

**LEGAL TREATMENT OF VERTICAL RESTRAINTS:
SOME LESSONS FROM THE ONGOING INTERNATIONAL DEBATES**

A Research Paper for the *Fiscalía Nacional Económica*

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I. INTRODUCTION

This research paper—a companion piece to Professor Patrick Rey’s recent report for the FNE¹ regarding the economics of vertical restraints—considers how the important policy implications raised by Professor Rey’s analysis might be translated into effective enforcement standards. As U.S. Supreme Court Justice Stephen Breyer has concluded, economic theory “can, and should, inform [competition] law;” nevertheless, the law, as an administrative system, “cannot, and should not, precisely replicate economist’s (sometimes conflicting) views.”² Thus, it must search for administrable rules that, on balance, maximize consumer welfare. To that end, this paper examines the ongoing debate over the legal treatment of one particular type of vertical restraint, resale price maintenance (RPM³), with the hope that any insights derived can be applied more broadly.

Vertical restraints have been defined to include any

agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under

¹ See Patrick Rey, “Vertical restraints – an economic perspective” (October 13, 2012), available at <<http://www.fne.gob.cl/wp-content/uploads/2012/10/Vertical-restraints.pdf>>.

² *Leegin Creative Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 914-15 (2007) (Breyer, J., dissenting). Justice Breyer noted:

[L]aw, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients.

Id. at 914.

While on the U.S. Court of Appeals for the First Circuit, then-Judge Breyer noted in another opinion:

Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve....

Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1983). In that case, the First Circuit adopted a price-cost test in determining that the challenged discounts at issue were not unlawful under the rule of reason when they remained above any relevant measure of cost. *Id.* at 233.

³ When using the term RPM, this paper is referring to *minimum* resale price maintenance, unless otherwise indicated.

which the parties may purchase, sell or resell certain goods or services.⁴

Some vertical restraints involve commitments about either party's behavior, which includes practices such as RPM, quantity fixing, exclusive dealing, tie-ins, and territorial or customer provisions. Others establish general terms for payments (beyond simply wholesale prices), which can take the form of non-linear tariffs like franchise fees, and progressive or so-called fidelity rebates, as examples. This list is far from exhaustive.⁵

RPM is a vertical restraint that limits *intra*brand price competition—*i.e.*, competition between resellers of the same manufacturer's product—by restricting the price at which retailers may sell that product.⁶ This practice may take many forms, ranging from agreements that directly control the retailer's transaction prices to policies that do so indirectly by, for instance, limiting sales only to resellers that follow the manufacturer's suggested retail prices.⁷ The procompetitive benefits of RPM may include the strengthening of *inter*brand competition by eliminating free-rider problems at the retail level that result in the suboptimal provision of pre-sale advice or other services, or by guaranteeing a margin at the retail level to encourage the promotion of a manufacturer's product.⁸ In other circumstances, however, the practice can result in serious anticompetitive harms, such as the facilitation of manufacturer and retail cartels, the restoration of an upstream firm's ability to exercise market power, and even, in the context of interlocking relationships, the elimination of both *intra*brand and *inter*brand competition.⁹

Perhaps the most well known product of the legal debate concerning RPM has been the U.S. Supreme Court ruling in *Leegin*,¹⁰ a 5-4 decision from June 2007 that overturned the nearly one-hundred-year-old *per se* rule established in *Dr. Miles*¹¹ in favor of a "rule of reason" analysis. The ruling, which harmonized the

⁴ European Commission's Guidelines on Vertical Restraints (2010/C 130/01, 19 May 2010), at ¶ 24, available at <http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf>.

⁵ See Rey, "Vertical restraints," *supra* note 1, at 5-7 (describing different types of vertical restraints).

⁶ Gregory T. Gundlach, "Resale Price Maintenance After *Leegin*: Topics and Questions for Research," FTC Hearings on Resale Price Maintenance (May 20, 2009), at 2. Available at <www.ftc.gov/opp/workshops/rpm/may09/docs/ggundlach_w.pdf>.

⁷ See *id.* at 2-3 for a discussion of various forms of direct and indirect RPM practices.

⁸ Rey, "Vertical restraints," *supra* note 1, at 40.

⁹ *Id.* at 41-44.

¹⁰ *Leegin Creative Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

¹¹ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 200 U.S. 373 (1911).

treatment of RPM in the U.S. with that of other vertical agreements,¹² relied on the existence of procompetitive justifications for the practice identified in the economics literature.¹³ Shortly thereafter, in 2009, the Canadian Competition Act was amended to decriminalize RPM and introduce a market effects approach more in line with the U.S.¹⁴ Under current Canadian law, the Competition Tribunal may prohibit RPM only if it has or is likely to have an adverse effect on competition. Meanwhile, the European Union’s (E.U.) Vertical Restraints Block Exemption Regulation and Guidelines of Vertical Restraints, which took effect in June 2010, acknowledged the potential efficiencies from vertical restraints, but nevertheless retained the “hard core” designation for RPM.¹⁵ Along the way, academics and regulators have come forward with numerous proposals—often variations on a theme—for dealing with RPM.

In working towards the goal of drawing policy lessons from Professor Rey’s insights and the ongoing conversations over RPM, this paper begins in section II with a discussion of decision theory and how that process might inform the debate on legal standards. Section III then turns to RPM and provides a brief summary of the anticompetitive risks and asserted procompetitive rationales associated with the practice, along with the limited empirical research on those subjects. Section IV then discusses RPM in the United States and the impact of *Leegin* at the federal and state levels, where considerable uncertainty still remains more than five years after the demise of *Dr. Miles*. Section V surveys the current standards in the E.U., Canada, Australia and New Zealand, the latter two of which, in contrast to Canada, have retained *per se* treatment of RPM. Section VI then considers additional proposed RPM standards—including various proposals for “structured” rule of reason analyses—and how those frameworks might allow for the legitimate, procompetitive benefits of RPM to be realized in an administratively feasible manner that also protects against anticompetitive abuses.

Section VII concludes with a brief consideration of the Chilean market and whether the particularities of that market counsel in favor or against certain standards. As will be seen throughout, relevant characteristics of the Chilean economy—like many other small economies¹⁶—include a relatively high degree of

¹² See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (applying rule of reason to non-price vertical restraints); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (applying rule of reason to maximum resale price agreements).

¹³ *Leegin*, 551 U.S. at 889 (“Though each side of the debate can find sources to support its position it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer’s use of resale price maintenance.”).

¹⁴ See *infra* Section V.B.

¹⁵ See *infra* Section V.A.

¹⁶ For a discussion of general characteristics of small economies, and implications for competition policy that might follow, see Michal S. Gal, COMPETITION POLICY FOR SMALL MARKET ECONOMIES (2003).

concentration, with some of the most important industries having just a few participants, with *intra*brand competition in many markets being driven by oligopolies. In this context, as Professor Rey notes, strategic behavior between rival vertical structures carries real risks for social welfare. Those risks may mean that RPM—and other vertical restraints—require more careful consideration, and thus different standards, than might be the case in other contexts.

II. DECISION THEORY AND THE DESIGN OF LEGAL STANDARDS

The structure of legal rules in the competition context—including the assignment of burdens of proof and the standards for satisfying those burdens—can play an important role in enforcement of those laws.¹⁷ In the U.S., for instance, the practical difference between litigating a *per se* case compared to a matter decided under the rule of reason is significant. As former FTC Chairman Robert Pitofsky has commented, “rule of reason cases often take years to litigate[,] are extremely expensive” and are “very difficult for a plaintiff (either the government or a private party) to win.”¹⁸ Indeed, commentators have noted that the rule of reason, as applied in the U.S. in the vertical non-price context, has resulted in a *de facto* rule of *per se* legality.¹⁹ That is not the result of non-price restraints never being harmful (as Professor Rey notes, they can be). Rather, it is because the “hurdles for recovery” imposed by U.S. courts applying an unstructured rule of reason standard are so high.²⁰

¹⁷ For an illuminating discussion about policy considerations and legal standards in the context of exclusionary discounts, see Robert H. Lande, “Should Predatory Pricing Rules Immunize Exclusionary Discounts?,” 2006 UTAH L. REV. 879 (2006), available at <<http://ssrn.com/abstract=1121473>>.

¹⁸ Robert Pitofsky, “In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing,” 71 GEO. L.J. 1487, 1489 (1983); see also Marina Lao, “Leegin and Resale Price Maintenance – A Model for Emulation or for Caution for the World,” 39 INT’L REV. I.P. & COMP. L. 253, 257 (2008) (noting that vertical restraint cases under the rule of reason “are notoriously expensive and difficult to litigate, and often degenerate into dueling matches between competing economic experts with contradictory economic theories on market definition, elasticities of demand or supply, entry barriers, and so forth.”)

¹⁹ See, e.g., Douglas H. Ginsburg, “Vertical Restraints: De Facto Legality Under the Rule of Reason,” 60 ANTITRUST L.J. 67 (1991); see also Lao, “Leegin and RPM – A Model for Emulation or for Caution,” *supra* note 18, at 257 (“This litigation reality will likely deter most private RPM suits under a rule of reason standard. Even if federal antitrust enforcers... choose to continue litigating these cases, their resources are limited.”).

²⁰ Richard M. Brunell, “Overruling *Dr. Miles*: The Supreme Trade Commission in Action,” 52 ANTITRUST BULL. 475, 518 (2007). Brunell observes that courts in the U.S. not only make “plaintiffs jump through the ‘agreement’ hoops... established for resale price maintenance,” but also they “have ordinarily required plaintiffs to make a threshold showing that the manufacturer has market power and ‘[m]ost cases have made clear that power will not be inferred unless the defendant’s market share is significant.” *Id.* at 518 n.188 (citing *Parkway*

According to the U.S. Supreme Court, a *per se* prohibition is warranted “only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.”²¹ Based on the procompetitive rationales for RPM identified in the literature, the *Leegin* majority concluded that “it cannot be stated with any degree of confidence that resale price maintenance ‘always or almost always tend[s] to restrict competition and decrease output.’”²² Thus, notwithstanding the potential that RPM might be used in an anticompetitive manner, the court concluded that the *per se* prohibition should give way to a rule of reason standard.

As Justice Breyer observed in his dissent, however, it is not enough simply to note that *sometimes* a practice may be beneficial. Because law is an administrative system, it “cannot, and should not, precisely replicate economists’ (sometimes conflicting) views.”²³ In devising administrable rules, it therefore is inevitable that business practices that “*sometimes* produce benefits” sometimes will be prohibited.²⁴ Accordingly, in addition to asking *whether* the economics literature suggests a practice *can* have procompetitive benefits, it is also necessary to ask “such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?”²⁵ The *Leegin* majority gave only cursory attention to these questions.²⁶

Justice Breyer’s analysis in *Leegin* is consistent with modern decision theory—“a process for making factual determinations and decisions when

Gallery Furn., Inc. v. Kittinger/Pennsylvania House Group, Inc., 878 F.2d 801 (4th Cir. 1989); quoting Areeda & Hovenkamp, *ANTITRUST LAW* (2d ed. 2004) ¶ 1645c, at 404-05).

²¹ *Leegin*, 551 U.S. at 886-87 (internal citations omitted).

²² *Id.* at 894 (quoting *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988)).

²³ *Id.* at 914-15 (Breyer, J., dissenting).

²⁴ *Id.* at 915 (emphasis added).

²⁵ *Id.* at 914.

²⁶ *See id.* at 894 (“[A]lthough the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical.”); *see also id.* at 890 (“The few recent studies documenting the competitive effects of resale price maintenance also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule.”).

Various commentators have questioned the strength of the empirical evidence upon which the *Leegin* majority relied. *See, e.g.*, Marina Lao, “Resale price maintenance: A reassessment of its competitive harms and benefits,” at 31-34 (“The weakness of these two empirical studies is evident from the fact that, while the *Leegin* majority cited them, it also specifically acknowledged that historical examples suggest that the use of RPM to implement and enforce dealer-cartels is a legitimate concern. In short, Ippolito’s conclusion seems to be inconsistent with history, and Overstreet’s conclusion is substantially qualified by his other contrary observations.”), available at <<http://ssrn.com/abstract=1434984>>.

information is costly and therefore imperfect,”²⁷ and a useful framework for analyzing legal standards. Courts or other decision makers, when considering whether to allow or prohibit particular activities, necessarily reach decisions based on limited and imperfect information.²⁸ Those sources of information include presumptions, logical analysis and factual investigation.²⁹ Decision theory helps to determine, among other things, how much information should be gathered in making a decision, and if information is to be gathered, what information is to be gathered, what information should be considered and in what order.³⁰

Following this model, an optimal standard depends on “the configuration of informational presumptions, costs and benefits for a particular case or class of cases.”³¹

- Presumptions are “the initial general and case-specific information known to the decision maker.”³² For instance, in the context of horizontal price fixing, the presumption may be that such conduct tends to harm consumers and is very unlikely to have any efficiency benefits;
- Costs include gathering and evaluating additional information about the conduct; and
- Benefits consist of “the reduced likelihood of factual and judicial error, which depends on the *degree of uncertainty* faced in the absence of the information and the *importance of the issue* to the proper outcome of the case.”³³

Decision theory posits that the proper focus is not simply whether challenged conduct might sometimes be procompetitive. Rather, the analysis also must consider (1) how *frequently* those procompetitive (versus anticompetitive) uses are encountered; (2) the *magnitude* of any benefits (versus harms) from that conduct; and (3) whether, given unavoidable error costs,³⁴ an alternative rule

²⁷ See C. Frederick Beckner III & Steven C. Salop, “Decision Theory and Antitrust Rules,” 67 ANTITRUST L.J. 41 (1999).

²⁸ *Id.* at 43.

²⁹ *Id.*

³⁰ See *id.* at 44 (“Every decision maker faced with imperfect information must resolve three related questions. First, assuming that a decision must be made with imperfect information, what is the optimal decision? Second, how much information should the decision maker gather and consider in making a decision? Third, if information is to be gathered, exactly which information should be considered and in what order?”).

³¹ *Id.* at 75.

³² *Id.*

³³ *Id.* (emphasis added).

