

Dr. Miles—A Rock of Ages

Matthew Moloshok

In 1911, the Supreme Court decided the case of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*¹ By an 8–1 vote, it ruled that minimum resale price maintenance arrangements between a supplier and its dealers constituted a per se violation of Section 1 of the Sherman Act. Over the intervening 96 years, the Supreme Court showed no interest in revisiting this fundamental doctrine. Until now. In 2006, the Supreme Court, having recently added two new appointees, granted review in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*² The sole argument advanced for review was that *Dr. Miles* no longer conforms to the Supreme Court's more recent antitrust rulings and modern economic theory. The Court's acceptance of the case signals the willingness of at least four justices to consider that argument.

I, for one, hope that the Court will preserve *Dr. Miles*.³ The per se prohibition against minimum resale price maintenance declared by *Dr. Miles* was and remains a proper and settled interpretation of the Sherman Act that should not be abandoned.

Dr. Miles and Its Reasoning

The Supreme Court that decided *Dr. Miles* fully understood the purposes and proposed benefits of resale price maintenance. The Court was presented with essentially the very same arguments that Leegin and its supporters offer today in favor of allowing retail price maintenance. As summarized by the Court, *Dr. Miles*, a manufacturer of proprietary medicines, found druggists “cut prices,” and this caused “much confusion, trouble, and damage” to the complainant's business, and “injuriously affected the reputation” and “depleted the sales” of its remedies; that this injury resulted “from the fact that the majority of retail druggists as a rule cannot, or believe that they cannot realize sufficient profits” by the sale of the medicines “at the cut-prices announced by the cut-rate and department stores,” and therefore are “unwilling to, and do not keep” the medicines “in stock” or “if kept in stock, do not urge or favor sales thereof, but endeavor to foist off some similar remedy or substitute, and from the fact that in the public mind an article advertised or announced at ‘cut’ or ‘reduced’ price from the established price suffers loss of reputation and becomes of inferior value and demand.”⁴

■
Matthew Moloshok is a member in Helling Lindeman Goldstein & Siegal LLP, Newark, New Jersey. He is a member of the editorial board of The Antitrust Source.

¹ 220 U.S. 373 (1911).

² 127 S. Ct. 763 (2006).

³ I do not stand alone in this view. See, e.g., Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1488–89, (1983) (“[M]inimum vertical price agreements lead to higher, and usually uniform, resale prices. . . . [E]conomically-based challenges . . . tend to ignore or downplay the practical considerations that have led courts to protect the ability of distributors to price in response to what they (as opposed to manufacturers) see as market conditions.”); see also Jean Wegman Burns, *Vertical Restraints, Efficiency and the Real World*, 62 FORDHAM L. REV. 597 (1993) (arguing that courts are out of step with public and Congressional expectations in applying economic efficiency theory to the exclusion of all other considerations).

⁴ *Dr. Miles*, 220 U.S. at 375.

The Court fully understood that Dr. Miles wanted the restraints in order to improve its position relative to other manufacturers. Its holding reflected its concern with protecting the dealers which, having bought the Dr. Miles's products for resale, ultimately bore the risk of interbrand rivalry. Nor did the Court blindly take the view that all "restraints" were unlawful. This was, after all, a Court of an era that was strident in its defense of "freedom of contract."⁵ Then as now, the Court sought to limit the Sherman Act's prohibition to "unreasonable" restraints. The Court took its understanding of what was "unreasonable" from the general historical perspective that "restraints upon alienation . . . [are] obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand."⁶ Restraints merely "designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them" did not comport with that policy.⁷

To the argument that the restraints benefited the restraining manufacturer and the public by inducing dealers to put more effort into selling that manufacturer's wares, the Supreme Court responded:

[T]he advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant. . . . [C]omplainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other.⁸

That is, in both motivation and effect, this was the equivalent of a dealer conspiracy. The Court's ultimate conclusion was that "[t]he complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."⁹

The Path of *Dr. Miles* and the RPM Rule over the 20th Century

The Supreme Court decided *Dr. Miles* within the same generation as the Sherman Act's 1890 enactment. Shortly after the decision, Congress considered sweeping additions and changes to federal antitrust law, adopting both the Clayton Act and the Federal Trade Commission Act in 1914. Congress did not make any changes to the rule of *Dr. Miles* then and has never done so

⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

⁶ *Dr. Miles*, 220 U.S. at 404.

