vert_price_fixing.pdf (discussing the circumstances surrounding the repeal of New York's Fair Trade Laws in 1975).

47. *See* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975); William S. Comanor, *The Two Economics Of Vertical Restraints*, 5 REV. INDUS. ORG. 99, 99.

48. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967).

49. Albrecht v. Herald Co., 390 U.S. 145, 152–52 (1968).

Sylvania Inc.,[50] which specifically overruled the *Schwinn* application of *per se* treatment to dealer location restrictions and determined:

> to return to the rule of reason that governed vertical restrictions prior to *Schwinn*. When anticompetitive effects are shown to result from particular restrictions, they can be adequately policed under the rule of reason, the standard traditionally applied to the majority of anticompetitive practices under § 1 of the Act.[51]

The Court elevated concern for interbrand competition above that for intrabrand sensitivities (to a yet higher level of concern with competition, rather than competitors). Consumer welfare became the watchword of antitrust policy.

During the 1980s, the Supreme Court further undermined the existing jurisprudence dictating that RPM was properly judged through the use of a *per se* approach. In *Monsanto Co. v. Spray-Rite Service Corp.*[52] and *Business Electronics Corp. v. Sharp Electronics Corp.*,[53] the Court in dealer termination cases indicated that it was readying itself for application of a denouement to the *per se* treatment of RPM.[54] In 1997, the Supreme Court signaled its readiness to deal a further significant blow to the *per se* treatment of vertical restrictions when it moved from non-price vertical restraints to price-related arrangements in *State Oil Co. v. Kahn*.[55]

Noting that "'stare decisis is not an inexorable command,'" the Supreme Court, in a unanimous decision, observed that in "antitrust law, there is a competing interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience."[56]

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50. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 (1977).

51. *Id.* at 59.

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

53. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

54. Terry Calvani & Andrew G. Berg, *Resale Price Maintenance After* Monsanto*: A Doctrine Still at War With Itself*, 1984 DUKE L.J. 1163, 1166 (1984).

55. State Oil Co. v. Khan, 522 U.S. 3, 22 (1997) (holding that all vertical maximum price fixing is not *per se* lawful, but rather that its lawfulness should be evaluated under the rule of reason analysis).

56. *Id.* at 20 (quoting in part from Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

Finding *Albrecht's* "conceptual foundations gravely weakened," the Court overruled it, but hastened to point out that, in doing so, it "of course [did] not hold that vertical maximum price fixing is *per se* lawful."[57]

Then along came *Leegin*! Leegin Creative Leather Products manufactured leather goods and accessories for women under its brand Brighton, and sold its goods largely through independent boutiques and specialty stores.[58] The plaintiff, PSKS, was a retailer operating a shop called Kay's Kloset.[59] Leegin imposed a policy in 1997 that it would refuse to sell to retailers who sold Brighton-branded goods below suggested retail prices.[60] In 2002, Leegin learned that PSKS was discounting the Brighton line by twenty percent and eventually stopped supplying PSKS.[61] PSKS sued.[62] The district court refused to allow evidence of procompetitive effects, and the jury found against Leegin's assertion of a Colgate Doctrine argument.[63] The case ultimately reached the Supreme Court.[64]

In a 5-4 decision, the Supreme Court overruled *Dr. Miles*, concluding that the rule of reason should be used when judging the lawfulness of vertical price-fixing situations, rather than adopting a *per se* approach to such activities.[65] The Court began with a statement that "the rule of reason is the acceptable standard for testing whether a practice restrains trade in violation of § 1 [of the Sherman Act]."[66] Acknowledging that "the *per se* rule can give clear guidance for [judging the lawfulness of] certain conduct,"[67] the majority stated that "[t]o justify a *per se* prohibition a restraint must have 'manifestly anticompetitive'

57. *Id.* at 22.
58. *Leegin*, 127 S. Ct. at 2710.
59. *Id.* at 2711–12.
60. *Id.* at 2711.
61. *Id.*
62. *Id.* at 2712.
63. *Id.*
64. *Id.*
65. *Id.* at 2725.
66. *Id.* at 2712.
67. *Id.* at 2713.

effects and 'lack . . . any redeeming virtue.'"[68] It then proceeded to note that "[t]he reasons upon which *Dr. Miles* relied do not justify a *per se* rule."[69]

The Court went on to "examine . . . the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the *per se* rule is nonetheless appropriate."[70] Totaling up the procompetitive justifications for RPM, which it found were "similar to those for other vertical restraints,"[71] and stacking them up against the anticompetitive consequences that can occur, the majority found that "it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output.'"[72]

The Court peremptorily disposed of the arguments that the *per se* rule should be maintained for administrative convenience and rejected the argument that the *per se* rule should be retained because minimum RPM can lead to higher prices.[73] The majority pointed out that it is a mistake, "relying on pricing effects absent a further showing of anticompetitive conduct" and "overlook[ing] that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins."[74]

The Court responds to the argument based on *stare decisis* for maintaining the *per se* rule in *Dr. Miles* by, among others, pointing out that "[f]rom the beginning, the Court has treated the Sherman Act as a common-law statute. . . . Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions."[75]

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68. *Id.* (citation omitted).
69. *Id.* at 2714.
70. *Id.*
71. *Id.* at 2715.
72. *Id.* at 2717 (citation omitted).
73. *Id.* at 2718–19.
74. *Id.* at 2718.
75. *Id.* at 2720.

The dissent, while acknowledging that RPM can be beneficial,[76] is primarily an argument with the majority's departure from *stare decisis*. Justice Breyer found a lack of sufficient changed conditions and empirical evidence to depart from *Dr. Miles*.[77] He notes in answer to the question—*per se* or rule of reason—that "[w]ere the Court writing on a blank slate, I would find these questions difficult."[78] One is hard-pressed not to notice the citation by Justice Breyer of two abortion cases and wonder whether there is an ulterior motive of concern for the present Court's prospects of tinkering with *Roe v. Wade*,[79] as several commentators have noted.[80]

Of great significance is the Court's direction with respect to the further development of the rule of reason analysis in reviewing RPM conduct. The Court observes that, through experience with RPM conduct without the baggage of the *per se* rule, the courts:

> can establish the litigation structure to ensure the rule [of reason] operates to eliminate anticompetitive restraints . . . and to provide more guidance to businesses. Court[s] can . . . 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.[81]

III. ECONOMICS WEIGHS IN

As observed by a group of Boalt Hall law and economics professors after the decision in *Leegin*, the Supreme Court's

76. *Id.* at 2728–29 (Breyer, J. dissenting).

77. *Id.* at 2737.

78. *Id.* at 2726.

79. *Id.* at 2731 (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854–55 (1992)); Roe v. Wade, 410 U.S. 113 (1973).

80. *See, e.g.*, Alan Devlin, *On the Ramifications of* Leegin Creative Leather Products, Inc. v. PSKS, Inc.*: Are Tie-Ins Next?,* 56 CLEV. ST. L. REV. 387, 395–96 (2008).

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

decision "in many ways reflects the ambivalence that most economists have about RPM in general."[82] The professors noted that

> [a] fundamental paradox at the core of RPM explains the ambivalence of economists: RPM can increase quality competition in a manufacturer's brand by eliminating price competition. Consequently, economists . . . concur that its ultimate defensibility turns principally on the factual context in which it is employed, a perspective that is consistent with a rule of reason approach.[83]

The uncertainty among economists would seem to direct the analytical progression of the antitrust laws away from the application of a *per se* rule to RPM, since the seemingly clear conclusion among economists is one of disputation and uncertainty accompanied by a paucity of empirical research and findings. As suggested by at least one economist, "based largely on a Hippocratic philosophy of non-intervention absent good evidence that intervention will have benefits, . . . direct evidence of likely harm should be required before condemning a vertical practice. If there were a Hippocratic Oath among antitrust practitioners, this is where a scientific approach would lead."[84]

Economics should be "a tool in the law-making process, rather than its prime driver,"[85] and, in the "evolutionary scheme [of competition law development,] . . . [t]he rationality of our antitrust system requires continuing efforts to make this process of adaptation well-informed by refinements in economic theory

82. RICHARD BUXBAUM ET AL., RESALE PRICE MAINTENANCE COMES OUT OF THE KLOSET 2, *available at* http://www.law.berkeley.edu/files/LeeginMemoFinal1.4-1-BCLBEinfo.pdf.

83. *Id.* at 3.

84. Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 82 (2008) [hereinafter PROS/CONS], *available at* http://www.kkv.se/upload/Filer/Ovrigt/Konferenser/Pros%20and%20Cons%202008/ppt_Dan_O_Brien_2008.pdf. O'Brien's paper is one of several in this work, a collection of papers presented at a conference sponsored by the Swedish Competition Authority on Nov. 7, 2008. *Id.* at Preface.

85. Joanna Goyder, *Is Nothing Sacred? Resale Price Maintenance and the EU Policy Review on Vertical Restraints*, *in* PROS/CONS, *supra* note 83, at 167, 171.

and empirical research."[86] As was observed in a 1983 FTC Bureau of Economics Staff Report, "[p]ublic policy toward RPM has oscillated between extreme views of the practice . . . The RPM status quo is extremely difficult to defend on economic logic, especially when the middle ground between full legal rights to use RPM and . . . *per se* illegality has never really been tested."[87]

In one of the major outpourings of economists' learning on a subject before the Supreme Court, three amicus briefs were filed by economists in the *Leegin* case. The one point on which all three agreed was the abandonment of a strict *per se* approach to RPM, although the three widely disagreed as to the version of the rule of reason that they recommended be used in place of *per se* treatment. Two of the three amicus briefs argued for a "structured" rule of reason that included a rebuttable presumption of illegality, not altogether unlike the "hard core" treatment accorded minimum RPM in the European Community.[88]

A group of twenty-three professors and scholars specializing in the economics of industrial organization, competition, and antitrust policy (the Economists) filed a brief as amicus curiae urging the Supreme Court to hold that RPM is subject to the rule of reason analysis and to "bring the law governing non-price and price restraints into congruence."[89] The Economists argued that minimum RPM "can help to align . . . incentives [for retailers to] enhance the competitiveness of a manufacturer's product[s], thereby benefiting consumers."[90] RPM can do so by eliminating "'free riding,'" "ensuring dealer contribution to product quality," and "managing demand uncertainty."[91] They

86. Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 GEO. MASON L. REV. 1, 29 (2003).

87. THOMAS R. OVERSTREET, JR., RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 176 (1983).

88. *See infra* text accompanying notes 89–106.

89. Brief for Economists & Scholars as Amici Curiae Supporting Petitioner, Leegin Creative Leather Prods., Inc., v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 6-480),[hereinafter Economist Brief].

90. *Id.* at 5.