³⁴ As Justice Breyer noted, economic theory suggests that even horizontal price-fixing could be more beneficial than “unfettered competition” under some very limited circumstances. See *Leegin*, 551 U.S. at 915 (citing F.M. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE AND

would, on balance, “generally improve consumer welfare and administration of the [competition] laws.”³⁵ This type of analysis can be seen in *Jefferson Parish*,³⁶ in which the Supreme Court—by balancing accuracy versus the costs and benefits of acquiring additional information— provided a justification for the *per se* rule against price fixing:

[T]he rationale for *per se* rules is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct.³⁷

ECONOMIC PERFORMANCE (3d ed. 1990) at 335-39). However, a *per se* rule against horizontal price fixing agreements is justifiable given the potential costs and the difficulties involved in identifying those few scenarios.

³⁵ See Brief of the American Antitrust Institute as *Amicus Curiae* in Support of Respondent, *Leegin Create Leather Prods., Inc. v. PSKS, Inc.*, No. 06-480 (Feb. 26, 2007) at 11. See also Brunell, “Overruling *Dr. Miles*,” *supra* note 20, at 495; Lao, “*Leegin* and RPM – A Model for Emulation or for Caution,” *supra* note 18, at 254 (Modern decision theory “requires focus... on the frequency of [any procompetitive] benefits and [anticompetitive] harms, error costs, and whether an alternative rule would better serve consumer welfare and the administration of the antitrust law.”); Arndt Christiansen & Wolfgang Kerber, “Competition Policy with Optimally Differentiated Rules Instead of “Per Se Rules vs Rule of Reason,” 2 J. COMP. L & ECON. 215, 238 (2006) (applying an “error cost approach,” it is “not sufficient to show that there are cases in which resale price maintenance can lead to positive welfare effects.”).

³⁶ *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2 (1984).

³⁷ *Id.* at 16 n.25. See also *NCAA v. Board of Regents*, 468 U.S. 85, 103 (1984) (“Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”); Beckner & Salop, “Decision Theory and Antitrust Rules,” *supra* note 27, at 62-63.

A test proposed in 1965 by Kaysen & Turner follows a similar rubric and suggests that a *per se* test could be justified when one of the following conditions is met:

- The practice is always harmful;
- The practice is sometimes harmful and sometimes neutral, but never contributes positively to the working of the market; or
- The practice is sometimes harmful, sometimes neutral and sometimes beneficial, but the aggregate of harm in the situations in which it is harmful far outweighs the aggregate of benefit in situations in which it makes a beneficial contribution to the working of the market.

See Warren Pengilley, “Resale price maintenance: An overview of the *per se* ban in light of recent court observations,” 16 COMP. & CONS. L. J. 1, 19 (2008) (citing C. Kaysen & Donald Turner, ANTITRUST POLICY (1965) at 142). Unlike the Beckner & Salop test, however, the

Although Justice Breyer found *per se* treatment of RPM to be a far more difficult call than for price fixing, given the plausible efficiency justifications, nevertheless he questioned the overall utility of engaging in the additional inquiry. Beginning with the initial presumption (studies suggesting that RPM can cause harm with some regularity³⁸), the inquiry considers the potential benefits of gathering additional information about the practice. Justice Breyer asks how frequently the potentially procompetitive uses identified by the majority are encountered in practice, and on this point, he concludes with an “uncertain ‘sometimes,’”³⁹ suggesting the overall benefits of additional inquiry may be modest. With respect to the costs of gathering additional information, these can be significant, often “invit[ing] lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical criteria to often ill-defined markets.”⁴⁰ Finally, how often will engaging in this information gathering decrease errors? Or in Justice Breyer’s words: “How easily can courts identify instances in which the benefits are likely to outweigh potential harms?”⁴¹ His answer: “[N]ot very easily.”⁴² Based on this analysis, Justice Breyer suggested that, were he forced to decide the question, he would opt for a *per se* rule, “slightly modified to allow an exception for the more easily identifiable and temporary condition of ‘new entry’”⁴³—a potential procompetitive use of RPM discussed in the next section.⁴⁴

The same model can provide insights into other possible inquiries beyond a simple rule *per se* rule or full rule of reason analysis, which could lead to more nuanced and better tailored approaches for particular categories of conduct. In *NCAA*⁴⁵ and *Indiana Fed. of Dentists*,⁴⁶ the U.S. Supreme Court recognized the appropriateness of “quick look” approaches to certain classes of restraints, in which efficiency claims could be considered (and sometimes summarily rejected) before engaging in a more extensive inquiry under the rule of reason if necessary. In the

Kaysen & Turner test does not focus so much on the costs and benefits of acquiring additional information.

³⁸ *Leegin*, 551 U.S. at 915 (Breyer, J., dissenting).

³⁹ *Id.* at 916.

⁴⁰ *Id.* at 917.

⁴¹ *Id.* at 916.

⁴² *Id.*

⁴³ *Id.* at 917-18.

⁴⁴ *See infra* at section III.B.1.

⁴⁵ In *NCAA* 468 U.S. 85, the Supreme Court declined to hold that agreements limiting the number of football games each participating college could sell to television was *per se* unlawful, but instead adopted a “quick look” approach under which a detailed market analysis was not required to prove that the defendant had market power and that the restraint had an anticompetitive effect.

⁴⁶ *Fed. Trade Comm’n v. Indiana Fed. of Dentists*, 476 U.S. 447 (1986).

wake of those decisions, the FTC announced in *Mass. Board of Optometry* a “structured” rule of reason approach for what the agency termed “inherently suspect” horizontal restraints.

First, we ask whether the restraint is “inherently suspect.” In other words, is the practice the kind that appears likely, absent an efficiency justification, to “restrict competition and decrease output.” ... If the restraint is not inherently suspect, then the traditional rule of reason... must be applied. But if it is inherently suspect, we must pose a second question: Is there a plausible efficiency justification for the practice... [which] cannot be rejected without extensive factual inquiry[?] If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a third inquiry—is needed to determine whether the justification is really valid.⁴⁷

This structured analysis—which is also consistent with the model described above⁴⁸—was used by the FTC again in *PolyGram Holdings*,⁴⁹ and accepted by the U.S. Court of Appeals for the D.C. Circuit on appeal.⁵⁰

Many commentators have suggested that the *Leegin* majority similarly invited lower courts and enforcement agencies to devise a structured rule of reason approach for RPM. “As courts gain experience considering the effects of these [RPM] restraints by applying the rule of reason over the course of decisions,” the majority wrote,

⁴⁷ *In the Matter of Mass. Bd. of Optometry*, 110 F.T.C. 549, 604 (1990).

⁴⁸ Beckner & Salop, “Decision Theory and Antitrust Rules,” *supra* note 27, at 68.

⁴⁹ *In re PolyGram Holding, Inc.*, FTC No. 9298 (2003). Available at <<http://www.ftc.gov/os/2003/07/polygramopinion.pdf>>.

⁵⁰ Writing for the court, Judge Ginsburg concluded:

If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.

PolyGram Holding, Inc. v. Fed. Trade Comm’n, 416 F.3d 29, 36 (D.C. Cir. 2005) (emphasis added). Because PolyGram failed to identify any such justification for an agreement with a joint venturer to refrain from advertising competing products not part of the joint venture, the D.C. Circuit held that the agreement violated section 5 of the FTC Act, without considering whether there was substantial evidence of actual competitive harm. *Id.* at 38.

they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businessmen. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.⁵¹

The FTC, in *Nine West*, set forth one such approach (as discussed below).⁵²

One problem arises when the probability of so-called Type I (false condemnation of procompetitive conduct) and Type II (failure of condemn anticompetitive conduct) errors cannot be reliably predicted. Probably the most influential view in the U.S. for dealing with this dilemma was advanced by Judge Easterbrook, who argued that erroneous condemnations of procompetitive conduct are apt to have higher costs than “false negatives.”⁵³ In his view, that is because erroneous rulings will not only prevent that economic agent from acting in a beneficial manner, but others that would employ the same or similar conduct.⁵⁴ It would, in short, have a chilling effect on competition. This view has resulted in the adoption of a strong anti-Type I error tendency in the U.S.⁵⁵ However, that bias—which is premised on a strong belief that because most collaborative business conduct is efficient, judges who refuse to condemn such conduct are more likely to be correct than not⁵⁶—is not uncontroversial.⁵⁷ Indeed, the same bias—whatever it may be—might not be appropriate for all categories of conduct.⁵⁸ Moreover, some

⁵¹ *Leegin*, 551 U.S. at 898-99.

⁵² *See infra* section VI.F. *See also infra* section VI.E for a similar *Leegin*-inspired proposal from then-U.S. Assistant Attorney General for Antitrust, Christine A. Varney.

⁵³ *See* Frank H. Easterbrook, “The Limits of Antitrust,” 63 TEX. L. REV. 1 (1984).

⁵⁴ *Id.* at 2.

⁵⁵ *See* Alvin Devlin & Michael Jacobs, “Antitrust Error,” 52 WM. & M. L. REV. 75, 96 (2010). Note, the co-author of that article should not be confused with the author of this paper.

⁵⁶ Easterbrook, “The Limits of Antitrust,” *supra* note 53, at 10.

⁵⁷ *See* Devlin & Jacobs, “Antitrust Error,” *supra* note 55, at 96 n.86.

⁵⁸ *Id.* at 103 (“We find that the likelihood, magnitude, and presence of error are far from homogeneous across case types and business behaviors. Different forms of conduct are likely to give rise to distinct risks of error, even if those risks cannot be precisely quantified. As a result, there is good reason for antitrust law to develop unique standards or rules for each.”).

have questioned whether a particular bias—even if appropriate to the U.S. context—is universally applicable from one economy to another.⁵⁹

Section VI summarizes several tests that have been proposed for dealing with RPM—ranging from *per se* illegality to *per se* legality. Following the model just described, for each of those tests, it should be asked: how often are the anticompetitive harms and any procompetitive benefits likely to occur; how easily the harmful situations can be distinguished from the beneficial situations, the magnitude of the harms and any benefits; and whether any benefits could be achieved through alternative means. This analysis necessarily requires that qualitative judgments be made about the ability of a particular legal institution to detect and deter anticompetitive uses of a practice—either through public or private enforcement mechanisms—and to distinguish accurately between anti- and procompetitive instances. And, as Professor Rey intimates, it also requires that the calculus of benefits and harms be calibrated to the particular economic circumstances of an economy, since the frequency and magnitude of those effects will likely vary.⁶⁰

III. THEORETICAL & EMPIRICAL LITERATURE ON RESALE PRICE MAINTENANCE

The anticompetitive effects of RPM, and possible procompetitive justifications for the practice—which are given more extensive treatment in Professor Rey’s research paper⁶¹—are the subjects of vigorous debate in the economic and legal literature. As discussed in the prior section, however, when considering the appropriate legal treatment of RPM, additional factors must enter the equation, including the frequency and magnitude of any procompetitive benefits and the anticompetitive harms. Moreover, some of the procompetitive benefits might be obtained through less-restrictive alternatives—another consideration to take into account. Unfortunately, while RPM has been the subject of extensive treatment in the theoretical literature, empirical data are limited and the results somewhat ambiguous. Nevertheless, at least some empirical data suggests that RPM is relatively widespread when permitted and results in higher consumer prices. With respect to the frequency of anticompetitive versus procompetitive uses, the empirical evidence is mixed.

⁵⁹ See, e.g., David Lewis, Chairperson, S. Afr. Competition Trib., Speech: Chilling Competition, at 2-4 (basic premises behind the U.S. rule that monopolies are short-lived and markets are self-correcting do not reflect the South African experience), available at <<http://www.icn-capetown.org.za/Publications/Speeches/lewis13.pdf>>.

⁶⁰ Rey, “Vertical restraints,” *supra* note 1, at 47 (suggesting that “[i]n th[e Chilean] context, vertical restraints such as RPM and exclusive dealing must be analyzed carefully, as the possibility of anticompetitive effects is more likely” given certain structural characteristics of the market).

⁶¹ See *id.* at 39-44.

A. Anticompetitive Effects of RPM

1. Increased Consumer Prices

Among the most immediate and direct harmful effects of RPM are increased prices, resulting from the fact that distributors are prevented from lowering their sales prices for that particular brand.⁶² Empirical studies about the effect of RPM in the U.S. before 1975—when, as discussed below, the Miller-Tydings Act permitted states to experiment with RPM⁶³—found that prices in states that had enacted “fair trade” statutes were 19–27 percent higher than in states where RPM was illegal, and that “fair trade” imposed costs on consumers of several billion dollars a year.⁶⁴ Similarly, in an investigation involving use by music companies of “minimum advertised pricing” for compact discs, the FTC estimated that efforts by music companies to support resale prices cost U.S. consumers as much as \$480 million.⁶⁵ Even the procompetitive theories generally rely on higher resale prices as the mechanism for generating other consumer benefits.⁶⁶

Various anticompetitive explanations have been advanced for higher PRM prices, even without evidence of cartelization at either the manufacturer or dealer levels.⁶⁷ For instance, a manufacturer may use RPM to lower downward pressure on

⁶² See Thomas R. Overstreet, Jr., *RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE* (1983) at 12-23; Brief for WS Comanor & FM Scherer as *Amicus Curiae* Supporting Neither Party, *Leegin Creative Leather Prods. v. PSKS, Inc.*, No. 06-480, at 4 (“It is uniformly acknowledged that RPM and other vertical restraints lead to higher consumer prices. And studies have suggested that these higher prices can be substantial.”). See also Marina Lao, “RPM: A reassessment,” *supra* note 26, at 12 n.57 (listing “studies, analyses, and literature indicating that resale price maintenance almost always raises prices”), available at <<http://ssrn.com/abstract=1434984>>.

⁶³ See *infra* at section IV.1.

⁶⁴ See Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary, 94th Cong. 122 (1975) (statement of KI Clearwaters, Deputy Assistant Att’y Gen., Antitrust Division, DOJ). See also F.M. Scherer, Comment on Cooper et al.’s “Vertical Restrictions and Antitrust Policy,” 1 *COMP. POL. INT’L* (Autumn 2005) at 65, 72-74 (summarizing studies showing substantial consumer savings after RPM in light bulb, over-the-counter drugs, blue jeans, and other sectors ended).

⁶⁵ See Fed. Trade Comm’n, “Record Companies Settle FTC Charges of Restraining Competition in CD Music Market,” (May 10, 2000), available at <<http://www.ftc.gov/opa/2000/05/cdpres.shtm>>.

⁶⁶ See Gundlach, “Resale Price Maintenance After *Leegin*,” *supra* note 6, at 10 (“With few exceptions, both the procompetitive and anticompetitive explanations for RPM include higher prices in their descriptions of its competitive effects.”).

