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### Just What the Doctor Ordered: A Second Opinion for Vertical Price-Fixing

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## I. INTRODUCTION

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>2</sup> a 5-4 Supreme Court majority held that the antitrust rule of reason would henceforth apply to minimum vertical price-fixing. Often referred to as “resale price maintenance” or “RPM,” minimum vertical price-fixing is an agreement between a supplier and customer setting the floor price, below which the customer will not resell the product. *Leegin* overturned the nearly 100 year-old *Dr. Miles* precedent, which held that vertical price-fixing was a per se federal antitrust violation—unlawful in and of itself, without any need to inquire whether the agreement produced anticompetitive effects.<sup>3</sup> As *Leegin*’s narrow majority reflects, the question was a close one. Indeed, while the United States Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”) had urged the Court to reject per se treatment, 37 states, led by New York, argued that the per se rule was appropriate.<sup>4</sup>

The debate over RPM centers on the fact that vertical price-fixing’s purpose is to increase an item’s price beyond that likely to prevail absent the price-fixing. As a leading commentator has said, RPM “tends to produce higher consumer prices than would otherwise be the case. The evidence is persuasive on this point.”<sup>5</sup> Dissenting in *Leegin*, Justice Breyer estimated, albeit roughly, an impact of \$750 - \$1000 per year for a family of four.<sup>6</sup>

Increasing an item’s price usually is thought of as harming consumers, and hence agreements that do so raise antitrust red flags.<sup>7</sup> On the other hand, RPM defenders contend that vertical price-fixing can operate to ensure that dealers provide services to customers, which translate into additional value. They further argue that, if a supplier permits its product’s resale price to be set too high, competitors will capture sales and eventually drive down the price. Market forces will, in other words, protect against consumer harm.

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<sup>2</sup> 551 U.S. 877 (2007).

<sup>3</sup> *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Twenty years earlier, the Supreme Court held that the rule of reason applied to maximum vertical price-fixing, which sets the ceiling above which the customer may not resale. *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

<sup>4</sup> Brief for the United States as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06-480, 2007 WL 173650 (U.S. Jan. 22, 2007); Brief for the State of New York and 36 Other States as Amici Curiae Supporting Respondent, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06-480, 2007 WL 621851 (U.S. Feb. 26, 2007).

<sup>5</sup> VIII PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1640b, at 40 (2<sup>nd</sup> ed. 2004).

<sup>6</sup> 551 U.S. at 926.

<sup>7</sup> *See, e.g.*, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) (“Low prices benefit consumers regardless of how those prices are set”); *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 360 (1982) (“Normally consumers search for high quality at low prices”).

This debate has persisted for decades among antitrust practitioners, economists, and business people. So, a Supreme Court ruling could hardly be expected simply to end the matter. And it has not.

*Leegin* now commands widespread attention. Antitrust practitioners are endeavoring to grasp the ruling's impact on the business community. Government enforcers are re-energized, not only at the State level—where RPM and vertical restraints in general have been an area of traditional concern—but also at the FTC. Even the DOJ—where RPM dropped off the antitrust radar screen years before the Bush administration essentially shut down civil non-merger enforcement—has gotten into the act. Congress itself has bills in both houses that are designed to reinstate per se treatment for RPM.

## II. THE DOORS OF WONDERLAND OPEN

For antitrust practitioners and government enforcers, *Leegin* closed one door, while opening still others. Although it rejected per se treatment for RPM, the Supreme Court majority invited developing an RPM analysis different than that associated with a typical rule of reason inquiry. As Justice Kennedy explained:

As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.<sup>8</sup>

Once something of a cottage industry, RPM discussion now serves as a staple of antitrust community gatherings, affording the sustenance for countless papers and CLE programs.<sup>9</sup> Fine-tuning an RPM rule of reason case is no mean feat.

In a recent article, Assistant Attorney General Varney herself suggested a “structured” approach, which would consider different factors, depending on whether the RPM was manufacturer- or retailer-driven, and whether it operated to facilitate price collusion or to exclude competition.<sup>10</sup> Each paradigm itself involved burden shifting and multiple avenues of fact inquiry. For example, where the paradigm involves manufacturer-induced RPM that facilitates collusion, the plaintiff would need to show the following elements to make out a prima facie case:

- RPM is used pervasively in the relevant market;
- Market structure conditions are conducive to price coordination; and
- RPM plausibly helps significantly to identify cheating.<sup>11</sup>

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<sup>8</sup> 551 U.S. at 898-99.

