Leegin Creative Leather Products, Inc. v. PSKS, Inc.: Loosening the Belt on Price Fixing

Crystal J. Clark

Casenote

Leegin Creative Leather Products, Inc. v. PSKS, Inc.: Loosening the Belt on Price Fixing

I. INTRODUCTION

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[1] the United States Supreme Court overturned almost a century of antitrust precedent by overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[2] and holding that vertical minimum resale price maintenance agreements were no longer per se illegal but would now be governed by the rule of reason.[3]

II. FACTUAL BACKGROUND

Leegin Creative Leather Products, Inc. ("Leegin") is a manufacturer and distributor of women's accessories, including products under the "Brighton" brand name. Leegin preferred to sell its products through small retail boutiques so that its customers received individualized

---

1. 127 S. Ct. 2705 (2007).
2. 220 U.S. 373 (1911).
3. *Leegin*, 127 S. Ct. at 2710.

customer service. PSKS, Inc. ("PSKS") operated Kay's Kloset, a women's apparel store that sold Brighton goods. Kay's Kloset began purchasing Brighton goods from Leegin in 1995. Brighton was the store's key brand and accounted for as much as fifty percent of its profits.[4]

In 1997 Leegin began the "Brighton Retail Pricing and Promotion Policy" (the "Policy") and sent a letter to its retailers to inform them of the Policy.[5] Leegin created the Policy to provide Brighton retailers with adequate margins, thereby enabling them to provide valuable customer service for Brighton products. The Policy was designed to stop retailers from discounting Brighton products, that the manufacturer believed to be damaging to the products' reputation.[6] In 1998 Leegin began the "Heart Store Program," a marketing strategy which required its retailers to sell Brighton products at Leegin's suggested prices.[7] As part of the Policy, Leegin would not sell Brighton products to retailers who sold them for less than Leegin's suggested prices. Kay's Kloset became a Heart Store the same year but lost that status soon after, due to the store's unsatisfactory appearance. However, the store continued to sell Brighton products and even increased its sales of Brighton goods. In 2002 Leegin learned that Kay's Kloset was discounting its Brighton products, and Leegin requested a return to the suggested price. When Kay's Kloset continued to discount Brighton products, Leegin refused to sell products to the store. Losing the Brighton brand substantially decreased the revenue of Kay's Kloset.[8]

PSKS filed an action against Leegin in the United States District Court for the Eastern District of Texas, alleging that Leegin had violated antitrust laws by entering into an agreement with retailers to charge fixed prices. PSKS alleged that, among other things, Leegin's Heart Store Program demonstrated the unlawful agreement. Leegin tried to introduce expert testimony to describe the procompetitive effects of its pricing policy. However, the district court excluded the expert testimony.[9] The court relied upon *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[10] in which the United States Supreme Court held that agreements to fix minimum prices were per se illegal.[11] Leegin contended that its marketing policy was lawful under the Sherman

---

4. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2710-11 (2007).
5. *Id.* at 2711.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 2712.
10. 220 U.S. 373 (1911).
11. *Id.* at 408.

Act[12] as a "unilateral pricing policy."[13] However, the jury found for PSKS and awarded it $1.2 million. The district court trebled the damages pursuant to 15 U.S.C. § 15(a)[14] and entered a $3,975,000.80 judgment against Leegin.[15]

Leegin appealed to the United States Court of Appeals for the Fifth Circuit.[16] On appeal, Leegin admitted to entering into "vertical price-fixing agreements with its retailers" but argued that the rule of reason was the correct standard to apply, not the per se rule.[17] The court of appeals, also following *Dr. Miles*, rejected this argument and held that the district court had not abused its discretion by excluding testimony of procompetitive justifications that were immaterial under the per se rule.[18] The Supreme Court granted certiorari and in a 5-4 decision, overruled *Dr. Miles*.[19] In doing so, the Court held that vertical minimum resale price maintenance agreements are to be evaluated under the rule of reason.[20]

