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**Resale Price Maintenance in  
the Post-*Leegin* World: A  
Comparative Look at Recent  
Developments in the United  
States and European Union**

Andrew I. Gavil

Howard University School of Law

# Resale Price Maintenance in the Post-*Leegin* World: A Comparative Look at Recent Developments in the United States and European Union

Andrew I. Gavil<sup>1</sup>

## I. INTRODUCTION

The conventional wisdom today holds that the federal law of vertical restraints in the United States has been “harmonized.” Thanks to the U.S. Supreme Court’s 2007 decision in *Leegin*,<sup>2</sup> the nearly century-old *per se* rule that absolutely banned minimum resale price maintenance (“RPM”) has been abandoned.<sup>3</sup> The more economically sound approach of the Court’s 1977 decision in *Sylvania*,<sup>4</sup> which held that *non*-price intrabrand restraints should be judged under the “rule of reason,” has been extended to price restraints, which were largely indistinguishable in effect. As a consequence, vertical intrabrand price and non-restraints will be treated alike—both are presumptively unlikely to significantly harm competition. Suppliers may now freely choose from a full pallet of vertical restraints to accomplish their marketing goals, provided they do not unreasonably restrain trade in some very specific, narrowly defined ways.

The true picture is far less clear. Three years after *Leegin*, the state of RPM in the United States is surprisingly uncertain, and that uncertainty is a reminder of the complexity of the U.S. competition policy system. Many voices can now be heard in the post-*Leegin* debate—federal, state, public, and private—and at least three camps have formed. Whereas some would overrule *Leegin* and restore the *per se* rule of *Dr. Miles*, others would work within *Leegin*, accepting its invitation to develop a structured and tailored approach to applying the rule of reason to RPM. Still others would read *Leegin* for all it is worth and more, happily depositing concerns over RPM into the trash-bin of antitrust history.

This debate about RPM is not confined to the United States. The confluence of *Leegin* and the expiration of the E.U.’s decade-old Vertical Restraints Block Exemption Regulation have ignited a more global re-examination of the economic and legal standards for evaluating RPM. Although that re-examination has led to some visible movement by the European Commission in the direction of greater permissiveness, formally, European enforcement authorities remain far more sceptical of the supposed economic benefits of RPM than at least some of their U.S. counterparts. As a consequence, all of the views currently being advocated in the United States differ from that endorsed by the new Block Exemption in the E.U. Some would be more restrictive, whereas others would be more permissive. The middle ground that is most

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<sup>1</sup> Professor of Law, Howard University School of Law, and Visiting Professor, Centre for Competition Policy, University of East Anglia, May-June 2010. This piece was prepared while I was visiting at the CCP and I wish to acknowledge its support. Copyright Andrew I. Gavil, 2010.

<sup>2</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

<sup>3</sup> The *per se* rule against minimum resale price maintenance is associated with the Court’s decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

<sup>4</sup> *Continental TV Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

likely to emerge as the dominant view in the United States, however, suggests that at the end of this period of re-examination, the prevailing views in the United States and Europe will have become more closely aligned, although not fully converged. The differences will be reduced to the distance between cautious optimism and cautious pessimism. It is also likely that the positions will continue to converge over the next decade, but the direction of that convergence will depend upon what we learn about RPM—its uses and effects—in the intervening years.

## II. THE POST-LEEGIN DEBATE IN THE UNITED STATES

### A. Diversity of Views at the Federal Level

Almost immediately after *Leegin*, bills were introduced in Congress to overrule the decision and restore the *per se* rule of *Dr. Miles*. These first bills languished due to lack of interest and perhaps a realization that passage was unlikely absent the support of the two federal enforcement agencies and the White House, which had urged the Court to abandon the *per se* rule in an amicus brief filed in *Leegin*.