<sup>9</sup> See, e.g., Thomas A. Lambert, *Dr. Miles Is Dead. Now What?: Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance*, 50 WM. & MARY L. REV. 1937 (2009) (critiquing multiple rule of reason approaches); Frank M. Hinman & Sujal J. Shal, *Counseling Clients on Vertical Price Restraints*, 23 ANTITRUST 60, No. 3 (2009); Warren G. Grimes, *The Path Forward After Leegin: Seeking Consensus of Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L.J. 467 (2008).

<sup>10</sup> Christine A. Varney, *A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason*, 24 ANTITRUST 22, No.1 (2009).

<sup>11</sup> *Id.* at 24.

Layering on the *Twombly-Iqbal* gloss could further mean that the plaintiff would have to plead specific facts—not conclusions—that make the individual elements “plausible,” not simply “possible.” The three other Varney paradigms each have their own three-part package of elements.

Antitrust litigators anxious to hone their skills in motion-making (and opposing), discovery-taking and trial-trying can be expected to rejoice. So too will the economist-experts that both sides will need. The clients that they serve might not, however. Litigation under the rule of reason—whether or not structured—tends not to come cheap, “and it is likely to be even more costly for a practice that is as poorly understood and as complex as RPM.”<sup>12</sup>

Meanwhile, the American Antitrust Institute has advocated that an RPM agreement give rise to a presumption of illegality, which the defendant then must rebut by showing no net anti-competitive effect.<sup>13</sup> The FTC, for its part, held a series of workshops to study the subject.<sup>14</sup> The Commission also enlisted Nine West, the shoe manufacturer, to provide it with data at two-year intervals as a condition for lifting the FTC’s earlier consent decree resolving allegations of RPM against the company—a dispensation that 27 states opposed when Nine West petitioned, post-*Leegin*, for relief.<sup>15</sup>

To be sure, the search for RPM’s rule of reason holy grail is understandable. Put all the members of the ABA’s Antitrust Section in a room and ask for a show of hands for those who have gone to trial in a Sherman Act § 1 rule of reason case—one not involving a monopolist or near-monopolist. Few, if any, hands will go up. These cases rarely make it to trial, and even if one does, the obstacles to a plaintiff prevailing not just before a jury, but on appeal as well, are formidable. Accordingly, applying conventional rule of reason analysis would mean, in the real world, that RPM is virtually per se legal. The relatively few decisions since *Leegin* suggest that trekking beyond the motion to dismiss stage will be steeply upward, albeit still possible.<sup>16</sup> On remand from the Supreme Court, *Leegin* itself was dismissed and is on appeal to the Fifth Circuit again.<sup>17</sup>

A notable exception here is the *Babies ‘R Us* case, where the district court denied dismissal and recently certified classes in an RPM case after a power buyer induced manufacturers to keep up prices and cut-off internet retailers.<sup>18</sup> Discovery prior to class certification proceedings produced a treasure trove of emails detailing the buyer’s efforts to have suppliers keep prices hiked. The plaintiffs showed that Babies ‘R Us (“BRU”) “threaten[ed] not to carry products unless their

<sup>12</sup> PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1620.1, at 317 (Supp. 2009).

<sup>13</sup> Brief for the American Antitrust Institute as Amicus Curiae in Support of Appellant and Reversal, in *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, No. 09-40506 (5<sup>th</sup> Cir. Aug. 14, 2009), <http://www.antitrustinstitute.org/search.aspx?keyword=leegin>.

<sup>14</sup> See <http://www.ftc.gov/opp/workshops/rpm/>.

<sup>15</sup> Order Granting in Part Petition to Reopen and Modify, In the Matter of Nine West Group, Inc., FTC Docket No. C-3937, slip op. at 17 (May 6, 2008), <http://www.ftc.gov/os/caselist/9810386/080506order.pdf>; Amended States’ Comments Urging Denial of Nine West’s Petition, In the Matter of Nine West Group, Inc., FTC Docket No. C-3937 (Jan. 17, 2008), [http://www.ag.ny.gov/bureaus/antitrust/pdfs/Amended\\_State\\_comments\\_011708-9west.pdf](http://www.ag.ny.gov/bureaus/antitrust/pdfs/Amended_State_comments_011708-9west.pdf).