III. LEGAL BACKGROUND

A. *The Sherman Act and Restraints on Trade*

In 1890 Congress enacted the Sherman Act,[21] which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[22] The statute, however, does not define "restraint of trade."[23] Justice Stevens, dissenting in *Business Electronics Corp. v. Sharp Electronics Corp.*,[24] stated that Congress intended for courts to interpret the Act "in the light of its common-law background."[25] In the same opinion, Justice Stevens also stated that because the plain language of the statute bans "every" contract restraining trade, a "literal reading of the statute would outlaw the entire body of private contract

12. 15 U.S.C. §§ 1-7 (2000 & Supp. V 2005).
13. *Leegin*, 127 S. Ct. at 2712.
14. 15 U.S.C. § 15(a) (2000).
15. *Leegin*, 127 S. Ct. at 2712.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 2710, 2712.
20. *Id.* at 2710.
21. 15 U.S.C. §§ 1-7 (2000 & Supp. V 2005).
22. *Id.*
23. *Id.*
24. 485 U.S. 717 (1988).
25. *Id.* at 736-37 (Stevens, J., dissenting).

law."[26] Thus, the United States Supreme Court has long interpreted the statute to apply only to "unreasonable restraints."[27]

Two standards developed for determining whether agreements violated the Sherman Act: the rule of reason and per se illegality.[28] Under the rule of reason, courts consider several factors in determining the lawfulness of the restraint, taking into account all of the circumstances surrounding the restraint and its effect on competition.[29] Such factors may include: (1) the number of manufacturers participating; (2) the source of the restraint; and (3) the market power of the entity.[30]

In contrast, under the standard of per se illegality, courts presume that certain agreements and practices are illegal regardless of their effect on the market.[31] Because of the severity of the standard, a restraint "must have 'manifestly anticompetitive' effects" to justify establishing a per se prohibition.[32] Over time, the Court's definition of what is "anticompetitive" has changed so that practices that were once per se illegal are now evaluated under the rule of reason.[33] Under the modern interpretation, courts determine that restraints are manifestly anticompetitive when they "would always or almost always tend to restrict competition and decrease output."[34] Thus, the Court is reluctant to use the per se rule when it is not certain of the effects a restraint may have.[35] Presently, the rule of reason is the accepted standard for determining whether a practice violates the Sherman Act's prohibition against restraint of trade.[36]

B. *Historically Significant Case Law*

In 1911 the Supreme Court ruled in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[37] that an agreement between a manufacturer and its distributors to establish minimum resale prices was per se illegal under

---

26. *Id.* at 736.
27. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).
28. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712-13 (2007).
29. White Motor Co. v. United States, 372 U.S. 253, 261-62 (1963).
30. *Leegin*, 127 S. Ct. at 2719-20.
31. *White Motor Co.*, 372 U.S. at 262.
32. *Leegin*, 127 S. Ct. at 2713 (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977)). Horizontal agreements among competitors still fall into this category. *Id.*
33. *See GTE Sylvania Inc.*, 433 U.S. at 59; *State Oil Co.*, 522 U.S. at 18; *Bus. Elecs. Corp.*, 485 U.S. at 724.
34. *Leegin*, 127 S. Ct. at 2713 (quoting *Bus. Elecs. Corp.*, 485 U.S. at 723).
35. *Id.*
36. *Id.* at 2712 (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)).
37. 220 U.S. 373 (1911).

section 1 of the Sherman Act.[38] In *Dr. Miles*, a manufacturer attempted to fix prices for its products both at the wholesale and retail levels, thereby establishing minimum prices for all subsequent purchasers.[39] The Court determined that, in doing so, the manufacturer had eliminated all competition and thereby restrained trade.[40] The Court looked to common law and reasoned that "a general restraint upon alienation is ordinarily invalid."[41] Consumer welfare and the public interest must be considered first.[42] The Court reasoned that after a manufacturer sold its products, the public was "entitled to whatever advantage may be derived from competition in the subsequent traffic."[43] Therefore, the Court held that price-fixing was per se unlawful under both the common law and the Sherman Act.[44]

