Leegin Creative Leather Products: What Does the New Rule of Reason Standard Mean for Resale Price Maintenance Claims?

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In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[1] a divided Supreme Court overruled the nearly century-old rule set forth in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[2] that made vertical agreements to fix minimum prices per se illegal under Section 1 of the Sherman Act.[3] Under the new rule announced in *Leegin*, resale price maintenance (RPM) now will be analyzed under the rule of reason.

Writing for the majority, Justice Kennedy focused on whether RPM meets the test the Court applies generally to per se prohibitions. Per se treatment is reserved for restraints that "'always or almost always tend to restrict competition and decrease output.'"[4] After concluding that the rationales on which *Dr. Miles* itself was based (principally, the rule against restraints upon alienation) do not continue to support the per se rule, the Court considered whether the economic effects of vertical agreements to fix minimum prices nonetheless make a per se rule appropriate.

The Court observed that the economic literature is replete with procompetitive justifications for RPM, including principally that: (1) by eliminating free riding, it can help ensure that retail services and promotions that enhance interbrand competition will not be underprovided; and (2) it may facilitate market entry for new companies and brands. As the Court noted, similar justifications were offered in support of rule of reason analysis for nonprice vertical restraints[5] and, in fact, nonprice restraints can be used to achieve similar objectives, while being less efficient and more costly to consumers than RPM.[6] The Court also rejected the argument that RPM is inherently suspect because it frequently leads to higher prices.[7] This critique of RPM "overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins,"[8] and that many other concerted actions—such as contracts for superior inputs, for example—may lead to higher prices while enhancing consumer welfare.[9]

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[1] 127 S. Ct. 2705 (2007).

[2] 220 U.S. 373 (1911).

[3] For further discussion of *Dr. Miles* and the Supreme Court's treatment of vertical restraints, see, for example, Donald M. Barnes & David T. Fischer, Dr. Miles*: Will the Supreme Court Find a Cure?*, Antitrust Source, Feb. 2007, http://www.abanet.org/antitrust/at-source/07/02/Feb07-Fischer2=23f.pdf, at 1–3.

[4] *Leegin*, 127 S. Ct. at 2713 (quoting Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988) (internal quotations omitted)).

[5] *Id.* at 2715–16. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–57 (1977).

[6] *Leegin*, 127 S. Ct. at 2722–23.

[7] *Id.* at 2718 ("Respondent is mistaken in relying on price effects absent a further showing of anticompetitive conduct.").

[8] *Id.*

[9] *Id.* at 2719.

At the same time, the Court was careful not to overlook the potential harmful effects of RPM. It noted, in particular, that RPM can be used to facilitate cartels either at the manufacturer or retailer level.[10] Nonetheless, in the majority's view, RPM simply does not meet the *Business Electronics*[11] test for per se rules. While recognizing that empirical evidence regarding the competitive effects of RPM is limited, the Court found it significant that "[e]ven those more skeptical of resale price maintenance acknowledge it can have procompetitive effects."[12]

Nor did the majority think that stare decisis dictated the result in this case. To the contrary, the Court explained that the doctrinal underpinnings of *Dr. Miles* are impossible to reconcile with many of the Court's more recent opinions (including, for example, *Colgate*,[13] *Sylvania*,[14] and *Business Electronics*) and the entire body of law that has grown up concerning other forms of vertical restraints.[15] The Court therefore held that "[v]ertical price restraints are to be judged according to the rule of reason."[16]

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented. Justice Breyer agreed with much of the majority's economic analysis of RPM, acknowledging that "sometimes resale price maintenance can prove harmful; sometimes it can bring benefits,"[17] but disagreed that this necessarily means that the per se rule is inappropriate. The dissent questioned whether the procompetitive justifications for RPM were compelling in light of the general agreement that RPM results in higher prices to consumers.[18] The dissent also concluded that the majority undervalued the administrative difficulties of separating "good" RPM from "bad" in the context of a rule of reason case (a topic to which we return below).[19] And most important from Justice Breyer's perspective, the majority erred by analyzing the question as if the Court were "starting from scratch."[20] In the dissent's view, the long history of per se prohibition of RPM—without any significant changes in economic theory or market dynamics that might support altering the rule—tipped the scale in favor of affirming the holding of *Dr. Miles*.[21]

Although the Court's decision overruling *Dr. Miles* was not unexpected, the practical impact that the decision will have on the U.S. economy is not yet clear. First, although state antitrust laws often closely follow the decisions of federal courts, some states may continue to apply a per se rule against RPM. In fact, thirty-seven states filed an amicus curiae brief in *Leegin* urging the Court to maintain the per se rule of *Dr. Miles*. It is possible that sharp differences may arise between state and federal law in this area such as occurred with respect to indirect purchaser actions in the

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[10] *Id.* at 2716–17.