⁶⁷ Lao, “RPM: A reassessment,” *supra* note 26, at 14.

its wholesale margins⁶⁸—an issue discussed by Professor Rey.⁶⁹ Limiting intrabrand competition, particularly on popular brands, may lead to higher prices not only for that brand, but also for competing brands sold by multibrand retailers.⁷⁰ Furthermore, use of RPM in markets with substantial brand differentiation may harm consumers by allowing manufacturers and retailers to jointly maximize profits:

Strong brand name acceptance insulates a brand from interbrand competition to a certain extent, giving the manufacturer some power to raise prices even in a relatively competitive market. In this situation, the economic presumption that restrictions on intrabrand competition are benign because of the existence of interbrand competition is questionable.⁷¹

While the U.S. Supreme Court has questioned whether higher prices are necessarily harmful,⁷² others have disagreed with this conclusion, noting that “it seems reasonable to presume anticompetitive effect when a practice consistently results in substantially higher prices on a wide range of products.”⁷³

⁶⁸ EC Vertical Restraint Guidelines, at ¶ 224. The Guidelines note that this may arise in particular when the manufacturer has a commitment problem

i.e. where he has an interest in lowering the price charged to subsequent distributors. In such a situation, the manufacturer may prefer to agree to RPM, so as to help it to commit not to lower the price for subsequent distributors and to reduce the pressure on its own margin.

Id. See also RL Steiner, “How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?,” 65 ANTITRUST L.J. 407, 441 (1997) (intense intrabrand competition minimizes retail markup of that brand, citing case studies involving Levi’s jeans).

⁶⁹ See Rey, “Vertical restraints,” *supra* note 1, at 42 (“[I]mposing an industry-wide retail price floor prevents downstream competition from percolating upwards, thus allowing the upstream firm to exert more fully its market power, at the expense of consumers and society.”).

⁷⁰ Lao, “RPM: A reassessment,” *supra* note 26, at 15.

⁷¹ *Id.*

⁷² See *Leegin*, 551 U.S. at 895; *Khan*, 552 U.S. at 15. See also *Tempur-Pedic*, 626 F.3d at 1339 (“Actual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality. Higher prices alone are not the “epitome” of anticompetitive harm (as [the plaintiff] claims). Rather, consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act.”).

⁷³ Lao, “RPM: A reassessment,” *supra* note 26, at 13-14. See also *National Soc’y of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) (“[p]rice is the ‘central

2. Reduced Retailing Innovation & Efficiency

In addition to higher prices, RPM may impede innovation at the distribution level.⁷⁴ Intrabrand competition provides new entrants with potent competitive tools, namely “the ability to discount popular branded items that draw customers.”⁷⁵ In the U.S., that ability has resulted in “a succession of innovative retailers emerging with new sales formats that consumers have embraced.”⁷⁶

These retail innovations include department stores (e.g. Macys), chain stores (e.g. Walgreen), self-service supermarkets (e.g. Safeway), catalog stores (e.g. Sears); and, more recently, mass-merchandise discounters such as Wal-Mart, specialty stores such as Home Depot, warehouse of ‘big box’ stores such as Best Buy and Costco, and now online stores such as Amazon.com.⁷⁷

nervous system of the economy”)(quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)).

⁷⁴ AAI *Amicus Br.*, *supra* note 35, at 14-15.

⁷⁵ Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* §6.3a2, at 335 (2d ed. 2006).

⁷⁶ Lao, “RPM: A reassessment,” *supra* note 26, at 16.

⁷⁷ *Id.* U.S. Senator Herb Kohl, chairman of the Judiciary Committee’s Antitrust Subcommittee—whose family retail business successfully positioned itself between higher-end department stores and discounters—remarked at a hearing on Leegin:

I know from my own experience in the retail industry decades ago that established retailers can take advantage of vertical price fixing to halt discounting dead in its tracks. In order to eliminate low-price competition from smaller retailers, large retailers can demand that manufacturers forbid discount pricing. These large retailers have the bargaining power with manufacturers to make these demands stick, all to the detriment of upstart discount competitors and consumers....

Sen. Kohl further commented:

In the last few decades, millions of consumers have benefited from an explosion of retail competition from new large discounters in virtually every product, from clothing to electronics to groceries, in both “big box” stores and on the Internet. We have all taken for granted our ability to walk into discount retailers and buy brand name products at sharply discounted prices.

By eliminating price competition between different distributors, however, RPM may dissuade more efficient retailers from entering the market, or hinder the entry and expansion of price discounters or other formats based on low prices.⁷⁸

3. Facilitation of Collusion

Furthermore, the use of RPM can facilitate collusion at the manufacturer or retailer levels. At the manufacturer level, the use of RPM increases transparency in the market, thereby making deviations from a collusive equilibrium by a supplier easier to detect.⁷⁹ RPM provides a disincentive, as well, for a manufacturer to cut prices to its distributors, since the minimum resale price imposed the retail level will preclude it from benefitting from any deviation by expanding sales.⁸⁰ These risks are particularly acute in oligopolistic markets, with a small number of competitors and high entry barriers, when a significant part of the market is covered by RPM agreements.⁸¹ At the distribution level, if organized resellers can

“The Discount Pricing Consumer Protection Act,” Hearings Before the Subcomm. on Antitrust, Comp. Policy & Consumer Rights of the H. Comm. on the Judiciary, 111th Cong. 267 (2009) (statement of Sen. Kohl).

Perhaps not surprisingly, major U.S. discounters, including Costco and eBay, have been vocal supporters of legislation to override *Leegin* and prohibit RPM. See Lao, “RPM: A reassessment,” *supra* note 26, at 17.

⁷⁸ EC Vertical Restraint Guidelines, at ¶ 224; *Leegin*, 551 U.S. at 893 (“A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs.”). See also Robert L. Steiner, “How Manufacturers Deal With the Price-Cutting Retailer: When are Vertical Restraints Efficient?,” 65 ANTITRUST L.J. 407, 424 & n.47 (1997) (“growth of... more efficient new retailing forms often has been seriously retarded by their inability to obtain well-known manufacturers’ brands, free of RPM”).

⁷⁹ EC Vertical Restraint Guidelines, at ¶ 224; *Leegin*, 551 U.S. at 892 (“Resale price maintenance may, for example, facilitate a manufacturer cartel.”); see also AAI *Amicus Br.*, *supra* note 35, at 17-18.

Professor Rey argues that facilitation of collusion at the upstream level

calls for the strongest form of RPM (dictating the retail price, rather than imposing a price cap or a price floor), and not only for market-wide agreements (imposing the same price to all retailers, so as to ensure that the final price of a product is indeed uniform across local markets), rather than bilateral agreements (in which the agreed resale price could vary from one retailer to another), but also industry-wide prevalence (that is, all the manufacturers participating to [sic] the collusion scheme should adopt similar schemes).

Rey, “Vertical restraints,” *supra* note 1, at 41-42.

⁸⁰ EC Vertical Restraint Guidelines, at ¶ 224; *Leegin*, 551 U.S. at 893.

⁸¹ EC Vertical Restraint Guidelines, at ¶ 224; *Leegin*, 551 U.S. at 897.

convince one or more suppliers to establish minimum resale prices above the competitive level, and thereby allowing the resellers to reach or stabilize a collusive equilibrium.⁸²

4. Softening of Competition

Apart from facilitation of cartels, RPM may soften competition at the manufacturer or retailer levels, or both, especially when manufacturers use the same distributors to distribute their products.⁸³ As discussed by Professor Rey in his report for the FNE, recent studies show how RPM can soften competition when two (or more) suppliers sell their products to two (or more) retailers, a situation which could be termed of “interlocking relationships.”⁸⁴ Some empirical studies appear to corroborate the theoretical models.⁸⁵

5. Foreclosure at the Manufacturer Level

Finally, a manufacturer with market power may use RPM to foreclose smaller rivals. By offering increased margins, the manufacturer may entice distributors to favor its brand over rivals when advising customers, even when such advice is not in the interest of the customer, or not to sell the rival brands at all.⁸⁶

Professor Rey, in his report for the FNE, asserts:

In dispersed industries, collusion is unlikely and thus the role of RPM as supporting a dealer cartel or as facilitating collusion among upstream firms is not a serious concern. By contrast, these concerns gain weight in markets with significant entry barriers and a small number of competitors.

Rey, “Vertical restraints,” *supra* note 1, at 45.

⁸² EC Vertical Restraint Guidelines, at ¶ 224; *Leegin*, 551 U.S. at 893 (“Vertical price restraints also might be used to organize cartels at the retailer level. A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance.”)(internal citation omitted).

⁸³ EC Vertical Restraint Guidelines, at ¶ 224; *see also* *AAI Amicus Br.*, *supra* note 35, at 18 (“RPM can be used as a facilitating device not only to enforce an unlawful cartel, but to dampen price competition among oligopolistic manufacturers.”).

⁸⁴ Rey, “Vertical restraints,” *supra* note 1, at 43.

⁸⁵ *Id.* at 43-44.

⁸⁶ EC Vertical Restraint Guidelines, at ¶ 224; *Leegin*, 551 U.S. at (“A manufacturer with market power... might use resale price maintenance to give retailers an incentive not to sell the products of small rivals or new entrants.”).

Actual instances of RPM initiated by dominant firms in face of emerging competition, such as U.S. Standard Fashion, lend support to an exclusionary explanation. *See* Ittai Paldor, “Rethinking RPM: Did the Courts Have It Right All Along?,” Doctoral Dissertation, Graduate

B. Potential Procompetitive Benefits of RPM

1. New Product Introduction

Apart from the competitive risks associated with RPM, the economics literature has identified potential procompetitive applications of the practice. For instance, when a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to provide an incentive for resellers to distribute and promote the product.⁸⁷ When introducing a new product, attracting dealers

may be difficult if dealers fear that their market development investments would be unprofitable. Without RPM, later-appointed dealers, who have incurred no market development costs, would be able to undercut the pioneering dealers' prices making it difficult for the pioneer dealers to reap the benefits of their efforts.⁸⁸

As noted below, this is one of the theories credited by the majority and dissent in *Leegin*, and Justice Breyer suggested a possible exception to the *per se* rule to permit such uses of RPM.⁸⁹ Critics of this theory, however, contend that it merely provides new dealers with unearned windfalls,⁹⁰ and that vertical non-price restraints such as exclusive territories provide a more appropriate mechanism for addressing this issue.

2. Prevention of Free Riding: Classic Theory

Perhaps the most frequently cited justification offered for RPM involves the elimination of free rider problems. Under this theory, some products require special point-of-sale services, such as in-store product demonstrations. If enough customers take advantage from those services but then purchase from a discounter that does not incur the costs of providing those services, high-service retailers may reduce or eliminate services that enhance the demand for the supplier's product.⁹¹ The extra

Department of Law, University of Toronto (2007), at 287-91, available at <<http://ssrn.com/abstract=994750>>.

⁸⁷ EC Vertical Restraint Guidelines, at ¶ 224; *Leegin*, 551 U.S. at 891, 913.

⁸⁸ Lao, "RPM: A reassessment," *supra* note 26, at 23.

⁸⁹ *Leegin*, 551 U.S. at 917-918 ("[I]f forced to decide now, at most I might agree that the *per se* rule should be slightly modified to allow an exception for the more easily identifiable and temporary condition of 'new entry.'")(Breyer, J., dissenting).

⁹⁰ Lao, "RPM: A reassessment," *supra* note 26, at 24 (citing Pitofsky, "In Defense of Discounters," *supra* note 18, at 1495).

⁹¹ EC Vertical Restraint Guidelines, at ¶ 224; *Leegin*, 551 U.S. at 890-91.

margin provided by RPM in theory allows retailers to provide pre-sales services, and thus may help to prevent “free-riding” at the distribution level.⁹²

Economists Klein and Murphy have argued that the standard free-rider theory for RPM is “fundamentally flawed” because it is based on “the unrealistic assumption that sole avenue of nonprice competition available to retailers is the supply of the particular services desired by the manufacturer.”⁹³ Finally, while use of RPM to prevent free riding and increase output, may be profit-maximizing for the manufacturer, “there is no a priori reason to believe that consumers as a whole benefit because most consumers may prefer the lower-priced product without the services.”⁹⁴

3. Prevention of Free Riding in Other Circumstances

A variation of the “classic” free-rider theory involves “quality certification.” According to this theory, when a reputable dealer carries a particular product, that “certifies” the product’s quality or stylishness. “Free riding occurs when discounters who did not invest to develop this reputation sell to consumers who want the product because it has the reputable retailer’s stamp of approval,”⁹⁵ which

⁹² The *Leegin* majority credited this theory as follows:

Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. Consumers might learn, for example, about the benefits of a manufacturer’s product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees.... If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services... the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates this problem because it prevents the discounter from undercutting the service provider.

Leegin, 551 U.S. at 890-91 (internal citations omitted).

⁹³ See Benjamin Klein & Kevin M. Murphy, “Vertical Restraints as Contract Enforcement Mechanisms,” 31 J.L. & ECON. 256, 266 (1988).

⁹⁴ AAI *Amicus Br.*, *supra* note 35, at 20 (citing Comanor & Scherer *Amicus Br.*, *supra* note 62, at 4-5 (noting that Scherer & Ross have shown “that RPM may reduce both consumer and social welfare under a plausible hypothesis regarding the impact on demand for the product”)).

⁹⁵ Lao, “RPM: A reassessment,” *supra* note 26, at 21.

supposedly deters dealers from investing in quality certification.⁹⁶ Critics have noted several problems with this theory, including (a) RPM tends to involve established brands that do not need retailer certification; and (b) RPM does not solve the problem, but merely gives the non-prestige retailer a greater cost advantage over the prestige retailer.⁹⁷ Furthermore, to the extent some manufacturers use RPM to promote a prestigious image for their brand, some commentators have questioned whether that provides a clear *consumer* benefit that warrants recognition by the competition laws.⁹⁸ Indeed, some have argued that this theory encourages consumer deception and is *anticompetitive*.⁹⁹

4. Other Explanations

Other theories positing pro-competitive uses of RPM have also been advanced. Some include:

- RPM as a contract enforcement mechanism, when it manufacturers may face difficulties enforcing contracts with resellers specifying a required level of services;
- RPM as a means of providing incentives to resellers to maintain inventory of a product when consumer demand is uncertain; and
- RPM as a mechanism for correcting for potential bias on the part of resellers towards price competition.¹⁰⁰

Criticism of these theories includes that (a) while they may demonstrate private efficiencies, they do not necessarily enhance consumer or social welfare; (b) RPM is not needed to induce dealer services even absent free-riding, as evidenced by the diversity of dealers that exist in the U.S. and EU at a time when RPM generally has not been permitted; and (c) there are likely less-restrictive alternatives to RPM that could achieve the same objectives.¹⁰¹

⁹⁶ *Id.* (citing HP Marvel & S. McCafferty, “Resale Price Maintenance and Quality Certification,” 15 RAND J. ECON. 346 (1984)).

