NOTE

Don't Discount Resale Price Maintenance: The Need for FTC Guidance on the Rule of Reason for RPM Agreements

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ABSTRACT

Nearly eight years have passed since the Supreme Court overturned the rule of per se illegality for minimum resale price maintenance ("RPM") agreements in Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, opting instead to analyze RPM agreements under a rule of reason test, but the federal government has been largely silent on how minimum RPM should be analyzed going forward. The Court in* Leegin *called for the lower courts and the federal agencies to develop the rule of reason analysis and provide guidance for manufacturers, distributors, and plaintiffs, but the relative silence of the Federal Trade Commission and the Department of Justice has left numerous questions regarding the appropriate analysis of RPM agreements unanswered. Clear policy guidelines for RPM agreements could settle the ambiguity left in the wake of the* Leegin *decision and ultimately benefit business and consumers. This Note examines the limited agency actions in the wake of* Leegin *and suggests that the FTC should provide specific guidelines to manufacturers and retailers regarding how minimum RPM agreements will be litigated under the*

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rule of reason analysis adopted in Leegin*, and proposes examples of potential guidelines.*

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Introduction

Imagine yourself, a new associate in your first year at a firm, invited to go golfing with a prominent partner and two valuable clients.[1] Hoping to make a good impression on all parties, you decide that your old irons—which have not seen the light of day since undergrad—

[1] This example is an adaptation (from televisions to golf clubs) of a presentation given at Wake Forest University School of Law by Ahmed Taha. *See* wakelawschool, *U.S. Supreme Court Review: Ahmed Taha on* Leegin Creative Leather Products v. PSKS, YouTube (Jan. 28, 2013), https://www.youtube.com/watch?v=y70OCFdAtFw.

simply will not do, and head out to your local Dick's Sporting Goods. At Dick's, you are immediately confronted with walls of golf clubs of varying brands, designs, and prices. Completely overwhelmed by the display, you track down a salesperson for assistance, but it soon becomes clear that the salesperson, although able to provide some basic guidance, probably knows as much about the latest iron models as he or she does about running shoes, bicycles, and tennis racquets. Although the salesperson can use the store computer to look up more information, and you might be able to hit a few balls into a net, you are ultimately left unclear as to which iron set would be the right choice for your skill level or playing style.

Frustrated with your experience at the big-box sporting goods store, you head to Golfsmith, a golf specialty store that focuses on golf club fitting and lessons.[2] Before you become overwhelmed again by the walls of irons, a store representative offers to provide a custom swing analysis to help narrow down which types of irons would be suitable for you. The salesperson has been trained and certified to use the latest motion and measurement technology to evaluate your swing. He or she may even be able to point out areas where your swing could improve, and find a few clubs that both fit your current swing and provide you with the best opportunity for future improvement. Once you narrow down the options to a particular brand, you can sample varying shaft flexes, bends, grinds, and lengths. With the salesperson's superior knowledge and the technology available in the Golfsmith store, you are able to select a set of clubs that performs best with your swing type: a beautiful set of Mizuno irons. As the salesperson tallies up the price to $1200, you realize that, now that you know which set to buy, you could go to Dick's and purchase this same set of irons for $1000, and could probably go online and find the Mizuno irons for even less.

The problem for Golfsmith is that, while they spend money promoting the Mizuno brand, learning about the Mizuno products, purchasing equipment, and training their salespeople, customers can simply take the information they learn from Golfsmith and then make their purchase at one of the big-box stores or online for a lower price. Golfsmith's dilemma is embodied in the economic concept called the "free rider" problem—where those who benefit from a resource (here, the consumer benefitting from the increased information pro-

2 The Author visited a Golfsmith store, located at 11052 Lee Jackson Memorial Highway in Fairfax, Virginia, on several occasions throughout 2014 and 2015 for research purposes and to gather relevant golf-fitting information.

vided by Golfsmith) do not ultimately pay for the benefit.[3] Customers benefit from the information, then take their business elsewhere—online, for example—where, because the same information is not provided, the retailer is able to charge a lower price and still maintain its sales margins.[4]

Faced with the problem of free riding, Golfsmith might contact Mizuno and explain the problem, and Mizuno could elect to instruct each retailer that sells its golf clubs not sell them for any less than $1200, a restraint known as a resale price maintenance ("RPM") agreement. An RPM agreement is a type of vertical restraint, meaning an agreement between cooperating firms (e.g., a supplier, manufacturer, distributor, or retailer), rather than competing firms.[5] Specifically, an RPM is a type of "intrabrand" vertical restraint, as opposed to an "interbrand" restraint, in that it affects the competition between sellers of the same brand—the Mizuno retailers in this example.[6] In such situations, the manufacturer, Mizuno, prohibits retailers from selling their products for less than a particular price, and Mizuno retailers are then forced to compete for sales based on quality service, information, and marketing, instead of price. Golfsmith benefits from intrabrand restraints because the resources it invests in creating an informative shopping experience and providing great service for its customers are likely to put it ahead of its competitors. Mizuno, as the manufacturer, benefits from the RPM agreement by having its retailers actively promoting its brand to obtain sales, rather than simply competing based on low margins.

More concisely, an RPM agreement is simply a practice in which an upstream firm—the manufacturer—restricts the price at which a downstream firm—the retailer—can resell its products.[7] RPM agreements are an attractive option for a brand seller who is selling a mid-to-high-priced brand "whose inherent superiority is not readily evident to consumers."[8] Mizuno, for example, does not have nearly the same brand recognition among consumers as golf retail giants such as

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3 *See* Victor P. Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U. L. REV. 736, 736 (1984).

4 *Id.*

5 ANDREW I. GAVIL ET AL, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 352–53 (2d ed. 2008).

6 *See id.* at 353.

7 Greg Shaffer, Univ. of Rochester, Presentation at the FTC Hearings on Resale Price Maintenance: Theories of Harm from Resale Price Maintenance (Feb. 19, 2009).

8 Warren S. Grimes, *Resale Price Maintenance: A Competitive Assessment* 2 (Feb. 19, 2009), https://www.ftc.gov/sites/default/files/documents/publicevents/resale_price_maintenance_under_sherman_act_and_federal_trade_commission_act/wgrimes0219.pdf.

Nike and TaylorMade, and thus would benefit from having a retailer promoting the its brand.[9] In this circumstance, an RPM also gives retailers increased incentive to stock a less widely recognized brand and to actively promote it.[10]

In this hypothetical, Mizuno gets to provide increased information to consumers and maintain their image as a premium brand while rewarding loyal retailers with strong margins. So what's the problem? At its core, an RPM agreement is ultimately a restraint on trade—i.e., Dick's or an online retailer are prevented from selling below Mizuno's set price of $1200, even if they would prefer to charge the lower price of $1000 because they believe more customers would purchase at the lower price. This type of restraint, which has the potential to impact consumers, is precisely the type of activity that risks running afoul of the Sherman Act,[11] and until 2007 was per se illegal under federal antitrust law.[12] In 2007, the Supreme Court, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[13] lifted the per se ban on RPM agreements, choosing instead to apply a rule of reason analysis that balances the competitive benefits and harms of the RPM agreement at issue.[14] While a manufacturer adopting an RPM agreement today has the opportunity to defend it as a reasonable restriction on trade, the boundaries of when an RPM agreement is in violation of the newly applied rule of reason are unclear, and federal agencies have provided little to no guidance.[15]

The Federal Trade Commission ("FTC") plays a broad role as a policymaker in U.S. antitrust law, and a wide range of actors rely on the policy guidelines that the FTC establishes, making the FTC's lack of guidance on RPM agreements particularly troubling. For example, antitrust plaintiffs use FTC reports and prior enforcement actions in determining whether or not to bring antitrust suits, businesses rely on FTC guidelines and public consultation in drafting agreements, and

9 *See RankingTheBrands Top 100 2015*, SyncForce, http://www.rankingthebrands.com/The-Brand-Rankings.aspx?rankingID=30&year=886 (last visited Jan. 5, 2016) (ranking Nike ninth and Adidas (owner of TaylorMade) thirty-seventh in 2015 brand rankings; Mizuno is not within the top 100 brands).

10 *See* Grimes, *supra* note 8, at 2.

11 Sherman Act, 15 U.S.C. §§ 1–7 (2012).

12 The legality of vertical intrabrand restraints is generally addressed under the Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1 (2012)), which states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."

13 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

14 *Id.* at 882.

15 *See infra* Part III.

states frequently set their own enforcement policies in accordance with the FTC.[16] The lack of a clear FTC policy on RPM also has an international impact because international enforcement of minimum RPM is largely inconsistent with the decision in *Leegin*. The United States plays a critical role in global antitrust policy, and its silence on RPM since the *Leegin* decision is in contradiction with the nation's role in promoting U.S. antitrust policies globally.

