THE END OF THE LEEGIN SAGA AND THE BEGINNING OF DEVELOPMENT FOR THE RULE OF REASON IN RPM CASES

〔Article〕

THE END OF THE *LEEGIN* SAGA AND THE BEGINNING OF DEVELOPMENT FOR THE *RULE OF REASON* IN RPM CASES

Yoshiteru UEMURA*

Resale Price Maintenance ("RPM") is a type of vertical agreement made among economic entities on the different levels of distribution for the sale of products or services, by setting the minimum price below which the products or services cannot be sold. Generally speaking, vertical restraints of trade have been treated less severely than horizontal restraints of trade, such as price fixing among competitors, which always, or almost always, tend to restrict competition and reduce output without any rewarding virtues. However, the only exception to the lenient rule for the vertical restraints was RPM. RPM had been treated illegal per se, just like horizontal restrains since Dr. Miles in 1911, until the Leegin Court overruled the longstanding precedent in 2007. During that period, many arguments against the per se illegal treatment for RPM had emerged from mostly antitrust economists who regarded promotion of the interbrand competition of different brands as more important compared to intrabrand competition within the same brand.

In the four years after Leegin, several RPM-related cases were brought before the federal courts where deep discussions ensued contemplating the factors to consider when assessing RPM under the rule of reason. While the Leegin decision gained full support from the federal antitrust enforcers, Congress simultaneously embarked on a mission to legislatively negate the decision. Today, in the face of strong opposition both in and out of Congress, and several failed legislative attempts, the Leegin decision still stands firmly.

At the end of the lengthy Leegin litigation, this paper aims to explore the development after Leegin in executive, judicial, and legislative branches of federal government, focusing on how the Leegin decision and its related cases have affected the treatment of RPM at the federal level.

---

* Associate Professor, Faculty of Economics, Hannan University, Osaka, Japan. Visiting Foreign Scholar at Fordham Law School, 2010-11. This Paper was written during my staying at Fordham Law School as a result of my research activities, utilizing a sabbatical year given by Hannan University. I am grateful to Professor Mark Patterson for his thoughtful comments and suggestions on the earlier drafts of this Paper. I would also like to thank Barry Hawk, Director of the Fordham Competition Law Institute, and Toni Fine, Assistant Dean in charge of International and Non-J.D. Programs for their generous research support at Fordham. Finally, I thank Ms. Sherna Channer, a Member of New York State Bar Association, LL.M Candidate at Fordham Law School, for her dedicated contribution to the editorial work of this Paper.

Table of Contents

INTRODUCTION

Since the groundbreaking decision of the Supreme Court in *Leegin*,[1] Resale Price Maintenance ("RPM") has been a controversial issue not only in courts but also in Congress. It is true that *Leegin* is marked an epoch in U.S. antitrust law when it overruled the longstanding *per se* rule against RPM established by *Dr. Miles*[2] and instead declared the application of the *rule of reason*. However, although *Leegin* mentioned some factors which could lead RPM to illegality under the *rule of reason*, it is also true that *Leegin* did not answer 'how' and 'on what standard' the lower courts should decide in each RPM case. Explicitly, the *Leegin* Court stated that "[i]f the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market."[3] The court continued further "[a]s courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[4] To put it simply, the *Leegin* Court expected lower courts to devise workable standards for RPM through discussion in the courtroom.

Following the remand decisions by the lower courts in 2009 and 2010, the lengthy antitrust litigation which had lasted since 2003 came to an end on February 22, 2011.[5] In this paper, following the quick review of the *Leegin* decision (Chapter I), post-*Leegin* movement in executive, judicial and legislative branches of federal government was summarized (Chapter II), in addition to the analysis of the remand decisions of *Leegin* (Chapter III).

Ⅰ. *LEEGIN*

A. Factual Background[6]

Leegin Creative Leather Products, Inc. ("Leegin") designed, manufactured, and distributed leather goods and accessories (handbags, belts, jewelry, etc.) under the brand name "Brighton". The Brighton brand is sold across the United States in over 5,000 retail establishments, for the most part independent, small boutiques and specialty stores. While Leegin distributed Brighton products at the wholesale level to independent retailers, it also owned and controlled about 70 Brighton retail stores. Leegin believed that at least for its products, small retailers tended to treat customers better, provide customers with more services, and make their shopping experience more satisfactory than the larger, often impersonal, retailers.

PSKS, Inc. ("PSKS"), operated Kay's Kloset, a retail fashion and accessories store in Lewisville, Texas, that sold Brighton products and goods from many other manufacturers to consumers in the greater Dallas area. Once Kay's Kloset started selling Brighton products, they became the destination retailer in the area to buy the brand products. Brighton was the store's most important brand and accounted for 40 to 50 percent of its profits at one time.

In 1997, Leegin instituted a new pricing policy, which enabled Leegin to refuse to sell to retailers that discounted Brighton products below suggested prices, expressing concern that discounting harmed Brighton's brand image and reputation. Leegin adopted the pricing policy to give its retailers sufficient margins to provide customers with better treatment, more services, and more a satisfactory shopping experience.

Although Kay's Kloset was one of the retailers who pledged to sell Brighton products at Leegin's suggested prices, it was discovered they had been significantly marking down Brighton's entire line. Therefore, this meant PSKS violated Leegin's pricing policy by offering Brighton products at discounted prices through Kay's Kloset store. When PSKS refused to cease discounting, Leegin stopped selling to the store. The loss of the Brighton brand had a considerable negative impact on the store's revenue from sales, which, in the end, led PSKS out of business.

PSKS sued Leegin in the United States District Court for the Eastern District of Texas alleging that Leegin had entered into vertical RPM agreements with retailers, and that Leegin had violated Section 1 of the Sherman Act. Leegin planned to introduce expert testimony describing the procompetitive effects of its pricing policy. The district court, however, excluded the testimony, relying on the *per se* rule established by *Dr. Miles*. The jury awarded $3,975,000.80 to PSKS as treble damages arising out of violation of the Sherman Act.

Leegin appealed to the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”). On appeal Leegin contended that the *rule of reason* should have applied to its vertical price fixing agreements with retailers. The Fifth Circuit affirmed the district court's ruling and rejected this argument, holding that the Supreme Court had consistently applied the *per se* rule to vertical minimum RPM agreements. The U.S. Supreme Court (the “Court”) granted certiorari to ascertain whether RPM agreements should continue to be treated as illegal *per se*.

