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Navigating the Murky Waters of Resale Price Maintenance in the Wake of Leegin

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Introduction

It has been two years since the Supreme Court decided *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), which overturned the nearly century-old *per se* rule of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and held that lower courts must evaluate vertical agreements fixing a minimum resale price under the rule of reason by balancing their anticompetitive effects against procompetitive benefits. Although *Leegin* presents fresh opportunities for firms to reconsider their resale price maintenance ("RPM")[1] policies under federal law, RPM continues to be an area of high antitrust risk for suppliers and franchisors, particularly those with market power and doing business nationwide. Indeed, given the controversial decision in *Leegin*, uncertainty in this area of law likely will remain for the foreseeable future as lower courts, states, and antitrust enforcement agencies continue to explore and pursue potentially divergent approaches to RPM. This article identifies the legal and practical considerations relevant to RPM that should be kept in mind in business counseling post-*Leegin*.

Background on the *Leegin* Case

At issue in *Leegin* was the "Brighton Retail Pricing and Promotion Policy" of *Leegin* Creative Leather Products, Inc. ("*Leegin*"), a manufacturer of women's accessories sold under the "Brighton" brand. 127 S. Ct. 2705, 2711 (2007). PSKS, Inc. ("PSKS"), a retailer of women's clothing and accessories, challenged *Leegin's* policy on the ground that it improperly required retailers to follow *Leegin's* suggested retail price or risk not receiving future shipments from *Leegin*. *Id.* at 2711-12. After *Leegin* stopped shipping Brighton products to PSKS because PSKS had discounted its entire line of Brighton products in violation of *Leegin's* pricing policy, PSKS sued

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Leegin, alleging that its pricing policy violated the *per se* rule against RPM agreements under *Dr. Miles*. *Id*. at 2712. At trial, the district court excluded Leegin's evidence tending to show the procompetitive benefits of *Leegin's* pricing policy on the grounds that the *per se* rule against minimum RPM rendered such evidence irrelevant. *Id.*; *see also PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 2004 WL 5254322, at *1 (E.D. Tex. Aug. 17, 2004). A jury awarded PSKS $3.9 million in damages and attorneys' fees, and *Leegin* appealed. 127 S. Ct. at 2712.

The Fifth Circuit affirmed the district court's decision on the ground that, like the district court, the appellate court was bound by the Supreme Court's holding in *Dr. Miles*. *PSKS Inc. v. Leegin Creative Leather Prods.*, 171 Fed. App'x 464, 466 (5th Cir. 2006).

After granting *certiorari*, the Supreme Court overturned *Dr. Miles*' *per se* treatment of RPM, concluding that a rule-of-reason treatment of RPM would better comport with modern economic understanding of the effects of RPM and with the Court's antitrust decisions in the prior three decades favoring rule-of-reason analysis over rules of *per se* illegality. 127 S. Ct. at 2721-25. Finding that "[n]otwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output[,]'" the Court held that *per se* treatment of *Leegin's* RPM policy was inappropriate, because modern economic literature tended to show that RPM agreements could have significant procompetitive benefits. *Id*. at 2717 (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988)). According to the Court, RPM may (1) increase interbrand competition at the manufacturer's level by encouraging retailers to invest and promote a particular manufacturer's products; (2) facilitate new entry by allowing manufacturers of a new product to incentivize retailers to promote a new and unknown product to consumers; and (3) improve retailers' performance if the profits guaranteed by RPM could be rescinded when the retailer fails to meet expectations of the manufacturer. *Id*. at 2715-16.

Although the Court in *Leegin* did not provide clear instructions to lower courts regarding how they should weigh RPM agreements' procompetitive benefits and anticompetitive effects, it identified three factors that are relevant for lower courts to consider in evaluating such agreements under the rule of reason. These factors may be useful "screens" for assessing whether certain RPM agreements may be upheld.

On remand, the district court recently dismissed PSKS's complaint for failure to allege, among other things, a tenable relevant product market under the rule-of-reason analysis. *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. CV 2:03 CV 107(TJW), 2009 WL 938561, at *1-8 (E.D. Tex. April 6, 2009).

The *Leegin* Court's Guidance

Although the Court in *Leegin* did not provide clear instructions to lower courts regarding how they should weigh RPM agreements' procompetitive benefits and anticompetitive effects, it identified three factors that are relevant for lower courts to consider in evaluating such agreements under the rule of reason. These factors

may be useful "screens" for assessing whether certain RPM agreements may be upheld.