In the wake of *Dr. Miles*, manufacturers tried to find ways to circumvent the holding and set resale prices. Eight years later in *United States v. Colgate & Co.*,[45] the Supreme Court effectively created a large loophole in its holding in *Dr. Miles*.[46] In *Colgate* a manufacturer urged its distributors to sell at its suggested prices and refused to continue to sell to anyone who did not. However, the manufacturer never specifically executed a contract.[47] The Court determined that without a contract, the distributors were not bound to sell at a fixed price, even if the manufacturer could refuse to sell to them.[48] The Court acknowledged that manufacturers had a right to refuse to sell to any wholesaler or retailer they chose.[49] Thus, a manufacturer could specify a resale price and refuse to sell to a dealer who would not comply.[50] The ruling in *Colgate* effectively created a dichotomy in the law such that price-fixing by contract was illegal per se, while the same conduct performed without a specific agreement was lawful.[51]

Over the next sixty years, Congress's view on the purpose of antitrust laws shifted. In an attempt to protect small businesses, Congress passed

38. *Id.* at 409.
39. *Id.* at 394.
40. *Id.* at 399-400.
41. *Id.* at 404.
42. *Id.* at 406.
43. *Id.* at 409.
44. *Id.*
45. 250 U.S. 300 (1919).
46. *Id.* at 307.
47. *Id.* at 303-04.
48. *Id.* at 305-06.
49. *Id.* at 307.
50. *Id.*
51. *See id.* at 307-08.

the Miller-Tydings Fair Trade Act[52] in 1937, which allowed states to enact laws to make vertical price restraints legal.[53] Then in 1952, Congress passed the McGuire Act,[54] which "expanded the exemption to permit vertical price-setting agreements between a manufacturer and a distributor to be enforced against other distributors not involved in the agreement."[55] Consequently, in states that allowed resale price maintenance, prices were about twenty percent higher than in states where it was illegal.[56] Then in 1975, Congress passed the Consumer Goods Pricing Act,[57] which repealed both the Miller-Tydings Fair Trade Act and the McGuire Act.[58] The Act "did not codify the rule of *per se* illegality for vertical price restraints," but "rescinded statutory provisions that made them *per se* legal."[59]

Starting in the 1970s, the Supreme Court began to trend away from employing per se rulings toward using the rule of reason standard. In 1967, for example, the Court in *United States v. Arnold, Schwinn & Co.*[60] addressed the question of whether it was legal for a manufacturer to restrict access to its product to certain retailers in specified territories.[61] The Court held that when the manufacturer no longer retained title in the product, the restraint was per se unlawful.[62] Ten years later, in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[63] the Supreme Court overruled *Schwinn* and held that the rule of reason governed all vertical nonprice restraints.[64] The Court mentioned some benefits of vertical restrictions—such as compensating for market imperfections and enabling entrance into new markets—but maintained that manufacturers had an interest in encouraging intrabrand competition (the competition between retailers of the same brand).[65] The Court concluded that a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[66]

52. Pub. L. No. 75-314, 50 Stat. 693 (1937) (repealed 1975).
53. *Leegin*, 127 S. Ct. at 2723.
54. Pub. L. No. 82-542, 66 Stat. 631 (1952) (repealed 1975).
55. *Leegin*, 127 S. Ct. at 2723.
56. *Id.* at 2728 (Breyer, J., dissenting).
57. Pub. L. No. 91-145, 89 Stat. 801 (1975).
58. *Leegin*, 127 S. Ct. at 2723.
59. *Id.* at 2724.
60. 388 U.S. 365 (1967).
61. *Id.* at 379.
62. *Id.* at 382.
63. 433 U.S. 36 (1977).
64. *Id.* at 59.
65. *Id.* at 54-56.
66. *Id.* at 58-59.

