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The Reasonableness of Resale Price Maintenance

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“For these reasons the Court’s decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 US 373 (1911) is now overruled. Vertical price restraints are to be judged according of the rule of reason.”

Leegin Creative Leather Products v. PSKS Inc., 551 U.S. ____ (2007).

The treatment of vertical agreements in the United States, relating to both price and non-price restraints, has seen its fair share of controversy since inception. Judgments of the U.S. Supreme Court have been followed by pages of growing economic and jurisprudential criticism. The Court itself has been divided in its decisions with regard to the suitable standard to be applied to resale price maintenance (RPM).¹ Barring *State Oil v. Khan*,² the landmark decisions have consistently seen dissenting opinions,³

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¹ The term “resale price maintenance” is normally understood to mean an agreement between the manufacturer and its wholesaler or retailer according to which the resale of the product by the retailer to the consumer would be at or above the price specified by the manufacturer. Other terms such as “vertical price restraints” and “vertical price-fixing” are also used, it has been said, depending on whether one is a proponent or opponent of the practice. See FTC Commissioner Pamela Jones Harbour, Open Letter to the United States Supreme Court (Feb. 26, 2007) [hereinafter Open Letter], at 2, n.5, available at <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf>. The distinction between an “agreement” and a “stipulation” by the manufacturer can get blurry as discussed later in this paper.

² *State Oil v. Khan*, 500 U.S. 3 (1997) [hereinafter *State Oil*].

³ *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911) [hereinafter *Dr. Miles*] (Justice Homes dissenting); *U.S. v. Arnold, Schwinn*, 388 U.S. 365 (1967) [hereinafter *Schwinn*] (Justice Stewart and Justice Harlan dissenting) and again in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) [hereinafter *Albrecht*]; *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) [hereinafter *Sylvania*] (Justice Brennan and Justice Marshall dissenting); *Leegin Creative Leather Products v. PSKS Inc.*, 551 U.S. ____ (2007) [hereinafter *Leegin*] (Justices Breyer, Steven, Souter, and Ginsburg dissenting).

including in the most recent one (*Leegin*) quoted at the start of this paper, in which the Court reached its conclusion by a margin of five to four.

This paper describes the circumstances precipitating the ruling that overturned a 96-year-old principal laid down by the Supreme Court of the United States, which had made the setting of minimum resale prices unlawful per se, and examines the position with respect to RPM in Indian jurisprudence. Section I of this paper describes the evolution of the jurisprudence from *Dr. Miles*⁴ in 1911 up until *State Oil*⁵ in 1997, when the per se approach was rejected with regard to maximum resale price-fixing, and ending, of course, with *Leegin*, albeit briefly. Section II describes the legal position in India both under the Monopolies and Restrictive Trade Practices Act of 1969 and the revamped Competition Act of 2002. Section III analyzes the justifications put forth on both sides of the debate and the *Leegin* judgment, and is followed by observations for suitable standards for the United States and India in conclusion.

I. TREATMENT OF RPM IN THE UNITED STATES

A. Minimum RPM

In the early years after the first antitrust legislation had been passed in the United States, the Supreme Court was faced with a dispute relating to fixing of resale prices by a pharmaceutical company, Dr. Miles Medical Company. Dr. Miles brought an action against a wholesaler (Park & Sons) who refused to enter into an agreement that effectively established minimum resale prices for the drugs. The complainant argued that Park & Sons was obtaining its drugs from other wholesalers and retailers at “cut prices”

⁴ See *Dr. Miles, id.*

⁵ *Supra* note 2.

by inducing them to breach their contracts with Dr. Miles. The question arose as to the validity and enforceability of the contracts themselves.

Relying on the common law principle that “a general restraint upon alienation is ordinarily invalid,”⁶ the Court held the contract to be void, finding that 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.”⁷ In laying down a *per se*⁸ approach to agreements that set minimum resale prices, the Court held that “[t]he complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes.”⁹

Agreements to fix minimum resale prices had thus been consigned to the same “class” as horizontal agreements on price-fixing since, the Court reasoned:

[T]he complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavoured to establish the same restrictions, and thus to achieve the same result, by agreement with each other.¹⁰

Consequently, the requirement of proving that the agreement had an adverse effect on competition was removed in cases of minimum RPM.

⁶ *Dr. Miles*, *supra* note 3, at 404.

⁷ *Id.* at 407.

⁸ The Court did not actually use the term “*per se*” in *Dr. Miles*. The terminology was introduced much later in the case of *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940). However, courts and authors alike have understood the ruling in *Dr. Miles* to lay down a *per se* standard. *See* Ittai Paldor, *The Vertical Restraints’ Paradox: Justifying the Different Legal Treatment of Price and Non-price Vertical Restraints* (mimeo) (2007), at 7, *available at* <http://law.bepress.com/cgi/viewcontent.cgi?article=1947&context=alea>.

⁹ *Dr. Miles*, *supra* note 3, at 408.

¹⁰ *Id.*

Criticism against the decision was slow to build at first. Retailers were free to discount on the manufacturers suggested prices, thereby directly benefiting the consumer.¹¹ This automatically invokes an emotion in favor of the rule, even where economic analysis may suggest otherwise. But the ruling left nagging doubts in its absoluteness. Judgment by the rule of reason,¹² in which one looks at the actual effects on competition, is the norm. Departure must be dictated by compelling evidence. While laying down the per se rule in *Dr. Miles*, the Court appears to have altogether ignored the actual effect of the agreements on competition in the relevant market.¹³ No doubt, evidence does exist to show that the setting of minimum resale prices may result in harmful effects to competition and consumers. However, the question, as framed by the Court in the later judgment of *Business Electronics v. Sharp*, is whether an agreement to fix resale prices “would always or almost always tend to restrict competition”¹⁴ so as to “justify a *per se* prohibition.”¹⁵

B. Maximum RPM

By the time *Business Electronics* came before the Supreme Court, agreements to fix the maximum resale price had also been declared unlawful per se in *Albrecht v.*

¹¹ Although price is not the only factor in determining the effectiveness of a competitive marketplace, it is almost always used as a proxy for measurement. The conflicting welfare standards with respect to the objectives of competition law are discussed later in this paper.

¹² The standard was first applied in 1711 by the Kings Bench in *Mitchel v. Raynolds*, 24 Eng. Rep. 347 (K.B. 1711). See GELLHORN, KOVACIC & CALKINS, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 5-7 (5th ed. 2004).

¹³ See, for contra, Open Letter, *supra* note 1, at 3-4.

¹⁴ *Business Electronics v. Sharp*, 485 U.S. 717, 723 (1988) [hereinafter *Business Electronics*] (quoting *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-290 (1985), and *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979)).

¹⁵ *Leegin*, *supra* note 3, at 6.

Herald Co. In that case, a newspaper publisher granted its distributors exclusive territories and published a retail price at or below which the distributors could sell the daily. If the distributor charged more than the price published by Herald, the agreement was liable to be terminated. When the petitioner exceeded the published price, Herald responded by soliciting customers away and supplying the papers directly, ultimately leading to the agreement being terminated.

Delivering the majority judgment of the Court, Justice White concluded that “schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market.”¹⁶ The Court’s concern seems to be aimed at maintaining the retailer’s freedom in deciding the final sale price.

In its judgment, the Court was influenced by the observation in *Kiefer-Stewart Co. v. Seagram & Sons* that “an agreement to fix maximum resale prices no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.”¹⁷ Unfortunately, in relying on *Kiefer* the Court appears to have missed the very vital fact that the agreement to fix maximum resale prices in that case was between two liquor manufacturers who conspired with each other in setting resale prices for the retailers. In relying on *Kiefer*, the Court therefore appears to have (mis)applied a principle relating to horizontal agreements to a vertical one.

¹⁶ *Albrecht, supra* note 3, at 152.

¹⁷ *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213 (1951).

Despite the Court's attempts in *Albrecht* to point out some of the harmful effects of setting maximum resale prices,¹⁸ in a very strongly worded dissent, Justice Harlan noted: "The question in this case is not whether dictation of maximum prices is ever illegal, but whether it is always illegal."¹⁹ Criticizing the reliance on *Dr. Miles*, Justice Harlan went on to state that "to conclude that no acceptable justification for fixing maximum prices can be found simply because there is no acceptable justification for fixing minimum prices is to substitute blindness for analysis."

