SUPREME COURT DEVELOPMENTS: *LEEGIN*

Should *Leegin* Finally Bury Old Man *Miles*?

BY THOMAS B. LEARY AND JANET L. McDAVID

ON DECEMBER 7, 2006, THE 65TH anniversary of the attack on Pearl Harbor, the Supreme Court announced it would hear a case involving a direct challenge to a precedent that is 30 years older. The Petitioner in *Leegin Creative Leather Products Inc. v. PSKS, Inc.*[1] posed the simple question whether "vertical minimum resale price maintenance agreements should be deemed per se illegal,"[2] based on the authority of *Dr. Miles Medical Co. v. John D. Park & Sons*.[3] Respondent countered with its own version of the same question, and asked whether it is "appropriate for this Court even to reconsider the long standing per se rule against vertical minimum price fixing?"[4]

The *Leegin* case presents the issue in its most pristine form. There is no doubt about the existence of a vertical minimum resale agreement; a jury found so, and Leegin does not challenge the finding. If *Dr. Miles* is reaffirmed by the Supreme Court, the agreement is illegal per se and Leegin will lose. If *Dr. Miles* is overruled, the Court will presumably remand for consideration under a rule of reason standard. But, then, PSKS will almost certainly lose because it will be extraordinarily difficult to prove competitive harm on the facts of this case.

The Factual Background

It appears that Leegin is a relatively small, family-owned manufacturer of women's fashion accessories. It differentiates its product from numerous other manufacturers of these items by focusing on boutique stores, which offer a high level of customer service.[5] In 1990, Leegin introduced its "Brighton" brand, beginning with women's belts and later adding other accessory items. Ten years later, "despite competition from hundreds of other brands, Brighton products were sold in more than 5000 specialty stores nationwide."[6]

Thomas B. Leary and Janet L. McDavid are, respectively, Of Counsel and Partner in the firm of Hogan & Hartson LLP, Washington, D.C. Mr. Leary is a former Federal Trade Commissioner and Ms. McDavid is a past Chair of the ABA Section of Antitrust Law. Both signed a brief on behalf of the National Association of Manufacturers in support of Petitioner, seeking Supreme Court review in the Leegin *case.*

In 1997, Leegin initiated a "Brighton Retail Pricing and Promotion Policy," which stated that Leegin would do business only with retailers that follow the suggested retail prices for the Brighton line. This could not be characterized simply as a unilateral announcement, however, because in 1998 and years following Leegin obtained from retailers a written agreement to adhere to its pricing policies for the Brighton line.[7]

It is therefore clear that Leegin's policy did not fit within the austere parameters of a *Colgate*-compliant resale policy;[8] in fact, Leegin does not seriously argue the point.[9] In addition to general policy arguments for reconsideration of the *Dr. Miles* precedent, however, Leegin does call attention to some specific facts that would suggest its particular resale policies could not cause competitive harm. These facts are set forth in the written submission of Professor Kenneth G. Elzinga,[10] which was excluded as irrelevant at the trial. Professor Elzinga points out, for example, that there are hundreds of manufacturers of womens' accessories and thousands of retailers that sell them, so that it is highly unlikely that Leegin's policy could have been used to facilitate a horizontal cartel at either the upstream or the downstream level. The issue of per se illegality is therefore paramount.

The Arguments for and Against Reconsideration of *Dr. Miles*

This discussion is necessarily somewhat speculative because PSKS did not argue the merits at any length in the exchanges before the Court granted certiorari and because this article goes to press before PSKS's brief on the merits is due. At the certiorari stage, Leegin's Petition and Reply Brief, the statement of Professor Elzinga included in the Appendix, and the three Amicus Briefs in support of the Petitioner total 129 pages; the Brief in Opposition is only 22 pages long. Two of the three amici have also filed similar briefs on the merits, and there are two new amici in support of petitioner—including, most notably, the United States.