[11] Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

[12] *Leegin*, 127 S. Ct. at 2715, 2717.

[13] United States v. Colgate & Co., 250 U.S. 300 (1919).

[14] Continental T.V., Inc. v. GTE Sylvania Inc. 433 U.S. 36 (1977).

[15] *Leegin*, 127 S. Ct. at 2721–22.

[16] *Id.* at 2725. Not surprisingly, the Court did not reach the issue of whether Leegin's ownership interest in stores selling Brighton goods affected this analysis. PSKS raised this issue for the first time in the Supreme Court. *Id.*

[17] *Id.* at 2729 (Breyer, J., dissenting).

[18] *Id.* at 2727–28 (Breyer, J., dissenting).

[19] *Id.* at 2730–31 (Breyer, J., dissenting).

[20] *Id.* at 2731 (Breyer, J., dissenting).

[21] *Id.* at 2731–37 (Breyer, J., dissenting).

wake of the Supreme Court's decision in *Illinois Brick*.[22] Second, it is conceivable that Congress may legislatively reintroduce the per se rule.[23] Third, the lower courts still need to decide how best to apply the rule of reason to RPM. We will spend the remainder of the article discussing the latter topic.

The Court's Guidance Regarding the Rule of Reason

In holding that RPM, like most other vertical restraints, now will be analyzed under the rule of reason, the Court appeared to anticipate two of the most common criticisms leveled against the rule of reason: that it is effectively a rule of per se legality[24] and it lacks any real content.[25] Thus, the Court urged lower courts to be vigilant in using the rule of reason to weed out anticompetitive transactions and also provided specific guidance for applying the rule in the RPM context.

The majority opinion makes clear that the Court's overruling of Dr. Miles *should not be interpreted as giving all RPM an automatic stamp of approval.*

The majority opinion makes clear that the Court's overruling of *Dr. Miles* should not be interpreted as giving all RPM an automatic stamp of approval. The majority emphasized that "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated,"[26] and cautioned courts "to be diligent in eliminating [the] anticompetitive uses" of RPM from the market.[27]

The Court then enumerated some of the more important factors relevant to the rule of reason analysis. First, it suggested that market power could be a threshold requirement for an RPM claim.[28] Second, the Court explained that RPM is unlikely to harm competition if it is not widespread in the relevant market (either at the manufacturer or retailer level).[29] Conversely, RPM should receive more scrutiny if competing manufacturers adopt the practice.[30] Third, vertical restraints driven by retailers are much more likely to be harmful to competition than restraints for

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[22] Furthermore, RPM is unlawful in some jurisdictions outside the United States, including, for example, the European Union. *See* Guidelines on Vertical Restraints, 2000 O.J. (C 291) 1, 11, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/c_291/c_29120001013en00010044.pdf (noting that the European Commission's 1999 Block Exemption Rule does not exempt RPM from liability under Article 81).

[23] Congress has been active in this field in the past. *See Leegin*, 127 S. Ct. at 2723–24. In fact, on July 31, 2007, the Senate Committee on the Judiciary's Subcommittee on Antitrust, Competition Policy and Consumer Rights held a hearing on the topic, "The *Leegin* Decision: The End of Consumer Discounts or Good Antitrust Policy?"

[24] *See, e.g.*, Robert Pitofsky, *Are Retailers Who Offer Discounts Really "Knaves"?: The Coming Challenge to the* Dr. Miles *Rule*, ANTITRUST, Spring 2007, at 61, 64 ("It is plausible that abandonment of a per se approach to minimum resale price maintenance would lead to a very generous and difficult to enforce full rule of reason and eventually to de facto per se legality."); *cf.* 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1633b, at 329 (2d ed. 2004) [hereinafter, AREEDA] ("The typical rule of reason is a form of presumptive legality in the sense that the defendant prevails unless the plaintiff offers some proof of harmful effects or tendencies.").

[25] *See, e.g.*, Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 153–57 (1984).

[26] *Leegin*, 127 S. Ct. at 2717.