First, RPM is more likely to raise concerns where its use is widespread in an industry because it may facilitate a cartel either at the manufacturer or retailer level. *Leegin*, 127 S. Ct. at 2719. The Court explained that "[w]hen only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers." *Id*. (citations omitted). Similarly, "a retailer cartel is unlikely when only a single manufacturer in a competitive market uses [RPM]. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand." *Id*. (citations omitted). Moreover, the Court stated that widespread use of RPM agreements could "depriv[e] consumers of a meaningful choice between [high-price] high-service and [low-price] low-service outlets." *Id*. (citation and quotation marks omitted).

Second, the source of the RPM restraint is also an important consideration. "If there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer." *Id*. (citations omitted). According to the Court, "the restraint is less likely to promote anticompetitive conduct" when "a manufacturer adopted the policy independent of retailer pressure." *Id*. Thus, an RPM agreement is less risky if it was initiated at the top, by the manufacturer rather than by the retailer.

Third, as in other rule-of-reason cases, the issue of market power (at either the manufacturer or retailer level) is important. *Id*. at 2717, 2720 ("that a dominant manufacturer or retailer can abuse [RPM] for anticompetitive purposes may not be a serious concern unless the relevant entity has market power"). As the Court explained: "A dominant retailer, for example, might request [RPM] to forestall innovation in distribution that decreases costs. 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." *Id*. (citations omitted). Similarly, "[a] manufacturer with market power . . . might use [RPM] to give retailers an incentive not to sell the products of smaller rivals or new entrants." *Id*. (citations omitted). By contrast, "[i]f a retailer lacks market power, manufacturers likely can sell their goods through rival retailers[,]" "[a]nd if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution centers." *Id*. at 2720 (citation omitted).

Implications of *Leegin*

Rule-of-reason treatment of RPM under *Leegin* makes it among other things, substantially more difficult for plaintiffs to bring RPM cases under federal antitrust law than under the old *per se* rule. *See Leegin*, 2009 WL 938561, at *7 (dismissing plaintiff's complaint on remand for failure to allege, among other things, a tenable relevant market under the rule of reason). This is particular true in the post-*Monsanto*/*Twombly* world,[2] where courts, including the district court on remand in *Leegin*, have expressed more willingness to dismiss complaints for failure to allege facts sufficiently, such as facts concerning the relevant market.[3]

Before *Leegin* eliminated the *per se* rule against RPM, some firms attempted to control their distributors' prices by using so-called "*Colgate* policies,"[4] by which the firm would announce a minimum resale price and, upon a retailer's deviation from the policy by selling below that price, unilaterally terminated the retailer without

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further negotiation or discussion. By acting unilaterally, the company avoided engaging in an "agreement," a required element for any claim under Section 1 of the Sherman Act. These policies were risky, however, because of the challenge of ensuring that conduct remained unilateral and no agreement was reached. (Indeed, the *Leegin* case involved a failed *Colgate* policy, and Leegin abandoned its unilateral conduct argument on appeal.) By eliminating the application of the *per se* rule to RPM, *Leegin* reduces the risks of improper implication of a *Colgate* policy.[5]

Significant risks concerning minimum RPM remain, however, even leaving aside the fact that litigating RPM issues under the rule of reason can be very costly. Firms with market power, or those without market power that operate in an industry where RPM use is ubiquitous, will face significant risk that their RPM policies may be deemed an unreasonable restraint. Similarly, firms without market power may also risk having their RPM policies rendered illegal *per se* if they were dictated by retailer cartels or requested by retailers with market power. Indeed, under *Leegin*, businesses are exposed to risks not faced in the typical rule-of-reason case. Usually, lack of market power is a defense to a rule-of-reason claim, but it is clear that under *Leegin* antitrust liability may attach even where a manufacturer has no market power, such as where RPM promotes a retailer cartel. Thus, considerable risks exist where RPM is imposed at the behest of a retailer. In their defense in any RPM suit, suppliers or franchisors likely will need to adduce evidence showing their RPM policy originated from them rather than being demanded by retailers or distributors.