The Supreme Court continued to broaden its standard of evaluating vertical restraints. In 1984, in *Monsanto Co. v. Spray-Rite Service Corp.*,[67] the Court distinguished between independent actions taken by a manufacturer (governed by the rule of reason), concerted action between a manufacturer and distributors on nonprice restrictions (governed by the rule of reason), and agreements to fix prices (classified, at that time, as per se illegal).[68] The Court held that in establishing a section 1 Sherman Act violation, a plaintiff must provide "evidence that tends to exclude the possibility of independent action by the manufacturer and distributor."[69] Significantly, while the Court was hearing *Monsanto*, the Solicitor General filed a brief for the United States as amicus curiae advocating that the Court overrule its decision in *Dr. Miles*.[70] Not faced with that particular issue, the Court declined to reach a decision on *Dr. Miles* at that time.[71] Justice Brennan, however, chose to write a separate concurring opinion solely to emphasize that *Dr. Miles* should continue to be upheld due to its seventy-year precedent and Congress's approval during that period.[72]

Following *Monsanto*, the Court continued to expand the scope of the rule of reason standard. In *Business Electronics Corp. v. Sharp Electronics Corp.*,[73] the Court held that "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels."[74] Based on *GTE Sylvania* and *Monsanto*, the Court reiterated that there was a "presumption in favor of a rule-of-reason standard" for vertical restraints.[75] It acknowledged the procompetitive effects of vertical restraints and indicated that requiring the per se rule could cause manufacturers "to forgo legitimate and competitively useful conduct."[76]

The trend toward employing the rule of reason was also evident in the Court's treatment of maximum resale price maintenance. In *Albrecht v. Herald Co.*,[77] the Supreme Court held that setting a maximum resale price was a per se illegal restraint on trade.[78] However, the Court later

67. 465 U.S. 752 (1984).
68. *Id.* at 763.
69. *Id.* at 768.
70. *Id.* at 761 n.7.
71. *Id.*
72. *Id.* at 769 (Brennan, J., concurring).
73. 485 U.S. 717 (1988).
74. *Id.* at 735-36.
75. *Id.* at 726.
76. *Id.* at 728.
77. 390 U.S. 145 (1968).
78. *Id.* at 153-54.

overruled *Albrecht* in *State Oil Co. v. Khan*,[79] holding that vertical maximum resale price fixing was not per se illegal but governed by the rule of reason.[80] In overruling *Albrecht*, the Court looked to its rationale in *GTE Sylvania* to explain that "[a]lthough the rule of *Albrecht* has been in effect for some time, the inquiry we must undertake requires considering 'the effect of the antitrust laws upon vertical distributional restraints in the American economy today.'"[81] Although the Court continued to affirm its holding in *Dr. Miles*, applying per se illegality to agreements setting minimum resale prices, it observed that the majority of antitrust claims were evaluated under the rule of reason.[82] The Court also stated the purpose of antitrust law as "protect[ing] interbrand competition."[83] Because vertical maximum resale price restraints lowered prices to the benefit of consumers, per se invalidation was not justified.[84]

IV. COURT'S RATIONALE

A. *The Majority Opinion*

Delivering the opinion of the Court, Justice Kennedy evaluated the potential economic effects of vertical minimum resale price agreements, determined what would be the appropriate standard to apply if the Court were starting anew, and explained why the Court could overrule *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[85] and apply the appropriate rule of reason standard.[86] Justice Kennedy was joined by Justices Roberts, Scalia, Thomas, and Alito.[87]

The Court first examined the procompetitive justifications for resale price maintenance.[88] In doing so, the Court noted that fixing minimum resale prices could stimulate interbrand competition (the competition between different manufacturers' brands of a similar product).[89] Likewise, it could potentially increase options in price and service levels for consumers.[90] Fixing minimum resale prices, according to the Court,

79. 522 U.S. 3 (1997).
80. *Id.* at 22.
81. *Id.* at 21-22 (quoting *GTE Sylvania Inc.*, 433 U.S. at 53 n.21).
82. *Id.* at 10-11.
83. *Id.* at 15.
84. *Id.*
85. 220 U.S. 373 (1911).
86. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).
87. *Id.* at 2710.
88. *Id.* at 2714-16.
89. *Id.* at 2715.
90. *Id.*

could also prevent "free riding," which occurs when a discounter takes advantage of another's services or reputation, thereby diminishing the other's return and discouraging further investments.[91] The Court noted further that minimum price maintenance could facilitate market entry and competition based on services instead of price.[92] Finally, the Court reasoned that setting a minimum resale price and allowing retailers to determine the services they would provide could be more efficient than requiring manufacturers to contract for specific services.[93]

