Federal Trade Commission

An Open Letter to the Supreme Court of the United States
from Commissioner Pamela Jones Harbour[1]

February 26, 2007

Subject: The Illegality of Vertical[2] Minimum Price Fixing

Mr. Chief Justice, and May It Please the Court:

Vertical minimum price fixing is almost always harmful to consumers. It creates no incentive for distributors and retailers to become more cost-effective in the delivery of goods and services to consumers. Indeed, it transfers to consumers the consequences of inefficient business practices: it typically leads to higher prices without bestowing countervailing benefits. A decision by this Court to overrule *Dr. Miles Medical Co.*[3] would wrongly eliminate *per se* illegality for vertical minimum price fixing. Moreover, unless the Court replaces *Dr. Miles* with a clearly articulated legal framework that preserves (at a minimum) a strong presumption of illegality, vertical minimum price fixing will become beyond effective challenge under the federal antitrust laws. This outcome would contradict rational antitrust policy and decrease consumer welfare.

The Court is urged to keep these principles in mind as it considers the case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[4] Leegin is a manufacturer of women's fashion

---

1 This letter reflects my own views. It does not purport to represent the views of the Commission or any other Commissioner.

2 A vertical arrangement is one between actors at different levels of the distribution system, such as a retailer and a manufacturer. A horizontal arrangement is one between actors at the same level of the distribution system, including arrangements between competitors.

3 *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

4 Docket No. 06-480 (Oct. 4, 2006). This matter is scheduled for oral argument on March 26, 2007.

accessories marketed under the Brighton® name. Leegin entered into vertical minimum price fixing[5] agreements with downstream retailers, primarily specialty boutiques. These types of agreements have been illegal under the Sherman Act[6] since this Court's 1911 decision in the *Dr. Miles* case. At trial, the jury awarded treble damages to PSKS, a former Leegin retailer that had been terminated for defying Leegin's unlawful vertical minimum price fixing scheme and selling Leegin's products at a discount.

Leegin and its *amici* ask the Court to reverse *Dr. Miles* and, in effect, legitimize vertical minimum price fixing, even though consumers inevitably will face higher prices as a result. The United States – with the concurrence of the Federal Trade Commission, acting on behalf of only three of its five Commissioners – has filed an *amicus* brief in support of Leegin's position.[7] I was one of the dissenting Commissioners. I voted against the Commission's decision to join the government's *amicus* brief, and this letter explains why.

As discussed in greater detail below, overruling the decision in *Dr. Miles* case would be:

- bad as a matter of law (Part I);
- bad as a matter of economic policy (Part II);
- expressly contrary to Congressional findings and intent (Part III); and
- unsupported by the facts of the *Leegin* case itself (Part IV).

The Court need not enmesh itself in a debate over the right "label" to apply to the analysis of vertical minimum price fixing agreements (*per se* or rule of reason or something else). Rather, the Court should focus on questions that elevate function over form. When a particular restraint

---

[5] Vertical minimum price fixing refers to an agreement between a manufacturer and retailers under which the retailers are obligated to sell that manufacturer's products to consumers only at or above the prices specified by the manufacturer. Thomas K. McCraw, *Competition and "Fair Trade": History and Theory*, 16 RES. IN ECON. HISTORY 185, 185 (1996). Those who favor vertical minimum price fixing agreements often refer to them using less pejorative terms, such as resale price maintenance, margin maintenance, or even retailer incentives. *Id.* ("It is no accident that proponents of legalizing resale price maintenance have used 'fair trade' as a synonym, while opponents have preferred terms such as 'vertical price fixing.'"); *see also Leegin*, Brief for Petitioner at 20 (vertical minimum price fixing "may be used by a manufacturer to provide its retailers with incentives to provide service or other promotional activities, where a retailer might otherwise have an inherent bias to rely too much on low prices . . . .").

[6] 15 U.S.C. § 1 *et seq.*

[7] *Leegin*, Brief for the United States As Amicus Curiae Supporting Petitioner (Jan. 22, 2007).

almost always increases prices to consumers, what legal presumptions should be imposed? Upon whom? And with what degree of rigor might those presumptions be rebutted, if at all?

I. Vertical Minimum Price Fixing Is – And Should Remain – Illegal As A Matter Of Law

A longstanding precedent, having celebrated its 95th birthday, should only be overruled if the Court is firmly convinced that the case was wrongly decided. *Dr. Miles* is not such a case. The arguments advanced for overruling *Dr. Miles* appear to be based on a misstatement of the grounds for the decision, as well as a failure to account for historical facts likely known to the Court in 1911 but not reflected in the Court's opinion. The *Dr. Miles* decision remains a vital tool in the public antitrust enforcement arsenal, particularly for state attorneys general. It is not, however, the inflexible impediment to rational marketing portrayed by Leegin. As developed in detail below, the Court's subsequent decisions create a great deal of flexibility and latitude for manufacturers to persuade retailers to abide voluntarily by a manufacturer's sales preferences.

Leegin and its *amici*, argue, incorrectly, that the *Dr. Miles* decision was based on respect for the venerable rule prohibiting restraints on alienation.[8] True, the *Dr. Miles* Court did observe that "restraints upon alienation have been generally regarded as obnoxious to public policy."[9] But the Court explicitly rejected Dr. Miles's claim that it had the inherent right to control subsequent pricing of goods, simply because it had owned the goods at the time of sale and pricing was an incident "derived from the liberty of the producer."[10] As the Court explained, "Whatever right the manufacturer may have to project his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, but upon agreement."[11]

In *Dr. Miles*, the manufacturer did enter into agreements to project its control beyond its own sales, but those agreements were illegal under the antitrust laws.[12] The arrangements between Dr.

---

8 *Leegin*, Brief for Petitioner at 9.

9 *Dr. Miles*, 220 U.S. at 383.

10 *Id.*

11 *Id.* at 384.

12 "It is as we have seen, a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition. . . . Thus a combination between the manufacturer, the wholesalers, and the retailers, to maintain prices and stifle competition has been brought about." *Id.* at 381 (citations omitted).

Miles and its 25,000 retailers constrained all downstream pricing in the goods; the Court held that this was the functional equivalent of horizontal price fixing agreements among the dealers themselves.[13] The Court deemed such price fixing agreements unlawful, and incapable of being "saved by the advantages which the participants expect to derive from the enhanced price to the consumer."[14] In other words, the Court in *Dr. Miles* grounded its decision on traditional antitrust concepts – elimination of competition and consequent harm to consumers – rather than a policy of disfavoring restraints on alienation.