This imbalance in bulk does not overstate the imbalance in the scope and the depth of the arguments, thus far. The Petitioner has pointed out in its two briefs that the underlying rationale of *Dr. Miles* is fundamentally inconsistent with the principles set out in recent Supreme Court cases, such as *Sylvania*, *Monsanto*, *Sharp*, and *Khan*.[11] Petitioner argues that the Supreme Court has not hesitated to reverse misguided precedent in the vertical restraints area. It argues that persistence of the per se prohibition against minimum resale price maintenance has serious practical consequences, and that the policy arguments for preservation of the *Dr. Miles* precedent are weak. These arguments are supported by the merits Brief for the United States.

The Amicus Briefs echo many of Petitioner's arguments, but each has its own individual slant. The Briefs on behalf of over 20 industrial organization economists—with diverse backgrounds[12]—review the literature and available empirical evidence, and state in summary: "The economics literature does not support a conclusion that minimum RPM almost

Dr. Miles is predicated on two fundamental assumptions that are almost universally rejected today. The first is the assumption that vertical price maintenance is equivalent to a horizontal cartel. . . . The second fundamental rationale of _Dr. Miles_ is similarly without support, namely, that vertical price restraints violate the longstanding rule against "restraints on alienation."

always produces anticompetitive effects."[13] The Brief on behalf of the National Association of Manufacturers points out, in particular, that judicial reluctance to apply the wooden prohibitions of *Dr. Miles* has restricted courts to "a highly formalistic inquiry" into the fact of "agreement" rather than an appropriate focus on competitive effects.[14] Two Briefs on behalf of CTIA—The Wireless Association, and a Brief on behalf of Ping, Inc., elaborate on the practical consequences of the per se rule, and point out how difficult it is for a supplier to take advantage of the right to choose its own customers that is theoretically granted by the Colgate case.[15]

Respondent PSKS, in its opposition to certiorari, argues first that this is not a vertical case at all, but rather a case involving "an active participant in the retail market implementing a horizontal cartel."[16] Leegin's owners apparently also own two chains of retail stores that sell their products, and some of them are direct competitors of the plaintiff.[17]

There are two problems with this argument. First, it apparently is an afterthought, mentioned for the first time in Respondent's opposition to the cert petition. All PSKS's arguments below were based on the per se rule of *Dr. Miles*.[18] Second, it simply is no longer the law that a supplier's own participation in the retail business (as a so-called "dual distributor") automatically converts a vertical restraint into a horizontal restraint.[19] The majority view today is that dual distribution arrangements should be evaluated under the rule of reason.

This is not to say that a timely argument of this point would have been frivolous. Dual distribution alone is not outcome-determinative, but it could be material if the facts indicated that the resale price restrictions were driven not by Leegin's interests as a supplier, but rather by its interests as a retailer in competition with its own customers. And, if these facts had been available and submitted below as an alternative theory of liability, the Supreme Court might have been less inclined to take an interest in the case.

The focus in the remainder of the Opposition Brief is not on the practical effects of the per se rule, but rather on the arguments that *Dr. Miles* is settled precedent; that there have been very few vertical price cases in recent years; that Congress has demonstrated its support for the precedent; and that a "compelling case exists for deferring to Congress to change the law, should any change be needed."[20]

These may have been the most sensible arguments to make at the certiorari stage. The Supreme Court has nibbled around the edges of *Dr. Miles* for almost 30 years, but let it stand; there have been expressions of Congressional support for *Dr. Miles* (albeit no present laws); and it is also true that there are not many recent cases that invoke the precedent (which, of course, may simply reflect the fact that suppliers are generally reluctant to challenge established law head-on).[21] Finally, it might be awkward for any respondent to argue that this is a matter unworthy of the Court's attention and, at the same time, to engage in an extended discussion of the merits.

What all this means is that fundamental economic principles are likely to be contested by PSKS to a much greater extent, now that the case is at the merits stage. The balance of this article will address what we believe might be some key issues on the merits.

The Mistaken Premises of *Dr. Miles*

Dr. Miles is predicated on two fundamental assumptions that are almost universally rejected today. The first is the assumption that vertical price maintenance is equivalent to a horizontal cartel. The *Dr. Miles* Court said that a seller "can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions."[22] As the briefs of Petitioner Leegin and the various amici point out at length, there simply is no way that the opinions in *Sylvania* and its progeny can be reconciled with this assumption. There is an overwhelming economic consensus that vertical price restraints can be beneficial, or at least benign, in some circumstances[23]—unlike horizontal price agreements. A simple thought experiment will demonstrate the fundamental difference between the two.