B. Supreme Court Opinion[7]

Before deciding whether RPM agreement should continue to be treated as illegal *per se*, the Court examined the standard for testing whether a practice restrains trade in violation of Section 1 of the Sherman Act. Although the Court acknowledged the doctrine of *stare decisis*, it did not blindly follow the *per se* rule but instead referred to a need to change the rule to meet the evolving and dynamic economic climate. Therefore, the Court identified the *rule of reason* as the accepted and prevailing standard for outlawing only unreasonable restraints with anticompetitive effect. On the other hand, the Court acknowledged that some types of restraints, including horizontal agreements among competitors to fix prices or to divide market, have manifestly anticompetitive effects and lack any redeeming virtue. The Supreme Court opined that types of restraints are illegal *per se* and no further analysis is needed to determine the illegality of the restraints. The Supreme Court, however, confined the application of the *per se* rule to the restraints that would always or almost always tend to restrict competition and decrease output. The Court also stated that the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue[8], and only if court can predict with confidence that it would be invalidated in all or almost all instances under the *rule of reason*.[9] The Court admitted its 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, and concluded that a departure from the rule-of -reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing.[10]

As for *Dr. Miles*, which had been interpreted by the Supreme Court as establishing the *per se* rule against a vertical agreement between manufacturer and its distributor to set minimum resale prices, the Court found that the reason upon which *Dr. Miles* relied did not justify the *per se* rule[11]. *Dr. Miles* found the manufacturer's control of resale prices to be unlawful relying on the common-law rule that a general restraint upon alienation is ordinarily invalid, and in turn, treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors without considering differences in economic effect between vertical and horizontal agreements. After deciding that *Dr. Miles* justification of the *per se* rule toward RPM was unreasonable, the Court examined the economic effects of RPM and sought to determine whether the *per se* rule was nonetheless appropriate.

The Court referred to economics literature being replete with discussions on procompetitive justification for a manufacture's use of RPM, and that recent studies, including empirical evidence, also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule.[12] The Court highlighted the fact that even the skeptics of RPM acknowledge it can have procompetitive effects.

The Court held that the justification for RPM is similar to those for other vertical restraints, which is the stimulation of interbrand competition among manufacturers selling different brands of the same type of product.[13] It is true that RPM can reduce intrabrand competition among retailers selling the same brand, but the justification for RPM is important because the primary purpose of the antitrust laws is to protect interbrand competition. Absent RPM, the retail services such as fine showroom, products demonstrations, and knowledgeable employees, which contribute to enhance interbrand competition might be underprovided because discounting retailers could 'free ride' on retailers who furnish the services and then capture some of the increased demand those services generate.[14] That prospect would force those retailers to cut back their services to a level lower than consumers would otherwise prefer.

In addition, the Court acknowledged that RPM could increase interbrand competition by facilitating market entry for new firms and brands and by encouraging retailer services that would not be provided even absent 'free riding'.[15] The Court also pointed out the probability that the market would be penetrated and more efficient retailers would provide more valuable services for consumers by the use of RPM.[16]

While admitting interbrand competition as procompetitive justification for RPM, the Court highlighted some cases in which RPM may have anticompetitive effects, and warned that the potential anticompetitive consequences of RPM should not be ignored or underestimated.[17] According to the Court, RPM could facilitate a manufacturer cartel by identifying price-cutting manufacturers in an unlawful cartel. RPM could also be used to organize retailer cartels by compelling a manufacturer to aid the unlawful arrangement at the retailer level. Furthermore, RPM could be abused by a powerful manufacturer or retailer. A dominant retailer might request a manufacturer to accept the retailer's demand for RPM in order to forestall innovation in distribution when the manufacturer needs access to the retailer's distribution network. A manufacturer with market power, on the other hand, has a possibility to use RPM to give retailers an incentive not to sell the products of smaller rivals or new entrants.

In light of the potential anticompetitive effects associated with RPM, the Court found that no one could state with any degree of confidence that RPM always or almost always tends to restrict competition and decrease output because RPM can be either procompetitive or anticompetitive, depending upon the circumstances in which they are formed.[18] The Court also found that the limited empirical evidence available did not suggest that efficient uses of RPM are infrequent or hypothetical.[19]

The Court then argued about the contention PSKS expressed for its position. At first, PSKS insisted that RPM should be illegal *per se* because the *per se* rules tended to provide guidance to the business community and minimize the burden on litigants and judicial system, thereby contributing to a decreased administrative cost. The Court, however, decided that the *per se* rule should not be adopted for administrative convenience alone, and recognized it was only part of the equation.[20] A *per se* rule can be counterproductive, the Court stated, increasing the total cost of the antitrust system by prohibiting procompetitive conduct which the antitrust laws should encourage. The Court also pointed out the possible increase of litigation costs the *per se* rule could cause by the frequency of frivolous lawsuits against legitimate practices. Secondly, PSKS argued that the *per se* rule for RPM was justified by the possibility of higher prices for the products sold. In response to this argument, the Court stated that the possibility of higher prices without a further showing of anticompetitive conduct was not enough to decide whether the welfare effects of RPM were procompetitive or anticompetitive, confirming again that the antitrust laws were designed primarily to protect interbrand competition, from which lower prices could later result. The Court, moreover, singled out the flaw of the argument for a *per se* rule, stating that it overlooked the interests of manufacturers and consumers are generally aligned with respect to retailer profit margins.[21] This is because the difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize. Accordingly, a manufacturer has no incentive to overcompensate retailers with unjust margins. As a general matter, therefore, a manufacturer will be inclined to adopt RPM only if the increase in demand resulting from enhanced services will offset a negative impact on demand of a higher retail price.

Keeping in mind that RPM has economic dangers which may lead the restraint to be anticompetitive, the Supreme Court requires lower courts to be diligent in eliminating its anticompetitive use from the market when applying the *rule of reason* to RPM.[22] The Court suggested certain factors which are relevant to the *rule of reason* inquiry. First of all, the Court stressed the importance of the number of manufacturers that utilize RPM in a given industry.[23] According to the Court, an anticompetitive concern would not arise, in all likelihood, from the situation where only a few manufacturers lacking market power adopt RPM, for a manufacturer cartel then could be undercut by rival manufacturers. Likewise, a retailer cartel is not likely to happen when only a single manufacturer in a competitive market uses RPM, because interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price fixing agreement over a single brand. By contrast, the Court noted that RPM should be examined more carefully if the practices were ubiquitous in a given industry.[24] The second factor the Court regarded as important was the source of the restraint.[25] If there is evidence retailers were the impetus for RPM, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer, given that the interests of manufacturers and consumers are, in general, aligned with respect to retailer profit margins. As for the manufacturer-driven RPM, which was adopted by a manufacturer independently of retailer pressure, the Court considered the restraint to be less likely to cause anticompetitive concern. Thirdly, the Court stated that market power was also an important factor to be taken into consideration, because a dominant manufacturer or retailer could abuse RPM for anticompetitive purposes and cause adverse effects on competition when they have market power.[26] On the contrary, both manufacturer and retailer which lack market power are not likely to bring about serious anticompetitive consequences even if they adopt RPM. In situation where a retailer lacks market power, manufacturers can have options to sell their products through rival retailers. Similarly, when a manufacturer without market power adopts RPM, there is less likelihood it can use the practice to keep its competitors away from distributors in facing interbrand competition.