91. *Id.* at 5–11.

asserted that, although RPM "inherently restrains intrabrand price competition," it offsets that effect in its enhancement of interbrand competition, and that the use of RPM as a cartel facilitator is "not very common," either at the manufacturer or retailer/distributor level.[92] The Economists pointed out that the ambivalence and disagreement in the economics literature does not support the position that minimum RPM is "often, much less almost invariably, anticompetitive."[93]

In a separate brief, two leading economic scholars, William Comanor of the University of California, Santa Barbara, and Frederic M. Scherer of Harvard University, propose a somewhat complicated rule of reason analytical framework for RPM.[94] Their standard begins with a consideration of the source of the restraints imposed by RPM conduct.[95] A showing "from a quick look that the restraint was induced by distributors, . . . [there should be a] presumption of a *per se* violation, rebuttable on the presentation of credible contradictory evidence."[96] However, if the restraint is "instigated by the manufacturer," the analysis should be conducted under the rule of reason, using "a test of quantitative substantiality."[97] That rule of reason test would "entail a rebuttable presumption of illegality when the . . . fair-traded sales in a relevant narrowly-defined line of commerce exceeds, say, 50 percent."[98] If such a structural situation is found, "antitrust standing would be granted if RPM is *extended* to cover an additional 10 percent of the relevant sales," thereby using a horizontal merger-related criterion for challenge.[99]

The third economist's brief was filed by a private economics consulting firm performing considerable work in the franchising

92. *Id.* at 11–15. *But see* Lao, *infra* note 112.

93. Economist Brief, *supra* note 89, at 16.

94. Brief for William S. Comanor & Frederic M. Scherer as Amici Curiae Supporting Neither Party, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480).

95. *Id.* at 8.

96. *Id.* at 9.

97. *Id.*

98. *Id.*

99. *Id.* (emphasis omitted). The concept of a structured rule of reason with an accompanying presumption of illegality rebuttable under limited circumstances has also been suggested. *See infra* note 193 and accompanying text.

industry.[100] It provides yet another version of a "quick look" approach that would be "in between the *per se* rule and the rule of reason,"[101] and urges the Court to "not completely abandon *per se* condemnation of minimum RPM."[102] The version of a hybrid *per se*/rule of reason suggested in this brief provides for a "quick look" after which, if minimum RPM is found, a rebuttable presumption of competitive harm would arise.[103] Only if the defendant demonstrated procompetitive justifications would the plaintiff be required to prove market power and demonstrate anticompetitive harm.[104] This standard would clearly support minimum RPM only in exceptional cases.[105] This amicus went on to quote former FTC Chairman Robert Pitofsky: "'[a]llowing occasional exceptions is not inconsistent with *per se* treatment. . . . Limited and carefully defined exceptions are a way of preserving efficient enforcement while accommodating those relatively few situations that merit more extended analysis.'"[106]

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100. Brief for Anderson Economic Group, LLC as Amicus Curiae Supporting Respondent, Leegin Creative Prods., Inc. v. PSKS, Inc., 127 S. Ct. at 2705 (2007) (No. 06-480).

101. *Id.* at 7–9.

102. *Id.* at 17–18.

103. *Id.* at 17.

104. *Id.* at 18.

105. *Id.* at 17–18.

106. *Id.* (quoting Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 GEO L.J. 1487, 1495 (1983)). The foundation for Professor Pitofsky's views have been somewhat undermined by subsequent studies done by the FTC's Bureau of Economics. He stated in 1983 that "experience shows that the manufacturer is often induced to act as an organizer of the dealer's cartel by dealer threats or enticements." *Id.* at 1490. Yet, five years later, an FTC staff report concluded that, for the period following the repeal of the state fair trade laws from 1976 to 1982, "[t]he samples of RPM cases provide little empirical support for the theory that RPM is an important device to facilitate either dealer or manufacturer collusion." PAULINE M. IPPOLITO, RESALE PRICE MAINTENANCE: ECONOMIC EVIDENCE FROM LITIGATION 87 (1988), *available at* http://www.ftc.gov/be/econrpt/ 232122.pdf. Given the widespread *per se* legality of RPM from 1937 to 1975, this was the first study done for a period governed by the *per se* rule of *Dr. Miles*. *See id.* at v, 6. A study of the period preceding enactment of the fair trade laws reached a similar conclusion with respect to use of RPM as a cartel device. *See* Andrew N. Kleit, *Efficiencies Without Economists: The Early Years of Resale Price Maintenance*, 59 S. ECON. J. 597 (1993).

By now, the theoretical and academic arguments supporting the procompetitive and anticompetitive justifications for RPM are well-known and well-argued.[107] The laundry list on both sides is well established:

A. Procompetitive justifications for RPM
   1. promotes interbrand competition
   2. encourages and rewards retailer investment in facilities and pre-sale services and brand promotion
   3. offers quality certification
   4. reduces the prospect for "free-riding"
   5. facilitates market entry for new brands
   6. encourages post-sale services
   7. provides a standard marketing and distinguishing technique for a manufacturer's status goods[108]

B. Anticompetitive harms
   1. Facilitates manufacturer or retailer collusion and cartel enforcement
   2. harms "infra-marginal consumers"

107. A letter from Representative John Conyers to the U.S. Justice Department and the Chairman of the FTC in Jan. 2007 asked for responses to several questions and attached "A Primer on Vertical Minimum Price Fixing (RPM)," prepared by long-time supporter of *per se* treatment of RPM Professor Warren Grimes. Letter From John Conyers, Jr., Congressman, to Thomas O. Barnett, Assistant Attorney General, U.S. Dep't of Justice Antitrust Division & Deborah Platt Majoras, Chairman, Fed. Trade Comm'n (Jan. 10, 2007), *available at* http://judiciary.house.gove/hearings/pdf/110-Leegin.pdf [hereinafter Conyers Letter]. The Primer listed scholarships supporting the retention of the *per se* rule as well as supporting elimination of the per se approach in favor of applying the rule of reason, together with "a sample" of federal and state agency cases involving prosecution of RPM or minimum advertised prices. *Id.* at 8–10.

108. *See* Conyers Letter, *supra* note 107, at 8–10; *Leegin*, 127 S. Ct. at 2714–16; Orbach, *supra* note 26, at 273, 286.

3. prevents intrabrand competition, at least on price
4. harms interbrand as well as intrabrand competition, at least to some degree (e.g., resulting from strong brand perception may insulate a producer from interbrand competition)
5. leads to higher consumer prices[109]

On the last of the listed anticompetitive effects, Professor Pitofsky's oft-quoted statement on the subject has become the mantra of *per se* advocates, "One point that emerges clearly in any debate concerning the *per se* rule is that minimum vertical price agreements lead to higher, and usually uniform, resale prices."[110] The Supreme Court in *Leegin* dismissed concerns in this regard, saying that those who assert this basis for applying the *per se* rule to minimum RPM are "mistaken in relying on pricing effects absent a further showing of anticompetitive conduct."[111]

IV. THE LANDSCAPE OF DIVERGENCE IN THE UNITED STATES

There are more concerns to be considered than merely the application of the intensely "circumstance-specific 'rule of reason'"[112] analysis dictated by the Supreme Court in *Leegin*. The divisions occasioned by *Leegin* are deep and intense, including an unusual difference even among FTC

109. *See* William Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 991–92 (1985) (discussing the impact vertical price fixing will have on customers who purchase a product regardless of the retailer services and promotions, also known as "infra-marginal consumers"); Marina Lao, *Leegin and Resale Price Maintenance: A Model for Emulation or for Caution for the World?*, 39 INT'L REV. OF INTELL. PROP. & COMPETITION L. 253, 255 (2008); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 879 (2004) (characterizing collusion as a supreme evil of anticompetitive behavior).

110. *See* Pitofsky, *supra* note 106, at 1488 & n.13 (relying on the study submitted at hearings on S. 408 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary).

111. *Leegin*, 127 S. Ct. at 2718 (citing OVERSTREET, *supra* note 87, at 176, in support of its conclusion that price surveys "do not necessarily tell us anything conclusive about the welfare effects of [resale price maintenance] because the results are generally consistent with both precompetitive and anticompetitive theories").

112. *See Leegin*, 127 S. Ct. at 2725 (Breyer, J., dissenting).

commissioners.[113] Domestic divergence with respect to RPM in the United States is primarily at the state level, although there is a noticeable lack of convergence, at the federal level, at the Federal Trade Commission.[114]

A. State Level Divergence

At the state level, beyond the fact that thirty-seven state attorneys general filed as *amici* (and the New York state solicitor general orally argued for *amici* before the Supreme Court) in *Leegin* for the retention of the *per se* rule for RPM analysis, the National Association of Attorneys General (NAAG) adopted a resolution at its spring 2005 meeting setting forth its "Principles of State Antitrust Enforcement," in which it was stated that "the federal antitrust laws were enacted by Congress with the intent that those laws complement rather than supplant state antitrust laws" and that the NAAG "[o]pposes [any] federal preemption of any state antitrust statutes."[115]

In a presentation before the American Bar Association Fall Forum in November 2007, the Director of Litigation in the Antitrust Bureau of the New York State Office of Attorney General emphasized that state law on RPM is "wholly enforceable" and "may diverge from the federal rule."[116] He suggested two enforcement alternatives: (1) state enforcement that "could create a patchwork of differing rules like the aftermath of Illinois Brick" or (2) "federal legislation to avoid this patchwork."[117]

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113. *See* Open Letter from Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, to the Supreme Court of the United States (Feb. 26, 2007) (noting the split among the Commissioners of the Federal Trade Commission), *available at* http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf.

114. *See infra* text accompanying notes 117, 137.

115. *See* Brief for State of New York et al. as Amici Curiae Supporting Responding, Leegin Creative Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480); NAT'L ASS'N OF ATTORNEYS GEN., RESOLUTION: PRINCIPLES OF STATE ANTITRUST ENFORCEMENT (2005).

116. Robert L. Hubbard, Dir. of Litig., N.Y. State Office of the Attorney Gen. Antitrust Bureau, Address at the American Bar Association Fall Forum: The Impact of *Leegin* on the Law of Vertical Restraints (Nov. 15, 2007), *available at* http://www.oag.state.ny.us/bureaus/antitrust/pdfs/aba_fall_07_forum.pdf.

117. *Id.*

In fact, an actual legislative and enforcement administration patchwork already exists among the states. Several states have existing legislation and case law that prohibit or make unenforceable agreements relating to RPM.[118] Only two states appear to have laws of general application to commodities prohibiting minimum RPM: New York[119] and New Jersey.[120] There are at least six states with legislation prohibiting RPM with respect to motor fuel.[121]

California law includes a statute that specifically prohibits arrangements "[t]o fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise."[122] Yet another subsection of California law prohibits agreements "not to sell, dispose of or transport any article or any commodity . . . below a common standard figure, or fixed value" or to "[a]gree . . . to keep the price of such . . . commodity . . . at a fixed or graduated figure."[123]

Since the *Leegin* decision in June 2007, it does not appear that any state legislature has introduced legislation similar to that in the states mentioned above in order to overcome the

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118. Michael A. Lindsay, *Resale Price Maintenance and the World After* Leegin, 22-FALL ANTITRUST 32, 34 (2007); M. Russell Wofford, Jr. & Kristen C. Limarzi, *The Reach of* Leegin*: Will the States Resuscitate* Dr. Miles*?*, ANTITRUST SOURCE, Oct. 2007, *available at* http://www.abanet.org/antitrust/at-source/07/10/Oct07-Wofford10-18f.pdf.