Consider why sellers may choose to distribute their products through (and share profits with) independent retailers in the first place. They obviously do so because they believe that these retailers can distribute the products more efficiently. The sellers are, in effect, purchasing services. They have every incentive to buy these services as cheaply as possible, whereas a horizontal combination of retailers would have an obvious incentive to sell the services for as much as possible.[24] Note that this obvious contrast assumes both sellers and retailers will act in their own self-interest, and does not depend on any assumption that sellers have superior knowledge or that retailers are unprincipled "knaves."[25]

The second fundamental rationale of *Dr. Miles* is similarly without support, namely, that vertical price restraints violate the longstanding rule against "restraints on alienation"[26]— a rationale aptly ridiculed as "the solution given three or four hundred years ago by an English judge who was talking about something else."[27]

There is a more contemporary and intellectually respectable expression of a similar rationale, namely, the notion of "dealer freedom." If you believe, as we do, that the preservation of freedom is at least one of the principal objectives of the antitrust laws, this is not an argument that can be dismissed out-of-hand.[28] A retailer may have a business model that is based on discount prices, and vertical price maintenance makes it impossible for the retailer to sell products that it owns in the way that it chooses.

On the other hand, a manufacturer's freedom should be entitled to some consideration, as well.

> It was wrong to assume that a manufacturer has no legitimate interest in what happens once it has parted with formal title; it may, for example, have ongoing service responsibilities, concerns about the amenities available at the points of sale to ultimate consumers, and an interest in preserving the goodwill associated with products that bear its name.[29]

The passage of title from a manufacturer to a dealer is simply not the same thing as the passage of title to a house. When people buy houses, the former owners cannot prevent the new owners from modifying them in any way they choose, even if the modifications fundamentally change the character of a property. But, this does not mean that retailers could without consequences add their own bows and ruffles to a line of women's clothing—or paint home appliances in psychedelic colors—in order to appeal to special audiences. Even if trademark law did not prohibit the modifications, no one would suppose that the offended manufacturers have an ongoing obligation to supply. The principle is arguably the same if a manufacturer believes that its property interests are being harmed in other ways—even if the retailer genuinely believes that it is marketing the products more effectively. The question in most vertical restraint cases is not which party has the better marketing plan; the question is whether a seller should be forced to continue a business relationship with a retailer that the seller, rightly or wrongly, believes is undercutting the value of its product. Put another way, is there an antitrust reason why sellers and retailers should not be free to contract on mutually acceptable terms—which may include various restrictions on what the retailer will do? We will return to this theme at the end of the article.

The question in most vertical restraint cases is not which party has the better marketing plan; the question is whether a seller should be forced to continue a business relationship with a retailer that the seller, rightly or wrongly, believes is undercutting the value of its product.

Sylvania and successor cases have fundamentally rejected the twin rationales of *Dr. Miles* and progressively narrowed the impact of antitrust on voluntary business arrangements between sellers and buyers. It is hard to argue credibly that the *Dr. Miles* rationale continues to make sense. However, some scholars have suggested that *Dr. Miles* could be right, or almost right, for the wrong reasons, and that *Sylvania* should be scaled back.

Critiques of the *Sylvania* Line of Authority

The critiques of *Sylvania* have evolved over time. Very few people today will argue that post-*Sylvania* antitrust jurisprudence is flawed because it fails to take account of various social and political factors; this objection had faded away 20 years ago, even among those who were critical of the *Sylvania* approach. There are some, however, who acknowledge the powerful insights of *Sylvania* but argue nonetheless that *Sylvania* should not be applied broadly, and that minimum resale price maintenance can be particularly pernicious.[30]

Professors Lawrence Sullivan and Warren Grimes, for example, have included what is perhaps the most exhaustive summary of possible arguments against vertical restrictions generally—and particularly minimum vertical price maintenance—in their massive antitrust treatise.[31] But, even if the arguments were valid in many circumstances, they do not support per se condemnation.