Next, the Court examined the anticompetitive effects of minimum resale price restraints.[94] The Court noted that minimum price restraints could enable a manufacturer to earn monopoly profits, create a manufacturer's cartel, or cause a manufacturer to lose its incentive to provide cheaper prices to consumers.[95] The restraints could enable retailers to form a retailer's cartel or to simply raise their profits rather than to provide extra services or consumer benefits.[96] Thus, a threat of abuse by a powerful manufacturer or retailer could exist.[97] The Court explained that horizontal cartels would remain per se illegal and that vertical agreements to facilitate a horizontal cartel would be held unlawful under the rule of reason.[98] Considering the strict criteria of the per se rule, the Court determined that vertical price maintenance provided enough procompetitive advantages to make the rule of per se illegality inappropriate.[99]

Although the Court acknowledged that allowing minimum price restraints could increase prices, it reasoned that anticompetitive effects must not be determined by price alone but by also evaluating anticompetitive conduct.[100] The rule of reason standard was "designed and used to eliminate anticompetitive transactions from the market."[101] The Court recognized that it had allowed the rule of reason standard to apply to vertical nonprice restraints even though those restraints also carried the risk of increasing prices.[102] Additionally, the Court reasoned that in attempting to avoid the harsh per se rule, manufacturers may have

---

91. *Id.* at 2715-16.
92. *Id.* at 2716.
93. *Id.*
94. *Id.* at 2716-17.
95. *Id.* at 2716.
96. *Id.* at 2717.
97. *Id.*
98. *Id.*
99. *Id.* at 2717-18.
100. *Id.* at 2718.
101. *Id.* at 2720.
102. *Id.* at 2718.

resorted to costly alternatives, in which case removing the per se rule would allow for lower costs, especially because manufacturers have no incentive to overcompensate their retailers.[103] Moreover, according to the Court, manufacturers' interests should align with those of consumers and should thus naturally act to protect prices from rising too high.[104] The Court also stressed that the purpose of antitrust laws is to encourage interbrand competition, which in turn should have the effect of lowering prices.[105]

Based on the analysis above, the Court determined that if it were considering this case as an original matter, it would choose the rule of reason standard and not per se illegality.[106] The Court reasoned that courts can use the rule of reason to offset any potential anticompetitive risks.[107] Additionally, the Court determined that administrative convenience did not justify maintaining the per se rule of illegality, especially when the per se rule could be counterproductive and lead to increased costs and litigation.[108]

Finally, the Court determined that it had the power to overrule *Dr. Miles*,[109] even while acknowledging several policies in support of stare decisis, such as the importance of having and maintaining settled law.[110] Although stare decisis generally carries more weight when interpreting statutes, the Court reasoned that it carried less weight when applied to the Sherman Act because the Sherman Act is a "common-law statute," which "adapts to modern understanding and greater experience."[111] Additionally, cases can be overruled "'when subsequent cases have undermined their doctrinal underpinnings.'"[112] The Court acknowledged that its common law approach had substantially altered the rules governing vertical restraints from the strict interpretation that was employed in 1911 when *Dr. Miles* was decided.[113] Because *Dr. Miles* was based on "'formalistic'" line drawing rather than "'demonstrable economic effect,'" the Court rejected the

103. *Id.*
104. *Id.* at 2718-19.
105. *Id.* at 2715.
106. *Id.* at 2720.
107. *Id.*
108. *Id.* at 2718.
109. *Id.* at 2720.
110. *Id.*
111. *Id.*
112. *Id.* at 2721 (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)).
113. *Id.*

reasoning as incongruent with its current approach.[114] The Sherman Act "'invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890.'"[115] Thus, the Court emphasized that the interpretation of the common law of 1911 was immaterial to the issues of the modern economy, and that the Court should not be held to that standard.[116]

