

Revisiting *Dr. Miles*: Reinstating a Modern Rule of Reason for Vertical Minimum Resale Price Agreements

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In 1911, the U.S. Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*¹ held that a manufacturer's setting the minimum prices at which independent resellers may resell its products was unlawful under the common law and Section 1 of the Sherman Act.² That result spawned the current per se rule—that all such agreements are illegal under the Sherman Act without regard to their purpose or effect.³ In late 2006, the Supreme Court agreed to revisit that blanket prohibition in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*⁴ This article contends that, for the reasons set out below, the per se rule against vertical minimum resale price agreements (RPM) has outlived the underpinnings of *Dr. Miles*, is not separately justified under current antitrust principles, and thus should be abandoned and replaced with the rule of reason.

Looking Back at *Dr. Miles*

A review of the facts and circumstances of *Dr. Miles* provides useful background in assessing the validity of the per se rule as applied to RPM. *Dr. Miles Medical Company* manufactured medicines which it sold to retail druggists through a network of over 400 jobbers and drug wholesalers operating under wholesale consignment agreements. The consignment agreements set the prices at which the wholesaler-consignees sold to retail druggists and prohibited the consignee from selling to anyone but designated retailers and other authorized wholesalers. *Dr. Miles* also entered into parallel agency agreements with literally thousands of retail druggists, which prohibited them from selling to consumers below prices printed on product packages. *Dr. Miles* claimed that its distribution system was intended to address deep discounting by department stores that had led consumers to view *Dr. Miles*' medicines as inferior and a majority of retail druggists to drop (or ignore) the line as unprofitable.⁵

Dr. Miles subsequently sued John D. Parks & Co., a drug wholesaler that had refused to enter into a consignment agreement but procured *Dr. Miles*' medicines from others in *Dr. Miles*' distribution chain. *Dr. Miles* alleged that Parks fraudulently obtained *Dr. Miles*' medicines from its consignees and agents "solely for the purpose of selling the remedies to dealers 'to be advertised,

¹ 220 U.S. 373 (1911).

² *Id.* at 406–09.

³ *See, e.g.,* *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 16–21 (1st Cir. 2004) (stating minimum RPM illegal, but not proved); *Pace Elecs., Inc. v. Canon Computer Sys., Inc.*, 213 F.3d 118, 121–24 (3d Cir. 2000) (minimum RPM illegal; terminated dealer adequately alleged antitrust injury).

⁴ 127 S. Ct. 763 (2006), *granting cert. to* *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 2006-1 Trade Cas. (CCH) ¶ 75,166 (5th Cir.) (not for publication) (finding vertical price fixing when manufacturer required retailers to follow suggested resale prices at all times in order to become "Brighton Heart Store").

⁵ 220 U.S. at 375 (Statement of the Case).

sold, and marketed at cut rates,' and 'to thus attract and secure custom and patronage for other merchandise, and not for the purpose of making or receiving a direct money profit' from the sales of the remedies."⁶ Dr. Miles sought, among other things, to stop Parks from inducing an alleged breach of trust by its consignees and agents and from selling its medicines at prices below those set by it. The court dismissed the complaint on demurrer, which was upheld by the Court of Appeals for the Sixth Circuit.

On appeal to the U.S. Supreme Court, the Court rejected Dr. Miles' inducement claim and concluded that distributor sales to Parks were not consigned for the benefit of Dr. Miles, and retail druggists were not, in form or substance, agents of Dr. Miles.⁷ The Court then focused on the validity of the price restrictions.⁸

The Court's analysis of the resale price agreements began with a wrong-headed reference to the "general restraint upon alienation"—a principle now roundly rejected in all quarters⁹—and then framed the issue as one of reasonableness:

The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. . . .

The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade . . . may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public.¹⁰

But, the reasonableness analysis of the price-restrictive agreements was cut short by their failure to fit within a then-narrow set of practices amenable to such review, namely, those ancillary to a license or transfer of a business.

The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. . . . The agreements are 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.¹¹

⁶ *Id.* at 381–82. *Dr. Miles* also contended that Parks had obliterated tracking numbers on product packages, "rendering the list of ailments and directions for use illegible," and sold those products to consumers in that condition. *Id.* at 382.

⁷ *Id.* at 397–99.