⁷ *Id.* at 407.

⁸ *Id.* at 407–08.

⁹ *Id.* at 409.

¹⁰ From 1937–1975, federal legislation authorized individual states, if so advised, to enact "Fair Trade" statutes. This enabled manufacturers to bypass the RPM prohibition. See Miller-Tydings Fair Trade Act, (Title VII at 50 Stat. 693) 75 P.L. 314, amended by 89 Stat. 801, Pub. L. No. 94-145 (Dec. 12, 1975); Amendment in Sec. 2 at 89 Stat. 801; McGuire Bill, 66 Stat. 631, 15 USCS §§ 45. Approximately 21 states adopted such laws. In 1975, however, Congress repealed those laws and effectively banned all "Fair Trade" statutes. Congress was fully aware it was "remitting RPM to the *Dr. Miles* regime." Brief for the United States as Amicus Curiae Supporting Petitioner at 21–22, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, No. 06-480 (U.S. Jan. 22, 2007) (describing House and Senate Reports on the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, amending 15 U.S.C. §§ 1 and 45(a) (1970)).

¹¹ For example, Congress reacted to the Reagan administration's brief, amicus curiae, in *Monsanto* urging reversal of *Dr. Miles* by prohibiting the Department of Justice from using its appropriations for that purpose. (Other than during the current and Reagan administrations, I am unaware of other efforts by the Federal Trade Commission or Department of Justice to upset the per se prohibition of minimum price fixing.)

since.¹⁰ Congress has consistently resisted efforts to cut back the federal per se prohibition of resale price maintenance (RPM) announced in *Dr. Miles*.¹¹

For its part, the Supreme Court repeatedly adhered to *Dr. Miles* over the ensuing decades.¹² When the Supreme Court decided *Sylvania*¹³ and directed application of the rule of reason to nonprice vertical restraints such as territorial exclusivity that arguably have similar price effects as RPM, it expressly affirmed that it was not departing from *Dr. Miles*: “The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy.”¹⁴ After *Sylvania*, the Supreme Court continued to apply the per se rule against RPM consistently and declined invitations to revisit the settled rule of *Dr. Miles*.¹⁵

Enter Leegin

Congress has

consistently resisted

efforts to cut back

the federal per se

prohibition of resale

price maintenance

(RPM) announced in

Dr. Miles.

There is nothing strikingly different or new about Leegin’s situation or its scheme. Leegin had terminated a complaining retailer for discounting its products. At trial, Leegin argued that its “suggested” retail pricing policies helped it compete against larger competitors; that the policies encouraged the boutiques to offer higher levels of service; and that it felt offering the products “on sale” somehow degraded the brand and made customers who paid full price at other times feel “cheated.” Leegin’s expert, economist Kenneth Elzinga, provided a report as to the procompetitive benefits of Leegin’s business model. The trial judge excluded that evidence as “irrelevant” because if Leegin had engaged in vertical price fixing, it was per se unlawful under *Dr. Miles*. The jury returned a verdict in favor of Leegin’s complaining retailer, finding that Leegin had engaged in price fixing with its retailers, and awarding \$1.2 million in damages (then trebled by the trial court). The Fifth Circuit affirmed, noting that *Dr. Miles* controlled.