<sup>16</sup> See *Spahr v. Leegin Creative Leather Products, Inc.*, No. 07-CV-187, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), appeal dismissed, No. 08-6165 (6<sup>th</sup> Cir. Nov. 20, 2008); *O’Brien v. Leegin Creative Leather Products, Inc.*, No. 04-CV-1668 (8<sup>th</sup> Jud. Dist. Sedgwick County, Kan. July 9, 2008), appeal granted, No. 101,000 (Kan. Sup. Ct. Oct. 6, 2008), docket at [http://judicial.kscourts.org.7780/pls/coa/CLERKS\\_OFFICE.list\\_case\\_detail?i\\_case\\_number+100100&i\\_case\\_name=](http://judicial.kscourts.org.7780/pls/coa/CLERKS_OFFICE.list_case_detail?i_case_number+100100&i_case_name=)

<sup>17</sup> No. 2:03-cv-107, 2009 WL 938561 (E.D. Tex. Apr. 6, 2009), on appeal, Docket No. 09-40506 (5<sup>th</sup> Cir. 2009).

<sup>18</sup> *McDonough v. Toys “R” Us, Inc.*, 638 F. Supp. 2d 461 (E.D. Pa. 2009); *Babyage.com, Inc. v. Toys “R” Us, Inc.*, 558 F. Supp. 2d 575 (E.D. Pa. 2008).

manufacturer agreed to prevent internet retailers from discounting them. Manufacturers were forced to acquiesce because industry-dominant BRU had become their most prized customer.”<sup>19</sup>

It is no secret that antitrust litigators believe juries in an RPM case will have little patience for defense explanations of why consumers supposedly benefit from RPM. Paying higher prices is something jurors understand. The benefits of “efficiency” and “competition” are mushy.<sup>20</sup> The trick, therefore, is to avoid getting before a jury—but if you do, to protect the record for appeal.

Also important, RPM enforcement at the state level militates in favor of cautious antitrust counseling for businesses thinking about instituting a new program after *Leegin*.<sup>21</sup> New York and California are notably *Leegin*-unfriendly, and 13 states reportedly still consider RPM a per se violation.<sup>22</sup> In 2009 Maryland became the first state to apply a post-*Leegin* legislative band-aid.<sup>23</sup> Many states, of course, are likely to follow *Leegin* as a matter of state antitrust law, absent specific legislation or case law condemning RPM. Still, as the most active RPM enforcers in recent years, the states might be able to hold the fort, at least for the time being.

### III. MARCHING TO THE BEAT OF A (MOSTLY) DIFFERENT DRUMMER

Where, then, does *Leegin* put the United States in the world at large? Throughout much of the rest of the world “fixing the resale price, or establishing a minimum resale price, have long been considered hard-core restrictions on competition and are therefore presumed anti-competitive.”<sup>24</sup> The EC, for example, has adopted this “hardcore” approach because “the direct effect of RPM is a price increase.”<sup>25</sup> Thus, there are “strong” presumptions, derived from TFEU Article 101(1) (formerly Article 81(1)), that the practice has anticompetitive effects.<sup>26</sup> These presumptions, although rebuttable, are that either: (1) RPM will not have positive effects, or (2) if there are efficiencies, (a) they will not be passed on to consumers, or (b) RPM is not indispensable

<sup>19</sup> 638 F. Supp. 2d at 468.

<sup>20</sup> See generally Michael A. Lindsay, *Resale Price Maintenance: Real Life Lessons from a Mock Trial*, ANTITRUST SOURCE 1 (June 2008), <http://www.abanet.org/antitrust/at-source/08/06/Jun08-Lindsay6=26f.pdf>.

<sup>21</sup> See, e.g., Alan M. Barr, *Antitrust Federalism in Action—State Challenges to Vertical Price Fixing in the Post-Leegin World*, ANTITRUST SOURCE, Dec. 2009, at 1, 3, <http://www.abanet.org/antitrust/at-source/09/12/Dec09-Barr12-17f.pdf> (citing Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 *Franchise L.J.* 173, 174 (2008)); Joel M. Mitnick, John J. Lavelle, William V. Reiss & Owen H. Smith, *On Life Support from Leegin’s Disease: Can the States Resuscitate Dr. Miles?*, 22 *Antitrust* 63, No. 3 (2008).