Moreover, lower federal courts may interpret and apply *Leegin* differently. For example, notwithstanding *Twombly* and *Leegin* and the dismissals of RPM claims by several lower courts, other courts have recently allowed RPM claims to survive dispositive motions.[6]

RPM Risks Remain Post-*Leegin*

In addition to the factors that the Court in *Leegin* provided for evaluating RPM agreements and the risks discussed above, the following additional issues should be kept in mind in deciding whether to adopt an RPM program.

1. Leegin *Does Not Make Minimum RPM Agreements Legal Per Se*

It is important to note that *Leegin* only changes the analytical treatment of minimum RPM agreements and does not in any way render such agreements *per se* legal. Unlike maximum RPM agreements, which the Supreme Court's decision in *Khan* and its progeny have practically made legal *per se*, and non-price vertical restraints, which firms may adopt with much flexibility pursuant to the Supreme Court's decision in *GTE Sylvania*, the *Leegin* decision does not suggest that rule-of-reason analysis with respect to minimum RPM agreements should become a *de facto* rule of *per se* legality.[7]

2. *Minimum RPM May Still Be Risky in the "Dual Distribution" Context*

The *Leegin* decision did not address treatment of RPM in the "dual distribution" context, where the manufacturer both sells to and compete with its retailers, because the issue was not properly presented on appeal. Thus, this issue remains open. Most appellate decisions currently treat restraints imposed by a dual distributor under the rule of reason.[8] However, because these courts have not had to address minimum RPM, such practice could still be characterized as horizontal price fixing in the dual distribution context. Thus, a dual distributor who engages in minimum RPM may still face the risk that some lower courts will condemn such a practice as *per se* illegal. Some lower courts, however, may follow the approach taken by the district court in *Leegin*, which held that where the relevant appellate court (in this case the Fifth Circuit) does not specifically distinguish between maxi-

mum RPM and minimum RPM, the rule of reason is applicable to both categories of RPM in the dual distribution context.[9]

3. Recently Introduced Federal Legislation, If Passed, Would Overrule Leegin

Congress has considered legislation aimed at overturning *Leegin* in the years since the Court's decision. Shortly after the Court's ruling in *Leegin*, on July 31, 2007, the Antitrust, Competition Policy and Consumer Rights Subcommittee of the Senate Judiciary Committee held a hearing entitled "The *Leegin* Decision: The End of Consumer Discounts or Good Antitrust Policy?" Three months later, on October 30, 2007, Senator Kohl as well as then-Senators Clinton and Biden introduced bills to overrule *Leegin*. Under their proposed legislation, Section 1 of the Sherman Act would be modified to contain a new provision that states: "Any contract, combination, conspiracy, or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor, shall violate [the Sherman] Act." S. 2261, 110th Cong. § 3 (2007). Senator Kohl has reintroduced his legislation in the new Congress as S. 148. *See* S. 148, 111th Cong. (2009). This bill is currently before the Senate Judiciary Committee.

> Significant risks concerning minimum RPM remain, however, even leaving aside the fact that litigating RPM issues under the rule of reason can be very costly. Firms with market power, or those without market power that operate in an industry where RPM use is ubiquitous, will face significant risk that their RPM policies may be deemed an unreasonable restraint.

4. Federal Enforcement Agencies May Prosecute RPM Agreements Aggressively Regardless of the Existence of any Federal Legislation Concerning Leegin

Before President Obama was elected, the federal antitrust agencies urged the Court to overrule *Dr. Miles*. Brief of the United States as *Amicus Curiae* Supporting Petitioner, No. 06-480, 2007 WL 173650, at *1, *3 (U.S. Jan. 22, 2007). The agencies argued that *per se* treatment was most appropriate for agreements where the effects "always, or almost always, reduce[d] consumer welfare[.]" *Id*. at *3. They contended that vertical minimum price agreements did not warrant such treatment, because RPM agreements could produce either procompetitive or anticompetitive effects. *Id*.

It is well known now, however, that the Obama administration has vowed to enforce the antitrust laws vigorously, and the newly appointed leaders at the antitrust enforcement agencies seemingly have reversed the agencies' prior position with respect to *Leegin*. Both Assistant Attorney General Christine Varney and Federal Trade Commission ("FTC") Chairman Jon Leibowitz are on record supporting Senator Kohl's proposed legislation to repeal *Leegin*. The FTC also has recently held public workshop sessions with a focus on the history of RPM, empirical evidence on its effects, and how RPM should be analyzed under the antitrust laws to distinguish between uses of RPM that benefit consumers and those that do not. *See* "FTC Announces Agendas for Resale Price Maintenance Workshops in May," *available at* http://www.ftc.gov/opa/2009/04/rpm.shtm. Although it is unclear what the outcome of these workshops will be, insights from the workshops may be used to formulate more aggressive FTC guidelines on application of federal antitrust laws to RPM agreements, consistent with the current leadership's position.