119. N.Y. GEN. BUS. LAW § 369-a (McKinney 2003).

120. N.J. STAT. ANN. § 56:4-1.1 (West 2001).

121. DEL. CODE ANN. tit. 6, § 2909 (2007) (requiring that each motor fuel dealer agreement include a legend stating "PRICE FIXING OR MANDATORY PRICES FOR ANY PRODUCTS COVERED IN THIS AGREEMENT IS PROHIBITED. A SERVICE STATION DEALER MAY SELL ANY PRODUCTS LISTED IN THIS AGREEMENT FOR A PRICE WHICH THE DEALER ALONE MAY DECIDE"); FLA. STAT. ANN. § 526.307(1) (West 2007) ("It shall be unlawful for a refiner or other supplier to fix or maintain the retail price of motor fuel at a retail outlet supplied by the refiner or supplier. Nothing herein contained shall be construed to prevent a refiner or supplier from counseling concerning retail prices, provided no threat or coercion is used in the counseling. This subsection shall not apply to retail outlets operated by a refiner or supplier."); HAW. REV. STAT. ANN. § 486H-5 (LexisNexis 2007); ME. REV. STAT. ANN. tit. 10 §§ 1454(1)(C), 1676(3) (2008); MD. CODE ANN., COM. LAW § 11-304(c) (West 2008); N.Y. GEN. BUS. LAW § 370-f (McKinney 2003).

122. CAL. BUS. & PROF. CODE § 16720(d) (West 2008).

123. § 16720(e).

Leegin holding. In addition, while each of the states (with the exception of Pennsylvania) has a statute similar to Sherman Act § 1, such statutes are subject to interpretation in state courts that may differ from the Supreme Court's interpretation in *Leegin*. Many of the state versions of the Sherman Acts are accompanied by statutory provisions directing that the interpretation of state antitrust laws should be "guided by" or "construed in harmony with" federal laws and their interpretation by federal courts, or that the latter should be persuasive authority.[124] Nonetheless, it is not unlikely that state courts will be encouraged by state attorneys general and private litigants to depart from *Leegin* and perpetuate the federally-abandoned *per se* rule in vertical price-fixing situations. The chief of the Antitrust Bureau of the New York Attorney General's Office wrote an article in January 2008 in response to *Leegin*, stating that RPM:

> will generally be judged under federal antitrust law's rule of reason . . . [u]nder state law, however, RPM arrangements will need to be analyzed on an individual state basis. Although many states defer to federal antitrust precedent in construing state law, this general precept cannot obviate the need for inquiry when a competitive practice is challenged under an individual state's law.[125]

State attorneys general have clearly signaled their displeasure with the Supreme Court's decision in *Leegin*, as indicated by their letter in support of the Discount Pricing Consumer Protection Act. This act was proposed in the United States Senate in 2008 and may seek to bring vertical price-fixing enforcement actions in state courts under state versions of the Sherman Act.[126]

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124. *E.g.*, MD. CODE ANN., COM. LAW § 11-202(a)(2) (West 2008) ("guided by"); MO. ANN. STAT. § 416.141 (West 2008) ("construed in harmony with"); OR. REV. STAT. § 646.715(2) (2007) ("persuasive authority").

125. Jay. L. Himes, *New York's Prohibition of Vertical Price Fixing*, N.Y.L.J., Jan. 29, 2008, *available at* http://www.oag.state.ny.us/bureaus/antitrust/pdfs/vert_price_fixing.pdf; *see also* Robert L. Hubbard, *Protecting Consumers Post*-Leegin, 22 ANTITRUST 41, 41–43 (2007) (discussing the different manners in which states may approach vertical price restraint actions after *Leegin*).

126. *See* Lindsay, *supra* note 118, at 33–34 (discussing the amicus briefs filed by

Two recent indications of the posture of many state attorneys general include: (1) the submission of comments by twenty-seven attorneys general to the FTC in the case of Nine West Group Inc.'s petition for relief from a 2000 FTC order prohibiting RPM actions by that company[127] and (2) a consent order obtained by three attorneys general against a minimum RPM program of a seller of high-end ergonomic office chairs, Herman Miller, Inc.[128]

After a five-year wrestling match with the state attorneys general of New York, Illinois, and Michigan, Herman Miller, Inc., entered into a consent decree with the attorneys general with respect to resale prices of its furniture.[129] In addition to paying civil penalties of $750,000 and the states' costs, the chair maker agreed to discontinue its minimum RPM program.[130] The consent decree prohibited Miller from requiring dealers to obtain its prior approval "before submitting Reserve Bids on any Internet auction website" or "to deviate from any MSRP for print or electronic media."[131] The complaint was filed alleging violation of section 1 of the Sherman Act as well as the comparable state statutes.[132]

Of equal concern should be the possibility of the use by state attorneys general of state unfair trade practices statutes. Many states have unfair and deceptive trade practice statutes that are fully capable of being used by state attorneys general and, in several states, by private parties to challenge both minimum and maximum RPM as unfair trade practices.[133]

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numerous state attorneys general in opposition of overturning *Dr. Miles*, and the state statutory structure by which these attorneys general may still pursue vertical price fixing enforcement actions).

127. *See* Letter from Robert L. Hubbard, Dir. Of Litig., N.Y. State Office of the Attorney Gen. Antitrust Bureau, to Fed. Trade Comm'n (Jan. 17, 2008), *available at* http://www.ftc.gov/os/comments/ninewestgrp/080117statesamendedcomments.pdf.

128. *See* Proposed Stipulated Final Judgment and Consent Decree, New York v. Herman Miller, Inc., No. 08-02977 (S.D.N.Y. Mar. 24, 2008).

129. *Id.* at 1–2.

130. *Id.* at 4–8.

131. *Id.* at 6.

132. *Id.* at 2; N.Y. GEN. BUS. LAW. § 340(1) (McKinney 2004); 42 ILL. COMP. STAT. ANN. 10/3-3 (LexisNexis 2008); MICH. COMP. LAWS ANN. § 445.772 (West 2002).

133. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 17.46(b)(12) & n.3 (Vernon 2002)

While unfair trade and deceptive trade practice laws are typically used—and viewed as properly employed—to stop consumer fraud, deceptive product sales, and other improper or overreaching tactics harmful to consumers, the content of many of them has not yet been fully developed. Many of the state unfair trade laws consist of a list of specific acts or practices that are prohibited.[134] Others are general in their prohibitions, some being very similar to section 5 of the Federal Trade Commission Act.[135]

B. Federal Level Activity

The activity of the federal antitrust agencies subsequent to *Leegin* has been muted, but there have been two developments of significance: (1) renewed interest in the scope of coverage and use of the FTC jurisdiction under sect 5 of the FTC Act and (2) the granting of a petition to modify a 2000 RPM consent order and the conduct of RPM workshops by the FTC.

Section 5 of the Federal Trade Commission Act states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[136] The depth of the coverage of section 5 of the FTC Act remains unplumbed despite almost 100 years of existence. While there has not been any significant effort to extend the reach of section 5 since the regime of FTC Chairman Michael Pertschuk in the last years of the Carter Administration,[137] there has been some recent indication of a new expansionary attitude in the issuance of a complaint against Negotiated Data Solutions LLC and acceptance of a proposed consent agreement settling it.[138] The FTC vote was

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(stating the point of the act was to allow consumers to bring causes of action for deceptive trade practices or practices prohibited by law).

134. *Id.* § 17.45(b)(1)–(26).

135. *See e.g.*, MICH. COMP. LAWS ANN. § 445.772 (West 2002).

136. 15 U.S.C. § 45(a)(1) (2006).

137. *See* THOMAS B. LEARY, A SUGGESTION FOR THE SURVIVAL OF SECTION 5 at 12–14 (2008), *available at* http://ftc.gov/bc/workshops/section5/docs/tleary.pdf (delivered at an FTC Workshop on "Section 5 of the FTC Act as a Competition Statute").

138. *See* Press Release, Fed. Trade Comm'n, FTC Challenges Patent Holder's Refusal to Meet Commitment to License Patents Covering 'Ethernet' Standard Used in

three to two, with Commissioners Harbour, Liebowitz, and Rosch voting in favor of the complaint and settlement and Chairman Majoras and Commissioner Kovacic voting against.[139]

The controversy within the FTC centers on whether section 5 should be used by the FTC to pursue activities where there is no liability under the other antitrust laws.[140] Chairman Majoras's dissent notes that, while limitation on section 5's operation in the area of unfair methods of competition is due to "partly self-imposed" limits, it "also reflects the insistence of the appellate courts that the Commission's discretion is bounded and must adhere to limiting principles."[141] Commissioner Kovacic's dissent raises a "spillover effects" issue as to which the majority is somewhat defensive.[142] He points out the dangerous possibility that the resolution of *Negotiated Data Solutions* could spill over into private litigation, affecting the application of state statutes modeled on the FTC Act and prohibiting unfair methods of competition and unfair acts or practices,[143] since "[t]he federal and state . . . systems do not operate in watertight compartments."[144]

Of interest for the current administration is the view of the scope of section 5 of the FTC Act that a new FTC will take. Interestingly, the FTC conducted a public workshop in October 2008 to "consider the appropriate scope of Section 5 in light of legal precedent, economic learning and changing business practices in a global and hi-tech economy."[145] The FTC

Virtually All Personal Computers in U.S. (Jan. 23, 2008) (on file with the FTC), *available at* http://www.ftc.gov/opa/2008/01/ethernet.shtm.

139. *Id.*

140. *See* Dissenting Statement of Chairman Majoras, In the Matter of Negotiated Data Solutions LLC, No. 0510094 at 2 (FTC Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf.

141. *Id.* at 3.

142. *See* Dissenting Statement of Commissioner William E. Kovacic, In the Matter of Negotiated Data Solutions, LLC, No. 0510094 at 1–2 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.

143. *Id.*

144. *Id.* at 2.

145. Notice of Public Workshop Concerning the Prohibition of Unfair Methods of Competition in Section 5 of the Federal Trade Commission Act, 73 Fed. Reg. 50818 (Aug. 28, 2008).

Workshop produced several papers that are critical to understanding the future of Section 5.