[27] *Id.* at 2719.

[28] *Id.* at 2720 ("[T]hat a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.") (internal citation omitted).

[29] *Id.* at 2719 ("When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers. Likewise, a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand.") (citations omitted).

[30] *Id.*

which the manufacturer was the impetus.[31] These comments highlight many of the procedural and substantive issues that will play out in future cases.

The Court stopped far short, however, of detailing how a rule of reason RPM case should proceed. Instead, the Court encouraged lower courts to "establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[32] To that end, the Court explained that lower courts could "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."[33]

Applying the Rule of Reason

Even though *Dr. Miles* has been the rule of law for nearly a century, many commentators have written about how to apply the rule of reason to RPM. In the remainder of the article we discuss some of those proposals in the context of the Court's opinion in *Leegin*.

One of the most effective means of reducing the burden of litigation, and providing more guidance to businesses, is to create safe harbors or non-rebuttable presumptions of legality. One commonly discussed safe harbor is a market power screen.

The Use of Screens or Filters to Reduce Litigation. The Court in *Leegin* encouraged lower courts to devise rules to enhance administrative efficiency and predictability for businesses. One of the most effective means of reducing the burden of litigation, and providing more guidance to businesses, is to create safe harbors or non-rebuttable presumptions of legality. One commonly discussed safe harbor is a market power screen.[34] That is, to state a claim for a violation of the Sherman Act based on RPM, the plaintiff would be required to plead (and later prove) that the defendant—either the manufacturer or the retailer—possesses market power in the relevant market. The rationale for a market power screen is that, unless the manufacturer has market power, competing manufacturers will be able to find distributors for their goods and discounters will be able to buy products from other manufacturers, thus affording consumers choices between higher- and lower-priced goods. For example, in the case of *Leegin* itself—given Brighton's tiny share of the relevant market—it is hard to see how consumers could be harmed by Leegin's RPM policy. Similarly, in the case of a retailer defendant, unless the retailer has market power, it will be unable to foist the RPM policy on an unwilling manufacturer or freeze discounters out of the market. Consumers will be able to purchase from other retailers. Although the Court in *Leegin* did not expressly sanction the adoption of a market power screen at the pleading stage, there is some support in the opinion for such an approach.[35]

But a simple market power screen might leave too much potentially harmful RPM unaddressed. If a small number of manufacturers together make up a very large share of the market, it is more likely that they will be able to use RPM to facilitate horizontal coordination. Retailer concentration

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[31] *Id.* ("If there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer.") (citation omitted).

[32] *Id.* at 2720.

[33] *Id.*

[34] *See, e.g.*, Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 Antitrust L.J. 83, 120 (1995).

[35] *See Leegin*, 127 S. Ct. at 2720 (RPM "may not be a serious concern unless the relevant entity has market power"). Justice Breyer, in the dissent, expressed concern that applying a market power screen would be "easier said than done" and would invite "lengthy time-consuming argument among competing experts." *Id.* at 2730 (Breyer, J., dissenting). To be sure, market power is frequently disputed and even hotly contested. But that does not mean that in many circumstances a prospective plaintiff simply would be unable to plead that the defendant has market power and litigation would be avoided altogether (or it would be readily apparent from a quick look at the facts in an early summary judgment motion that there was no market power). *Leegin*, itself, would appear to be just such a case.

also increases the likelihood that RPM will be used for anticompetitive purposes. Consequently, some commentators suggest that the focus of analysis should be market concentration—irrespective of whether any single manufacturer or retailer enjoys market power.[36] Although allowing suits against defendants without market power in cases where the market is concentrated suggests that RPM might be subjected to more rigorous rule of reason scrutiny than other forms of vertical restraints, there is arguably some support in Justice Kennedy's opinion for this approach, particularly in circumstances where more than one manufacturer has adopted RPM.[37]

Thus, under a possible modified screen approach, the plaintiff would be required to allege and prove either that (1) the defendant has market power or (2) the market is concentrated and the defendant is one of the leading manufacturers or retailers in the market.[38] Requiring, at a minimum, that the defendant be one of the leading firms in the industry seems appropriate to eliminate the possibility that a small manufacturer or retailer could be subjected to expensive rule of reason litigation merely because the market was concentrated and other manufacturers in the same market had previously adopted RPM. In such a case, the small firm's adoption of RPM could not have any significant incremental harmful effect on competition. In fact, the manufacturer quite likely may have followed its larger competitors in adopting RPM merely to survive.[39]