Part I of this Note lays out the development of the laws of vertical restraints and RPM. Part II examines the Supreme Court's decision in *Leegin* and the guidance it provides for analyzing RPM agreements. Part III examines reactions to *Leegin* and searches federal agency actions following *Leegin* for indications of how federal enforcers will analyze RPM agreements. Finally, Part IV discusses the role of the FTC in setting antitrust policy, argues that the FTC should provide specific guidelines to manufacturers and retailers on how minimum RPM agreements will be litigated under the rule of reason analysis adopted in *Leegin*, and suggests possible factors to be weighed in that analysis.

I. History of Vertical Restraints and RPM

For nearly one hundred years leading up to *Leegin*, U.S. antitrust law governing vertical restraints was turbulent, with legal interpretations and state and federal laws vacillating wildly on what was permissible conduct.[17] Vertical restraint doctrine began with the Supreme Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[18] In *Dr. Miles*, the plaintiff, a manufacturer of medicines, alleged that the defendant, an unapproved retailer of the plaintiff's product, had committed tortious interference when it induced approved retailers to sell the plaintiff's product below contractually specified prices.[19] The Court "assumed that dealers, and not Dr. Miles, were the primary beneficiaries of higher retail prices," making the RPM agreements little different from a naked horizontal price fixing agreement between the retailers.[20] While the Court did not explicitly use the term "per

16 *See infra* Part IV.

17 *See* Warren S. Grimes, *The Path Forward After* Leegin*: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 Antitrust L.J. 467, 469 (2008).

18 Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

19 *Id.* at 381–82.

20 *See* Alan J. Meese, *Assorted Anti-*Leegin *Canards: Why Resistance Is Misguided and Futile*, 40 Fla. St. U. L. Rev. 907, 916–17 (2013); *see also* Richard A. Posner, Antitrust Law: An Economic Perspective 156 (1976) ("According to the Court in *Dr. Miles*, resale price maintenance benefits dealers . . . and is bad because it has the same effect as a dealers' cartel.").

se," *Dr. Miles* was universally recognized as holding that vertical price restraints (between manufacturers and retailers) were, in fact, per se unlawful.[21] This per se illegality meant that minimum RPM was just as unlawful as any output restriction agreement—i.e., the Court essentially viewed RPM as the equivalent of price fixing, and did not really consider the possible beneficial effects on competition.[22]

Just eight years after *Dr. Miles* in *United States v. Colgate & Co.*,[23] the Court changed course slightly, holding that a business could impose RPM "unilaterally," so long the business was not a monopolist.[24] Later known as the "*Colgate* Doctrine," this meant that a manufacturer was free to publicly announce that it would only sell to dealers that would not cut prices, but any actual agreement between manufacturer and retailer regarding RPM was still per se illegal.[25]

Following the Great Depression, many economists believed that price floors (a form of minimum RPM) could help stabilize the economy and stem rapid deflation.[26] In an effort to protect industries, Congress passed and President Roosevelt signed the National Industrial Recovery Act,[27] which authorized the President to impose "codes of fair competition."[28] Within a year of passage, the President had implemented approximately eighty codes that mandated minimum RPM in specific industries.[29] In 1937, in response to the perceived need for RPM agreements, Congress passed the Miller-Tydings Fair Trade Amendments,[30] which allowed states to permit RPM agreements on an industry-by-industry basis. In 1952, Congress further protected the use of minimum RPM with the McGuire Act.[31] At one point, as many as forty-six states had laws protecting rights to enter into RPM agreements.[32] However, after World War II, economic the-

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21 GAVIL ET AL., *supra* note 5, at 356.

22 *See id.* at 356–57; *see also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 465–66 (1999).

23 United States v. Colgate & Co., 250 U.S. 300 (1919).

24 GAVIL ET AL., *supra* note 5, at 357 (quoting *Colgate*, 250 U.S. at 307).

25 *Id.*

26 *See* Gene Smiley, *The Concise Encyclopedia of Economics: Great Depression*, LIBR. ECON. & LIBERTY, http://www.econlib.org/library/Enc/GreatDepression.html (last visited Jan. 5, 2016); *see also* Sarwat Jahan et al., *What is Keynesian Economics?*, INT'L MONETARY FUND (Sept. 2014), http://www.imf.org/external/pubs/ft/fandd/2014/09/pdf/basics.pdf.

27 *See* National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933).

28 *Id.* at 196.

29 ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 58–59 (1966).

30 District of Columbia Revenue Act of 1937, Pub. L. No. 314, 50 Stat. 673.

31 McGuire Act, Pub. L. No. 542, 66 Stat. 631 (1952).

32 *See* Meese, *supra* note 20, at 918.

ory began to shift away from governmental control of markets towards price theory economics, which presumed that unconstrained markets functioned effectively, and that efficiencies were necessarily technological in nature and thus realized within firms.[33] Agencies, courts, and Congress followed suit in this shift towards price theory economics, which did not support RPM.[34] With the Great Depression far behind, Congress repealed the Miller-Tydings Act and the McGuire Act,[35] restoring *Dr. Miles* and its rule of per se illegality for minimum RPM.

Almost as soon as *Dr. Miles* was restored, the Court began to chip away again at the per se illegality, distinguishing nonprice vertical price restraints (intrabrand restraints that promote interbrand competition)[36] from strict minimum RPM in *Continental T.V., Inc. v. GTE Sylvania Inc.*[37] After *GTE Sylvania*, the Court shifted to evaluating the competitive effects of the nonprice restraints, and subsequently vertical intrabrand nonprice restraints have been treated as virtually per se lawful.[38] The Court nearly overruled *Dr. Miles* in *Monsanto Co. v. Spray-Rite Service Corp.*,[39] but passed on the opportunity, fearing that Congress would pass a law in response once again prohibiting minimum RPM.[40] Maximum RPM agreements, where manufacturers set the maximum price that retailers may charge, have been evaluated under the rule of reason since *State Oil Co. v. Khan*.[41] There is general agreement, however, that maximum RPM agreements do not pose the same potential anticompetitive risks as minimum RPM agreements.[42]

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33 *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 370–71 (1985).

34 *See* Meese, *supra* note 20, at 918–20.

35 *See* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801.

36 *See supra* notes 5–6 and accompanying text.

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

38 *See generally* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67 (1991) (concluding that after *GTE Sylvania* non-monopolists were largely free from antitrust regulation of vertical nonprice restraints.

39 Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

40 Justice Powell's private documents during consideration of *Monsanto* indicate that he would have overruled *Dr. Miles* in *Monsanto*, but was prevented from doing so because the issue had not been preserved by the parties and Congress still showed signs of support for the per se rule. *See* GAVIL ET AL., *supra* note 5 at 374–75 (discussing Congress's intervention precluding the Justice Department from advocating for overturning *Dr. Miles* and Justice Powell's handwritten notes).

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

42 *See id.* at 15–18.

To fully understand the decision in *Leegin*, it is important to understand the basic tenets behind antitrust law's rule of reason, a legal doctrine used to interpret the Sherman Act. The rule of reason, a core legal doctrine in antitrust law, dates back to *Addyston Pipe & Steel Co. v. United States*,[43] and is applied to analyze restraints which are not per se illegal (such as cartel formation), but which are only considered illegal where their anticompetitive effects unreasonably restrain trade.[44] Antitrust scholar Phillip Areeda describes the rule of reason as a three-pronged inquiry that asks:

> (1) What harm to competition results or may result from the collaborators' activities? (2) What is the object they are trying to achieve and is it a legitimate and significant one? That is, what are the nature and magnitude of the "redeeming virtues" of the challenged collaboration? (3) Are there other and better ways by which the collaborators can achieve their legitimate objectives with fewer harms to competition? That is, are there "less restrictive alternatives" to the challenged restraint?[45]

Ultimately, after making these inquiries, the court must weigh the anticompetitive and procompetitive factors to determine whether the restraint is an unreasonable restraint of trade. Where the "pluses and minuses" of a particular restraint are disputed by the parties or difficult to quantify, the final judgment under the rule of reason can be "elusive."[46] Although different theories of harm have developed varying presumptions and burdens under the rule of reason, analysis of an unreasonable restraint of trade involves a three-step, burden-shifting analysis.[47] Typically, an antitrust plaintiff bears the initial burden of demonstrating that a potentially anticompetitive arrangement exists.[48] The defendant then has an opportunity to rebut the plaintiff's prima facie case by disproving the plaintiff or demonstrating that the procompetitive effects outweigh the anticompetitive effects; the plaintiff would then have a final opportunity to attack the defendant's assertions as false or pretextual.[49] In each case, courts should "consider

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43 Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

44 *See* GAVIL ET AL., *supra* note 5, at 202–11.