⁹⁷ *Id.* at 21-22.

⁹⁸ *Id.* at 22.

⁹⁹ See Warren Grimes, “Spiff, Polish, and Consumer Demand Quality, Vertical Price Restraints Revisited,” 80 CAL. L. REV. 815, 834-36 (1992).

¹⁰⁰ Lao, “RPM: A reassessment,” *supra* note 56, at 24-26. See also Gundlach, “Resale Price Maintenance After *Leegin*,” *supra* note 8, at 9 (mentioning other rationales that have been offered, including limiting destructive competition and retailer allocation).

¹⁰¹ *Id.* at 26-31; see also AAI *Amicus Br.*, *supra* note 35, at 21-22 (“Any procompetitive effects of RPM can be achieved by less restrictive means that do not prevent efficient retailers from passing on the benefits of their efficiency to consumers.”).

C. Prevalence of Resale Price Maintenance

Information regarding the prevalence of RPM in an economy is an important consideration in assessing the potential magnitude of harms or benefits that might result from the practice. A 2008 review of studies on this question finds that, “[c]onceding the generalisations and qualifications made in these estimates and their inherent imprecision, it can nonetheless be fairly concluded that resale price maintenance was, when legal, a practice commonly accepted and widespread.”¹⁰² The review noted that, prior to legislative controls being enacted, 25-28 percent of goods were subject to RPM in Sweden, 25-38 percent in Britain, and 25 percent in Australia.¹⁰³ In Canada, before the prohibition of RPM in 1951, 20 percent of goods sold through grocery stores, and 60 percent sold through drugstores, were subject to RPM.¹⁰⁴ While the U.S. Supreme Court in *Leegin* cited one survey estimating that RPM agreements applied to no more than ten percent of consumer goods, and another placing the number at between four and ten percent,¹⁰⁵ the U.S. estimates are not comparable to those previously cited since the former refer only to *agreements* and therefore do not account for the entirety of the practice.¹⁰⁶ With respect to the use of RPM in the U.S. following *Leegin*, there is some anecdotal evidence of increased prevalence,¹⁰⁷ but does not appear to be any definitive answer to this question.

D. Prevalence of Pro- Versus Anticompetitive Uses of RPM

Another critical consideration in assessing how the law should deal with RPM relates to the frequency with which the practice is used in procompetitive,

¹⁰² Pengilley, “Resale price maintenance: An overview,” *supra* note 37, at 10.

¹⁰³ *Id.*

¹⁰⁴ Lilla Csorgo, “Resale Price Maintenance Provisions: Who has it Right?,” at 11 (citing F.M. Scherer and D. Ross, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (3d ed. 1990) at 549), available at <<http://w3.unisa.edu.au/crma/docs/CCW%202011/Paper%20and%20Commentaries/Day2session1.pdf>>.

¹⁰⁵ *Leegin*, 551 U.S. at 907 (“It is also of note that during this time ‘when the legal environment in the [United States] was more favorable for [resale price maintenance], no more than a tiny fraction of manufacturers ever employed [resale price maintenance] contracts.... [N]o more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases, even employed [resale price maintenance] in any single year in the [United States].”).

¹⁰⁶ Pengilley, “RPM: An overview,” *supra* note 37, at 17-18.

¹⁰⁷ *See infra* at n.161. *See also* Gundlach, “Resale Price Maintenance After *Leegin*,” *supra* note 7, at 4 (“[W]hether RPM would increase post-*Leegin* no longer appears to be as much a question as it once was[.]... Following modern trends in application of the rule of reason commentators predicted that RPM would increase post-*Leegin* and anecdotal reports since the decision appear to bear out that the practice has increased.”).

versus anticompetitive, manners. Unfortunately, on this point, the empirical evidence is limited, and the conclusions ambiguous.

While there appear to be some examples of RPM-facilitated cartels,¹⁰⁸ empirical data on the frequency of such collusion is inconclusive. One study, which sampled litigated RPM cases in the U.S. between 1976 and 1982, concluded that the conduct alleged generally was not consistent with manufacturer or reseller cartel theories.¹⁰⁹ As Justice Breyer and other critics have pointed out, however, the study “equates the failure of plaintiffs to *allege* collusion with the *absence* of collusion.”¹¹⁰ A second study, which examined RPM cases brought by U.S. federal enforcement agencies between 1890 and 1983, concluded that 36 percent might have involved retailer or manufacturer cartels, and that of those, manufacturer cartels may have accounted for a quarter to a third.¹¹¹ Commentators have noted, however, that because RPM was a *per se* offense, “it is likely the US enforcement agencies would not have taken the trouble to prove the existence of conspiracy in addition to RPM but in the most obvious of cases,” thus probably understating the frequency of the practice.¹¹² A third study reviewed 68 RPM cases brought by the FTC between 1965 and 1982, and concluded that the majority of those “was not likely motivated by collusive dealers who had successfully coerced their suppliers,” though the author has acknowledged limitations in the data.¹¹³

¹⁰⁸ Examples of RPM-facilitated collusion at the manufacturer level include *United States v. General Elec. Co.*, 82 F. Supp. 753, 765-66 (1949), and *United States v. General Elec. Co.*, 358 F. Supp. 731 (1973). See Lao, “RPM: A reassessment,” *supra* note 26, at 19 & n.78. An example of RPM-facilitated collusion at the retailer level may include *Dr. Miles*. See Herbert Hovenkamp, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2005) at 186; *Leegin*, 551 U.S. at 893 (“Historical examples suggest this possibility [of retail cartel facilitation] is a legitimate concern.”).

¹⁰⁹ Pauline M. Ippolito, “Resale Price Maintenance: Empirical Evidence from Litigation,” 34 J.L. & ECON. 263 (1991)

¹¹⁰ *Leegin*, 551 U.S. at 920 (Breyer, J., dissenting) (citing H. Hovenkamp, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* (3d ed. 2005) §11.3c, at 464 & n.19). Critics have noted other problems with the study, some of which Ippolito also appears to recognize. See Lao, “RPM: A reassessment,” *supra* note 26, at 32.

¹¹¹ Stanley I. Ornstein, “Resale Price Maintenance and Cartels,” 30 ANTITRUST BULL. (1985) at 431.

¹¹² Csorgo, “Resale Price Maintenance Provisions: Who has It Right?,” *supra* note 104, at 16-17.

¹¹³ Overstreet, *RESALE PRICE MAINTENANCE*, *supra* note 62, at 66, 80.

Ittai Paldor concludes “that one should be rather suspicious of theoretical arguments according to which RPM as an enforcement tool for a retailers’ cartel is implausible or even impossible... the history of RPM makes a very persuasive case that... retailer collusion is not simply an academic curiosity.” Regarding manufacturer cartels, Paldor concludes, based on a review of cases, that while “there are not many RPM systems that clearly fit the

With respect to the classic free rider theory, Professors Comanor and Scherer have noted the “skepticism in the economic literature about how often [free riding] occurs.”¹¹⁴ As critics have noted, few products actually require demonstrations or pre-sale services, particularly in many of the instances in which the use of RPM has been observed, such as boxed candies, pet food, jeans, shampoo, men’s underwear or music CDs.¹¹⁵ Comanor and Scherer further point to the *Toys “R” Us*¹¹⁶ litigation—where “free rider” claims were raised by the defendant and rejected by the FTC and the U.S. Court of Appeals for the Seventh Circuit—as a cautionary lesson that “that arguments supporting RPM and other vertical restraints on free-riding grounds should not be accepted without the most careful analytic and factual scrutiny.”¹¹⁷

IV. RESALE PRICE MAINTENANCE IN THE UNITED STATES

The economics literature summarized by Professor Rey have resulted in a transformation in U.S. law regarding vertical restraints generally, and RPM in particular, as insights about potential procompetitive justifications for those restraints have gained acceptance by the courts.

A. Brief Pre-*Leegin* History of RPM in the United States

In 1911, the U.S. Supreme Court adopted a *per se* rule against minimum RPM in *Dr. Miles* decision.¹¹⁸ Eight years, however, the Supreme Court held that a manufacturer, acting unilaterally—*i.e.*, without the agreement of its resellers—could

manufacturers’ cartel explanation” some clearly do. Moreover, Paldor concludes that use of RPM to facilitate manufacturer cartels is more than a theoretical possibility. *See* Paldor, “Rethinking RPM: Did the Courts Have It Right All Along?,” *supra* note 86.

There are at least two additional surveys of recent studies on RPM: the first, by four members of the FTC staff, *see* J. Cooper, L. Froeb, D. O’Brien & M. Vita, “Vertical Restrictions and Antitrust Policy: What About the Evidence,” 1 COMP. POL’Y INT’L 45 (2005); the second, by Francine Lafontaine and Margaret Slade, *see* F. Lafontaine & M. Slade, “Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy,” HANDBOOK OF ANTITRUST ECONOMICS 391(2008). As Professor Lao notes, the former has been harshly criticized. Lao, “RPM: A reassessment,” *supra* note 26, at 33-34. With the second, the authors themselves acknowledged problems stemming largely from the very limited amount of empirical evidence available. *Id.* at 34.

¹¹⁴ Comanor & Scherer *Amicus Br.*, *supra* note 62, at 6.

¹¹⁵ Lao, “RPM: A reassessment,” *supra* note 26, at 20-21.

¹¹⁶ *In re Toys “R” Us, Inc.*, FTC No. 9278 (Oct. 13, 1998), *aff’d sub nom.*, *Toys “R” Us, Inc. v. Fed. Trade Comm’n*, 221 F.3d 928 (7th Cir. 2000).

¹¹⁷ Comanor & Scherer *Amicus Br.*, *supra* note 62, at 6-7 (emphasis added).

¹¹⁸ *Dr. Miles*, 220 U.S. at 394, 408-09 (holding that an agreement between a medicine manufacturer and its dealers to fix the minimum resale prices for those medicines to be invalid under section 1 of the Sherman Act).

refuse to deal with distributors that did not adhere to suggested retail prices.¹¹⁹ This exception to the *per se* rule became known as the “*Colgate doctrine*,” and over the next several decades, the Supreme Court would redefine its boundaries.¹²⁰

In 1937, during the Great Depression, the U.S. Congress enacted the Miller-Tydings Fair Trade Act, which amended section 1 of the Sherman Act to make vertical price fixing agreements lawful under federal law when authorized by fair trade laws at the state level.¹²¹ Fifteen years later, in 1952, Congress extended this exemption in the McGuire Act to permit those vertical price agreements to be enforced against other distributors not involved in the agreement.¹²² Ultimately, thirty-six of the fifty states enacted “fair trade” legislation permitting vertical price fixing agreements before Congress passed the Consumer Goods Pricing Act in 1975, repealing both the Miller-Tydings and McGuire Acts.¹²³ Support for the repeal of these Acts in 1975 came from evidence suggesting that use of RPM in the states that had enacted “fair trade” legislation resulted in higher consumer prices.¹²⁴

In the years leading up to *Leegin*, state attorneys general actively pursued minimum RPM cases.¹²⁵ During the latter years of the first Bush administration, and throughout the Clinton administration, the FTC and U.S. Department of Justice also actively pursued RPM matters, bringing more than a dozen cases.¹²⁶

¹¹⁹ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

¹²⁰ The U.S. Supreme Court curtailed the *Colgate doctrine* during the Warren Court, and subsequently expanded it following enactment in 1975 of the Consumer Goods Pricing Act. After the Supreme Court held that the rule of reason applied to non-price vertical restraints in *Sylvania*, 433 U.S. 36, it subsequently heightened the burden of proof required for establishing the existence of an agreement (as opposed to purely unilateral conduct) in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). It also narrowed the definition of a “price” versus “non-price” agreement in *Sharp Electronics*, 485 U.S. 752. See Brunell, “Overruling *Dr. Miles*,” *supra* note 20, at 477-78.

¹²¹ 50 Stat. 693 (1937). As Richard Brunell notes, the Miller-Tydings Act has been the only substantive amendment made to section 1 of the Sherman Act in its entire history, dating to 1890. See Brunell, “Overruling *Dr. Miles*,” *supra* note 20, at 477 n.8.

¹²² 66 Stat. 631 (1952). This statute responded to a narrow reading by the U.S. Supreme Court of the Miller-Tydings Act in *Schewgmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). See Brunell, “Overruling *Dr. Miles*,” *supra* note 20, at 477 n.9.

¹²³ Pub. L. No. 94-145, 89 Stat. 801 (1975).

¹²⁴ See *supra* notes 63-64 and accompanying text.

¹²⁵ See Brief for the States of New York et al. as *Amicus Curiae* Supporting Respondent, *Leegin Creative Products, Inc. v. PSKS, Inc.*, No. 06-480.

¹²⁶ FTC cases include: *In re Nintendo of America Inc.*, 114 F.T.C. 702 (1991); *In re Kreepy Krauly USA, Inc.*, 114 F.T.C. 777 (1991); *In re The Keds Corp.*, 117 F.T.C. 389 (1994); *In re Reebok Int’l, Ltd.*, 120 F.T.C. 20 (1995); *Fed. Trade Comm’n v. Onkyo U.S.A. Corp.*, 1995-2 Trade Cas. (CCH) ¶ 71,111 (D.D.C. 1995); *In re New Balance Athletic Shoe, Inc.*, 122 F.T.C.

B. Evolution of U.S. Treatment of Vertical Restraints Pre-*Leegin*

Around the same time as the repeal of the Miller-Tydings and McGuire Acts in 1975, a transformation began in the treatment of vertical restraints under U.S. law. Not many years earlier, in 1967, the Supreme Court had held in *Schwinn*¹²⁷ that the vertical non-price restraints at issue in that case—agreements by a bicycle manufacturer assigning exclusive territories to its distributors, and imposing exclusive dealing restrictions on its retailers—were *per se* unlawful under the Sherman Act. The next year, in *Albrecht*,¹²⁸ the Supreme Court ruled that *maximum* resale price maintenance fell within the same *per se* prohibition that had been established more than fifty years earlier in *Dr. Miles*.¹²⁹

Less than a decade later, however, in *Sylvania*,¹³⁰ the Supreme Court reversed *Schwinn* and held that non-price vertical restraints would be examined under the

137 (1996); *In re American Cyanamid Co.*, 123 F.T.C. 1257 (1997); *In re Nine West Group, Inc.*, No. C-3937, 2000 WL 250227 (F.T.C.); and *In re Sony Music Entertainment, Inc.*, No. C-3971, 2000 WL 1257799 (F.T.C.).