Leegin then filed its certiorari petition. The petition drew instantaneous support from the National Association of Manufacturers, the American Petroleum Institute, CTIA-The Wireless Association, and a group of 25 distinguished economists, all urging abandonment of the per se rule. The complaining retailer filed the only brief opposing the grant of certiorari. The Supreme Court granted review December 7, 2006.¹⁶

¹² See, e.g., *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 451–52 (1922); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944).

¹³ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

¹⁴ *Id.* at 51 n.18. The Supreme Court noted Congress’s then-recent repeal of the fair trade law exception as “approval of a per se analysis of vertical price restrictions.” *Id.*

¹⁵ See, e.g., *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 n.7 (1984) (declining to revisit *Dr. Miles* where the case had been tried based on a per se instruction and the challenge to *Dr. Miles* was advanced by the United States, amicus curiae, rather than the parties); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

¹⁶ On January 22, 2007, Leegin and its amici filed their merits briefs. The United States joined the case, when the Solicitor General filed a brief joined in by the Department of Justice Antitrust Division and the Federal Trade Commission, supporting petitioner’s request for reversal and the overturning of the per se rule. Briefs for respondent and its amici were not due at the time of writing.

Professors William S. Comanor and Frederic M. Scherer also filed an amicus brief on the merits “in support of neither party.” This is noteworthy because, on the one hand, Professor Scherer had been one of the certiorari-stage economist amici urging reversal of the per se rule, while, on the other, Professor Comanor had authored a leading article supporting the per se rule. In that article, Professor Comanor cited the many “circumstances in which manufacturers’ interests conflict with those of consumers,” noted the difficulty of differentiating vertical restraints which enhance rather than diminish efficiency, and concluded it is “more expeditious to set general policy standards, even though they will sometimes lead to improper results.” William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions and the New Antitrust Policy*, 98 HARV. L. REV. 983, 1001 (1985).

Why Abolish the Per Se Rule for RPM?

For a long-standing principle, the rule in *Dr. Miles* has had many detractors. Many economists lambaste the per se treatment of RPM as bad economic policy, believing that vertical restraints generally can improve interbrand competition, thereby decreasing prices and increasing output.¹⁷ Some law professors offer the same economics-based criticism.¹⁸ In particular, they find fault with *Dr. Miles* because it failed to recognize that in some circumstances manufacturers could independently desire to impose RPM, so that it should not have been equated in all instances with a dealer conspiracy. The publisher of this journal, the ABA Section of Antitrust Law, has recently adopted a resolution requesting that *Dr. Miles* be overruled because RPM “like other vertical resale restraints, can stimulate interbrand competition and is not so inevitably pernicious as to warrant per se illegality.”¹⁹

By prohibiting the practice per se, Dr. Miles established a rule which is relatively easy to understand, cost-effective to enforce, and causes little demonstrable harm to anyone.

Perhaps the tide towards overturning the RPM rule has risen too high to be stopped. But, although RPM may not be invariably anticompetitive and may even be procompetitive in some instances, that ultimately does not provide an adequate basis to set aside *Dr. Miles*. Given the long-standing precedent of *Dr. Miles*, the burden ought to be on those urging reversal of history to show there is some inherent evil in per se condemnation of RPM that justifies abandonment of the rule. They do not satisfy that burden.

Dr. Miles Is a Good Doctrine that We Should Preserve

The rule against RPM has served our economy well. In contrast, as discussed below, the circumstances in which economists posit manufacturers would desire RPM, or that RPM could be procompetitive, seem rather esoteric or can be addressed, and have been addressed for nearly a century, through other, nonprice means, making the benefits of allowing RPM rather trivial. For although RPM may not invariably be anticompetitive, it can be anticompetitive.²⁰ By prohibiting the practice per se, *Dr. Miles* established a rule which is relatively easy to understand, cost-effective to enforce, and causes little demonstrable harm to anyone. The per se rule thus works a positive good. Two maxims come to mind that explain why. The first maxim is that “an ounce of prevention is worth a pound of cure.” Having the per se rule prevents the bad conduct—even if it could cause occasional, trivial, or theoretical impediments to optimal competition. In contrast, abandoning the rule would lead to long-recognized adverse effects on competition without any cost-effective means for correction.