45 PHILLIP AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 2 (1981).

46 *Id.* at 2–3.

47 Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 782 (2015).

48 *See id.*

49 *See id.*

administrative convenience . . . or estimates about the balance of harm and virtue in the generality of similar cases."[50]

II. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*

The final blow to the *Dr. Miles* per se ban on RPM came by the Supreme Court's 5-4 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[51] Having abandoned the rule of per se illegality for nonprice vertical restraints, the Court in *Leegin* addressed the question of whether it should allow RPM agreements to be judged by the rule of reason, rather than per se condemnation under *Dr. Miles*.[52] Finding that "[r]espected economic analysts . . . conclude that vertical price restraints can have procompetitive effects," the majority opinion delivered by Justice Kennedy overruled *Dr. Miles* and held that vertical price restraints should be judged by the rule of reason, "the usual standard applied to determine if there is a violation of [Section 1 of the Sherman Act]."[53]

Petitioner Leegin Creative Leather Products was the designer, manufacturer, and producer of the "Brighton" brand of women's fashion accessories.[54] It sold its product in over five thousand retail establishments, most of which were "independent, small boutiques and specialty stores."[55] In 1997, Leegin instituted an RPM agreement with its retailers, entitled the "Brighton Retail Pricing and Promotion Policy," after which "Leegin refused to sell to retailers that discounted Brighton goods below [Leegin's] suggested prices."[56] Leegin sent a letter to retailers stating:

> In this age of mega stores like Macy's, Bloomingdales, May Co. and others, consumers are perplexed by promises of product quality and support of product which we believe is lacking in these large stores. Consumers are further confused by the ever popular sale, sale, sale, etc.
>
> We, at Leegin, choose to break away from the pack by selling [at] specialty stores; specialty stores that can offer the customer great quality merchandise, superb service, and support . . . . [H]alf the equation is Leegin producing great Brighton product and the other half is you, our retailer, cre-

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50 *See* Areeda, *supra* note 45, at 3.

51 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

52 *Id.* at 882.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 883.

> ating great looking stores selling our products in a quality manner.[57]

The Court found that Leegin's intentions behind the policy were: (1) to allow retailers to achieve high enough margins to cover the costs of excellent customer service, and (2) to prevent cheapening the image of the Brighton brand.[58] In addition to the pricing policy, Leegin instituted a marketing strategy called the "Heart Store Program," through which it incentivized retailers and offered "Heart Store" status in exchange for pledges from the retailer, including adherence to Leegin's suggested prices.[59]

PSKS, the respondent, ran Kay's Kloset, one of the stores that became a "Heart Store" shortly after Leegin created the program.[60] Starting in 1995, Kay's Kloset began purchasing Brighton products from Leegin, promoting the brand, running advertisements, and hosting Brighton days in the store—just the sort of promotion and customer service that Leegin hoped to incentivize through its pricing policy.[61] Brighton became Kay's Kloset's most important brand, at one point accounting for forty to fifty percent of Kay's Kloset's profits.[62]

In December 2002, Leegin discovered that Kay's Kloset had been discounting Brighton's entire line by twenty percent and "requested Kay's Kloset cease discounting."[63] Kay's Kloset argued the discounting was necessary to compete with nearby retailers who were also undercutting Leegin's suggested prices.[64] After Kay's Kloset refused to stop discounting Brighton products, Leegin stopped dealing with Kay's Kloset, which had a significant impact on Kay's Kloset's business.[65] PSKS subsequently brought suit against Leegin in the U.S. District Court for the Eastern District of Texas, alleging that "Leegin had violated the antitrust laws by 'enter[ing] into agreements with retailers to charge only those prices fixed by Leegin.'"[66]

At trial, Leegin sought to introduce evidence and expert testimony demonstrating the procompetitive effects of its Brighton RPM

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57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.* at 883–84.

61 *Id.* at 882–83.

62 *Id.* at 883.

63 *Id.* at 884.

64 *Id.*

65 *Id.*

66 *Id.*

pricing policy, but the district court, following the per se rule established by *Dr. Miles*, excluded the testimony.[67] The jury was persuaded by PSKS's argument that Leegin and its retailers had agreed to fix prices, and the court ultimately applied treble damages and entered judgment against Leegin for over $3.9 million.[68] In appealing to the U.S. Court of Appeals for the Fifth Circuit, Leegin argued that the rule of reason—not the *Dr. Miles* rule of per se illegality—should apply to the agreement between PSKS and Leegin.[69] The Court of Appeals applied the per se rule precedent of *Dr. Miles* and affirmed,[70] but the Supreme Court granted certiorari to determine "whether vertical minimum resale price maintenance agreements should continue to be treated as per se unlawful."[71]

Leegin argued that, in its experience with its products, "small retailers treat customers better, provide customers more services, and make their shopping experience more satisfactory than do larger, often impersonal retailers."[72] Leegin's President Jerry Kohl stated that "[w]e want the consumers to get a different experience than they get in Sam's Club or in Wal-Mart."[73]

The Supreme Court in *Leegin* began by laying out the rationale of applying the rule of reason when evaluating Section 1 of the Sherman Act.[74] Section 1 states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."[75] The Court has repeatedly held that Section 1 "outlaw[s] only unreasonable restraints."[76] The majority noted that "[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of" Section 1."[77] The Court returned to the approach articulated in *GTE Sylvania*: "Under [the rule of reason], the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on

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67 *Id.*

68 *Id.*

69 *Id.* at 884–85.

70 *See* PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 F. App'x 464, 466, 470 (5th Cir. 2006).

71 *Leegin*, 551 U.S. at 885.

72 *Id.* at 882.

73 *Id.*

74 *Id.* at 885.

75 15 U.S.C. § 1 (2012).

76 *See, e.g.*, *Leegin*, 551 U.S. at 885 (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)).

77 *Id.* (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)).

competition."[78] Factors to consider when applying the rule of reason include "specific information about the relevant business"; the "history, nature, and [actual] effect" of the challenged restraint; "[w]hether [any of] the businesses involved have market power" (the Court considers this "significant"); and the structure of the relevant market.[79] The majority stated that the rule "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[80]

Next, the Court described the circumstances under which the rule of reason does not apply. The per se rule applies to categories of restraints which are deemed illegal with no need to evaluate the restraint's reasonableness, including "horizontal agreements among competitors to fix prices . . . or to divide markets."[81] The per se rule should be applied only to restraints "that would always or almost always tend to restrict competition and decrease output."[82] The Court continued: "[t]o justify a per se prohibition a restraint must have 'manifestly anticompetitive' effects . . . and 'lack . . . any redeeming virtue,' "[83] and a "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 it would be invalidated in all or almost all instances under the rule of reason."[84] The Court rejected the reasoning of *Dr. Miles*, which was rooted in a "common-law rule against restraints on alienation" and which incorrectly relied on rules governing horizontal restraints in examining a vertical restraint.[85]

Having found the need to revisit the holding of *Dr. Miles*, which had found RPM to be per se unlawful, the Court stated that it was "necessary to examine . . . the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the per se rule is nonetheless appropriate."[86] The Court began by noting that "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance,"[87] and discussed the

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78 *Id.* (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)).

79 *Id.* at 885–86 (citations omitted).

80 *Id.* at 886.

81 *Id.* (citations omitted).

82 *Id.* (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

83 *Id.* (citations omitted).

84 *Id.* at 886–87.

85 *Id.* at 887–88.

86 *Id.* at 889.

87 *Id.* The Court goes on to cite nearly a full page of amicus briefs, scholarship, and trea-

most compelling justifications for permitting vertical price restraints, primarily the increase in interbrand competition, the promotion of which is "the primary purpose of the antitrust laws."[88]

First, minimum RPM agreements "can stimulate interbrand competition," e.g., competition between Titleist, Nike, and Mizuno to sell golf clubs, "by reducing intrabrand competition," e.g., competition between Dick's Sporting Goods and Golfsmith to sell Mizuno brand irons.[89] When one manufacturer adopts vertical price restraints for its brand, thereby eliminating intrabrand competition, this "encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers."[90] The Court also noted the potential for resale price maintenance to give consumers greater selection between "low-price, low-service brands; high-price, high-service brands; and brands falling in between."[91]

Without the ability to impose vertical price restraints, retailers are likely to be discouraged from investing in improved services that enhance interbrand competition because of the risk of free riders—i.e., discounting retailers who benefit from the increased demand generated by others who offer those additional services.[92] Retail services, such as quality showrooms, product demonstrations, or knowledgeable employees, serve to educate the consumer and increase customer demand.[93] If, after selecting a product based on these quality services, absent resale price maintenance, the customer is able to then purchase from a discounter, "the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer."[94] Minimum RPM prevents the free rider problem and pushes retailers to "compete among themselves over services," rather than over prices.[95]

Next, the Court found that minimum RPM agreements could also "increase interbrand competition by facilitating market entry for new

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tises of both supporters and skeptics of resale price maintenance agreements that acknowledge the procompetitive effects of RPM agreements. *See id.* at 889–90.