U.S. Department of Justice cases include: *United States v. Canstar Sports USA, Inc.*, 1993-2 Trade Cas. (CCH) ¶ 70,372 (D. Vt. 1993); *United States v. California SunCare, Inc.*, 1994-2 Trade Cas. (CCH) ¶ 70,843 (C.D. Cal. 1994); *United States v. Playmobil USA, Inc.*, 1995-1 Trade Cas. (CCH) ¶ 71,000 (D.D.C. 1995); *United States v. Anchorshade, Inc.*, 1996-2 Trade Cas. (CCH) ¶ 71,640 (S.D. Fla. 1996); and *United States v. Brush Fibers, Inc.*, 1997-2 Trade Cas. (CCH) ¶ 71,915 (E.D. Pa. 1996).

¹²⁷ *United States v. Arnold, Schwinn & Co.*, 338 U.S. 365 (1967).

¹²⁸ *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

¹²⁹ The Supreme Court in *Albrecht* described the potential anticompetitive harms from maximum RPM as follows:

Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices.

Id. at 152-53.

¹³⁰ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

rule of reason. Using an analysis consistent with the model described above,¹³¹ the court stated:

Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases *are not sufficiently common or important* the time and expense necessary to identify them.¹³²

Pointing to the insights of the economics literature concerning vertical non-price restraints, the Supreme Court in *Sylvania* observed that “[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.”¹³³ The court then credited various ways in which “manufacturers can use such restrictions to compete more effectively against other manufacturers.”¹³⁴ Based on these potential procompetitive justifications—which are among those discussed above¹³⁵—the Supreme Court

¹³¹ See Beckner & Salop, “Decision Theory and Antitrust Rules,” *supra* note 27, at 63.

¹³² *Sylvania*, 433 U.S. at 50 n.16 (quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609-610 (1972)) (emphasis added).

¹³³ *Id.* at 54.

¹³⁴ *Id.* at 55.

¹³⁵ The justifications credited by the Supreme Court in *Sylvania* include:

[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.

decided that non-price vertical restraints do not satisfy the criteria for application of a *per se* prohibition, *i.e.*, that the “restrictions have or are likely to have a ‘pernicious effect on competition’ or that they ‘lack... any redeeming virtue.’”¹³⁶

In 1997, the Supreme Court extended the holding in *Sylvania*—which until then had applied only to *non-price* restraints—to *maximum* resale price agreements in *Khan*.¹³⁷ In overruling *Albrecht*, the court noted that the concerns articulated in that case “can be appropriately recognized and punished under the rule of reason.”¹³⁸ It concluded, however, that *per se* treatment of the practice was inappropriate, both because the potential harms were less serious than previously imagined, the *per se* rule itself may actually harm consumers by, for instance, “exacerbat[ing] problems related to the unrestrained exercise of market power by monopolist-dealers.”¹³⁹

C. *Leegin Creative Products, Inc. v. PSKS, Inc.*

Ten years after *Khan*, the Supreme Court addressed *minimum* RPM in *Leegin*. The case arose as a dispute between the designer and manufacturer of leather goods and accessories and one its dealers. In 1991, Leegin began to sell belts under the “Brighton” brand name, eventually expanding to more than 5,000 dealers—mostly small boutiques and specialty stores—across the U.S.¹⁴⁰ In 1997, Leegin instituted a retail pricing and promotion policy under which it refused to sell to retailers that discounted Brighton products below suggested prices.¹⁴¹ The claimed rationale for this policy was “to give its retailers sufficient margins to provide customers the service central to its distribution strategy” through specialty stores.¹⁴² In December 2002, Leegin discovered that PSKS, which operated a women’s apparel store called Kay’s Kloset, had been discounting Brighton products to compete with other retailers who had been selling below Leegin’s suggested prices.¹⁴³ When Kay’s Kloset refused to cease discounting, Leegin ceased selling to the store, resulting in considerable harm to the store’s revenues.¹⁴⁴ PSKS then sued Leegin, alleging

Id. at 55.

¹³⁶ *Id.* at 58.

¹³⁷ *State Oil v. Khan, Inc.*, 522 U.S. 3 (1997).

¹³⁸ *Id.* at 17.

¹³⁹ *Id.* at 18.

¹⁴⁰ *Leegin*, 551 U.S. at 882.

¹⁴¹ *Id.* at 883.

¹⁴² *Id.*

¹⁴³ *Id.* at 884.

¹⁴⁴ *Id.*

violations of the Sherman Act by *inter alia* “enter[ing] into agreements with retailers to charge only those prices fixed by Leegin.”¹⁴⁵

In its 5-4 decision, the Supreme Court reversed *Dr. Miles* and held that, similar to other vertical restraints, the rule of reason was applicable to minimum RPM. Beginning from the premise that *per se* rules are applicable only to conduct that “would be invalidated in all or almost all instances under the rule of reason,”¹⁴⁶ the majority noted various procompetitive justifications for RPM that have been identified in the economics literature (and discussed above), including:

- Stimulation of interbrand competition¹⁴⁷ by encouraging retail services that might otherwise not be provided if discounting retailers can “free ride” on retailers that furnish those services;¹⁴⁸
- Facilitation of market entry for new firms and brands;¹⁴⁹ and
- Encouragement of retailer services that would not be provided even absent free riding concerns.¹⁵⁰

At the same time, the majority recognized that RPM could result in anticompetitive harms, such as the facilitation of manufacturer or retail cartels;¹⁵¹ and abuse by a powerful manufacturer or retailer to, for example, discourage entry

¹⁴⁵ *Id.* Leegin argued before the district court that it had not entered into actual agreements with any resellers, but rather had established a lawful unilateral pricing policy in accordance with the *Colgate* doctrine. The jury, however, sided with the plaintiff, and Leegin did not pursue the *Colgate* defense on appeal. *See id.* at 884-85.

¹⁴⁶ *Id.* at 886-87. The *Leegin* majority went on to note: “It should come as no surprise, then, that ‘we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.’” *Id.* at 887 (quoting *Khan*, 522 U.S. at 10).

¹⁴⁷ Citing its earlier decision in *Khan*, the majority stated that the promotion of interbrand competition is “the primary purpose of the antitrust laws.” *Id.* at 890. This proposition is by no means generally accepted. *See* Warren S. Grimes, “Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints,” 64 ANTITRUST L.J. 83 (1995-96) (proposing an “approach to vertical restraints that focuses on brand merchandising and the intrabrand competition that it generates,” which “disciplines any downstream market power associated with brand merchandising.”).

¹⁴⁸ *Leegin*, 551 U.S. at 890-91.

¹⁴⁹ *Id.* at 891.

¹⁵⁰ *Id.* at 891-92. Some of these potential benefits (discussed above) that were mentioned by the *Leegin* majority include: specification of services to be provided by a retailer when it may be difficult or inefficient for a manufacturer to make and enforce a contract to that effect; and motivating retailers to stock adequate inventories of a manufacturer’s goods when consumer demand might be uncertain.

¹⁵¹ *Id.* at 892-93.

or forestall innovation.¹⁵² Based on the limited empirical evidence available, the majority concluded that efficient uses of RPM are not unusual or rare.¹⁵³

In adopting the rule of reason, the Supreme Court suggested various screens that might be used to distinguish procompetitive from anticompetitive scenarios. Those include whether retailers were the impetus for the practice—in which case there may be a greater likelihood of a retailer cartel or exclusion by a dominant retailer—and whether the relevant retailer or manufacturer has market power.¹⁵⁴

Justice Breyer, writing for the minority, agreed that RPM sometimes could be beneficial. He found there to be no consensus, however, regarding the frequency with which RPM might be procompetitive,¹⁵⁵ and questioned whether courts, as a practical matter, easily identify those instances, even with the screens suggested by the majority.¹⁵⁶ Finally, placing considerable emphasis on *stare decisis*, Justice Breyer concluded that “no change in circumstances” since *Dr. Miles* was first decided justified changing the long-established *per se* rule in the U.S. at the federal level.

D. RPM in the U.S. Post-*Leegin*

Soon after *Leegin* was decided, proposed legislation was introduced in the U.S. Congress that would statutorily overturn the ruling and restore the *per se* rule

¹⁵² *Id.* at 893-94.

¹⁵³ *Leegin*, 551 U.S. at 894 (quoting Overstreet, RESALE PRICE MAINTENANCE, *supra* note 62, at 170 (noting that “[e]fficient uses of [resale price maintenance] are evidently not unusual or rare”)).

¹⁵⁴ *Id.* at 897-98.

¹⁵⁵ *Id.* at 915-16 (Breyer, J., dissenting).

¹⁵⁶ With respect to potential screens, Justice Breyer wrote:

How easily can courts identify instances in which the benefits are likely to outweigh the potential harms? My own answer is, *not very easily*. For one thing, it is often to identify *who*—producer or dealer—is the moving force behind any given resale price maintenance agreement. Suppose, for example, several large multibrand retailers all sell resale-price-maintained products. Suppose further that small producers set retail prices because they fear that, otherwise, the larger retailers will favor (say, by allocating better shelf-space) the goods of other producers who practice resale price maintenance. Who “initiated” this practice, the retailers hoping for considerable insulation from retail competition, or the producers, who simply seek to deal best with the circumstances they find?

Id. at 916-17 (emphasis in original).

at the federal level.¹⁵⁷ “Repealer” statutes also have been proposed (and in one instance, enacted¹⁵⁸) at the state level. Even in the absence of legislation, however, state courts are not necessarily certain to follow *Leegin*.¹⁵⁹ As a consequence, uncertainty remains about the status of RPM, and enforcement officials in several states—including some large jurisdictions such as California—continue to demonstrate a willingness to pursue RPM as a *per se* offense under state law.¹⁶⁰

¹⁵⁷ See, e.g., S. 2261 (110th) (“Discount Pricing Consumer Protection Act”). During recent confirmation hearings before the U.S. Senate Judiciary Committee, William Baer, who was nominated to serve as Assistant Attorney General in charge of the U.S. Department of Justice’s Antitrust Division, indicated that he “would have kept *Dr. Miles*” and supported legislative efforts to restore the *per se* standard for RPM. See “Senate Judiciary Committee Considers Antitrust Chief Nomination,” *Antitrust Connect Blog* (July 31, 2012), available at <<http://antitrustconnect.com/2012/07/31/senate-judiciary-committee-considers-antitrust-chief-nomination/>>.

¹⁵⁸ See MD. CODE ANN., COM. LAW § 11-204(b) (West 2012) (defining any “contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service” to be an unreasonable restraint of trade or commerce).

¹⁵⁹ For instance, in *O’Brien v. Leegin Creative Leather Prods., Inc.*, 277 P.3d 1062 (Kan. 2012), a putative class action based on the same basic facts as the U.S. Supreme Court’s *Leegin* decision, the Kansas Supreme Court held that “[t]he clear statutory language” of the state antitrust statute makes RPM agreements *per se* unlawful. *Id.* at 1083 (noting that the Kansas antitrust statute, however, is not patterned on the Sherman Act).

In contrast, in *People v. Tempur-Pedic Int’l, Inc.*, 95 A.D.3d 539 (N.Y. App. Div. 2012), an intermediate appellate court in the State of New York affirmed the dismissal of an RPM claim brought by the New York Attorney General.

Although many state antitrust statutes include “federal harmonization clauses” directing, in one way or another, state courts to give consideration to federal antitrust rulings interpreting similar provisions under the Sherman Act, differences have arisen in other contexts as well, such as the federal bar on indirect purchaser standing. See, e.g., *Comes v. Microsoft Corp.*, 646 N.W. 2d 440 (Iowa 2002) (declining to follow *Illinois Brick* notwithstanding harmonization clause); *Bunker’s Glass Co. v. Pilkington plc.*, 75 P.3d 99 (Ariz. 2003); *Arthur v. Microsoft Corp.*, 676 N.W.2d 29 (Neb. 2004).

¹⁶⁰ For a more thorough treatment of RPM at the state level, see, e.g., Michael A. Lindsay, “From the Prairie to the Ocean: More Developments in State RPM Law,” ANTITRUST SOURCE (August 2012); see also Michael A. Lindsay, “A Tale of Two Coasts: Recent RPM Enforcement in New York and California,” ANTITRUST SOURCE (April 2011) (noting that the California Attorney General, post-*Leegin*, obtained a consent decree under state law against a company that had entered into RPM agreements with independent resellers in California).

Professor Gavil has noted, with respect to the potential “Balkanization” of RPM treatment in the U.S. at the state level, that

if firms inclined to use RPM craft distribution strategies that utilize RPM in states where it is presumptively legal, while avoiding it in states where it is not, natural experiments

Whether or not the prevalence of RPM in the U.S. post-*Leegin* has increased, and the effect of any confusion at the state level on the implementation of RPM policies, appear to be open questions.¹⁶¹

At least three federal appellate courts have addressed RPM since *Leegin*, and these decisions provide illustrate some of the issues involved in litigating an RPM case under the rule of reason. In *Toledo Mack*,¹⁶² the U.S. Court of Appeals for the Third Circuit concluded that the plaintiff, a Mack truck dealer, had presented sufficient evidence under the rule of reason of an unlawful RPM agreement between the manufacturer and its dealers. In reaching its decision, the Third Circuit noted that two of the *Leegin* “plus” factors¹⁶³—evidence that retailers were the impetus of the vertical price restraint, and use by a dominant manufacturer—were particularly relevant.¹⁶⁴ First, the plaintiff presented evidence that the manufacturer agreed to support the horizontal agreement among its dealers, which the court concluded was sufficient to establish the illegal object of the agreements.¹⁶⁵ Second, the plaintiff established that the manufacturer possessed market power in two relevant product markets, which was sufficient to meet the plaintiff’s burden of proving anti-competitive effects in the relevant market.¹⁶⁶ While *Toledo Mack* demonstrates that

could result that would provide some needed empirical data for studying the uses and abuses of PRM.

