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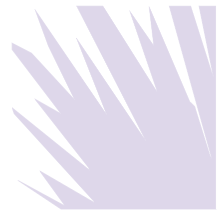

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THE *LEEGIN* CASE: SOME PERSONAL OBSERVATIONS ABOUT HOW IT BEGAN & WHERE IT WILL TAKE US NEXT

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I. INTRODUCTION

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), the Supreme Court overturned one of the longest standing antitrust precedents, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). The holding is easy to state: vertical price agreements between a manufacturer and its distributors now are subject to the rule of reason, rather than the previously applicable *per se* rule dating from 1911. The decision brought the law governing vertical price agreements into conformity with the law concerning vertical non-price agreements.

Like most Supreme Court decisions, the focus in the opinion and in the commentary that has followed is on the legal principles and supporting analysis used by the Court. But, of course, all cases have a life before the Supreme Court, and many of those facts do not appear in the Court's opinion. I had the privilege of representing Leegin Creative Leather Products ("Leegin") from the district court through the Supreme Court.[1] In this paper, I will make a few observations about the background of the case, the process by which it arrived at the Supreme Court, and also what the decision means for the future. Needless to say, I have found the case to be extremely interesting, and I hope that the following discussion will be interesting and even useful to the reader.

My opportunity to work on the case came through one of those "right place at the right time" coincidences that cannot be planned. Earlier in my career, I taught antitrust at the University of Virginia School of Law. Jim Browning was one of the first students I met there. Jim eventually returned home to practice law in New Mexico where he later successfully handled a case for Leegin.[2] In 2003, when Leegin was sued in Marshall, Texas (approximately 800 miles from Albuquerque), Leegin needed to find Texas counsel. Luckily for me, Jim was the closest lawyer to Marshall known by Leegin's General Counsel in Los Angeles.[3] Jim recommended me, and I was hired. There was an additional coincidence: After law school, I had the great good fortune to clerk for Justice Lewis F. Powell, Jr., at the Supreme Court.[4] During that year, I had the chance[5] to work with Justice Powell on the opinion in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the case that set in motion the forces that ultimately resulted in the decision in *Leegin*. Earlier in my career when I was a young law professor at the University of Virginia, I had written about *Sylvania* and its meaning for other areas of antitrust law. So, for all these reasons, I was more than normally excited to represent Leegin.

1 In the Supreme Court, I was co-counsel to Ted Olson, who argued the case, obviously effectively. Josh Lipton, an associate at Gibson, Dunn & Crutcher, also did a wonderful job coordinating the comments from a number of different sources for the briefs.
2 He is now a judge in the Federal District Court in New Mexico.
3 Gary Freedman serves as Leegin's outside general counsel. He is a skilled litigator with a deep knowledge of the clothing industry.
4 After graduating from Virginia, Jim Browning also clerked for Justice Powell before returning to New Mexico. The fact that we shared that wonderful experience kept us in contact with each other.
5 My "number" literally came up at the right time. The law clerks had a rotation system like the NFL draft in which each clerk in Justice Powell's chambers chose from among the cases for which *certiorari* had been granted. One of my co-clerks was also very interested in antitrust and *Sylvania*, but on that day, I chose first.

II. LEEGIN AND THE PRICING POLICY

Leegin is an interesting company. In many ways, it is an example of the American dream. When they were high school sweethearts, Leegin's current owners, Jerry Kohl and wife, started a small retail business selling sandals and belts to other young people on the beach in Los Angeles. One of their suppliers was Leegin, another small company owned by young people. Leegin's owners were named Lee and Ginny, which they contracted to form the company name. Lee and Ginny were surfers, and one day they decided to go in search of bigger waves. So, the Kohls bought Leegin. From that point, they gradually grew the business and added different products. For purposes of the case, an important decision was to focus on women's accessories in the early 1990s. The trademark they used for that business was "Brighton."

No doubt inspired by his own experience as the owner of a small retail store, Jerry Kohl decided that Leegin would sell primarily through small, independent retailers. He liked the personal touch in such stores. In the mid-1990s, he made another related decision: he decided that it was important for his products to be sold at the same price in all the stores carrying the products. He had two main reasons for this decision. First, he wanted his retailers to have the incentive to merchandise and promote the products, and he wanted to be sure that they had the margin necessary to do so. Second, he did not want customers to be deterred from buying a Brighton product for fear that they would see the same product on sale at another store the next week. In essence, he wanted an everyday fair price approach.