Others have suggested that a modified market power screen also should include the requirement that RPM have been adopted in a significant portion of the market.[40] There appears to be general agreement that RPM is unlikely to be harmful if it operates only in a small portion of the market.[41] A potential problem, however, with adding this element to a pleading screen is that the plaintiff may not be in a position at the time the suit is filed to know how many competing manufacturers or retailers use or require RPM. The Areeda and Hovenkamp treatise argues that "market coverage is the most difficult [factor] to prove or disprove."[42] This observation, if correct, suggests that market coverage should not be used as a screen to keep plaintiffs from bringing a case at all.

Another possible screen or filter is to require the plaintiff to plead that a retailer or group of retailers was the driving force behind the RPM. There appears to be widespread consensus that RPM is much less likely to be harmful if it is instituted by the manufacturer. Because "the interests of

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[36] *See, e.g.*, AREEDA, *supra* note 24, ¶ 1632d2, at 322.

[37] *See Leegin*, 127 S. Ct. at 2719.

[38] For instance, a modified market power screen could require the plaintiff to allege and prove that the market is concentrated and the defendant has at least a 10 percent share of the relevant market. *See* Brief Amici Curiae of William S. Comanor and Frederic M. Scherer in Support of Neither Party at 10, *Leegin* (No. 06-480) [hereinafter Comanor and Scherer Brief] (proposing a market power screen that is triggered when the "relevant line of commerce is oligopolistic, e.g., with a Herfindahl-Hirschman index exceeding 1800" and when the "RPM is implemented by a seller with a relevant market share of 10 percent or more, i.e., a Herfindahl-Hirschman change of 100 or more").

[39] While proof of this assertion would serve as a defense, it would be more efficient not to allow the small manufacturer or retailer to be haled into court in the first place.

[40] *See, e.g.*, Easterbrook, *supra* note 25, at 161–62 ("Unless all or almost all firms in an industry use the same vertical restraints, a case should be dismissed on the pleadings. The rationale for this filter is that every one of the potentially-anticompetitive outcomes of vertical arrangements depends on the uniformity of the practice. For example, RPM or territorial restraints could facilitate or enforce a cartel only if all firms in the industry use identical practices.").

[41] AREEDA, *supra* note 24, ¶ 1632d2, at 322 ("we doubt that facilitation of manufacturer coordination is a serious threat" if the percentage of the market engaging in RPM is less than 60 percent); *id.* ¶ 1632e2, at 324 ("We would suggest that coverage [in the retail market] in the range of 50 or 60 percent signifies a risk of competitive harm."); *see also Leegin*, 127 S. Ct. at 2719 (RPM is more likely to be a problem when "many competing manufacturers adopt the practice").

[42] AREEDA, *supra* note 24, ¶ 1633c2, at 332.

manufacturers and consumers are aligned with respect to retailer profit margins,"[43] if the manufacturer is the moving force behind RPM, it "must have some special reason for wanting resale price maintenance."[44] But the fact that the efficiency justifications for RPM are found most often when the manufacturer originates RPM (see the discussion of justifications below) does not necessarily mean that manufacturer-driven RPM is never harmful to consumers.[45] While a "retailer screen" might dramatically reduce the number of cases that could be brought, it probably would be overbroad and inconsistent with *Leegin*.

Conversely, it has been suggested that the courts should adopt a rebuttable presumption of *illegality* if the RPM is instituted at the behest of retailers.[46] According to Professors Comanor and Scherer, "there are no arguments in economic analysis supporting restraints arising from distributor actions or pressures."[47] Although, as noted, there is broad agreement that retailer-driven RPM is more likely to be harmful than RPM initiated by the manufacturer, a rebuttable presumption of per se liability seems clearly inconsistent with *Leegin*. And, as Justice Breyer pointed out, it may not be easy to determine which party is the driving force behind the RPM.[48] In circumstances where the interests of the manufacturer and at least some of its distributors align—such as when there are legitimate free-rider concerns—it may not be clear who is the driving force behind the RPM and it probably does not matter.[49] For example, assume a retailer of high-end stereo equipment tells a manufacturer that it can no longer afford to provide highly trained sales people to explain the features of the manufacturer's products because it is losing too many sales to discounters. The retailer says it will either stop allocating trained sales people to the manufacturer's line or drop it altogether unless the manufacturer adopts an RPM policy. In response, the manufacturer adopts a new policy requiring all of its distributors to agree not to sell below the manufacturer's suggested retail prices. Assuming no agreement among retailers to pressure the manufacturer, is there any reason why this RPM—which is intended to address a classic free-rider problem—is any more suspect than if the manufacturer had instituted RPM without having been asked to do so? In such cases a rebuttable presumption of illegality for retailer-driven RPM would be both overinclusive and difficult to administer. Nonetheless, in the face of evidence that RPM was adopted as a result of retailer coercion, it might be relatively easy to condemn the restraint through the rule of reason analysis discussed below.