The second is a variant on the maxim that “war is too important to leave to the generals.” Antitrust law, as a set of positive values, can be informed by economists and economics, but in

¹⁷ James C. Cooper, Luke M. Froeb, Dan O’Brien & Michael G. Vita, Vertical Antitrust Policy as a Problem of Inference (Feb. 18, 2005), available at <http://www.ftc.gov/speeches/froeb/050218verticalecon.pdf>.

¹⁸ See, e.g., ROBERT H. BORK, THE ANTITRUST PARADOX 289 (1978); Roger D. Blair, Jill Boylston Herndon & John E. Lopatka, *Resale Price Maintenance and the Private Antitrust Plaintiff*, 83 WASH. U. L. Q. 657, 659–60 (2005) (“The economic effects of RPM, however, are not ‘plainly anticompetitive.’ Indeed, economic theory establishes that RPM can be procompetitive, and empirical evidence indicates that it usually is. What, then, to make of *Dr. Miles*? . . . [T]he Court misapprehended the effect of RPM on consumers, reasoning that consumers must be injured when a practice prevents a retailer from lowering a price.”).

¹⁹ Joseph Angland, ABA Section of Antitrust Law, Report to the ABA House of Delegates—Recommendation (2006), available at <http://www.abanet.org/antitrust/at-comments/2006/reports/ANTITRUST-RPM-REPORT-12-06.pdf>.

²⁰ See, e.g., Peter C. Carstensen, *The Competitive Dynamics of Distribution Restraints: The Efficiency Hypothesis Versus the Rent-Seeking, Strategic Alternatives*, 69 ANTITRUST L.J. 569 (2001) (most vertical restraints serve to organize, facilitate, or implement anticompetitive and rent-seeking conduct rather than performing benign functions). See also *infra* the discussion in text accompanying note 31.

its inception, its operation, and its public acceptance, it includes, and has to include, values other than economics alone. That is to say, we must remain true to the intention of the enactors of the Sherman Act, 100 years of history, and the reasonable reliance and public expectations that those have engendered.

Allowing RPM Will Likely Have Little Positive Benefit

If we want to maintain public confidence in antitrust law, it must not only actually promote consumer welfare, it must meet public expectations of what the antitrust laws are designed to achieve. There is no amount of judicial explanation that will convince a consumer that it should be lawful to terminate a dealer for saving that consumer money by selling them a designer handbag at a discount or otherwise permit consumers to receive the best prices they can obtain. What benefits do the proponents of the abolition of the per se rule offer as a trade-off for giving up that tangible benefit?

There is no amount of judicial explanation that will convince a consumer that it should be lawful to terminate a dealer for saving that consumer money by selling . . . at a discount . . .

RPM does not enhance output. Some economists argue that per se condemnation of RPM is wrong because there can be circumstances in which it would be procompetitive for a manufacturer to impose RPM restrictions on its dealers. It is hard to test those claims in action because vertical price fixing remains per se unlawful. The economic studies praising the benefits of vertical restraints in action mostly extrapolate from experience with nonprice vertical restraints.²¹ But even the theoretical underpinnings for allowing RPM show it offers little meaningful promise for positive benefits. As Lester Telser's pioneering article hypothesized,²² RPM can be used legitimately under limited conditions to induce certain suppliers to increase output to attract so-called "marginal" customers. But the conditions under which the parties will even agree to a price-maintenance scheme only exist where (a) the supplier already enjoys market power (otherwise dealers would not forgo the ability to set their own prices); or (b) the supplier lacks market power and looks to induce dealers to take up its products (in which case the dealer does not need to make a commitment to maintain particular prices unless the dealer's goal is to assure itself that competing dealers will collectively keep up their prices—a spoke and wheels kind of conspiracy among the dealers, run through the supplier).²³ Many, perhaps most, economists seem to share the view that "[t]he assertion that output-expanding resale price maintenance [RPM] enhances consumer welfare . . . should be recognized as a special case *not applicable under plausible conditions*."²⁴