One paper submitted at the FTC Workshop suggested a two-step screening process for considering the use of section 5 in competition cases. If the economic effect of the conduct being reviewed is the same as that subject to liability under the Sherman Act, "[i]s there nonetheless some *legal* reason to bring the challenge under Section 5 rather than the Sherman Act?"[146] The commentators named categories that might fit the criteria—"'frontier' cases, 'gap-filling' cases, and 'yes, but' cases."[147] They also warn that "these rationales [should] not [be] used to skip over a rigorous analysis of whether the legal elements of a Sherman Act claim otherwise are met."[148] With respect to the *Leegin* decision, former Commissioner Tom Leary strongly suggested that the FTC should use a section 5 complaint to further develop the *Leegin* decision's direction to "'devise rules over time for offering proof or even presumptions where justified.'"[149] He went on to say that

> If one of the two Federal antitrust agencies does not take the lead on this issue, the evolving principles will be shaped by private litigation or by application of state law. This is not an optimal outcome. And, the Federal Trade Commission is the better of the two Federal agencies to break new ground because an action under Section 5 would be less likely to have retroactive effects—not assuredly so, but significantly so.[150]

What Tom Leary should keep in mind is the scenario that played out during the last round of U.S. government agency efforts to develop guidelines on vertical restraints (even without the emotion surrounding RPM). The Justice Department adopted guidelines for vertical restraints in the mid-1980s on the heels of the *Sylvania* and *Monsanto* decisions[151] that were

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146. SUSAN A. CREIGHTON ET AL., SOME THOUGHTS ABOUT THE SCOPE OF SECTION 5 1, 2 (2008), *available at* http://www.ftc.gov/bc/workshops/section5/docs/screighton.pdf.

147. *Id.*

148. *Id.* at 3.

149. LEARY, *supra* note 137, at 8–9 (quoting *Leegin*, 127 S. Ct. at 2720).

150. *Id.* at 8.

151. U.S. DEP'T OF JUSTICE, VERTICAL RESTRAINTS GUIDELINES (1985), *reprinted in*

withdrawn early in the Clinton administration.[152] The withdrawal had been occasioned by the adoption of competing vertical restraints guidelines by the National Association of Attorneys General (NAAG)[153]—shades of the currently bubbling cauldron between federal and state enforcement officials![154]

The FTC began the process of devising new rules for RPM analysis in its May 2008 order to grant in part Nine West's petition to modify an RPM order from 2000, as discussed below.[155] Another of the several papers submitted at the FTC Workshop on Section 5 was provided by the President of the American Antitrust Institute, who suggested that "[t]he FTC should use Sec. 5 as a bridge toward convergence with Europe."[156]

Understandably there should be concern about the FTC's view of the reach of Section 5 of the FTC Act and its encouragement and influence on state government and private party enforcement with respect to both minimum and maximum RPM, especially in light of the upcoming 2008 elections. It should be kept in mind that one of the commissioners comprising the majority in *Negotiated Data Solutions* was Commissioner Harbour who (1) argued before the Supreme Court in *State Oil* for the state attorneys general as *amici* in favor of retaining the *per se* rule with respect to maximum RPM, (2) beyond opposing the FTC's filing an amicus brief in support of overturning *Dr. Miles* in the *Leegin* case, went to the extent of writing a lengthy letter imploring the Court to retain the *per se* rule's applicability to maximum vertical price fixing,[157] and (3)

4 TRADE REG. REP. (CCH) ¶ 13,105.

152. *See* Remarks of Assistant Attorney Gen. Anne K. Bingaman to the ABA Antitrust Section (Aug. 10, 1993), *reprinted in* 7 TRADE REG. REP. (CCH) ¶ 50,110.

153. *Id.*

154. *See supra* text accompanying notes 113–29.

155. In re Nine West Group, Inc., Docket No. C-3937, Order Granting in Part Petition to Reopen and Modify Order Issued Apr. 11, 2000, at 12 (May 6, 2008), *available at* http://www.ftc.gov/os/caselist/9810386/080506order.pdf [hereinafter Order to Reopen].

156. ALBERT A. FOER, SECTION 5 AS A BRIDGE TOWARD CONVERGENCE (2008) (delivered at an FTC Workshop), *available at* http://www.ftc.gov/bc/workshops/section5/docs/afoer.pdf.

157. *State Oil v. Kahn*, 522 U.S. at 7 (stating that Harbour argued as amicus for the state of New York); Open Letter from Pamela Jones Harbour, *supra* note 113.

vigorously supported, both in testimony and in writing, legislation to overturn the *Leegin* decision.[158]

Nine West markets its quality women's shoes and accessories through retail outlets and department stores in the U.S. and through licensees outside the U.S.[159] It entered into a consent decree with the FTC in 2000 prohibiting it from "[f]ixing, controlling, or maintaining the resale price at which any dealer may advertise, promote, offer for sale or sell any Nine West Products and from "coercing or . . . pressuring any dealer to maintain, adopt, or adhere to any resale price."[160]

The FTC unanimously granted Nine West's petition in part and modified its original order with respect to RPM conduct.[161] Applying a "truncated analysis" that it felt was suggested by the Court in *Leegin*,[162] the Commission used a two-prong test: (1) whether Nine West possesses market power and (2) whether the impetus for the RPM is from Nine West and not retailers. The Commission concluded that Nine West prima facie lacks market power, and "there is no reason to believe that there is collective market power in any putative market."[163] In considering the second prong, the FTC determined there was "no evidence of a

158. *The Leegin Decision: The End of the Consumer Discounts or Good Antitrust Policy?*: Hearing Before the S. Subcomm. on Antitrust, Competition Policy and Consumer Rights, 110th Cong. (2007) (statement of Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n), *available at* http://www.ftc.gov/speeches/harbour/070731test.pdf; Letter from Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, to Senator Herb Kohl, Chairman, Subcomm. On Antitrust, Competition Policy & Consumer Rights (Sept. 5, 2007), *available at* http://www.ftc.gov/speeches/harbour/070905kohl.pdf [hereinafter Harbour letter]; *see* Pamela Jones Harbour, *A Tale of Two Marks, and Other Antitrust Concerns*, 20 LOY. CONSUMER L. REV. 32, 33–34 (2007).

159. Press Release, Fed. Trade Comm'n, Nine West Settles State and Federal Price Fixing Charges (Mar. 6, 2000) (on file with the FTC), *available at* http://www.ftc.gov/opa/2000/03/ninewest.shtm; *see also* Answers.com, Nine West Group, Inc., http://www.answers.com/topic/nine-west-group-inc (last visited Apr. 2, 2009).

160. Decision and Order, In re Nine West Group, Inc., Docket No. C-3937 at 2 (2000), *available at* http://www.ftc.gov/os/2000/04/ninewest.do.htm.

161. Press Release, Fed. Trade Comm'n, FTC Modifies Order in Nine West Resale Price Maintenance Case (May 6, 2008), *available at* http://www.ftc.gov/opa/2008/05/ninewest.shtm.

162. Order to Reopen, *supra* note 155.

163. *Id.* at 14–15.

dominant, inefficient retailer in this market."[164] However, in line with the Supreme Court's imprecation in *Leegin*, courts and administrative agencies can "devise rules over time for offering proof, or even presumptions where justified" to fairly and efficiently judge RPM activities.[165]

The Discount Pricing Consumer Protection Act[166] was introduced in the United States Senate on January 6, 2009. The bill would amend section 1 of the Sherman Act to add a second sentence, "'Any contract, combination, conspiracy or agreement setting a minimum piece below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act.'"[167] In addition to Commissioner Harbour's strong support, the attorneys general of thirty-five states joined in a letter to members of Congress expressing their support for the Discount Pricing Consumer Protection Act.[168] This bill is not the first of these types of bills. In reaction to the decision in *Monsanto*,[169] several bills were introduced in Congress in the late 1980s and early 1990s, one of which was passed by a voice vote in the Senate, but which was defeated in the House of Representatives.[170]

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164. *Id.* at 15.

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

166. Discount Pricing Consumer Protection Act, S. 148, 111th Cong. (2009).

167. *Id.* § 3.

168. Letter from State Attorneys General to Members of Congress Expressing Support for the Discount Pricing Consumer Protection Act (S. 2261) (May 14, 2008), *available at* http://www.naag.org/assets/files/pdf/signons/antitrust.AG_Letter_Supporting_S2261.pdf. *See* Neal R. Stoll & Shepard Goldfein, *'Discount Pricing' Act: Direct Rebuke to* 'Leegin', N.Y. L.J., Mar. 18, 2008, *available at* http://www.skadden.com/content/Publications/Publications1375_0.pdf (discussing the legislation and hearings held within five weeks of the decision in *Leegin*).

169. *See supra* notes 51–53 and accompanying text.

170. S. 429, 102nd Cong. (1991). Several commentators have discussed *Monsanto*-reactive legislation. *See generally, e.g.*, Anthony J. Greco, *The Price Maintenance Struggle: Its Legislative Updating*, 51 AM. J. ECON. & SOC. 173 (1992); David W. Boyd, *The Resale Price Maintenance Struggle:* A Comment, 52 AM. J. ECON. & SOC. 447 (1993) (responding to Anthony Greco's 1992 article regarding S. 430 and S. 865); Anthony J. Greco, *Response of Professor Anthony J. Greco*, 52 AM. J. ECON. & SOC. 454 (1993) (responding to David Boyd's Comment).

V. RPM IN THE EUROPEAN COMMUNITY

The *Leegin* decision has created what appears to be a deep divergence between U.S. antitrust law and the competition regime in the European Union (EU).[171]

The primary spokesperson for the European Commission on RPM, Lucas Peeperkorn, principal administrator at the DG Competition of the European Commission, has given a fairly clear picture of the direction of the EC on RPM.[172] The arrival of the *Leegin* decision is particularly timely in that the EC is currently engaged in reviewing its vertical restraints guidelines and block exemption.[173]

In May 2008, Peeperkorn made a presentation at a conference in Paris that, together with a follow-up article,[174] provides the latest view of RPM prevailing in the EC.[175] He first addressed the current EC rules on vertical arrangements, noting that, while the Block Exemption for vertical arrangements provides an effects-based approach towards vertical arrangements, RPM is considered a hardcore restriction and

171. *Compare Leegin*, 127 S. Ct. 2725 (holding that vertical price restraints are not *per se* illegal) *with* Sandoz Prodotti Farmaceutici Spa v. Comm'n of the European Cmtys., 1990 E.C.R. I-00045 (interpreting the European Union's vertical pricing restriction as a per se restriction). But not as deep a legal abyss as that created between the U.S. and Canada. *See infra* notes 178–84 and accompanying text.

172. *See* Luc Peeperkorn, *Resale Price Maintenance and Its Alleged Efficiencies*, 4 EUR. COMPETITION J. 201 (2008) (discussing the current treatment of RPM in the EU as well as the possible negative and positive effects for consumers that may result from RPM as identified in the *Leegin* case).

