THE RULE OF LAW IS THE RULE OF REASON

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ABSTRACT

Since the enactment of the Sherman Antitrust Act of 1890, businesses have been prohibited from implementing both vertical and horizontal restraints. Such restraints are construed as against public policy in a democracy, and were traditionally invalidated under a *per se* analysis. The result has been to thwart smaller scale manufacturers from competing with larger manufacturers. In a recent August 2007 decision, the United States Supreme Court has shown a willingness to permit vertical restraints by changing the level of judicial scrutiny from the rigid *per se* violation to the more subjective and flexible rule of reason.

I. INTRODUCTION

For the past decade, the United States Supreme Court has vigorously prohibited the use of price maintenance agreements on the basis that they are conducive to cartels and are predisposed to exhibit anticompetitive effects.[1] As a result, the United States Supreme Court has imposed a *per se* prohibition on price maintenance agreements, resulting in a complete bar on any price restraints, without looking at the subjective facts of the alleged price maintenance agreement.[2]

On June 28, 2007 the United States Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc*.[3] abolished a ninety-six

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1. *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 407 (1911) (holding that price fixing is injurious to the consumer, as these types of arrangements destroy competition).

2. *Id*. at 408. The specific advantages derived from the agreement, derived from the enhanced price, will not be considered when faced with a price fixing agreement. *Id*.

3. 127 S. Ct. 2705 (2007).

year-old prohibition of vertical minimum pricing agreements between manufacturers and retailers.[4] The decision reflected an emerging trend within the United States Supreme Court to permit courts to look subjectively at alleged vertical agreements, as opposed to the rigid *per se* violation.[5] As a result, the courts have replaced the *per se* standard with the more flexible rule of reason to determine whether the agreement has anticompetitive effects.[6]

Part II of this article will begin by providing a brief history and legal background of this area. This will include an explanation of the Sherman Antitrust Act,[7] which is the basis for prohibiting anticompetitive behavior. This article will explain the purview of the Sherman Act and describe the two different standards available to the courts when faced with an alleged restraint in violation of the Sherman Act. Part II will conclude with a comparison and contrast of vertical and horizontal price maintenance agreements to ascertain the anticompetitive and/or procompetitive effects that result from the respective price maintenance agreements.

Part III of this article will discuss both the majority and dissenting opinion in the 5-4 holding of *Leegin*. Part IV will address the practical ramifications for practitioners as well as the factors a practitioner should consider when incorporating a vertical price maintenance agreement. Finally, a summary of the new standard of review in Part V will conclude the article.

II. LEGAL BACKGROUND

This section will discuss the scope of the Sherman Antitrust Act with an emphasis on Section One of the Act, which prohibits unreasonable restraints on trade. This section will then discuss the two possible standards by which an alleged restraint will be adjudged: the *per se* violation and the rule of reason. Section II will conclude by discussing horizontal and vertical price restraints, both of which have the potential to unreasonably restrain trade, thus violating Section One of the Sherman Antitrust Act.

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4. *Leegin,* 127 S. Ct. at 2725.

5. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (distinguishing between joint ventures and competitors, whereas joint ventures involve price setting as opposed to price fixing and are thus analyzed under the rule of reason); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (holding that vertical price fixing agreements do not meet the criteria to be rejected as a *per se* violation); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) (providing a holding that is not contingent upon the organizational structure of the subsidiary); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (using the rule of reason in vertical geographical restraints in lieu of the traditional *per se* analysis).

6. *Leegin*, 127 S. Ct. at 2720.

7. Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

A. THE SHERMAN ANTITRUST ACT

The Sherman Antitrust Act was passed in 1890 to protect trade and commerce against unlawful restraints,[8] and has been a powerful weapon in allowing the government to regulate commerce and to promote a procompetitive economy.[9] The Sherman Act serves as a consumer protection tool, as it prohibits any restraint that adversely affects the consumer.[10] It is comprised of two major provisions, which are instrumental in facilitating a competitive economy. The first provision, Section One of the Sherman Act, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."[11] Section Two of the Sherman Act prohibits monopolies.[12] While Section Two is a major provision, it falls outside the scope of this article.

Section One prohibits unreasonable vertical and horizontal restraints, which adversely affect consumers.[13] Horizontal restraints are agreements between competitors that put restraints on commerce.[14] In contrast, vertical restraints are restraints enacted by a manufacturer to a buyer.[15] While Section One prohibits "every contract . . . in restraint of trade," courts have not strictly interpreted the legislative language.[16] Instead, courts have held that the legislative intent of Section One of the Sherman Act was to prohibit unreasonable restraints of trade.[17]

B. STANDARDS FOR EVALUATING RESTRAINTS OF TRADE

Courts have determined that there are two standards for evaluating the reasonableness of trade restraints.[18] The reasonableness of the restraint will be decided by either the rule of reason or the *per se* violation.[19] The nature

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8. *Id.*

9. *See* Hammes v. AAMCO Transmissions, 33 F.3d 774, 779 (7th Cir. 1994) (holding that there are very few antitrust cases falling outside the scope of the commerce clause).

10. Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

11. *Id.*

12. *Id.* § 2.

13. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

14. Spectators' Comm'n Network, Inc. v. Colonial Country Club, 231 F.3d 1005, 1013 (5th Cir. 2000).

15. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724-25 (1988) (citing *GTE Sylvania*, 433 U.S. at 36, 52 n.19).

16. Sherman Antitrust Act, 15 U.S.C. § 1 (1997); *Khan*, 522 U.S. at 10.

17. *Khan*, 522 U.S. at 10.