²¹ ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW AND ECONOMICS OF PRODUCT DISTRIBUTION 74 (2006). Cf. Francine Lafontaine & Margaret Slade, Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy (2005), available at <http://www2.warwick.ac.uk/fac/soc/economics/staff/faculty/slade/wp/ecsept2005.pdf> (noting the very small number of empirical studies of effects of various types of vertical restraints, and identifying only two examining RPM; studies are suggestive that "although the law usually discriminates between price and non-price restraints, treating the former more harshly," efficiency is likely enhanced by both price and non-price vertical restraints; and "while we find the evidence compelling, it is clearly not sufficient."). While many economists line up with Lafontaine and Slade on this issue, others conclude that the history of Fair Trade laws and other vertical price restrictions tends to indicate strongly that allowing RPM would cause significant price increases. See *infra* notes 31–33 and accompanying text.

²² Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86 (1960).

²³ Carstensen, *supra* note 20, at 576 n.28 and accompanying text (citing Ward Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825 (1955)).

²⁴ Brief for William S. Comanor and Frederic M. Scherer as Amici Curiae Supporting Neither Party 2, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06-480 (U.S. Jan. 22, 2007) (emphasis added) [hereinafter Comanor-Scherer Amicus Brief].

The disadvantages of RPM are immediate and clear: dealers give up their ability to discount the goods subject to the restraint.

RPM does not lead to better service. Perhaps the most popular argument for RPM is that it will induce dealers to provide additional services that the manufacturer and consumers want and prevent “free riding.” Again, this argument seems to be based on multiple unrealistic assumptions. First, it assumes that consumers want or require a high level of service. That may be true for new or complex products, but many products with which consumers are already familiar, including those most frequently sought to be subjected to vertical price fixing, do not require those high levels of service. T-shirts, CDs, DVDs, and books come to mind, and I would warrant that belts and handbags are no different. Where higher levels of service are desirable, dealers who provide the higher level of service will be rewarded by higher prices they set themselves; they can even in many instances charge separately for the services. Suppliers can reward the higher level of service by providing promotional assistance, discounts for services, and the like. (Paying dealers to provide the desired services also assures that if competitors do “ride” on their services, the service-providing dealer was compensated.) In all events, suppliers do not need to constrain all dealers to cookie-cutter pricing.

The second assumption is that by requiring higher prices, the manufacturer assures a particular level of service will be provided. Not so: a dealer may simply pocket the extra money, without providing the services at all. Or the dealer may be so inefficient that it eats through the additional margin without actually accomplishing the desired service level.²⁵ Since monitoring then becomes required to assure that the desired, higher services are provided,²⁶ it makes more sense to impose nonprice restraints that directly require provision of the services.²⁷

Against these theoretical advantages of RPM, the disadvantages of RPM are immediate and clear: dealers give up their ability to discount the goods subject to the restraint. That penalizes consumers by preventing truly efficient dealers from sharing their efficiency with the consumer through lower prices on those goods.

RPM does not promote interbrand competition. Those in favor of RPM say there is no need to worry that prices will go up on the brand subject to the restraint—interbrand competition will keep prices down in the long run. That argument does not work in practice. If dealers can maintain high margins because they enjoy (individually or collectively) market power, then interbrand competition among suppliers will not discipline those high margins.²⁸ In markets in which there are a small number of suppliers, a “thicket” of RPM arrangements by those suppliers could lead to at least tacit price fixing among the suppliers. Even in the absence of universal adoption of RPM policies by manufacturers, multi-line dealers must raise their prices on the competing brands too, so they

²⁵ *Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980), provides a classic example: a manufacturer required a “profit pass over” if a dealer sold outside its area of responsibility to compensate dealers presumed to be providing the follow-on warranty services; the problem was the arrangement was basically a sham as the charge bore no relation to actual services performed by the recipient distributor. (In consequence, the Second Circuit invalidated the arrangement under the Rule of Reason.) By extrapolation, targeting a particular gross margin neither assures that dealers will provide a particular class or level of services, nor provides the best incentive to do so.