173. *See* Commission Regulation 2790/1999 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 J.O. (L 336) 21, 21 (EC) (stating that the block exemption should be limited to vertical agreements which satisfy the conditions of Article 81(3)). As Peeperkorn points out, the block exemption is "a package with the guidelines on vertical restraints." Peeperkorn, *supra* note 172, at 201–02.

174. *See* Peeperkorn, *supra* note 172, at 201 (discussing the current treatment of RPM in the EC and how it differs from the U.S. approach). Although Peeperkorn disclaims that he speaks for the DG Competition, I suggest that his views clearly reflect those of the DG Competition on RPM.

175. Luc Peeperkorn, Address at Conference on Vertical Restraints in Comparative Competition Law (May 23, 2008) (slides from the presentation are available at http://www.ucl.ac.uk/laws/clge/paris-23may08/03_Peeperkorn_23may.pdf) [hereinafter Peeperkorn Address].

cannot benefit from block exemption.[176] He has pointed out that the "hardcore" characterization both excludes RPM from the block exemption and includes a presumption of "negative effects and that positive effects are either nonexistent or will not outweigh the negative effects or that RPM will not be indispensable in achieving . . . efficiencies."[177] In his comparison of the treatment of RPM in the EC and in the U.S. after *Leegin*, Mr. Peeperkorn noted in his conference presentation that, under EC rules,expert testimony on pro-competitive effects would have to be taken into account, even though there is the presumption that it is unlikely that RPM will have positive effects, that a fair share will be passed on to consumers and/or that the restraint is indispensable.[178]

Peeperkorn concluded with the observation that "current rules, which seem to work well in general, are still unchanged and applicable" and that the "hardcore approach [is] more flexible than *per se*."[179] Drawing on the Supreme Court's statement in its opinion in *Leegin* that the courts should "establish a litigation structure," possibly including presumptions,[180] Peeperkorn has suggested (somewhat prematurely) that "the EC hardcore approach is in a way an application of what is described . . . by the US Supreme Court."[181]

Peeperkorn highlighted what he believes to be the negative effects of RPM: facilitating collusion, preventing direct price decreases, lowering pressure on manufacturer margins, and reducing "dynamism and innovation in the distribution system."[182] He also noted what he sees as positive effects:

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176. Peeperkorn, *supra* note 172, at 201–02. Article 4 of the BER provides that "the exemption . . . shall not apply to vertical agreements which directly or indirectly. . . . Have as their object … the restriction of the buyer's ability to determine its sales price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price. . . " *Id.* at 202 n.5.

177. *Id.* at 203-04.

178. Peeperkorn Address, *supra* note 175.

179. *Id.*

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

181. Peeperkorn, *supra* note 172, at 204.

182. *Id.* at 206-08.

increased distributor promotion and inter-brand competition, leading to more promotion in the absence of free riding, incentives to distributors to keep more stock, and assisting new market entry.[183]

Having thus nodded in the direction of balancing the positive and negative effects of RPM, which he says is necessary for reaching "a balanced and focused opinion useful for policy formulation towards the various types of vertical restraints," Peeperkorn wrote that "it is possible for most types or vertical restraints, even if sometimes only in a (small) minority of cases, to have net positive effects,"[184] a necessary proof to overcome the presumption under the EC competition law.

Peeperkorn concluded by noting that the review of the BER and the Guidelines, "necessitated by the expiry of the BER on 31 May 2010 . . . will be an open process, with ample opportunity for all parties to comment on the current rules and practice, including the treatment of RPM."[185]

Heeding Peeperkorn's comments, it is difficult to disagree with one observation that "though unreconstructed lawyers would be wrong to regard current EU policy as sacred, they can be fairly confident that it is likely to emerge from the review fundamentally unscathed."[186] Scholarship by economists in the EU seems to be no more convergent and at least as disputative as that in the U.S.[187]

While the EC competition law applies to all of its member countries with respect to agreements and practices that apply across national borders, and thus govern most franchise arrangements in the EU, attention must also be accorded individual national competition law regimes. EC regulations

183. *Id.* at 208-12.

184. *Id.* at 205.

185. *Id.* at 212.

186. Goyder, *supra* note 85, at 192.

187. *Compare* Paul W. Dobson, *Buyer-Driven Vertical Restraints*, *in* PROS/CONS 102, 132 (according to the British professor, economics "points to the need for [sic] to apply a general rule-of-reason approach for consideration of these restraints") *with* Patrick Rey, *Price Control in Vertical Relations*, *in* PROS/CONS 135, 135 (finding by the French scholar, that both price and non-price vertical restraints to be very nearly equally likely to produce anticompetitive effects).

require the courts of Member States to apply and enforce EC competition law as well as national competition law in reviewing agreements that may affect trade among Member States.[188] The limits of this presentation compel me to address only three of those countries' approaches.

VI. RPM IN NATIONAL JURISDICTIONS

A. Mexico and Canada

In North America, the position of the two U.S. neighbors, Canada and Mexico, should be considered, particularly in light of their relationship within the North American Free Trade Agreement (NAFTA). Mexico's competition law, as most recently amended in 2006, provides essentially for a rule of reason test for both maximum and minimum RPM. Its Federal Law of Economic Competition (LFCE) provides that "relative monopolistic practices" are deemed to be present where acts, contracts, or combinations have the effect "to set the prices or other conditions that a distributor or supplier was to abide by when marketing or distributing goods or providing services."[189] To be considered a violation of law, such vertical practices require proof of two conditions in connection with the practices: (1) the responsible party has "substantial power in the relevant market" and (2) they are "carried out regarding goods or services corresponding to that relevant market."[190] The Mexican law goes on to identify factors to be considered to determine the "relevant market," including product substitutability, market entry conditions, government restrictions, and cost considerations.[191] The following should be evaluated in order to determine if an economic agent has "substantial market power:" market share, entry barriers, access to input services, competitor's power, and competitor performance.[192]

188. Council Regulation 1/2003, art. 8, 2003 O.J. (L 1) 1 (EC).

189. Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, Diario Oficial de la Federación [D.O.], ch. II, art. 10, 24 de Deciembre de 1992 (Mex.).

190. *Id.* art. 11.

191. *Id.* art. 12.

192. *Id.* art. 13.

One area of retailing that has provoked particular interest in several countries did likewise in Mexico—the book trade. In 2005, the Federal Competition Commission (CFC) issued a proposal to amend the competition laws to adopt a Law to Promote the Book and Reading, a proposal to allow publishers and importers to fix a single retail price of books.[193] The law was passed.[194]

Canada presents quite a different picture. An article in *Economica* pointed out that "Canada was the first country to ban resale price maintenance unconditionally (December 28, 1951) and then follow the ban with an exhaustive inquiry into loss-leader selling."[195] Canada's Competition Act provides that it is a *per se* criminal offense for a supplier of a product to, "by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada."[196] The law goes on to also prohibit any supplier's refusal "to supply a product or otherwise discriminate against any other person . . . because of the low pricing policy of that other person."[197] Worse yet, the Competition Act goes on to condemn, as a prohibited "attempt to influence" a resale price

> a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at . . . in the absence of proof that the person making the suggestion . . . also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations . . . of the suggesting person or any other person.[198]

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193. OECD, *Annual Report on Competition Policy Developments in Mexico*, at 3, OECD Doc. DAF/COMP(2006)7/25 (May 29, 2006).

194. *Id.*

195. L.A. Skeoch, *The Abolition of Resale Price Maintenance: Some Notes on Canadian Experience*, 31 ECONOMICA 260, 260 (1964).

196. Canada Competition Act, R.S.C., c. C-34, s. 1, § 61(1)(a) (1985).

197. *Id.* § 61(1)(b).

198. *Id.* § 61(3).

There are certain limited exceptions to the outright prohibition of even suggestions of RPM, such as a reseller's use of a product as a "loss leader" and the reseller's engagement in misleading advertising.[199]

As directly and succinctly stated in a recent article, "[t]he effect of Canada's prohibition on price maintenance is to make it difficult for franchisors to influence their franchisees' prices—regardless of whether there is a sound business justification for doing so."[200] Or, I hasten to add, where there are demonstrable procompetitive aspects to the RPM practice or the absence of substantial anticompetitive effects.

Thus, for instance, fast food restaurant franchisors who may be able to advertise or provide menus including prices to their franchisees in the U.S. (e.g., in Detroit) and Mexico are likely inviting criminal prosecution if they do so in Canada (e.g., Windsor, Ontario) because the definition of "product" under the Competition Act is "broad enough in Canada to include franchisors."[201]

An opportunity for considering harmonization of the competition law regimes with respect to RPM in the U.S. and Canada has been presented. In June 2008, the Canadian Competition Policy Review Panel, mandated by the national government to review Canada's competition and foreign investment policies and recommend ways for improvement, issued its report following a year of review.[202] One of its recommendations is an updating of the Competition Act, including repealing outdated or ineffective pricing provisions.[203] The review elicited hundreds of comments, including comments from the U.S. Department of Justice and the FTC. Surprisingly and unfortunately, considering the deep difference on RPM between post-*Leegin* U.S. and Canadian RPM law, the U.S.

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199. *See id.* § 61(10).

200. Chris Hersh & Larry Weinberg, *Cross-Border Confusion? Price Maintenance Still* Per Se *Offence in Canada*, THE FRANCHISE LAWYER 1, 3, (2008).

201. *Id.* at 1.

202. COMPETITION POLICY REVIEW PANEL, COMPETE TO WIN: FINAL REPORT-JUNE 2008 1, *available at* http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete _to_ win.pdf/$File/Compete_to_Win.pdf.

203. *Id.* at 60–61.

officials' letter does not mention RPM.[204] In fact, out of hundreds of comment letters submitted to the Panel, only one from a Canadian law firm provided RPM comments.[205]

B. Australia

Under the competition laws down under, RPM is a *per se* offense.[206] The Australian Trade Practices Act of 1974 (TPA) condemns vertical price fixing without respect to its effect on competition, providing very clearly that "a corporation or other person shall not engage in the practice of resale price maintenance."[207] As a result of the Hilmer Report in 1993,[208] the RPM provisions of the TPA were amended by the Competition Policy Reform Act of 1995 (CPRA) to include services and to authorize the Australian Competition and Consumer Commission (ACCC) to grant authorization to engage in conduct constituting RPM when it concludes that the proposed conduct would result in a public benefit justifying its exemption from the statutory prohibition.[209] The CPRA amendments to the TPA also effectively provided limited exceptions to the *per se* prohibition of RPM in cases of (1) recommended resale prices that make it clear the action is a recommendation only and (2) withholding of supplies to a below-cost reseller (i.e., one practicing "loss-leadering").[210]

204. *See, e.g.*, Harbour letter, *supra* note 158 (addressing questions regarding the *Leegin* decision, but with no reference to RPM).