Sullivan and Grimes claim, for example, that "most distribution restraints cannot be justified as a tool for eliminating free-riding" because "a rival retailer may simply pocket the added margin without providing the hoped for services."[32] We know of no empirical data to support use of the word "most" but, in any event, the argument does not apply to Leegin. Leegin, and other manufacturers who rely on distribution through boutique stores, are relying on a particular ambiance in the retail environment—something that is both costly and highly visible.

Similarly, these authors claim that an already knowledgeable customer "is denied the choice of buying a lower cost, unpromoted version of the brand."[33] This could be true, of course, but what if this customer has already been educated by the ability to shop (without buying) in the pleasant ambiance of a boutique store, like those that Leegin chooses to sell through? Moreover, it is not unreasonable for a seller to adopt a business model that caters particularly to another kind of customer who is not knowledgeable. The authors then claim that vertical price maintenance, in particular, is likely to create incentives for unscrupulous multibrand retailers to exploit consumers' ignorance by steering them toward the brands with the higher guaranteed margins.[34] This could also be true but, even in the absence of vertical restrictions, retailers have the same incentive to steer customers toward the more expensive or optioned-up versions of the products they sell. No one seems to suggest that sales of premium brands or high-priced alternatives should be subject to special antitrust scrutiny.

This point-counterpoint discussion is not, however, primarily offered as a response to Professors Sullivan and Grimes. It is offered to demonstrate the fact that these thoughtful critics are highly skeptical about some justifications that have been offered in support of vertical restraints. Yet, even with all their skepticism, they do not support the per se prohibitions of *Dr. Miles*. They say: "The overall picture of distribution restraints suggests that a blanket condemnation or approval of all such restraints would be unwise."[35] When they address minimum price restraints, in particular, they say: "The [per se] rule, or something approaching it, can be justified if vertical price fixing is consistently anticompetitive. But the rule has been under attack because not all applications of vertical price fixing may be anticompetitive."[36]

For the last 30 years, however, there has been a consistent trend away from simple per se prohibitions in favor of more flexible but potentially more complex inquiries, across the full range of antitrust.

Finally, these authorities state that "[a] sound policy approach to distribution restraints emphasizes economic policy, not a sterile debate over whether a conspiracy or agreement exists."[37] We agree. Along with Robert Pitofsky, they have raised some potential competitive problems that we and others believe are exaggerated. But, these longstanding policy differences can never be resolved if resale price maintenance continues to be per se illegal, because the underlying factual issues cannot be explored in per se litigation. That is why commentators tend to rely so much on theory and speculation today, and why courts are forced to focus on a "sterile" inquiry into who said what to whom.

This, in short, is the problem that Respondent PSKS will need to address before a Court that has already said per se treatment is only appropriate when "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it."[38]

Perhaps the most far-reaching economic argument that has been advanced by critics of the *Sylvania* line of cases is that vertical restraints could chill the growth of discount outlets and innovative marketing methods.[39] It was certainly the most compelling argument offered in support of the various Congressional attempts to overrule or modify the *Sylvania* line of authority, and it may have seemed reasonable at the time.[40]

It is obvious now that the dire predictions about the demise of discount alternatives were spectacularly wrong. In recent years, there have indeed been dramatic changes in the retail environment, but that movement has been in precisely the opposite direction. The trend toward a proliferation of discount alternatives has been so pronounced that the Federal Trade Commission recently closed its investigation into the merger of two of the largest department store chains in the country, which created a new combination that is by far the largest.[41]

The Commission's Statement acknowledged that the "transaction will create high levels of concentration among conventional department stores in many areas of the country," but then went on to explain.[42]

> Fifty years ago, many individual department stores were freestanding in cities, rather than suburban malls, and they offered consumers the convenience of one-stop shopping, particularly for home furnishings or clothing. There were few discount department store chains of the kind we have today (like Kohl's) or vertically integrated sellers of clothing (like The Gap). There were no consumer electronics chains (like Circuit City); no mass marketers (like Wal-Mart); and of course, no Internet outlets (like Amazon.com). As alternative outlets have proliferated, the wide array of products in department stores has dwindled.
>
> * * * * * * *
>
> The evidence demonstrates that the conventional department stores operated by Federated and May (and their competitors) no longer occupy the unique position they once held, even the more limited range of products that they sell. While department stores once were a distinctive niche market, they now face pressures both from "above" and "below" even in the same mall, not to mention mass market, mail order and Internet alternatives.