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5. *Lower Federal Courts May Construe* Leegin *to Permit Application of An Abbreviated Rule of Reason to Minimum RPM*

The *Leegin* Court expressly invited lower courts to experiment with application of the rule of reason to RPM agreements. Specifically, the Court directed lower courts applying the rule of reason "to be diligent in eliminating . . . anticompetitive uses [of RPM] from the market" and suggested that courts might "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 competitive ones." 127 S. Ct. at 2720. Given that some commentators have suggested application of a "quick look" rule of reason to RPM, some lower federal courts may ultimately determine that minimum RPM warrants only a truncated, rather than a full-blown, rule-of-reason treatment based on additional economic understanding of RPM's effects. *See, e.g.*, Robert L. Hubbard, *Protecting Consumers Post-Leegin*, 22 Antitrust 41 (Fall 2007) (suggesting that the antitrust standard for judging RPM agreements should involve an abbreviated or "quick look" rule of reason that requires a showing of some pro-competitive rationale).

Leegin is not binding on states with respect to their antitrust laws and is subject to state courts' inconsistent interpretations. Indeed, *Leegin* does not alter the fact that certain states, such as New York and California, likely will continue to maintain that their pre-existing laws continue to prohibit minimum RPM agreements.

6. *Firms May Still Face Risks of Per Se Treatment Under State Laws.*

Although many states follow federal precedents or view them as persuasive, the *Leegin* decision is applicable only to analysis of minimum RPM under federal antitrust laws.[10] Thus, *Leegin* is not binding on states with respect to their antitrust laws and is subject to state courts' inconsistent interpretations. Indeed, *Leegin* does not alter the fact that certain states, such as New York and California, likely will continue to maintain that their pre-existing laws continue to prohibit minimum RPM agreements.[11]

States also may affirmatively pass "*Leegin* repealer" laws, as they did in response to the Supreme Court's ruling in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).[12] In April 2009, Maryland became the first state to enact such a law. The Maryland law repealing *Leegin*, which will be effective on October 1, 2009, provides: "[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 [that violates the Maryland Antitrust Act]."[13] This new law thus permits suits against suppliers subject to Maryland law that impose RPM policies. Other states that filed an *amicus* brief with Maryland in *Leegin*, unsuccessfully urging the Court to uphold *Dr. Miles*, may follow Maryland's legislative lead or aggressively prosecute RPM cases under certain state laws that still condemn minimum RPM as *per se* illegal.

Moreover, the attorneys general of twenty-seven states recently expressed strong resistance to *Leegin* by signing a petition opposing the FTC's modification of the *Nine West* decree to reflect *Leegin*'s rule-of-reason treatment of RPM. In 2000, when minimum RPM was still unlawful *per se* under *Dr. Miles*, the FTC and 56 attorneys general from U.S. states, territories, commonwealths, and possessions filed RPM claims against Nine West. Nine West entered into a consent decree with the FTC that barred Nine West from "fixing, con-

trolling, or maintaining the resale price" for 10 years, and settled the states' claims for $34 million.[14] Shortly after the Supreme Court decided the *Leegin* case, Nine West petitioned the FTC to modify the decree to reflect that RPM was no longer *per se* illegal at the federal level.[15] Upon seeking public comments on the issue, the FTC received comments from twenty-seven state attorneys general opposing the modification.[16]

Since not all states have jumped on the anti-*Leegin* bandwagon, firms doing business across state lines may need to deal with a potentially complex web of state laws that require different standards for analyzing RPM.[17]

7. Many Foreign Countries Treat RPM Harshly

Although this article focuses on U.S. laws, firms that do business worldwide also should be aware that many developed countries, such as those in the European Union, treat RPM as a "hard core" offense, condemning it almost as a *per se* violation.[18] Thus, it would be prudent for multinational companies to determine the relevant foreign countries' laws concerning RPM to ensure that their RPM policies are compliant with those laws as well.