The reason for Justice Harlan's scathing comments is that the setting of a per se standard to an offence does away with the need for the plaintiff to bring forward evidence showing that competition has been restricted. The classification of an offence as per se has a huge bearing on the outcome of the matter. As noted authors Gellhorn, Kovacic, and Calkins point out, such characterization often determines the outcome of a case. Apply the per se rule and "the plaintiff always wins"; apply the rule of reason and the "the defendant generally wins."²⁰

Unlike horizontal agreements on price-fixing, which have consistently been shown to have adverse effects on competition that are not sufficiently offset by any possible justifications, vertical agreements, even on price, do not portray the same results. The plaintiff is thereby entitled to a favorable decree under which he can show that a horizontal combination to fix prices exists, without showing anything further. Enterprises are quick to take cognizance of rulings by which their chances of successfully bringing or

¹⁸ *Albrecht*, *supra* note 3, at 152-53.

¹⁹ *Id.* at 165.

²⁰ GELLHORN, KOVACIC & CALKINS (2004), *supra* note 12, at 370.

defending a claim are considerably enhanced and modify their behavior accordingly.

Thus, classifying an offence as per se unlawful carries with it the burden of justifying the reshaping of the very way in which business is conducted.

Suffice to say, the *Albrecht* decision attracted considerably more criticism than did the *Dr. Miles* decision.²¹ Again, the direct price benefit to consumers would weigh heavily in the analysis when concluding that setting a ceiling price would rarely restrict competition and in most cases benefit consumers. Particularly in *Albrecht*, in which the distributor was granted a monopoly for a defined area, in the absence of a price cap, the distributor was free to overcharge as consumers did not have an alternate distributor to turn to.²² Herald's decision to enter the area and compete gave them the choice and brought down the price. It is only in cases in which the maximum price is set too low that there is cause for concern, and only occasionally may they be shown to actually harm competition. This is, to say the least, far from justifying a per se standard.

C. The Turning Tide

A year prior to *Albrecht*, the U.S. Supreme Court had declared even vertical territorial exclusivity to be unlawful per se in *United States v. Arnold, Schwinn*.²³ Surprisingly, even though the Court explicitly recognized that “[w]e are here concerned with a truly vertical arrangement,”²⁴ it still held that “where a manufacturer sells products to his distributor subject to territorial restrictions upon resale, a *per se* violation of the

²¹ See *Sylvania*, *supra* note 3, at 47-49.

²² This factor weighed with Justice Stewart also dissenting. *Albrecht*, *supra* note 3, at 168.

²³ See *Schwinn*, *supra* note 3.

²⁴ *Id.* at 378.

Sherman Act results.”²⁵ Unsurprisingly, in coming to this decision the Court relied on *Dr. Miles*, and concluded that:

[I]t is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. [...] Such restraints are so obviously destructive of competition that their mere existence is enough.²⁶

The Court did not clarify how or why.

The assumption in each of these cases appears to be that restraints on a dealer’s freedom of resale once title to the commodity has passed automatically restricts competition. This is faulty for three reasons. First, the restraints on alienation of property are not the restraints on competition and the analysis of anticompetitive effects (rule of reason) cannot be done away with based on this common law principle. Second, the assumption is not buttressed by empirical evidence.²⁷ Third, and most importantly, the purpose of competition law is primarily to protect competition between goods manufactured by competing enterprises (inter-brand competition) and not competition between goods manufactured by the same enterprise (intra-brand competition). The analysis should always be founded on the impugned practices’ effect on competition. Vertical agreements have been found to have both negative and positive effects on competition. Given that the inter-brand competition is the primary goal of competition law, the negative effects of vertical agreements, in general, tend to affect competition to a

²⁵ *Id.* at 379.

²⁶ *Id.*

²⁷ In *White Motor Co. v. United States*, the Court refused to adopt a per se rule to vertical agreements stating that “we need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a ‘pernicious effect on competition and lack ... any redeeming virtue’” (i.e., the standard laid down in *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958) (as reproduced in *Sylvania*, *supra* note 3, at 50) (*see White Motor Co. v. United States*, 372 U.S. 253 (1963) [hereinafter *White Motor Co.*]).

lesser degree than do the negative effects of horizontal agreements. Therefore, they are normally to be judged by the rule of reason.

A decade later, *Continental T.V. Inc. v. GTE Sylvania Inc.*²⁸ marked the restoration of the application of the rule of reason. The Court, while overruling *Arnold Schwinn*, held that “departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing.”²⁹ Although in *Sylvania* the Court was concerned with vertical territorial restrictions, it concluded “that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*.”³⁰ Anticompetitive effects resulting from any particular vertical restraint could “be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under [section] 1 of the Act.”³¹

The United States has a fairly strong tradition of stare decisis.³² Perhaps that is the reason it took almost twenty years post-*Sylvania* before *Albrecht* was overruled despite its many “infirmities, [and] its increasingly wobbly, moth-eaten foundations.”³³ The matter concerned the leasing and operation of a gas station owned by State Oil to the respondents. Under the agreement, the lessee could charge more than the rates suggested

²⁸ *Sylvania*, *supra* note 3.

²⁹ *Id.* at 58-59.

³⁰ *Id.* at 59.

³¹ *Id.*

³² See *State Oil*, *supra* note 2, at 28 (quoting *Agostini v. Felton*, 1997 U.S. Lexis 4000, & *Burnet v. Coronado Oil & Gas Co.*, 285 US 393) (“Stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right”) (internal quotes omitted). See also *Leegin*, *supra* note 3, at 19-28.

³³ *State Oil*, *supra* note 2, at 20 (quoting Chief Judge Posner in 93 F. 3d, at 1363).

by State Oil, but if it did, would have to remit the excess back to the lessor, making it not worthwhile to raise the price. The arrangement did not work out to be profitable for the lessee, and ultimately a receiver was appointed to operate the station. The receiver, not being constrained by the terms of the agreement, charged different rates for different grades of petrol and turned around the profitability of the station. Khan promptly sued on the basis that State Oil had effectively set a maximum resale price which was, according to *Albrecht*, unlawful per se.

Departing from its earlier approach, the Court concluded that there was “insufficient economic justification for *per se* invalidation of vertical maximum price fixing.”³⁴ Following *Sylvania*, the Court noted that “vertical maximum price fixing, like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the rule of reason,” which would “effectively identify those situations in which vertical maximum price fixing amounts to anticompetitive conduct.”³⁵

This set the stage for overruling *Dr. Miles*. The opportunity arose when PSKS, a retailer of women fashion accessories, filed legal proceedings against Leegin, the manufacturer and brand owner, for conspiring to fix retail prices. The suit was a result of PSKS’s dealership being terminated by Leegin for the reason that PSKS refused to follow Leegin’s pricing policy. After numerous amicus curiae filings, mostly supporting the petitioner’s case, the Court found, by the narrowest of margins, in favor of overruling the per se approach to vertical minimum price restraints.

³⁴ *Id.* at 25.

³⁵ *Id.* at 31-32.

The decision and justifications for applying the rule of reason to minimum RPM agreements are discussed in section III following a discussion of the status of affairs in India in the next section.

II. TREATMENT OF RESALE PRICE MAINTENANCE IN INDIA

The treatment of RPM in India is an altogether different story. At the time maximum RPM had been declared unlawful per se by the U.S. Supreme Court in *Albrecht*, India was passing its first legislation on the subject in the form of the Monopolies and Restrictive Trade Practices Act 1969 (“MRTP Act”).

Under the scheme of the original Act, all agreements, horizontal and vertical, were to be judged by the rule of reason. An amendment in 1984 created a legal fiction under which such agreements, including agreements on resale price, were “deemed” to be restrictive.

In 2002, the Competition Act was introduced in place of the MRTP Act, in which it is expressly provided that RPM agreements are to be judged by the rule of reason.³⁶ Ironically, the substantive provisions of the Act have yet to come into force, and as a result the MRTP Act, along with its deeming provision, still rules the roost.

A. RPM under the MRTP Act

The MRTP Act in a sense does not deal with maximum resale price but rather with fixed RPM and minimum RPM separately. The former is dealt with under Section (S.) 33 whereas the latter under S. 39-41.

³⁶ MRTP Act, at Section 3(4).

1. Fixed RPM

Section 33(1) of the original MRTP Act provided that an agreement relating to a restrictive trade practice falling within one of the categories listed in the section would require registration with a prescribed authority. The section provided a suggestive list of agreements that may or may not be restrictive of competition in a given case. Section 33(f) provides that one such agreement is that of RPM: “[T]o sell goods on condition that the prices to be charged on re-sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.” The effect was that under the original Act, an agreement to fix resale prices was liable to be registered but was not necessarily anticompetitive.

Section 2(o) of the Act (both original and amended) defines “restrictive trade practice” to mean:

a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified cost or restrictions.

Prior to 1984, an agreement, whether it fell in one of the categories listed in S. 33 or not, was required to be tested against the opening words of S. 2(o) (i.e., the agreement must be shown to have the “effect of preventing, distorting or restricting competition”). RPM agreements were thus analyzed according to their effect on competition.