Leegin and its *amici* further mischaracterize the agreements between Dr. Miles and its 25,000 retailers when they portray the agreements as unilateral policy decisions by Dr. Miles. It is quite likely that Dr. Miles adopted its vertical minimum price fixing policies in order to avoid any adverse effects of the so-called "Tripartite Plan."[15] As described in the Third Circuit's 1906 *Jayne v. Loder*[16] decision, the plan was a joint arrangement entered into by three affiliated trade associations representing almost all of the manufacturers, wholesalers, and retailers of proprietary medicines.[17] The purpose of their agreement was for manufacturers to establish and maintain wholesale and retail prices, at levels deemed adequate by the downstream actors, or risk being boycotted by them.[18] Dr. Miles implemented its so-called "unilateral" pricing actions in that context, of which the Court undoubtedly was aware.[19] In effect, the *Dr. Miles* Court relieved a plaintiff of having to prove the fact of a horizontal price fixing cartel where functional equivalency could be shown. This was neither an imprudent nor novel result.[20]

---

[13] *Id.* at 384-85 (". . . complainant 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 or combination between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.").

[14] *Id.* at 385.

[15] JOSEPH C. PALAMOUNTAIN, JR., THE POLITICS OF DISTRIBUTION 94 (Greenwood Press 1968) (1955).

[16] 149 F. 21 (3rd Cir. 1906) (termination of a dealer for "aggressive price cutt[ing]").

[17] *Id.*

[18] Such cartel disciplinary actions appear to have continued at least into the 1930s. PALAMOUNTAIN , *supra* note 15, at 94, 238.

[19] The Court expressly relied upon the decisions relied upon by Justice (then Judge) Lurton in the decision of *John D. Park & Sons Co. v. Hartman*, 153 F. 24 (6th Cir. 1907), which included the *Jayne* decision. 153 F. at 35.

[20] Warren S. Grimes, *Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CAL. L. REV. 815, 854 (1992) [hereinafter Grimes, *Spiff*] ("The consequences of fixed resale prices are the same whether or not a conspiracy can be proven.").

The 1997 outcome in *State Oil Co. v. Khan* [21] does not weaken the vitality of *Dr. Miles*. In *Khan*, the Court overruled prior precedent regarding vertical maximum price fixing, in part because "neither the parties nor any of the *amici curiae* have called our attention to any cases in which enforcement efforts have been directed solely against the conduct encompassed by [that] *per se* rule."[22] In sharp contrast, the *Dr. Miles* precedent is of continuing utility in public antitrust enforcement.[23] In particular, the rule of *per se* illegality for vertical minimum price fixing has been used by this Court to invalidate a number of state regulatory measures.[24] Those regulations typically promoted manufacturer-administered downstream pricing of products. The laws were held to violate the Sherman Act because the prices set by the manufacturers were not adequately supervised by the state itself.[25] The implicit assumption of those cases – *i.e.*, that manufacturers cannot and should not be trusted to set downstream consumer prices unless the state actively oversees the resulting displacement of competition – cannot easily be squared with the arguments advanced by Leegin and its *amici*. Overruling *Dr. Miles* likely would have an unsettling effect on both antitrust and state regulatory laws.

Finally, if the Court overrules *Dr. Miles* without also overruling (or substantially modifying) precedents that were adopted to mitigate or evade the *Dr. Miles* rule of *per se* illegality, the Court may render vertical minimum price fixing agreements presumptively lawful. Under *Colgate*,[26]

---

[21] 522 U.S. 3 (1997) (abandoning the *per se* rule against vertical maximum price fixing, where the manufacturer specifies a maximum price and prohibits dealers from selling to consumers at a higher price).

[22] *Id.* at 18-19.

[23] *See, e.g.*, Commissioner Pamela Jones Harbour, Vertical Restraints: Federal and State Enforcement of Vertical Issues, Written Materials Provided for the ALI-ABA Course of Study on Product Distribution and Marketing (Mar. 8-10, 2007), *available at* http://www.ftc.gov/speeches/harbour.htm (listing of recent state and federal government enforcement actions against vertical restraints of trade, at least 27 of which have involved vertical minimum price fixing).

[24] *See, e.g.*, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341 (1987) ("Resale price maintenance has been a *per se* violation of § 1 of the Sherman Act since the early years of national antitrust enforcement" (citing *Dr. Miles*; other citations and internal quotation marks omitted)).

[25] *See, e.g., 324 Liquor*, 479 U.S. at 345 ("New York neither establishes prices nor reviews the reasonableness of the price schedules. . . . New York does not monitor market conditions or engage in any pointed reexamination of the program.") (quotation marks and citations omitted).

[26] *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (recognizing right of manufacturer to announce in advance the circumstances under which it will refuse to deal).

Monsanto,[27] and *Business Electronics*[28] (to name a few), it may be virtually impossible to prove even the fact that a vertical minimum pricing restraint has been imposed by a contract, combination or conspiracy.[29] The practical effect of these cases is that an agreement inferred from a course of business conduct between vertical actors faces virtually insurmountable hurdles of proof in order to "exclude the possibility of independent action,"[30] absent an express agreement. Few (if any) economists – let alone antitrust enforcers – would take such a benign view of vertical minimum price fixing.[31]

II. As A Matter of Economic Policy, Vertical Minimum Price Fixing Remains Harmful To Consumers

Leegin and its *amici* claim that modern economic analysis[32] mandates the resuscitation of vertical minimum price fixing, because there might be some instances where vertical minimum price

---

27 *Monsanto Co. v. Spray-Rite Corp.*, 465 U.S. 752 (1984) (requiring evidence that tends to exclude the possibility of unilateral action by manufacturer and dealers).

28 *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) (dealer termination may not be deemed to be based on pricing unless an agreement as to a price or pricing level can be shown to exist between the manufacturer and the remaining dealers).

29 *See* Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1489 (1983) ("As a result, it is very difficult for a plaintiff (either the government or a private party) to win a rule of reason case. Thus, a determination to adopt a rule of reason approach is not merely a procedural determination affecting the scope of an investigation or trial.").

30 *Monsanto*, 465 U.S. at 768.