***Some type of modified market power screen appears to have widespread support and would be consistent with the Court's opinion in* Leegin.**

Thus, although there are a number of possible filters or screens that courts could consider to enhance administrative efficiency and predictability for businesses, some type of modified market power screen appears to have widespread support and would be consistent with the Court's opinion in *Leegin*.

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[43] *Leegin*, 127 S. Ct. at 2718.

[44] *Id.* at 2729 (Breyer, J., dissenting).

[45] *See id.* at 2716–17.

[46] *See* Comanor and Scherer Brief, *supra* note 38, at 9.

[47] *Id.* at 8 ("In such circumstances, RPM and similar restraints lead to higher consumer prices with no demonstrated redeeming values, unless one subscribes to the notion that protecting small retailers is desirable in its own right."); *cf.* AREEDA, *supra* note 24, ¶ 1648, at 442 ("if dealers coerce a manufacturer into restraining intrabrand competition, the restraint is clearly anticompetitive").

[48] *Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting).

[49] Of course, this is very different from a situation in which a retailer or group of retailers coerces a manufacturer to introduce RPM contrary to the manufacturer's own interests. *Cf.* Areeda, *supra* note 24, ¶ 1633d2, at 335 ("Except for each dealer's interest in not being the victim of free riding by rival dealers, the dealers' interests should generally be regarded as illegitimate.").

The Plaintiff's Prima Facie Case. Although *Leegin* suggests several factors that would be relevant to determining whether the RPM is anticompetitive, the Court did not establish a standard for the plaintiff's prima facie case. What is clear from the Court's opinion, however, is that the plaintiff's prima facie showing cannot consist only of proof that the RPM raised prices. As the majority was careful to explain, the price effect of RPM, standing alone, tells us nothing about consumer welfare.[50] After all, the point of RPM is to prevent harmful price cutting that would deprive consumers of services and choices they desire.

Writing long before the *Leegin* decision, Professors Areeda and Hovenkamp recommended a structured rule of reason approach for RPM under which the plaintiff's prima facie case consists of showing the presence of one or more of the following "adverse factors," which are consistent with the *Leegin* analysis:

- Manufacturer concentration;
- Dealer concentration;
- Widespread market coverage;
- The RPM was initiated by a dealer or group of dealers;
- The RPM covers a powerful brand;
- The RPM was requested by a powerful dealer that a manufacturer could not readily replace;
- The RPM is used only in select markets (suggesting dealer power in those markets accounts for the restraint); or
- The RPM is used for a homogeneous product (suggesting that there could be no free rider or enhanced service justification for the restraint).[51]

After all, the point of RPM is to prevent harmful price cutting that would deprive consumers of services and choices they desire.

The presence of only one of these factors may not be sufficient to establish that there is a danger of competitive harm and satisfy the plaintiff's prima facie case.[52] Nor is this list of "adverse factors" necessarily exhaustive. Nevertheless, the list provides a useful starting point for courts to consider in determining whether the plaintiff has shown that the RPM is likely to harm competition by perpetuating inefficient distribution; suppressing competition to enhance dealer profits; facilitating manufacturer coordination; or promoting some other anticompetitive interest.[53]

The Defendant's Rebuttal and Procompetitive Justifications. In a typical rule of reason case, once the plaintiff makes out a prima facie case that the restraint is anticompetitive, the burden shifts to the defendant to explain why the restraint in fact does not harm competition. The defendant can meet this burden in one of two ways. First, the defendant can show that the RPM does not have the harmful effect on competition suggested by the plaintiff's prima facie showing. Circumstances in the particular market may mean that RPM is not harmful despite the presence of one or more adverse factors. For example, the defendant might offer evidence that consumers were not denied a full range of retailers selling competing products at various prices and levels of service. Or a manufacturer-defendant may show that it needed to introduce RPM to gain or maintain a toehold in a new market, a widely agreed upon procompetitive use of RPM.[54]

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[50] *Leegin*, 127 S. Ct. at 2718.