In 1984, the Act was amended to the effect that all the agreements listed in S. 33 were deemed to be restrictive and did not have to be proven to be restrictive of

competition. However, this is not quite the same thing as applying a per se standard to the agreements. The peculiarity with the MRTP Act is that the Commission must, after coming to a finding that an agreement is restrictive, further conclude that it is “prejudicial to public interest.” Section 38 of the MRTP Act solves this problem by again introducing a legal fiction whereby agreements found to be restrictive are deemed to be prejudicial to public interest.³⁷ But the section does not stop there. It also lists eleven instances that a party may plead to escape from the presumption.³⁷

³⁷ MRTP Act, at Section 38:

S. 38. Presumption as to the public interest.—(1) For the purposes of any proceedings before the Commission under section 37, a restrictive trade practice shall be deemed to be prejudicial to the public interest unless the Commission is satisfied of any one or more of the following circumstances, that is to say—

(a) that the restriction is reasonably necessary having regard to the character of the goods to which it applies, to protect the public against injury (whether to persons or to premises) in connection with the consumption, installation or use of those goods;

(b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom;

(c) that the restriction is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged;

(d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such persons, controls a preponderant part of the market for such goods;

(e) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade, or industry to which the agreement relates is situated;

(f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of India or in relation to the whole business (including export business) of the said trade or industry;

The upshot of this is that even though RPM agreements are deemed to be restrictive, a manufacturer may still plead one of the gateways provided in Section 38 of the Act. In a sense, S. 38 builds into the analysis the rule of reason, but the analysis is post facto (i.e., it comes only after a finding by the Commission that the agreement is restrictive of competition).

As one can see, the provision in S. 33 is concerned with the fixing of a resale price at a stipulated amount. It is not the prescription of resale prices by itself that is the concern, but that it is done without stating that prices lower than the ones stipulated may be charged. The hidden premise being that the price stipulated by the manufacturer may become the fixed price below which the retailer would not be allowed to sell.

This is also in consonance with the finding in *State Oil*³⁸ in which the fixation of maximum resale prices by themselves was shown to be rarely destructive of competition except when they may be predatory in nature. With regard to maximum retail price, the Parliament has made it mandatory for retail prices to be printed on the article being sold

(g) that the restriction is reasonably required for purposes in connection with the maintenance of any other restriction accepted by the parties, whether under the same agreement or under any other agreement between them, being a restriction which is found by the Commission not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the Commission;

(h) that the restriction does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so;

(i) that such restriction has been expressly authorised and approved by the Central Government;

(j) that such restriction is necessary to meet the requirements of the defence of India or any part thereof, or for the security of the State; or

(k) that the restriction is necessary to ensure the maintenance of supply of goods and services essential to the community; ...

³⁸ See *State Oil*, *supra* note 2, at 20.

in accordance with the Standards of Weights and Measures Act, 1976 (“SWM Act”) and the Standards of Weights and Measures Rules, 1977 (“SWM Rules”).

Rule 2 of the SWM Rules, while defining the term “retail sale price,” provides that the term:

means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and where such price is mentioned on the package, there shall be printed on the packages the words [Maximum or Max. retail price] ... inclusive of all taxes or in the form MRP Rs ... inclusive of all taxes.³⁹

Rule 6 and S. 39 mandate that a person must declare the maximum retail price of the commodity being offered for sale. The responsibility to have the price printed on the article is that of the packer whether it be the manufacturer, the dealer, or a third party, but in any case the retailers cannot resell the article for any price exceeding the maximum retail price (MRP).

The Parliament has therefore statutorily mandated that maximum resale prices be stipulated by manufacturers and also made it unlawful for retailers to exceed this amount, thereby obviating any recurrence of the *Albrecht* decision here. This results in a situation where manufacturers selling must stipulate, by law, the maximum retail (resale) price on the article, but at the same time are prohibited from stipulating vide an agreement a fixed resale price without expressly stating that the dealer is free to charge lower prices.⁴⁰

Most consumers tend to take the MRP as the only price at which the article may be sold. Recently, consumer associations have been spreading the message that this price

³⁹ Section 2(b) defines a “commodity in packaged form” to mean commodity packaged, whether in any bottle, tin, wrapper, or otherwise, in units suitable for sale, whether wholesale or retail.

⁴⁰ The anomaly between unilateral price stipulation and an agreement for the same purpose is discussed further in Section III of this paper.

is negotiable and that the dealer is free to lower the price if he wishes. Interestingly, consumers have also approached the court against restaurants, cinemas, and hotels against charging prices higher than the ones printed on the article. In March 2007, the High Court of Delhi dismissed one such petition on the ground that a customer does not enter a hotel or a restaurant to make a simple purchase of commodities such as a bottle of drinking water, but rather the direct purpose is the enjoyment of the ambience and incidental purpose the ordering of any article for consumption.⁴¹ Since the matter has been dragged to court, manufacturers and retailers have attempted to avoid the problem altogether. A 750 ml bottle of packaged drinking water in a popular cinema chain now comes printed with the label “MRP Rs. 20/-” whereas the MRP for a one liter bottle of packaged drinking water from the same manufacturer costs Rs. 12/- outside the cinema hall. Similarly, one of the most popular coffee shops in a luxury hotel has modified its menu to (comically) state that for Rs. 90/-, one can purchase “Packaged Drinking Water *and services*”.

The matters that have come up for adjudication before the MRTP Commission under Section 33(1)(f) have been largely straightforward and involved price lists given by the manufacturers to their wholesalers or retailers without incorporating in them a clear indication that lower prices may be charged, resulting in the Commission directing the manufacturer to do so.⁴² An RPM agreement of the sort described in S. 33(1)(f) has not been excused under the gateways provided under S. 38.

⁴¹ Federation of Hotels and Restaurants Association of India v. Union of India, 139 (2007) DLT 7, at para. 16.

⁴² See S.M. DUGAR, MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, CONSUMER PROTECTION AND COMPETITION ACT 1, 343-44 (4th ed., 2006).

2. *Minimum RPM*

While there may be a limited scope for argument in case of maximum resale price agreements under S. 33, there is none with regard to minimum resale price agreements. Minimum resale price agreements are void ab initio according to S. 39.⁴³ The gateways under S. 38 are not available for such agreements.⁴⁴ This means that (a) resale price agreements, where they incorporate a statement that prices lower than those stipulated may be charged, are allowed; (b) resale price agreements, in the absence of an express communication stating that dealers are free to charge lower prices, are deemed to be restrictive (virtually a per se standard for practical purposes); and (c) minimum resale price agreements are per se unlawful. This is analogous to the position in the United States prior to *State Oil*.⁴⁵

The MRTP Act also came into existence at a time when RPM had been statutorily legalized in the United States. During the Depression, various states had passed “fair trade laws” that allowed manufacturers to control the prices at which retailers sold their products. Minimum RPM was granted immunity under the state enactments so as to “allow the States to protect small retail establishments that Congress thought might

⁴³ Section 39(1) reads:

Without prejudice to the provisions of this Act with respect to registration and to any of the powers of the Commission or of the Central Government under this Act, any term or condition of a contract for the sale of goods by a person to a wholesaler or retailer or any agreement between a person and a wholesaler or retailer relating to such sale shall be void in so far as it purports to establish or provide for the establishment of minimum prices to be charged on the re-sale of goods in India.

⁴⁴ See *RRTA v. Bennett Coleman & Co. Ltd.*, RTP Enquiry No. 30 / 1979 (Sep. 2, 1981) [hereinafter *RRTA*].

⁴⁵ See *State Oil*, *supra* note 2, at 20.

otherwise be driven from the marketplace by large-volume discounters.”⁴⁶ To avoid the apparent conflict with the Sherman Act, as interpreted by the U.S. Supreme Court in *Miles*, the Miller Tydings Act of 1935 and the McGuire Act 1952 were passed, which saved their application. The legislations also exempted resale price-fixing agreements from antitrust laws if they related to trademarked or branded products,⁴⁷ or where stores were using the products as loss leaders.⁴⁸

In 1965, the Indian Monopolies Inquiry Commission concluded:

We have already noticed in our examination of foreign legislation that several countries consider resale price maintenance harmful and objectionable per se. In that view, Canada, Sweden, Denmark, and recently England, has prohibited resale price maintenance. The main argument in support of resale price maintenance, is that it enables small traders and shopkeepers to survive the competition of big merchants and powerful chain stores. Against this is to be weighed the injury to the public in general as a result of reduction of competition in efficient salesmanship. It seems to be generally true to say that the consumers have to pay higher prices than would be the case if the maintenance of a fixed or minimum price was not insisted upon. [...] On an anxious consideration of the problem, we have come to the conclusion that the harmful effect of resale price maintenance far out-weigh its advantages. In our opinion, the interests of the general public demand that resale price maintenance should be prohibited subject to the exceptions being made as regards loss leader sales.⁴⁹

⁴⁶ California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, 102 (1980) (as quoted in *Leegin*, *supra* note 3).