<sup>22</sup> See N.Y. Gen. Bus. Law § 369-a; Jay L. Himes, *New York’s Prohibition of Vertical Price Fixing*, N.Y.L.J., Jan. 29, 2008, at 4; *New York v. Herman Miller, Inc.*, No. 08-cv-2977 (S.D.N.Y. Mar. 25, 2008); (consent decree), [http://www.ag.ny.gov/bureaus/antitrust/pdfs/Signed\\_FJ.pdf](http://www.ag.ny.gov/bureaus/antitrust/pdfs/Signed_FJ.pdf); Cal. Bus. & Prof. Code § 16720(d), (e)(1) & (2); *Mainland v. Burckle*, 20 Cal. 3d 367 (1978). See generally Michael A. Lindsay, *Overview of State RPM (Complete)* (2007) (surveying state laws), <http://www.abanet.org/antitrust/at-source/07/12/LindsayFullChart11-29.pdf>.

<sup>23</sup> 2009 Md. Laws 169–171, codified as Md. Code Ann., Com. Law § 11-204(a)(1) (2009).

<sup>24</sup> W. Todd Miller & Kimberly N Shaw, *EU/US Comparison Pricing*, in GLOBAL COMPETITION POLICY, THE ANTITRUST REVIEW OF THE AMERICAS 2010, <http://www.globalcompetitionreview.com/reviews/20/sections/71/chapters/787/eu-us-comparison-pricing/>. See also Luc Peepkorn, *Resale Price Maintenance and Its Alleged Efficiencies*, 4 *EUR. COMP. J.* 201, 202 (2008) (“Peepkorn, RPM”).

<sup>25</sup> *Id.* at 207.

<sup>26</sup> *Id.* at 212. In pertinent part, TFEU Article 101(1) (formerly Article 81(1) EC) prohibits, among other things, “concerted practices” that “have as their object or effect the prevention, restriction or distortion of competition,” including those which “[d]irectly or indirectly fix purchase or selling prices.” This Article, together with the EC’s 1999 block exemption regulation and guidelines on vertical restraints, form the “package” that defines the EC’s approach to RPM. *Id.* at 201.

to achieving those efficiencies. A company using RPM may refute the presumptions by convincing evidence demonstrating that RPM will increase efficiencies. Then, the determination must be made whether there are net pro-competitive effects.<sup>27</sup>

Although the EC is revising its existing regulations and guidelines on vertical restraints, which expire on May 31, 2010, the revisions are unlikely to change the EC's treatment of RPM.<sup>28</sup> As a matter of national competition law, various EU members, such as the United Kingdom, Spain and France, either adopt the EC approach presuming that RPM is illegal, or prohibit it as a per se violation.<sup>29</sup>

Outside of Europe, RPM is similarly considered anticompetitive. The Australian Trade Practices Act of 1974 makes RPM a per se offense, stating expressly that "a corporation or other person shall not engage in the practice of resale price maintenance."<sup>30</sup> In Japan, RPM agreements are prohibited, although there are exceptions for specific uniform, identifiable commodities, including books.<sup>31</sup> Even China, whose Anti-Monopoly Law took effect in 2007, prohibits the practice.<sup>32</sup>

Nearer to home, the United States has company, however. Mexico's competition law provides for what is essentially a rule of reason analysis for RPM.<sup>33</sup> Canada recently amended its Competition Act to decriminalize RPM, replacing it with a civil right of action triggered by an "adverse effect on competition in a market,"<sup>34</sup> essentially a rule of reason standard.

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<sup>27</sup> Peeperkorn, RPM, *supra* note 25, at 203-04. *See generally* Draft Commission Notice—Guidelines on Vertical Restraints, at 59-60, ¶ 219 (released July 28, 2009) ("EC Draft Vertical Restraints Guidelines"), [http://ec.europa.eu/competition/consultations/2009\\_vertical\\_agreements/draft\\_notice\\_en.pdf](http://ec.europa.eu/competition/consultations/2009_vertical_agreements/draft_notice_en.pdf); Conference: Resale Price Maintenance—An Issue for the European Agenda? (Sep. 12, 2008, Vienna, Austria), at 1 (presenting an overview of European and German treatment), <http://www.bwb-conference.at/files/pdf/summary.pdf>; Albert A. Foer, *Section 5 as a Bridge Toward Convergence*, ANTITRUST SOURCE 7 (February 2009), [http://www.antitrustinstitute.org/archives/files/ABAAntitrustSourceFeb09-Foer\\_030320091821.pdf](http://www.antitrustinstitute.org/archives/files/ABAAntitrustSourceFeb09-Foer_030320091821.pdf).