31 *Leegin*, Brief of Economists at 16 ("There is some disagreement within the economics literature, and among *amici*, regarding the frequency with which minimum RPM has procompetitive or anticompetitive effects.").

32 Leegin's views reflect the version of modern economic analysis practiced by the most conservative proponents of the so-called Chicago School, who favor a static, rather than dynamic, view of economics. *See, e.g.*, Mark Blaug, *Is Competition Such a Good Thing? Static Efficiency versus Dynamic Efficiency*, 19 REV. INDUS. ORG. 37, 44-47 (2001). "The Chicago school does not deny that there is a case for antitrust law but they doubt that it is a very strong case because most markets, even in the presence of high concentration ratios, are 'contestable' (Bork, 1978). How do we know? We know because [of] the good-approximation assumption: the economy is never far away from its perfectly competitive-equilibrium growth path! Believe it or not, that is all there is to the 'antitrust revolution' of the Chicago School." *Id.* at 47. (The "good-approximation assumption" refers to the intuition that observed prices and quantities may be treated as good approximations of their long-run equilibrium values. *Id.* at 40.)

fixing enhances competition.[33] Leegin's reliance on economic theory is misplaced, however, because Leegin's arguments contradict a fundamental principle of antitrust law. The essence of the Sherman Act, according to this Court's decision in *Reiter v. Sonotone*,[34] "is to ensure fair price competition in an open market."[35] If consumers are treated as advocated by Leegin and its *amici*, consumers will lose many critical benefits of fair price competition in an open market.

Leegin's main economic argument is that the higher retail prices generated by vertical minimum price fixing will lead to extra profits for retailers, which will create incentives for Leegin's dealers to provide additional "services" to consumers. But the actual benefit to consumers is far from clear, especially in this particular product market.[36] It appears that the primary "service" the retailers offer is to steer consumers toward Leegin's products and away from those of other manufacturers, even if an individual customer's needs might be better met by alternative products in the dealer's inventory. The guaranteed margins sponsored by Leegin's vertical minimum price fixing accomplish little more than a consumer-funded bribe to retailers, in return for which the retailers will favor Leegin's merchandise.[37] Leegin's conduct also invites other manufacturers to respond with higher consumer-funded bribes of their own.

Leegin and its *amici* make two simultaneous claims: first, that these added "services" are sufficiently beneficial to consumers to outweigh any possible harm to competition; and second, that consumers prefer to deal with discounters who might offer fewer or different services. Both cannot be true, unless this Court is ready to declare consumer preferences to be market failures. This Court

---

[33] When Congress passed the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 80 [hereinafter Consumer Goods Pricing Act] (*see infra* Part III), Congress made it clear that the law was not intended to affect the unilateral ability of manufacturers to suggest retail prices or to chose the parties with whom they would do business (within the meaning of the *Colgate* doctrine). *See* S. Rep. 94-466, *Act to Repeal Enabling Legislation for Fair Trade Laws* (1975), at 3. Accordingly, the question in this case is limited to whether manufacturers should be permitted to enter into *express* vertical minimum price fixing agreements.

[34] 442 U.S. 330 (1979).

[35] *Id.* at 342.

[36] *See infra* Part IV (in the factual context of this product market – ladies handbags and other fashion accessories – any "services" provided to consumers are of particularly dubious value).

[37] *See* Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L. J. 83, 109-110 (1995) (noting that unlike commercial bribes, consumer-funded higher margins may be inexpensive for the manufacturer, but are, nonetheless, as capable as a bribe of causing economic injury by distorting the allocation of goods).

is asked to affirm Leegin's utter lack of faith in an economy where consumers are able to express their preferences with their pocketbooks (Brighton®-branded or otherwise).[38]

A review of the 1936-37 issues of the *Trade Regulation Review: A Bulletin on Economics and Law of Business Co-operation* [39] shows that most of the same arguments for or against vertical minimum price fixing were being advanced then as are being advanced today. The so-called new wisdom of modern analysis is not much more than repackaged old chestnuts. Indeed, many of the current arguments appear in the *Dr. Miles* opinion itself.[40] Furthermore, as discussed more fully below,[41] the United States experimented with vertical minimum price fixing at the state level for over forty years. In response to this economic learning, Congress ultimately declared the experiment a failure by passing the Consumer Goods Pricing Act of 1975, which banished vertical minimum price fixing on a national scale.

Sound economic policy grounded in the well-being of consumers should favor lower consumer prices and greater efficiency in the distribution and sale of consumer goods.[42] Vertical minimum price fixing, by itself, promises neither. In many (if not most) cases, vertical minimum price fixing will lead to prices that provide a margin of comfort for a manufacturer's *least* efficient

---

38 "[A]uthorizing the manufacturer to decide what mix of products and services is desirable, instead of allowing the market to decide that question, is inconsistent with the nation's commitment to a competitive process." Pitofsky, *supra* note 29, at 1493. "Simply put, the argument assumes an identity between cost and value and thereby begs the question of the competitive marketplace by denying the consumer the right to assign his own value to the intangible asset of trademark or image." H.Rep. 94-341 at 5 (quoting FTC Chairman Lewis Engman).

39 TRADE REGULATION REVIEW: A BULLETIN ON ECONOMICS AND LAW OF BUSINESS COOPERATION, Vol. 1-7 (Reinhold Wolff, Dec. 1936 - Nov. 1937)

40 Even in 1911, manufacturers and retailers favoring vertical minimum price fixing cited the need to create incentives (via margin enhancement) to stock the product, provide pre-sale product promotion, avoid competition from discounters, and protect the product's reputation and value image. *Dr. Miles*, 220 U.S. at 375 (noting that the complaint alleged that ". . . druggists . . . cannot[] realize sufficient profits by the sale of the medicines at the cut-prices, . . . 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 . . . suffers loss of reputation and becomes of inferior value and demand.") (internal quotes omitted). The "new" economic learning has over a century's worth of history attached.

41 *See infra* Part III.

42 *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) ("Low prices, we have explained, benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . Our interpretation of the Sherman Act also incorporates the notion that condemnation of practices resulting in lower prices to consumers is especially costly because cutting prices to increase business often is the very essence of competition.") (internal quotations and citations omitted)).

retailers.[43] In addition, the higher dealer profits yielded by vertical minimum price fixing are likely to fund benefits that create as much or more value for Leegin's interbrand *competitors* than for consumers. Creating a more attractive shopping venue in a multiproduct store, for instance, benefits Leegin's interbrand competitors who are able to free-ride on Leegin's initiative.