18. *Id.*

19. Denny's Marina Inc. v. Renfro Prods. Inc., 8 F.3d 1217, 1220 (7th Cir. 1993).

of the restraint determines which standard will be applied to the alleged violation.[20]

1. *Rule of Reason*

The general standard, applied to alleged violations of Section One of the Sherman Act, is adjudged under the rule of reason.[21] This standard was adopted in *Standard Oil Co. v. United States*.[22] The United States Supreme Court adopted the rule of reason criteria, as it reflected the spirit of the Sherman Act to prohibit all contracts that unreasonably restrain trade.[23] Under the rule of reason, the Court utilized a balancing test, whereby each factor would be afforded weight to ascertain whether a restrictive practice imposes an unreasonable restraint on competition.[24] The key in this analysis was to determine whether the contract under scrutiny had an interbrand in intrabrand effect.[25] The rule of reason is thus decided on a case by case basis.[26] In determining whether the restraint is reasonable, the United States Supreme Court has enumerated several factors that should be incorporated within the balancing test.[27] The factors include: (1) specific information about the business; (2) the history, nature, and effect of the restraint; (3) the applicable market power of both the manufacturer and the distributor; and (4) the reason for the restraints.[28]

The first two factors analyze the specific information about the business, in conjunction with the history, nature, and effect of the restraint. The combinations of these factors are analyzed to ascertain whether the restraint imposed by the business regulates or suppresses competition.[29] If the restraint is regulatory in nature, it has the possibility of promoting competition. When courts evaluate these factors, they look at the condition of the business before and after the restraint, as well as the effect of the restraint.[30]

The third factor involves the market power of both the manufacturer and the distributor. This factor protects against the possibility of forming a cartel, which would violate the Sherman Act. If numerous manufacturers, who each possess a significant amount of market power, engage in a resale

20. *Id.*
21. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712 (2007).
22. Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911).
23. *Id.*
24. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).
25. *Leegin*, 127 S. Ct. at 2718.
26. *GTE Sylvania*, 433 U.S. at 49.
27. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
28. *Id.*
29. *Id.*
30. *Id.*

price maintenance agreement, the agreement can deprive consumers of the option of selecting between high-service and low-price outlets.[31] As a result, resale price maintenance agreements that involve manufacturers or retailers with a significant amount of market power, possess a heightened risk.[32] In this situation, the resale price maintenance agreement is closely scrutinized.[33]

In contrast, when only a few manufacturers who lack market power enter into price maintenance agreements, it is unlikely that they will facilitate a manufacturer's cartel, as they may be undercut by competitors.[34] Moreover, a retailer cartel is unlikely to occur when a single manufacturer in a competitive market imposes a price maintenance agreement.[35] In this situation, interbrand competition would redirect consumers to lower priced substitute goods, thus minimizing any benefit derived from entering into a resale price maintenance agreement.

The fourth factor inquires into the reason for the resale price maintenance agreement.[36] In determining the purpose of the agreement, courts will inquire into the reason for adopting the remedy as well as the end sought to be obtained.[37] Good intentions, however, will not validate an objectionable restraint, but will assist the court in construing or predicting the consequences of the restraint.[38]

The rule of reason is a flexible test that permits the court to analyze the subjective practices of the business in conjunction with the effects of the questionable business agreement.[39] If the business agreement has an anticompetitive effect, the agreement will be invalidated under the Sherman Act.[40] While the rule of reason is the general standard, some agreements are of the type that, if there is a strong probability that the agreement will have an anticompetitive effect, the agreement is *per se* illegal.[41]

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31. *Leegin*, 127 S. Ct. at 2719.

32. *Id.* at 2720.

33. *Id.*

34. *See id.* at 2720 (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 727 (1988)) ("Retail market power is rare, because of the usual presence of interbrand competition and other dealers.").

35. *Id.*

36. *Chicago Bd. of Trade*, 246 U.S. at 238. The courts must ascertain whether the agreement merely regulates or suppresses competition. *Id.*

37. *Id.*

38. *Id.*

39. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (citing Chicago Bd. of Trade v. U.S., 246 U.S. 231, 238 (1918)).

40. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2713 (2007) (holding that the *per se* analysis is confined to restraints that are substantially certain to thwart competition).

41. *Id.*

2. Per Se *Violation*

A *per se* violation is issued when the type of restraint has previously been scrutinized by the courts and has consistently been determined to violate Section One of the Sherman Act.[42] A series of disallowed agreements will change the scrutiny of that type of agreement from the rule of reason to the *per se* standard.[43] When this occurs, such agreements are presumed to violate Section One of the Sherman Act.[44] Until the *per se* standard applies, however, the rule of reason is applied.[45] Accordingly, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue and can predict with confidence that the practice would be invalidated in almost all instances under the rule of reason. For example, the *per se* violation standard is used in cases that involve predatory pricing, as well as horizontal customer division agreements such as price fixing, group boycotts, and tying arrangements.[46] In other words, the contract is deemed illegal *per se* without requiring a showing of the actual or likely impact on a market.[47]

The purpose of using the *per se* standard is twofold.[48] First, it promotes judicial efficiency by allowing the court to use a strict standard and avoid lengthy litigation on facts that have an extremely high probability of violating the Sherman Act.[49] While this factor is considered, administrative efficiency in itself is insufficient to justify a *per se* violation.[50] Secondly, the *per se* standard provides consistency within the law. As a result, practitioners are able to advise their clients as to permissible conduct, or conduct that has a substantial likelihood to violate the Sherman Act.

C. TYPES OF RESTRAINTS

In order for a restraint to violate Section One of the Sherman Act, there must be an agreement between at least two parties. The agreement will either be classified as a horizontal or vertical restraint. A horizontal restraint occurs when members at the same level of the supply chain enter

42. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988).

43. *Id.* at 724. The *per se* analysis is used when the likelihood of anticompetitive effects are substantially certain. *Id.*

44. *Id.*

45. *Id.* at 723.

46. United States v. Sealy, Inc., 388 U.S. 350, 357 n.5 (1967) (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

47. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

48. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977).

49. *Id.* at 49-50.

50. *Id.* at 50 n.16.

into an agreement that restricts competition. In contrast, a vertical restraint occurs when two or more parties at different market levels, such as a manufacturer and distributor, enter into an agreement relating to price or geographical boundaries.