The 2008 presidential election brought about a changing of the antitrust guard in Washington, however, and with it has come renewed interest in seeking a legislative “fix” for *Leegin*. That fix is currently embodied in S. 148, and its companion H.R. 3190, the “Discount Pricing Consumer Protection Act,” which would amend the Sherman Act to ban minimum RPM, thus overruling *Leegin*.<sup>5</sup> The bill has relatively few co-sponsors, however, and its seeming simplicity masks a range of complicated issues that will arise if the bill becomes law.

Although S. 148’s preamble expresses an interest solely in overruling *Leegin* and restoring the rule of *Dr. Miles*, *Dr. Miles* was not a solitary source of RPM doctrine. In cases such as *Colgate*, *Parke Davis*, *Monsanto*, and *Business Electronics*, the Court repeatedly increased the proof requirements associated with establishing an “agreement” to fix minimum resale prices, narrowing the effective scope of the *per se* rule.<sup>6</sup> And in cases like *Colgate*, *General Electric*, and *Simpson Oil* the Court, in effect, carved out a variety of exceptions to the *per se* rule for firms engaged in formally unilateral conduct that achieved the same results as RPM.<sup>7</sup> Perhaps more importantly, over time the lower federal courts and the enforcement agencies also acknowledged protected areas of conduct, such as some kinds of minimum suggested resale prices, minimum advertised pricing, agreements between suppliers and resellers to pass-on lower prices to meet competition, and others.<sup>8</sup>

If S. 148 were to become law, therefore, it is not at all certain how its literal ban on RPM would affect the elaborate collection of law that moderated and qualified the rule of *Dr. Miles* over nearly a century. Ironically, Justice Breyer’s prediction in dissent that the *Leegin* majority’s

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<sup>5</sup> Section 3 of S. 148 provides:

Section 1 of the Sherman Act ... is amended by adding after the first sentence the following: “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.”

<sup>6</sup> *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

<sup>7</sup> *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (announced terms of dealing); *United States v. General Elec. Co.*, 272 U.S. 476 (1926) (true agency sales); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (consignment sales).

<sup>8</sup> See generally ANDREW I. GAVIL, WILLIAM E. KOVACIC, & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 403-06 (2d ed. 2008).

decision would lead to uncertainty and costly litigation to resolve the issues it exposed might also prove accurate with respect to a legislative fix at this point.

The pending bills nevertheless indicate that at least some members of Congress strongly believe that the Supreme Court erred in *Leegin*. It is not clear, however, that the two federal antitrust enforcement agencies entirely agree. Indeed, the bills, along with continued efforts in some states to enforce the *per se* ban on RPM (discussed below), have exposed some significant divisions within the Federal Trade Commission (“FTC”) and between the FTC and the Antitrust Division of the U.S. Department of Justice (“Antitrust Division”) on the ultimate and relative wisdom of *Dr. Miles* and *Leegin*.

When *Leegin* was pending before the Court in 2007, the Antitrust Division and three of the then sitting five commissioners of the FTC all supported the amicus curiae brief of the United States urging the Court to overrule *Dr. Miles*.<sup>9</sup> One of the dissenting votes at the FTC was Commissioner Jon Leibowitz who, with the change of administration in Washington, became the Chairman in March 2009. In that new capacity he promptly endorsed the bill to overrule *Leegin*, arguing that *Dr. Miles* should be restored.<sup>10</sup> With the departures of former Chairman Deborah Platt Majoras, who voted in favor of the *Leegin* brief, and Commissioner Harbour, who voted against it, the views of only three of the current Commissioners are now known. In the end, the position of the FTC as an agency may be largely influenced by the two newly appointed Commissioners, Edith Ramirez and Julie Brill, who will be in a position to decide whether a majority of the Commission will favor a return to a more harsh approach to RPM.

Even Chairman Leibowitz’s position is not wholly unambiguous. Following *Leegin*, women’s shoe manufacturer Nine West petitioned the FTC to reopen and modify a 2000 consent decree that prohibited the firm from utilizing RPM. It argued that the change in the law brought about by *Leegin*, coupled with both the unlikelihood that its use of RPM could be anticompetitive and its pro-competitive justifications for using RPM, warranted setting aside the decree’s prohibition of RPM. At the time, the Commission had but four commissioners (former Chairman Majoras had left, but her seat had not yet been filled). All four sitting commissioners voted to grant the petition, modifying the decree to drop the ban on RPM—including then Commissioner, now Chairman, Leibowitz.