Additionally, the Court determined that its decisions in *Colgate*, *GTE Sylvania*, *Business Electronics*, *Monsanto*, and *Khan* had effectively narrowed the reach of *Dr. Miles* such that the recent treatment of other vertical restraints now justified overruling *Dr. Miles*.[117] In these cases, the Court determined the lawfulness of the restraints based on their procompetitive effects.[118] Because procompetitive effects were sufficient to warrant overruling *Schwinn* and *Albrecht*, the Court reasoned that retaining *Dr. Miles* could call into question the cases that overruled them, *GTE Sylvania* and *Khan*, as well as other vertical restraint cases.[119] Furthermore, alternatives to price-fixing could be less efficient, thereby costlier, and could act to impair competition and consumer welfare.[120] For instance, *Colgate* granted manufacturers the "right to refuse to deal with retailers that do not follow its suggested prices," but the risk that a "jury might conclude its unilateral policy was really a vertical agreement . . . has led, rational manufacturers to take wasteful measures."[121] Thus, maintaining the per se rule did not create the economic effect that was originally desired.[122]

Additionally, the Court concluded that because "Congress intended § 1 [of the Sherman Act] to give courts the ability 'to develop governing principles of law' in the common-law tradition," Congress's failure to codify the rule in *Dr. Miles* was a sign that the Court was free to adopt the rule of reason, which was more appropriate to modern times and circumstances.[123] Furthermore, because resale price maintenance was legal from 1935 to 1975 and manufacturers had continued to set

---

114. *Id.* at 2714 (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977)).

115. *Id.* (alteration in original) (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988)); 15 U.S.C. §§ 1-7 (2000 & Supp. V 2005).

116. *Leegin*, 127 S. Ct. at 2714.

117. *Id.* at 2721-22.

118. *Id.* at 2722.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 2723.

123. *Id.* at 2724 (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 643 (1981)).

minimum resale prices through nonprice restraints, the Court determined that the reliance interests in this case were not sufficient to require the Court to continue upholding the per se rule in *Dr. Miles*.[124] Therefore, the Court overruled *Dr. Miles* and held that the rule of reason would govern vertical minimum resale price restraints.[125]

B. *Justice Breyer's Dissent*

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented.[126] In his dissent, Justice Breyer discussed the economic impact of minimum resale agreements and the criteria necessary to overrule precedent.[127] Justice Breyer maintained that although the Court may have found a different standard appropriate if it were deciding the case originally, there was insufficient justification to overrule a precedent that was almost a century old.[128]

In considering the potential economic effects of minimum price restraints and the arguments for and against the per se rule, Justice Breyer agreed with the majority opinion that minimum price restraints could provide potential benefits, such as facilitating new market entry, causing greater interbrand competition, and helping to prevent free riding.[129] Justice Breyer also agreed that minimum resale price restraints could cause serious anticompetitive effects.[130] For example, minimum resale price restraints could affect dealers by decreasing or eliminating price competition, by hindering "dealers from responding to changes in demand," by "wastefully" attracting too many resources to an industry that lacked demand, and by "stifling the development of new, more efficient modes of retailing."[131] Allowing manufacturers to set minimum resale prices could also foster collusion between manufacturers, reduce incentive to lower wholesale prices, and prevent price competition.[132] Furthermore, Justice Breyer pointed to empirical data that provided evidence of the anticompetitive effects of minimum resale price restraints, especially in regard to increased consumer prices.[133] The Miller-Tydings Fair Trade Act[134] and the McGuire Act[135] permit-

124. *Id.* at 2724-25.
125. *Id.* at 2725.
126. *Leegin*, 127 S. Ct. at 2725 (Breyer, J. dissenting).
127. *Id.*
128. *Id.* at 2725-37.
129. *Id.* at 2728.
130. *Id.* at 2727.
131. *Id.*
132. *Id.*
133. *Id.* at 2727-28.
134. Pub. L. No. 75-314, 50 Stat. 693 (1937) (repealed 1975).

ted states to allow minimum resale price-fixing.[136] Thirty-six states made this kind of price-fixing lawful, and prices effectively increased by nineteen to twenty-seven percent in those states during that time.[137]