To implement the pricing policy, Leegin issued and publicized a written pricing policy that set the price level for all the different types of Brighton products as a multiple of the wholesale price. There was an important exception—any retailer could sell any product at any discounted price so long as the retailer did not intend to reorder that particular product. This exception was designed primarily to deal with the situation where products did not sell as expected or for other reasons the retailer had ordered too much of a particular product. But the net effect was to give retailers discretion to depart from the suggested prices. Since different retailers would exercise that discretion on different products at different times, some Brighton products could be found on sale regularly. Because the exception permits each retailer to make the decision whether to discount a particular product based on that retailer's individual circumstances, the exception eliminated the possibility that the pricing policy could be used to facilitate collusion among either other manufacturers or Brighton retailers. In addition, the highly competitive and fragmented markets in which Leegin operates also made successful collusion vanishingly unlikely anyway.

III. KAY'S KLOSET AND THE VIOLATION OF THE PRICING POLICY

The plaintiff in *Leegin* was a retail store in a northern Dallas suburb that operated under the name of Kay's Kloset, although the suit was brought in the corporate name of PSKS, Inc. The store sold a wide array of women's clothing and accessories, although the Brighton brand was their best selling line. It is not entirely clear why Kay's Kloset suddenly decided to breach Leegin's well-known pricing policy, but business problems appear to be the reason. The store was in a declining area of town, and has since moved. Also, a number of its customers were affiliated with the airline business, and the turmoil after September 11, 2001, may have been another blow to its business. There is some reason to believe that the owners may have seen a lawsuit as their best business opportunity. In any event, in December 2002 they flamboyantly started selling all their Brighton products at 20% off the suggested price. The violation of the policy was clear, leaving Leegin no choice but to enforce its policy of not dealing with retailers who did not follow the policy. The lawsuit followed.

IV. THE COMPLAINT, THE TRIAL, AND THE FIFTH CIRCUIT

Although the complaint was loosely drafted, it soon became clear that the case involved vertical price agreements allegedly imposed by Leegin on its retailers. Kay's Kloset alleged that its termination was the result of its violation of a *per se* illegal vertical minimum price agreement.

Leegin clearly had tried to take advantage of the *Colgate*[6] doctrine, under which a manufacturer can unilaterally announce a policy that it will only do business with retailers who follow its suggested resale prices. Leegin had announced such a policy. Moreover, in order to avoid the argument that it had "agreed" with its retailers, Leegin had instructed its field sales representatives that they were not to discuss prices at all, but rather were to refer all such issues to the two top officials in the company. But, *Leegin* is something of a case study for how reliance on the *Colgate* doctrine can go wrong.

As will often be true, despite Leegin's best efforts, the sales representative *did* talk to Kay's Kloset about its violation of the pricing policy. Not only did she hate to lose an account, but she hated to see the owners, whom she knew and liked, lose a good product line. Unknown to her, however, the owners secretly tape recorded the conversation. In fact, the conversation was largely innocuous, but there was an expression of concern about the violation and a hope that it would cease. If those were the only facts suggesting agreement, the situation might have been manageable. In addition, however, the case included references to the pricing policy in two other sets of documents that memorialized "agreements" on other subjects.

Leegin had developed a marketing program called the "Heart Store" program, named after the heart symbol that appeared on many Brighton products. The idea was to recognize and encourage retailers that devoted special attention to Brighton products. Under the program, a retailer could qualify by purchasing a certain volume and variety of Leegin products and also agreeing to display them together, rather than putting the purses with other purses and the belts with other belts, and so forth. Retailers who participated in the program received various marketing benefits, such as discounts on specialized display cases. Retailers who desired to participate signed a Heart Store "pledge" stating that they would meet certain minimum standards, one of which was to follow the Leegin pricing policy. Plaintiffs argued that these Heart Store documents created an "agreement" to charge the suggested prices that crossed the line between a permissible policy and an impermissible agreement. While these documents were certainly not a positive fact, we felt that we could still argue that the Heart Store pledge was just a soft marketing gimmick and not a serious "agreement."