⁸ *Id.* at 394–95 (Opinion of the Court).

⁹ The Court in *Dr. Miles* described the "right of alienation" as:

one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved such as . . . an heirloom, have been generally held void.

Id. at 404 (citation omitted). This "principle" has been sharply criticized, and reliance on the rule described as a "misreading of legal history and a perversion of antitrust analysis." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977).

¹⁰ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 406–07 (1911) (citation omitted).

¹¹ *Id.* at 407.

The Court then proceeded to hold on the pleadings that “the advantage of established retail prices primarily concerns the dealers,” and collapsed the distinction between vertical agreements and dealer cartels, condemning Dr. Miles’ “plan [as one that] falls within the principle which condemns” horizontal dealer agreements.¹²

[Dr Miles] 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. . . . But agreements . . . between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.¹³

The Court rejected as irrelevant whether the products at issue were produced by several manufacturers or by one, and held simply that Dr. Miles “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.”¹⁴

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The Underpinnings of *Dr. Miles* Are Fatally Flawed

Antitrust law has come a long way since 1911, with the aging analysis of *Dr. Miles* now squarely at odds with current antitrust norms. As discussed below, the grounds for a per se rule against RPM as set out in *Dr. Miles* have been since separately rejected, leaving the current per se treatment of RPM unexplained and without foundation

Dr. Miles’ per se rule against RPM was not derived under the demanding standards for per se treatment.

Since *Northern Pacific Railway Co. v. United States*,¹⁵ application of the per se rule has been limited to “agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”¹⁶ Measured against those “demanding standards,” the Supreme Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*¹⁷ rejected per se treatment of vertical nonprice restraints because “there ha[d] been no showing . . . either generally or with respect to Sylvania’s agreements, that vertical restrictions have or are likely to have a ‘pernicious effect on competition’ or that they ‘lack . . . any redeeming virtue.’”¹⁸ Per se treatment is “appropriate only for ‘conduct that is manifestly anti-competitive,’ that is, conduct ‘that would always or almost always tend to restrict competition and decrease output.’”¹⁹

Decided almost a half-century before *Northern Pacific*, the Court in *Dr. Miles* did not require, nor was it confronted with, evidence from which it could reasonably conclude that vertical minimum resale price agreements were manifestly anticompetitive in virtually all circumstances. And, as observed by the dissent in *Dr. Miles*, the Court, even on a policy level, was moving into unchart-

¹² *Id.* at 407–08.

¹³ *Id.* at 408.

¹⁴ *Id.* at 409.

¹⁵ 356 U.S. 1 (1958).

¹⁶ *Id.* at 5.

¹⁷ 433 U.S. 36 (1977).

¹⁸ *Id.* at 58.

¹⁹ *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (citations omitted).

ed waters: “there is no statute covering the case; there is no body of precedent that by ineluctable logic requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere.”²⁰

In fact, not only did the per se rule for RPM arise under a now-discredited and narrow common law standard, it was based on price agreements which Justice Holmes, writing in dissent, thought unlikely to have any demonstrable economic effect:

I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we cannot get along without. There may be necessities that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines.²¹

Per se condemnation cannot rest on a perceived need to protect intrabrand competition. *Dr. Miles* did not distinguish between interbrand and intrabrand competition, deemed irrelevant the presence of other producers of medicines to whom retail druggists could switch, and condemned as against public policy *any* restriction on price competition among resellers of Dr. Miles' medicines.

The preservation of intrabrand price competition, without more, is not an aim of modern antitrust law. Today, it is axiomatic that the “primary purpose of the antitrust laws is to protect interbrand competition.”²² Generally, “when interbrand competition exists [as it does in most cases], it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.”²³ Moreover, in situations in which interbrand competition may be weak or nonexistent, the rule of reason has proven an effective tool to assess intrabrand effects and to identify restraints that allegedly harm consumers.²⁴

Per se condemnation cannot rest on an assumption that a vertical practice never benefits the upstream supplier or may have horizontal effects. In *Dr. Miles*, the Court saw no distinction between a series of identical agreements between Dr. Miles and its individual resellers, and a dealer price-fixing cartel, claimed the only benefit from a “plan of identical contracts” went to the dealers, and held the distribution system illegal because “[i]t, in effect, creates a combination for the prohibited purposes.”²⁵

The Supreme Court has long since rejected that approach:

There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal per se, but we do not regard the problems of proof as sufficiently great to justify a per se rule [for the former].²⁶

²⁰ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 411 (1911) (Holmes, J., dissenting).