Unlike the majority, Justice Breyer highlighted the significance of administering the standard that applies to minimum resale price agreements.[138] He pointed out that the Court should look at how often the problem was likely to occur and how difficult it would be for courts to distinguish a beneficial restraint from a prohibited restraint on trade.[139] Under the rule of reason, it is difficult to determine when a restraint is "serious enough to warrant legal protection."[140] Indeed, Justice Breyer noted that analyzing the factors under the rule of reason would be abstract, technical, and time-consuming.[141] Using the rule of reason standard could also increase litigation, and courts left without guidance would likely make mistakes.[142] Justice Breyer was also concerned that enforcement would be more difficult without a bright-line rule and that enterprises might be more tempted to hedge toward anticompetitive practices.[143]

Justice Breyer also disagreed with the majority regarding Congress's intentions.[144] He noted that Congress had repealed the McGuire and Miller-Tydings Acts in response to urging by the Department of Justice and the Federal Trade Commission to remove states' discretion in applying the *Dr. Miles* per se rule.[145] According to Justice Breyer, Congress "fully understood, and consequently intended" for minimum resale price maintenance to be per se illegal.[146] Moreover, for the last century, Congress had been aware of *Dr. Miles* and never overturned the per se rule; therefore, Justice Breyer determined, the Court was not justified in doing so now.[147]

Additionally, Justice Breyer contended that the repeal of the McGuire and Miller-Tydings Acts established public reliance such that the case should not be overruled unless a substantial change had taken place

---

135. Pub. L. No. 82-542, 66 Stat. 632 (1952) (repealed 1975).
136. *Leegin*, 127 S. Ct. at 2727-28 (Breyer, J., dissenting).
137. *Id.*
138. *Id.* at 2730-31.
139. *Id.* at 2730.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 2731.
144. *See id.* at 2731-32.
145. *Id.*
146. *Id.*
147. *Id.* at 2726.

since that time.[148] According to Justice Breyer, the potential benefits of vertical minimum resale price maintenance that were argued before the Court were not new, and the American economy had not changed such that overruling *Dr. Miles* was justified.[149] Justice Breyer determined that, if anything, "[c]oncentration in retailing has increased," which means that price maintenance could make it more difficult for discount competitors to obtain market share.[150] Thus, there was "no ground for abandoning a well-established antitrust rule."[151]

According to Justice Breyer, a century's worth of precedent was bound by considerable reliance and should not be overturned lightly.[152] He deemed that this Court was unjustified in doing so in this case.[153] To support his contention, Justice Breyer analyzed six factors that the Court had previously employed for determining whether to overrule a case[154] and concluded that the majority in *Leegin* did not satisfy a single one.[155] Additionally, Justice Breyer disagreed with the majority that invoking common law gave the Court the authority to overrule *Leegin* because "[c]ommon-law courts rarely overrule[d] well-established earlier rules outright," but instead they "over time issue decisions that gradually eroded the scope and effect of the rule in question."[156] Furthermore, Congress and the Federal Trade Commission, unlike the Court, are "well-equipped to gather empirical evidence outside the context of a single case."[157] Therefore, according to Justice Breyer, such a decision should have been left to them.[158]

---

148. *Id.* at 2732.
149. *Id.* at 2732-33.
150. *Id.* at 2733-34.
151. *Id.* at 2734.
152. *Id.* at 2731.
153. *Id.*
154. *Id.* at 2734-37. Factors that supported overruling a case included: (1) determining that a case was "decided wrongly only a reasonably short time ago"; (2) determining that a "legal regime" is "unworkable"; and (3) determining that "a decision unsettles the law." *Id.* On the other hand, factors that supported upholding a decision included: (1) applying stare decisis more "rigidly" in statutory interpretation than in constitutional cases; (2) determining that the case "involves property rights or contract rights, where reliance interests are involved"; and (3) determining that "a rule of law has become embedded in our national culture." *Id.* (internal quotation marks omitted).
155. *Id.*
156. *Id.* at 2737.
157. *Id.*
158. *Id.*

V. IMPLICATIONS

Because the rule of reason is so widely used in other areas of antitrust jurisprudence, Congress is not likely to supersede the Court's holding by statute. As a result of the holding in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[159] courts must now weigh a minimum resale price agreement's procompetitive effects against its anticompetitive effects to determine whether a restraint is unlawful. The rule of reason standard can theoretically continue to further the Sherman Act's goal of prohibiting harmful restraints on trade, but in practice, the standard has significant hurdles to overcome.