⁴⁷ See REPORT OF THE MONOPOLIES INQUIRY COMMISSION (1965) [hereinafter MIC Report], at 148.

⁴⁸ *Retail Price Maintenance Policies: A Bane for Retailers, but a Boon for Consumers?*, KNOWLEDGE@WHARTON (Aug. 8, 2007), available at <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1789&jsessionid=a830263edb1c13371c5c>. According to the Explanation to Section 40 of the MRTP Act:

A wholesaler or retailer is said to use goods as loss leaders when he re-sells them otherwise than in a genuine seasonal or clearance sale not for the purpose of making a profit on the re-sale but for the purpose of attracting to the establishment at which the goods are sold, customers likely to purchase other goods or otherwise for the purpose of advertising his business.

⁴⁹ MIC Report, *supra* note 47, at 164; DUGAR (2006), *supra* note 42, at 511.

It is no surprise then that exemptions relating to loss leader sales and trademark licensing⁵⁰ are incorporated in the MRTP Act.⁵¹ S. 39 carves out an exemption for RPM enforced by a licensor of a patent or trademark.⁵² However, this exemption is limited only to the licensee and not the retailer, who is not bound by the terms of the license. S. 40, while generally prohibiting the withholding of supplies as a form of retaliation for price cutting,⁵³ allows a manufacturer to withhold supplies if his products are being used as loss leaders.⁵⁴

⁵⁰ MIC Report, *id.* at 148, 164.

⁵¹ The language of the actual provisions is based on the Resale Prices Act 1964 of the United Kingdom. DUGAR (2006), *supra* note 42, at 512 & 515.

⁵² The proviso to S. 39(3) states:

Provided that nothing in this section shall affect the validity as between the parties and their successors, of any term or condition of a licence granted by the proprietor of a patent or trade mark or by a licensee of patent or trade mark or of any assignment of a patent or trade mark, so far as it regulates the price at which articles produced or processed by the licensee or the assignee may be sold by him.

⁵³ See MIC Report, *supra* note 47, at 156. It is pertinent to note that it is the withholding of goods that is prohibited and not termination. This appears again to be based on the interpretation of U.S. law. In *United States v. Colgate & Co.*, the Supreme Court expressly held it lawful for a “trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal, and, of course, he may announce in advance the circumstances under which he will refuse to sell” including in the facts of the case the right to announce “in advance the prices at which his good may be resold and refusing to deal with wholesaler and retailers who do not conform to such price.” (*United States v. Colgate & Co.*, 250 U.S. 300, 301 & 304-06 (1919) [hereinafter *Colgate*]). Thus, non-compliance with the price stipulated by the manufacturer entitles the manufacturer to terminate the dealership. However, it was not clear whether aggressive persuasion, pressurizing, or threatening termination would be unlawful under the *Colgate* doctrine. Indeed, prior to 1984, there were questionable opinions from the trial courts relating to whether manufacturers had stepped beyond the boundaries of *Colgate* by persuading, threatening, or sanctioning dealer for non-compliance. See Michael J. Lockerby, *Franchising after Leegin: A License to fix Prices?*, 27(2) FRANCHISE L.J. (Fall 2007), available at http://www.foley.com/files/tbl_s31Publications/FileUpload137/4410/Lockerby.pdf. After *Monsanto*, however, withholding of supplies as a sanction may be permissible. In that case the Court while affirming the ‘*Colgate* right’ held that “the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer’s demand in order to avoid termination” (see *Monsanto v. Spray Rite*, 465 U.S. 752, 761 (1984) [hereinafter *Monsanto*]).

⁵⁴ Section 40(2) states that:

Nothing contained in sub-section (1) shall render it unlawful for a supplier to withhold supplies of goods from any wholesaler or retailer or to cause or procure another supplier to do so if he has reasonable cause to believe that the wholesaler or the retailer, as the case may be, has been using

Of particular interest is Section 41 which confers on the Commission the power to exempt a class of goods from the rigors of S. 39 and 40. If a person can show that in the absence of minimum RPM for that class of products that (a) the quality of goods available for sale or the varieties of goods so available would be substantially reduced; (b) the prices at which the goods are sold by retail would, in both the short and long run, be increased; or (c) any necessary services actually provided in connection with or after the sale of goods by retail would cease being provided or would be substantially reduced, then the manufacturers of that class may legally enforce a minimum resale price.

While the section appears to allow the leading of evidence to show that RPM may be beneficial on the whole, a manufacturer cannot do so in his individual case. Leegin, for example, in order to obtain an exemption under this provision, would have to argue on behalf of the entire women's fashion accessories⁵⁵ industry and lead evidence to show that in all (or substantially all) cases the prohibition on fixing resale prices would lead to one of the outcomes mentioned in the section. The exemption is limited and not available to a lone product. Another critical difference is that the MRTP Act (following precedence in the United Kingdom at the time) casts the analysis in a reverse fashion. The objective

as loss leaders any goods of the same or a similar description whether obtained from that supplier or not.

⁵⁵ The exact product market in Leegin's case is unclear. The petitioner refers to the market as "women's fashion accessories." See Brief for Petitioner, *Leegin*, *supra* note 3 [hereinafter Brief for Petitioner], at 2, 22 & 39; and Reply Brief for Petitioner, *Leegin*, *supra* note 3, at 16 [Reply Brief for Petitioner], available at <http://www.law.cornell.edu/supct/cert/06-480.html>. However, Commissioner Harbour refers to the market specifically as "ladies handbags and other fashion accessories" (see Open Letter, *supra* note 1, at 7). Thomas O. Barnett, Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, refers to Leegin as a manufacturer of "women's fashion accessories, including leather handbags" (see Thomas O. Barnett, Presentation to the American Conference Institute's Third Annual In-House Counsel Forum on Pharmaceutical Antitrust (May 2007), available at <http://www.usdoj.gov/atr/public/speeches/223390.htm>). The Supreme Court itself does not appear to address this issue only referring to the market as mentioned in the Brief for Petitioner. See Slip Opinion, *Leegin*, *supra* note 3, at 2.

is to show that the removal of minimum RPM is undesirable as the effects would be worse than if the practice were allowed. In a way, a manufacturer would be arguing that his fixing the minimum resale price is the lesser evil.

The Commission has been faced with precious few matters under these provisions as the RPM widely prevalent in India is that of fixed resale prices.⁵⁶

B. RPM under the Indian Competition Act 2002

In contrast, the Competition Act 2002, which replaces the MRTP Act, expressly lays down a rule of reason standard for both maximum and minimum RPM agreements. The Act is based on the Report of the High Level Committee on Competition Policy and Law chaired by Mr. S.V.S Raghavan.⁵⁷ While discussing the treatment of vertical restraints under U.S. antitrust law, the Committee, devoting a paragraph exclusively to RPM, concludes:⁵⁸

In a number of countries, RPM is presumed to be per se anti-competitive. The majority of the members of the committee also felt that RPM should be treated as presumed to be illegal. However, after considerable discussions, in order to arrive at a consensus, it was decided not to treat it as presumed to be illegal. It will be judged under the “rule of reason”.

Unfortunately, the issues on which there were “considerable discussions” have not been elaborated on. One factor that may have weighed with the Committee Members appears to have been the fact that vertical agreements are generally treated more leniently

⁵⁶ See MIC Report, *supra* note 47, at 126, 129; DUGAR (2006), *supra* note 42, at 342. Newspapers were granted an exemption under this section in *RRTA*, *supra* note 44.

⁵⁷ RAGHAVAN COMMITTEE, REPORT OF THE HIGH LEVEL COMMITTEE ON COMPETITION POLICY LAW (May 2002) [hereinafter Raghavan Committee Report], available at http://www.competition-commission-india.nic.in/Act/Report_of_High_Level_Committee_on_Competition_Policy_Law_SVS_Raghavan_Committee29102007.pdf.

⁵⁸ *Id.* at para. 4.4-1. The Report also states in paragraph 4.3-6 that agreements regarding fixing of purchase or selling prices ought to be subject to the rule of reason.

and only pose anticompetitive concerns when one of the parties possesses market power. In such cases, it concluded “the agreement is, in any case, likely to attract the provisions of the law relating to abuse of dominance.”⁵⁹

Consequently, the Act itself clearly lays down how horizontal and vertical agreements are to be treated. Section 3 of the Act makes a demarcation between the two. Section 3(3) of the Act incorporates an almost per se standard in case of horizontal agreements.⁶⁰ It states that all horizontal agreements would be “presumed to have an appreciable adverse effect on competition,” (i.e., the touchstone of determining whether an agreement is anticompetitive). This presumption is however rebuttable unlike the per se rule applied in the United States. The presumption shifts the burden of proof onto the defendant to show that the impugned agreement is not anticompetitive or that the pro-competitive effects outweigh the harm.