Andrew Gavil, “Resale Price Maintenance in the Post-*Leegin* World: A Comparative Look at Recent Developments in the United States and European Union,” CPI ANTITRUST J. (June 2010) at 2, available at <<http://www.competitionpolicyinternational.com/resale-price-maintenance-in-the-post-leegin-world-a-comparative-look-at-recent-developments-in-the-united-states-and-european-union/>>.

¹⁶¹ Professor Lao notes the existence of some anecdotal evidence “that many suppliers have already acted on *Leegin* to require retailers to enter into minimum-pricing pacts and have cut them off when they priced below the set minimums.” See Marina Lao, “Resale price maintenance: A reassessment of its competitive harms and benefits,” at 9-10, available at <<http://ssrn.com/abstract=1434984>>.

¹⁶² *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008).

¹⁶³ J. Thomas Rosch, “Developments in the Law of Vertical Restraints: 2012,” at 16 (characterizing these as *Leegin* “plus” factors), available at <<http://www.ftc.gov/speeches/rosch/120507verticalrestraints.pdf>>.

¹⁶⁴ *Toledo Mack*, 530 F.3d at 225.

¹⁶⁵ *Id.* at 226. The Third Circuit identifies four factors as relevant to analyzing a restraint under the rule of reason: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy. *Id.* at 225 (quoting *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 464-65 (3d Cir. 1998)).

¹⁶⁶ *Id.* at 226.

a plaintiff can prevail in a rule of reason RPM case, it nevertheless also provides a glimpse at the considerable burdens associated with doing so, even when one or more *Leegin* plus factors is present.

Some courts have applied the strict standard articulated by the U.S. Supreme Court in *Twombly*¹⁶⁷ to dismiss RPM cases at the pleading stage—*i.e.*, before any evidence is even introduced. In the *Leegin* case itself, following remand to the district court, plaintiff filed an amended complaint, which was subsequently dismissed on the basis that the relevant market alleged was defective as a matter of law.¹⁶⁸ The U.S. Court of Appeals for the Fifth Circuit affirmed.¹⁶⁹ In so doing, the Fifth Circuit noted that because “even anticompetitive uses of RPM do not create concern unless the relevant entity has market power,” a market-power screen is “compatible with *Leegin* and our precedent and that of our sister circuits.”¹⁷⁰ Given the procedural posture of the case, however, the screen applied potentially creates a “safe harbor” of *de facto per se* legality for RPM under certain circumstances.

In *Tempur-Pedic*,¹⁷¹ the U.S. Court of Appeals for the Eleventh Circuit similarly concluded that the plaintiff failed to plead a proper relevant market with sufficient factual detail to survive a challenge under *Twombly*.¹⁷² It went even further, though, and held that, even the relevant market proposed by the plaintiffs—in which the defendant had an 80-90 percent market share—were accepted, dismissal would still be required because the complaint did not provide “direct evidence of the injurious exercise of market power,” such as *marketwide* price increases.¹⁷³ Again, this decision suggests that successfully prosecuting an RPM case under the rule of reason could prove difficult, unless—as discussed below—courts follow the FTC’s suggestion of following a “structured” approach.¹⁷⁴

¹⁶⁷ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁶⁸ *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 2009 WL 938561 (E.D. Tex. 2009).

¹⁶⁹ *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412 (5th Cir. 2010) (citations and footnotes omitted), *cert. denied*, 131 S. Ct. 1476 (2011).

¹⁷⁰ *Id.* at 418-19. *See also Spahr v. Leegin Creative Leather Prods., Inc.*, 2008 WL 3914461 (E.D. Tenn. 2008) (dismissing complaint for failure to plead a proper relevant market).

¹⁷¹ *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327 (11th Cir. 2010).

¹⁷² The dissent questions whether the proper scope of the relevant market, which is a “detailed and complicated” analysis, can be determined on a motion to dismiss. *Id.* at 1345-46 (Ryskamp, J., dissenting).

¹⁷³ *Id.* at 1340. The Eleventh Circuit, in support of this proposition, cited *Leegin’s* statement that the primary purpose of the antitrust laws is to protect interbrand competition. *But see Babyage.com, Inc. v. Toys “R” Us, Inc.*, 558 F. Supp.2d 575 (E.D. Pa. 2008) (harm to intrabrand competition cognizable when brought about by a dominant retailer with market power in the retail sales market).

¹⁷⁴ *See infra* at section VI.f.

V. RESALE PRICE MAINTENANCE IN OTHER JURISDICTIONS

A. European Union

In contrast to the U.S., E.U. law has not undergone a similar transformation with respect to treatment of RPM. In 2010, the European Commission promulgated a new Regulation and Guidelines on the treatment of vertical agreements under E.U. competition law,¹⁷⁵ which has been seen as the introduction in E.C. competition law of an effects-based approach to vertical agreements. Before the new regulation and guidelines were issued, E.U. law treated minimum RPM as quasi-*per se* unlawful, and the practice could result in significant fines if discovered by the Commission or a national competition authority (NCA).¹⁷⁶ While possible relaxation of the E.U.'s strict approach was debated during the consultation process leading up to the implementation of the new regulations,¹⁷⁷ in the end, the E.U. appears to have made only minor changes to the established RPM standard, notwithstanding its general "move in a decidedly more U.S.-style direction" by more fully acknowledging the potential efficiency rationales associated with vertical restraints.¹⁷⁸

Under E.U. law, Article 101(1) prohibits agreements that appreciably restrict or distort competition,¹⁷⁹ while Article 101(3) exempts those agreements that

¹⁷⁵ European Commission's Guidelines on Vertical Restraints, *supra* note 5; Commission Regulation (EU) No 330/2010 (OJ L 102/1-7, 23 April 2010), available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>>.

¹⁷⁶ Deirde Trapp, "Resale Price Maintenance and Hub-and-Spoke Collusion: EU perspective on recent developments," ABA SECTION OF INTERNATIONAL LAW, 2011 FALL MEETING (October 2011), at 2, available at <http://www2.americanbar.org/calendar/section-of-international-law-2011-fall-meeting/Meeting%20Materials/Issues%20of%20Vertical%20and%20Horizontal%20Price%20Coordination%20-%20At%20the%20Top%20of%20the%20Enforcement%20Agenda/TRAPP_Deirdre-Resale_Price_Maintenance_Hub_and_Spoke.pdf>.

¹⁷⁷ *Id.*, at 2-3; *see also* Gavil, "RPM in the Post-*Leegin* World," *supra* note 151, at 7.

¹⁷⁸ Gavil, "RPM in the Post-*Leegin* World," *supra* note 160, at 7. Gavil refers to the Regulation and Guidelines as "compromise documents" that "seek to reconcile sometimes-competing goals and, at times, hint at some continuing debate within the EC as to the proper treatment of vertical restraints." *Id.*

¹⁷⁹ Article 101(1) provides:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

confer sufficient benefits to outweigh the anticompetitive effects.¹⁸⁰ The Block Exemption Regulation (BER) creates a “safe harbor” for certain vertical agreements that, by virtue of a lack of market power, are considered not to raise competition concerns. The exemption applies if the supplier and buyer’s market shares are both 30 percent or less. The exemption does not apply, however, to certain “hardcore restrictions”—including RPM¹⁸¹—that are set forth in Article 4 of the BER. Hardcore

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Treaty on the Functioning of the European Union (TFEU) Art. 101(1), available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>>.

¹⁸⁰ Article 101(3) provides:

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

TFEU Art. 101(3).

¹⁸¹ The regulation includes not only contractual provisions that control resale prices directly, but also certain practices that do so indirectly:

Examples of the latter are an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making

restrictions instead give rise to the presumption that (a) the agreement falls within Article 101(1); and (b) it is unlikely to fulfill the conditions of Article 101(3).¹⁸² Nevertheless, the possibility still remains for the parties to establish that Article 101(3) has been satisfied in that particular instance. If that burden is met, then the Commission is to assess the likely anticompetitive effects before determining whether, in fact, the requirements of Article 101(3) have been satisfied.¹⁸³

The E.U. Guidelines recognize the same anticompetitive risks associated with RPM that had been identified by the U.S. Supreme Court in *Leegin*. In addition, the Guidelines describe additional dangers, including (1) dampening competition, “in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them,”¹⁸⁴ and (2) reducing pressure on manufacturer margins.¹⁸⁵ As Professor Gavil has noted, while the *Leegin* majority

downplayed the competitive value of intrabrand competition... these additional theories are based on the contrary assumption that intrabrand competition has independent value to consumer because it can foster upstream interbrand competition.¹⁸⁶

With respect to the efficiencies that might be assessed under Article 101(3), the Guidelines also reflect the same economic views recognized in *Leegin*.¹⁸⁷ Like Justice Breyer, the Guidelines appear to give the most credence to this potential justification.¹⁸⁸ This is conditioned, however, on it not being “practical for the

the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level.

EC Vertical Restraint Guidelines, *supra* note 5, at ¶ 48.

In contrast, recommending resale prices, or requiring the reseller to respect a *maximum* resale price, is covered by the Block Exemption Regulation, provided these do not, in fact, constitute minimum or fixed sale price as a result of pressure or incentives offered. *See id.* at ¶ 226.

¹⁸² *Id.* at ¶ 223.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at ¶ 224.

¹⁸⁵ EC Vertical Restraint Guidelines, at ¶ 224.

¹⁸⁶ Gavil, “RPM in the Post-*Leegin* World,” *supra* note 160, at 8.

¹⁸⁷ *See* EC Vertical Restraint Guidelines, at ¶ 225.

¹⁸⁸ With respect to this theory, the Guidelines note:

supplier to impose on all buyers by contract effective promotion requirements.”¹⁸⁹ As for free rider theories, which (as noted above) have come under criticism in the economics literature, the Guidelines caution:

The parties will have to *convincingly* demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free riding between retailers on these services and that the pre-sales services overall benefit consumers as part of the demonstration that all the conditions of Article 101(3) are fulfilled.¹⁹⁰

Given the burden of demonstrating that RPM be indispensable (within the meaning of Article 101(3)) to achieve the asserted efficiencies, the practical effect of the Regulation and Guidelines may be de facto *per se* unlawfulness.¹⁹¹ NCAs continue to treat RPM as an enforcement priority, taking a strict enforcement approach against minimum RPM, and there are numerous examples of fines being imposed for the practice.¹⁹² To date, there do not appear to be any examples so far at the EU-level an authority or a court accepting that minimum RPM was justified under Article 101(3), although some examples can be found at the NCA level when the RPM arrangements could not have had any appreciable effect on competition.¹⁹³

B. Canada

In contrast to the E.U., Canada implemented sweeping changes to its treatment of RPM in the wake of *Leegin*. Prior to 2009, RPM was treated not only as a *per se* violation of the Competition Act, but also a *criminal* offense. Since then, RPM has been decriminalized and a competitive effects test has been prohibits RPM only

Most notably, where a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer’s interest to promote the product. RPM may provide the distributors with the means to increase sales efforts and if the distributors in this market are under competitive pressure this may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers.

EC Vertical Restraint Guidelines, at ¶ 225 (emphasis added).

¹⁸⁹ *Id.*, at ¶ 225 n.59.

¹⁹⁰ *Id.*, at ¶ 225 (emphasis added).

¹⁹¹ Trapp, “Resale Price Maintenance,” *supra* note 176, at 3.

¹⁹² *Id.*, at 3, 5-8 (discussing NCA cases).

¹⁹³ *Id.*, at 8-9.

when it has been established that “the conduct has had, is having or is likely to have an adverse effect on competition in a market.”¹⁹⁴

The Competition Act provides a number of exemptions—all of which were available under the previous criminal provisions—that assume a critical role in establishing efficiency defenses once RPM has been established. In particular, no order against RPM will be made if the Competition Tribunal is satisfied that:

- There was a practice by the reseller of using the product as a loss leader;
- The product was being used as a “bait and switch”; i.e., “a practice of using the products not for the purpose of selling them at a profit but for the purpose of attracting customers in the hope of selling them other products”;
- The reseller was making a practice of engaging in misleading advertising; or

¹⁹⁴ Competition Act s. 76(1)(b), available at < <http://www.laws.justice.gc.ca/eng/acts/C-34/page-48.html#h-32>>.

Under the Competition Act, the RPM prohibition applies to when a person, “directly or indirectly”

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person’s customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons[.]

Id., s. 76(1)(a).

Suggestion of resale or minimum prices, under the Competition Act

is proof that the person to whom the suggestion is made is influenced in accordance with the suggestion, in the absence of proof that the producer or supplier, in so doing, also made it clear to the person that they were under no obligation to accept the suggestion and would in no way suffer in their business relations with the producer or supplier or with any other person if they failed to accept the suggestion.

Id., s. 76(5).

Similarly, an advertisement by a producer or supplier that mentions a resale price

is proof that the producer or supplier is influencing upward the selling price of any person to whom the product comes for resale, unless the price is expressed in a way that makes it clear to any person whose attention the advertisement comes to that the product may be sold at a lower price.

Id., s. 76(6).

- There was a practice of not providing the level of service that purchasers of the product might reasonably expect.¹⁹⁵

It has been observed that “[m]any modern economic theories on the pro-competitive nature of RPM do not easily fit under these exemptions.”¹⁹⁶ The free rider theory is included, but not, for instance, a new entry justification.

Given the recent nature of the amendments to the Competition Act, there do not appear to be any rulings by the Competition Tribunal on the meaning of “adverse effect on competition in a market” under section 76(1)(b). (A matter is currently pending before the Tribunal in which these issues may be addressed.¹⁹⁷) The Tribunal has, however, considered the meaning of that standard in the context of refusal to deal cases under section 75, in which the Tribunal noted that

[a]dverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market (including such product features as warranties, quality of service and product innovation) or a decrease in the variety of products made available to buyers.¹⁹⁸

This is a lower threshold than is required under the abuse of dominance provisions, for which a “substantial lessening” must be found.¹⁹⁹ Whether or not the section 75 interpretation is adopted, this provision should tend to act as an initial screen and prevent the RPM provision from reaching agreements between manufacturers and resellers that do not have some degree of market power at either level of the distribution chain.

¹⁹⁵ *Id.*, s. 76(9).

¹⁹⁶ Csorgo, “Resale Price Maintenance Provisions: Who has it Right?,” *supra* note 104, at 11.

¹⁹⁷ See *Comm. of Competition v. Visa Canada Corp. and MasterCard Int’l, Inc.*, CT-2010-010, case documents available at <<http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=333>>.

¹⁹⁸ *B-Filer Inc. et al v. The Bank of Nova Scotia*, CT-2005-006 (Dec. 20, 2006).