Proponents of vertical minimum price fixing often assign belittling labels – such as "knaves"[44] and "free-riders"[45] – to efficient retailers who share the fruits of their efficiency with consumers. But these labels do not necessarily convey antitrust meaning. The "knaves" and "free-riders" may provide better sales locations, consumer services, and information than their higher-priced competitors. If so, vertical minimum price fixing only serves to block distribution and retailing efficiencies that otherwise would reach consumers and enhance competition.

If *Dr. Miles* is reversed and vertical minimum price fixing becomes more prevalent, consumers likely will suffer the following outcomes:

- higher prices set by manufacturers;[46]

---

[43] *See* Robert L. Steiner, *Intrabrand competition – stepchild of antitrust*, 36 ANTITRUST BULL. 155, 177 (1991) ("[Vertical] restraints have often sheltered an anachronistic, high-cost group of retailers against the entry of new and more efficient types of distributors."); Robert L. Steiner, *How Manufacturers Deal With The Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, 65 ANTITRUST L. J. 407, 419-25 (1997) (describing the effect on incumbent retailers of the emergence of more efficient retailers who provide a different service package which is equal or superior to those being provided by incumbents).

[44] "I cannot believe that in the long run the public will profit by this court permitting *knaves* to cut reasonable prices for some ulterior purpose of their own." *Dr. Miles*, 220 U.S. at 386 (Holmes, J., dissenting) (emphasis supplied).

[45] The concept of the free-rider is generally ascribed to the work of Professor Telser. *See* Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960). "To sum up, the free-rider justification of resale price maintenance has severe limitations. Its plausibility is palpably low in many product areas where RPM is used." FREDERIC M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 554 (3d ed. 1990). Indeed, the efficiency claims for vertical minimum price fixing made by Bork, and others, reflect "a special case not applicable under many circumstances. The Bork argument should not be accepted by the Court as a general principle." *Leegin*, Brief for Comanor & Scherer at 5. ("The Bork argument" refers to the proposition that vertical price fixing promotes "higher margins which promote enhanced consumer welfare and efficiency." *Id.* at 4.)

[46] Pitofsky, *supra* note 29, at 1488 (". . . minimum vertical price agreements lead to higher, and usually uniform, resale prices); H. Rep. 94-341, *Consumer Goods Pricing Act of 1975*, at 3 (1975) ("From the consumers' point of view, 'fair trade' laws have one effect – higher prices."). The same page of the report cited studies showing that vertical minimum price fixing led to price increases as high as 27-37.4%. The report also cited a Library of Congress study performed for Senator Brooke, finding that fair trade cost consumers $3 billion a year, and a Stanford study that put the annual cost at $6.5 billion a year.

- reduced efficiency in distribution and retailing;[47]
- lower levels of retail sales per outlet;[48]
- higher rates of business failure;[49]
- reduced opportunities for effective entry by new competitors and products;[50]
- distortion of retailer incentives to provide objective comparisons of competing brands on their shelves;[51]
- diminished levels of competition between competing brands of goods;[52] and

---

47 *See, e.g.,* Pitofsky, *supra* note 29, at 1493 ("To deny the sellers access to products because they are aggressive in pricing (and perhaps more efficient as well) hardly seems to be a service to consumers, or a vote of confidence in the competitive process."); Statement of Senator Brooke, 121 CONG. REC. 1339 (Jan. 27, 1975) ("The crux of the problem of resale price maintenance, is whether the consumer should reap the benefits of the most efficient forms of retailing or . . . should be forced to pay more in order to make retailing . . . a more comfortable occupation.") (quoting an editorial from *Consumers Union*)).

48 "It has been established by a U.S. Department of Justice study prepared by Dr. Leonard Weiss in 1969, that stores in fair trade States almost universally have a significantly lower volume of retails sales than stores in free trade areas . . . sales volume per store is systematically lower under fair trade." Statement of Senator Brooke, 121 CONG. REC. 38,050 (Dec. 2, 1975).

49 S. Rep. 94-466, *supra* note 33, at 3 (" . . . 'fair trade' States with fully effective laws have a 55 percent higher rate of firm failures than free trade states.").

50 *See* H. Rep. 94-341, *supra* note 46, at 5; Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83, 98 (1995) ("Preserving entry opportunities for new retailers and new retailing approaches is a critical component to the dynamic growth of our economy. Intrabrand competition serves this goal by preserving one of the new entrant's most potent competitive tools: the ability to discount popular branded items that draw customers.").

51 "The consumer . . . has little reason to suspect that a retailer will promote a particular brand for reasons other than its merits. In short, consumers often may view retailers as neutral, advice-giving marketers, raising the risk that consumers will accept the retailer's self-interested purchase advice." Grimes, *Spiff*, *supra* note 20, at 830 (further noting that retailer competition keeps margins down for all products – limiting the incentive to promote one product over another).

52 H. Rep. 94-341, *supra* note 46, at 3-4 (citing the testimony of Keith Clearwaters, Dep. Ass't Attorney General, Antitrust Division, U.S. Dep't of Justice).

- increased competition by manufacturers for the loyalty of their dealers, the costs of which will be borne by consumers.[53]

It is no wonder, therefore, that most industrialized nations of the world treat vertical minimum price fixing as *per se* illegal – sometimes even subject to penalties – while non-price vertical restraints are treated more leniently.[54]

III. <u>Congress Intends Vertical Minimum Price Fixing To Be *Per Se* Unlawful</u>

The Court is asked, in effect, to repeal the Consumer Goods Pricing Act of 1975, in which Congress expressed its clear support for a *per se* rule against vertical minimum price fixing. Congress repeatedly has declined to reverse its position. The Court should respect Congressional intent.

Congress passed the Miller-Tydings Resale Price Maintenance Act[55] in 1937, twenty-six years after the Court issued its *Dr. Miles* opinion. In deference to so-called "fair trade" laws passed by various states early in the Depression,[56] the Miller-Tydings Act amended the Sherman Act to create an exemption for vertical minimum price fixing agreements that were promoted under state fair trade laws.[57] Thus, until the mid-1970s, Congress sponsored an economic experiment at the state

---

[53] Indeed, competitive responses in some industries could result in upward-spiraling price escalations to attract dealer loyalty.