Vertical agreements are dealt with by S. 3(4), which does not set a rebuttable presumption in place.⁶¹ One of the species of vertical agreements specifically mentioned

⁵⁹ *Id.* at para 4.4.

⁶⁰ Section 3(3) reads:

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

- (a) directly or indirectly determines purchase or sale prices;
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

⁶¹ Section 3(4) reads:

is an agreement on RPM. Of particular importance is the definition of the term provided in the explanation to the section. The explanation states that:

“[R]esale price maintenance” includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

This definition appears to have been lifted from Section 33(f) of the MRTP Act alluded to earlier. Section 33 deals with deemed anticompetitive agreements being registerable with the Director General of Investigation and Registration (DGIR). A resale price agreement would not be registerable with the DGIR or deemed anticompetitive if it was provided in the agreement that lower prices than those stipulated may be charged. This was the effect of the wording of S. 33 of the MRTP Act. The effect of the words “unless it is clearly stated that prices lower than those prices may be charged” in the explanation to S. 3(4) of the Competition Act where the term “resale price maintenance” is defined, is that an RPM agreement which clearly states that lower prices may be charged is not an RPM agreement at all. This results in the position that such an agreement, in which it was clearly stated that lower prices may be charged, would be excluded from the application of the section altogether (i.e., it would be lawful). The question of what is the appropriate standard on which to judge it does not arise.

Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

- (a) tie-in arrangement;
- (b) exclusive supply agreement;
- (c) exclusive distribution agreement;
- (d) refusal to deal;
- (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

In any event, the section appears to deal with fixing resale prices rather than setting a maximum or minimum price. There is no separate provision on minimum RPM so one could conclude that it is subsumed in the inclusive definition given in the explanation as well as in the inclusive nature of S. 3(4). Minimum RPM agreements are to be analyzed therefore according to the rule of reason.

The interesting, if unintended, complication arises in the case of unilateral resale price-fixing. Under S. 4 of the Act, an abuse of a dominant position is prohibited.⁶² As to what constitutes an abuse, an exhaustive list of five examples is given.⁶³ A problem, however, arises because the section is currently worded such that it is not necessary to show that such abuse has, or is likely to result in having, an adverse effect on competition in India. That particular factor is missing altogether from S. 4, which renders it as listing five per se violations. This does not appear to be the intention of the Raghavan

⁶² S. 4(1) reads: “No enterprise or group shall abuse its dominant position.”

⁶³ S. 4(2) states:

There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group –

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

[...]

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access in any manner; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Committee, which states that: “By and large, abuse of dominance and exclusionary practices will need to be dealt with by the adjudicating authority on the rule of reason basis.”⁶⁴ Further, the Report states:

Key questions for adjudication on abuse of dominance could include :

- How will the practice harm competition?
- Will it deter or prevent entry?
- Will it reduce incentives of the firm and its rivals to compete aggressively?
- Will it provide the dominant firm with an additional capacity to raise prices?
- Will it prevent investments in research and innovation?
- Do consumers benefit from lower prices and/or greater product and service availability?⁶⁵

At the moment, assuming unilateral fixation of resale price falls under S.

4(2)(a)(ii),⁶⁶ S. 4 goes beyond even the rebuttable presumption reserved for horizontal price-fixing agreements and sets a per se standard (overlooking, say, the *Colgate* judgment).⁶⁷

III. LEEGIN & THE JUSTIFICATIONS FOR THE MAINTENANCE OF A MINIMUM RESALE PRICE/PER SE STANDARD

Although *Dr. Miles* may be criticized for its reasoning while laying down a per se standard when dealing with RPM agreements, the end result may not be criticized as heavily. After all, there must be a reason why a number of jurisdictions around the world, including the European Community, the United Kingdom, Canada, Italy, and France (to name a few), explicitly prohibit RPM.⁶⁸ The United Kingdom,⁶⁹ Canada,⁷⁰ and India⁷¹ go

⁶⁴ Raghavan Committee Report, *supra* note 57, at para. 3.8.

⁶⁵ *Id.* at para. 4.5.

⁶⁶ *Id.*

⁶⁷ See n. 53, *supra*, as well as text to n. 71, *infra*.

⁶⁸ See Scott Martin & Fiona Schaeffer, *A Rule of Reason for Vertical Price Fixing—Part II*, THE METROPOLITAN CORPORATE COUNSEL (Nov. 2007), at 6, available at

even further and prohibit the cutting off of supplies as retaliation for failing to observe retail prices sought to be established by the manufacturer, a right that the U.S. Supreme Court guaranteed in *Monsanto Co. v. Spray-Rite Corp.* (affirming *U.S. v. Colgate & Co.*).⁷² Unfortunately, in the United States justifying a per se standard for minimum RPM necessarily involves justifying the continuance of the Court's decision in *Dr. Miles*, which is a harder thing to do.

Regulatory agencies and the courts have always been sensitive to practices relating directly to price. Indeed, even today the debate still rages on over whether the primary goal of competition law ought to be “consumer welfare” or “total welfare”.⁷³ According to traditional economic understanding, the goal of antitrust law ought to be the enhancement of economic efficiency.⁷⁴ Such efficiency incorporates both consumer welfare as well as producer welfare.⁷⁵ If costs are reduced for a producer, then that

<http://www.metrocorpounsel.com/current.php?artType=view&EntryNo=7404>; Ittai Paldor (2007), *supra* note 8, at 3-4. Ironically India, as shown earlier in this paper, despite being an extremely price sensitive nation, no longer treats regards minimum RPM as unlawful per se under the Competition Act 2002.

⁶⁹ Resale Prices Act 1964 (as amended in 1976)

⁷⁰ See M. Russell Wofford, Jr. & Jonathan R. Chally, *Leegin: Challenge or Opportunity for Cross-Border Trade?*, THE METROPOLITAN CORPORATE COUNSEL 53 (Oct. 2007), available at <http://www.metrocorpounsel.com/pdf/2007/October/53.pdf>.

⁷¹ MRTP Act, at Section 33.

⁷² See text in n. 53, *supra*.

⁷³ See, e.g., Summary of Antitrust Modernization Commission Hearing on the Treatment of Efficiencies in Merger Enforcement (Nov. 17, 2005), available at <http://www.abanet.org/antitrust/at-links/pdf/at-mod/efficiencies-merger-enforcement.pdf>. This was also an issue recently being discussed in the investigation relating to the proposed merger of XM Satellite and Sirius, two satellite radio service providers. J. Gregory Sidak, *Trusting the Antitrust Law; Sirius and XM are no Different*, National Review Online (Oct. 3, 2007), available at <http://article.nationalreview.com/?q=Zjk5NTJjNjc1MjE1ZjUwZjBiMDQ0YWNjNjRIYjFhNTk=>.

⁷⁴ See JOHN B. KIRKWOOD, ANTITRUST LAW & ECONOMICS 2 (2004).

⁷⁵ The terms “consumer welfare” and “producer welfare” can be likened to the economic terms “consumer surplus” and “producer surplus”. Consumer surplus is the difference between the amount a consumer is willing to pay for an article and the price he/she actually pays. Producer surplus is the

enhances efficiency and therefore increases the total welfare. According to the total welfare standard it is irrelevant whether the cost savings are transmitted to the consumer in the form of lower prices. Thus, even if such a practice increases prices, it may still meet the objective of competition law if it increases efficiency.⁷⁶

In contrast, consumer welfare focuses on prices in the marketplace.⁷⁷ This approach follows from the reasoning that preventing consumers from being exploited by manufacturers is the primary aim of competition law.⁷⁸ Thus, cost reduction alone does not increase consumer welfare. However, if it results in a price reduction for consumers, then presumably it would meet competition law's stated goal.

The consumer welfare standard appears to have the edge in this particular debate. While opinion appears to be divided between academics and economists, the consumer welfare standard appears to have won over the judiciary.⁷⁹ Judges would naturally find it

difference between the amount a manufacturer receives for an article and the amount he/she would be willing to receive and still continue to produce the article. Total welfare can be taken as the sum of consumer surplus and producer surplus. *See* DENNIS CARLTON & JEFFREY PERLOFF, MODERN INDUSTRIAL ORGANIZATION 70-71 (4th ed. 2005).

⁷⁶ KIRKWOOD (2004), *supra* note 74, at 5.

⁷⁷ *Id.*

⁷⁸ *Id.* at 5-6.