The Commission agreed with Nine West that its use of RPM was unlikely to be anticompetitive. But it found the firm’s evidence of pro-competitive efficiencies unpersuasive.<sup>11</sup> It therefore continued the decree, requiring periodic compliance reports on Nine West’s use of RPM. Most interesting was the FTC’s explication of its likely future approach to RPM. Accepting the Court’s invitation in *Leegin* to develop methods of applying the rule of reason in a

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<sup>9</sup> See Brief for the United States as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), available at <http://www.justice.gov/atr/cases/f221000/221027.pdf>. The three Commissioners voting in favor of the brief were then Chairman, Deborah Platt Majoras, as well as William E. Kovacic and J. Thomas Rosch. Voting against were Commissioners Jon Leibowitz, who is now the Chair, and Pamela Jones Harbour, who has since departed the agency. For Commissioner Harbour’s dissent, see *An Open Letter to the Supreme Court of the United States: The Illegality of Vertical Minimum Price Fixing* (Feb. 26, 2007), available at <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricfixing.pdf>.

<sup>10</sup> See Roundtable Conference with Enforcement Officials, ANTITRUST SOURCE, Apr. 2009, at 14-15, available at <http://www.abanet.org/antitrust/at-source/09/04/Apr09-EnforcerRT4-29f.pdf>.

<sup>11</sup> See *In the Matter of Nine West Group Inc.*, Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000 (May 6, 2008), available at <http://www.ftc.gov/os/caselist/9810386/080506order.pdf>.

“fair and efficient” manner,<sup>12</sup> the Commission explained how it might go about evaluating RPM to determine whether it was likely or not to be anticompetitive. Among the options it mentioned was reliance on the abbreviated, “inherently suspect” approach it used in cases like *Polygram Holdings*.<sup>13</sup> As the Commission explained:

Through the Commission’s own enforcement work, research, and external consultations such as workshops, we anticipate further refinements to this analysis, including the further specification of scenarios in which RPM poses potential hazards and those in which it does not.

Chairman Leibowitz’s concurrence in the decision, despite his opposition to the *Leegin* amicus brief in 2007 and his present support for the *Leegin* repealer bill, suggests that if the bill does not become law, he may be comfortable with such alternative, “middle ground” approaches.

Development and reliance on such a middle ground also would be more consistent with the apparent position of the FTC’s sister agency, the Antitrust Division. In a substantial speech made to a group of state antitrust enforcers last Fall, Christine Varney, the Assistant Attorney General in charge of the Antitrust Division, urged the FTC and state enforcement officials to work *within Leegin*.<sup>14</sup> Citing the same passage from *Leegin* as had the FTC in its *Nine West* opinion, AAG Varney argued that the Court had invited the agencies and courts to develop alternatives to comprehensive rule of reason treatment—to, in essence, look for truncated approaches to more readily differentiating pro- and anti-competitive uses of RPM based on the factors identified by the Court. As noted by the FTC, developing a more refined and targeted approach to judging RPM could help to evolve the rule of reason into a more “fair and reasonable” standard.

Varney then proposed specific three-part tests for establishing prima facie cases of anticompetitive RPM tailored to each of the four anticompetitive scenarios described by the Court in *Leegin*: manufacturer’s cartel, dealer’s cartel, dominant manufacturer exclusion, and dominant retailer exclusion. For the collusion scenarios, she advocated focusing on whether structural conditions in the market were conducive to coordination, whether a majority of sales in the market were covered by RPM, and whether RPM could plausibly help industry participants significantly to identify cheating.<sup>15</sup> For the exclusion scenarios, she emphasized market power and the likelihood that RPM could have a significant exclusionary effect; in the case of dealer

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<sup>12</sup> The Court stated:

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.