²¹ *Id.* at 412.

²² *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

²³ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977).

²⁴ *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560 (11th Cir. 1983).

²⁵ 220 U.S. at 408.

²⁶ *Continental T.V.*, 433 U.S. at 58 n.28 (citations omitted).

Clarifying what is now plain, the Supreme Court subsequently added: “a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement.”²⁷

There is no distinction more fundamental to modern Sherman Act Section 1 analysis than the distinction between vertical and horizontal agreements, which in turn determines the standard under which the conduct is evaluated. Antitrust courts have not shirked from that distinction, and regularly distinguish between vertical distribution agreements and alleged dealer conspiracies on the facts presented.²⁸ As noted by leading commentators, “[t]o the extent that *Dr. Miles* rests on the false categorical propositions that resale price maintenance never benefits manufacturers and always has the same effects as an illegal dealer cartel, its ruling is ripe for a reexamination the Supreme Court has never given it.”²⁹

***Dr. Miles* Stands Alone Against a Trend**

The per se rule against vertical price restraints has become a shadow of itself. With the recognition that “[t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition,”³⁰ per se treatment of vertical price restraints has been, correspondingly, narrowed. Unlike the ban against horizontal price fixing where “price” includes virtually any aspect of price, “price” in the context of vertical price agreements means, more narrowly, “price or price level”³¹ and is limited to agreements on minimum resale prices.

The Supreme Court in *State Oil Co. v. Khan*³² overturned application of the per se rule to vertical agreements on maximum resale prices. The potential harm of such agreements was thought to include three situations. Specifically, such agreements might: (1) depress reseller margins such that resellers could no longer offer services desired by consumers; (2) result in channeling distribution through a few large resellers, thereby excluding less efficient resellers; or (3) disguise a minimum resale price scheme.³³ The *Khan* Court viewed the first as unlikely, the second as not necessarily an antitrust concern, and the third as amenable to review under the rule of reason.³⁴ The fact that a reseller’s margin target may preclude selling at less than the maximum price has been held not to convert a price cap to a per se unlawful price floor.³⁵

²⁷ *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 n.4 (1988).

²⁸ *See, e.g., Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir. 1999) (rejecting characterization as horizontal market allocation, court held “this particular agreement was a vertical one in which Generac played the role of ‘supplier’ and Caterpillar both upstream supplier of the trademark, and downstream purchaser of the finished goods”); *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 2005 U.S. Dist. LEXIS 11052, at *5–*13 (E.D. Pa. Mar. 29, 2005) (sufficient evidence to infer that Mack Trucks’ reasons for its policies were pretextual and that it, instead, allegedly conspired with its dealers to limit price competition).

²⁹ PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* § 1620d, at 217 (2d ed. 2004).

³⁰ *Continental T.V.*, 433 U.S. at 51–52.

³¹ *Business Elecs.*, 485 U.S. at 735–36; *see also* *Great Clips, Inc. v. Levine*, 1993-2 Trade Cas. (CCH) ¶ 70,390, at 71,037–38 (D. Minn. 1993) (franchisor price restrictions requiring franchisees to post even-dollar prices, charge a single even-dollar price for haircuts and limit discounting to 21 days of every 3 months not minimum RPM where franchisees could adopt any even-dollar price and offer any discount during the 21-day period and promotional coupons at any time).

³² 522 U.S. 3 (1997).

³³ *Id.* at 12; *see also* *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 753 (1st Cir. 1994).

³⁴ 522 U.S. at 17–18.

³⁵ *Khan v. State Oil Co.*, 143 F.3d 362, 364 (7th Cir. 1998) (on remand).

Agreements on minimum advertised prices (MAP), once thought to be per se illegal, are now subject to a rule of reason.³⁶ MAP programs often condition receipt of a supplier's cooperative advertising or other promotional funds on the reseller's adherence to suggested minimum advertised prices in certain designated media. The flexibility that has arisen in connection with price-restrictive cooperative advertising programs now generally extends to programs that limit price advertising without regard to the source of promotional funding, so-called bald advertising programs. Such restrictions have generally been assessed under the rule of reason, provided the distinction between resale and advertised prices is maintained.³⁷

The relaxation of per se rules for maximum resale price agreements and price-restrictive advertising programs has been coupled with a recognition that such price restraints do not invariably harm competition and may result in procompetitive benefits.³⁸ As discussed below, the same observations apply to RPM.