It is reasonable to assume that this retail revolution will continue, whether or not resale price maintenance continues to be per se illegal. And, it is, of course, simply absurd to imagine that the resale policies of a small venture with a focused retail strategy, like Leegin, will stand in the way of the juggernaut.

The Predictability Argument

One argument for retention of the per se rule is that it is at least predictable. It is claimed that this predictability not only benefits potential plaintiffs but also contributes to judicial economy, and can even makes things easier for businesses.[43] There is, of course, general recognition that the competing claims of predictability and accuracy involve tradeoffs. For the last 30 years, however, there has been a consistent trend away from simple per se prohibitions in favor of more flexible but potentially more complex inquiries, across the full range of antitrust. (The *Sylvania* case itself was a major event, although it could be argued that the trend really began with the *General Dynamics* merger case, decided three years earlier.)[44] In fact, some very recent decisions indicate that the simple dichotomy between a per se analysis and a rule of reason analysis is itself too rigid, and that an appropriate approach really extends across a spectrum—in the words of the Supreme Court "what is required is . . . an enquiry meet for the case, looking to the circumstances, details and logic of a restraint."[45]

At first glance, it would appear that these increasingly fluid standards would necessarily impose excessive burdens on the courts, on litigants, and on antitrust counselors. Yet, that does not seem to be the case.

One reason is that the substitution of the rule of reason for a per se standard previously applied to a particular strategy does not mean that businesses will automatically flock toward the strategy in question. The threat of rule of reason litigation is by itself a powerful deterrent, and a risk-averse business may prefer strategies that are unlikely to stimulate either a private or a public challenge. Another reason is that increasingly sophisticated antitrust counselors and economists may be better able to distinguish between activities that are likely to be deemed anticompetitive and those that are benign. This surmise may be hard to demonstrate in the area of horizontal or vertical restraints because the "universe" of restraints is unknown. In the merger area, however, premerger notifications make it possible to identify a universe of substantial mergers, and recent statistics reflecting enforcement activity in different administrations show that the overwhelming majority of mergers are cleared without challenge—notwithstanding a progressive retreat from simple concentration measures.[46] This means that antitrust counselors are pretty good at predictions.

It therefore seems unlikely that the Supreme Court will be moved by the argument based on predictability.

The Fundamental Anomaly

As any antitrust counselor knows, there are basic inconsistencies in the law of vertical restraints, which have endured for almost 90 years. In 1919, just eight years after the decision in *Dr. Miles*, the Supreme Court's *Colgate* decision[47] upheld the right of a supplier to announce a resale pricing policy and to terminate retailers who departed from it—so long as the retailers did not overtly "agree" to adhere to the policy. The decision vindicated the basic right of suppliers to choose their customers, but it required some distortion of ordinary principles of contract law which recognize "agreements" based on performance.

What this means in practical terms is that a *Colgate* resale price program is safe if all the retailers are satisfied and quietly comply. The program will only be vulnerable to antitrust attack if mavericks—like PSKS—become dissatisfied and charge less than the seller's announced prices. In other words, a fundamental policy *disagreement* can trigger liability based on the existence of an *agreement*, unless the affected parties are very careful to avoid communications that might be construed as a retailer's promise to reform. The safest thing to do is terminate any offending retailer[s] abruptly, without any communications about the reasons. Present law can therefore compel people to conduct supplier-customer relations in a distinctly odd way. And, it is even odder to impose liability for the entire program based on conversations with one or a few mavericks, rather than on the competitive effects of the "common scheme"[48] in which many have silently acquiesced. In fact, if maverick dealers actually promise to reform ex post and keep the promise—and no other mavericks emerge—an antitrust issue is unlikely to arise.