¹⁹⁹ See Competition Act, s. 79(1)(c) (requiring that “the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market”).

C. Australia & New Zealand

Finally, Australia and New Zealand appear to take the strictest approaches to RPM. Both the Australian Competition and Consumer Act 2010²⁰⁰ and the New Zealand Commerce Act 1986²⁰¹ establish *per se* bans against the practice. Indeed, given that neither law recognizes a *Colgate*-type exception for unilateral conduct, the *per se* prohibitions are even more restrictive than the U.S. rule prior to *Leegin*.²⁰² One exception available in Australia (but not New Zealand) is when a reseller has used the supplier's goods or services as a loss leader within the past twelve months.

Perhaps because of the *per se* treatment of RPM in Australia and New Zealand, there is little jurisprudence from either country on the subject.²⁰³ In *Jurlique Int'l*,²⁰⁴ which involved the maker of premium skin care products,²⁰⁵ the

²⁰⁰ Section 48 of the Australian Competition and Consumer Act 2010 provides that "corporation or other person shall not engage in the practice of resale price maintenance." Available at <http://www.comlaw.gov.au/Details/C2012C00514/Html/Volume_1>.

See also Australian Submission, "Resale Price Maintenance," OECD Policy Roundtable (1997), at 22, available at <<http://www.oecd.org/competition/abuseofdominanceandmonopolisation/1920261.pdf>>; Csorgo, "Resale Price Maintenance Provisions: Who has it Right?," *supra* note 104, at 6.

²⁰¹ Section 37 of the New Zealand Commerce Act 1986 provides that "[n]o person shall engage in the practice of resale price maintenance" (s.37(1)), available at <<http://www.legislation.govt.nz/act/public/1986/0005/latest/DLM88289.html>>.

²⁰² Part VIII, Section 96, of the Australian Competition and Consumer Act 2010, defines conduct that constitutes RPM to include, *inter alia*:

- Setting a minimum price at which resellers should advertise, display or offer their goods for sale or for the resupply of services (s.96(3)(a));
- Inducing resellers not to discount, for example by giving special deals to resellers who agree not to (s.96(3)(b));
- Agreements with resellers that the latter will not advertise or sell below a specified price (s.96(3)(c));
- Taking or threatening to take action against a reseller to force the reseller to sell the goods or resupply services at or above the minimum specified price, for example by refusing to continue supplying them (s.96(3)(d),(e)); or
- Indicating a price that is taken by the reseller as a price below which the reseller should not resell (s.96(3)(f)).

The New Zealand statute provides similar definitions of resale price maintenance. See Commerce Act s.37(2)-(4). Merely recommending a price, without more, is not RPM provided the supplier makes clear that the price is only recommended and that there is no obligation to comply with the recommendation. See *id.* s.39.

²⁰³ Csorgo, "Resale Price Maintenance Provisions: Who has it Right?," *supra* note 104, at 7.

²⁰⁴ *ACCC v. Jurlique Int'l. Pty Ltd.*, ATPR 42-146; [2007] FCA 79; BC200700396, available at <<http://www.austlii.edu.au/au/cases/cth/FCA/2007/79.html>>.

Australian Federal Court acknowledged the economics literature regarding potential procompetitive uses of RPM.²⁰⁶ In particular, the court noted the arguments concerning preservation of brand image:

There is a strong case for the argument that by employing a minimum resale price, and preventing the undercutting of prices by discount retailers, the image and status of a product is protected; that is, the high price is a mechanism through which a manufacturer can certify to its customers consumer that the products they are purchasing are of a high quality.²⁰⁷

The court concluded, however, that “notwithstanding [these] views... [r]esale price maintenance is a *per se* contravention of s 48 of the Act [and that i]t is therefore somewhat of an indulgence to consider whether the law ought to be different from what it presently is.”²⁰⁸ The court imposed a record fine for the company’s deliberate violations of the prohibition.²⁰⁹

In both countries, suppliers may seek approval from their respective competitions commissions to use RPM,²¹⁰ which will be granted only if the supplier can demonstrate that any benefits to the public outweigh the harm.²¹¹ This

²⁰⁵ *Id.* at ¶ 57.

²⁰⁶ *Id.* at ¶¶ 61-74.

²⁰⁷ *Id.* at ¶ 69. Whether this is a “procompetitive” justification that should be credited by the competition laws is a matter of debate. *See* Grimes, “Spiff, Polish, and Consumer Demand Quality,” *supra* note 102, at 834-36.

²⁰⁸ *Jurlique Int’l. Pty Ltd.*, ATPR 42-146, at ¶ 75.

²⁰⁹ *Id.* at ¶ 102; *see also* Csorgo, “Resale Price Maintenance Provisions: Who has it Right?,” *supra* note 104, at 7.

²¹⁰ Part VII, Section 88, of the Australian Competition and Consumer Act 2010 provides:

[T]he Commission may, upon application by or on behalf of a person, grant an authorisation to the person to engage in conduct that constitutes (or may constitute) the practice of resale price maintenance. While the authorisation remains in force, section 48 does not prevent the person from engaging in that conduct in accordance with the authorization (s.88(8A)).

Part 5, Section 58, of the New Zealand Commerce Act includes a similar provision with respect to the New Zealand commission. *See* Commerce Act s.58(7) (“A person who wishes to engage in [RPM]... may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to engage in the practice.”).

²¹¹ Section 90 of the Australian Competition and Consumer Act 2010 establishes that no authorization shall be given by the ACCC for an undertaking to engage in RPM

exception was introduced in Australia in 1995 in recognition of possible efficiencies such as “a desire to provide a high quality image for the product or to ensure that retailers provide adequate after sales service and the required level of safety training.”²¹² The exception has been available in New Zealand since 1990.²¹³ The exception do not appear to have had any practical effect on the *per se* treatment of RPM.²¹⁴ Nevertheless, they provide a vehicle through which the Australian and New Zealand laws could account for potentially procompetitive uses of RPM, notwithstanding the *per se* rule.

VI. SOME PROPOSED LEGAL STANDARDS FOR RPM

During the course of the debate over RPM, both leading up to and following *Leegin*, various commentators have offered suggestions for the appropriate legal treatment of the practice—standards that might permit procompetitive uses of RPM, while protecting against anticompetitive harms. This section surveys some of those proposed standards and the rationales underlying them.²¹⁵ The purpose of

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be[.] (s.90(8)(a)).

Section 61 of the New Zealand Commerce Act provides:

The Commission shall not make a determination granting an authorisation... unless it is satisfied that [the use of RPM]... will in all the circumstances result, or be likely to result in such a benefit to the public that... the engaging in the practice should be permitted[.]

Commerce Act s.61(8).

²¹² Australian OECD RPM Submission, *supra* note 200, at 21; *see also* Csorgo, “Resale Price Maintenance Provisions: Who has it Right?,” *supra* note 104, at 6.

²¹³ Csorgo, “Resale Price Maintenance Provisions: Who has it Right?,” *supra* note 104, at 7.

²¹⁴ As one scholar has noted with respect to Australia: ““It seems to be the generally accepted view that authorisation for any resale price maintenance conduct is so unlikely that one would need astronomical odds from the bookies before placing a bet on an application succeeding.” Pengilley, “Resale price maintenance: An overview,” *supra* note 37, at 34. At least as of 2010, there do not appear to have been any such applications made in New Zealand. *See* Csorgo, “Resale Price Maintenance Provisions: Who has it Right?,” *supra* note 104, at 7.

²¹⁵ This survey is by no means exhaustive. For a further discussion of various RPM proposals, *see* Jürgen-Peter Kretschmer, “How to deal with resale price maintenance: What can we learn from empirical results?,” Joint discussion paper series in economics, No. 16-

this survey is to illustrate how different approaches can be constructed using the decision theoretic model. The variations generally result from differences regarding initial presumptions about the anticompetitive harms likely to result from RPM, and the kinds of screens (or low cost, high value information) that would best resolve the majority of cases before proceeding to the collection of higher cost information under full “rule of reason” analyses.

A. *Per se* Illegality²¹⁶

As discussed above, Justice Breyer advocated maintaining a *per se* ban on RPM in the U.S. Balancing the magnitude of possible benefits and harms of following a rule of reason approach (for which he found no economic consensus), with the ability of courts to differentiate between procompetitive and anticompetitive uses of RPM (which he believed would prove to be a difficult task).²¹⁷

The American Antitrust Institute (AAI) argued in favor of maintaining the *per se* rule (although it has suggested an alternative rule as well, which is discussed below) premised on the grounds that the anticompetitive harms of RPM are significant and likely to be realized, while any procompetitive benefits are unlikely or, at the very least, could be accomplished by means of less restrictive alternatives.²¹⁸ In the Australian context (which does not have a *Colgate*-like

2011 (2011) at 11-18, available at <http://www.uni-marburg.de/fb02/makro/forschung/magkspapers/index_html%28magks%29>.

²¹⁶ At the opposite end of the spectrum, others have argued for *per se* legality. *See id.* at 12 (discussing Posner and Bork, arguing that existing horizontal cartel prohibitions are sufficient to deal with the potential manufacturer or dealer collusion).

Posner, for example, applying a model that downplays the competitive risks associated with certain vertical restraints, has written:

Given the absence of either theoretical or empirical grounds for condemning purely vertical restrictions as anticompetitive, to declare vertical restrictions in distribution legal *per se* would serve both to lighten the burden of the courts and to lift a cloud of debilitating doubt from practices that are usually... procompetitive.

Richard A. Posner, “The Next Step in the Antitrust Treatment of Restricted Distribution: *Per se* Legality,” 48 U. CHI. L. REV. 6, 23 (1981). Such a rule, however, is difficult to reconcile with the economic literature, and relies on certain assumptions—not necessarily grounded in empirical evidence—that anticompetitive uses of vertical practices will be rare.

²¹⁷ *Leegin*, 551 U.S. at 917-918 (Breyer, J., dissenting).

²¹⁸ AAI *Leegin Br.*, *supra* note 35, at 1-2. The AAI argues:

In contrast to the theoretical case offered by proponents for a radical shift in antitrust policy, the reality is that RPM virtually always raises prices to consumers, prevents more efficient retailers from passing along the savings from their

doctrine exempting unilateral practices), Warren Pengilley, former Commissioner of the Australian Trade Practices Commission, also has argued for maintaining the *per se* prohibition on RPM notwithstanding developments in other jurisdictions.²¹⁹

The primary argument against the *per se* rule, as discussed above, is that it would prohibit the efficient uses of RPM identified in the economics literature. To accommodate that, however, limited carve-outs could be created—such as Justice Breyer’s suggestion that he might opt for a “slightly modified [*per se* rule] to allow an exception for the more easily identifiable and temporary condition of ‘new entry.’”²²⁰ Similarly, mechanisms could be established, as in Australia and New Zealand, by which businesses could petition for authorization to use RPM if a public benefit can be demonstrated. The latter approach would tend to nudge a *per se* rule in the direction of the E.U. model, although burdens could be adjusted accordingly to account for competitive risks (or relative lack thereof) for narrow categories of conduct.

B. Presumption of Illegality

Notwithstanding her criticism of *Leegin*, Professor Lao appears to concede that a *per se* approach may not be the ideal standard because *sometimes* such agreements might be justifiable.²²¹ She therefore advocates applying a presumption of illegality to RPM—similar to the E.U. approach—which the defendant could rebut only by showing that (a) the restraint is reasonably necessary to achieve a legitimate business purpose *that benefits consumers*, and (b) no less restrictive alternative is available to accomplish that goal.²²² Professor Lao defends the presumption of illegality as follows:

[M]arket competition is the norm in the economies of most advanced industrialized countries, and price is an important dimension of competition. Since resale price maintenance is essentially a restraint on price competition, albeit intrabrand price competition, presuming illegality to the practice and placing the onus of rebuttal on the RPM proponent would strike a proper balance. This is particularly true given the absence of

efficiency to consumers, tends to retard innovations in retailing, and often has been used by retailers and manufacturers for anticompetitive ends.

Id.

²¹⁹ Pengilley, “Resale price maintenance: An overview,” *supra* note 37, at 21-22.

²²⁰ *Leegin*, 551 U.S. at 917-918 (Breyer, J., dissenting).

²²¹ Lao, “RPM: A reassessment,” *supra* note 56, at 35 (emphasis on “*sometimes*” in original).

²²² *Id.*

reliable empirical evidence on the prevalence and significance of RPM's effects.²²³

The AAI in its *amicus* brief in *Leegin*, put forward a similar proposal (in the event the Supreme Court overturned *Dr. Miles*). Beginning from the presumption that an open-ended rule of reason standard would be a “litigation nightmare,”²²⁴ the AAI suggests that a presumption of illegality be applied to RPM given the fact that (a) the practice ordinarily *directly* raises prices to consumers, and (b) there is an absence of theoretical and empirical evidence that consumers generally benefit from these higher prices.²²⁵ The AAI then proposes that, in addition to the subsequent burdens imposed on the defendant under Professor Lao’s approach, any evidence of retailer pressure in imposing RPM would weigh against finding any legitimate purpose.²²⁶ This “any evidence” rule—which does not appear to require that it be proven by a preponderance of the evidence that retailers originated the conduct—mitigates some of the concerns raised by Justice Breyer about the effectiveness of this potential screen.²²⁷ If the defendant rebuts the presumption, the burden would then shift to the plaintiff to establish that the RPM nevertheless is anticompetitive. This could be accomplished, for instance, by proving that the upstream market is highly concentrated or that RPM coverage in downstream markets is widespread.²²⁸

Advantages of the Lao and AAI approaches—if the relative ratio of anticompetitive risks to procompetitive benefits is perceived to be high—lies in its administrability, as a near *per se* rule that allows the proponent of RPM to justify the practice in certain circumstances. However, to the extent the approaches do not permit the proponent to offer some low information cost rebuttal that might satisfy its burden (such as proposed in *Motta et al*, below), it is possible that they could result in over deterrence of beneficial or otherwise benign uses of RPM.

C. Comanor & Scherer

In their *Leegin amicus* brief, Professors Comanor and Scherer propose an approach that would not treat all RPM as presumptively unlawful; rather, they suggest an initial “quick look” screen that would consider the source of the restraint. Because, they argue, RPM efficiency defenses “arise preponderantly from

²²³ *Id.*

²²⁴ AAI *Leegin* Br. at 28 n.43 (citing Thomas Overstreet Jr. & Alan A. Fisher, “Resale Price Maintenance and Distribution Efficiency: Some Lessons from the Past,” 3 CONTEMP. POLICY ISSUES 43, 53-54 (1985)).