In conclusion, the Supreme Court confirmed that the *rule of reason* was designed and used to eliminate anticompetitive restraints from the market and to promote procompetitive ones. The Court opined that courts can establish the litigation structure to ensure the *rule of reason* operates to achieve the purpose of providing more guidance to businesses, and asserted that the courts would be able to do this as they gain experience presiding over RPM cases and actually applying the rule over the course of decisions.[27]

C. Dissent [28]

While recognizing potential anticompetitive consequences, like higher retail prices or stifling of the development of more efficient retailing models, the dissenting opinion in *Leegin* asserted that there are circumstances when RPM will benefit competition in terms of new entry and prevention of 'free-riding'. The dissent cast doubt on the frequency of the benefits, stating that it was not significant enough to justify overturning the long-lasting *per se* rule. Apart from new entry, which should be taken into consideration even under the *per se* rule it supports, the dissent raised the question of how often the 'free-riding' problem becomes serious enough to deter dealer investment.[29] The dissent maintained that sometimes 'free-riding' could happen in reality, but that it did not take place so often in the economy where firms sell complex technical equipment to consumers.

The dissent also pointed out that it was not very easy for courts to identify instances in which the benefits of RPM are likely to outweigh potential harms, showing the difficulty of identifying who, producer or dealer, is the driving force behind any given RPM agreement, and the difficulty of determining when and where 'free-riding' is serious enough to warrant legal protection.[30] Given the difficulties of the problem, the dissent emphasized that the question before the Court was not 'what should be the rule' starting from scratch, but rather 'whether it was necessary to change a clear and simple *per se* rule that had been applied by courts for a long time'.[31]

In the end, the dissent concluded that, in the absence of substantial change in economy, which might have helped to support the majority's argument, there was no ground for abandoning a well-established antitrust rule of *per se* illegality, upon which untold numbers of business decisions had relied for nearly a century.[32]

Ⅱ. POST-*LEEGIN* MOVEMENT

A. Federal Antitrust Enforcers

In *Leegin*, as enforcers of the federal antitrust laws, Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") jointly filed an *amicus curiae* brief supporting the petitioner, Leegin, concluding that the *per se* rule against RPM should be abandoned, and *Dr. Miles* should be overruled.[33] Considering that the effects of RPM could be either anticompetitive or procompetitive depending on the fact in a given case, the brief insisted that the *per se* rule established in *Dr. Miles* was clearly inappropriate. Moreover, the brief stated that, in light of modern antitrust principles and experiences backed by economic analysis, there was no basis for subjecting RPM to *per se* analysis while analyzing non-price vertical restraints and maximum RPM under the *rule of reason*, citing *Sylvania*[34] and *Khan*.[35]

After *Leegin*, FTC modified a previous consent order[36] and released Nine West Footwear Corporation (former Nine West Group Inc., hereinafter, "Nine West") from the prohibition of adopting RPM policy,[37] by examining factors identified by *Leegin* as potentially anticompetitive. FTC also held a series of public workshops in February and May 2009 in order to explore "how to best distinguish between uses of RPM that benefit consumers and those that do not."[38] DOJ expressed remarks supporting *Leegin* and suggesting a new structured approach for RPM under the *rule of reason*. In addition, the federal enforcers submitted a paper, which reviewed the theoretical and empirical research on the effects of RPM, to OECD Roundtable on Competition Policy. The federal enforcers confirmed that the shift to a *rule of reason* treatment declared by *Leegin* had the potential to create substantial benefits for consumers.[39]

1. *Nine West*

On October 30, 2007, about four months later *Leegin*, Nine West filed a petition to reopen and modify the consent order issued by FTC on April 11, 2000. According to the FTC complaint in 2000, Nine West engaged in contracts, combinations, or agreements with certain of its retailers in connection with the sale and distribution of Nine West branded products (women's shoes etc.) in order to fix, raise, maintain or stabilize the retail prices at which its products were advertised and sold to consumers. To put it concretely, Nine West adopted pricing policies governing the retail sale of its product and distributed "off limits" or "non-promote" lists of shoes, including shoes that could not be promoted outside of defined periods of clearance sale. Retailers communicated to Nine West their agreement to adhere to these pricing policies. Nine West shared revisions of these pricing policies with certain of its dealers prior to implementation of such revised polices for the purpose of soliciting input as to shoes that should, or should not, be included on the revised lists. Nine West also added or removed shoes from the coverage of these policies as well as extended or limited the periods of clearance sale for shoes covered by the policies at the request of its dealers. Moreover, Nine West negotiated individualized exemptions from the coverage of its policies for certain dealers, and often conditioned its agreement in those cases on the condition that the dealers would not advertise the newly-negotiated retail price. In response to violations of its pricing policies by some of its dealers, Nine West suspended shipments to the violating dealers for a limited period, with the tacit understanding that shipments would resume if Nine West discovered no further violation of the policy in the meantime, or if the dealers promised not to violate the policy again in the future. FTC asserted that, in recognizing the facts that prices to consumers of Nine West products increased and price competition among retailers decreased, the effect of the practices between Nine West and its dealers restrained trade unreasonably, hindered competition in the sale of women's footwear in the United States, and deprived consumers of the benefits of competition, in violation of Section 5 of the Federal Trade Commission Act.[40]

The 2000 FTC order prohibited Nine West from fixing, controlling or maintaining the resale price at which any dealer may advertise, promote, offer for sell or sell any Nine West products. The order also prevented Nine West from requiring, coercing, or otherwise securing a commitment from any dealer to maintain a resale price for its products. In addition, the order imposed a ten-year ban on Nine West adopting, maintaining, enforcing or threatening any policy that the dealer is subject to warning or suspension or termination if it sells, promotes, advertises Nine West products below any retail price designed by Nine West. The ten-year ban imposed on Nine West included not to adopt, maintain, enforce, or threaten any policy that dealers will be subject to a greater sanction if it continues or renews selling, offering for sale, promoting or advertising any Nine West products below any resale price designed by Nine West.

In its petition, Nine West argued that the relief it was seeking was required by changed conditions of law and public interest. Nine West asserted that the Supreme Court's decision in *Leegin* revamped antitrust law and required FTC, in light of the change in the law, to reopen the order and set aside its prohibitions as 'no longer necessary' or 'appropriate' under the new law. As for public interest, Nine West highlighted its competitive disadvantage compared with other competitors which may use RPM after *Leegin*.

The Act allowed FTC to reopen an order to consider whether it should be modified once the respondent was able to make a satisfactory showing that changed conditions of law or fact required such modification.41) According to precedents, a satisfactory showing sufficient to require reopening is made when a request to reopen identifies sufficient change in circumstances and shows that the changes eliminate the need for the order, or make continued application of it inequitable or harmful to competition. FTC had previously reopened and modified the order in *Sharp Electronics Corporation*42) based on the change of law enunciated in *Sylvania*,43) which changed the test for territorial restraints (non-price vertical restraints) from *per se* condemnation to the *rule of reason*.