[51] AREEDA, *supra* note 24, ¶¶ 1633c1 & 1633e.

[52] A possible variation on this would be to require the plaintiff to show one or more of these factors in addition to the factors already incorporated into the modified market power screen discussed above.

[53] *See* AREEDA, *supra* note 24, ¶ 1632, at 316.

[54] *See Leegin*, 127 S. Ct. at 2716; *id.* at 2728 (Breyer, J., dissenting). Cases involving new market entrants and small companies using RPM to survive in the face of dominant competitors should be eliminated by the modified market power screen discussed above.

Second, the defendant may offer evidence of efficiencies to justify its use of RPM despite any potential harmful effects. In some cases, it may be obvious that the RPM serves no legitimate purpose. For example, if RPM is used to raise prices of homogeneous products, it is unlikely that there is any procompetitive justification for the restraint.[55] There also may not be a legitimate justification in circumstances where a manufacturer is coerced by a retailer into adopting RPM.[56] But in many cases, the defendant will be able to offer a plausible efficiency justification for RPM. The principal justification offered is that RPM is necessary to support retail and distributor services that consumers value.[57] Without RPM some dealers might "free ride" on the investment in those services made by other dealers. In the long run, as a result of free riding, all dealers might stop investing in services that benefit the seller and consumers.[58] Other potentially legitimate justifications for RPM include giving retailers an incentive to provide valuable services even in the absence of free riding,[59] or encouraging prestigious retailers to stock a manufacturer's product and give it an implicit "quality certification."[60] Another possible efficiency justification is to help stabilize demand for a product and thereby encourage retailers to maintain adequate inventories.[61] Retailers' interests—at least where they diverge from those of the manufacturer—are generally suspect.[62]

Balancing. Assuming that the defendant offers a legitimate and non-pretextual efficiency justification for the RPM, under traditional rule of reason analysis the court should balance the competing interests and determine whether the challenged restraint should be allowed to stand. Such balancing is often fraught with difficulties, and RPM is no different than other rule of reason cases in that respect.

In the first place, the court could try to assess the competitive significance of the defendant's justification. The court could analyze the seriousness of the business problem that the RPM is designed to address and the effectiveness of RPM in solving that problem.[63] If it is clear that the free riding (or other business) problem is minimal or that the business problem could be better addressed by other less harmful means, the defendant's justification should be given relatively little weight in the balancing. In most cases, though, it may be difficult to assess whether RPM is an effective means of addressing the business problem at issue.

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[55] AREEDA, *supra* note 24, ¶ 1633c3(D), at 334 ("Product homogeneity is an easily observable fact that is inconsistent with known legitimate uses of RPM.").

[56] *Id.* ¶ 1632e3 (discussing dealer power over manufacturer).

[57] The other most widely accepted justification is that RPM can facilitate new entry. *See, e.g.*, *Leegin*, 127 S. Ct. at 2728 (Breyer, J., dissenting) (discussing how a new producer may use RPM to convince dealers to help it enter the market and the "result might be increased competition at the producer level, i.e., greater *inter*-brand competition, that brings with it net consumer benefits"). As we have already mentioned, cases involving that reason for RPM should not get past the modified market power screen.

[58] *See, e.g.*, *id.* at 2715–16; *id.* at 2728 (Breyer, J., dissenting); Brief Amici Curiae of Economists at 5–10, *Leegin* (No. 06-480) [hereinafter Economists' Brief] (detailing the relationship between RPM and the prevention of harmful free riding). The authors' law firm, Heller Ehrman LLP, served as counsel for the amici economists.

[59] *See Leegin*, 127 S. Ct. at 2716; Economists' Brief, *supra* note 58, at 11.

[60] *See* Brief Amicus Curiae of United States at 14, *Leegin* (No. 06-480) [hereinafter U.S. Brief]; Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom*, 63 ANTITRUST L.J. 59, 65–68 (1994). *But cf.* AREEDA, *supra* note 24, ¶ 1631c3(A), at 311 ("Although [the quality certification] argument cannot be categorically rejected, we question its persuasiveness and suggest that it may reflect the market power of elite stores rather than a consumer benefit.").

[61] *See* U.S. Brief, *supra* note 60, at 15–16; Economists' Brief, *supra* note 58, at 11.