1. *Horizontal Restraints*

A horizontal restraint is an agreement that in some way restrains competition between competitors at the same market level.[51] The competitors are at the same market level if they are similarly situated on the distribution chain.[52] A common example occurs when two retailers agree to establish a minimum price at which to sell a product or service.[53] In cases involving the allegation of horizontal restraints, the courts will use the more stringent *per se* standard to thwart out violations of the Sherman Act.[54] The courts use the exception to the rule of reason, as horizontal restraints are indicative of anticompetitive behavior and are consistent with conditions conducive to a cartel.[55] The United States Supreme Court emphasized the inherent dangers associated with such agreements in relation to free competition in *United States v. Socony-Vacuum Oil Co*.[56] The Supreme Court held that reasonableness of the agreement was insufficient as a defense.[57] The two most prevalent types of horizontal restraints include price fixing and market division.[58]

a. Price Fixing

Price fixing occurs when competitors at the same level of the market structure agree to set a certain price for a product, and thus diminish the nature of competition for a given product.[59] However, an agreement upon a set price is not necessary.[60] Price fixing may also arise if the range in which purchases or sales will be made is agreed upon by competitors.[61]

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51. Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988).
52. *Id*.
53. *Id*.
54. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2713 (2007) (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50 (1990)).
55. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-22 (1940).
56. 310 U.S. 150, 221 (1940).
57. *Socony-Vacuum Oil Co*., 310 U.S. at 222-23.
58. ROGER LEROY MILLER & GAYLORD A. JENTZ, BUSINESS LAW TODAY COMPREHENSIVE 970-71 (7th ed. 2007).
59. Denny's Marina, Inc. v. Renfro Prods., 8 F.3d 1217, 1220-21 (7th Cir. 1993).
60. *Id*. at 1221.
61. *Socony-Vacuum Oil Co*., 310 U.S. at 222.

This is construed to be price fixing, since the competitors agree upon the pricing technique.[62] Moreover, whether the agreed upon price is reasonable based upon market factors is immaterial.[63] As a result, horizontal price fixing is evaluated under the *per se* standard, thus eliminating the requisite showing of an actual or likely impact on the market.[64] This type of agreement is scrutinized under the *per se* standard because the joint action by competitors to engage in price fixing has the requisite "substantial" potential for an impact on competition.[65] The *per se* standard is the appropriate standard, as horizontal price fixing agreements have manifestly anticompetitive effects and lack any redeeming virtue. Furthermore, these agreements almost always tend to restrict competition and decrease output.[66] As a result, they do not warrant a subjective analysis of the effect of the actual restriction.[67]

In *Catalano, Inc. v. Target Sales*,[68] the Supreme Court addressed this issue.[69] In *Catalano*, a certified class of beer retailers brought suit against wholesalers, claiming that they conspired to eliminate short-term trade credit.[70] Prior to the agreement, manufacturers extended credit to retailers without interest for the amount of time permitted by California state law.[71] During this time, wholesalers competed with respect to trade credit, and the terms afforded to the individual retailers varied.[72] After the agreement, the manufacturers uniformly refused to extend any credit.[73]

In its holding, the United States Supreme Court acknowledged that price fixing is a *per se* violation of the Sherman Act and that it is immaterial as to the reasonableness of the fixed price.[74] The Supreme Court further held that an agreement to cease the practice of extending credit is tantamount to an agreement abolishing discounts, and is thus a *per se* violation of the Sherman Act.[75] As a result, credit terms are characterized as an inseparable part of the price.[76]

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62. *Id*.
63. *Id*. at 223.
64. *Id*. at 223-24.
65. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984).
66. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2713 (2007).
67. *Id*.
68. 446 U.S. 643 (1980).
69. *Catalano*, 446 U.S. at 644.
70. *Id*.
71. *Id*.
72. *Id*. at 645.
73. *Id*.
74. *Id*. at 647.
75. *Id*. at 648.
76. *Id*.

b. Market divisions

In addition to horizontal price fixing, the Sherman Act prohibits horizontal market divisions whereby competitors divide up territories.[77] The territories are often divided based upon geographical location.[78] In dividing up the territory, the competitors agree to refrain from competing with one another within their respective territories.[79] The rationale behind prohibiting such market divisions is that the actions permit competitors to increase the price to consumers within their jurisdiction by minimizing the competition.[80] This type of collusion between competitors almost always results in an anticompetitive effect.[81]

Palmer v. BRG of Georgia, Inc.[82] addressed the issue of market division.[83] In *Palmer*, two competing providers of bar review courses, a Georgia corporation and a Delaware corporation, entered into an agreement. The agreement stated that the Delaware corporation would not compete with the Georgia corporation in the state of Georgia, and the Georgia corporation would pay certain fees to the Delaware corporation and would not compete outside the state of Georgia.[84] After entering into the agreement, the Georgia corporation nearly tripled the cost of the bar review service.[85]

The United States Supreme Court held that horizontal territorial restrictions are naked restraints of trade with the sole purpose of stifling competition.[86] As such, these agreements are *per se* violations of the Sherman Act.[87] The court further held that whether the parties split a market that they are both competing in, or whether they merely reserve their respective markets, is immaterial.[88]

2. *Vertical Restraints*

While horizontal restraints involve competitors at the same level of the market structure, vertical restraints are agreements or restrictions between

77. United States v. Sealy, Inc., 388 U.S. 350, 357 (1967) (citing Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6-7 (1958)).
78. Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990) (citing United States v. Topco Assocs., Inc., 405 U.S. 596, 604 (1972)).
79. *Id*.
80. *Id*.
81. *Id*.
82. 498 U.S. 46 (1990).
83. *Palmer*, 498 U.S. at 46.
84. *Id*. at 47, 49.
85. *Id*. at 47.
86. *Id*. at 49 (citing U.S. v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972)).
87. *Id*.
88. *Id*.

parties at different levels of the market structure, such as a manufacturer of a product and the distributor.[89] The most common forms of vertical restraints include (1) territorial and customer restrictions common within franchising agreements, and (2) retail price maintenance agreements.[90]

a. Territorial and Customer Restrictions

Territorial and customer restrictions occur when manufacturers insulate distributors from direct competition with other distributors.[91] In order to accomplish this objective, the manufacturer may implement territorial restrictions or prohibit the resale of products to certain classes of buyers, such as other retailers.[92] Traditionally, manufacturers were prohibited from incorporating territorial or customer restrictions into their dealings with distributors.[93] These vertical restraints received the same *per se* standard utilized within horizontal restraints.[94] As a result, vertical territorial or customer restrictions were prohibited.[95]