Near the end of the discovery period, we learned that references to the pricing policy had also found their way into formal trademark agreements signed by Leegin and some of its retailers. Although most of the stores selling the Brighton products were independently owned, Leegin's owner Jerry Kohl had started a small number of stores specializing in Brighton products. These stores operated under the name "Brighton Collectibles." Kohl and his wife owned a number of these stores, but some were also operated under franchise agreements by other owners. Because the Brighton name was on the stores, it was necessary to give trademark licenses. We learned that those license agreements stated that licensees were required to comply with the obligations of other Brighton retailers, and in that context referred to the pricing policy. These trademark license agreements were formal legal documents that had a very different look and feel from the Heart Store pledges. Although we could still argue that the reference to the policy was simply to reiterate Leegin's commitment to that policy, these agreements gave Kay's Kloset another document to wave in front of the jury in arguing that Leegin had made a minimum price *agreement*.

From the beginning, we planned to preserve the argument that the *per se* rule from *Dr. Miles* should not apply. There was a serious risk that the trial court would instruct the jury on that theory, and we wanted to create a record that would support a change in the law. To that end, I contacted Professor Kenneth Elzinga, a distinguished antitrust economist at the University of Virginia. Professor Elzinga is in high demand as a consultant and has his pick of antitrust cases, but he was interested in working on this case because of the opportunity, remote though it was at that time, to improve the law. Professor Elzinga prepared a wonderful report that showed in detail why Leegin's pricing policy could not harm competition and also showed why the existing *per se* rule was seriously overbroad and flawed.

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

Although we had to preserve the argument that *Dr. Miles* should be rejected, we understood, of course, that neither the trial court nor the Fifth Circuit could change a rule established by the Supreme Court. Instead, we argued that existing Supreme Court and Fifth Circuit cases recognized the possibility of an exception to a *per se* rule where the facts made it clear that the rationale for the rule did not apply in the case in question. Based on the Supreme Court's decisions in *Sylvania* and *Business Electronics Corp v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), we argued that the only remaining rationale for the *per se* rule for vertical price agreements (as compared to the rule of reason standard for vertical non-price agreements) was the risk that such agreements could be used to facilitate *horizontal* collusion among either manufacturers or retailers. Professor Elzinga demonstrated that under the facts of our case no such risks existed.

We also argued that Kay's Kloset could not show antitrust injury. At most, its evidence showed that it had suffered some economic harm from losing the profitable Brighton line of products. That loss, however, was not related to any harm to competition, as compared to competitors. While it was true that Kay's Kloset did not and could not show antitrust injury, the argument suffered from the fact that demonstrating antitrust injury would require proof that arguably was inconsistent with the simple elements of the *per se* rule.

As it turned out, the trial court began and ended its analysis with *Dr. Miles*. Before trial, it granted a motion to exclude the testimony of Professor Elzinga on the ground that his analysis was irrelevant under a *per se* standard. At trial, it instructed the jury to find liability if it found an agreement to fix vertical minimum prices.

We hoped to do better at the Fifth Circuit. Of course, we understood that it could not ignore *Dr. Miles*, but there were options available. At best, we hoped that the Fifth Circuit would agree that the jury should have been allowed to find an exception to *Dr. Miles* because of the clear inconsistency between our facts and the remaining rationale for *per se* treatment. At a minimum, we hoped for a sympathetic statement that, although the court was constrained by the precedent of *Dr. Miles*, it regretted that fact and encouraged the Supreme Court to revisit the issue. Like the trial court, however, the appeals court simply held that the case was controlled by *Dr. Miles*. To add insult to injury, it designated the option as "Not for Publication," thus (we feared) making the case an even less attractive vehicle for Supreme Court review.[7]

V. THE SUPREME COURT

Because of the antiquity of the *Dr. Miles* decision, it was impossible to show a conflict among the circuits, the most reliable way to convince the Supreme Court to grant *certiorari*. We contacted the Antitrust Division of the Justice Department to see if they would weigh in on our side. While they were sympathetic, they informed us that the Division would not get involved at the *certiorari* stage, but would be likely to file an amicus brief if the Court took the case. Luckily, at least in part as a result of the urging by Ted Olson, a number of organizations filed briefs in support of our petition. Probably the most important of these was a joint brief by twenty-five leading antitrust economists, including nine who had led the economics group of either the Antitrust Division or the Bureau of Competition of the Federal Trade Commission. Finally, however, we surely benefited from the fact that in recent years the number of cases decided by the Court has declined dramatically, for reasons no one seems to be able fully to understand. When I was a clerk at the Court in the mid-1970s, for example, the Court regularly decided 140 or more cases a year. In contrast, in recent years, the number has hovered around 70. For a Court looking for good cases to fill the docket, the question whether there should be a dramatic difference between the standards for vertical price and non-price agreements was interesting and important. In effect, the conflict was in the Court's own cases.