551 U.S. at 898-99.

<sup>13</sup> *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005)(“The *Leegin* decision may be read to suggest a truncated analysis, such as the one applied in *Polygram Holdings*, might be suitable for analyzing minimum resale price maintenance agreements, at least under some circumstances.”).

<sup>14</sup> Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, *Antitrust Federalism: Enhancing Federal/State Cooperation* (Oct. 7, 2009), available at <http://www.justice.gov/atr/public/speeches/250635.pdf>.

<sup>15</sup> *Id.* at 11, 13.

exclusion, she also urged attention to evidence that the dealers coerced the manufacturers into adopting RPM.<sup>16</sup>

Varney ended with an acknowledgement that the FTC and the states, not the Antitrust Division, historically had been the leaders in RPM prosecutions. But she also conveyed the message that the Division desired to influence future development of U.S. standards for evaluating RPM: “By addressing this topic, we are not seeking to disrupt the traditional preeminent role of the FTC and the States in this area. Rather, our interest is in supporting a jurisprudential effort to aid the development of federal law under *Leegin*.” She also reserved judgment on whether a return to the *per se* rule might become appropriate should efforts to develop a structured rule of reason fail in the courts or if new empirical data and “accumulated experience” suggests it would be appropriate.<sup>17</sup>

Passing antitrust legislation without the unanimous support of the two federal agencies could be politically tricky. The FTC, as an independent administrative body subject to Congressional oversight, might at once be more subject to influence and influential in persuading Congress to act, especially if it decides to prioritize passage of the *Leegin* repealer. But at best, it seems likely that the agency will remain divided. More complicated is the possibility that, if asked, the Antitrust Division could oppose the bill, while perhaps preserving the discretion to support some kind of limited *per se* prohibition in the future. AAG Varney surely had the opportunity to endorse the bill in her speech to the state enforcers last fall; instead, she elected to advocate a framework for working within *Leegin*. That suggests that, at least for now, the Antitrust Division does not favour a return to the *per se* rule.

If *Leegin* is not legislatively overruled, it seems likely that the FTC and the DOJ will continue to work along the lines already established in *Nine West* and Varney’s Fall 2009 speech to develop focused and abbreviated rules for evaluating RPM. Depending upon the circumstances of each case, such rules might lead to either quicker exoneration or a shifting of the burden to defendants to establish genuine efficiencies. Although Varney interpreted the charge from the Supreme Court narrowly and did not venture beyond the four anticompetitive scenarios specifically identified in *Leegin*, the economic literature and the FTC’s authority under Section 5 might invite broader consideration of the conditions under which RPM can be used to harm competition. If firms are willing to risk challenges from the states, the FTC might have some additional opportunities to develop the law post-*Leegin*.

## **B. More Consistency, but Some Divergence Among the States**

As already noted, a number of states have consistently urged their view that *Dr. Miles* was correctly suspicious of RPM. That view was vigorously advocated by 37 states in an amicus brief filed in *Leegin*,<sup>18</sup> and again by 27 states that opposed *Nine West*’s petition to the FTC in 2008.<sup>19</sup> Indeed, since *Leegin*, several state Attorneys General have pursued RPM cases under the *per se* approach, relying on state antitrust laws. New York has been a leader in the effort.

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<sup>16</sup> *Id.* at 12, 13.

<sup>17</sup> Varney Speech at 14. This position was consistent with the views she expressed in her confirmation hearings before the Senate Judiciary Committee when she was asked about her opinion of *Leegin*.

<sup>18</sup> Brief of the States of New York, et. al as Amici Curiae on Behalf of Respondents, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), available at [http://www.ag.ny.gov/bureaus/antitrust/pdfs/leegin\\_states2.pdf](http://www.ag.ny.gov/bureaus/antitrust/pdfs/leegin_states2.pdf).

<sup>19</sup> Amended States’s Comments Urging Denial of *Nine West*’s Petition (Jan. 2008), available at <http://www.ftc.gov/os/comments/ninewestgrp/080117statesamendedcomments.pdf>.