United States v. Arnold Schwinn & Co.[96] is the leading case prohibiting vertical territorial and customer restrictions.[97] The Schwinn company implemented a strategy to sell to specific distributors and retailers by consignment or credit.[98] Schwinn would assign territories to its wholesale distributors and restrict the distributor's sales to franchised dealers within the allocated territory.[99] The allocation of territories was challenged by the government as a possible violation of the Sherman Act.[100] The United States Supreme Court distinguished between territorial restrictions when the distributor/retailer purchased the items for resale, as opposed to when the manufacturer retained title.[101] When the manufacturer retained title to the product, the restraint was analyzed under the rule of reason, as the manufacturer retained the risk of loss.[102] Now, when the distributor/retailer purchases the product, the manufacturer relinquishes title, dominion and

89. White Motor Co. v. United States, 372 U.S. 253, 267 (1967) (Brennan, J., concurring).
90. MILLER & JENTZ, *supra* note 58, at 972-73.
91. State Oil Co. v. Khan, 522 U.S. 3, 11 (1997) (citing United States v. Arnold Schwinn & Co., 388 U.S. 365, 379 (1967)).
92. *White Motor Co*., 372 U.S. at 254.
93. *Arnold Schwinn & Co*., 388 U.S. at 382.
94. *Id*.
95. *Id*.
96. 388 U.S. 365 (1967).
97. *Arnold Schwinn & Co*., 372 U.S. at 367.
98. *Id*. at 369.
99. *Id*.
100. *Id*. at 369-70.
101. *Id*. at 380.
102. *Id*. at 381.

risk.[103] Any effort thereafter to restrict territory or persons to whom the product may be transferred is deemed a *per se* violation of the Sherman Act.[104]

Continental T.V., Inc. v. GTE Sylvania, Inc.[105] involved a contest of the *per se* standard in relation to the vertical territorial or customer restrictions.[106] In that case, Continental, a retailer, filed suit against GTE Sylvania, a manufacturer, claiming that the geographical limitations imposed by GTE Sylvania violated Section One of the Sherman Act.[107] The United States Supreme Court held that vertical restraints can be used to induce retailers to offer services necessary to the efficient marketing of the manufacturer's product.[108] The Supreme Court further held that the enhanced services may not otherwise be provided by the retailer as a consequence of market imperfections, which include the "free rider" effect.[109] Free riding occurs when discount retailers capitalize upon the marketing and promotional efforts of others to create demand.[110] The discount retailer is able to avoid the marketing expenses associated with the promotional strategy, enabling the discounter to resell the item at a discounted price.[111]

As a result, the United States Supreme Court held that nonprice vertical restraints are not by nature anticompetitive, and thus overruled *Arnold Schwinn & Co*.[112] Under *Continental T.V.*, territorial and customer restrictions were analyzed under the rule of reason standard.[113]

b. Price Maintenance Agreements

Vertical price maintenance agreements are arrangements between the manufacturer and distributor as to the price of a product.[114] The agreements are classified as either maximum or minimum retail price maintenance agreements.[115]

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103. *Id*.
104. *Id*.
105. 694 F.2d 1132 (9th Cir. 1982).
106. *Cont'l T.V.*, 694 F.2d at 1135.
107. *Id*. at 1134.
108. *Id*. at 1136 (citing Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977)).
109. *Id*. at 1137 (citing *GTE Sylvania*, 433 U.S. at 55).
110. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2715 (2007).
111. *Id*.
112. *Cont'l T.V.*, 694 F.2d at 1135.
113. *Id*.
114. AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc., 705 F.2d 1203, 1205 (10th Cir. 1982).
115. State Oil Co. v. Khan, 522 U.S. 3, 12 (1997).

3. *Maximum Price Maintenance Agreements*

Vertical maximum price maintenance agreements are agreements between parties at different levels of the market structure that establish a ceiling as to the maximum price charged for a product.[116] As held in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,[117] prior to 1997 maximum price maintenance agreements were analyzed under the *per se* standard.[118] In that case, Kiefer-Stewart Co., a wholesaler of liquor, alleged that Seagram and Calvert only sold liquor to wholesalers who agreed not to sell the product above the fixed price. The United States Supreme Court held that business practices, formed for the purpose and with the effect of raising, depressing, fixing, or stabilizing the price of a product, are illegal *per se*.[119]

The justification for using the *per se* standard was twofold. First, there was a possibility that vertical maximum price agreements could facilitate discrimination against certain dealers, by channeling distribution through advantaged dealers and shielding them from nonprice competition.[121] The second concern was that the agreement could restrict the services that dealers could afford to offer customers, or effectively serve as a minimum price fixing scheme.[122] This situation occurs when the selling price for the product is almost always at the level of the fixed maximum price.[123] When this occurs, the distributor will have incentive to forgo costly services such as promotional activities in order to reduce the overhead associated with selling the product.

In 1997, the United States Supreme Court held that the primary purpose of the antitrust laws was to protect interbrand competition in *State Oil Co. v. Khan*.[124] The Court acknowledged that the invalidation of businesses practices that result in lower prices to the consumer is counterintuitive, as reducing prices in order to increase the business market share is often the very essence of competition.[125] Moreover, the court held that low prices benefit consumers, and as long as the maximum price agreements do not

116. USA Petroleum Co. v. Atl. Richfield Co., 972 F.2d 1070, 1071 (9th Cir. 1992).
117. 340 U.S. 211 (1951).
118. *Kiefer-Stewart Co.*, 340 U.S. at 223.
119. *Id.*
121. *Khan*, 522 U.S. at 17.
122. Albrecht v. Herald Co., 390 U.S. 145, 153 (1968).
123. *Id.* at 152.
124. 522 U.S. 3, 15 (1997).
125. *Khan*, 522 U.S. at 15.

rise to predatory levels, they do not threaten competition.[126] As a result, the court held that vertically imposed maximum prices did not possess the requisite likelihood to warrant a *per se* invalidation.[127] The holding permits manufacturers to impose maximum resale price maintenance agreements, which are subsequently judged against the more flexible rule of reason standard.[128] Since this landmark holding, lower courts have adhered to the ruling per *stare decisis*.[129] The lower courts, however, have reiterated that while *Khan* changes the standard by which the maximum price maintenance agreements are adjudged, it does not stand for the proposition that maximum resale price maintenance schemes are presumptively lawful.[130] *Khan* merely permits the trial to take additional factors into consideration, in deciding whether the maximum price maintenance agreement violates Section One of the Sherman Act.[131]