On December 7, 2006, 2007, the Court granted *certiorari*. At that point, the prevailing opinion among antitrust commentators seemed to be that the Court had taken the case to reverse and

7 The also rejected our arguments that the damages model was seriously flawed in a variety of ways. For example, the damages model assumed that the shelves formerly dedicated to Brighton products would sit empty for years into the future, when in fact Kay's Kloset had filled them with good quality substitute products of the same kind long before trial.

would almost surely abandon *Dr. Miles* in favor of a rule of reason analysis. But, it only takes four votes to grant review, while it takes five to decide the case. While we were encouraged, we did not consider it a done deal.

The case again attracted a number of amicus briefs, both for and against our position. Two briefs in support of our position were particularly important. First, both federal enforcement agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission, joined in a strong brief that supported the Leegin position at every step. To have both of these expert agencies on our side must have been important for the Justices who are not deeply experienced in antitrust law. Second, the Ping golf club company filed a particularly useful brief that focused sharply on the practical problems with the *Colgate* doctrine. Rather than simply echoing the legal analysis of our brief, the Ping brief explained in detail the importance to the company of being able to control resale prices and the extreme expense and inefficiency in having to do so through the artificial mechanism of a *Colgate* "policy." The Ping brief effectively answered the question: "Given the ability to use a *Colgate* policy, why does it really matter if we leave *Dr. Miles* in place?"

Based on the very high standard that the Court has established for *per se* rules, we felt that a per se rule could not be justified. It was not possible to support the decision in *Dr. Miles* on the rationale that the Court had used in 1911. At that early stage in the development of antitrust doctrine, the Court in *Dr. Miles* had relied on two main propositions: first, that vertical minimum price agreements impinge on the common law rule against restraints on alienation and, second, that agreements between a manufacturer and its retailers are equivalent to a horizontal agreement among the retailers. As to the first proposition, the Court in *Sylvania* had clearly held that old common law doctrines, specifically including the rule against restraints on alienation, are not a valid basis for antitrust doctrine. As to the second, *Sylvania* had clearly recognized important economic distinctions between a manufacturer's reasons for imposing restrictions as compared to those of a cartel of dealers. *Dr. Miles* was decided decades before the current economic understanding of vertical restrictions was developed, so it is hardly surprising that the opinion incorrectly equated horizontal and vertical restrictions. Predictably, therefore, the *Leegin* Court concluded that neither argument could support a *per se* rule, but that did not end the analysis.

The Court then examined the economic pros and cons of resale price maintenance taking into account current economic understanding. While some thoughtful people think that vertical price agreements pose a not insubstantial risk of anticompetitive effect, no serious economist thinks that such agreements are always or almost always anticompetitive, as required under the Court's test for *per se* rules. While the Court acknowledged that such agreements can sometimes harm competition, it also recognized that, like vertical non-price agreements, they are also often used for pro-competitive reasons. On the economic merits, therefore, the Court concluded that per se condemnation was not justified.

The Court then turned to the argument that we recognized as our greatest risk—that, regardless of the lack of economic justification for the rule in *Dr. Miles*, respect for long standing precedent and arguable Congressional approval of the rule were sufficient reasons not to overrule *Dr. Miles*, but rather to leave any changes to Congress. On this issue, there were legitimate arguments on both sides, although not surprisingly I favor the majority's approach. The changes in closely related areas--including vertical non-price agreements, vertical maximum price agreements, and agreements to terminate discounters—had clearly left *Dr. Miles* as an outlier. The Supreme Court has consistently approached the interpretation of the broad provisions of the Sherman Act as a type of common law doctrine, and by common law standards, the antitrust law concerning vertical restrictions was an area of law that was badly in need of reconciliation. The evidence of Congressional approval of the old *per se* rule was not controlling in this context. In 1975 Congress abolished the statutes that allowed the states to create "fair trade" laws that legalized resale price maintenance, but that legislative change simply exposed resale price maintenance to the prevailing antitrust standards; it did not purport to legislatively freeze the law as of that time. Moreover, evidence from the fair trade era is questionable. Under the fair trade laws, resale price maintenance was essentially *per se* legal, rather than being subject to the rule of reason. Also, it seems clear that the impetus for resale price maintenance in

those years came from groups of retailers, such as retail pharmacists, rather than from manufacturers who were motivated to increase the interbrand competitiveness of their products. Thus, the Court correctly concluded that it was free to continue with the common law development of the law.