88 *Id.* at 890 (quoting State Oil Co. v. Khan, 522 U.S. 3, 15 (1997)).

89 *Id.*

90 *Id.*

91 *Id.* at 878.

92 *Id.*

93 *Id.* at 890–91.

94 *Id.* at 891.

95 *Id.*

firms and brands."[96] For example, "[n]ew manufacturers . . . can use the [RPM] restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer."[97] The Court found that resale price maintenance could be particularly important to new entrants, a clearly procompetitive effect, given that "[n]ew products and new brands are essential to a dynamic economy."[98]

Even absent the problem of free riding, RPM can increase interbrand competition by making it easier to establish and enforce contracts between manufacturers and retailers specifying particular services which the retailer must perform, ultimately allowing manufacturers to promote a desired brand image.[99] The Court stated: "Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services."[100] Providing a guaranteed margin and removing the risk of being undersold may also encourage retailers to stock adequate inventory.[101]

The majority then considered possible anticompetitive effects of minimum RPM, primarily the "ever-present temptation" of "unlawful price fixing . . . designed solely to obtain monopoly profits."[102] The majority noted that minimum RPM may "facilitate . . . manufacturer[ ] cartel[s]" by helping to identify manufacturers that are cheating by undercutting the prices set by the cartel.[103] This type of unlawful cartel "discourage[s] . . . manufacturer[s] from cutting prices to retailers," and ultimately prevents cheaper prices to consumers.[104]

The Court also found that vertical price restraints could be used in furtherance of "cartels at the retailer level."[105] A group of retailers "might collude to fix prices to consumers and then compel a manufac-

96 *Id.*

97 *Id.* (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977)).

98 *Id.*

99 *Id.* at 891–92.

100 *Id.* at 892.

101 *Id.* (citing Raymond Deneckere et al., *Demand Uncertainty, Inventories, and Resale Price Maintenance*, 111 Q.J. ECON. 885, 911 (1996)).

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 893 (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725–26 (1988)).

turer to aid the unlawful arrangement with resale price maintenance."[106] Under this arrangement, "inefficient retailers" could benefit from protected margins, while more efficient "[r]etailers with better distributions systems and lower cost structures would be prevented from . . . lower[ing] prices."[107]

Finally, both dominant retailers and manufacturers might be able to abuse their power through RPM agreements. A powerful retailer "might request resale price maintenance to forestall innovation in distribution that decreases costs."[108] Moreover, the Court explained that "[a] manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's distribution network."[109] Further, "[a] manufacturer with [significant] market power" could implement "resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants."[110]

The Court next considered PSKS's argument that the "administrative convenience of per se rules" for vertical price restraints lends "guidance to the business community and . . . minimize[s] the burdens on litigants," and thus the per se rule on RPM is desirable.[111] The Court noted that this argument "misinterprets our antitrust law,"[112] and suggested that per se rules may actually be counterproductive by increasing "the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage."[113] The Court stated that per se rules should be "relegated . . . to restraints that are 'manifestly anticompetitive.'"[114] The Court went so far as to say that "[a]ny possible reduction in administrative costs cannot alone justify the *Dr. Miles* rule."[115]

In response to respondent PSKS's argument that resale price maintenance agreements often lead to higher prices, the Court stated:

> Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might . . . contract with different suppliers to obtain

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.* at 893–94.

110 *Id.* at 894.

111 *Id.* (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977)).

112 *Id.* at 895.

113 *Id.*

114 *Id.* (quoting *Sylvania*, 433 U.S. at 49–50).

115 *Id.*

> better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for resale price maintenance.[116]

Acknowledging the "economic dangers" of RPM agreements, the Court noted that in applying the rule of reason going forward, courts will "have to be diligent in eliminating their anticompetitive uses from the market."[117] The Court provided some general guidance on how future courts might approach analyzing minimum resale price maintenance agreements under the rule of reason.

First, "the number of manufacturers that make use of the practice in a given industry can provide important instruction."[118] In an industry where only a few manufacturers (with little market power)[119] adopt RPM agreements, the likelihood that the RPM agreements are being used to facilitate a cartel is decreased.[120] On the other hand, "a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance."[121] Minimum RPM agreements should be subject to heightened scrutiny for anticompetitive effects "if many competing manufacturers adopt the practice."[122] If RPM agreements are pervasive in a particular industry, there is a risk that customers will be deprived of "choice between high-service and low-price outlets."[123]

Another consideration for the rule of reason analysis is the source of the RPM agreement—whether it is requested by a retailer or imposed by the manufacturer. The majority noted that where "re-

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116 *Id.* at 896–97.

117 *Id.* at 897.

118 *Id.*

119 A core concept of antitrust law, market power is "the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded." William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981).

120 *Leegin*, 551 U.S. at 897.

121 *Id.*

122 *Id.*

123 *Id.* (quoting FREDERIC M. SCHERER & DAVID R. ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 558 (3d ed. 1990)).

tailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer."[124] Where a manufacturer adopts an RPM agreement for procompetitive purposes, as was the case in *Leegin*, and not at the behest of unscrupulous retailers, it "is less likely to promote anticompetitive conduct" and should be treated as less suspect.[125]

Finally, the Court noted that the anticompetitive risks of vertical price restraints may not be of "serious concern" if the manufacturer or retailer imposing the minimum RPM agreement lacks market power.[126] More specifically, the Court stated: "If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers . . . . And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets."[127] This seems to be a clear indication that when a court evaluates any RPM agreement under the rule of reason, one of the first considerations should be whether the relevant party accused of an unreasonable restraint of trade has sufficient market power such that any anticompetitive effect would be of concern.

Although the *Leegin* Court laid out three factors for evaluating the anticompetitive effects of RPM agreements—(1) the scope of use of the minimum RPM in the relevant market, (2) the source of the restraint, and (3) the relative market power of the retailer and the manufacturer[128]—it left a number of questions about the analysis unanswered. For example, what would it take for a plaintiff to demonstrate anticompetitive effects and shift the burden of production to the defendant? In its discussion of factors relevant for analysis of RPM under the rule of reason, the Court states:

> A party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation. 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 ex-

124 *Id.* at 897–98.
125 *Id.* at 898.
126 *Id.*
127 *Id.* (citation omitted).
128 *See id.* at 897–98.

> ample, 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.[129]

While this statement is recognized as an invitation to lower courts to implement methods that may expedite the litigation process in RPM cases, such as "market power screens, burden-shifting based on actual effects evidence, . . . [and] inferences of harm to competition from the absence of a legitimate business justification,"[130] it provides very little guidance as to what those might look like in practice.

III. After *Leegin*: Reactions by the States and Federal Agencies and What They Reveal About the Future of RPM

The Court's decision in *Leegin* left a number of questions unanswered. Would Congress intervene to overrule or limit *Leegin*? Federal and State lawmakers have sought to repeal *Leegin* and return RPM to a rule of per se illegality, but they have been largely unsuccessful so far.[131] How would states react in their own independent enforcement of RPM agreements? How should federal courts apply the rule of reason in antitrust cases?

A. *State Legislative Developments*

Federal antitrust laws do not preempt state laws.[132] While federal antitrust laws set the baseline, states have the authority to fashion stricter antitrust requirements, and antitrust statutes of some states include express statutory per se prohibitions on RPM.[133] In the words of one scholar: "If major states like New York, California, Texas, and Florida re-assert [the *Dr. Miles* rule of per se illegality for RPM], the impact of *Leegin* may be limited, as nationwide manufacturers would not be able to impose RPM across-the-board."[134] At present, the state laws regarding RPM agreements are a "patchwork quilt" providing businesses with the challenge of navigating different laws nation-

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129 *Id.* at 898–99.

130 *See* Gavil et al., *supra* note 5, at 400.

131 *See* John R. Foote & Ernest N. Reddick, *Resale Price Maintenance After* Leegin*: Defense Perspective*, 22 Competition: J. Antitrust & Unfair Competition L. Sec. St. B. Cal. 95, 95–96 (2013).

132 *See* California v. ARC Am. Corp., 490 U.S. 93, 102 (1989).