²⁶ See Blair et al., *supra* note 18, at 669 n.226.

²⁷ A plethora of other economic analyses have been offered to try to sustain the legitimacy of RPM, including the “certification” that high-service dealerships (say a celebrity department store) implicitly confer on goods they choose, which then enables off-price dealers to profit from that certification. However, if the cost of the goods is very high to begin with, and require substantial services to induce consumers to buy the goods, they are not a good candidate for cut-rate selling. Conversely, if the mark-up for the services is excessively high because the seller cannot provide the service efficiently, there is no reason to protect those inefficiently high margins.

²⁸ Cf. *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) (powerful retailer organized manufacturers into a boycott of lower priced warehouse stores).

can avoid undercutting their RPM price. To avoid the risk that parties not subject to the RPM restriction will undercut the prices, dealers may be tempted to cartelize or prevent competing dealers from getting product at all.²⁹

RPM does not encourage efficiency at the supplier or retailer level. It is often argued that suppliers that cannot fix prices vertically may be forced to vertically integrate, which would be less efficient and harmful to smaller suppliers. The problem with this line of argument is that *Dr. Miles* has been with us for nearly 100 years and yet there is scant evidence that discounting at the retail or wholesale level has produced any such effect. Where intermediate dealers purchase the product, the “purchaser”—and the consumer’s supplier—is not the ultimate consumer but the dealer. It is the dealer, not the manufacturer, who takes the risk of unsold products. Manufacturers do not accept counterpart restraints on their own pricing discretion.³⁰ Dealers also create not only service output but product output in important ways (such as creating house brands). The dealers are fully justified in requiring pricing and service discretion.

RPM Would Harm—Not Benefit—the Economy

In those circumstances where Fair Trade laws or other pricing restraints have been lawfully imposed, studies indicate “vertical pricing restraints cost consumers over \$1 billion each year and raise prices by as much as fifty percent.”³¹ When it repealed the Fair Trade laws, Congress found that Fair Trade restrictions increased the prices of the affected articles by 18–20 percent, and that business failures were 55 percent higher in the Fair Trade states.³² With repeal of Fair Trade, “retail pharmacy margins fell from an average of 40 percent to approximately 20 percent—a saving to consumers and health care insurers of some \$40 billion at 2003 sales volumes.”³³ These experiences demonstrate that the potential for interbrand competition will not, in fact, discipline the higher prices that RPM would cause.

The triviality of any benefit from RPM is further confirmed by the fact that the vast majority of manufacturers did not make use of Fair Trade laws because they did not find them advantageous.³⁴ There is little reason to believe they would ultimately find RPM schemes advantageous, either. In the meantime, however, consumers will suffer, and dealers who want to discount will suffer, too. Thus, the actual economic consequences of RPM are typically higher prices and less output, while the touted economic benefits of RPM are either trivial or can better be accomplished through nonprice restraints.

²⁹ LAWRENCE A. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 385–87 (1st ed. 1977).

³⁰ In several reported cases over the past ten years, distributors have sued their suppliers with varying success for setting prices of required supplies so high they knew the distributors could no longer operate profitably, asserting the supplier’s actions violated an implied covenant of good faith and fair dealing.

³¹ Burns, *supra* note 3, at 632–35 (gathering studies and reports by Consumer Federation of America, Consumers Union, and AARP reaching these conclusions).