⁷⁹ *Id.* at 6; Also in *Leegin*, respondent PSKS Inc. relies on several decisions that point to the fact that securing lower prices has been a fundamental goal of antitrust law: "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. * * * We have adhered to this principle regardless of the type of antitrust claim involved." (*see* Brief for Respondent, *Leegin*, *supra* note 3 [hereinafter Brief for Respondent], at 21-22, available at www.law.cornell.edu/supct/cert/06-480.html (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. at 340 (1990))).

See also *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, No. 05-381 slip op. (U.S. Feb. 20, 2007), at 6 ("discouraging a price cut and * * * depriving consumers of the benefits of lower prices * * * does not constitute sound antitrust policy") (quoting *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) ("Price is the 'central nervous system of the economy'") (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 (1940)). *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594 ("Cutting prices in order to increase business often is the very essence of competition."); and *Barry Wright*

harder to justify basing a decision on the cold figures provided by economic analyses when the same figures show that consumers are paying higher prices.⁸⁰ It is perhaps this underlying debate that has made the treatment of minimum RPM such a sticky issue.

From a review of the discussion, the starting points that emerge are (i) the primary objective of competition law is to enhance consumer welfare (or ensure that consumers pay competitive prices); (ii) the rule of reason is the norm;⁸¹ and, (iii) the protection of inter-brand competition is more important than the protection of intra-brand competition.

A. The Score Board

There are several empirical studies that support the finding that minimum RPM may harm competition. In a 2007 Open Letter to the U.S. Supreme Court, Pamela Jones Harbour, Commissioner at the U.S. Federal Trade Commission, concludes that minimum RPM would likely result in consumers suffering several adverse outcomes, the first of which is high prices.⁸² In her letter, Commissioner Harbour cites studies by the U.S.

Corp. v. ITT Grinnell Corp., 724 F.2d 227, 231 (1st Cir. 1983) (Breyer, J.) (for a legal rule that inhibits price-cutting “risks interference with one of the Sherman Act’s most basic objectives: the low price levels that one would find in well-functioning competitive markets.”).

⁸⁰ This is not to say that judges would shy away from applying economic principles that may result in an unpopular decision; rather, in matters for which there may be many “right” answers, would lean in favor of a measure that directly protects consumers rather than increases overall economic efficiency.

⁸¹ See *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918):

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

⁸² See Open Letter, *supra* note 1, at 9 (referring to Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per se Rule against Vertical Price Fixing*, 71 GEORGETOWN L.J. 1487-88 (1983)). The studies showed that vertical minimum price fixing led to price increases as high as 27 to 37.4 percent, that the Miller Tydings Act and the State “fair trade” laws cost consumers US\$3 to US\$6.5 billion per year.

Library of Congress, Stanford University, and Robert Pitofsky on the effect of the Consumer Goods Pricing Act of 1975 (which repealed the Miller Tydings Act).

In its brief in *Leegin*, PSKS Inc. cites empirical studies that show “price surveys indicate that RPM in most cases increased the prices of products sold with RPM, although this was not always the case.”⁸³ Conversely, the respondent also cites empirical evidence showing that elimination of RPM led to significant price reductions in those products.⁸⁴ In the Court’s dissenting opinion, Justice Breyer refers to more empirical evidence that shows “minimum resale price maintenance had raised prices by 19% to 27%.”⁸⁵ Even parties supporting an overruling of *Dr. Miles* concede that empirical studies show that “identical products tend to cost more in Fair Trade states than in other states...”⁸⁶

⁸³ Brief for Respondent, *supra* note 79, at 23 (citing Thomas R. Overstreet, Jr., Resale Price Maintenance: Economic Theories and Empirical Evidence, Bureau of Economics Staff Report to the Federal Trade Commission (1983), at 160). See also Howard P. Marvel & Stephen McCafferty, *The Political Economy of Resale Price Maintenance*, 94 J. POL. ECON. 1074, 1078 (1986) (the authors concluded: “In summary, the limited price information on the effects of RPM suggests that the practice exerted substantial upward pressure on retail prices”).

⁸⁴ *Id.* at 23-24.

⁸⁵ Dissenting Opinion, *Leegin*, *supra* note 3, at 5 (referring to the Hearings on S. 408 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 173 (1975). The Minority also cited T. Overstreet (1983), *supra* note 83, which concluded, after studying numerous price surveys, that “resale price maintenance in most cases increased the prices of products sold” and AREEDA & HOVENKAMP, *ANTITRUST LAW* 1604b (2nd ed. 2004), at 40 (“Most economists today agree that, in the words of a prominent antitrust treatise, resale price maintenance tends to produce higher consumer prices than would otherwise be the case”).

⁸⁶ Janet L. McDavid, Statement on behalf of the American Bar Association before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary of the United States Senate concerning “The *Leegin* Decision: The End of Consumer Discounts or Good Antitrust Policy” (Jul. 31, 2007), available at <http://www.abanet.org/antitrust/at-reports/consumer-discount.pdf>. McDavid goes on to say that “the premise underlying these studies was that minimum resale price maintenance agreements were usually imposed by buyers upon reluctant sellers—a premise that ... has not won universal acceptance among economists.”

In its defense, the petitioner points out that RPM does not “necessarily lead to high nominal retail prices.”⁸⁷ When addressing this issue, the petitioner only cites one empirical study that shows “that the practice can, in some situations, actually result in lower nominal retail prices.”⁸⁸ The remainder of the literature points to benefits that may accrue to consumers, but these remain hypotheses and prompted the respondent to comment that: “No empirical study ever has shown that consumers tangibly benefit by the imposition of RPM, and Leegin points to none.”⁸⁹ The petitioner does point out that with RPM having been per se unlawful all this time “real world examples are difficult to identify,” citing only Leegin’s own case as an example.⁹⁰ This is not entirely accurate since the United States has experimented with RPM. By 1951, all but two states (Texas and Missouri) and the District of Columbia had enacted state fair trade laws. Coupled with the Miller Tydings Act, they legalized RPM throughout the United States for almost forty years.⁹¹ The results of this experiment are found to have increased prices.⁹²

This is essentially where the second starting point comes to the petitioners’ aid. Rule of reason being the norm, the onus is on the per se proponents to show that the practice of minimum RPM warrants such treatment. The test set by the U.S. Supreme Court for deviation from the rule of reason to per se is to determine whether the agreement or practice, “because of [its] pernicious effect on competition and lack of any

⁸⁷ Brief for Petitioner, *supra* note 55, at 17.

⁸⁸ *Id.* (citing T. Overstreet (1983), *supra* note 83).

⁸⁹ Brief for Respondent, *supra* note 79, at 23.

⁹⁰ Reply Brief for Petitioner, *supra* note 55, at 9.

⁹¹ Ittai Paldor (2007), *supra* note 8, at 7.

⁹² The petitioner’s stand is validated to the extent that these studies do not indicate whether there are sufficient countervailing benefits that offset the price increase.

redeeming virtue[, is] conclusively presumed to be unreasonable and therefore illegal” so as to preclude any requirement for an “elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”⁹³ Thus, any “conduct that would always or almost always tend to restrict competition” would qualify for per se treatment.⁹⁴

For RPM to be prohibited per se therefore it would be necessary to show that it results in pernicious effects without any countervailing benefits. Its most troublesome effect lies in the prices “almost always” rising as a result. Other relevant effects of RPM include:

(1) The facilitation of cartels. This stems from the reasoning that retailers (or an association of retailers) may see RPM as a method by which they can maximize their profits without breaking antitrust law. In other words if RPM were lawful it would facilitate cartelization at the dealer level. The minimum resale price would be the retailers’ price rather than the manufacturers.⁹⁵ *Dr. Miles* was decided in the backdrop of a very strong retailer’s association that threatened to boycott the manufacturer’s products if they did not adopt and maintain resale prices.⁹⁶ The practice may also facilitate cartelization at a manufacturer level, and more so in

⁹³ *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) [hereinafter *Northern Pacific*]. “The *per se* rule is appropriate only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason” (*Leegin*, *supra* note 3, at 6).

⁹⁴ *Business Electronics*, *supra* note 14, at 723.

⁹⁵ This argument assumes that (a) retailers favor RPM and (b) that the retailers command sufficient market power to persuade manufacturers to adopt the system. The first proceeds on the basis that RPM guarantees retailers a fixed margin and they do not have to compete with other retailers on price. However, to the contrary a pro-competitive justification for RPM is said to be the prevention of free riding, which claims that RPM is best suited to prevent the malady of price-cutting discounters. The second assumption again is questionable as there is little proof that retailer power is a common feature of industry (*See* Brief for Petitioner, *supra* note 55, at 21). Moreover, even if it were, the practice would be per se illegal as a horizontal price-fixing agreement. A per se treatment for a vertical price-fixing agreement cannot be justified because of the difficulties in proving that it is in fact the result of a horizontal price-fixing agreement. Nevertheless, it is true that RPM may facilitate a cartel at the dealer level, but doubtful that this warrants a per se treatment as a result.