Justice Breyer's opinion for the dissenting Justices was based almost exclusively on the argument that the Court should not overturn such a venerable precedent as *Dr. Miles*. The issue of the power of *stare decisis* runs through many areas of the law, including areas in which the Court currently is very closely divided. As a result, the dissenters in *Leegin* may have been as concerned with sending a message for future cases of other kinds as for a deep respect for *Dr. Miles* itself. Justice Breyer also noted that there was not clear empirical support for the idea that consumers could benefit from vertical price agreements, and he predicted that the only sure result of the decision would be that prices would go up, perhaps by a lot. Those arguments are impossible to square with the 30 years of experience under *Sylvania*, which is based on exactly the same economic assumptions, has the same potential for prices in exclusive territories to go up, and yet has not apparently created any demonstrable harm to consumers. The essential economic similarity between vertical price and non-price agreements was a point that Justice Breyer chose largely to ignore.

The ominous warning about increases in prices also seemed overblown for other reasons. First, where the vertical restrictions are being used to incentivize additional services that consumers prefer, the product is not just the physical product, but rather the overall product and shopping experience. Second, for many years, many manufacturers have controlled downstream prices through the *Colgate* doctrine by announcing and enforcing a "policy" not to deal with retailers who deviate from suggested prices. For the products of those manufacturers, overturning *Dr. Miles* is not likely to result in a change in prices from their pre-*Leegin* levels.

VI. RESALE PRICE MAINTENANCE LITIGATION AFTER LEEGIN

Justice Kennedy's opinion for the Court made it clear that the Court recognized the possibility that minimum vertical price agreements can be anticompetitive. *Leegin* clearly does not announce a rule of *per se* legality.

The first question is whether the facts in a particular case involve a vertical agreement at all. The test that most courts use to distinguish vertical from horizontal restrictions is whether the restriction at issue originated with the manufacturer. Although *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), properly recognized that communications between a manufacturer and its retailers are often legitimate and are not a sufficient basis for inferring agreement, the question whether the restriction really is vertical remains a potentially important factual question. If the facts show that the retailers decided upon a restriction and then banded together to force the manufacturer to impose it against its best judgment, a *per se* horizontal theory would be available. For this reason, manufacturers need to manage their communications with their retailers carefully. They should also document their internal decision-making about whether to impose vertical restrictions and the business justification for doing so.

Assuming that the restriction in question is truly vertical, the inquiry is not over. The question remains whether the restriction is reasonable under the circumstances. The Court identified market power as one important issue in the analysis. This is consistent with the view that active interbrand competition will constrain any bad judgments by manufacturers about vertical restrictions. Where there is active interbrand competition, if the restriction does not provide something that consumers value, then consumers will turn to the competing products of other manufacturers. Manufacturers who have market power may still have entirely legitimate reasons to use vertical restrictions, but they are clearly at greater risk in doing so.

The Court also suggested that the rule of reason analysis might be different if all or nearly all the manufacturers in a particular market use vertical price agreements. This is consistent with both the previous point and also the recognition that vertical minimum price agreements can be used to facilitate a manufacturers' cartel. First, if all manufacturers are using similar restrictions, interbrand competition may not provide alternatives to consumers. Second, if all manufacturers are using similar

restrictions, there is a much greater risk that the restrictions might be used to facilitate collusion among the manufacturers. The reason is that resale prices are easier for cartel participants to monitor. If a manufacturer sought to "cheat" on the cartel by lowering its price, all the benefit would go to its retailers unless the retail price were also lowered, which could alert the other cartel participants to the cheating. What all this means is that there is a greater risk under the rule of reason if all the manufacturers use resale price maintenance agreements than if only one does. It will be interesting to see how the law develops in this area. One possibility, of course, is that all the manufacturers choose to use such restrictions because the restrictions are efficient for all of them. Also, this factor means that there could be a problem even though the defendant does not have market power, thus making it harder to use a "market power screen" to weed out cases where harm to competition is unlikely. Finally, the risk for an early adopter of vertical price agreements may change over time if its competitors subsequently follow suit.