Despite this seeming level of uniformity among the state AGs, the RPM waters at the state level are also murkier than might first appear. Many states, either by statute or by decisions of their high courts, follow federal antitrust precedent in enforcing their state antitrust laws. Several state courts in these states have already held that they will follow *Leegin*. Others are likely to follow. Hence, state enforcement officials inclined to continue to prosecute RPM may encounter courts hostile to simple reliance on the *per se* rule and, like their federal counterparts, state enforcers may need to articulate and prove that the specific instances of RPM being challenged are in fact anticompetitive.

Yet other states have statutes that could be read, like the *Leegin* repealer bill in Congress, to establish an absolute ban on RPM as a matter of state antitrust law. Among those states is New York, which recently filed a case against mattress manufacturer Tempur-Pedic that appears to be designed to confirm that New York law bans RPM without regard to its actual effects on competition. In addition, since *Leegin* one state, Maryland, has adopted a specific statute banning minimum RPM—a pre-emptive repeal of *Leegin* that ensures its courts will not follow the federal lead on RPM.<sup>20</sup> Additional state legislatures may respond pre-emptively to *Leegin*, as did Maryland, or they might react to decisions of their own courts to follow *Leegin* by undertaking later legislative repeal.

The future treatment of RPM at the state level, therefore, could become balkanized. Interestingly, if that happens, and if firms inclined to use RPM craft distribution strategies that utilize RPM in states where it is presumptively legal, while avoiding it in states where it is not, natural experiments could result that would provide some needed empirical data for studying the uses and abuses of RPM.

### III. THE INHERENT CONFLICT OF VOICES IN THE 2010 BLOCK EXEMPTION

*Leegin*, and the post-*Leegin* debates in the United States coincided with the planned expiration of decade-old Commission Regulation (EC) No. 2790/1999 on May 31, 2010. In anticipation of that expiration, the European Commission (“EC”) launched a public consultation on review of competition rules for distribution in the summer of 2009. The effort culminated in the release of Commission Regulation 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices,<sup>21</sup> along with accompanying Guidelines on Vertical Restraints,<sup>22</sup> both of which took effect on June 1, 2010.

These are compromise documents. They seek to reconcile sometimes-competing goals and, at times, hint at some continuing debate within the EC as to the proper treatment of vertical restraints. On the one hand, the Commission lauds Internet commerce, which it maintains can provide greater consumer choice and price competition. It also retains the “hard core” designation for RPM, which could be understood, at least in part, as a concession to safeguarding Internet-based price competition. But the Block Exemption and Guidelines simultaneously appear to move in a decidedly more U.S.-style direction, more fully acknowledging the potential efficiency gains that can flow from vertical restraints, including RPM. Hence, they endorse the

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<sup>20</sup> See Alan M. Barr, *State Challenges to Vertical Price Fixing in the Post-Leegin World*, Comments at the FTC Hearings on Resale Price Maintenance 4-6 (May 21, 2009), available at <http://www.ftc.gov/opp/workshops/rpm/may09/docs/abarr.pdf> (discussing Maryland *Leegin* repealer).

<sup>21</sup> Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>.

<sup>22</sup> Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>.

view that firms—especially those without any market power—should be free to select their own distribution strategies, including use of various kinds of vertical agreements. This acknowledgement that vertical restraints can lead to more efficient distribution arrangements suggests that there is now greater internal recognition at the Commission that suppliers should be permitted more flexibility with respect to their use of vertical restraints—and that consumers could be the beneficiaries.

While these two goals—safeguarding the Internet and promoting firm autonomy in the choice of distribution strategies—can be reconciled in that both can promote consumer welfare, in truth they can also collide, especially when firms use vertical restraints to modulate competition between Internet and brick and mortar sources of their products and services. The tension is especially evident in the treatment of RPM.