³² S.REP. NO. 94-466 (1975), *excerpts reprinted in* 2 U.S.C.C.A.N. 1569, 1571–72. (citing, *inter alia*, studies by the Department of Justice noted in the 1969 Economic Report of the President).

³³ Comanor-Scherer Amicus Brief, *supra* note 24, at 8.

³⁴ Reportedly fewer than 1 percent of manufacturers elected to designate their products for Fair Trade because (1) they raised prices, hurting sales; and (2) costs of policing and administering the RPM program were too high. John A. Humbach, Comment, *Fair Trade: The Ideal and the Reality*, 27 OHIO ST. L.J. 144, 150–51 (1966).

Other Values Trump the Trivial Economic Benefits of RPM

Even if the case for allowing RPM were stronger, the Court should still preserve the per se rule.

Conforming to legislative intent. The per se rule against resale price maintenance corresponds to the expectations of the sponsors of the Sherman Act. Historians generally concur that Congress did not adopt a particular view of economic theory in passing the Sherman Act, but did intend to protect historic “freedoms” of dealers,³⁵ including their power to price as they chose.

Preserving stability. If any rule in American antitrust law has become ‘settled law’ it is *Dr. Miles’s* per se rule, which has been there almost from the dawn of the statute.³⁶ The fact that Congress has not legislatively affirmed the rule of *Dr. Miles* is easily explained by its impression that the Supreme Court had settled the issue and was not going to change it.³⁷ Individual members of Congress have already expressed concern about the Supreme Court’s acceptance of certiorari in *Leegin*.³⁸ This may be a situation where, as “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”³⁹

A regime where RPM is tested under the rule of reason . . . is going to lead to one of several outcomes, all bad.

Ease of administration. *Dr. Miles’s* rule against minimum RPM provided something sorely lacking in many other branches of antitrust law—a predictable, easily administered, cost-effective, positive rule. That has benefits to all concerned. If we end up in a regime where RPM is tested under the rule of reason, it is going to lead to one of several outcomes, all bad. Dealers and consumers will be unable to challenge the restraint because they cannot afford to pay the prohibitive costs of hiring experts to conduct studies and assemble the necessary (and murky) economic data. Or, to handle the costs, the issues will be presented on behalf of classes of dealers and consumers, with consequent disproportionate fees to lawyers and burdens on the defendants. Or, perhaps, rather than allow themselves and litigants to be dragged into those morasses, judges will simply throw out all cases without analyzing the competitive consequences of the restraint at

³⁵ See Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQUIRY 2, 263 (1992) (legislators sought multiple social ends rather than imposition of economic efficiency only); see also HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 225–32, 570–72 (1954). (Thorelli asserts, however, that RPM had not been condemned at common law prior to 1890. *Id.* at 49.)

³⁶ Justice William Brennan noted more than 20 years ago: “That decision has stood for 73 years, and Congress has certainly been aware of its existence throughout that time. Yet Congress has never enacted legislation to overrule the interpretation of the Sherman Act adopted in that case. Under these circumstances, I see no reason for us to depart from our longstanding interpretation of the Act.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 769 (1984).

³⁷ Various bills have passed one house or another of Congress directed at overturning prior rulings like *Monsanto* and *Business Electronics v. Sharp*, which were perceived as weakening the availability of enforcement of the per se rule, albeit the Senate and House of Representatives were unable to reach consensus on a final law. See, e.g., Freedom from Vertical Price Fixing Act, passed by the House in 1987, H.R. 585, 100th Cong., 1st Sess., 133 CONG. REC. H9796 (daily ed. Nov. 9, 1987); a somewhat different bill styled “Retail Competition Improvement Act of 1987” was approved by the Senate Judiciary Committee earlier that year, S. 430, 100th Cong., 1st Sess., 133 CONG. REC. S1484 (daily ed. Feb. 2, 1987). The House and Senate approved competing versions of a Consumer Protection Against Price Fixing Act of 1991, but the Act was tabled on failure of the House to agree to the Conference Report. See CONFERENCE REPORT H.R. REP. NO. 102-605, ON S. 429, H.R. 1470; CONG. REC. (June 30, 1992 H.5657) (reporting House Roll No. 251). The tipping point may well be revocation of the per se rule.