<sup>28</sup> The American Antitrust Institute has suggested that the EC's approach could "serve as a model for the U.S. courts" going forward post-Leegin. Albert A. Foer, Richard M. Brunell & John B. Kirwood, Comments of The American Antitrust Institute On the European Commission's Proposed Block Exemption Regulation And Guidelines On Vertical Restraints, at 5 (Sept. 27, 2009) (footnote omitted), [http://www.antitrustinstitute.org/archives/files/AAI%20Comments%20on%20EC%20Vertical%20Guides\\_092820090810.pdf](http://www.antitrustinstitute.org/archives/files/AAI%20Comments%20on%20EC%20Vertical%20Guides_092820090810.pdf).

<sup>29</sup> *See* EC Draft Vertical Restraints Guidelines, at 16, ¶ 48; Draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, at 6 (Art. 4(a)) (released July 28, 2009), [http://ec.europa.eu/competition/consultations/2009\\_vertical\\_agreements/draft\\_regulation\\_en.pdf](http://ec.europa.eu/competition/consultations/2009_vertical_agreements/draft_regulation_en.pdf).

<sup>30</sup> *See* United Kingdom Competition Act 1998, c. 41, pt. 1, ch. 1, § 2; Francis J. Devlin, *Resale Price Maintenance and Leegin: Opening Kay's Klostet Opened the Lid on Pandora's Box in Global Competition Law*, 31 HOUSTON J. INT. L. 565, 601-04 (2009) ("Devlin, Opening Kay's Klostet").

<sup>31</sup> Australia Trade Practices Act of 1974, Part IV, § 48 & Part VIII, § 96. *See also* Devlin, *Opening Kay's Klostet*, *supra* note 29, at 600-01.

<sup>32</sup> *Id.* at 597.

<sup>33</sup> *See* Jun Wei & Janet McDavid, *China's Anti-Monopoly Law*, NAT'L L.J., Oct. 15, 2007 ("Vertical monopoly agreements include minimum resale price-fixing"); Devlin, *Opening Kay's Klostet*, *supra* note 29, at 606-07; Hannah C. L. Ha & Gerry P. O'Brien, *The Price of Competition: How China's Anti-Monopoly Law Impacts Business Pricing* (Dec. 10, 2009), <http://www.mayerbrown.com/publications/article.asp?id=8042&mid=6>.

<sup>34</sup> Devlin, *Opening Kay's Klostet*, *supra* note 29, at 13.

<sup>35</sup> Section 417 of Bill C-10, The Budget Implementation Act, 2009 S.C. (Can.), which became law on March 12, 2009, repealed the provisions of the Canada Competition Act making RPM a criminal offense. The new RPM provisions are the Canada Competition Act, R.S.C., 1985, c. C-34, s. 1, § 76(1) (2009); Paul Crampton, *Major*

#### IV. THE CONGRESSIONAL CAVALRY TO THE RESCUE?

On the legislative front, *Leegin's* bits were barely key-stroked before Senator Kohl had introduced a measure in the Senate, the Discount Pricing Consumer Protection Act (“DPCPA”), to return RPM to per se treatment.<sup>35</sup> The DPCPA’s substantive provision was barely longer than the bill’s title: “Any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act [Sherman Act § 1].”<sup>36</sup>

The DPCPA had little traction the first time around. However, Senator Kohl re-introduced the DPCPA in the current Congress,<sup>37</sup> and there is also a parallel House bill.<sup>38</sup> Congressional hearings were held in 2009,<sup>39</sup> with the House Judiciary Committee approving the bill by voice-vote in mid-January of this year.<sup>40</sup> At this point, the prospects of enactment are uncertain. However, as elections approach later this year, members of Congress may find it increasingly hard to oppose legislation intended to prevent higher consumer prices.

State attorneys general have overwhelmingly supported a federal legislative fix. Most recently, 41 states attorneys general endorsed the DPCPA, asserting that, with *Leegin* nearly two years old, there is “no evidence that consumers are provided any tangible benefits, let alone benefits that outweigh the higher prices that result from minimum resale price-fixing.”<sup>41</sup>

#### V. DÉJÀ VU ALL OVER AGAIN

Mark Twain is reported to have said that “[h]istory never repeats itself; at best it sometimes rhymes.”<sup>42</sup> We see that here for sure. Within 20 years of the 1911 *Dr. Miles* decision, the Great Depression battered the nation. With prices plummeting and businesses failing, states enacted so-called “Fair Trade” laws, ostensibly to protect small businesses, which allowed RPM where trademarked goods were in “free and open competition” with those of other producers. After the

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*Changes to the Competition Act (Canada) and the Competition Bureau’s Enforcement Policies*, ANTITRUST SOURCE 1, 4 (June 2009),

<http://www.osler.com/uploadedFiles/Jun09-CramptonC.pdf>; Devlin, *Opening Kay’s Closet*, *supra* note 29 at 598-600, 612.