[54] *See, e.g.*, Ittai Paldor, *The Vertical Restraints' Paradox: Justifying the Different Legal Treatment of Price and Non-price Vertical Restraints* at 3-4 (Jan. 24, 2007), *available at* http://ssrn.com/abstract=951609 (listing the United States, Canada, the United Kingdom, the European Union, and Australia as countries with a rule of *per se* illegality for vertical minimum price fixing, and noting their generally more lenient treatment of non-price vertical restraints); Australian Competition & Consumer Comm'n News Release, *Topfield distributor penalised $238 000 for resale price maintenance* (Dec. 13, 2006), *available at* http://www.accc.gov.au/content/index.phtml/itemId/773132/fromItemId/2332.

[55] Miller-Tydings Resale Price Maintenance Act (Act of Aug. 17, 1937, Pub. L. 314, ch. 690, Title III, 50 Stat. 693) [hereinafter Miller-Tydings Act]; *see also* McGuire-Keogh Fair Trade Enabling Act (Act of July 14, 1952, Pub. L. 543, ch. 745, 66 Stat. 631) (expanded exemption to cover so-called non-signor statutes invalidated by this Court in *Schwegmann Bros. v. Calvert Distillers Corp* , 341 U.S. 384 (1951) [hereinafter McGuire Act]. Subsequent citations to the Miller-Tydings Act are intended to refer to the McGuire Act as well.

[56] SCHERER & ROSS, *supra* note 45, at 556 ("The U.S. federal fair trade law was born during the Great Depression of the 1930s. It died in the recession of 1975.").

[57] Prior to 1937, Congress had refused to pass legislation permitting vertical price fixing every session since 1914, and President Roosevelt had opposed passage of the Miller-Tydings Act. *See* PALAMOUNTAIN, *supra* note 15, at 236; *Deadlock in the Resale Price Movement*, TRADE REG. REV. (July 1937), at 2 ("Endeavors to extend price

level, permitting individual states to test the real-world effects of vertical minimum price fixing.[58] During that time, Congress continued its refusal to adopt federal legislation that would have reversed *Dr. Miles* and allowed vertical minimum price fixing on a national scale.[59]

Ultimately, Congress declared the states' experiment with vertical minimum price fixing a failure.[60] Recognizing that the fair trade laws were "anachronistic" in a modern economy, Congress passed the Consumer Goods Pricing Act of 1975, which repealed the Miller-Tydings Act. Congress found that vertical minimum price fixing served little purpose other than raising prices to consumers.[61] Congress examined and rejected various justifications for vertical minimum price fixing, including: the provision of additional services; the protection of small businesses; and providing entry opportunities for new businesses.[62] Congress also found that legalized vertical

---

fixing of branded [goods] over a nation-wide area came to a standstill when President Roosevelt, early in May, sidetracked the Tydings-Miller Resale Price Maintenance Bill."). Professor Kramer claims that the Miller-Tydings Act was enacted in no small measure because the National Association of Retail Druggists ("NARD") made a significant cash "payoff" to "a high official in the [Roosevelt] administration." Victor H. Kramer, *Legislating fair trade by foul means (1937-1939)*, 36 ANTITRUST BULL. 81, 87 (1991). Palamountain noted that similar tactics were used to secure state statutes permitting vertical price fixing. PALAMOUNTAIN , *supra* note 15, at 238 n.12 (noting that a Connecticut grand jury found that bribes jointly funded by NARD and McKesson & Robins, a drug wholesaler, had been used to get Connecticut's fair trade law adopted).

58 *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

59 During the floor debate on the Consumer Goods Pricing Act, Representative Van Deerlin noted that the "move in Congress in the 1960's to enact a national fair trade law . . . never reached the mark-up stage in our House Commerce Committee." 121 CONG. REC. 23,661 (1975). In that same statement, Van Deerlin said that fair trade was not fair to consumers; "referred to the benefits to manufacturers and retailers;" provided "good profits for the retailers and bad prices for consumers;" and created "no evidence that the failure rates for small businessmen have been any higher in States lacking the dubious benefits of fair trade laws." Van Deerlin concluded his statement by saying, "Clearly, fair trade is an idea whose time has gone." *Id.*

60 "[O]ur economy has evolved to the point that it no longer requires and no longer is served by resale price maintenance under the fair trade laws. . . . Moreover, the fair trade laws have been abused. . . . [T]he fair trade laws have clearly become anti-consumer. In an economic system built on the principle of competition, they are an anachronistic anomaly whose repeal is long overdue." *Id.* at 23,662 (statement of Rep. Seiberling). "[T]he seriously depressed economy of the 1930's exists no longer and the [fair trade] laws should now be repealed to aid the consumer." *Id.* at 38051 (statement of Sen. Hruska).

61 *See supra* note 46 (noting Congressional findings of significantly higher prices in states permitting vertical minimum price fixing).

62 S. Rep. 94-466, supra note 33, at 3-4; H. Rep. 94-341, supra note46, at 4-5 (". . . it finds no real support in the facts, [and] . . . 'fair trade laws can actually work to stifle market entry by new small retail businesses,[such that] . . . resale price maintenance could not be justified.").

minimum price fixing provided a cover and invitation for *horizontal* price fixing as well.[63] President Ford recognized the *per se* illegality of vertical minimum price fixing when he signed the Consumer Goods Pricing Act into law.[64]

Congress had no reason to suspect that vertical minimum price fixing would survive the 1975 legislation, or that Congress might need to specify a liability standard for vertical minimum price fixing conduct. After all, vertical minimum price fixing already was *per se* unlawful under *Dr. Miles*. In addition, the Court had made clear its aversion to inquiries about the reasonableness of fixed prices,[65] and Congress therefore had no reason to suspect that the Court might wish to encourage such inquiries in the future.

This Court expressly found, in its 1977 *GTE Sylvania*[66] decision, that Congress intended vertical price fixing to be *per se* unlawful.[67] That same footnote in the *GTE Sylvania* opinion also endorsed Justice Brennan's observation in *White Motor Co.*[68] that minimum vertical price fixing tends to reduce both interbrand and intrabrand competition.[69]

---

63 *Id.* at 3-4.

64 2 PUB. PAPERS 724 (Dec. 12, 1975).