As an analytical framework in the early stage after *Leegin*, FTC weighed certain factors (identified by the Supreme Court as a helpful guide) to begin an assessment of RPM and its relevance to the Nine-West situation. According to the Court, RPM could be harmful to competition when retailers are the source of RPM, when RPM are ubiquitous in the industry, and when a manufacturer or retailer is a dominant player in the market.44) In the end, FTC determined that Nine West had made satisfactory showing that changes in law caused by *Leegin* required reopening and modifying the order which had prohibited Nine West from entering into RPM arrangements with its retailers. As for the procompetitive effects of its use of RPM, Nine West could not provide any specific, empirical evidence indicating that it was prohibited from engaging in RPM.

Although FTC granted Nine West's petition based on the fact that Nine West lacked market power and that Nine West itself was the source of RPM, thus allowing Nine West to adopt RPM policy as a result, it recognized the necessity to monitor the effects of Nine West's use of RPM because the circumstances in the market could change. FTC stated that monitoring the effects of the RPM would also contribute to ensuring the procompetitive efficiency Nine West could not demonstrate in its petition. For those purposes, Nine West was required to file a report with FTC one, three, and five years after the order had been modified and this report would provide information describing Nine West's use of RPM and its effect on its price and output.

2. DOJ's Remarks on *Leegin*

The Antitrust Division of the Department of Justice has also been active in addressing *Leegin*. It expresses a support for *Leegin*, analyzes the standards by *Leegin*, and proposes a new structured rule-of-reason approach for RPM. For example, Thomas Barnett, who headed the Antitrust Division when the Supreme Court declared the departure from *per se* condemnation for RPM in *Leegin*, addressed the Federalist Society highlighting that economic scholarship and the Court's more recent decisions had thoroughly undermined the bases for *Dr. Miles* opinion.45) The former Assistant Attorney General also pointed out the importance of the interbrand competition, which can be promoted by RPM, observing that the *per se* rule is appropriate only for conduct that is almost invariably anticompetitive.

Then there are the comments of Christine Varney who was in charge of the Antitrust Division. In her remarks before the National Association of Attorneys General, Varney explained how the courts might apply a structured rule-of-reason analysis, stating that a careful reading of *Leegin* suggests a structured application of the *rule of reason* tailored to the plaintiff's theory of how RPM is anticompetitive in the case at hand.[46] According to her argument, a preliminary showing of the existence of the arrangement, scope of its operation, and the presence of structural conditions under which RPM is likely to be anticompetitive might well be sufficient to establish the illegality.[47] She maintained that under this approach, the burden of proof would shift to the defendant to demonstrate either that its RPM was actually procompetitive or that the plaintiff's characterizations of the marketplace were erroneous. At least, the defendant would have to establish that it adopted RPM to enhance its success in competing with rivals and that RPM was a reasonable method for accomplishing its procompetitive purposes.[48] The remarks were that the use of a structured *rule of reason* was consistent with *NCAA*[49] and *Indiana Federation of Dentists*,[50] in which the Supreme Court made clear that the *rule of reason* did not open the field widely to include any argument in favor of a challenged restraint, but permitted the Court to engage in a truncated review when the practice at issue was plainly anticompetitive and did not appear to have any countervailing competitive virtue.[51]

Keeping in mind that the structured rule-of-reason approach for RPM is consistent with modern development of antitrust analysis under Section 1 of the Sherman Act, the Assistant Attorney General detailed the elements that a plaintiff could use to establish a *prima facie* showing to shift the burden to defendants, along with the scenarios indicated by *Leegin* as potentially anticompetitive.

In case of a manufacturer-driven RPM, the arrangement can be anticompetitive when the RPM is used to facilitate manufacturer collusion by helping a cartel police their agreement. In this situation, the burden will shift to the defendants where: a majority of sales in the market are covered by RPM; market structure is conducive to price coordination; RPM is significantly useful to identify cheating. Manufacturer-driven RPM can also be anticompetitive when a dominant manufacturer uses RPM to guarantee large margins to retailers and make them unwilling to carry the products of small rivals or new entrants. In this situation, the following are required to make the case *prima facie* illegal: the manufacturer has dominant market position; its RPM contracts cover a substantial portion of distribution outlets; RPM has significant foreclosure effect that impacted an actual rival.

As for retailer-driven RPM, it is obvious that the greater concern was shown by *Leegin*. The former Assistant Attorney General points out that all five potential procompetitive uses of RPM identified by *Leegin* involve benefit to manufacturers, not retailers, concluding that a plaintiff presenting substantial evidence that retailer coercion was responsible for RPM has made a *prima facie* showing of anticompetitive effects. Under retailer exclusion theory, a retailer with significant market power, or several retailers acting together, could coerce important manufacturers to institute RPM and thereby prevent price competition from discounters. In this situation, the following are required to establish a *prima facie* showing of anticompetitiveness: the retailers have sufficient market power; coercion by retailers results in RPM covering most of the market; RPM plausibly has a significant exclusionary effect that impacted an actual rival. In addition, under retailer collusion theory, an agreement by retailers to fix prices can be implemented and policed by coercing sufficient manufacturers to use RPM consistent with the retailer cartel agreement. In this situation, *prima facie* showing of anticompetitive effects, which shift the burden to defendant, consist of the fact that RPM is used pervasively – at least 50 percent of the sale in the market, that RPM was instituted by retailer coercion, and that retailer collusion could not be thwarted by manufacturers. For this third element, extensive reliance on well-established retailers carrying the products of many manufacturers should be sufficient.

3. Written Submission to OECD Roundtable on RPM

In October 2008, the OECD Competition Committee discussed the positive and negative effects of RPM, in which U. S. delegates submitted a paper representing their perspectives on antitrust enforcement in the U.S.. After concluding that both theoretical economic literatures related to RPM and available empirical evidence, regarding the effects of RPM, support an analysis of RPM under the *rule of reason*, the federal enforcers identify some practical points for enforcing the rule. At first, they examine the possibility of manufacturer or retailer cartel by checking whether RPM is widespread in the industry in question. If few manufacturers have RPM agreements in place with their retailers, or if few retailers enter into RPM agreement with a given manufacturer, then the enforcers are of the opinion that RPM does not contribute to help enforce a cartel.[52] Next, they evaluate whether the manufacturer in question possesses meaningful market power in the relevant market. If it does not, they doubt that retailer cartel will succeed because the retailer cartel might not be able to earn supracompetitive profits in facing vigorous interbrand competition.[53] The absence of market power would also prevent a manufacturer from using RPM in an exclusive fashion, because the presence of robust competition from other brands enables consumers to switch to one of the alternatives. Therefore, they assume that a manufacturer's decision to adopt RPM in a competitive market is likely to reflect an effort to improve its ability to compete.[54]