²²⁵ *Id.* at 29.

²²⁶ *Id.*

²²⁷ See *Leegin*, 551 U.S. at 916-17 (noting the potential difficulties of identifying the primary motivator of RPM).

²²⁸ AAI *Amicus* Br., *supra* note 35, at 30.

circumstances where the manufacturer is the moving party,”²²⁹ evidence that distributors induced the restraint would result in presumption of *per se* unlawfulness, rebuttable only on the “presentation of credible contradictory evidence.”²³⁰ If the restraint originated with the manufacturer, on the other hand, they suggest that a rule of reason analysis would be followed.²³¹

Comanor and Scherer propose a rule of reason approach that would apply a “test of quantitative substantiality” to take into account that “RPM is most likely to be harmful to consumers when widely applied in a meaningful product line.”²³² They suggest a rebuttable presumption of illegality when more than 50 percent of commerce in a relevant, *narrowly-defined* market is covered by RPM.²³³ Respondents would then have an opportunity to rebut this presumption by establishing that (a) the relevant market was improperly defined; (b) consumer choices were not significantly limited as a result of the practices; or (c) the restraints were “necessary to sustain the provision of services valuable to consumers.”²³⁴

The advantage of the Comanor and Scherer approach is that it would be more favorable to potential procompetitive uses of RPM, assuming that the benefits of allowing such conduct tended to outweigh the risks. However, it is premised on the ability to quickly and easily identify the source of the practice—an assumption that

²²⁹ Comanor & Scherer *Amicus Br.*, *supra* note 62, at 7-8.

²³⁰ *Id.* at 9.

²³¹ *Id.*

²³² According to Comanor & Scherer

[i]n such circumstances, consumer choice is restricted to goods bearing high distribution margins in the absence of possible lengthy and energy-guzzling shopping trips. And if under the umbrella of high margins, most retailers engage in substantial pre-sale promotion, their efforts will largely cancel each other out in the aggregate, leading to a high-price, high-margin, high promotional cost equilibrium with relatively little if any expansion of demand.

Id.

²³³ *Id.*

²³⁴ *Id.* at 9-10. Comanor & Scherer propose an alternative test conforming to the then-current U.S. Department of Justice and FTC Horizontal Merger Guidelines. The first screen would consider whether the Herfindahl-Hirschman index exceeded 1800—indicating an oligopolistic market in which imitation of one seller’s marketing strategy by others is more likely than in less concentrated markets. Under this proposal, antitrust standing would be conferred when RPM is implemented by a seller with at least a 10 percent share of the relevant market, and the conduct would be presumed unlawful, subject to the defenses mentioned earlier. *Id.* at 10.

has been questioned elsewhere.²³⁵ Moreover, the second screen presumes the ability to identify, with relative ease, the relevant market, and to measure market concentration—another assumption that has been questioned.²³⁶

D. Motta *et al*

Motta *et al*—a group that includes Professor Rey—propose an initial screen based on market share. They suggest changes to the Block Exemption Regulation as follows: (1) the *de minimis* rule under the E.U. standard, described above, would apply to RPM as with other vertical restraints (*i.e.*, a firm with less than 15 percent market share can engage in RPM); (2) when a firm has a share above 15 percent, it would have the burden of proving that RPM will have beneficial effects; and (3) it should be presumed that a firm with a share in excess of 30 percent is will be unlikely to be able to show that RPM will have a net beneficial effect.²³⁷ This proposal is premised upon the following conclusions with respect to the potential harms and benefits of RPM:

(i) for both the commitment effect and for the softening competition effect to be a source of worry, the suppliers engaging into RPM should be endowed with considerable market power. Therefore, it is likely that such effects could be overlooked if suppliers have small market share; (ii) the pro-collusive effects of RPM require industry-wide RPM to exist, and can therefore be taken care of by the BER's provisions (article 8) that the exemption can be revoked in the case of networks of vertical restraints covering more than 50% of the market. Further, where firms have deliberately

²³⁵ See *Leegin*, 551 U.S. at 916-17 (noting the potential difficulties of identifying the primary motivator of RPM).

²³⁶ Justice Breyer observed with respect to this issue:

I recognize that scholars have sought to develop check lists and sets of questions that will help courts separate instances where anticompetitive harms are more likely from instances where only benefits are likely to be found. But applying these criteria in court is often easier said than done. The Court's invitation to consider the existence of "market power," for example, invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets.

Id. at 917 (internal citations omitted).

²³⁷ Massimo Motta, *et al*, "Hardcore restrictions under the Block Exemption Regulation on vertical agreements: An economic view," at 4, available at < http://ec.europa.eu/dgs/competition/economist/hardcore_restrictions_under_BER.pdf >.

coordinated to establish RPM so as to sustain collusion, anti-cartel law would apply anyhow.²³⁸

This last assumption, at least in the U.S. context, has been subject to criticism, since establishing such a violation can be difficult, costly and time consuming, the result of which is that “much tacit collusion goes unpunished.”²³⁹ On the other hand, as compared to the other approaches discussed, Motta *et al* would tend to allow businesses to engage in procompetitive uses of RPM.

E. *Leegin* Structured Approach

Former U.S. Assistant Attorney General for Antitrust Christine Varney has proposed a “structured” rule of reason approach based on *Leegin*’s recognition of the need for lower courts to “establish a litigation structure to ensure that the rule [of reason] operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.”²⁴⁰ Varney’s framework—which is premised upon the circumstances identified by the *Leegin* majority regarding when RPM might be anticompetitive (facilitation of cartelization at the manufacturer or retailer levels, retailer exclusion, and manufacturer exclusion)—proposes elements that a plaintiff could use to establish a *prima facie* case that particular instance of RPM is unlawful, thereby shifting the burden to the defendant:

- For manufacturer-driven RPM that might be used to facilitate manufacturer collusion, a plaintiff would need to show: (1) a majority of sales in the market are covered by RPM; (2) structural conditions are conducive to price coordination; and (3) RPM plausibly helps “significantly” to identify cheating, “which would not be the case if wholesale prices are otherwise transparent.”²⁴¹
- For manufacturer-driven RPM used as an exclusionary device, a plaintiff would have to show: (1) the manufacturer has a dominant market position;

²³⁸ *Id.* at 3.

²³⁹ Thomas Lambert, “*Dr. Miles* is Dead. Now What?: Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance,” 50 WM. & MARY L. REV. 1937 (2005), at 25, available at <<http://papers.ssrn.com/abstract=1263376>>.

²⁴⁰ Christine A. Varney, “Antitrust Federalism: Enhancing Federal/State Cooperation,” Remarks as Prepared for the National Association of Attorneys General Columbia Law School State Attorneys General Program (Oct. 7, 2009), at 8 (quoting *Leegin*, 551 U.S. at 898), available at <<http://www.justice.gov/atr/public/speeches/250635.htm>>.

Varney and others have seen this and other statements by the *Leegin* majority as an invitation to lower courts to create a “litigation structure” that will allow them to “separate the wheat from the chaff and ‘devise rules... for offering proof, or even presumptions... to make the rule of reason a fair an efficient way to prohibit anticompetitive restrains and to promote procompetitive ones.” *Id.* (quoting *Leegin*, 551 U.S. at 898-99).

²⁴¹ *Id.* at 11.

- (2) its RPM contracts cover a substantial portion of distribution markets; and (3) RPM plausibly has significant foreclosure effect that impacted an actual rival.²⁴²
- For retailer-driven RPM that might be used to facilitate collusion, a *prima facie* case could consist of the plaintiff showing: (1) RPM is used pervasively (perhaps 50 percent of sales in the market); (2) RPM was instituted by retailer coercion (not simply persuasion); and (3) retailer collusion could not be thwarted by manufacturers.²⁴³
 - Finally, for retailer-driven RPM used as an exclusionary device, a *prima facie* case might include the following elements: (1) the retailers involved has sufficient market power; (2) coercion by retailers resulted in RPM covering much of the market; and (3) RPM plausibly has a significant exclusionary effect that impacted an actual rival.²⁴⁴

This “structured approach” has the advantage—in the U.S. context—of closely following the *Leegin* majority’s competitive concerns regarding RPM. Like the Comanor and Scherer proposal, however, identification of the origins of the RPM (manufacturer- versus retailer-driven), and definition of a relevant market and measurement of coverage by RPM in that market, are often difficult and time-consuming tasks. The additional elements suggested by Varney (compared to the Comanor and Scherer proposal) before the burden shifts to the defendant, would only make the inquiry more complex. Moreover, the *Leegin* majority, as discussed above, did not identify all of the competitive concerns identified in the literature, and therefore the proposed screens—which do not necessarily account for those concerns—might result in certain anticompetitive effects being underdeterred.

F. “FTC” Approach

As noted above, the FTC was petitioned by Nine West following *Leegin* to modify a consent order under which the company was prohibited the company from engaging in RPM practices.²⁴⁵ In its ruling on Nine West’s request, the FTC proposed evaluating RPM under a truncated rule of reason analysis, based upon the framework that had been accepted by the D.C. Circuit in *PolyGram*. The FTC would not treat every use of RPM as “inherently suspect,” but rather only those instances in which the defendants could not establish the absence of *Leegin* factors, which include:

²⁴² *Id.* at 12.

²⁴³ *Id.* at 13.

²⁴⁴ *Id.*

²⁴⁵ See May 6, 2008 Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, *In the Matter of Nine West Group Inc.*, available at <<http://www.ftc.gov/os/caselist/9810386/080506order.pdf>>.

- The RPM is used by manufacturers that together comprise a significant portion of the relevant product market;
- Dealers, rather than manufacturers, were the impetus for the RPM; and
- A dominant manufacturer or retailer possesses market power.²⁴⁶

If the defendant satisfies this burden, its conduct is presumed lawful. If not, it is then treated as inherently suspect and unlawful unless the defendant can prove that the use of RPM enhanced its total sales relative to what they would have been absent the practice.²⁴⁷ In *Nine West*, because the defendant was able to establish that none of these factors was present, it was not required to make a further showing that its use of RPM was procompetitive.

Like the proposal by former AAG Varney, the FTC approach would tend to favor procompetitive uses of RPM, at the risk of increased anticompetitive harms. It also focuses on concerns identified in *Leegin*, and not necessarily all competitive risks identified in the literature. However, under the FTC approach, the proponent of the practice has the initial burden of establishing the absence of “*Leegin* factors,” as opposed to the Varney proposal, under which the opponent has the initial burden of establishing their existence. That suggests the FTC approach might better filter anticompetitive uses of RPM—but not as well as the other approaches discussed earlier.

VII. CONCLUSION: QUESTIONS FOR CHILE

The economics literature, as summarized by Professor Rey, provides valuable insights into the potential procompetitive benefits, as well as the anticompetitive risks, associated with vertical restraints in general, and RPM in particular. But because law is an administrative system, legal standards cannot replicate the complexities in that literature, even assuming consensus in the economics community. Instead, the economics literature can inform the legal discussion and assist in devising administrable rules that maximize consumer welfare.

As discussed above, decision theory provides a framework for making factual determinations and decisions with imperfect information and is a useful tool for analyzing legal standards. Under that framework, relevant questions when considering an efficient enforcement standard concerning RPM—or any vertical restraint—include (1) how *frequently* procompetitive (versus anticompetitive) uses are encountered; (2) the *magnitude* of any benefits (versus harms) from that conduct; and (3) whether, given unavoidable error costs, an alternative rule would, on balance, result in increased consumer welfare and better administration of the competition laws.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

Pengilley—who argues in favor of maintaining a *per se* ban in Australia notwithstanding liberalization in the U.S. and elsewhere—observes that *Leegin* was decided in the context of the US economy, and that the rationales for adopting the rule of reason do not “necessarily translate to the Australian economy and would not follow at all if the likelihood of undesirable consequences were greater in Australia than in the United States.” Indeed, he asserts that the particular structure of Australian economy makes the competitive risks of RPM considerably greater there than they might be elsewhere, thereby tipping the balance in favor of more conservative treatment:

The concentration of Australian industry is such that this gives rise to those potential detriments which those opposing liberalisation of resale price maintenance laws fear.... Australian industry structure makes it highly likely that a liberalisation of resale price maintenance laws would lead to increased prices, reduced competition and increased cartelisation, (at least in a tacit oligopolistic coordination sense). The potential for wrongful use of market power in particular areas is significant.²⁴⁸

Whether or not Pengilley is correct with respect to the suitability of a *per se* standard in Australia, his argument is important inasmuch as it suggests that, under a decision theoretic approach, the optimal outcome in terms of an administrative or judicial approach to RPM may differ from country to country. Structural characteristics in some economies might result in a higher *frequency* of anticompetitive uses of the practice, or the *magnitude* of expected harms from those practices, than in other economies. Additional factors might also need to be considered, including litigation costs in a particular legal system,²⁴⁹ public resources dedicated to enforcement, and availability of private enforcement mechanisms,²⁵⁰ among others.

As Professor Rey notes, the Chilean economy—like many other small economies—is characterized by a relatively high degree of concentration. Some of

²⁴⁸ Pengilley, “Resale price maintenance: An overview,” *supra* note 37, at 21-22.

²⁴⁹ As noted, those costs in the U.S. system are high. *Leegin*, 551 U.S. at 916-17 (Breyer, J., dissenting).

²⁵⁰ See Pengilley, “Resale price maintenance: An overview,” *supra* note 37, at 18 (discussing private litigation in Australia as a “distinct aid to public enforcement,” and arguing that “a competition test will add substantial litigation complications and that, for this reason, in Australia deserving cases will be less likely to be brought because the legal bill will be higher.”).

the most important industries having just a few participants, and in many markets, intrabrand competition is driven by oligopolies.²⁵¹

In this context, market power is likely to be important, which can encourage unilateral conduct aiming at exploiting it more fully, as well as strategic behavior aiming at softening competition between incumbent rival vertical structures or foreclosing the market to new competitors. *In this context, vertical restraints such as RPM and exclusive dealing must be analyzed carefully, as the possibility of anticompetitive effects is more likely.*²⁵²

Whatever the appropriate enforcement standard might be for the Chilean context—in light of its particular structural characteristics—the issues addressed in the debates elsewhere, and the efforts to apply decision theory to the RPM question, are instructive.

²⁵¹ Rey, “Vertical restraints,” *supra* note 1, at 47.

²⁵² *Id.* (emphasis added).