205. *See* CASSELS, BROCK & BLACKWELL LLP, SUBMISSION TO THE COMPETITION POLICY REVIEW PANEL (Jan. 11, 2008), *available at* http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Cassels_Brock_Blackwell.pdf/$FILE/Cassels_Brock_Blackwell.pdf (explaining that the *Leegin* decision put the Canadian approach to RPM at odds with that of the U.S.).

206. OECD Policy Roundtable, *supra* note 22, at 19.

207. *See id.* at 28.

208. INDEP. COMM. OF INQUIRY, NATIONAL COMPETITION POLICY REVIEW (1993), *see generally* Brebner, *supra* note 19; John Freebairn, *Competition Policy: Some Neglected Issues in the Hilmer Report*, 28 AUSTL. ECON. REV. 27 (1995).

209. *See* Competition Policy Reform Act, 1995, § 16 (Austl.). The list of "public benefits" includes assistance to small business, promoting efficiency and industrial rationalization, and positive effects on employment. Julie Brebner, *Resale Price Maintenance-The Need for Further Reform*, 9 TRADE PRAC. L.J. 19, 21 (2001), *available at* http://julieclarke.info/publications/2001rpm.pdf.

210. OECD Policy Roundtable, *supra* note 22, at 30–31.

The ACCC has been very aggressive in prosecuting parties charged with RSM. In 2007, a $3.4 million penalty was ordered by the Federal Court of Australia in Brisbane against Jurlique International, a manufacturer and seller of premium skincare, cosmetic, and herbal products.[211] That same year, a $1.25 million in penalties was imposed against Navman Pty LTD, a supplier of marine, personal and in-car navigational equipment with dealerships across Australia.[212] In 2008, a $168,000 penalty was ordered against Hobie Cat Australasia Pty Ltd, a manufacturer and importer of kayaks and sailboats.[213]

As for books, a major book supplier with some other smaller companies had filed an application for exemption from the Restrictive Trade Practices from the then-Australian Competition Tribunal for an RPM agreement.[214] The application was denied.[215] However, as a report has noted, there is "a remaining serious problem with Australian book prices."[216] The problem stems from "parallel import restrictions."[217]

C. United Kingdom

In the UK, the principal competition laws are the Competition Act of 1998 and the Enterprise Act of 2002.[218] The

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211. Press Release, Austl. Competition & Consumer Comm'n, Highest Ever Penalty For Resale Price Maintenance Against Skincare, Cosmetics Company Jurlique: $3.4 Million (Feb. 8, 2007), *available at* http://www.accc.gov.au/content/index.phtml/itemId/780091.

212. Press Release, Austl. Competition & Consumer Comm'n, Navman Penalised $1.25 Million for Resale Price Maintenance (Dec. 21, 2007), *available at* http://www.accc.gov.au/content/index.phtml/itemId/806701/fromItemId/776481.

213. Press Release, Austl. Competition & Consumer Comm'n, Hobie Cat Australasia Pty Ltd Penalised $168,000 for Resale Price Maintenance (Mar. 28, 2008), *available at* http://www.accc.gov.au/content/index.phtml/itemId/814387/fromItemId/810627. Hobie Cat admitted to having included in its dealership agreements terms prohibiting dealers from selling or advertising its products at prices less than those of recommended retail prices or less than 90 percent of those prices. *Id*.

214. OECD Policy Roundtable, *supra* note 22, at 23.

215. *Id.* The rejection came despite the grant of an exemption from RPM prohibitions in the UK shortly before the Australian application. *Id.*

216. *Id.*

217. *See id.* at 23–24.

218. *See* Peter Freeman, Deputy Chairman, Competition Comm'n, Lecture at the Law Society European Group's Lord Fletcher Lecture: UK Competition Law after

latter created the Office of Fair Trading (OFT) and accomplished a reform of the UK merger regime.[219] The former is the general UK competition law, which replaced several competition laws in the UK.[220] Chapter 1 of the Competition Act clearly states that agreements or practices are prohibited that "directly or indirectly fix purchase or selling prices or any other trading conditions."[221]

A fairly recent example of OFT aggressiveness and success in its enforcement of Competition Act violations involved Hasbro toys. In February 2007, the Appeal Committee of the House of Lords refused three companies' requests for appeals of earlier Court of Appeals judgments that upheld the OFT prosecutions and fines.[222] The Hasbro case involved an agreement fixing resale prices of Hasbro toys between Hasbro, a manufacturer, and Littlewoods and Argos, two of the largest catalogue retail stores in the UK at the time.[223] Hasbro has also entered into price-fixing agreements with ten distributors.[224] Hasbro was fined almost five million pounds for the latter agreements in November 2002, but had its potential fine of over fifteen million pounds reduced to zero for providing evidence against those two

Modernization 10 (Mar. 15, 2005), *available at* http://www.competition-commission.org.uk/our_role/speeches/pdf/freeman_lord_fletcher_lecture_150305.pdf.

219. Press Release, Office of Fair Trading, New Competition and Consumer Law Responsibilities for OFT: OFT Launches Guide to Enterprise Act (Nov. 8, 2002), *available at* http://www.oft.gov.uk/news/press/2002/pn_74-02; Department for Business Enterprise & Regulatory Reform, Enterprise Act, http://www.berr.gov.uk/whatwedo/businesslaw/enterprise-act/index.html (last visited Apr. 2, 2009).

220. *See* Competition Act, 1998, c. 41, pt. 1, ch. 1 (Eng.) (replacing the Restrictive Practices Court Act, the Restrictive Trade Practices Act, the Resale Prices Act, and the Restrictive Trade Practices Act).

221. *Id.* § 2.

222. Press Release, Office of Fair Trading, House of Lords Rejects Appeal in Price Fixing of Toys and Games and Replica Football Kit Cases (Feb. 7, 2007), *available at* http://www.oft.gov.uk/news/press/2007/17-07.

223. Decision of the Office of Fair Trading, No. CA98/8/2003, Agreements Between Hasbro U.K. Ltd, Argos Ltd and LittlewoodsLtd Fixing the Price of Hasbro Toys and Games, Case CP/0480-01 (Nov. 21, 2003), *available at* http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/hasbro3.pdf [hereinafter Hasbro].

224. *Id.* at 2.

retailers.[225] For their agreements Littlewoods and Argos were fined a total of almost twenty-three million pounds.[226]

A bit of a controversy over RPM practices in the distribution of books continues currently, with the OFT in the UK having published a report evaluating productivity impacts if the prohibition of RPM on books was ended.[227] The EC had prohibited an agreement between Dutch and Flemish book trade associations imposing RPM on book sales in those two countries, an action that had been upheld by the Court of Justice in 1984.[228] In an action overturned by the Court of Justice on somewhat technical grounds in 1992, the famous UK Net Book Agreement that had been in effect among book publishers for sales in the UK and Ireland since as early as 1900 was "abandoned in autumn 1995 after several large publishers withdrew and stopped setting net prices for their titles."[229]

D. France

French national law on competition was originally adopted in 1986 and is contained in Book IV of its Commercial Code as codified in 2000.[230]

Minimum RPM is treated as a *per se* violation of French competition law as a prohibited unfair trade practice and also as an abuse of dominant position.[231] In its prosecution of the

225. *See id.* at 27.

226. Hasbro, *supra* note 223, at 13.

227. Office of Fair Trading, *supra* note 20, at 3.

228. OECD Policy Roundtable, *supra* note 22, at 109.

229. Marianne MacDonald, *Collapse of Net Book Agreement 'Within Months' Collapse,'* THE INDEPENDENT (UK), Dec. 26, 1994, http://www.independent.co.uk/news/uk/collapse-of-net-book-agreement-within-months-collapse-1388530.html (stating that Net Book Agreement dated from 1898); OECD Policy Roundtable, *supra* note 22, at 109 (explaining how that agreement, which bound UK and Irish booksellers, was abandoned in 1995).

230. CODE DE COMMERCE [C. COM.] bk. IV (Fr.); OECD, *France—The Role of Competition Policy in Regulatory Reform*, at 5, OECD Doc. DAFFE/COMP(2003)7 (2003), *available at* http://www.oecd.org/dataoecd/52/60/31415943.pdf (describing the development and history of France's competition policy).

231. CODE DE COMMERCE [C. COM.] art. L. 420-1 (Fr.). In the Interflora case, the imposition of uniform prices on members through the use of catalogues by the French division of the world's largest floral delivery network was considered unlawful. OECD, FRANCE: COMPETITION LAW AND POLICY IN 2000 10 (2001), *available at*

French version of the UK Hasbro case, the French Competition Council fined five manufacturers (including Hasbro and Lego), together with three distributors (including Carrefour France) a total of thirty-seven million euros in December 2007 for vertical price fixing arrangements.[232]

In a case involving the franchise system of one of France's largest contact lens distributors, the French Competition Council determined that the "opaqueness" of a rebate program made it so difficult for franchisees to take the rebates into account in setting their resale prices as to amount to a minimum RPM arrangement prohibited by French law.[233]

E. Spain

Spain has, as have several other EU Member States incorporated by Royal Decree the EU block exemption on vertical restraints as part of its competition law.[234] In 2000, the Spanish Court for the Defense of Competition condemned two national petroleum companies for imposing restrictive agreements, including RPM, on their petrol station retailers.[235] The Spanish law contains exemptions for medicines and books.[236]

F. Japan

RPM is treated as an unfair and restrictive trade practice prohibited under section 19 of Japan's Antimonopoly Act, and it should be noted that vertical restraints are not treated as

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http://www.oecd.org/dataoecd/52/58/39554000.pdf. In addition, exclusivity clauses imposed on florists were considered as an abuse of a dominant position, given Interflora's position in the flower market. *Id.*

232. Sudip Kar-Gupta, *France Fines Toy Firms Total of 37 Million Euros*, REUTERS, Dec. 20, 2007,http://www.reuters.com/article/companyews/ idUSL2061849020071220.

233. Conseil de la Concurrence decision no. 00-D-10, Apr. 11, 2000.

234. R.D. 378/2003 (B.O.E. 2003, 90).

235. OECD, *Annual Report on Competition Policy Developments in Spain*, at 7, OECD Doc. DAFFE/COMP(2002)27/06 (Oct. 15, 2002), *available at* http://www.meh.es/Documentacion/Publico/SEEconomia/Defensa%20de%20la%20Competencia/Memorias/Annual%20Report%20Competition%202001.pdf.