Although the federal enforcers state that the existence of market power is a useful screen to determine whether a closer scrutiny of the actual effects of RPM on consumers is warranted, they note that it would be inappropriate to conclude merely from a finding that the manufacturer possessed market power, that its use of RPM is likely to harm consumers.[55] In this case, reliable evidence – for example, a finding that RPM caused sales of the manufacturer's product to increase – would be crucial to the assessment of its competitive effect.[56] The fact that RPM contributed to sales increase would also be strong evidence against hypothesis that its purpose was to sustain a cartel among either retailers or manufacturers.[57]

As for the frequent concern that RPM will lead to higher prices for consumers, the paper submitted to OECD points out that a direct examination of the effect of RPM on retail prices would be useful and important to help discern whether this is indeed the case, and if so, in which circumstances.[58] According to the paper, a manufacturer might choose to lower price if the additional demand it expected from enhanced retail services enabled it to exploit economies of scale more fully.[59] And if an increase in retailer services is associated with an increase in the price elasticity of demand, RPM can lead to lower retail prices. The paper states that a careful analysis would make it possible to establish that RPM had this effect in practice.[60] Furthermore, the paper notes that it would be inappropriate to conclude that consumers had been harmed based on the evidential fact that RPM led to a higher retail price for a product.[61] Considering that evidence of RPM's effect on quantity is far more probative than price evidence for establishing its effect on consumer welfare, the enforcers observe that consumers could be better off if the higher retail price created an incentive for retailers to provide valuable services or higher quality.[62] They also regard the sales increase, despite price increase, as evidence that consumers benefited from increased services.[63]

B. Federal Cases

Although still remaining small in number, some lower courts have encountered RPM-related cases after *Leegin* and have considered applying the *rule of reason* to RPM. The following are six relevant cases other than the remand decisions of *Leegin*.

1. *Spahr* [64)]

In the class action complaint against Leegin, two Tennessee residents who purchased Brighton products manufactured by Leegin alleged that Leegin coerced or entered into agreements with retailers to implement RPM in order to stabilize prices for its products, thereby keeping prices at supracompetitive levels and denying consumers the benefit of a free market. Given that the Brighton products were unique and distinct products characterized by an inelasticity of demand and recognition by the public and the industry as a whole, the plaintiffs alleged that the relevant product market was the market for the manufacture, distribution and/or sale of Brighton products. The plaintiffs also defined the relevant geographic market as the United States based on the fact Brighton products were available in approximately 6,000 stores located from coast to coast. According to the complaint, Leegin had a substantial and/or dominant market share in the above-mentioned relevant market. As for the effects of Leegin's conduct, the plaintiffs alleged that they and other class members were forced to pay artificially high, anticompetitive prices for Brighton products without benefit from free and open competition in the market.

The United States District Court for the Eastern District of Tennessee found that the plaintiffs' definition of the relevant product market is deficient and could not be cured for surviving the defendant's motion to dismiss, recognizing that other product lines of women's accessories made by other manufacturers were reasonably interchangeable substitutes for Brighton products.[65)] The district court also pointed out the insufficiency of the plaintiffs' conclusory allegation that Brighton products were distinct products characterized by an inelasticity of demand.[66)] Therefore, in accordance with *Twombly*, [67)] which required a claim under Section 1 of the Sherman Act to prove sufficient facts and reasoning as a threshold of plausibility for surviving motion to dismiss, the district court noted, that the plaintiffs should have alleged Brighton products' inelasticity of demand with enough reasons and explanations.[68)] As an anticompetitive effect of RPM, the plaintiffs alleged only that agreements at issue resulted in higher prices for Brighton products. The district court, however, stated that higher prices alone, absent a further showing of anticompetitive conduct, were not sufficient evidence of the anticompetitive effect of RPM, citing the Supreme Court's decision in *Leegin*.[69)] Among the circumstances under which higher prices might be anticompetitive, the plaintiffs alleged that the defendant and its retailers formed a 'retailer cartel' through the dual distribution system, and hoped that this allegation would allow them to withstand the defendant's motion to dismiss. But the *Leegin* Court had defined a 'retailer cartel' as an arrangement to fix prices and then compel a manufacturer to aid the unlawful arrangement with RPM.[70)] Considering the plaintiffs' allegation that the defendant coerced retailers and forced upon retailers the RPM agreements instead of utilizing RPM as an organizer of price-fixing cartel by retailers, the district court decided that the plaintiffs did not properly allege a 'retailer cartel' as defined by the Supreme Court.[71)] In the end, the district court dismissed the complaint that Leegin's RPM violated the Sherman Act on the ground that the plaintiffs did not plausibly plead either a relevant market or anticompetitive effect of RPM agreements at issue.[72] The appeal by the plaintiffs to the United States Court of Appeals for the Sixth Circuit was dismissed on the same reasoning.

2. *Jacobs* [73]

Defendants, Tempur-Pedic North America, Inc. along with its parent corporation, Tempur-Pedic International, Inc. (hereinafter collectively "TPX") manufactured visco-elastic foam mattresses and sold them to consumers nationwide through distributors and its own website. The sales of the foam mattresses by TPX accounted for 80 to 90 percent of the visco-elastic foam mattresses sold in the United States. In addition to entering into RPM agreements with distributors, TPX also sold mattresses directly to consumers through its website at the same prices it agreed with its distributors. Plaintiffs, Benny and Wanda Jacobs ("Jacobs")[74] purchased a Tempur-Pedic mattress from a TPX distributor in Rome, Georgia at a price equal to or above the minimum price stated in the distributor's agreement with TPX. Later, Jacobs brought an antitrust action in the United States District Court for the Northern District of Georgia, alleging that the price at which they purchased the mattresses were artificially raised by the arrangements between TPX and its distributors in violation of Section 1 of the Sherman Act. According to the complaint, TPX violated the antitrust law by enforcing RPM agreements with its distributors and by engaging with its distributors in horizontal price fixing. Jacobs sought treble damages against TPX on behalf of all who had purchased Tempur-Pedic mattresses in the United States, as well as an injunction against TPX's further implementation of these agreements.