133 Gavil et al., *supra* note 5, at 393.

134 *Id.*

wide.[135] Businesses must frequently review their RPM policies, content, administration, and training to ensure that they do not run afoul of the complex variety of state laws.[136]

There has been little legislation at the state level with regard to minimum RPM agreements, and the two laws that have been passed since the Court's 2007 decision come down on opposite sides of *Leegin*. In April 2009, Maryland passed what is so far the only anti-*Leegin* statute, expressly rejecting the application of the rule of reason to minimum RPM agreements.[137] The Maryland law states, in no uncertain terms, that "a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce," and is therefore prohibited.[138] Kansas became the second state to address the decision in *Leegin* following a 2012 Kansas Supreme Court case that chose not to apply the rule of *Leegin* to Kansas's restraint of trade act.[139] The Kansas Supreme Court instead found vertical RPM agreements to be prohibited by a per se rule.[140] The Kansas legislature responded to the decision by adopting a "federal harmonization rule,"[141] and specifically noted that minimum RPM agreements are not prohibited if they are "reasonable in view of all of the facts and circumstances of the particular case and do[ ] not contravene public welfare."[142] Pennsylvania, the only state without an antitrust statute,[143] has twice unsuccessfully proposed legislation that would "prohibit any contract, combination or conspiracy 'to establish a minimum price below which a retailer, wholesaler or distributor may not sell a commodity or service.' "[144]

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135 Michael A. Lindsay, *Repatching the Quilt: An Update on State RPM Laws*, ANTITRUST SOURCE 1, 1 (Feb. 2014) [hereinafter Lindsay, *Repatching*], http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb14_lindsay_2_20f.authcheckdam.pdf. For a frequently updated and comprehensive table of various state laws, see Michael A. Lindsay, *Overview of State RPM*, ANTITRUST SOURCE (Oct. 2014), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf.

136 *See* Lindsay, *Repatching*, *supra* note 135, at 6.

137 *See* MD. CODE ANN., COM. LAW §§ 11-204(a)(1), (b) (LexisNexis 2013).

138 *Id.* § 11-204(b).

139 *See* O'Brien v. Leegin Creative Leather Prods., Inc., 277 P.3d 1062, 1079 (Kan. 2012) ("We address the federal antitrust rulings first and briefly: We conclude that they compel nothing.").

140 *See id.* at 1083.

141 Lindsay, *Repatching*, *supra* note 135, at 5 (citing KAN. STAT. ANN. § 50-161 (2014)).

142 KAN. STAT. ANN. § 50-163(c).

143 Lindsay, *Repatching*, *supra* note 135, at 6.

144 *Id.* at 6 & n.54–56.

One potential positive consequence of the diverging state RPM laws is that so long as some states permit minimum RPM and other states continue to treat it as per se illegal, "natural experiments" may be created which will allow economists to compare outcomes and better understand the positive and negative effects of minimum RPM.[145] While this lack of uniformity at the state level must appear daunting for businesses to navigate, an articulated policy at the federal level could bring clarity to any states that choose to model their antitrust law on federal law.

Commissioner Pamela Jones Harbour led the FTC's criticism of the *Leegin* decision, writing an open letter to the Supreme Court critical of the majority's decision[146] and testifying before Congress in opposition of applying the rule of reason to RPM.[147] Harbour told Congress that she had closely reviewed the factual findings on which Congress relied upon in repealing the fair trade exemption (and RPM antitrust exception) in 1975,[148] and concluded that those findings remained extremely persuasive.[149] Harbour found it "difficult to reconcile the legislative history with the *Leegin* Court's casual disregard for Congressional intent," noting that Congress "has *never* adopted or endorsed a preference for RPM at the federal level."[150]

B. Agency Statements and Actions

The business community has been left largely in the dark as to what conduct the FTC and the Department of Justice ("DOJ") might challenge as an anticompetitive use of RPM agreements. To determine how the federal agencies might treat an RPM case under the rule of reason, it is necessary to read between the lines. Since the shift to the rule of reason in *Leegin*, neither the DOJ nor the FTC has brought any cases challenging minimum RPM agreements. While

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145 *See* Gavil et al., *supra* note 5, at 405.

146 *See* Letter from Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, to the Supreme Court of the United States, on the Illegality of Vertical Minimum Price Fixing (Feb. 26, 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/open-letter-supreme-court-united-states-commissioner-pamela-jones-harbour-subject-illegality/070226verticalminimum-pricefixing.pdf.

147 *Bye Bye Bargains? Retail Price Fixing, the* Leegin *Decision, and Its Impact on Consumer Prices: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 9–20 (2009) [hereinafter *Bye Bye Bargains*] (statement of Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n), http://judiciary.house.gov/_files/hearings/printers/111th/111-37_49387.pdf.

148 *See supra* Part I (describing the Miller-Tydings Fair Trade Amendments).

149 *Bye Bye Bargains*, *supra* note 147, at 12–13.

150 *Id.* at 12.

some state AGs have continued to actively oppose RPM,[151] the federal agencies have been largely silent, leaving businesses with little guidance on how federal agencies might choose to handle RPM cases in the future. Three events since *Leegin* may be helpful in discerning how federal agencies envision the development of RPM under the rule of reason: (1) the February 2009 FTC public hearings on Resale Price Maintenance,[152] (2) a 2009 speech by Assistant Attorney General Christine Varney,[153] and (3) the May 2008 FTC *Nine West* Order Modification.[154]

1. *Gathering Information: 2009 FTC Conference on RPM*

In February of 2009, the FTC hosted a workshop series designed to "explore the legal, economic, and business significance of resale price maintenance" in order to "better understand how those different circumstances might affect an analysis of RPM under the rule of reason," and "craft an appropriate framework for the analysis of RPM."[155] In her opening remarks, Commissioner Harbour was upfront about the uncertainty left by *Leegin*:

> We are here today because, to be frank, the *Leegin* decision set the ship of antitrust law adrift on a sea of uncertainty. No one really knows how to apply the rule of reason to resale price maintenance, which is a form of price-fixing. Courts and enforcement agencies—including this agency—have no experience in assessing the antitrust "reasonableness" of retail prices that are established by manufacturers, rather than being set unilaterally by retailers themselves.[156]

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151 *See* Meese, *supra* note 20, at 931 (describing the states' post-*Leegin* challenges to minimum RPM).

152 *See Resale Price Maintenance Under the Sherman Act and the Federal Trade Commission Act*, FED. TRADE COMMISSION, http://www.ftc.gov/news-events/events-calendar/2009/02/resale-price-maintenance-under-sherman-act-federal-trade (last visited Jan. 5, 2016) (describing FTC workshop held from February 17–19, 2009).

153 Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Justice Antitrust Div., Remarks as Prepared for the National Association of Attorneys General, Columbia Law School State Attorneys General Program: Antitrust Federalism: Enhancing Federal/State Cooperation (Oct. 7, 2009).

154 Nine West Grp. Inc., FTC File No. 981-03886, 2008 WL 2061410 (F.T.C. May 6, 2008) [hereinafter Nine West Modification Order] (order granting in part petition to reopen and modify Apr. 11, 2000 order).

155 Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, Opening Remarks at FTC Workshop on Resale Price Maintenance: Consumer Benefits and Harms from Resale Price Maintenance: Sorting the Beneficial Sheep from the Antitrust Goats? 1–2 (Feb. 17, 2009), https://www.ftc.gov/sites/default/files/documents/public_statements/consumer-benefits-and-harms-resale-price-maintenance-sorting-beneficial-sheep-antitrust-goats/090217rpmwksp.pdf.

156 *Id.* at 1.

Harbour acknowledged that the majority and the dissent in *Leegin* disagreed on a number of major issues, including whether to retain the per se rule, free riding and the extent of its legal significance, the lessons to be drawn from the periods where RPM was largely legal from 1937 until 1975, and the lessons to be drawn from 1975 until *Leegin*.[157] She pointed out that both the majority and dissent in *Leegin* agreed that RPM can be potentially harmful, recalling that "the majority's [sic] explicitly recognized this harm, and therefore expressly disclaimed any suggestion that rule of reason analysis should become a de facto rule of per se legality."[158]

Harbour acknowledged that the main issue in the debate is the lack of evidence with which to evaluate the effects of RPM, stating that "[t]he truth is, there is very little empirical evidence to support any of these conflicting economic theories of benefit or harm."[159] Likening the current state of RPM economics to religion, Harbour explained that "[t]here are many fervently held beliefs, both for and against the use of resale price maintenance . . . . But there are few, if any, objective facts to provide policy guidance."[160] She further stated that "with too few economic facts, decisions must be based on what we believe to be true regarding resale price maintenance, based on our reconciliation of conflicting theories, all shaped by our reading of antitrust law and policy as reflected by case law and Congressional intent."[161]

Harbour herself was hopeful that, through the workshop series, the Commission would be able to "inform business counseling and decisionmaking."[162] She expressed personal beliefs, stating: "[A]bsent empirical evidence to the contrary, I believe the antitrust laws should prioritize retailers' role as purchasing agents for consumers. According to this view, we should cast a skeptical eye upon minimum resale price maintenance, because it tends to suppress discounting."[163] But perhaps most revealing about the lack of empirical evidence on the drawbacks of RPM is that Harbour stated that her views were based partly on "Adam Smith's admonitions: first, that consumers are generally better off when the goods they need are cheaper;" which is hardly

157 *Id.* at 4–5.