³⁸ In a letter to the FTC and DOJ, Rep. John Conyers, Jr. (D-MI), Chair of the House Judiciary Committee, asked the agencies, among other things, “Given Congress’ active involvement in the RPM issue—on the last two occasions (in 1975 and in 1983) in unequivocal support of the *Dr. Miles* line of cases—would you agree that the Supreme Court should defer to Congress on this issue?” Letter from Rep. John Conyers, Jr. to the DOJ and FTC (Jan. 10, 2007), available at <http://judiciary.house.gov/media/pdfs/110-leegin.pdf>. (The United States’s brief seems to answer that question.) In the same letter, reportedly, Congressman Conyers referenced a briefing paper prepared by Professor Warren Grimes, which concluded that RPM “threatens the broad cross-section of multi-brand retailers,” and among all vertical restraints “is the most threatening to innovative and efficient retailing and to the consumer interest in shopping for the lowest price.”

³⁹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

all. This is not an idle fear: some commentators believe that courts abused the shift to a “rule of reason” with respect to nonprice vertical restraints by dismissing such cases without appropriate evaluation of competitive impacts.⁴⁰ We thus create an environment in which there would no longer be an effective “cure” for the anticompetitive impacts that we no longer provide the best tool to prevent. That would be bad for businesses generally and bad for consumers in particular.

Keeping the public engaged. Antitrust law will only retain the public’s trust if it delivers results that not only benefit the public but also meet the public’s expectations. If courts, after nearly 100 years, turn around and tell consumers they are better off being denied the opportunity to buy goods from discount merchants, they may understandably mistrust antitrust doctrine generally and perhaps the courts charged with protecting the public interest.⁴¹

We also need to ensure that the antitrust laws are meaningfully enforceable for dealers and consumers. If the process becomes so expensive and intractable that antitrust law is accessible and enforceable only by the government or class action attorneys it will also lose public connection and support. *Dr. Miles* achieves those necessary connections. To most people, the prevention of price fixing, whether by cartels or by RPM, is the essence of antitrust law.⁴² We alienate the public and deny their long-standing and reasonable expectations at our peril.

If the arguments for the reversal of the per se rule were that compelling, one would assume that consumer groups would push it, and Congress would latch onto it. The proponents have every opportunity to make that case to Congress and the public: *Leegin* comes to the High Court just as the congressionally established Antitrust Modernization Commission studies what changes to antitrust policies, if any, to recommend to Congress. If there is to be a change to the RPM rule, then, it should come through that legislative process.

Conclusion

There is no compelling reason to change *Dr. Miles*’s long-settled rule. The per se prohibition against minimum resale price maintenance has a long pedigree for a good reason—it is a respectable policy choice that Congress and the public have relied on for nearly a century and it is preferable to the alternatives. If a change is to be considered at this point, it should come from the legislative branch. The Supreme Court gave us a good doctrine in 1911. Please leave well enough alone. ●

⁴⁰ Douglas H. Ginsburg, *The Effect of GTE Sylvania on Antitrust Jurisprudence: Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67 (1991). Of course, if courts will not actually analyze the real effects of vertical restraints, it is useless to try to articulate how RPM should be evaluated. Nor would it be easy to draw up an appropriate and workable alternative to the per se rule.

⁴¹ Perhaps it will raise eyebrows that within a year after the appointment of two new Justices (who both testified in their confirmation hearings of their fidelity to the principle of stare decisis), and within a month of a change in the political control of Congress, the Supreme Court elected to revisit this venerable case.

⁴² See generally Burns, *supra* note 3.