Conclusion

The Supreme Court's decision in *Leegin* clearly marked a significant doctrinal turning point with respect to minimum RPM agreements, but it left open issues that still need to be sorted out, likely for years to come. The three-factor screen identified in *Leegin* should be considered first in any RPM analysis, although admittedly applying those factors may not be easy in practice. Firms that wish to implement or revise their RPM policies should continue to do so cautiously, as substantial risks persist with respect to state, federal, and foreign laws.

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[1] RPM can involve setting a minimum resale price or a maximum resale price. The Supreme Court had earlier held in *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997), that RPM agreements setting a maximum price must be analyzed under the rule of reason.

[2] *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (holding that, despite the "notice pleading" standard of Rule 8(a), a conspiracy claim under Section 1 should be dismissed under Rule 12(b)(6) when it alleges only parallel conduct, absent "factual context suggesting agreement"); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (requiring there must be "evidence that tends to exclude the possibility of independent action by the [defendants]" in a vertical dealer termination case); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (making the *Monsanto* rule applicable to horizontal conspiracy cases and adding that "antitrust law limits the range of permissible inferences from ambiguous evidence in a Section 1 case").

[3] *See, e.g., Rick-Mik Enters. v. Equilon Enters.*, 532 F.3d 963, 975-76 (9th Cir. 2008) (dismissing minimum RPM claim for failure to allege facts of a conspiracy sufficiently under *Twombly*); *Leegin*, 2009 WL 938561, at *7 (dismissing minimum RPM claim for failure to allege facts concerning a relevant market sufficiently under *Twombly*); *Spahr v. Leegin Creative Leather Prods., Inc.*, 2008 WL 3914461 (E.D. Tenn. 2008) (dismissal of consumer class action); *Jacobs v. Tempur-pedic Int'l, Inc.*, 2007 WL 4373980 (N.D. Ga. 2007) (same); *but see Babyage.com v. Toys "R" Us, Inc.*, 558 F. Supp. 2d 575 (E.D. Pa. 2008) (denying motion to dismiss).

[4] The policy is named after *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), which held that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

[5] *See, e.g.*, Michael A. Lindsay, *Resale Price Maintenance and the World After Leegin*, 22 Antitrust (Fall 2007), at 36 ("now is the time to reconsider" adopting a *Colgate* policy given that "*Leegin* has reduced the exposure that would result if a unilateral policy inadvertently becomes (or is perceived as becoming) an 'agreement'"); Thomas B. Leary & Erica S. Mintzer, *The Future of Resale Price Maintenance, Now That Doctor Miles*

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is Dead, 4 N.Y.U. J.L. & Bus. 303, 341 (2007) (noting that "manufacturers with *Colgate* programs[] may be able to discuss their differences with non-compliant retailers, rather than terminating them absolutely as they heretofore have been required to do so"); Marie L. Fiala & Scott A. Westrich, Leegin Creative Leather Products: *What Does the New Rule of Reason Standard Mean for Resale Price Maintenance Claims?*, Antitrust Source (Aug. 2007), at 9.

[6] *See, e.g., Toledo Mack Sales, Inc. v. Mack Trucks, Inc.*, 530 F.3d 2004 (3d Cir. 2008) (reversing trial court's grant of summary judgment dismissing an RPM claim); *Babyage.com*, 558 F. Supp. 2d at 583 (holding that despite the *Leegin* decision, plaintiffs can adequately plead actionable antitrust injury even though the only harm is to intrabrand competition).

[7] *See Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977) (non-price vertical restraints are subject to rule-of-reason analysis); *Khan*, 522 U.S. at 22 (maximum resale price restraints are analyzed under the rule of reason).

[8] *See, e.g., AT & T Corp. v. JMC Telecom, LLC.*, 470 F.3d 525, 531 (3d Cir. 2006) (agreement involving dual distributor arrangement remained "vertical" and analyzed under the rule of reason); *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1004-07 (5th Cir. 1981) (same); *Electronics Communications Corp. v. Toshiba America Consumer Products, Inc.*, 129 F.3d 1141 (9th Cir. 1995) (same); *Glacier Optical, Inc. v. Optique du Monde*, 46 F.2d 1442 (4th Cir. 1995) (not for publication) (same); *Smalley & Co. v. Emerson & Cuming, Inc.*, 13 f.3d 366, 368 (10th Cir. 1993) (same); *Hampton Audio Electronics, Inc. v. Contel Cellular, Inc.*, 966 F.3d 1442 (4th Cir. 1992), *as amended*, (Aug. 6, 1992) (same); *III, Corporate Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751, 753 (7th Cir. 1989) (same); *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F. 2d 904, 906 (6th Cir. 1989) (same); *Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1230 (8th Cir. 1987) (same).