158 *Id.* at 5 (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 905–06 (2007)).

159 *Id.* at 6.

160 *Id.*

161 *Id.* at 6–7.

162 *Id.* at 8.

163 *Id.* at 9.

concrete evidence or even specifically relevant to the RPM question, considering Smith wrote his work over one hundred years before the enactment of the Sherman Act.[164] Although this workshop series produced a number of competing reports and theories with regards to RPM, they have yet to produce a tangible impact in antitrust law or be reflected in any public comments or policy changes.

2. *The DOJ Perspective: Christine Varney's Speech Before the State Attorneys General*

Two years after *Leegin*, Assistant Attorney General Christine Varney delivered a speech to the National Association of Attorneys General in which she outlined a new structured rule of reason in RPM cases from the DOJ's perspective.[165] After using the first half of her speech to extol the virtues of cooperation between state and federal enforcement,[166] Varney stated that determining how to proceed with RPM agreements in light of *Leegin* is "one of the most important legal challenges facing State Attorneys General."[167] She noted that while many states were reevaluating whether their respective state law may still treat RPM arrangements as per se illegal, federal law after *Leegin* is clear in calling for a rule of reason inquiry, although the appropriate form of the inquiry was left open.[168] Recognizing that "*Leegin* leaves many questions unanswered," Varney went on to give some thoughts on how courts might apply a structured rule of reason analysis in RPM cases.[169]

Varney first suggested that, in response to the Supreme Court's call for a "litigation structure,"[170] a court "could require a plaintiff to make a preliminary showing of 'the existence . . . and scope of [an RPM agreement]' . . . as well as the presence of structural conditions

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164 *Id.* (citing Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 461 (Edwin Cannan ed., 1937) (1776)).

165 *See generally* Varney, *supra* note 153.

166 *See id.* at 2–6. This speech was delivered at Columbia Law School in New York, N.Y., one of the most prominent states in which RPM agreements are still treated as per se illegal, in contrast to the position outlined by the DOJ in Varney's remarks. At the conclusion of her statement, Varney called for enforcers to keep an open mind as RPM practices are implemented and "natural experiments" take place, citing to *Leegin*'s statement that the "per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue," so that "courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Id.* at 14 & n.27 (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886–87 (2007)).

167 *Id.* at 7.

168 *See id.* at 8.

169 *Id.*

170 *Id.* (quoting *Leegin*, 551 U.S. at 898).

under which RPM is likely to be anticompetitive."[171] Varney argued that this showing may "establish a prima facie case that RPM is unlawful," which would then shift the burden "to the defendant to demonstrate either that its RPM policy is actually—not merely theoretically—procompetitive or that the plaintiff's characterizations of the marketplace were erroneous."[172] Varney noted that the defendant's burden could change to correspond with the "strength of the showing made by the plaintiff," but that the defendant would at least need to demonstrate that the RPM agreement was adopted "to enhance its success in competing with rivals and . . . was a reasonable method for accomplishing its procompetitive purposes."[173]

Next, Varney applied the guidance from *Leegin* to suggest how a structured rule of reason could be applied to the "four generally accepted [anticompetitive harm] theories: manufacturer collusion, manufacturer exclusion, retailer collusion, and retailer exclusion."[174] In the first circumstance, where RPM might be used to enable collusion between manufacturers,[175] a plaintiff can establish a prima facie case by demonstrating that:

> (1) [A] majority of sales in the market are covered by RPM, (2) structural conditions are conducive to price coordination, because such coordination is unlikely in an unconcentrated market, and (3) RPM plausibly helps significantly to identify cheating, which would not be the case if wholesale prices are otherwise transparent.[176]

In the second circumstance, where dominant incumbent manufacturers adopt RPM as a means of excluding other manufacturers from entering the market by guaranteeing large margins to retailers,[177] plaintiffs can establish a prima facie case where: "(1) the manufacturer has a dominant market position, (2) its RPM contracts cover a substantial portion of distribution outlets, and (3) RPM plausibly has sig-

171 *Id.* (footnotes omitted).

172 *Id.* at 8–9.

173 *Id.* at 9.

174 *Id.* at 11.

175 This type of horizontal agreement between manufacturers to restrain prices is itself per se illegal and a criminal offense, but Varney argues that such agreements "can be difficult to detect and prove," so the ability of a plaintiff to challenge "pervasive and suspicious use of RPM" agreements "could frustrate the cartel" where criminal collusion could not be proven. *See id.* at 11–12 & n.21.

176 *Id.* at 11.

177 *See id.* at 12 (citing A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 403–05 (2006)).

nificant foreclosure effect that impacted an actual rival."[178] In contrast, where RPM agreements guaranteeing high margins to retailers are used by small retailers or new entrants to the market, even the dissent in *Leegin* agreed that RPM can have a procompetitive effect.[179]

Addressing retailer-driven exclusion and coercion, Varney noted that the Court in *Leegin* and many economists agree that where a retailer is the impetus of the RPM agreement, it is of greater concern for competition, and should be reflected in the plaintiff's burden of establishing a prima facie case.[180] Facing lower prices offered by discount or online competitors, a powerful retailer or group of retailers could collude in order to coerce a manufacturer to adopt an RPM policy, eliminating the lower-price advantage of their cost-cutting competition.[181] Varney suggests a plaintiff here could shift the burden to the defendant by showing: "(1) that the retailers involved had sufficient market power, (2) that coercion by retailers resulted in RPM covering much of the market, and (3) [that] RPM plausibly has a significant exclusionary effect that impacted an actual rival."[182] In a circumstance where retailers use RPM to maintain a cartel, coercing manufacturers to adopt RPM agreements would prevent retailers from cheating on the cartel by undercutting the prices of other members.[183] To shift the burden on a theory of retailer collusion, the plaintiff could show: "(1) that RPM is used pervasively (e.g., at least [fifty percent] of the sales in the market), (2) that RPM was instituted by retailer coercion (not merely persuasion), and (3) [that] retailer collusion could not be thwarted by manufacturers."[184] Manufacturers would likely be cooperative in providing consumer plaintiffs with necessary information in this circumstance, as both share an interest in limiting retail margins.[185]

Ultimately, Varney only provided rough guidelines that a court might require of a plaintiff seeking to attack an RPM agreement, but it was a step in the right direction. Varney concluded by mentioning

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178 *Id.*

179 *Id.* (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 917–18 (2007) (Breyer, J., dissenting)).

180 *Id.* at 12–13. Varney also noted the five potential procompetitive uses of RPM that the Court in *Leegin* identified, all of which involved benefits to manufacturers, not retailers. *See id.* at 10.

181 *Id.* at 13.

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.* at 13–14.

that states where RPM practices are implemented in the wake of *Leegin* would serve as "important laboratories for obtaining [resultant] data" from these new RPM practices.[186] She noted that the DOJ did not want "to disrupt the traditional preeminent role of the FTC and the States in this area,"[187] but that the DOJ has some idea of how it would like to see a structured rule of reason play out in RPM cases. With no reaction from the FTC, one can only assume that this framework advanced by the DOJ might be indicative of what FTC guidelines—or FTC and DOJ joint guidelines—might resemble.

3. *The FTC's Lone Action: The* Nine West *Modification Order*

The only legal action relating to minimum RPM from the FTC came in the form of an order modification. In October 2007, Nine West Footwear Corporation requested the revision of an April 2000 Consent Order, which it entered into after an FTC complaint alleged that Nine West violated Section 5 of the Federal Trade Commission Act[188] "by engaging, in combination with its dealers, in a course of conduct to maintain the resale prices at which dealers sell Nine West branded products."[189] Following the Court's decision in *Leegin*, which ended per se illegality for vertical price restraints, Nine West filed a petition requesting that the order "be modified to allow Nine West to take actions to maintain resale prices, other than unilaterally terminating the retailer without prior notice."[190] The Commission ultimately removed the order restricting Nine West from engaging in RPM, requiring it provide periodic reports to the FTC.[191] The foundation of the Commission's decision was that "Nine West has demonstrated that it lacks market power and that [Nine West] itself is the source of the resale price maintenance."[192]

First, the Commission noted that the Court in *Leegin* did not declare "RPM to be per se legal."[193] The Commission's "obligation is to ask whether a modification is appropriate in light of *Leegin*'s cautions about the circumstances in which the establishment of an RPM program could be anticompetitive and subject to prohibition under the

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186 *Id.* at 14.