Furthermore, suppliers today can engage in a broad range of unilateral activities that directly affect the resale prices of their products but do not raise the specter of RPM. For example, a supplier may unilaterally announce suggested minimum resale prices, and refuse to deal with any reseller that does not comply.³⁹ The fact that resellers independently choose to adhere to the policy to avoid termination is, without more, insufficient to establish "agreement" on resale prices,⁴⁰ notwithstanding the practical effect of maintaining resale prices at levels determined by the supplier. Likewise, a supplier's mere pre-ticketing products with suggested resale prices,⁴¹ independent adjustments (up or down) to wholesale prices in the ordinary course to meet market con-

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³⁶ See, e.g., *Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc.*, 246 F.3d 752, 754, 757 (5th Cir. 2001) (cooperative advertising program that limited reimbursement to ads containing suggested retail prices or no price subject to rule of reason); *In re Nissan Antitrust Litig.*, 577 F.2d 910, 915–17 (5th Cir. 1978) (cooperative advertising program that limited reimbursement to ads containing suggested retail prices or no price and required dealer contributions not per se unlawful, but noting evidence that dealers sold cars at whatever price they chose and were free to advertise at any price at their own expense); *Campbell v. Austin Air Sys., Ltd.*, 2005-2 Trade Cas. (CCH) ¶ 75,023, at 103,410 n.6 (W.D.N.Y. 2005) (finding Internet MAP policy limited to advertised prices not antitrust violation); *Blind Doctor Inc. v. Hunter Douglas, Inc.*, 59 Fed. R. Serv. 3d 635, 645 (N.D. Cal. 2004) (restraints limited to advertised price not per se unlawful); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 212 (D. Me. 2003) (“[P]laintiffs have no direct precedent for their argument that the case can proceed on a theory of per se illegality . . . [B]y their terms the MAP policies at best were agreements on what prices could be advertised, not what prices could be charged.”).

³⁷ *Blind Doctor*, 59 Fed. Rules Serv. 3d at 643, 637–38, 645–46 (advertising policy restricting certain price advertising subject to rule of reason); *Cranfill v. Scott & Fetzer Co.*, 773 F. Supp. 943, 950–53 (E.D. Tex. 1991) (absent agreement on resale prices, blanket restrictions on dealer's price advertising of Kirby vacuums evaluated under rule of reason). *But cf. Illinois Corporate Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751, 752 (7th Cir. 1989) (dicta) (describing supplier's ban on price advertising as “form of” RPM).

³⁸ See *Khan*, 522 U.S. at 15 (“difficult to maintain that vertically imposed maximum prices could harm consumers or competition to the extent necessary to justify their per se invalidation”); Federal Trade Comm'n, Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs—Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987):

Cooperative advertising programs that restrict reimbursement for the advertising of discounts . . . do not establish the existence of an agreement on price between a supplier and a dealer and do not necessarily affect the resale prices of dealers. Like other vertical restraints that are subject to a rule of reason analysis, such cooperative advertising programs may provide competitive benefits, or they may be competitively neutral. . . . [T]he legality of such cooperative advertising programs should be assessed in each case [under the rule of reason].

³⁹ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

⁴⁰ *Id.*

⁴¹ *Klein v. Am. Luggage Works, Inc.*, 323 F.2d 787 (3d Cir. 1963).

ditions,⁴² setting wholesale prices based on estimated resale prices⁴³ or as a percentage of resale prices with wholesale minimums,⁴⁴ or using mystery shoppers to monitor resale prices⁴⁵ have been held not to amount to RPM. Nor is it RPM for a supplier to strive to maintain reseller margins by setting certain wholesale and suggested resale prices, so long as resellers remain free to price below suggested prices.⁴⁶

This trend in the lower courts—to narrow the scope of the per se rule as applied to vertical price restraints and to treat an increasing range of price-related activity by suppliers as not directed to setting “resale” prices—heightens the need to reexamine *Dr. Miles* and the justification for retaining the per se rule for vertical minimum “resale” “price” “agreements” as construed today.