65 *See, e.g., United States v. Trenton Potteries*, 273 U.S. 392, 397-98 (1927) ("The reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow. . . . Agreements which create such potential power may well be held in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether the particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.").

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

67 *Id.* at 51 n.18 (". . . Congress recently has expressed its approval of a per se analysis of vertical price restrictions by" the passage of the Consumer Goods Pricing Act); *see also* Statement of Rep. Jordan, 121 CONG. REC. 23,659 (Jul. 21, 1975) ("Together, the Miller-Tydings and McGuireActs constituted special interest legislation that legitimized what, without the exemption granted by those acts, would be per se violations of the antitrust laws.").

68 *White Motor Co. v. United States*, 372 U.S. 253 (1963).

69 *Id.* at 268 (Brennan, J., concurring) ("Resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands.").

On four subsequent occasions, Congress re-emphasized its belief in a *per se* rule for vertical minimum price fixing. Congress explicitly forbade the use of federal antitrust enforcement appropriations to advocate for the reversal of *per se* illegality for such conduct.[70]

Leegin in effect asks the Court to resolve a political question: should retailers function solely as the sales agents for manufacturers, to the substantial exclusion of any role as purchasing agents for consumers?[71] Leegin implicitly favors the sales agent model, but this model would deprive consumers of competition between retailers, including any efficiencies that competition might produce. This is not what Congress intended. When Congress repealed the exemptions that permitted vertical minimum price fixing, Congress believed this otherwise unlawful pricing practice had been ushered into oblivion, never to trouble consumers further. Leegin and its *amici* now urge the Court to make expressly contrary findings. The Court should not authorize its own economic experiment, on a far grander scale than Congress ever permitted.[72]

IV. <u>The *Leegin* Facts Do Not Support Overruling *Dr. Miles*</u>

Leegin adopted its vertical minimum price fixing regime to insulate its own stores from competition from its other dealers. Even if there were a case to be made for more lenient treatment of restraints imposed by a manufacturer to control identifiable market failures in product distribution, this case hardly presents compelling facts to support that outcome.

---

[70] Departments of Commerce, Justice, and State, the Judiciary, and Related Appropriations Act, 1984, § 510, Pub. L. No. 98-166, 97 stat. 1102-03 (1983); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1986, § 605, Pub. L. No. 99-180, 99 stat. 1169-71 (1985) (The provisions of this act expressly cited *Dr. Miles* with approval, and the then-just-released Department of Justice Vertical Restraint Guidelines with disfavor. Finding the Guidelines inconsistent with existing law and not in the interests of the business community, the appropriations statute expressly stated that those Guidelines "shall not be accorded any force of law or be treated by the courts of the United States as binding or persuasive," and called for their recall. *Id*. at 99 stat. 1170. [DOJ's now-withdrawn Vertical Restraint Guidelines are available at 4 TRADE REG. REP. (CCH) ¶ 13,105 (1985)]); Continuing Appropriations for Fiscal Year 1987, § 605, Pub. L. No. 99-500, 100 Stat. 1783-73 (1986); Continuing Appropriations, Fiscal Year 1988, § 605, 101 Stat. 1329-38 (1987). *Compare with Leegin*, Brief for Petitioner at 35 ("For example, in the mid-1980s, Congress *twice* prohibited the Department of Justice from using appropriations to advocate for a reversal of the *per se* rule against resale price maintenance.") (emphasis added).

[71] *See* RUTH PRINCE MACK, CONTROLLING RETAILERS 91 (1936) ("Control of prices in part determined whether the retailer was the 'selling agent for the manufacturer' or 'the purchasing agent for the consumer'.").

[72] A Court-sponsored experiment in vertical minimum price fixing would be on a grander scale because it would permit vertical minimum price fixing on a national rather than state-by-state basis. It also would be undisciplined by a rule of *per se* illegality to guard the boundaries of the experiment.

First, the restraints at issue in this case cannot be characterized as purely vertical, because they are substantially horizontal as well. Leegin operates seventy of its own retail stores. These stores compete directly with approximately 5,000 independent retailers, including plaintiff PSKS, who also sell Leegin's goods.[73] Leegin appears to have crafted a horizontal price fixing agreement to protect its own stores from competition with other retailers. Leegin does not explain why the antitrust laws should not apply to this horizontal price fixing conduct. Indeed, Leegin's own expert condemns its conduct when he argues in favor of *per se* illegality for any agreement that has "any horizontal component."[74]

Second, Leegin misrepresents that it has chosen to market its products through smaller, boutique-type stores, rather than chain stores or department stores, and must engage in vertical minimum price fixing to guarantee that the boutiques earn a sufficient margin to justify carrying Leegin's products.[75] In truth, Leegin sells not only through its own chain of stores, but also through Nordstrom, a major department store chain. The information regarding Nordstrom is disclosed without elaboration in an obscure footnote toward the end of Leegin's expert's report (which was excluded at trial).[76]

Third, Leegin presents a factually inapplicable justification for its vertical minimum price fixing. Leegin claims that if is unable to control the retail prices of its dealers, it might have to integrate into retailing – which, as Leegin's expert posits in his report, would "draw Leegin away from its core competency (creating and manufacturing women's fashion accessories)."[77] But Leegin, with its seventy stores, is already integrated into retailing (albeit not to the exclusion of other retailers). Furthermore, even if the argument were factually applicable, Leegin's expert does not explain how to reconcile it with sensible antitrust policy in light of the following contradiction: why is it preferable for a manufacturer operating outside the scope of its core competency to set the prices charged by retailers, instead of allowing the retailers – operating *within* the scope of their core competency – to determine prices themselves?

Fourth, a legion of coupon-clipping, bargain-hunting consumers in this country would strongly disagree with Leegin's notion of what "benefits" consumers. Leegin argues that it is efficient for a manufacturer to set and enforce uniform prices to be charged by all of its dealers,

---

73 *Leegin*, Brief in Opposition to *Certiorari* at 4.

74 *Leegin*, Petition for *Certiorari,* Appendix D at 50a (expert report of Professor Kenneth Elzinga).

75 *Leegin*, Brief for Petitioner at 23.

76 *Leegin*, Petition for *Certiorari*, Appendix D at 50a n.44.