187 *Id.*

188 Federal Trade Commission Act (FTC Act), 15 U.S.C. 45 (2012).

189 Nine West Modification Order, *supra* note 154, at *2.

190 Petition to Reopen and Modify Order at 1, Nine West Grp. Inc., FTC File No. 981-0386 (F.T.C. Oct. 30, 2007).

191 Nine West Modification Order, *supra* note 154, at *2.

192 *Id.* at *9.

193 *Id.* at *4.

rule of reason."[194] The Commission also hypothesized that the decision in *Leegin* "may be read to suggest a truncated analysis, such as the one applied in *Polygram Holdings*,[195] might be suitable for analyzing resale price maintenance agreements . . . ."[196] The Commission continued: "Under *Polygram Holdings*, if a practice is 'inherently suspect' a defendant using it must then 'either identify some reason the restraint is unlikely to harm consumers, or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.'"[197] The Order also stated that "[t]hrough 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."[198]

The Commission then turned to two of the factors that *Leegin* suggested indicate whether an RPM agreement will have an anticompetitive effect on competition: market power and impetus of the restraint:

> [T]wo ways that Nine West can demonstrate that its use of RPM will not harm competition is to show that it lacks market power, and that the impetus for the resale price maintenance is from Nine West itself and not retailers . . . . If market power does not exist, the forces of interbrand competition will discipline any supra-competitive pricing. But, if market power does exist and those forces therefore will not discipline Nine West's resale prices, then it could be profitable for Nine West to impose higher resale prices than would otherwise prevail over a substantial period of time. That is harmful to both competition and consumers.[199]

Leaning on the understandings of market power from what was, at the time, the most recent Horizontal Merger Guidelines, the Commission concluded that "Nine West has only a modest market share in any putative relevant product market in which it competes."[200] It found "no evidence of a dominant, inefficient retailer in [Nine West's] market," and that "Nine West itself is responsible for its desire to engage in resale price maintenance . . . based on its wish to increase the

194 *Id.* at *6.

195 Polygram Holdings, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

196 Nine West Modification Order, *supra* note 154, at *6.

197 *Id.* at *6 (quoting *Polygram Holdings*, 416 F.3d at 36).

198 *Id.* at *7.

199 *Id.* at *8 (footnotes omitted).

200 *Id.*

services offered by retailers that sell Nine West products."[201] The Commission made it explicitly clear that it was granting the decision on these grounds.

In what amounts to dicta, the Commission stated that, had it found otherwise, Nine West could "meet its burden by demonstrating that its use of resale price maintenance is procompetitive."[202] The Commission indicates that evidence (it seems that only empirical evidence would be acceptable) of enhanced output, increased consumer demand, or that consumers place a higher value on nonprice factors such that RPM enhances efficiency might suffice to support a claim that the RPM agreement in question is procompetitive.[203] In granting Nine West's request for modification, the Commission required that Nine West report with the Commission one, three, and five years after the modification to keep the commission informed on Nine West's use of RPM and its effects on price and output.[204] The Commission found that "Nine West has met its burden under the analysis suggested in *Leegin* with respect to scenarios in which RPM may endanger competition. Nine West's potential use of RPM is currently not captured by the factors that *Leegin* identified as possible criteria for condemning RPM."[205]

IV. The FTC Should Develop RPM Guidelines to Inform Businesses How to Proceed When Structuring Minimum RPM Agreements

Though the Court in *Leegin* called on courts to develop the rule of reason in relation to RPM agreements, other governmental entities—principally the FTC—may also choose to advance policies through administrative guidelines. The FTC has historically been an agency intended to provide clear guidance to business.[206] In announcing his plan for the agency to Congress, Woodrow Wilson underscored the importance of this purpose:

> And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.* at *9.

[205] *Id.*

[206] For a comprehensive analysis of the history surrounding the creation of the FTC and competing policies, see Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1 (2003).

> definite guidance, and information which can be supplied by an administrative body, an interstate trade commission . . . . [S]uch a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided . . . .[207]

The Horizontal Merger Guidelines are an example of FTC and DOJ success in publishing guidelines by which industry and businesses can model their behavior.[208] The Horizontal Merger Guidelines:

> [O]utline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission . . . .
>
> . . . .
>
> These Guidelines are intended to assist the business community and antitrust practitioners by increasing transparency of the analytical process underlying the Agencies' enforcement decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context.[209]

While the Horizontal Merger Guidelines define the boundaries of merger enforcement such as market definition, market participation, and consideration of efficiencies,[210] RPM guidelines could outline principles for evaluation of factors such as industry concentration of agreements, origin of the agreements, and market power. A set of RPM guidelines would be a modest undertaking in comparison to the Horizontal Merger Guidelines, but would at least give manufacturers and retailers rough boundaries as to what RPM agreements are or are not in danger of litigation.

The FTC should break the silence on RPM by adopting a clear policy on which private plaintiffs, businesses, and state attorney generals can rely. In addition to the successful Horizontal Merger Guidelines,[211] the FTC adopts a number of other guidelines with respect to competition policy, both in collaboration with the DOJ and indepen-

207 H.R. DOC. NO. 625, 51 CONG. REC. 1979 (1914) (address of President Wilson).

208 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter HORIZONTAL MERGER GUIDELINES], http://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf.

209 *Id.* at 1.

210 *Id.* at 7–19, 29–31.

211 *See supra* note 208 and accompanying text.

dently with regards to specific industries or practices.[212] The FTC's competition policy guidance page states:

> [T]he FTC provides guidance about the application of the U.S. antitrust laws to promote transparency and encourage compliance with the law. [The FTC's guidance] resources aid antitrust practitioners, policy makers, businesses, and consumers with questions about the antitrust laws or competition policy. Core competition documents have been developed with the U.S. Department of Justice Antitrust Division to promote sound U.S. competition policy.[213]

A set of joint or FTC-specific RPM guidelines addressed to the retail industry is certainly a reasonable extension of the current reach of agency guidelines. While the guidelines would not be binding,[214] the agencies would likely carry out enforcement consistent with the guidelines, and they would provide businesses with a permissible structure for RPM agreements, which would strengthen the credibility of such agreements during litigation.

The Court in *Leegin* called on lower courts to "establish the litigation structure" and "to provide more guidance to businesses," but the lack of successful RPM claims provides little direction.[215] Without any successful federal RPM cases since *Leegin*, some antitrust scholars wonder if federal RPM litigation is nothing but a "dim memory."[216] However, there is still the possibility of state or private challenges to RPM agreements that a set of agency authored guidelines could help to navigate. Guidelines could help businesses avoid antitrust legislation in the first place, saving their money and the court's time.[217]

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212 *See Competition Policy Guidance*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance (last visited Jan. 6, 2016). In addition to the Horizontal Merger Guidelines, the FTC and DOJ have adopted joint guidelines on collaborations among competitors, enforcement in the health care industry, licensing intellectual property, and international operations. *Id.* The FTC has developed additional guidelines with respect to Health Care, Oil and Gas, and Technology. *Id.*

213 *Id.*

214 *See* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (stating that agency "policy statements, agency manuals, and enforcement guidelines" are not entitled to deference and "lack the force of law").

215 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 898 (2007).

216 Robert L. Hubbard, *Applying the Rule of Reason to Resale Price Restraints: A Fresh Perspective*, ANTITRUST, Fall 2014, at 95, 95.

217 *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 105 (2005) (explaining that litigating a rule of reason case is "one of the most costly procedures in antitrust practice").

A. What the RPM Guidelines Could Contain

FTC and DOJ guidelines on the rule of reason could be similar in design to the Horizontal Merger Guidelines. Updated over time, and as recently as 2010, the Horizontal Merger Guidelines outline "the principal analytical techniques, practices, and the enforcement policy" of the DOJ and FTC.[218] A set of RPM guidelines could serve the same function of identifying potentially harmful RPM practices so that businesses can structure their agreements accordingly and avoid unnecessary interference from federal agencies. Like the Horizontal Merger Guidelines, RPM guidelines could add much needed transparency to an area of law that is otherwise murky. The following sections propose five categories of RPM analysis that a set of RPM guidelines might include. While the list is certainly not exhaustive, it addresses some of the general areas of interest in an RPM analysis, based on *Leegin*, as well as the statements from the FTC and DOJ discussed previously.[219]

1. Source of the Restraint

The most obvious starting point for analyzing whether an RPM agreement passes muster under the rule of reason would be to start with the source of the restraint. The Court in *Leegin* noted that RPM agreements requested by retailers, rather than manufacturers, were inherently more likely to facilitate a cartel or support a dominant retailer.[220] In the Nine West Modification Order, the FTC states that one way Nine West might demonstrate that its RPM agreement would not harm competition was showing that Nine West itself, rather than the retailers, was the source of the restraint.[221] In line with Assistant Attorney General Christine Varney's proposal, the guidelines might suggest that a retailer-driven RPM agreement provides the most difficult burden for a defendant to overcome a plaintiff's prima facie case, likely requiring a demonstration of actual procompetitive effects that outweigh any anticompetitive risks inherent in retail-driven RPM agreements.[222]

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218 Horizontal Merger Guidelines, *supra* note 208, at 1.