The discussion and treatment of RPM in the new Block Exemption and Guidelines very specifically reflect *Leegin* in their exposition of the anticompetitive and pro-competitive uses of RPM but, importantly, they are not bounded by *Leegin*. Paragraph 224 details the various anticompetitive uses of RPM, incorporating the four scenarios outlined in *Leegin* and the three factors deemed significant in *Leegin*—the source of the restraint (suppliers or dealers), the market power or lack thereof of the firm or firms imposing it, and the degree to which RPM is used widely in an industry. Importantly, however, the Guidelines go beyond *Leegin*. In addition to the two collusion and two exclusion scenarios specified by the Supreme Court in *Leegin*, Paragraph 224 describes several additional ways in which RPM can be anticompetitive, such as dampening competition and diminishing pressure on manufacturers' margins. Whereas *Sylvania* and *Leegin* both downplayed the competitive value of intrabrand competition, declaring that interbrand competition is the “primary concern” of antitrust law, these additional anticompetitive theories are based on the contrary assumption that intrabrand competition has independent value to consumers because it can foster upstream interbrand competition.<sup>23</sup>

Section 1.2 of the Guidelines, especially Paragraph 107, details a broad range of “positive effects” that can flow from vertical restraints, generally. Section 2.10 more specifically addresses RPM and Paragraph 225 more narrowly describes the practice's potential advantages, which it asserts “will be assessed under Article 101(3).” The representation that RPM's potential efficiencies will be considered under Article 101(3) seems to signal a more tolerant attitude, one that reflects the general consensus among economists that was integrated into *Leegin*, i.e., that strict prohibition of RPM could unduly constrain firms from pursuing efficient distribution. But this seeming movement towards U.S.-style leniency can easily be overstated. With *Leegin*, federal antitrust law in the United States leaped from the *per se* end of the anticompetitive effects spectrum to a neutral, middle ground, where anticompetitive effects must be proved and can no longer be presumed. The Block Exemption does not take an equally permissive stance.

Although the Block Exemption and Guidelines more fully acknowledge the efficiency potential of vertical restraints generally, and of RPM in particular, they still categorize RPM as a “hardcore” violation that is ineligible for treatment under the exemption. Under Paragraph 47 of the Guidelines, the hardcore categorization has two specific and very significant consequences: (1) RPM presumptively falls within the scope of prohibited agreements under Article 101(1); and (2) it presumptively does not satisfy the justification standards of Article 101(3).<sup>24</sup> Hence, once an

<sup>23</sup> See Luc Peepkorn, *Resale Price Maintenance and its Alleged Efficiencies*, 4 EUR. COMP. L.J. 201, 206-07 (2008).

<sup>24</sup> There are some who have argued that these presumptions are not supported by case law in Europe and may even be contrary to that law.



RPM “agreement” is established—which is easier to do in the E.U. than under current U.S. law—the agreement is presumptively anticompetitive AND presumptively unjustifiable. As was true before the new Block Exemption, those presumptions can be rebutted and, as noted, Paragraph 225 of the Guidelines represents that justifications will be considered. But it remains to be seen whether the more welcoming language of the Block Exemption and Guidelines will lead to a more welcoming reality for RPM before the Commission and, if it gets that far, the courts.

#### **IV. CONCLUSION**

As a consequence of *Leegin* and the new Vertical Restraints Block Exemption Regulation, resale price maintenance has now received a great deal of theoretical attention on both sides of the Atlantic. For the moment, that attention has led to a decidedly more permissive view of RPM in the United States, and a somewhat more permissive view in Europe.

What remains lacking is strong empirical data to support either the optimistic or pessimistic view of the practice—a void in knowledge that has been acknowledged by enforcement authorities in both the United States and Europe. In the United States, it supports continued monitoring and reservation of the possibility that RPM might be presumptively unlawful in some circumstances to be defined. In Europe it means the presumption of caution has not yet been fully overcome at the Commission—or at least not to the satisfaction of all decision-makers. Those positions could move closer together over time, however, if further study persuades enforcement authorities that their respective optimism or pessimism is unwarranted.