4. *Minimum Price Maintenance Agreements*

Even while the standard applied to most vertical restraints shifted from the *per se* standard to the more flexible rule of reason, courts continued to hold steadfast against minimum price maintenance agreements that applied the *per se* standard. These courts distinguished minimum price maintenance agreements from the other vertical restraints.[132] A minimum price maintenance agreement occurs when a manufacturer establishes a price floor at which distributors or retailers may sell the product.[133]

Dr. Miles Medical Co. v. John D. Park & Sons Co.[134] prohibited the use of minimum price maintenance agreements.[135] In that case, Dr. Miles Medical Company manufactured proprietary medicines.[136] The medicines were sold to select wholesalers, who in turn sold the product to retailers, for sale to the consumer.[137] Dr. Miles Medical Company not only established a minimum resale price that the wholesaler could charge to the retailer, but

126. *Id.* (citing Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990)).
127. *Id.* at 7.
128. *Id.* at 22.
129. *See, e.g.*, Mathias v. Daily News, L.P., 152 F. Supp. 2d 465, 485 (S.D.N.Y. 2001) (dismissing for failure to plead a viable market).
130. *Id.* at 485.
131. *Id.*
132. *Khan*, 522 U.S. at 11.
133. Khan v. State Oil Co., 93 F.3d 1358, 1362 (7th Cir. 1996).
134. 220 U.S. 373 (1911).
135. *Dr. Miles Medical Co.*, 220 U.S. at 396.
136. *Id.* at 394.
137. *Id.*

also a minimum price that the retailer could charge to the consumer.[138] Some of the retailers violated the agreement and set lower prices. Dr. Miles Medical Company filed suit to prohibit this practice and enforce the minimum price maintenance agreement.[139] The United States Supreme Court dismissed the complaint and held that a manufacturer could not set prices for future sales, and that minimum price maintenance agreements would *per se* violate the Sherman Act.[140]

5. Court's Analysis of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*

On August 14th, 2007, the United States Supreme Court took a proactive stance in *Leegin Creative Leather Products, Inc. v. PSKS Inc.*, stating that the minimum resale price maintenance agreements should fall under the purview of the law of reason, as opposed to the *per se* standard previously articulated under *Dr. Miles Medical Co. v. John D. Park & Sons, Co*.[141] The decision reversed a significant amount of established case law that had been designed to prohibit minimum price maintenance agreements.

Leegin will be analyzed in the following section. The analysis will consist of the material facts giving rise to the decision, as well as the procedural history of the case. This article will then provide an in-depth analysis of the majority's opinion, which changed the standard from a *per se* violation to the rule of reason. This section will conclude with an analysis of the dissenting opinion.

a. Facts

In 1997, the Leegin company instituted a policy whereby it refused to sell to retailers that discounted their products below the suggested prices.[142] The purpose of this policy was to promote superior customer service, which Leegin believed was lacking with most discounting conglomerates.[143] In return, Leegin set a minimum price to ensure that retailers received sufficient margins on Leegin products, allowing them to provide superior quality customer service consistent with the distribution strategy, and maintaining a high quality brand image.[144] PSKS was a retailer that sold Leegin

138. *Id.*
139. *Id.*
140. *Id.* at 405-06, 408-09.
141. Leegin Creative Leather Prods., Inc. v. PSKS Inc., 127 S. Ct. 2705, 2710 (2007).
142. *Id.* at 2711.
143. *Id.*
144. *Id.*

products.[145] PSKS began discounting the product in violation of the minimum price maintenance agreement.[146] In response, Leegin discontinued distributing to the retailer, and PSKS lost a significant amount of business.[147] PSKS filed suit, attempting to invalidate the minimum price maintenance under the *per se* standard.[148]

b. Procedural History

The United States District Court held that the minimum price maintenance pricing policy was a *per se* violation of the Sherman Act, and thus refused to take into consideration expert testimony regarding the procompetitive effects of the agreement.[149] The United States Court of Appeals for the Fifth Circuit affirmed the holding.[150] The United States Supreme Court granted certiorari and reversed the District Court and Court of Appeals, with a 5-4 opinion, changing the standard from the *per se* violation to an analysis under the rule of reason.[151]

c. Majority's Opinion

The key in the Supreme Court's analysis under the rule of reason was to determine whether the contract, under scrutiny, had a procompetitive or anticompetitive effect.[152] In *Leegin*, the Supreme Court held that it was essentially undisputed that minimum resale price maintenance agreements would have procompetitive effects.[153] Furthermore, under numerous market conditions, a minimum price contract would unlikely have anticompetitive effects.[154] In addition, the Supreme Court held that there was a pervasive consensus that permitting a manufacturer to control the price at which its goods are sold would promote interbrand competition in a variety of ways.[155] Finally, recent studies documenting the competitive effects of resale price maintenance support the position that this practice neglects to

145. *Id*.
146. *Id*.
147. *Id*.
148. *Id*. at 2712.
149. *Id*.
150. *Id*.
151. *Id*.
152. *Id*. at 2717.
153. *Id*. at 2721.
154. *Id*. at 2715.
155. *Id*. (citing ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW AND ECONOMICS OF PRODUCT DISTRIBUTION 76 (2006)).

meet the criteria for a *per se* rule.[156] As previously stated, the primary purpose of the antitrust laws is to protect interbrand competition.[157]

The primary advantage of minimum resale price maintenance agreements is that they have the ability to stimulate interbrand competition.[158] Interbrand competition is defined as competition among manufacturers selling different brands of the same type of product.[159] This occurs by reducing intrabrand competition, the competition between retailers selling the same brand.[160] The facilitation of interbrand competition is desirable, as it coincides with the spirit of antitrust regulations to foster and protect interbrand competition.[161]