[62] *See, e.g.*, AREEDA, *supra* note 24, ¶ 1633d2, at 335.

[63] *See id.*

An even more serious concern is that it may be very difficult in RPM cases to determine the relative weight that should be given to the plaintiff's proof of harm. Assume that the plaintiff has shown that a manufacturer with market power has introduced RPM and the result has been higher prices throughout the relevant market. The defendant then offered credible evidence that without RPM, retailers were not providing the level of service desired by consumers and the defendant's sales increased after it introduced RPM. The plaintiff might argue that the balancing in this case must go in its favor because the price effects reflect actual consumer harm. The extent to which higher prices from RPM reflect consumer harm, however, is difficult to determine. On the one hand, the so-called "inframarginal consumers," i.e., consumers who would have purchased without any additional services, likely will have been made worse off by the RPM. On the other hand, consumers who value the enhanced retail services may have been made better off by the RPM even though prices increased. Unless the court can assess the effect of the RPM on aggregate consumer welfare in the relevant market, it may be difficult to engage in any meaningful balancing of the plaintiff's showing of harm to competition and the defendant's proffered procompetitive justification.

Unless the court can assess the effect of the RPM on aggregate consumer welfare in the relevant market, it may be difficult to engage in any meaningful balancing of the plaintiff's showing of harm to competition and the defendant's proffered procompetitive justification.

Some might argue that the fact the defendant's sales increased after it introduced RPM answers the question—i.e., if RPM causes sales to increase, on balance consumers are better off.[64] Even if sales increase after RPM is introduced, however, the true competitive effects of the RPM might not be clear. For example, there may be difficult questions of causation (did the RPM cause the rise in sales?). Merely looking to whether the defendant's sales increased after it introduced RPM might go too far in the direction of creating a presumption of per se legality for RPM. That said, it seems appropriate to tip the scale in favor of a defendant who can show that the RPM was legitimately intended to address a serious business concern such as the prevention of free riding in a market for highly differentiated goods.

Conclusion

The full impact of the Supreme Court's decision in *Leegin* will depend on how the lower courts apply the rule of reason and what sorts of presumptions and rules of proof they adopt. *Leegin* suggests that there is not one obviously correct approach. What is clear, however, is that any rule of reason framework should recognize that, in Justice Breyer's words, "sometimes resale price maintenance can prove harmful; sometimes it can bring benefits."[65] In keeping with the Court's opinion, lower courts should strive to develop a rule of reason framework that (1) leads to predictable and efficient results and (2) strikes an appropriate balance between the recognized potential harms and benefits of RPM.

Where does this leave businesses in the meantime? Manufacturers have two options. They may continue to rely on the *Colgate/Monsanto*[66] line of cases under which they may unilaterally announce and enforce a retail pricing policy so long as they do not enter into an agreement with buyers. This strategy is now less risky than it was in the past because, under *Leegin*, the manufacturer is no longer subject to potential per se liability (at least under federal law for U.S. sales) if it crosses the somewhat artificial line that courts have drawn between wholly legal unilateral conduct and an agreement that may be actionable under Section 1.

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[64] *See, e.g.*, Easterbrook, *supra* note 25, at 163–64.

[65] *Leegin*, 127 S. Ct. at 2729 (Breyer, J., dissenting).

[66] United States v. Colgate & Co., 250 U.S. 300 (1919); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

Alternatively, companies now may choose to enter into direct agreements with U.S. buyers to adhere to their retail pricing policy. Manufacturers may determine that direct agreements are more efficient and effective than the old way of doing business, and worth the risk of potential rule of reason litigation. This strategy may be appropriate where the risk of successful rule of reason challenges to RPM are low: for example, if the manufacturer has a small market share; the market is not highly concentrated; the manufacturer sells a differentiated product; and the manufacturer introduces RPM to address a legitimate business problem such as free riding. However, an important caveat is that businesses will need to take into account the possibility that some states may maintain per se rules against RPM, which may complicate nationwide retail pricing policies. If and when the position of the states to follow *Leegin* becomes clear, and lower courts have developed rules and presumptions designed to streamline rule of reason litigation involving RPM, including potentially the use of various forms of market power screens, the risks associated with RPM policies should decline for many manufacturers. If, however, any significant number of states decide to maintain the per se rule, *Leegin* may have little practical effect on manufacturers' pricing strategies. ●