First of all, the district court referred to *Twombly* as principal guidance for considering TPX's motion to dismiss in the case at issue.[75] In *Twombly*, the Supreme Court specifically required a plaintiff to allege enough factual matter that would suggest plausible ground to infer an antitrust violation in order to survive a motion to dismiss.[76] The district court then analyzed the anticompetitive effect of TPX's conduct on the relevant market, stating that the plaintiffs must define the relevant market and establish TPX's power in that market to prove that TPX's behavior had potential for genuine adverse effects on competition.[77] With respect to actual detrimental effects on competition, Jacobs alleged in their complaint that TPX harmed the plaintiffs by selling its products at the artificially elevated prices as a result of RPM agreements with distributors, eliminating the price competition in the sales of Tempur-Pedic mattresses. The district court, however, concluded that the plaintiffs' allegations were insufficient to make a plausible showing of actual harm, and regarded their allegations as precisely the kind of "labels and conclusions" and "formulaic recitation of the elements of a cause of action" that the Supreme Court condemned in *Twombly*.[78] For the purpose of proving potential anticompetitive effects, Jacobs alleged that visco-elastic foam mattresses constituted the relevant product market by themselves, while the defendants argued that the relevant product market was simply the mattress market without distinction between traditional innerspring mattresses and non-traditional mattresses which include visco-elastic foam mattresses. Relying on *Du Pont*[79], which defined the relevant product market based on the product's interchangeability on use with alternatives, the district court held that the relevant product market was not simply visco-elastic foam mattress but, instead, was mattress market in general as argued by TPX.[80] According to the court, the TPX's non-traditional mattresses may be very different from traditional innerspring mattresses, but they are still products on which people sleep.[81] By failing to define 'relevant market' for the purpose of this case, the Jacobs could not plausibly plead anticompetitive effect of TPX's conduct on the relevant market.

Finally, the district court concluded that the plaintiffs' complaint did not allege facts that would show plausible grounds from which to infer an antitrust violation.[82)]

After reviewing the district court's order *de novo*, the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") affirmed the ruling of the district court that Jacobs' relevant market allegations fell short of *Twombly's* requirement.[83)] Given the responsibility under *Twombly* to plead a plausibly defined relevant product market, the Eleventh Circuit pointed out that Jacobs' conclusory allegation that the foam mattresses constituted, by themselves, a separate and distinct submarket of the larger mattress market, lacked sufficient reasoning and explanations based on evidence of the products' cross-elasticity of demand and reasonable substitutability of the products.[84)] Also, in response to the allegations that the foam mattresses are more expensive than traditional innerspring mattresses and they have unique attributes, the Eleventh Circuit stated that Jacobs did not indicate the degree to which consumers prefer the foam mattresses to traditional mattresses because of these unique attributes and differences in price.[85)] Moreover, the court noted that Jacobs should have provided demonstrable empirical evidence to support the plaintiffs' definition of the alleged submarket.[86)]

In terms of horizontal restraint claim that TPX, as a distributor, entered into a horizontal price-fixing agreement with its distributors when selling mattresses directly to consumers through its website, the district court had dismissed the claim because courts generally have treated the dual distribution system as vertical rather than horizontal in nature, and also because Jacobs did not allege a freestanding horizontal arrangement between TPX and its distributors.[87)] The Eleventh Circuit drew two possible inferences from the fact that TPX and its distributors charged the same minimum price. The first inference was that an arrangement existed between TPX, as a distributor, and its distributors in the guise of RPM agreements. Although Jacobs alleged that TPX would tacitly collude with its distributors through the RPM agreements, the Eleventh Circuit denied the argument, stating that tacit collusion is not in itself unlawful without any further allegation that TPX and its distributors signaled, in some way, each other on how and when to maintain or adjust prices.[88)] The second inference the court made was that TPX and its distributors set prices independently of each other after fully taking into consideration the economic sense to do so. According to the court, it suited the distributors' independent economic interest to maintain prices at the level TPX set in its website, given the risk of losing significant amounts of business by raising their prices above TPX's resale price.[89)] The Eleventh Circuit also observed that TPX, as a distributor, would not set its price under the minimum resale price it imposed on its distributors, because doing so would drive the distributors out of business by making consumers switch to purchasing Temper-Pedic mattresses from TPX's website.[90)] Considering that the distributors are intended and expected to provide consumers with first-hand information, which is critically important for customers to make a purchasing decision about an item on which they will spend one-third of their lives, the Eleventh Circuit noted that it would not make any economic sense for TPX to undercut the minimum prices it asks distributors to maintain.[91)] Under the pleading standard of *Twombly*, the court pointed out that Jacobs had the burden to present allegations showing why it was more plausible that TPX and its distributors, who were assumed to be rational actors acting in their self-interest, would rather enter into an illegal price-fixing agreement to reach the same result realized by purely rational profit-maximizing behavior.[92)] Taking into consideration the potential costs of fixing prices with its distributors, the court also observed that the benefits that TPX and its distributors would realize by engaging in illegal horizontal price-fixing would equal nothing, especially where independent economic activity would bring the participants the same result with none of the costs.[93]

The dissenting opinion of the court of appeals argued that the majority went too far when it interpreted *Twombly* to essentially require Jacobs to include actual evidence of cross-elasticity of demand or other indications of price sensitivity in pleading the relevant product market, given the fact that product market analysis was detailed and complicated and could not be done easily on a motion to dismiss, absent access to discovery.[94] The dissent also pointed out that the majority's demand for empirical evidence at the pleading stage of litigation was improper and carried *Twombly* too far against the statement of the Supreme Court's decision that a complaint did not need detailed factual allegations.[95]

3. *Toledo Mack*[96]

Defendant, Mack Trucks, Inc. ("Mack") manufactured a variety of heavy-duty trucks, and distributed its products primarily through a nationwide network of authorized dealers. Each dealer was assigned a geographic region called an "Area of Responsibility" ("AOR"), but the AOR was not exclusive and dealers were contractually free to sell anywhere in the United States. Plaintiff, Toledo Mack Sales and Service, Inc. ("Toledo Mack"), an authorized Mack dealer located in Toledo, Ohio, had aggressively pursued its low-price sales strategy throughout the country until Mack terminated Toledo Mack's status as an authorized dealer, due to competing on price against other Mack dealers for sales in other dealer's AORs. Most of Mack's trucks were made to order with various chassis, engines, and transmission options, and a transaction-specific discount known as "sales assistance" was to be given to any dealer who submitted to Mack a list of specification from a potential customer. The amount of sales assistance that Mack offered a dealer on a particular transaction varied according to the nature of the relationship between the dealer and the customer, the number of trucks ordered, potential competition, and other factors.[97] The greater the discount that Mack provided to the dealer, the lower the price that the dealer could profitably charge the customer. Therefore, the sales assistance played an important role when dealers prepared prices for customers. Because potential customers would often solicit bids from multiple Mack dealers as well as from Mack's competitors, Mack dealers competed against other manufacturers' dealers and amongst themselves.