To complicate matters further, consider that retailers logically should have *Colgate* rights as well. If a boutique store adopts a business model that provides expensive amenities at the point of sale, why shouldn't it also have the right to announce unilaterally that it will not buy products from a supplier that sells the same products to competitive retailers that do not provide the same amenities? A roughly similar factual scenario was presented in the 1988 *Sharp* case,[49] in which the Supreme Court held that it was not per se illegal for the supplier to cut off a discounting retailer in response to this kind of demand, so long as there were no further agreements on price with the complaining retailer. One wonders whether the result would have been the same in 1988 if the case had involved multiple suppliers,[50] but it should be the same if *Colgate* protections are symmetrical. Suppose, indeed, that a retailer announced as part of its *Colgate*-like policy that it would not deal with any manufacturer that did not announce and enforce its own *Colgate* policy? The mind reels at the delicacy of discourse that would be mandated by present law, but the competitive effects overall could well be trivial in the current retail environment.

If the Supreme Court overturns *Dr. Miles*, and declares that all vertical restraints should be judged by a rule of reason, the incidence of these anomalies may be drastically reduced, but they will not be eliminated entirely. After all, vertical restraints cases are not usually brought to recover damages for ultimate consumers, the group that antitrust seeks to protect. Virtually all of them are initiated by terminated maverick retailers that sue to recover lost profits—profits that are likely to have been inflated to the extent that competitor retailers have continued to adhere to the very arrangements that the mavericks attack as illegal.

In the end, there may be a shift in the entire emphasis of the law that governs vertical price maintenance. In a dealer case, the focus arguably should be on the competitive effects of the conduct that triggers the antitrust lawsuit—that is, the act of termination—rather than on the discussions with the maverick dealer before termination. A court might inquire whether there is something about the termination itself that raises particular consumer-welfare concerns, and whether these concerns are serious enough to override a strong sense that people should not be required to maintain business relationships against their will. In other words, the rule of reason analysis would track the analysis in any other refusal to deal case.

Any competitive concerns about the global arrangements between a supplier and multiple compliant retailers could similarly be addressed under the rule of reason, without regard to the existence or the circumstances of particular terminations. The scope of the rule of reason inquiry should be responsive to the needs of particular cases, consistent with recent Supreme Court authority.[51] Robert Pitofsky suggests, and we agree, that relevant factors would include "extreme free rider problems" or the needs of a "new entrant."[52] He might also agree it would be relevant if the proven facts showed that a company like Leegin competes in a nearly atomistic environment. In our view, these do not exhaust the appropriate matters to consider, but perhaps there is a common consensus that antitrust should focus on competitive realities rather than nuances of communication and "agreement." The long-deferred burial of *Dr. Miles* is a necessary first step. ■

---

1 2006 WL 690946 (5th Cir.) (unpublished opinion), *cert. granted*, 75 U.S.L.W. 3311 (U.S. Dec. 7, 2006) (No. 06-480).

2 Petition for a Writ of Certiorari at (i); *see also* Brief for Petitioner at (i).

3 220 U.S. 373 (1911).

4 Brief in Opposition at (i).

5 This summary description of the business is based on Leegin's Petition for a Writ of Certiorari at 2–4. Because the plaintiff PSKS relies on a per se theory, this factual description is as yet unchallenged. It seems unlikely that these particular facts will be disputed.

6 *Id.* at 3.

7 *See* Respondent PSKS's Brief in Opposition at 3.

8 *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (manufacturer can unilaterally announce a pricing policy and terminate dealers that do not follow it).

9 *See Leegin* Brief at 30–32; Petition, at 22 n.8; Appendix A, at 3a.

10 *See id.* at 18a, 30a–35a.

11 Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988); State Oil Co. v. Khan, 522 U.S. 3 (1997).

12 The group includes a number of economists who had significant responsibilities in the Antitrust Division during the same administration in which Chairman Robert Pitofsky served, and cannot fairly be described as advocating "the more conservative version of Chicago School doctrine." *Compare* Robert Pitofsky, *Are Retailers Who Offer Discounts Really "Knaves"?: The Coming Challenge to the* Dr. Miles *Rule*, ANTITRUST, Spring 2007, at 61.

13 Brief of *Amici Curiae* Economists in Support of Petitioner at 3. *See also* Brief of *Amici Curiae* Economists in Support of Petitioner, filed at the certiorari stage.