219 *See supra* Part III.B.

220 *See Leegin*, 551 U.S. at 897–98.

221 *See* Nine West Modification Order, *supra* note 154, at *8.

222 *See* Varney, *supra* note 153, at 12–13.

2. *Industry Prevalence of RPM*

The next logical step in an RPM analysis under the rule of reason is to look to whether RPM agreements are employed frequently in the relevant industry and whether they are adopted by retailers with considerable market power. The Court in *Leegin* specifically addressed this issue, noting that there was low risk of an RPM agreement facilitating a cartel where RPM is employed by a few manufacturers with little market power.[223] Here, the guidelines could adopt a metric, perhaps similar to the Herfindahl-Hirschman Index ("HHI") of the Horizontal Merger Guidelines,[224] which could account for the number of firms in a given market, their respective shares of the market, and whether or not each firm implements RPM.

3. *Market Power*

Tied to the above analysis, and crucial in almost any inquiry conducted under the rule of reason, is the market power of the firm implementing the challenged restraint. The *Leegin* Court noted that any anticompetitive effects of resale price maintenance agreements, whether adopted by the manufacturer or retailer, "may not be a serious concern unless the relevant entity has market power."[225] The FTC, in the Nine West Modification Order, further noted that Nine West could demonstrate that its use of RPM would not harm competition by showing that it lacked market power.[226] Like the Commission in the Nine West case, a court analyzing the reasonableness of an RPM agreement could borrow from the Horizontal Merger Guidelines analysis of market power. The RPM guidelines could adopt thresholds at which a firm's share of the market is presumptively too small to have anticompetitive effects, a middle ground that would be suspect, and a percentage of market share where a firm adopting RPM would be presumed to be implementing an RPM agreement that unlawfully restrains trade.[227]

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223 *See Leegin*, 551 U.S. at 897.

224 HHI is used to measure market concentration, and is calculated by summing the squares of the individual firm's market shares in the relevant market. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 208, at 18. While the HHI equation is not specifically relevant to RPM, a similar metric could be devised that weighs the total number of competitors in a market, their respective market shares, and the market shares of firms that do and do not use RPM agreements.

225 *Leegin*, 551 U.S. at 898.

226 *See* Nine West Modification Order, *supra* note 154, at *8.

227 The Horizontal Merger Guidelines categorize markets in the merger analysis as "[u]nconcentrated [m]arkets," "[m]oderately [c]oncentrated [m]arkets," or "[h]ighly [c]oncentrated [m]arkets," which are subject to escalating levels of scrutiny as concentration increases.

4. *New Entrants Exemption*

Next, the guidelines could carve out an exception that protects new, smaller entrants to the market, and would allow for a grace period in which the RPM agreements are presumed to have higher procompetitive than anticompetitive effects. As noted by Commissioner Harbour, even the dissent in *Leegin* seemed willing to accept that the per se rule was too harsh and could be modified in the case of "new entry."[228] The guidelines could contain an estimated timeframe during which firms defined as "new entrants"—market participants that have recently entered a market or industry—could be immune or nearly immune from minimum RPM scrutiny, as the benefits in those circumstances are most likely to outweigh the drawbacks.

5. *Increased Sales Test*

Finally, the guidelines could allow for a presumption in favor of legality where the firm can demonstrate that as a result of the RPM agreements, sales of the brand increased—reflecting that the policy behind RPM of allowing retailers to promote the brand and offer increased information to consumers was effective.[229] An increased sales test could be used to assess the procompetitive effects of a minimum RPM agreement by looking to see if the restraint on discounting actually led to an increase in sales.[230] Determining whether sales have actually increased can be easily proven with admissible evidence, rather than resorting to a more complicated economic analysis, which courts tend to avoid.

B. *Applying the Guidelines*

Returning to the Mizuno golf clubs example,[231] the hypothetical guidelines could be applied to reassure Mizuno that it could adopt an RPM agreement that would not run afoul of federal regulators nor risk litigation in states where RPM is not treated as per se illegal. First, examining Part 1 of the hypothetical RPM guidelines—the source of the restraint—if Mizuno chose to implement the RPM agreement in an effort to grow its brand, as opposed to a retailer like

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See HORIZONTAL MERGER GUIDELINES, *supra* note 208, at 19. The RPM guidelines could reflect a similar framework for analysis.

228 *See* Harbour, *supra* note 155, at 5 (quoting *Leegin*, 551 U.S. at 917–18 (Breyer, J., dissenting)).

229 *See supra* Part II (detailing the *Leegin* majority's favorable understanding of the potentially beneficial impact of RPM agreements on brand value and consumer awareness).

230 *See* Hubbard, *supra* note 216, at 96.

231 *See supra* Introduction.

Golfsmith requesting Mizuno set prices for all other retailers, the restraint could be presumed to be more procompetitive than anticompetitive.

Next, Mizuno is a relatively small player in the market, with considerably less market power in the U.S. market than larger competitors such as Titleist, TaylorMade, Nike, and Callaway. Mizuno's total revenue for golf related sales totaled approximately $36 million in the United States in 2012.[232] Those sales make up less than 1.5% of the roughly $4 billion in U.S. golf equipment sales for the same year.[233] Applying Parts 2 and 3 of the proposed guidelines—industry prevalence of RPM and market power, respectively—without specific insider knowledge of the industry, one can hypothesize that it is unlikely that there is a significant number of manufacturers implementing RPM agreements. Even if other firms do implement RPM, because Mizuno has a relatively small market power, it would likely fall under the category of an unconcentrated market and would likely be treated as presumptively not harmful to competition. Part 4 of the proposed guidelines—an exemption for new entrants—would not apply to Mizuno, a company that has been a part of the golf industry for a number of years. Part 5 of the guidelines—the increased sales test—would require actual sales information. Ultimately, the guidelines applied to Mizuno would likely suggest that an RPM agreement would be presumptively procompetitive, and that a plaintiff seeking to attack the restraint would likely fail. Not every case may be as clear-cut, but the guidelines would provide reassurance for businesses like Mizuno seeking to implement RPM that their agreements would not be challenged by the federal agencies.

C. *The Need for Further Research on the Effects of Minimum RPM Agreements*

While the guidelines will go a long way in providing clarity to manufacturers and retailers as to what kinds of RPM agreements are appropriate, there is still a lack of information on the actual effects of RPM. Commissioner Harbour stated that she was "discomforted (to say the least) by the absence of an objective basis for making law en-

232 MIZUNO CORP. 4TH QUARTER FIN. REPORT 12 (2013), http://media.mizuno.com/~/media/Files/com/investors/summary/en/2013/4q_fy12.pdf?v=dc957d5a-05b5-4c35-806a-985d31c909ab.

233 Thomas Black, *Golf's $25 Billion Market Rides Economy to Gain on Woods' Return*, BLOOMBERG BUSINESS (Apr. 4, 2012, 12:01 AM), http://www.bloomberg.com/news/articles/2012-04-04/golf-s-25-billion-market-rides-economy-to-gain-on-woods-return.

forcement decisions about resale price maintenance."[234] If the FTC has engaged in any empirical analysis since *Leegin*, those results have not been made public. If the FTC is to fulfill its "unique dual mission to protect consumers and promote competition,"[235] then it should engage in the type of empirical analysis that only an agency with its enforcement and information-collecting authority is capable of doing. Perhaps producing a set of guidelines might allow more RPM agreements to be publicly analyzed and allow for further empirical research.

Conclusion

Eight years after *Leegin*, courts and agencies have yet to rise to the task of crafting a rule of reason analysis for RPM agreements. The silence of the FTC and the DOJ has left industry experts to speculate on how the rule of reason might be applied, and has left questions regarding the appropriate analysis of RPM agreements unanswered. The FTC, either alone or in conjunction with the DOJ, should develop clear policy guidelines for RPM agreements that can provide businesses with the information necessary to determine whether or not they can adopt RPM agreements. If the silence of the agencies on RPM continues, it may be a long wait before a case is litigated in which a court has the opportunity to outline the application of the rule of reason to RPM and to bring transparency to this murky area of antitrust law.

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234 Harbour, *supra* note 155, at 6.

235 *What We Do*, Fed. Trade Commission, http://www.ftc.gov/about-ftc/what-we-do (last visited Jan. 6, 2016).