<sup>35</sup> S. 2261, 110<sup>th</sup> Cong. (2007).

<sup>36</sup> *Id.* § 3(a). The DPCPA was refined from N.Y. Gen. Bus. Law § 369-a, which provides that “[a]ny contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.”

<sup>37</sup> S. 148, 111<sup>th</sup> Cong. (2009).

<sup>38</sup> H.R. 3190, 111<sup>th</sup> Cong. (2009).

<sup>39</sup> *The Discount Pricing Consumer Protection Act: Do We Need to Restore the Ban on Vertical Price Fixing?* : Hearing on S.B.148 Before the Sen. Judiciary Comm., 111st, Cong. (2009); *Bye Bye Bargains? Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices: Hearings before the House Subcomm. on Courts and Competition Policy of the Comm. on the Judiciary*, 111<sup>th</sup> Cong. (2009).

<sup>40</sup> *See Discount Pricing Consumer Protection Act of 2009*, H.R. 3190, 111th Cong., Overview, <http://www.govtrack.us/congress/bill.xpd?bill=h111-3190>.

<sup>41</sup> Letter from 41 Attorneys General to Rep. John Conyers and Rep. Lamar Smith, dated Oct. 27, 2009, at 2, [http://naag.org/assets/files/pdf/signons/20091027.HR\\_3190.pdf](http://naag.org/assets/files/pdf/signons/20091027.HR_3190.pdf). The AG’s sent an identical letter to the Senate Judiciary Committee. Thirty-five AG’s sent a similar letter supporting Sen. Kohl’s 2007 bill. Letter to Sen. Patrick Leahy and others, dated May 14, 2008, [http://www.naag.org/assets/files/pdf/signons/antitrust.AG\\_Letter\\_Supporting\\_S2261.pdf](http://www.naag.org/assets/files/pdf/signons/antitrust.AG_Letter_Supporting_S2261.pdf).

<sup>42</sup> History News Network, <http://hnn.us/articles/1328.html>.

Supreme Court sustained Illinois' statute,<sup>43</sup> attention shifted to Congress to ensure that interstate transactions, too, were made safe for vertical price-fixing.

Following the advice of the FTC chair—who opined that “[t]here is great probability that manufacturers and dealers may abuse the power to arbitrarily fix resale prices by unduly increasing prices”—President Roosevelt urged Congress to stay its hand.<sup>44</sup> But the legislative branch concluded that legalizing RPM was an idea whose time had come. In 1937, Congress passed legislation that permitted states to “opt out” of *Dr. Miles*' prohibition.<sup>45</sup> A reluctant President Roosevelt signed the law, which Congress had attached to an unrelated District of Columbia revenue bill to minimize the risk of a veto.<sup>46</sup> Fair Trade laws thus flourished in most of the states for a period of time. A few others, referred to as “Free Trade states,” declined the invitation to legalize vertical price-fixing, and their number grew as states repealed their laws and as state courts invalidated the laws under state constitutions.

The split among the states amounted to a lengthy, unique natural experiment involving RPM, which permitted price levels in the two state groups to be compared. The data thus derived showed higher consumer prices in Fair Trade states—those permitting RPM—compared to those in Free Trade states that did not legalize the practice. By the mid-1970's, with inflation driving prices up, not down, ending legalized RPM was part of the solution. According to the House Judiciary Committee, “[p]recisely how much ‘fair trading’ costs the American consumer has never been determined, but studies clearly indicate that the amount involved is substantial”—in the billions in 1975 dollars.<sup>47</sup> Data also showed both higher business failure rates and lower retailer growth rates in the Fair Trade states that permitted vertical price-fixing.<sup>48</sup> Moreover, repeal of fair trade in Great Britain and Canada several years earlier were said to have led to “generally lower prices, more vigorous competition and no adverse effects on small businesses.”<sup>49</sup>

Both the DOJ Assistant Attorney General for Antitrust and the FTC chair urged Congress to repeal the existing federal legislation, as did President Ford's economic advisors. For example, Thomas E. Kauper, then heading the Antitrust Division told Congress that “manufacturers and retailers . . . , with State permission, are reaching into the pockets of consumers after dollars they could never hope to obtain under totally free market conditions.”<sup>50</sup> Congress responded by

<sup>43</sup> *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936).