77 *Id.* at 44a.

because the price fixing will relieve consumers of the costs of searching for a bargain, and also eliminate any possible anxiety by consumers who fear having missed a better bargain.[78] Leegin should be embarrassed to make this argument. Common sense dictates – and the Court should recognize – that most consumers would much rather have the opportunity to seek a bargain. These consumers will not be better off if vertical minimum price fixing is treated more leniently.[79] Further, if the Court holds that the elimination of consumer search costs is a cognizable justification for vertical minimum price fixing, the same logic could be used to defend many price fixing schemes among competitors.[80]

Fifth, Leegin's expert makes at least one argument that the Court should reject summarily. He states that if Leegin were to engage in a "suggested retail price" (SRP) policy, which would be "permissible under Colgate, than [sic] it follows that an SRP policy instituted 'by agreement' does nothing more to harm consumers."[81] This argument, like the one rebutted in the preceding paragraph, may be a satisfactory outcome of "modern economic analysis." But reduced to its essence, the argument stands for the following proposition: if the same result could be obtained by either lawful or unlawful means, it does not matter if the law has been broken. This neither represents good public policy nor upholds the basic tenets of a just legal system. It is a slippery slope best avoided.

Leegin fails to identify how its vertical minimum price fixing activities have benefitted consumers. Leegin suggests that vertical minimum price fixing might lead to more retail outlets carrying the product, outlets maintaining greater inventories, greater point-of-sale services, particularized sales expertise, more effective signaling of product quality, a more ideal shopping

---

[78] *Id.* at 48a.

[79] It is not even necessarily true that manufacturer-fixed, uniform consumer prices would lead to lower consumer search costs. Suppose that Leegin and other manufacturers engaged in vertical minimum price fixing. It is plausible to suppose that they also would impose minimum stocking and display requirements on their dealers. These additional requirements, in turn, might lead each retailer to carry fewer competing brands per store. As a consequence, each consumer might have to visit a substantially greater number of stores, perhaps distributed over a broader geographic area, in order to find the "right" product (in terms of price, quality, and other factors). Therefore, it is equally likely that Leegin's pricing scheme, if adopted widely in the market, would *raise* consumer search costs.

[80] Every form of non-market price fixing (horizontal, vertical, or regulatory) is capable of eliminating consumer search costs. This argument proves too much and represents a frontal assault on competition itself. If elimination of consumer search costs were a general justification for restraints of trade, bargain hunting would become a waste of consumers' time and effort. Indeed, if manufacturer-administered pricing were to become widespread, it might also promote forms of price coordination between manufacturers that are beyond the reach of the antitrust laws, such as acts that are merely consciously parallel. Phillip E. Areeda & Herbert Hovenkamp, VI Antitrust Law § 1417g at 115 (2003) ("At all events, it seems clearly established that mere parallelism is insufficient to get to the jury.").

[81] *Leegin*, Petition for *Certiorari*, Appendix D at 49a n.43.

experience, and the avoidance of free-riding.[82] Leegin's own expert concedes, however, that ladies handbags and other fashion accessories are not "high tech, information-intensive consumer durables."[83] Ladies handbags are not technological wonders requiring extensive operational expertise and consumer education. Ladies handbags do not require acoustically optimized demonstration rooms. Ladies handbags do not require extensive post-sales servicing, or inventories of repair and replacement parts. Ladies handbags do not require special climate-controlled storage to prevent health risks. The only real "service" at issue appears to be steering the consumer to purchase Leegin's products,[84] to the benefit of the manufacturer and the agreeing retailers. The benefit to consumers is not self-evident.

The free-riding argument, in particular, is a red herring in this case.[85] PSKS's only alleged fault was discounting. Leegin did not claim that PSKS was allocating insufficient shelf space to Leegin's products. Leegin did not claim that PSKS was providing any less service than other dealers. PSKS's "free-riding" was nothing more than its success in gaining market share, at the expense of price-fixing retailers who had agreed not to respond to PSKS's competitive threat. Leegin asks this Court to provide the enforcement muscle for its price fixing agreement. The Court should not bless this flawed free-riding argument.

V. <u>Conclusion: Where Should The Law Go?</u>

Dr. Miles was good law when decided and remains good law today. Sound antitrust policy condemns restraints, such as vertical minimum price fixing, whose necessary and inevitable tendency is to raise prices to consumers.[86] A rule of continued *per se* illegality for vertical minimum

---

[82] Brief for Petitioner at 3-4, 20-21, and 22-24.

[83] *Id.* at 26a.

[84] Even if consumers did need and value some additional services when purchasing ladies fashion accessories, increasing dealer margins hardly would ensure that such services will be provided. "After all, there is no guarantee that the dealer, once its resale price is raised, will know exactly what kind and amount of service the manufacturer has in mind. If the distributor is a multiproduct outlet – for example, a supermarket, drug store, or department store carrying hundreds or even thousands of items – the idea that the manufacturer can induce better services or more amenable surroundings by raising the retail price is ridiculous. In any event, there are far more appropriate and less restrictive methods of insuring the availability of services." Pitofsky, *supra* note 29, at 1493.

[85] Free-riding might, of course, be a legitimate concern in other markets, or under different factual circumstances.

[86] *See, e.g.*, Commissioner J. Thomas Rosch, Monopsony and the Meaning of "Consumer Welfare": A Closer Look at *Weyerhaeuser*, Address at the 2006 Milton Handler Annual Antitrust Review (Dec. 7, 2006), available at http://www.ftc.gov/speeches/rosch/061207miltonhandlerremarks.pdf. "In my view the antitrust laws protect

price fixing accords with judicial precedent and Congressional intent. Most importantly, the facts of this particular case do not justify overturning *Dr. Miles*. Accordingly, the judgment below should be affirmed.

That being said, other vertical cases may present the Court with a better opportunity to refine the legal analysis of vertical minimum price fixing under *Dr. Miles* and its progeny. This Court certainly does not condone total knee-jerk adherence to a bright-line rule of *per se* illegality in the area of horizontal price fixing.[87] Nor need it do so in the vertical price fixing area. The Court may, in a future case, wish to specify ways in which parties might make *factual* showings of countervailing evidence that would support the legality of specific vertical conduct.