⁹⁶ *See* Open Letter, *supra* note 1, at 4.

concentrated markets,⁹⁷ by easily identifying price-cutting manufacturers to help enforce the cartel.⁹⁸

(2) The distortion of retailer incentives.⁹⁹ This refers to the fact that RPM would induce retailers to stock and encourage consumers to buy the product being sold at the maintained price as he receives a larger margin from the sale.¹⁰⁰

(3) The restriction of intra-brand competition.¹⁰¹

What RPM does have on its side is the prevailing opinion of leading economists,¹⁰² the U.S. Department of Justice, the U.S. Federal Trade Commission,¹⁰³ and the Antitrust Section of the American Bar Association,¹⁰⁴ to name a few. The Court, while noting that “economics literature is replete with procompetitive justifications for a manufacturer’s use of resale price maintenance,”¹⁰⁵ lists two of the most persuasive pro-competitive benefits that minimum RPM is said to have:

(1) The prevention of “free riding”. This refers to price-cutting retailers taking unfair advantage of the services performed by other retailers. In other words, a retailer may invest time and money in “fine showrooms, ... product demonstrations, ... knowledgeable employees”¹⁰⁶ in order to generate demand.

⁹⁷ Dissenting Opinion, *Leegin*, *supra* note 3, at 16.

⁹⁸ *Id.* at 12-13.

⁹⁹ Open Letter, *supra* note 1, at 10.

¹⁰⁰ See Brief for Respondent, *supra* note 79, at 27.

¹⁰¹ One of the results of classifying RPM as per se however, was that many suppliers began to integrate forward into distribution themselves, thus eliminating the retailer altogether. See *State Oil*, *supra* note 2, at 22 and *Leegin*, *supra* note 3, at 24.

¹⁰² Amicus Brief for Economists, *Leegin*, *supra* note 3, at 15-16 (concluding: “In the theoretical literature, it is essentially undisputed that minimum RPM can have pro-competitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects”).

¹⁰³ Amicus Brief for the United States, *Leegin*, *supra* note 3 [hereinafter Brief for the United States], available at <http://www.usdoj.gov/atr/cases/f221000/221027.htm>.

¹⁰⁴ See McDavid (2007), *supra* note 86.

¹⁰⁵ *Leegin*, *supra* note 3, at 11.

¹⁰⁶ *Id.*

Discounters, without making any investment, may wean away these customers by offering the same products at lower prices, ultimately killing the motivation of the service-providing retailer. In fact, one of the amicus briefs in favor of the petitioner was filed by PING Inc., which focuses solely on the free-riding problem. It explains the role of PING retailers in providing “custom fitting”¹⁰⁷ golf clubs “regardless of his or her skill level.”¹⁰⁸ PING adopted a unilateral pricing policy allowed by *Colgate* in order to encourage retailers to provide the necessary services. Discounters would advise customers to visit a PING store providing these custom fitting services and then purchase the product from them. In order to avoid any accusation of entering into a price-fixing agreement under Section 1 of the Sherman Act, it would terminate the dealership with discounters altogether and abruptly. The amicus concludes that:

Companies like PING that adopt resale pricing policies for procompetitive purposes should not be forced to damage their relationships with retailers and consumers, and limit consumer choice, in order to avoid risking *per se* liability. A better alternative ... is to allow companies like PING to enter into pricing agreements with retailers that would involve negotiation and the free flow of communication between a manufacturer and its retailers.¹⁰⁹

¹⁰⁷ According to the company:

A PING custom fitting identifies which, of the more than one million custom manufacturing possibilities PING can deliver, is the right one for each individual golfer. An iron and wedge fitting session requires 30 to 60 minutes to evaluate properly each golfer’s physical characteristics and swing in arriving at the golf club specifications unique to that golfer. The fitting involves: an interview process (to identify the golfer’s current and desired ball flight); static measurements (height and other physical measurements necessary to calculate a starting point for club length, lie angle, and grip size); a dynamic swing test (“impact tape” is applied to the sole of the club, and the marks left on the tape are used to calculate the proper loft and lie angles); ball flight observations (ball flight is observed to determine the final lie angle specifications—which will minimize the chance that the golfer hits shots that miss left or right of the intended target); and performance monitor (the PING “Performance Scoresheet” is employed to identify any changes to the golfer’s shot making patterns). As a result of this technical and time-intensive effort, PING customers who have been custom fitted receives the precise clubs that will allow them to “play their best,” and obtain all of the value built into PING golf clubs.

See Brief of Ping Inc. as amicus curiae supporting the Petitioner, *Leegin*, *supra* note 3, at 6-7, available at <http://www.law.cornell.edu/supct/cert/06-480.html>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 19.

The example at once shows free riding as a real problem as also the limitations of *Colgate* as an alternative to RPM in controlling it.

(2) The stimulation of inter-brand competition. This means that:

new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer.¹¹⁰

The Court further notes that RPM would enhance inter-brand competition

by encouraging retailer services that would not be provided even absent free riding. It may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services.¹¹¹

In light of this, can it be said that minimum RPM “lacks of any redeeming virtue”?¹¹² One would have to conclude not. Justice Breyer still objects “the proponents of a *per se* rule have always conceded” that minimum RPM indeed does have some pro-competitive effects at times.¹¹³ According to the dissenting judges, the question is “how often are benefits ... likely to occur ... in practice?”¹¹⁴ No matter how many pro-competitive benefits RPM may have, if they are unlikely to accrue in reality, they are of little value. Even the economists concede that “[t]he disagreement in the literature relates principally to the relative frequency with which pro-competitive and anticompetitive

¹¹⁰ *Sylvania*, *supra* note 3, at 55.

¹¹¹ *Leegin*, *supra* note 3, at 12. This may have been worded better because achieving compliance by threatening termination is something that *Colgate* already provided. However the risks associated with implementing a unilateral resale price scheme renders *Colgate* problematic by not allowing any dialogue between the manufacturer and its retailers.

¹¹² *Northern Pacific*, *supra* note 93, at 5.

¹¹³ Dissenting Opinion, *Leegin*, *supra* note 3, at 14.

¹¹⁴ *Id.* at 8.

effects are likely to ensue”¹¹⁵ and little can be pointed to in all the pleadings before the Court emphasizing factual events.

But this is true for the ill effects of RPM as well. The “how often?” question is equally applicable to the harmful consequences of RPM.¹¹⁶ The only almost certain result is the rise in prices. In reply, the most persuasive argument Justice Kennedy makes for the Court is while addressing the consequential price rise following the implementation of RPM. The Court holds:

- (a) that it is wrong to rely “on pricing effects absent a further showing of anticompetitive [effects]” since “price surveys do not necessarily tell us anything conclusive about the welfare effects of resale price maintenance,”¹¹⁷ suggesting that consumers in mature markets may prefer to bear higher retail prices if they receive benefits in the form of services, etc;
- (b) that “the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result,”¹¹⁸ since higher prices in general stimulate entry of other manufacturers, and RPM also allows new manufacturers to use it to induce retailers to stock and sell its products;¹¹⁹ and
- (c) that:

[I]n general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer’s cost of distribution, which, like any other cost, the manufacturer usually desires to minimize. [...] As a general matter, therefore, a single manufacturer will desire to set minimum resale

¹¹⁵ Brief for the United States, *supra* note 103, at 25.

¹¹⁶ Justice Breyer in fact alludes to this himself in asking “How often are harms or benefits likely to occur?” and in stating “I can find no economic consensus on this point.” Dissenting Opinion, *Leegin*, *supra* note 3, at 8.

¹¹⁷ *Leegin*, *supra* note 3, at 15-16 (internal quotations omitted).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 11.

prices only if the increase in demand resulting from enhanced service ... will more than offset a negative impact on demand of a higher retail price.¹²⁰

1. Price vs. non-price vertical restraints and combined vs. unilateral action

Two further issues tilt the balance in favor of a rule of reason. First is the apparent dichotomy between the treatment of vertical price restraints as opposed to vertical non-price restraints. Second is the distinction between the treatment of unilateral conduct in maintaining minimum resale prices and that of agreements to fix resale prices.