In its complaint before the United States District Court for the Eastern District of Pennsylvania, Toledo Mack alleged, as a Sherman Act claim, that Mack conspired with its dealers to restrain price competition and allocated markets by restricting sales assistance to sales occurring only within a dealer's AOR. According to the complaint, this arrangement had the purpose and effect of severely impairing the ability of Mack dealers, especially discount dealers like Toledo Mack, to compete with other Mack dealers for the sales outside of their AORs. In response to the complaint, Mack moved for summary judgment claiming that Toledo Mack's evidence was insufficient to show concerted action between Mack and its dealers. The district court found that summary judgment was not appropriate in this case, and the court finally judged, in accordance with the verdict of the jury, in favor of defendant Mack as against Toledo Mack's claim on Section 1 of the Sherman Act.[98]

In its appeal to the United States Court of Appeals for the Third Circuit ("Third Circuit"), Toledo Mack argued that individual Mack dealers entered into horizontal "gentlemen's agreements" to fix prices and that Mack agreed with its dealers to support that conspiracy through vertical agreements denying sales assistance to any dealer who sought to compete against other Mack dealers on price. In this regard, the Third Circuit held that Toledo Mack presented several pieces of direct evidence for the existence of horizontal agreements among Mack dealers not to compete with each other.[99] Similarly, with respect to the vertical agreements, the Third Circuit held that Toledo Mack presented direct evidence that Mack agreed with its dealers to support the dealers' illegal horizontal conspiracy to control prices by refusing to offer sales assistance to dealers who sought to sell outside their AORs.[100] Moreover, the court held that Toledo Mack presented evidence that Mack's policy denying sales assistance to dealers on sales outside their AORs was the result of collaboration between Mack and its dealers through the vertical agreements above, which were initiated at the request of dealers.

Citing *Leegin*, the Third Circuit confirmed that the rule-of-reason analysis applied even when, as in this case, the plaintiff alleged that the purpose of the vertical agreement between a manufacturer and its dealer was to support illegal horizontal agreements between multiple dealers.[101] In addition, the Third Circuit pointed out two possibly illegal situations clarified in *Leegin*, which were particularly relevant to Toledo Mack's appeal. Those were the source of the restraint and the dominance of a manufacturer or retailer in the relevant market. According to *Leegin*, if there was evidence that retailers were the impetus for a vertical restraint, there was a greater likelihood that the restraint facilitated a retailer cartel.[102] Likewise, if a dominant manufacturer or retailer had market power, RPM could be abused for anticompetitive purposes and would cause serious concerns regarding competition.[103] Besides noting that Toledo Mack produced evidence that the vertical agreements were the result of dealer pressure, the Third Circuit held that Mack had power in both conventional straight truck market and low cab-over-engine truck market.[104] According to the court, Toledo Mack succeeded in defining the markets at issue and in demonstrating Mack's market power in the relevant markets by presenting expert testimony.[105] Finally, applying the rule-of-reason analysis to Toledo Mack's claim, the Third Circuit concluded that Toledo Mack presented sufficient evidence of an illegal agreement between Mack and its dealers, for a jury to find for Toledo Mack, vacating and remanding the district court's decision on the Sherman Act claim.[106]

4. *Babyage*[107]

Defendant, Babies 'R' Us ("BRU") is a large retailer of baby and juvenile products including strollers, high chairs, breast pumps, bedding, car seats and infant carriers. It carries products manufactured by Britax, Peg Perego, Medela, Maclaren, Kids Line, Regal Lager, and Baby Bjorn (the "manufacturers"). Smaller retailers like Babyage, and Baby Club (the "retailers") competed with BRU by undercutting BRU's prices in order to increase their sales volume. This undercutting ceased when the manufacturers began to require the retailers to sell their products at or above a certain price. The retailers and various consumers (the "consumers") brought an antitrust action against BRU and the manufacturers in the United States District Court for the Eastern District of Pennsylvania, alleging that BRU orchestrated the arrangements in order to restrain competition, and manufacturers agreed to take RPM policies in the deal with their retailers in violation of the Sherman Act.[108] As a result, the plaintiffs argued that they had paid more for baby products because of the RPM policies taken by the manufacturers. In response, BRU and the manufacturers moved to dismiss the complaints for failure to state a claim upon which relief could be granted.

First of all, the district court confirmed the Supreme Court's support of the pleading standard in

Twombly, that is, to survive a motion to dismiss for failure to state a claim, a plaintiff must provide a statement which has enough heft to show that the pleader is entitled to relief above a speculative level.[109] As for Section 1 of the Sherman Act claim, the district court noted, in accordance with *Twombly* and the precedents in the Third Circuit, that the plaintiffs must state their claim with enough factual matter taken as true to suggest (1) a market or markets in which competition has been harmed, (2) concerted action involving (a) BRU and each manufacturer and (b) each manufacturer and various retailers, (3) the anticompetitive nature of the concerted action, and (4) a causal nexus between the concerted action and the plaintiffs' particular injuries.[110]

With respect to relevant market, the plaintiffs alleged that separate markets of retail sales of high-end baby and juvenile products made by manufacturers constituted several relevant markets in this case. Taking into consideration both reasonable interchangeability and cross-elasticity of demand, the district court held that the plaintiffs succeeded in pleading that the manufacturers would not, by raising prices for their respective relevant high-end baby and juvenile products a small but significant non-transitory amount, lose sufficient sales to make such a price increase unprofitable.[111] According to the court, this in turn meant that the plaintiffs clearly accounted for all economically substitutable products based on reasonable interchangeability and cross-elasticity of demand. Finding that the plaintiffs had stated enough facts to suggest the existence of several high-end baby and juvenile products' markets in which competition has been harmed, the district court declared the clearance of *Twombly* standard as to relevant market.[112]

As for concerted action, the district court stated the necessity for the plaintiffs to plead two interrelated types of concerted action in order to link BRU's actions with the RPM policies.[113] Those were concerted action between BRU and each manufacturer, and concerted action between each manufacturer and that manufacturer's retailers. In order to plead concerted action between BRU and each manufacturer, the plaintiffs claimed parallel conduct coupled with circumstances that tended to negate the possibility that BRU and each manufacturer acted independently. While some factors are widely recognized as useful to negate the possibility of participants' independence, the plaintiffs had evidence to show that parallel conduct in the form of imposition of RPM policies, which were contrary to each manufacturer's independent economic self-interest, were taken by the manufacturers. The plaintiffs also alleged that BRU wielded significant power over each manufacturer because the manufacturers relied on BRU's orders to remain economically viable. Moreover, the plaintiffs also alleged that BRU threatened each manufacturer with severe repercussions in order to induce each manufacturer to impose RPM policies on its retailers. According to the district court, these assertions took the concerted-action allegations beyond mere parallel conduct and negated other potential explanations for the striking parallelism, which constituted enough heft to raise the satisfaction of the concerted-action element of the claim above a speculative level.[114] In addition to concerted action between BRU and each manufacturer, the plaintiffs alleged concerted action between each manufacturer and its retailers in the form of RPM agreements, which were accepted in the end by the district court as having enough fact to raise the satisfaction of the concerted-action element of the claim above a speculative level.[115]