RPM Should Be Assessed Under a Rule of Reason

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Continuation of per se treatment of RPM has caused the business community, practitioners, and courts to focus sharply on whether an “agreement” on “price” may be found—often on ambiguous facts perceived differently by the supplier and a disgruntled reseller. For example, a supplier may freely advocate its suggested resale prices and price positioning strategies, but its antitrust risks can substantially increase if it engages in vigorous discussion and is misperceived by the tenor of its communications as “soliciting” an “agreement.”⁴⁷ The line between advocacy and solicitation in the press of business is thin indeed, and the value protected by insisting on such a line (which catapults permissible conduct into the realm of per se unlawful price fixing) is hard to discern when the supplier’s underlying interest in downstream prices is legitimate.⁴⁸

Much ink has been spilt over the extent to which RPM could result in distributional efficiencies and/or benefits to consumers. But the shadow of *Dr. Miles* has precluded robust analysis of such benefits on particular facts. In *Leegin*, for example, now before the Supreme Court, the district court refused to permit the defendant to introduce evidence demonstrating the alleged benefits

⁴² *Butera v. Sun Oil Co.*, 496 F.2d 434, 437–38 (1st Cir. 1974); *see also Khan v. State Oil Co.*, 143 F.3d 362, 364 (7th Cir. 1998) (on remand) (“A supplier is free to charge any price he wants to his retailers. The fact that the higher that price is, the higher the retailer’s price will have to be unless he is willing to sell below his cost has never been thought to be price-fixing”). *But see Newberry v. Washington Post Co.*, 438 F. Supp. 470, 482 (D.D.C. 1977) (retaliatory wholesale price increase made with intent and effect of preventing reseller from departing from prices announced by supplier, or depriving him of any profit if he did depart, held coercive).

⁴³ *See Kingray, Inc. v. National Basketball Ass’n, Inc.*, 188 F. Supp. 2d 1177, 1191 (S.D. Cal. 2002) (formula for wholesale price based on estimated resale price held not to restrict freedom of reseller to set subscription prices).

⁴⁴ *See General Cinema Corp. v. Buena Vista Distrib. Co.*, 681 F.2d 594, 596–98 (9th Cir. 1982) (movie theaters required to pay distributor either certain percentage of each ticket sold, or same percentage of minimum ticket price whichever was greater; held not coercive where no effect on actual price charged); *Martindell v. News Group Publ’ns, Inc.*, 580 F. Supp. 330, 331–33 (E.D.N.Y. 1984) (newspaper charged carriers 77 cents to extent newspaper price did not exceed \$1.25 plus 60% of price in excess of \$1.25; held not coercive).

⁴⁵ *See Chavez v. Whirlpool Corp.*, 113 Cal. Rptr. 175, 182–83 (Cal. Ct. App. 2001) (under Cartwright Act). *But cf. Acquire v. Canada Dry Bottling Co. of New York*, 24 F.3d 401, 412 (2d Cir. 1994) (not reviewing magistrate’s finding of coercive “price surveillance”).

⁴⁶ *See Khan*, 143 F.3d at 363–64; *Butera*, 496 F.2d at 437–38.

⁴⁷ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 n.9 (1984) (agreement means not only that reseller conformed to suggested price but that reseller “communicated its acquiescence or agreement, and that this was sought by the manufacturer”).

⁴⁸ *See, e.g., id.* at 762 (“A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market.”); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 707 (7th Cir. 1984) (manufacturer has “vital interest” in retail prices); *In re Nissan Antitrust Litig.*, 577 F.2d 910, 917 (5th Cir. 1978) (manufacturer “vitaly interested in the continued prestige, acceptability, and marketability of [its] product”); *Great Clips, Inc. v. Levine*, 1993-2 Trade Cas. (CCH) ¶ 70,390, at 71,038 (D. Minn. 1993) (“legitimate [price-related] restrictions are the price franchisees pay for the benefits of the franchise. It is important to remember that the franchisor has legitimate and important interests in how the franchise is run, marketability of further franchises not the least among them.”).