One of the arguments of the petitioner was that different legal standards should not be applied to vertical price and non-price agreements given that “the economic effects of price and nonprice restrictions is in many cases similar or identical.”¹²¹ Vertical non-price restraints such as exclusive territories completely exclude other retailers in the same area, tending to create monopolies, as in *Albrecht*,¹²² whereas RPM only imposes a restraint on the final price, leaving retailers to compete on non-price factors. Then why is it that non-price restraints are judged by rule of reason and price restraints by per se? The Court alluded to this distinction in its earlier judgments as well,¹²³ and there has not been

¹²⁰ *Leegin*, *supra* note 3, at 16-17. This is supported by the fact that RPM was a largely uncommon tool even at a time when they were lawful under the Fair Trade laws, being used by no more than ten percent of the manufacturers. *See* T. Overstreet (1983), *supra* note 83, at 6 & 169; F.M. SCHERER & D. ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 549 (3d ed. 1990); and (in the Brief for Petitioner, *supra* note 55) Frank Mathewson & Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13 *REV. INDUS. ORG.* 57, 61 (1998).

¹²¹ Brief for Petitioner, *supra* note 55, at 18 (internal quotations omitted) (citing *Monsanto*, *supra* note 53, at 762).

¹²² *See Albrecht*, *supra* note 3.

¹²³ *Monsanto*, *supra* note 53; *Business Electronics*, *supra* note 14, at 728; and *Sylvania*, *supra* note 3, at 69.

any convincing explanation forthcoming.¹²⁴ This unexplained dichotomy strengthens the case for the application of the rule of reason for RPM agreements.

A common thread running through *Dr. Miles* and up until *Leegin* is the finding of a “conspiracy” in the setting of resale prices. To bring minimum RPM under the erstwhile per se treatment of Section 1 of the Sherman Act, it was necessary to show that the manufacturer and the retailer conspired in fixing resale prices. This distinction between an “agreement” in the real sense of the term (i.e., consensus ad idem), in the setting of a minimum resale price and the dictation of one by the manufacturer can be quite blurry. This is true even in S. 33 of the MRTP Act where “agreements” on “stipulation” of maximum resale prices are prohibited. In most cases, the action is brought by the erstwhile retailer, the counter party to the “agreement”. As referred to earlier, the *Colgate* rule ensured the right of a manufacturer to independently impose

¹²⁴ One paper dedicated to justifying the difference is by Ittai Paldor (2007), *supra* note 8. The basis of the argument in favor of the distinction is that non-price restraints are much more likely than price restraints to result in the pro-competitive benefits that vertical price restraints claim to have, such as the prevention of free-riding and the inducement of new entrants. The argument finds support in the Court’s decision of *Business Electronics*, *supra* note 14, at 728, where the Court observes that vertical nonprice restraints “only accomplish the benefits identified in *GTE Sylvania* because they reduce intrabrand price competition to the point where the dealer’s profit margin permits provision of the desired services.” This argument presumes that although they certainly have pernicious effects, because vertical non-price restraints are more likely to achieve their pro-competitive justifications, they have sufficient “redeeming virtues” so as not to apply the per se rule.

However, the Court in *Leegin* thought otherwise. According to it, “vertical nonprice restraints may prove less efficient for inducing desired services, and they reduce intrabrand competition more than vertical price restraints by eliminating both price and service competition” (*Leegin*, *supra* note 3, at 25). The argument also does not address Justice Breyer’s question of “how often”? (*see* text to n. 114, *supra*). In reality, how often do vertical non-price restraints actually result in pro-competitive effect? How often are these effects likely to offset the anticompetitive effects that such restraints admittedly have? To allow the discrimination the onus of the test in *Business Electronics*, *supra* note 14, at 723 of the “conduct almost always tend[ing] to restrict competition” ought to be reversed. That is to say it should be shown that vertical non-price restraints almost always results in pro-competitive effects in order to justify using the rule of reason.

resale prices.¹²⁵ But, assuming the effects of RPM to be the same (whether independently imposed or conspired on), the unanswered question is: Why are they treated differently?¹²⁶

In the end, it appears that while pre se proponents score heavily on the price-rise “consumer welfare” argument, rule of reason proponents score on the promotion of inter-brand competition apart from its inherent advantage of being the norm. On “a clean slate,”¹²⁷ therefore, we are left with a final score, if a somewhat unconvincing one, of: Per se, 1; Rule of Reason, 2.

IV. CONCLUSION

By way of guidance on how minimum RPM agreements may be analyzed, the Court suggested that one could look at: (i) the number of manufacturers in the market using RPM;¹²⁸ (ii) the source of the restraint;¹²⁹ and (iii) the market power of the

¹²⁵ See *supra* note 54, 66 & text to n. 71, *supra*.

¹²⁶ The U.S. Supreme Court had also noted this earlier: “the economic effect of all of the conduct described above—unilateral and concerted vertical price setting, agreements on price and nonprice restrictions—is in many, but not all, cases similar or identical.” See *Monsanto*, *supra* note 53, at 762.

¹²⁷ See *Leegin*, *supra* note 3, at 19 and Dissenting Opinion, *Leegin*, *supra* note 3, at 11. I have not discussed the issue of stare decisis since it is not particularly relevant in India. The primary reason for this being the fact that the Indian Supreme Court does not sit en banc as in the United States but normally in benches of twos. Moreover, the judges are not appointed “for life”, but have a mandatory retirement age of 65. Therefore, not only are there several faces of the Indian Supreme Court, but even these change quite often. Landmark three or five judge bench decisions have been overturned in less than five to six years. For example, the Full Bench (3 judges) decision in *Konkan Rly. Corporation Ltd. v. Mehul Construction Co.*, AIR 2000 S.C. 2821 : 2000 (7) S.C.C. 201, approved by the Constitution Bench (5 judges) in *Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.*, AIR 2002 S.C. 778 : (2002) 2 SCC 388, was overruled by a seven member decision in *S.B.P. & Co. v. Patel Engineering*, AIR 2006 S.C. 450.

¹²⁸ Stating that:

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

concerned entity.¹³⁰ Yet there are many grey areas. If anything, the *Leegin* judgment underlines the need to analyze and understand the circumstances and market structures in which RPM would likely result in pro-competitive effects. There is little consensus of the circumstances in which retailers or manufacturers would prefer to enter into RPM agreements; whether the size of the retailer or manufacturer matters and in what way; what the effects of a concentrated retailers' market would have if the manufacturers exercise market power as well and what the effects would be if they did not; what products lend themselves to RPM more than others; what kinds products would justify the claim of enhanced retail services or the prevention of free riding; whether a unilateral policy would achieve the same results in a comparably efficient manner; what foreseeable exceptions to the rule of reason exist in the case of vertical non-price or price restraints;¹³¹ and so on. While *Leegin* has cleared the way for scores of manufacturers to

Leegin, *supra* note 3, at 17 (internal citations omitted).

¹²⁹ Stating that:

If there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer. If, by contrast, a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct.

Id. at 18.

¹³⁰ Stating that:

a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.

Id. at 18.

¹³¹ Justice Breyer even concedes that “I might agree that the *per se* rule should be slightly modified to allow an exception for the more easily identifiable and temporary condition of ‘new entry’” (Dissenting Opinion, *supra* note 1, at 11).

control the final retail price, the pitfalls and dangers in doing so are also still unclear.¹³² It appears that the remark of Justice Douglas in *White Motor Co.* about the “need to know more than we do about the actual impact of these arrangements on competition”¹³³ before drawing up any “bright line”¹³⁴ rules, still holds.

In the meantime, in order to strike the right balance between *Dr. Miles* and *Colgate*, the United States may do well to adopt the standard used in India to judge horizontal agreements—that of a rebuttable presumption. This would at once overcome the seemingly insurmountable evidentiary burden otherwise cast on the plaintiff and shift the onus on the defendant to show that the pro-competitive effects outweigh the harm. India on the other hand, given the express statutory dictate, would need its judicial authorities to tighten the law that concerns vertical RPM agreements under Section 3(4) while adopting a purposive approach and perhaps reading into Section 4 where unilateral RPM is concerned. Moreover, as alluded to by the Raghavan Committee Report (though not elaborated on),¹³⁵ the Competition Commission and the Courts would have to adopt an appropriate guideline for the best course of action to pursue in cases in which Sections 3 and 4 overlap.¹³⁶

¹³² See Lockerby (2007), *supra* note 53; Martin & Schaeffer (2007), *supra* note 68; Leon Greenfield, Gil Ohana, and David Olsky, *The Lessons of Leegin: Supreme Court Overturns a 96 Year Old Ban on Resale Price Maintenance* (mimeo, Wilmer Hale) (June 29, 2007), available at <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=3845>; Hon. James L. Warren, *Manufacturers must follow ‘Rule of Reason’ in Setting Floor Prices*, INDUSTRY WEEK (Aug 03, 2007), available at <http://www.industryweek.com/ReadArticle.aspx?ArticleID=14701&SectionID=3>.

¹³³ *White Motor Co.*, *supra* note 27.

¹³⁴ Dissenting Opinion, *Leegin*, *supra* note 3, at 1, 11 & 20.

¹³⁵ Raghavan Committee Report, *supra* note 57, at para. 4.4.

¹³⁶ See n. 60.