236. Marjorie Holmes & Clara Cerdan, *Resale Price Maintenance: Is Price Control Ever justified?*, Competition L. Insight, MAR. 8, 2005, at 10, 14.

collusive activities under section 3 of that act.[237] Section 23 of the Antimonopoly Act provides exemptions from the RPM prohibition for "a commodity, the uniform quality of which is easily identifiable and which is designated by the Fair Trade Commission."[238] The designation of a commodity for exemption must be done by notification and is limited to goods (1) for daily consumer use and (2) as to which free competition exists.[239] Publishers are specifically exempt, thereby creating an RPM system for books.[240]

It appears that the Japan Fair Trade Commission (JFTC) will allow recommended resale prices when "necessary to maintain the uniformity of the network and to facilitate the choice of consumers."[241] Nonetheless, the JFTC has a history of having issued cease and desist orders against the vertical fixing of prices.[242] However, it should also be noted that the JFTC issued a 1983 Decree on the Application of Antimonopoly Laws to Franchise Systems that indicated the franchisee must be able to adopt its own "pricing policy to take account of the particularities of the market."[243] According to guidelines issued in 1991, "where any artificial measures have been taken to cause distributors to sell at a supplier's indicated price, such conduct will be deemed as resale price maintenance and therefore illegal."[244]

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237. *See generally* John O. Haley, *Marketing and Antitrust in Japan*, 2 HASTINGS INT'L & COMP. L. REV. 51, 52–53, 62 (1979).

238. Iwakazu Takahashi, *Anti-Monopoly Act Exemptions in Japan*, The Specific Workshop between the Drafting Committee on Competition Law of Vietnam and the Japan Fair Trade Commission 3–4, Aug. 8, 2003, *available at* http://www.jftc.go.jp/eacpf/05/hanoiTaka.pdf.

239. *Id.* at 4.

240. *See id.* at 5 (discussing the Japanese Antimonopoly Act and its exemptions).

241. OECD, COMPETITION POLICY AND VERTICAL RESTRAINTS: FRANCHISING AGREEMENTS 101 (1994), *available at* http://www.oecd.org/dataoecd/34/53/1920326.pdf.

242. *Id.*

243. *Id.*

244. *Id.*

G. China

Following the route suggested by Chairman Kovacic,[245] the Anti-Monopoly Law (AML) that became effective in China in 2007 seems to have followed the lead of the EU in its treatment of RPM. The AML includes minimum RPM and vertical fixing of a retail price among prohibited activities.[246] It does not prohibit other vertical restraints except for tying, price discrimination, and other restrictive trade practices that constitute an abuse of a dominant position.[247] Interestingly, Hong Kong is considering a "cross-section" competition law of its own, which is reported to take a somewhat different approach on RPM from that taken by the AML.[248] It would treat vertical arrangements other than those imposed by a supplier with substantial market power as "simply a way of influencing the way in which its product is distributed and marketed."[249]

An interesting situation occurred in 2006 when the Chinese General Administration of Press and Publication (GAPP), an administrative agency responsible for drafting and enforcing China's prior restraint regulations and screening books discussing "important topics."[250] GAPP was reported in a blog to have issued a memorandum in the fall of 2006 ordering the

245. Kovacic, *supra* note 2.

246. Jun Wei & Janet McDavid, *China's Anti-Monopoly Law*, Nat'l L.J., Oct. 15, 2007.

247. *See id.*

248. China Law Insight, Hong Kong's Proposed Competition Ordinance: Unsettled Issues of Design, http://www.chinalawinsight.com/2008/11/articles/corporate/antitrust-competition/hong-kongs-proposed-competition-ordinance-unsettled-issues-of-design/ (last visited Apr. 2, 2009).

249. *Id.*

250. U.S. Congressional-Executive Commission on China, Agencies Responsible for Censorship in China, http://www.cecc.gov/pages/virtualAcad/exp/expcensors.php (last visited Apr. 2, 2009).

Disanji Bookstore to cease offering a thirty percent off promotion on its inventory of books.[251] It was reported that the vice-director of the circulation department at GAPP stated that price wars were detrimental to publishing and distribution.[252]

VII. CONCLUSION

Considering FTC Chairman Kovacic's reminder that "what happens in the EU and the US does not stay there,"[253] where are we on, in what Professor Warren Grimes has suggested as "The Path Forward After *Leegin*: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints"?[254] Not very far, it seems.

The economists and legal scholars generally agree with the Supreme Court that there are both procompetitive and anticompetitive effects resulting from minimum RPM. There are some voluble few economists and legal observers who continue to argue strongly for a return to *per se* treatment of minimum RPM by their support in varying degrees of the Discount Pricing Consumer Protection Act's re-imposition of the *per se* rule for minimum RPM through legislation.[255] At the other end of the spectrum are economists and legal observers who agree with Professors Elzinga and Mills of the University of Virginia that "it should be presumed that RPM is precompetitive."[256]

251. Arts Council England, *Red—the new black*, 1, 36 (2007), www.artscouncil.org.uk/documents/publications/Redthenewblackexecutivesummary_phpAgt48s.doc (last visited Apr. 2, 2009).

252. *Id.*

253. Kovacic, *supra* note 2.

254. Warren S. Grimes, *The Path Forward After* Leegin*: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 Antitrust L.J. 467, 467 (2008) (discussing the *Leegin* decision and its future applications to the vertical restraints analysis).

255. Press Release, U.S. Senator Herb Kohl, Kohl Introduces "Discount Pricing Consumer Protection Act" (Oct. 30, 2007), *available at* http://kohl.senate.gov/~kohl/press/07/09/2007A30814.html (noting that Commissioner Harbour and Professor Pitofsky have "strongly endorsed restoring the ban on vertical price fixing").

256. Kenneth G. Elzinga & David E. Mills, *The Economics of Resale Price Maintenance*, *in* ISSUES IN COMPETITION LAW AND POLICY 1841, 1856 (A.B.A. 2008).

Lying between the extremes are those who grudgingly accept the *Leegin* decision by suggesting a narrowly structured rule of reason.[257]

When the divergence of academic and scholarly views are combined with the vituperative reaction to *Leegin* by the state attorneys general, reaching consensus on RPM will be quite difficult, a situation significantly compounded by the change in the U.S. administration. While the outgoing Justice Department officials and the currently constituted FTC filed a brief urging elimination of the *per se* treatment of minimum RPM, the incoming administration has signaled a reversal in that position through testimony of the new U.S. Attorney General Eric Holder. In answer to Senate Kohl's question as to whether he agreed on the principle that manufacturer setting retail prices should be banned at his confirmation hearings on January 16, 2008, General Holder replied "the [*Leegin*] decision disturbs me. I'm not all certain that . . . the decision . . . is necessarily a good one, and, so, I would want to work with you to try to figure out ways in which we can bring the competitiveness back . . . that . . . that decision has removed from the system."[258]

With the politically, rather than judiciously, motivated position of the state attorneys general and, apparently, the incoming administration's attorney general, together with a

257. *See* Edward D. Cavanaugh, *Vertical Price Restraints After* Leegin, 21 Loy. Consumer L. Rev. 1, 2 (2008) (viewing RPM as "presumptively unlawful" and subject to demanding standards of proof of economic benefits and the outweighing of anticompetitive effects by those that are procompetitive); Grimes, *supra* note 254, at 492 (presuming that "distribution-narrowing restraints (such as exclusive territories or exclusive territories) are presumptively lawful" and that "open distribution restraints (such as vertical minimum price fixing or supplier-imposed limits on dealer discount advertising) are unlawful"). Yet another commentator, Professor Marina Lao, has suggested the use of "the quick-look rule of reason that is often used in horizontal restraint cases." Marina L. Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, *in* How the Chicago School Overshot the Mark: The Effect of Conservative Analysis on U.S. Antitrust 196, 197 (ROBERT PITOFSKY ED., 2008).

258. *Executive Nomination: Hearing to Consider the Nomination of Eric Holder to be Attorney General Before the S. Judiciary Comm.*, 111th Cong. (Jan. 18, 2009) (statement of Eric Holder, nominee for Attorney General).

relatively modest number of scholars (and none of the economists), the chances for a reasonable consensus on the aftermath of the *Leegin* decision would seem unattainable.

Hence, we have a disappointing confluence of events. The Canadian government is at the beginning of a period of reconsideration of its competition legislation, including its laws on RPM with the recommendations of its Competition Policy Review Panel.[259] The EC is reviewing its Block Exemption Regulation on Vertical Restraints and its accompanying guidelines in preparation for the expiration of its current BER and Guidelines in 2010.[260] With the U.S. legal establishment (and, to a lesser degree, its economists) in such political turmoil over the approach to RPM after *Leegin*, an opportunity to participate in joint efforts to reach a harmonized approach to RPM seems unlikely except for the threatening possibility of falling under a regressive mindset that seeks to return to the former *per se* treatment of RPM. As it is, the current skepticism of the EC and a number of national competition law authorities as to a rule of reason approach to minimum RPM is clear.[261]

Even with a U.S. Justice Department and FTC motivated to seek harmonization with the EC and Canada (and other national competition laws) other than regressively, the effort would be great. As FTC Chairman Kovacic has pointed out, there are substantial "centrifugal forces" at work between the U.S. and EU competition regimes.[262] Even the resistant EC

259. *See supra* Part V.

260. *See* AUSTRIAN FED. COMPETITION AUTHORITY CONFERENCE, "Resale Price Maintenance—An Issue for the European Agenda?" (2008), *available at* http://www.bwb-conference.at/files/pdf/summary.pdf (discussing recommendations and opinions regarding the Block Exemption, vertical agreements and recent developments in the U.S.).

261. *See supra* Part IV; AUSTRIAN FEDERAL COMPETITION AUTHORITY CONFERENCE, *supra* note 260.

262. *See* Kovacic, *supra* note 2 (describing the convergence of the EU and U.S. competition policies). Kovacic highlighted several of these forces, not the least of which was the administrative versus the adversarial models of policymaking that the EU and the U.S. employ, respectively. *Id.* One commentator has suggested that convergence on the basis of the EU model could be achieved by the FTC's use of Section 5 of the FTC Act to "work in conjunction with the EU to agree on a rebuttable presumption and burden shifting approach very similar, if not identical with, the current EU guidelines to arrive at a structured rule of reason approach which meets the Supreme Court's requirements."

authorities are more likely to consider retaining their current "hard core" treatment rather than joining in the reflexive return to the draconian *per se* approach and reflective and empirical experiment that most economists and legal scholars (along with, I hasten to say, practicing lawyers) would support.

The rule of reason should be applied at a minimum without any of the Fair Trade Law era baggage that some would attach to it. The U.S. courts will now have an opportunity to test all the economic theorizing about the pro and anti competitive aspects of RPM without the restraints of the *per se* treatment. There should be a period during which a "natural experiment" comparing distribution chains with and without the restraint[263] can be observed, unburdened by either *per se* treatment or *per se* legality, as was the case during the 1937–75 period of the Fair Trade Laws.[264] Using a study presented to a Congressional committee considering the repeal of the Federal Fair Trade Laws in 1975, which compared the prices in states with and without fair trade laws, is not, as an assistant New York attorney general has described, an "amazing natural experiment,"[265] because it ignores the empirical definition of such an experiment since it compares a *per se* legal situation with a *per se* illegal situation, hardly a valid empirical comparison.