14 Brief of the National Association of Manufacturers at 6. The authors of this article were on this Brief.

15 *E.g.*, Brief of CTIA—The Wireless Association in Support of Petitioner at 15–16; Brief of Ping Inc. as *Amici Curiae* in Support of Petitioner.

16 Opposition Brief at 7.

17 *Id.* at 4.

18 Respondent's Reply Brief at 2–3.

19 *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253 (1963); *see also* discussion and cases cited in ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 160–61 (5th ed. 2002).

20 Opposition Brief at 15.

21 Sometimes the precedent is invoked reluctantly. *See, e.g.*, Concurring Statement of Orson Swindle and Thomas Leary in the Matter of Nine West Group (Mar. 6, 2000), *available at* http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf ("when an appropriate case arises, we believe the Court [should revisit] . . . per se treatment of minimum RPM").

22 *Dr. Miles*, 220 U.S. at 408–09.

23 *See, e.g.*, authorities cited in Petitioner's Brief at 10–11; Amicus Brief for CTIA—The Wireless Association at 6-7; Amicus Brief for Economists, in its entirety.

24 *See, e.g.*, Amicus Brief for the Business Roundtable in *State Oil Company v. Khan* at 13 (1997) ("if you view vertical relationships as the purchase of services by the manufacturer rather than the purchase of goods by the retailer . . . [it] then becomes obvious . . . that vertical restrictions are highly unlikely to be in aid of horizontal ones. . . .") One of the authors of this article was also on this brief.

25 *See* Pitofsky, *supra* note 12.

26 *Dr. Miles*, 220 U.S. at 404.

27 ROBERT BORK, THE ANTITRUST PARADOX 285 (1978).

28 *See generally*, Thomas Leary, *Freedom as the Core Value of Antitrust in the New Millennium*, 68 ANTITRUST L.J. 545 (2000).

29 *Id.* at 551.

30 *See, e.g.*, Robert Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 431 (1988). ("Few antitrust scholars believe that antitrust should return to a Warren Court approach based largely upon social and political concerns.") *See also* Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price-Fixing*, 71 GEO. L.J. 1487 (1983) (defending a near per se rule with economic arguments).

31 LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK (2000).

32 *Id.* at 305.

33 *Id.* at 314.

34 *Id.* at 311–12.

35 *Id.* at 316.

36 *Id.* at 336. Even Robert Pitofsky's article, published 17 years earlier, would permit "narrow, carefully defined exceptions to a per se rule." *See* Pitofsky, *supra* note 30, at 1495. He still maintains this view. *See* Pitofsky, *supra* note 12, at 64.

37 *Id.* at 325.

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

39 *See, e.g.*, Sullivan & Grimes, *supra* note 31, at 306, 333.

40 For a roughly contemporaneous summary of these failed efforts, see Richard M. Steuer, *The Turning Points in Distribution Law*, 35 ANTITRUST BULL. 467, 490–96 (1990). Robert Pitofsky also suggested at the time that "the recent ideology about 'free riders'" threatened discounters. *See* Pitofsky, *supra* note 30, at 1493.

41 *See* Statement of the Commission, Federated Department Stores, Inc./The May Department Stores Company (Aug. 31, 2005), *available at* http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf.

42 *Id.* at 2.

43 *See* Petitioner's Brief at 19–20.

44 United States v. General Dynamics Corp., 415 U.S. 486 (1974) (holding that present market share statistics did not reflect future competitive potency).

45 California Dental Ass'n v. FTC, 526 U.S. 756, 780–81 (1999). *See* PolyGram Holding, Inc., FTC Docket No. 9298 (July 24, 2003) (Commission opinion), *available at* http://www.ftc.gov/os/adjpro/d9298/030724commoppinionandfinalorder.pdf.

46 *See* Thomas Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 137–42 (2002).

47 United States v. Colgate & Co., 250 U.S. 300, 307 (1919) .

48 *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

49 *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

50 *Cf.* Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000).

51 *See* California Dental Ass'n v. FTC, 526 U.S. 756, 780–81 (1999).

52 Pitofsky, *supra* note 12, at 64.