In a rule of reason case, an obviously important question will be the business justification for the decision to use resale price maintenance. If the facts show that the manufacturer has a unilateral and economically consistent objective that the restriction could advance, a jury is much more likely to find the restriction to be reasonable. If the manufacturer has no such business justification, it casts doubt on whether the restriction really is vertical, as opposed to something cooked up by the retailers. A legitimate fact question is whether the claimed business objective is pretextual. In this context, it will be interesting to see if the mere desire to secure the services of "better" retailers by guaranteeing them higher margins is viewed as a legitimate business justification.

The Court also expressly left open the possibility that the lower courts might develop further structures for rule of reason analysis that could both provide greater guidance to businesses and also give more structure to litigation in this area. A suggestion along this line was made by two well-known economists who submitted an amicus brief to the Supreme Court. They acknowledged that the *per se* rule of *Dr. Miles* could not be defended, but they suggested that resale price maintenance has more anticompetitive risk than suggested by other economists. They proposed different presumptions depending on the presence of certain market characteristics, rather than an open-ended rule of reason. I believe the Court was correct not to attempt to set forth a new standard other than the rule of reason in Leegin. *Dr. Miles* has precluded serious analysis of these issues since 1911. It is better to let the lower courts wrestle with the issues for a time. For this reason, we decided against suggesting such alternatives in our briefs at the Supreme Court. It is entirely possible, however, that over time new understandings will emerge that might justify a modification to the rule of reason standard.

Significantly, *Leegin* did not change the *Colgate* doctrine. As things now stand, therefore, manufacturers may continue to rely on the use of a "policy" as a first line of defense. In the event that a jury nevertheless finds an "agreement," the manufacturer can still defend under the rule of reason, as Leegin unsuccessfully attempted to do. It will be interesting to see if there is erosion in the *Colgate* doctrine—that is, a tendency to more easily find that an agreement exists—as a result of the elimination of the *per se* rule. The *Colgate* doctrine has provided a degree of flexibility to control resale prices notwithstanding the per se rule. It is certainly possible that courts have been willing to find a "policy" rather than an "agreement" in order to avoid the draconian result under *Dr. Miles*.

VII. CONCLUSION

Leegin is an interesting example of how the common law process works in antitrust. *Sylvania* started that process 30 years ago, incorporating the antitrust thinking of scholars like Robert Bork and Richard Posner. At the time, *Sylvania* was very unusual in that the Supreme Court expressly overruled one of its existing decisions. Prior to that time, it was much more common for the law to evolve through opaque decisions that used the same terminology but reached different results. Over the 30 years since *Sylvania*, the Court, with a shifting cast of Justices, consciously expanded the analysis in *Sylvania* to other related areas.[8] Overturning *Dr. Miles* was clearly the biggest step in that

8 Monsanto (limit inference of agreement based on the legitimacy of communications between manufacturer and retailers), Sharp (limit Dr. Miles to vertical agreements that specify a particular price, thus applying rule of reason to agreement to terminate a "discounter"), State Oil Co. v. Khan, 522 U.S. 3 (1997) (overrule per se rule from Albrecht v. The Herald Co., 390 U.S. 145 (1968) against vertical maximum price agreements).

process, and it almost certainly could not have come first in the progression. But the Court's other decisions essentially dictated the result because it made no sense to have dramatically different standards of analysis for closely analogous practices. With the decision in *Leegin*, manufacturers now can choose between vertical price and non-price restrictions based on the needs of their businesses.[9] This is important because not all businesses can make effective us of non-price restrictions. However, the continuing risk of liability under the rule of reason should ensure that they do so only where there is a legitimate pro-competitive reason for the restrictions.

9 *Leegin* only applies to the federal antitrust laws. The state attorneys general have been active enforcers of the *Dr. Miles per se* rule and actively opposed any modification to it. State laws may continue to forbid vertical minimum price agreements, although decisions under the federal law are persuasive in many states. The antitrust laws of other countries, for example Canada, also forbid vertical price agreements.