The Supreme Court held that when a single manufacturer implements vertical price restraints, interbrand competition is promoted in three ways. First, minimum resale price maintenance agreements minimize intrabrand price competition.[162] By reducing or eliminating intrabrand competition, retailers are encouraged to invest in services or promotional efforts that aid the manufacturer's position as against rival manufacturers.[163] The Supreme Court further noted that if intrabrand competition exists, retailers have a disincentive to make such investments for fear that a discounting retailer could "free ride" on the value and increase in demand derived from the investment of the initial retailers, who allocate significant time and resources in creating the demand for the product.[164] Free riding occurs when discount retailers capitalize upon the marketing and promotional efforts of others to create the demand.[165] The discount retailer is able to avoid the marketing expenses associated with the increase in demand, and then may resell the item at a discounted price.[166] If the consumer has the option of purchasing the product from a retailer that discounts because it has not invested the capital to provide services or develop a quality reputation, the high-service retailer will lose sales to the discounter.[167] As a result, the high service retailer will be forced to restrict services to a level

156. *Id.* (citing T. OVERSTREET, RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 170 (1983)).
157. *Id.* at 2718 (citing State Oil Co. v. Khan, 522 U.S. 3, 15 (1997)).
158. *Id.* at 2715.
159. *Id.* (citing Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-57 (1977)).
160. *Id.* (citing *GTE Sylvania*, 433 U.S. at 51-52).
161. *Khan*, 522 U.S. at 15.
162. Leegin Creative Leather Prods., Inc., v. PSKS, Inc., 127 S. Ct. 2705, 2715 (2007).
163. *Id.*
164. *Id.* (citing *GTE Sylvania*, 433 U.S. at 55).
165. Chicago Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 675 (1992).
166. *Leegin*, 127 S. Ct. at 2715 (citing *GTE Sylvania*, 433 U.S. at 55).
167. *Id.* at 2716.

lower than consumers would prefer in order to compete with the discounter.[168] The minimum resale price maintenance agreement alleviates the problem, as it prevents the discounter from undercutting the service provider. Retailers are then able to compete among themselves over services.[169]

A second advantage of the minimum resale price maintenance agreement is that it facilitates interbrand competition by encouraging market entry for new firms and brands.[170] New manufacturers can use the restrictions to entice competent and aggressive retailers and distributors to make the requisite investment that is often required in the distribution of products unknown to the consumer.[171] This occurs as the distributor is ensured a sufficient profit margin to warrant such an infusion of capital.[172] The minimum price maintenance agreement assures the distributor and/or retailer that they will not be undercut by a free rider, who capitalizes on the capital expenditure and marketing efforts of the distributor.[173] This serves as an incentive for distributors to aggressively promote a manufacturer's product, and to compete based upon marketing efforts and customer service, as opposed to price.[174] The result is a procompetitive effect, which occurs when markets are penetrated by using resale price maintenance agreements.

Finally, the resale price maintenance contract can increase interbrand competition by offering the retailer a guaranteed margin and threatening termination of the contract if the retailer fails to meet or exceed expectations.[175] Such action induces the performance of the retailer, and thus increases the manufacturer's market share.[176] This occurs as smaller distributors and retailers are able to maintain a competitive price without regard to the economies of scale, and can provide a competitive advantage through superior customer service and marketing.[177]

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168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* (quoting *GTE Sylvania*, 433 U.S. at 55).

172. *GTE Sylvania*, 433 U.S. at 55. *See* Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346, 349 (1984) (explaining that by reducing competition based upon price, specialty retailers are able to compete based upon enhanced service).

173. *Leegin*, 127 S. Ct. at 2716.

174. *GTE Sylvania*, 433 U.S. at 55.

175. *Leegin*, 127 S. Ct. at 2716.

176. *Id.* (citing Frank Mathewson & Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13 REV. INDUS. ORG. 57, 74–75 (1998).

177. *Id.* at 2726 (Breyer, J., dissenting).

d. Dissenting Opinion

Leegin was a 5-4 opinion with a dissent written by Justice Breyer. Justice Stevens, Justice Souter, and Justice Ginsburg joined the dissent. The thrust of the dissent was that intrabrand minimum price controls have been consistently held, and for good reason, to be a *per se* violation of the Sherman Act since 1911.[178] The *Leegin* dissent echoes irritation as to how the majority dealt with the issue of *stare decisis* in moving past *Dr. Miles Medical Co*.[179] For purposes of this article, however, the discussion is limited to the reasons stated in the dissent for arguing in favor of continuing to use the *per se* standard.

The dissenting opinion distinguishes between the appropriate standard, acknowledging that the decision between the rule of reason and *per se* violation would be a difficult issue if the Court had been writing on a blank slate.[180] A blank slate would occur if this were a case of first impression.[181] The Supreme Court, however, recognized the plethora of existing case law and the restraints of *stare decisis*, which in this case included nearly a century of established case law.[182] The dissent explained that absent the constraints of *stare decisis*, there are several classical arguments for and against the use of a *per se* rule.[183] The arguments focused on three sets of consideration, involving: (1) potential anticompetitive effects; (2) potential benefits; and (3) administration.[184] These considerations, however, differ depending upon the perspective.[185]

The dissent recognized that with respect to dealers, resale price maintenance agreements, not unlike horizontal price agreements, can diminish competition among dealers of a single brand or among multi-brand dealers.[186] In doing so, the manufacturer may thwart dealers from offering customers the discounted prices that many customers prefer.[187] Moreover, the dissent opined that the agreement can frustrate dealers' efforts in meeting changes in demand, such as reducing prices to meet market pressures.[188] In addition, "they can inhibit expansion by more efficient dealers

178. *Id*. at 2725.
179. *Id*. at 2726.
180. *Id*.
181. *Id*.
182. *Id*.
183. *Id*.
184. *Id*.
185. *Id*.
186. *Id*. at 2727.
187. *Id*.
188. *Id*.

whose lower prices might otherwise attract more customers," thus oppressing "the development of new, more efficient methods of retailing."[189]

With respect to producers, the dissent explained that "[r]esale price maintenance agreements can help reinforce the [anticompetitive] behavior" of businesses within a respective industry.[190] In such industries, competitors may collude by observing each other's pricing strategies.[191] According to the dissent, this occurs as each competitor recognizes that price cutting is likely to signal a price reduction by substantially all of the remaining competitors.[192] The producer who resists the price increase will not benefit financially, as the dealer is prohibited from increasing "demand by passing along the producer's price cut to consumers."[193]

The dissenting opinion continued with its business analysis, opining that most economists today concur that "resale price maintenance tends to produce higher consumer prices than would otherwise be the case."[194] This occurs as it eliminates discounters from capitalizing on economies of scale. Businesses that incorporate cost leadership pricing strategies generally minimize costs and compete on price. When there is a minimum price, discounters lose their competitive advantage.