Allowing manufacturers the right to set minimum prices can help alleviate the problem of free riding, which occurs when one retailer benefits from another retailer's investment in providing services to consumers, such as building a showroom for demonstrations. The retailer that provides the services increases its overhead, but consumers use the services to learn about the product. The retailer that does not provide the services is able to discount its prices, due to lower overhead, and the consumers then purchase from that retailer. In such cases, service-providing retailers lose sales to discounters and may lose incentive to invest in additional customer services. Free riding can eventually cause an overall decrease in the quality and availability of services in the market. Such a decrease in services may negatively impact the consumer, the industry, and healthy customer-oriented competition. Consequently, customers may be better served when pricing is fixed to adequately cover the additional cost of added-value services that improve consumers' ability to make appropriate and educated choices.

Consumer prices are likely to increase as they did when minimum resale price agreements were lawful under state law. Setting minimum resale prices restricts intrabrand competition, which causes prices to be higher than they would without the restraint. For example, without minimum price restraints, retailers often compete to sell the same product by offering it at different prices. However, minimum resale price restraints can stifle efficiency incentives and restrict retailers' ability to discount products. As a result, higher prices may be supported unjustifiably if added-value services are not rendered by retailers.

On the other hand, when retailers cannot compete through price, they frequently look for other ways to compete, which can be to the benefit of the consumer. Competition through quality of service can be especially

---

159. 127 S. Ct. 2705 (2007).

effective in certain industries, such as technology industries, where knowledge of the product and demonstrations of its benefits and features are important. Consumers, for example, are much more likely to buy a computer, even if the price is higher, if they are provided with information and a hands-on demonstration than they would be if these services were not provided. A problem may arise, however, if retailers do not provide the added services as the manufacturer had intended. In such a situation, the minimum price restraint would only act to keep prices higher without the extra benefits.

Without offsetting competition, minimum price restraints are likely to have an anticompetitive effect. In the present United States economy, many industries are concentrated such that there are few manufacturers, and thus less interbrand competition exists to offset a minimum price restraint. As Justice Breyer pointed out in his dissent, "[i]ncreased concentration among manufacturers increases the likelihood that producer-originated resale price maintenance will prove more prevalent today than in years past, and more harmful."[160]

The new standard also comes at an additional procedural cost. The cost of litigating under the rule of reason will be much higher than under the per se rule. Unlike the per se rule, the rule of reason standard will require expert testimony and analysis of the market with and without the restraint to determine its effects. Thus, litigation will be much more complex. Furthermore, by not giving courts specific guidelines, many variations and inconsistencies are likely to develop in how cases are determined.

Enforcement may also become more difficult. Much of the danger of minimum resale price maintenance depends on the motivation behind the restraint. If the manufacturer initiates the restraint, the price restraint is likely to be beneficial because it is in the manufacturer's best interest to keep prices at a minimum to increase its sales. On the other hand, if retailers initiate the price restraint, the restraint is more likely to be an effort to limit competition and increase profits. A problem arises in distinguishing minimum prices that encourage added value and benefit consumer welfare from ones that have a negative or unjust effect.

Whether minimum resale price restraints will benefit or harm consumer welfare depends heavily upon the integrity of the market. By changing the standard of review, the Court has allowed manufacturers more freedom within the market. Manufacturers can now use minimum resale price restraints as a tool to prevent free riding and to provide quality services for their products. The new standard also allows courts

---

160. *Id.* at 2734 (Breyer, J., dissenting).

to step in to protect consumers from extreme or unjustified market pricing when the restraint proves to be detrimental to the consumer.

CRYSTAL J. CLARK

***