While a true "natural experiment" is being observed, if *Leegin* survives sufficiently long and the experiment is not interrupted by state attorneys general, I suggest the following approach, similar to that taken by the FTC in the Nine West situation. The first step should be application in succession of a determination of the relevant product and geographic markets, and then of the market power of each party using a minimum RPM tactic. It seems to me that, provided that there is a

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FOER, *supra* note 156, at 11.

263. Luke M. Froeb, Director, Fed. Trade Comm'n Bureau of Econ., Address at the American Bar Association Fall 2004 Forum: Vertical Restraints: What About the Evidence? (Nov. 18, 2004).

264. *See supra* text accompanying notes 32–46.

265. Robert L. Hubbard, Director of Litig., New York State Dep't of Law Antitrust Bureau, Presentation to Student Interns Working at the Antirust Bureau: Vertical Restraints (June 11, 2008).

sufficient supply of products that are available with a sufficient cross-elasticity with the product involved that is subject to minimum RPM, a manufacturer making use of a minimum RPM should be of little concern unless there is some evidence of such other antitrust misconduct as a manufacturer's or retailer's cartel. The presence of the latter should be fairly readily discernible and is readily subject to prosecution as a horizontal violation.

The best solution, I suggest, is to make haste slowly. The FTC workshop on RPM begun in February 2009[266] will hopefully produce and provoke additional scholarship and empirical research. When joined by further research and analysis of RPM for the Canadian and EC reviews of their competition law approach to RPM, we may finally have a body of learning from which rational conclusions on vertical pricing restraints can be developed.

The title of a presentation made at an ABA Spring Meeting five years ago was entitled "International Product Distribution: It's a Small World After All."[267] The competition law situation surrounding RPM is hardly flat, and despite Tom Friedman's book title,[268] at least insofar as RPM is concerned, the world is most assuredly not flat.

266. Press Release, Federal Trade Comm'n, FTC Announces Agendas for First Two Resale Price Maintenance Workshops (Jan. 21, 2009), *available at* http://www.ftc.gov/opa/2009/01/rpm.shtm. As of the writing of this Article, the only public comment submitted to the FTC Workshop on RPM was from a former assistant attorney general of Connecticut. Submission of Robert M. Langer, Former Assistant Attorney Gen., Office of the Conn. Attorney Gen., to the Fed. Trade Comm'n, (Dec. 10, 2008), *available at* http://www.ftc.gov/os/comments/resalepricemaintenance/00001.pdf.In his submission, Robert Langer strongly argued that the conflict between the federal antitrust laws and both state legislation and state attorneys generals' stated enforcement intentions "represents a very real obstacle to the accomplishment of the precompetitive benefits to minimum resale price maintenance recognized by *Leegin*." *Id.* He went on to propose that the state laws and enforcement position "should be precluded from stifling the progress of the Sherman Act wither through the doctrine of preemption, dormant Commerce Clause principles, or both." *Id.*

267. Margaret M. Zwisler, Partner, Latham & Watkins LLP, Presentation to the ABA Section of Antitrust Law Program 52nd Annual Spring Meeting: International Product Distribution: It's a Small World After All (Mar. 31, 2004).

268. Thomas L. Friedman, The World Is Flat: A Brief History of the Twenty-First Century (2005).

AFTERWORD

Subsequent to the preparation of this article for publication, two developments occurred that must of necessity be reflected in this Afterword.

The first was the enactment by the Canadian Parliament of Bill C-10, an Act to implement certain provisions of the budget tabled in Parliament, known as the Budget Implementation Act, 2009 (the "Budget Bill").[269] The Bill included many non-budget-related provisions, not the least of which were "the most significant amendments to the . . . [Competition Act] since it was implemented in 1986."[270] The second was collectively the appointments of FTC Commissioner Jon Leibowitz as Chairman of that agency and of Christine A. Varney as Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice.

Prior to the amendments to the Canadian Competition Act, Canadian law prohibited minimum RPM as a *per se* criminal offense.[271] In what can only be described as a "fast-track process," the Competition Act was amended with little or no discussion to, among other major revisions, result in a "new civil price maintenance law [that] essentially conforms the Canadian treatment of resale price maintenance with the 'rule of reason' approach taken by the U.S. Supreme Court in *Leegin*."[272] Section 61 of the Competition Act[273] was repealed by the Budget Bill.[274] Minimum RPM may be prohibited by the Competition Tribunal if "the conduct is having or is likely to have an adverse effect on competition in a market."[275] It has been observed that "[t]he meaning of the term 'adverse' is not entirely clear;

269. Budget Implementation Act, 2009 S.C., (Can.).

270. Mark Nicholson, Chris Hersh, & Yana Ermak, *Government Passes Major Amendments to the* Competition Act and Investment Canada Act—*Some Good, But Mostly Bad*, *available at* http://www.casselsbrock.com/Section/Resources/Articles (last visited May 30, 2009).

271. *See supra* Section V and text accompanying notes 195–205.

272. Osler, Hoskin & Harcourt LLP, S*ignificant Changes to Canada's Competition Law and Foreign Investment Regime*, Mar. 12, 2009, at 8, http://www.osler.com/resources.aspx?id=17110.

273. *See supra* notes 195–98 and accompanying text.

274. Budget Implementation Act, § 417.

275. Canada Competition Act, R.S.C., ch. C-34, s. 1, § 76(1) (2009).

however, based on its treatment in the refusal to deal context, it means something less than a 'substantial' lessening of competition."[276] A consequence of the amendments to Canada's RPM provision is that U.S. manufacturers and suppliers who engage in RPM conduct in the U.S., can apply comparable competition law principles in Canada as in the U.S. under *Leegin*.[277]

A somewhat remarkable consequence of the Canadian amendments is that U.S. businesses now face the application of a *per se* regime to minimum RPM by state attorneys general in the U.S.. Whereas comparable conduct, previously criminal in Canada, has now effectively become subject only to a rule of reason test in Canada.

The second occurrence has been brought on by the change in administrations in the U.S. with the assumption of office of senior antitrust officials. More specifically, Christine A. Varney as Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, and Jon Leibowitz as Chairman of the FTC. Having described the antitrust enforcement policies of the administration under George W. Bush as presenting "the weakest record of antitrust enforcement . . . in the last half century,"[278] the President has appointed two officials whose positions on vigorous antitrust enforcement are well-known. Their positions on minimum RPM are only slightly less well-known and are easily discernible. Assistant AG Varney is reported to have followed the lead of her new supervisor, Attorney General Holder,[279] in her testimony at her confirmation hearings by saying that she "was 'quite surprised' by the *Leegin* decision but thought that the decision 'left the division a lot of room to continue to prosecute retail price maintenance where it results in anticompetitive

276. Osler, *supra* note 272, at 7.

277. *See id.* at 8. "For example, minimum advertised price or 'MAP' programs that are not likely to adversely affect competition are now permissible in Canada," *Id.*

278. Statement of Senator Barack Obama for the American Antitrust Institute, *available at* http://www.antitrustinstitute.org/archive/files/aai-Presidential campaign-Obama 9-07_092720071759.pdf

279. *See supra* note 257 and accompanying text.

consequences.'"[280] In a presentation to an American Bar Association meeting during her tenure as a Commissioner at the FTC, Varney stated that "the FTC is determined to work closely with . . . [the state attorneys general] to maximize our enforcement dollars" in RPM cases.[281] Not least to be noticed is a statement by Varney at the time that she returned to private practice of law from the FTC in 1997. Having typically voted with Chairman Pitofsky while on the FTC (and possibly having Pitofsky as a mentor), Varney said on her departure that "[Pitofsky's] a different person than I am. He's not as overtly aggressive, but he is persuasive."[282] Former Chairman Pitofsky's views in favor of maintaining *per se* treatment of RPM are open and notorious.[283]

While Varney's colleague down Pennsylvania Avenue at the FTC, Chairman Leibowitz, has not been as talkative as Varney on the subject of RPM, his background may be instructive. The new chairman of the FTC served as chief counsel to Senator Herb Kohl from 1989 to 2000. As one who has spent a significant part of his governmental career being mentored by Senator Kohl, the chairman seems unlikely to be unsupportive of Senator Kohl's attempt to reinstate *per se* treatment for minimum RPM in his legislation, the Discount Pricing Consumer Protection Act.[284] In addition, Chairman Leibowitz joined two other commissioners to form the majority in the Negotiated Data Solutions matter before the FTC,[285] apparently supporting expanded use of Section 5 of the FTC Act. He stated in remarks at the FTC's Section 5 Workshop[286] that in light of

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280. Sean Gates & Tej Srimushnam, *Antitrust enforcement: Against the grain,* Apr. 23, 2009, http://www.legalweek.com/Navigation/32/Articles/1197880/Antitrust+ enforcement+ Against+the+grain.html.

281. Christine A. Varney, *Vertical Restraints Enforcement at the FTC*, Remarks at the ALI-ABA Eleventh Annual Advanced Course on "Product Distribution and Marketing," Jan. 16, 1996, http://www.ftc.gov/speeches/varney/varnmg.shtm.

282. Courtney Macavinta, *FTC commissioner returns to law*, CNET NEWS, July 9, 1997, *available at* http://www.cnet.com/FTC-commissioner-returns -to-law/2100-1023_3-201267.html.

283. *See supra* note 106 and text accompanying note 109.

284. *See supra* notes 166–70 and accompanying text.

285. *See supra* notes 136–44 and accompanying text.

286. *See supra* notes 145–50 and accompanying text.

Leegin and other recent Supreme Court decisions "the result, at least in the aggregate, is that some anticompetitive conduct is not being stopped."[287] It seems likely that the FTC chairman, like Varney, believes that there is room for the federal agencies to pursue minimum RPM conduct.[288] This may occur through the interstices remaining in Section 1 of the Sherman Act, or, as in the case of the FTC, through Section 5 of the FTC Act since, as Chairman Liebowitz has said, "simply put, consumers can still suffer plenty of harm for reasons not encompassed by the Sherman Act as it is currently enforced in the federal courts."[289]

With the current federal enforcement officials' views apparent and the views of the state attorneys general readily known, there is a significant danger that antitrust and competition law will be deprived of the "natural experiment" needed to adequately reach supportable conclusions about the legal posture of minimum RPM in today's markets. On the other hand, there remains the possibility that the outcome of *Leegin* will be given an opportunity to develop without draconian reactions such as a legislative return to *per se* treatment.

287. Jon Leibowitz, *"Tales from the Crypt" Episodes '08 and '09: The Return of Section 5*, at 4, Remarks at the Federal Trade Comm Section 5 Workshop, Oct. 17, 2008, http:www.ftc.gov/speeches/leibowitz/081017section5.pdf.

288. *See id.*

289. *Id.*