The dissent acknowledged that although there are risks associated with minimum price maintenance agreements, these agreements can provide important consumer benefits.[195] The primary advantages include enticing market entry and limiting free riding by capitalizing on the marketing efforts of other retailers.[196] The dissent also conceded that when a manufacturer or producer seeks to impose a minimum price maintenance agreement, it is usually more compelling that a legitimate benefit exists, as opposed to when the distributors facilitate the agreement.[197] "That is because, other things being equal, producers should want to encourage price competition among their dealers," which generally translates into an increase in profits as a result of an increase in demand.[198]

While the dissent indeed raised the issue of concern associated with minimum price controls, the dissent continually overlooked one important

189. *Id*.
190. *Id*.
191. *Id*.
192. *Id*.
193. *Id*.
194. *Id*. at 2728 (citing 8 P. AREEDA & H. HOVENKAMP ANTITRUST LAW 40 (2nd ed. 2004)).
195. *Id*.
196. *Id*.
197. *Id*. at 2729.
198. *Id*.

point: the *Leegin* decision did not contain a ruling that all minimum price controls would be valid, but merely changed the method by which they would be evaluated for compliance with the Sherman Act.[199] It is true *Leegin* means that a contract containing an intrabrand minimum price control will be presumed to be a valid contract clause, but the contract is still subject to review by the court.[200] Such contract clauses will be given the benefit of the doubt, instead of held as a *per se* violation.[201] Even the dissent acknowledged that minimum price controls could have beneficial consequences, with the conclusion that they are not necessarily (or, perhaps, *per se*) anticompetitive.[202] The dissent's real objection to the majority ruling in this case was summed up in the following:

> Economic discussion, such as the studies the Court relies upon, can help provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that fact means that courts will often bring their own administrative judgment to bear, sometimes applying rules of [*per se*] unlawfulness to business practices even when those practices sometimes produce benefits.[203]

According to the dissent, the majority should have followed the doctrine of *stare decisis*, and should have continued to hold that minimum price controls are a *per se* violation of the Sherman Act.[204] Much of the dissenting opinion addressed *stare decisis* and how the majority too easily overruled a nearly century old precedent.[205] Is the dissent's real objection over the procedural issue of how to review the law? Is it really concerned with the substance behind the issue of minimum price controls and their effect on competition? At best, the dissent only points out that there is not a unanimous agreement between economists on the effects of minimum price controls, as economists disagree on whether particular controls are

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199. *See id.* at 2725 (setting forth the dissent's acknowledgment that agreements will be analyzed under the rule of reason in lieu of the bright line *per se* violation).

200. *Id.* at 2714.

201. *Id.* at 2720.

202. *Id.* at 2730 (Breyer, J., dissenting).

203. *Id.* at 2729.

204. *Id.* at 2736.

205. *Id.* at 2731-36.

beneficial. Furthermore, the dissent implies that although the opinions of economists are useful to the Court in explaining business issues, it is only the Court, in reliance on its own "rules and precedents," that will know when a business practice adversely affects the competitive nature of the market place.[206] While it is indeed the Court's place to interpret and apply the law, it is not within the Court's expertise to decide the true nature of factors in the market place.[207] That is the province of business, as well as of the customers of business.[208] *Leegin* merely allows a business practice, which even the dissent acknowledges has support among economists, to actually be put into practice.[209] It is the marketplace that will reveal the effect of minimum price controls on business.[210] The Court, however, will continue to analyze the agreement under the rule of reason to determine whether such controls in specific contracts violate the Sherman Act.

IV. THE IMPLICATIONS OF *LEEGIN*

Practicing attorneys must be cognizant that vertical price control agreements may now become surprisingly common as a result of *Leegin*. Such controls are not only of interest to large scale manufacturers and distributors, but will also prove beneficial to smaller businesses.[211] Any business that produces or distributes products or services may have a legitimate interest in setting minimum price controls. Such a business can include farms producing crops, livestock, animal products, as well as any item produced and sold in a local or regional market, or businesses engaged in e-commerce.

Leegin is significant in that the United States Supreme Court has made it clear that vertical restraints, in particular minimum price control agreements, do not constitute *per se* violations of the Sherman Antitrust Act.[212] Instead, such agreements must be analyzed by the trier of fact on the rule of reason basis.[213] Only if the four factors, identified by the Court to apply the rule of reason, show a particular agreement to be anticompetitive, will it be

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206. *Id.* at 2729.

207. *Id.* at 2731-36.

208. *Id.*

209. *See id.* at 2710 (avoiding the *per se* violation in lieu of the rule of reason, resulting in consideration of the subjective effects of the agreement).

210. *See id.* at 2715 (noting that the consumer will have the option between choosing different brands, including low-price, low-service brands; high-price, high-service brands; and any other intermediate combination).

211. *See id.* at 2716 (explaining that a small business may focus on competition other than that which is based upon price, such as customer service).

212. *Id.* at 2720.

213. *Id.*

held to violate the Sherman Act.[214] This has immediate implications on state legislatures and state courts, to attorneys and their clients as they prepare or review agreements with vertical controls, and to manufacturers, distributors, and retailers.

A. STATE LEGISLATURES AND STATE COURTS

In any state in which state law corresponds with the requirements of the Sherman Act, both statutes and case law will have to be reviewed and perhaps modified in order to discontinue the identification of vertical price restraints (including minimum price control agreements) as a *per se* violation of state anti-trust law.[215] Even if state law intends to set standards that are more stringent than federal law, this decision may still require change. A mandate from the United States Supreme Court that minimum price control agreements are not a *per se* violation of the Sherman Act, or are not a *per se* violation of anti-competition laws, seems to invalidate any law to the contrary.