[9] *See Leegin*, 2009 WL 938561, at *7 ("The law in the Fifth Circuit is that these types of arrangements are dual distributorships and should be analyzed under the rule of reason. *Red Diamond Supply*, 637 F.2d at 1004-07. The *Red Diamond* court did not distinguish between price fixing and other types of restraints. Therefore, the same deficiencies in the rule of reason analysis [in the *Leegin* case] are present in PSKS's dual distributorship case.").

[10] In *Leegin*, the attorneys general of 37 states filed an *amicus* brief urging the Supreme Court to uphold the *per se* rule of *Dr. Miles*, on the grounds that RPM agreements raised prices and harmed consumers. The states cited studies finding that RPM agreements invariably increased prices to consumers and pointed out that, through the state attorneys general's attacks on such agreements, they had "recovered more than $115 million in cash and $75 million in product for consumers[.]" States' Brief as *Amici Curiae*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), *available at* http://www.naag.org/assets/files/pdf/amici.leegin.states.pdf, at 1. The state attorneys general who filed the *amicus* brief in *Leegin* were from Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.

[11] New York law provides that "[a]ny contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law." N.Y. General Bus. Law § 369-a. While this provision appears on its face to render such contracts *unenforceable* rather than unlawful, relying upon this provision the head of the Antitrust Bureau of the New York Attorney General's office has written that "under New York law, minimum vertical price-fixing is a *per se* antitrust violation that violates the Donnelly Act in and of itself, without any need for inquiry into market conditions or other circumstances," and that any "injury should be recoverable under the Donnelly Act's treble damage provision." Jay L. Himes, *New York's Prohibition of Minimum Price Fixing*, N.Y. L.J., Jan. 29, 2008, *available at* http://www.oag.state.ny.us/business/ new_antitrust/jay%20jan%202008%20nylj%20vertical%20price-fixing.pdf.; *see also* Cal. Bus. & Prof. Code § 16720 (e) (prohibiting vertical agreements to fix prices).

[12] States may also depart from federal antitrust precedent as a matter of statutory interpretation by their judiciaries. *See, e.g., Hyde v. Abbott Labs., Inc.*, 473 S.E.2d 680, 684-85 (N.C. Ct. App.) (interpreting state counterpart of Sherman Act to authorize indirect purchaser suits), *review denied*, 478 S.E.2d 5 (N.C. 1996); *McLaughlin v. Abbott Labs.*, No. CV 95-0628 (Ariz. Super. Ct. Yavapai Co. July 9, 1996 (same); *Blake v. Abbott Labs.*, 1996-1 Trade Cas. (CCH) ¶ 71,369 (Tenn. Ct. App. March 27, 1996) (same); *Mack v. Bristol-Meyers Squibb Co.*, 673 So. 2d 100, 103 (Fla. Dist. Ct. App. 1996) (interpreting state deceptive practices act to authorize indirect purchaser suits).

[13] *See* Md. Code Ann., Com. Law § 11-204, *amended by* 2009 Maryland Laws Ch. 43 (S.B. 239).

[14] *In re Nine West Group, Inc.*, No. C-3937 F.T.C. (April 11, 2000); F.T.C. Nine West Press Release, No. C-3937 (March 6, 2000).

[15] *In re Nine West Group, Inc.*, No. C-3937 (F.T.C. May 6, 2008).

[16] States Amended Comments Opposing Modification of Nine West Order, No. C-3937 F.T.C. (Jan. 17, 2008), *available at* http://www.ftc.gov/os/comments/ninewestgrp/080117statesamendedcomments.pdf. The state attorneys general who opposed the modification were from Alaska, Arkansas, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia.

[17] *See* Michael A. Lindsay, *Overview of State RPM*, Antitrust (Fall 2007) (chart providing comprehensive overview of state RPM laws).

[18] *See, e.g.*, Luc Gyselen, *Resale Price Maintenance: Growing Convergence Between the US and the EC in Sight?*, in *Views of European Law from the Mountain*, 151-65 (Bulterman, Hancher, McDonnell and Sevenster, eds., Kluwer Law International BV, 2009).