of its pricing policies.⁴⁹ In counseling clients over the years, facts suggest that proposed minimum price strategies—albeit not undertaken—are frequently driven by legitimate considerations, such as price positioning commensurate with product quality, innovation or brand value, a need to maintain adequate distribution, or a need to ensure adequate reseller margins to stimulate promotional activity, pre- or post-sale services, or facility investment. Economists and scholars increasingly have recognized plausible explanations for RPM that may enhance distribution efficiencies and increase interbrand competition.⁵⁰ Retrospectives of RPM cases have generally disavowed the use of RPM as a facilitating practice in connection with supplier or dealer cartels (originally thought to justify per se treatment of RPM), and, instead, suggested that RPM could serve legitimate objectives.⁵¹ It is worth noting that the Court in *Dr. Miles* ignored the alleged purpose of Dr. Miles’ challenged price restraints, namely, to combat loss leadering and increase the profitability of its products in order to retain adequate distribution—objectives since viewed as pro-competitive by the FTC in the context of vertical advertised-price restraints.⁵²

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Further, and more fundamentally, the extent to which RPM invariably causes consumer harm is far from clear. Even the dissent in *Dr. Miles* made that point. More recently, the Seventh Circuit in *Isaksen v. Vermont Castings, Inc.*⁵³ expressed the same skepticism:

[W]e would have difficulty understanding how a 10 percent factor in a tiny market could restrain competition . . . merely by placing a floor under its dealers’ prices (“resale price maintenance”). If the floor were set higher than necessary to induce dealers to provide the point-of-sale services that would maximize the sales of Vermont Castings’ stoves, Vermont Castings not only would be transferring wealth from itself to its dealers (and why would it want to do that?) but would be pricing its stoves out of the market; consumers would switch to competing products whose retail prices were not inflated by resale price maintenance.⁵⁴

The recognition of plausible benefits and uncertain consumer harm cautions strongly against application of a per se standard for RPM—a standard unwarranted “where the economic impact of [the practice] is not immediately obvious.”⁵⁵

The argument in favor of rule of reason treatment is not that RPM causes no harm under any circumstance; it is, simply, that it should not be treated as unlawful under all circumstances. With no marker pointing to the inevitability of anticompetitive effects, it is time to bring RPM under the umbrella of the rule of reason. The *Khan* Court recognized, albeit indirectly, that the rule of reason could effectively address RPM masquerading as maximum resale price schemes, and the Court in *Texaco Inc. v. Dagher*⁵⁶ arguably foreshadowed a coherent rule for maximum and mini-

⁴⁹ PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 2006-1 Trade Cas. (CCH) ¶ 75,166 at 104,323-24 (5th Cir. 2006).

⁵⁰ See, e.g., ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW AND ECONOMICS OF PRODUCT DISTRIBUTION 58-76 (2006); AREEDA & HOVENKAMP, *supra* note 29, § 1631; Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond Conventional Wisdom*, 63 ANTITRUST L.J. 59 (1994).

⁵¹ See, e.g., Pauline M. Ippolito & Thomas R. Overstreet, Jr., *Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission’s Case Against the Corning Glass Works*, 39 J.L. & ECON. 285 (1996); Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & ECON. 263 (1991).

⁵² *In re Interco, Inc.*, Trade Reg. Rep. [Transfer Binder FTC Complaints and Orders 1993 to 1997] ¶ 23,791, at 23,540-42 (FTC March 27, 1995).

⁵³ 825 F.2d 1158 (7th Cir. 1987).

⁵⁴ *Id.* at 1161 (citation omitted).

⁵⁵ *Khan*, 522 U.S. at 10 (quoting *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458-59 (1986)).

⁵⁶ 126 S. Ct. 1276 (2006).

mum resale price strategies by characterizing its holding in *Khan* as “concluding that vertical price-fixing arrangements are subject to the rule of reason.”⁵⁷

RPM is not the stuff of conduct that “so often prove[s] so harmful to competition and so rarely prove[s] justified that the antitrust laws” should condemn it as per se illegal.⁵⁸ The failure of *Dr. Miles* to withstand antitrust law developments, emergence of economic theory that credits plausible procompetitive explanations for RPM, and the lack of coherence between per se treatment of RPM and the courts’ acceptance of (or rule of reason treatment of) a broad spectrum of other vertical price-related conduct warrant reversal in *Leegin* and restoration of a modern rule of reason for RPM. ●

⁵⁷ *Id.* at 1279.

⁵⁸ *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998).