In North Dakota, for example, anti-trust issues should be construed consistently with the federal interpretation.[216] As a result, North Dakota practitioners are now permitted to incorporate most vertical price restraints into their contracts, which will then be reviewed under the rule of reason.[217] Such restraints will withstand judicial scrutiny if the restraints are based on a legitimate foundation and have procompetitive effects, such as promoting interbrand competition. Prior to *Leegin*, minimum price agreements would have been considered *per se* violations.[218]

B. CONTRACTS CONTAINING VERTICAL RESTRAINTS

So what does this mean for a manufacturer and a distributor as they sit down to write a contract? There is now a formal legal acknowledgment that vertical price restraints can be a legitimate and enforceable term in their contract.[219] There are, however, still limitations. The parties to such a contract must carefully consider the impact of their agreement on interbrand competition in the market place, and should also remember that their

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214. *Id.* at 2713.

215. Catherine M. Clayton & Carrie A. Longstaff, *Vertical Minimum Pricing Agreements Permitted*, 189 N.J.L.J. 1089, 1090 (2007).

216. Op. N.D. Atty. Gen. Op. No. 86-24 (Aug. 18, 1986).

217. *See Leegin*, 127 S. Ct. at 2720 (noting that the federal interpretation of the Sherman Act uses the rule of reason as opposed to the *per se* violation standard).

218. *See id.* (providing that states traditionally prohibited vertical minimum price agreements as *per se* violations).

219. *Id.*

agreement may only relate to intrabrand pricing.[220] Producers and sellers of the same type of product of another brand will remain viable competitors, unencumbered by intrabrand pricing agreements. The Supreme Court's own factors for applying the rule of reason should be applied to the parties' contract.[221] As a general rule, courts will likely invalidate minimum price maintenance agreements in the following situations: the effect of the contract is to inhibit competition; the contract results in the domination of the relevant market place by the contract parties; the contract results in fewer options with regard to the availability of the contract to customers, due to the subject matter of the contract; or the parties to the contract already possess significant market power.[222] *Leegin*, however, does not stand for the proposition that minimum price maintenance contracts will be categorically upheld; contracts will be analyzed on a case by case basis instead of held as a *per se* violation.[223]

C. REASONS THAT A MANUFACTURER OR PRODUCER WOULD BE INTERESTED IN MINIMUM PRICE CONTROL AGREEMENTS POST-*LEEGIN*

1. *The Interested Manufacturer*

It might seem that a manufacturer would determine its own costs, add its profit margin, and set a price for its brand. As long as the manufacturer's buyers (distributors and retailers) pay the manufacturer's price, it would not seem to matter at what price the product was then sold to retailers or at retail. However, the manufacturer would have an interest in the minimum retail price of its product, to not be set at a high price.[224] If the price is set too high, the manufacturers of other brands of similar products sold at a lower price would have a competitive advantage.[225] In fact, a distributor that sells different brands of the same product may attempt to eliminate competition for the cheaper brands of the product by negotiating a contract with the manufacturer that set a minimum price above the manufacturer's competition. This practice may be anti-competitive and

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220. *See id.* at 2718 (stating that a manufacturer must have significant marketing power before being found to have violated the Sherman Act, as competitors would still be able to compete via rival retailers).

221. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (holding that courts must consider the history, reason, purpose, and effect of the restraint).

222. *See Leegin*, 127 S. Ct. at 2712 (stating that the factors are conducive to cartels and anticompetitive effects).

223. *Id.* at 2725.

224. *Id.* at 2715.

225. *Id.*

ultimately a violation of the law, but it may still cause damage until it is successfully challenged. Manufacturers, therefore, have an interest in reviewing any such price control language in contracts to assure as much as possible that the minimum price control will not be harmful.

2. *The Interested Distributor*

Distributors may find minimum price controls advantageous on some products. An investment of capital may be required to show retailers that the product should be purchased for resale to retail customers.[226] This may be especially true with a new product or with new versions of an existing product.[227] Retailers do not simply buy everything that they can; a distributor must instead market their offerings. A contract between a manufacturer and distributor that requires a minimum price for a product would allow the distributor to determine how much it could allocate to marketing that product and still achieve its profit margin.[228] Furthermore, since distributors of different brands of similar products are not covered by vertical price controls, this fact will be the market force influencing where the vertical price control is set.

3. *The Interested Retailers*

Retailers, even those who are not parties to a contract between a manufacturer and a distributor containing a minimum price control agreement, are still affected by this decision. If a distributor must sell a brand at a minimum price, a retailer buying the brand will understand that all retailers that buy the same brand from the same distributor will have the same cost.[229] This requires each retailer to base their competitive advantage on factors other than product cost.[230] Factors such as reducing a profit margin, and/or offering services, accessories, or other features with the product can stimulate competition between retailers for the sale of the product.[231]

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226. *See id.* at 2715-16. The *Leegin* Court treated the retailer as the distributor. *Id.* Often, the manufacturer sells to a distributor, who sells to a retailer, who then sells to a customer. *Id.* The same principle applies to a distributor selling to a retailer as a retailer selling to a customer. *Id.*

227. *See id.* (explaining that marketing is needed to convince the retailer of the product's appeal).

228. *See id.* (providing that the distributor would not need to be worried about investing too much in marketing expenses and then being undercut by a free rider).

229. *Id.* at 2716.

230. *Id.*

231. *Id.*

V. CONCLUSION

While the new standard permits a subjective approach in terms of reviewing a businesses price maintenance agreement, the United States Supreme Court has provided a list of plausible reasons for maintaining such an agreement, of which practitioners should be cognizant. First, manufacturers are permitted to enter into minimum resale price maintenance agreements to avoid the free riding of a discount retailer. Secondly, the agreement is more likely to withstand judicial scrutiny if it is incorporated to promote interbrand competition, such as rewarding competitors for investing in promotional and advertising campaigns to sell an item and enhance customer service. Finally, if the minimum price maintenance agreement is designed to encourage entry into the market, it is probable that the agreement will be upheld.

While the standard of judicial scrutiny associated with the minimum price maintenance agreements has been relaxed, the practitioner must remain cognizant that minimum price maintenance agreements will still be condemned under the Sherman Act if they possess anticompetitive effects. Moreover, the holding in *Leegin* is only authoritative under federal law. The practitioner must remain cognizant of state law when he or she attempts to incorporate a minimum price maintenance agreement.[232]

232. Clayton & Longstaff, *supra* note 215, at 1090.