If a case arises that warrants more lenient treatment of vertical pricing restraints, the Court should still begin with a firm presumption that vertical minimum price fixing is unlawful. That presumption should only be rebuttable by a *factual*, case-specific showing that (1) vertical minimum price fixing is necessary to deliver identifiable net consumer benefits (2) in a quantity at least as great as the amount by which prices have been raised, and (3) such benefits could not be delivered by less-restrictive, alternative means.

A sufficient showing could be based, for example, on empirical analyses or simulations[88] using robust models. But these models *must* accurately portray actual market conditions. They should not rely on representations of market conditions achievable only via simplifying (and unverifiable) assumptions of fact, such as an assumption that downstream markets are perfectly

---

consumers – and by "consumers" I mean consumers who buy the output in the relevant market. . . . To me, "consumer welfare" means just that – the welfare of those who are confronted by actual or threatened exercises of seller market power in the output market." *Id.* at 6-7 (emphasis in original). *See also State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (discussed *supra* note 42).

[87] *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

[88] "The paucity of empirical evidence on RPM's effects exacerbates the problem of choosing between efficiency and market-power explanations. Moreover, the existing evidence tends to be interpreted according to preconceived beliefs." Thomas K. McCraw, *Competition and "Fair Trade": History and Theory*, 16 RES. IN ECON. HIST. 185, 227 (1996); *see also* Pauline M. Ippolito & Thomas R. Overstreet, Jr., FTC Staff Report, *Resale Price Maintenance: An Economic Study of the FTC's Case Against the Corning Glass Works* (Jan. 1994), at 70 ("Until recently, the problems of product distribution have not received much serious economic study, in part, because features of an effective distribution system are often difficult to articulate and to measure. . . . Additional empirical studies . . . would . . . help . . . generate more serious consideration of . . . antitrust policy [for] . . . vertical business practices.").

competitive and reflect a complete pass-through of manufacturing costs.[89] Steiner and others reject this assumption both theoretically and empirically.[90]

In order to rebut the presumption of illegality for vertical minimum price fixing, the factual showing should also detail the comparative losses and gains by marginal and inframarginal consumers.[91] Consistent with *Daubert*,[92] such a showing would have to consist of more than a recital

---

[89] Pamela Jones Harbour, *An enforcement perspective on the work of Robert L. Steiner: why retailing and vertical relationships matter*, 49 ANTITRUST BULL. 985, 987 (2004) ("Most economic models of consumer goods markets completely ignore retail activities, based upon an assumption that retail markets are perfectly competitive. According to this view, distribution is characterized as an undifferentiated pass-through for manufacturing costs, competitive conditions, and the like."); Pitofsky, *supra* note 29, at 1492 n.22 ("But 'perfect competition' rarely occurs in the real world. Even when a manufacturer has a relatively small market share, it can extract higher prices from consumers if the product is brand differentiated in their minds.") (citing LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 379 (1977)).

[90] *Id.* "Furthermore, to the best of *amici*'s knowledge, no one has rebutted their proof that the Bork result is a special case not applicable under many circumstances. The Bork argument should not be accepted by the Court as a general principle." *Leegin*, Brief for Comanor & Scherer at 5. *See also* SCHERER &ROSS , *supra* note 45, at 558 ("On the other hand, Chicagoans' claim that strictly vertical RPM cannot impair economic efficiency are plainly wrong, and their estimates of the benefits from RPM are correspondingly exaggerated.").

[91] Comanor and Scherer would allow the presumption to rise or fall based on whether vertical minimum price fixing was "instigated" by the manufacturer or retailers. *Id.* at 9. Their distinction would be elusive in the best of times. Even if vertical minimum price fixing were clearly the sole product of a manufacturer at its inception, the likelihood that it would remain so is far more problematic. Even as an initial matter, if the purpose of the restraint is to incentivize retailers to engage in desired activity, the primary focus is on retailer wants and needs more so than manufacturer wants and needs. Additionally, once in place, it would be virtually impossible as a factual matter to tell whether the manufacturer or the retailers were in control of the restraint going forward. Assuming the universe of agreeable retailers included almost all available outlets, how many manufacturers would have the wherewithal to engage in a pointed re-examination of the policy, and change directions as a "unilateral" matter, without brokering a deal with the retailers? At what point would such an arrangement change from being manufacturer-instigated to being a horizontal dealer agreement adopted and enforced by the manufacturer? The test proposed by Comanor and Scherer is an interesting analytical exercise, but seems potentially impractical and difficult to administer. It appears to depend on formalistic distinctions. In addition, the facts of actual cases are unlikely always to lend themselves to easy characterizations of manufacturer- versus dealer-instigated. Finally, it may generate a rule that is too inaccessible to business managers. If a business adopted a vertical minimum price fixing strategy in response to expressions of dealer outrage – some by groups of dealers, and some by individual dealers – would that restraint be instigated by the dealers or the manufacturer?

[92] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (expert testimony must be based on scientifically valid reasoning or methodology that can be applied to the facts at issue in a valid and proper manner). It is unclear whether an economist's review of the theoretical literature could ever pass muster under this standard. *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055-57 (8th Cir. 2000) (plaintiff antitrust verdict reversed because expert testimony should have been excluded for failing to include all relevant circumstances, ignoring inconvenient facts, and failing to separate lawful from unlawful conduct).

of theoretical literature positing potential benefits. The showing would have to factually demonstrate that all conditions necessary to achieve those benefits actually exist. In short, the required proofs would have to demonstrate "actual market realities"[93] – something more than an expert report hypothesizing the existence of an ambiguous range of alternative outcomes.

The United States has been down the vertical minimum price fixing road before. Congress put manufacturer-administered retail pricing to the test, and the manufacturers failed. Leegin and its *amici* ask the Court to ignore Santayana's *dictum*: "Those who cannot remember the past are condemned to repeat it."[94]

Respectfully submitted,

Pamela Jones Harbour
Commissioner
Federal Trade Commission

---

[93] *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466 (1992).

[94] JOHN BARTLETT, FAMILIAR QUOTATIONS 588 (Justin Kaplan ed., 16th ed. 1992) (quoting *The Life of Reason [1905-06], vol. 1, Reason in Common Sense*); *see also* THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 48 [bk. 1, sec. 22] (413 B.C., Rex Warner trans., Penguin Books 1972) ("It will be enough for me, however, if these words of mine are judged useful by those who want to understand clearly the events which happened in the past and which (human nature being what it is) will, at some time or other and in much the same ways, be repeated in the future.").