<sup>44</sup> S. Doc. No. 58, 75<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 1, 3 (Apr. 24, 1937).

<sup>45</sup> See the Miller-Tydings Act, 50 Stat. 693 (1937), later supplemented by the McGuire Act, 66 Stat. 631 (1952). Similar bills were introduced in Congress as early as 1929, even before “fair trade” captured the states' fancy. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 390-91 (1951).

<sup>46</sup> Presidential Statement Upon Signing H.R. 7472, dated Aug. 18, 1937, reprinted in 1 EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 538 (1978).

<sup>47</sup> Report of the House Comm. on the Judiciary, H.R. Rep. No. 341, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 3 (1975) (“House Report”). See also 121 Cong. Rec. S20871, S20872-73 (daily ed. Dec. 2, 1975) (statement of Sen. Brooke).

<sup>48</sup> Report of the Senate Comm. on the Judiciary, S. Rep. No. 466, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 3 (1975); House Report, *supra* note 47, at 4.

<sup>49</sup> *Id.* at 4. See also 121 Cong. Rec. S20871, S20873 (daily ed. Dec. 2 1975) (statement of Sen. Brooke) (noting that repeal in Great Britain and Canada resulted in “upgrading and modernizing,” and “more dynamic and efficient” distribution and retailing practices).

<sup>50</sup> Hearings before the Subcomm. on Antitrust and Monopoly of the Senate Comm. On the Judiciary on S. 408, Part 1, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 17 (Feb. 18, 1975). See also *id.* at 11 (testimony of FTC Chair Lewis A. Engman); *id.* at 43 (testimony of Albert Rees, director of the Council on Wage and Price Stability).



repealing the federal legislation authorizing the states to ignore *Dr. Miles*.<sup>51</sup> Those states still permitting vertical price-fixing repealed the authorization for RPM.

Accordingly, “Congress declared the experiment a failure,”<sup>52</sup> and *Dr. Miles* was revived. But over time, it became almost a rite of passage for antitrust practitioners, academicians, and economists to insist that “enlightened” contemporary thinking put the patient on life-support. Only dorks would argue otherwise. With *Leegin*, the Supreme Court majority pulled the plug.

## VI. THE PAST AS PROLOGUE

The rhymes of history deliver its lessons. The fair trade era teaches that RPM produces higher consumer prices, a result at odds with the objectives of the antitrust laws. The arguments that nonetheless gained favor in *Leegin* were “repackaged old chestnuts”<sup>53</sup>—no tastier today than when they were first packaged for courts and legislators decades ago. Justice Breyer got it right in his dissent: “[t]he only safe predictions to make about today’s decision are that it will likely raise the price of goods at retail and that it will create considerable legal turbulence as lower courts seek to develop workable principles.”<sup>54</sup> In just over two years, the “turbulence” Justice Beyer foresaw is a veritable tsunami in antitrust circles.

The pending congressional legislation would again set us on a correct course. The alternative, decades of case-by-case doctrine-cobbling, may eventually get us to the same place. But we all will pay a good deal more along the way as businesses, together with litigation professionals on both sides, reap the benefit. That, too, is one of history’s rhymes. As George Santayana reminded, “[t]hose who cannot remember the past are condemned to repeat it.”<sup>55</sup>

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<sup>51</sup> Consumer Goods Pricing Act of 1975, 89 Stat. 801 (1975).

<sup>52</sup> Testimony of Pamela Jones Harbour before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the Senate Judiciary Comm, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 4 (July 31, 2007), <http://www.ftc.gov/speeches/harbour/070731test.pdf>.

<sup>53</sup> Pamela Jones Harbour, An Open Letter to the Supreme Court of the United States, dated Feb. 26, 2007, at 8, <http://ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf>.

<sup>54</sup> 551 U.S. at 929.

<sup>55</sup> George Santayana, Wikipedia, [http://en.wikipedia.org/wiki/George\\_Santayana](http://en.wikipedia.org/wiki/George_Santayana).