Relying on *Indiana Federation of Dentists*,[116] the district court stated that the plaintiffs could allege the anticompetitive nature of the concerted action by alleging actual harm to competition.[117] According to judicial precedents in the Third Circuit within which the district court sits, hallmarks of such actual harm include an increase in retail prices above competitive level, a reduction in output below competitive level, and deterioration in quality and service.[118] The district court stated that the plaintiffs succeeded in pleading enough facts to suggest the concerted action was anticompetitive by alleging, with evidence, that the RPM raised retail prices for the manufacturers' products beyond competitive level, reduced the output of the products lower than competitive level, and deteriorated customer service.[119] Furthermore, the district court pointed out that harm to intrabrand competition should be examined carefully in this case in accordance with *Leegin* because BRU was a dominant retailer and the RPM at issue was initiated by the dominant retailer contrary to each manufacturer's independent economic self-interest.[120] Accordingly, the court concluded that the allegations far exceeded a conclusory accusation of anticompetitive effect, and constituted the heft required by *Twombly* to raise the satisfaction of anticompetitive effects of the case beyond mere speculation.[121]

The plaintiffs also succeeded in pleading the causal relationship between their injuries and the defendants' conducts by alleging that the injuries were caused by BRU's RPM scheme rather than by ambient market conditions or other natural forces.[122]

For the foregoing reasons, the district court denied the defendants' motions to dismiss.[123]

5. *McDonough*[124]

In the class action against defendants, Toys "R" Us, Inc., the parent company of baby-product retail chain Babies "R" Us, Inc. ("BRU"), and baby-product manufacturers,[125] thirteen consumers who had purchased the baby products alleged that BRU conspired with the manufacturers to restrict competition in violation of Section 1 of the Sherman Act. Specifically, the plaintiffs alleged that BRU coerced the manufacturers into adopting vertical price policies designed to prevent retail discounting and then charged consumers higher prices.

Defendant, retail giant Toys "R" Us, Inc. created BRU and opened several stores in 1996, hoping to capture the U.S. retail market for baby products, which had been dominated by small specialty stores. Unlike these stores, BRU carried many brands and all types of baby products at one location. By purchasing other retail stores, establishing many new stores year by year, and opening an online store, BRU became the dominant retailer of baby products in place of small specialty stores. However, BRU soon began facing tough price competition from internet retailers which offered huge discounts that other retailers could not match. To respond to this competition, BRU demanded that the manufacturers stop internet retailers from discounting their products by adopting RPM and banning internet-only retailing. Considering that BRU dominated this market, the plaintiffs alleged that the baby-product manufacturers were substantially forced to acquiesce to the BRU's demand.[126]

In terms of antitrust violation, the United States District Court for the Eastern District of Pennsylvania reviewed the case based on *Leegin*, which announced that vertical price restraints should be analyzed under the *rule of reason* because they could benefit interbrand competition. The *Leegin* Court mentioned certain factors that should be considered under the *rule of reason* for potential anticompetitive consequences of RPM while discussing three situations[127] where RPM could benefit interbrand competition. One of the factors was the source of the restraints. In *Leegin*, the Supreme Court stated that if there was evidence retailers were the impetus for vertical restraint, there was a greater likelihood that the restraint would support a dominant, inefficient retailer.[128] The Supreme Court also suggested that courts consider whether the restraint-instigator had market power, stating that a retailer which had market power could abuse RPM to the extent that a serious concern in competition would arise.[129]

The district court confirmed that the Third Circuit, within which the district court sat, employed a burden-shifting analysis for the *rule of reason*.[130] Under this approach, a plaintiff bore initial burden showing that an alleged arrangement produced adverse, anticompetitive effects within the relevant markets. And the plaintiff could show that the defendant had the ability to raise prices above those that would prevail in a competitive market instead of showing the existence of actual anticompetitive effects. When the plaintiff met the initial burden of adducing adequate evidence of market power or actual anticompetitive effects, the burden shifted to the defendant to show that the challenged conduct promoted a sufficiently procompetitive objective. To rebut, the plaintiff had to demonstrate that the restraint was not reasonably necessary to achieve the stated objective. In this case, the district court found that the plaintiffs offered evidence that BRU was a dominant retailer that coerced vertical restraints to prevent internet discounting.[131] The court also found that the plaintiffs properly argued that because BRU coerced those restraints, there were only anticompetitive effects.[132] Applying the Third Circuit's burden-shifting analysis to RPM, the district court was satisfied that the plaintiffs met their initial burden of proving the restraints' anticompetitive effects.

6. *Valuepest*[133]

Defendants, Bayer CropScience LP and Bayer Corp. (hereinafter collectively "Bayer") introduced a poisonous termiticide called "Premise" which was highly efficacious to kill termites, and gained market share since its introduction. Bayer initially sold its Premise-products to large termiticide distributors like Univar USA, Inc. ("Univar"). Univar and other distributors then resold the products to pest management professionals ("PMPs"), who provided pest control services to homeowners, as well as other individual customers. Univar and other distributors usually resold the products to PMPs such as plaintiffs, Valupest.com of Charlotte, Inc. ("Valuepest"), National Pest Control, Inc., and Pest Pros, Inc. However, facing competition from Aventis CropScience LP ("Aventis"), which began distributing similar kind of non-repellent termiticide "Termidor" through Univar and other distributors pursuant to non-exclusive agency agreements, Bayer began selling "Premise" through an agency program similar to that used by Aventis. According to the agency agreements, manufacturers were the sellers of termiticides to PMPs, retaining title to the termiticides in the possession of the distributor-agents until they were sold to PMPs, and were allowed to set the prices at which termiticides were sold to PMPs. The distributor-agents merely facilitated the transactions between manufacturers and PMPs, receiving commissions for the sales they facilitated. In the wake of acquisition of Aventis by Bayer, the FTC required Bayer to divest assets relating to fipronil, Termidor's active ingredient. BASF Corp. ("BASF") acquired the fipronil assets from Bayer and since then manufactured and sold Termidor in the United States using agency agreements. The plaintiffs filed a class action lawsuit in the United States District Court for the Western District of North Carolina, alleging that defendant manufacturers, Bayer and BASF, each engaged in RPMs with their termiticides products. Both parties filed motions for summary judgment. While the district court was considering these motions the Supreme Court was listening to arguments in *Leegin*, and while it ruled on the defendants' motion, the district court decided to postpone ruling on the plaintiffs' motion until *Leegin* was decided.[134] In the end, the district court granted summary judgment for defendants on the ground that defendants' contracts with their distributors represented a genuine agency relationship that did not render liability under Section 1 of the Sherman Act.[135)]

In their appeal to the United States Court of Appeals for the Fourth Circuit (“Fourth Circuit”), the plaintiffs insisted that after *Leegin* the agency defense under *General Electric*[136)] to a claim of RPM was no longer viable because the *Leegin* Court overruled *General Electric*. Examining the structure of Section 1 of the Sherman Act, the Fourth Circuit analyzed that *General Electric* addressed what types of relationship constituted agreements to set prices for purposes of the Sherman Act, while *Leegin* was concerned with whether such agreements, once proven, should be considered *per se* unlawful or evaluated under the *rule of reason*.[137)] The Fourth Circuit pointed out that the plaintiffs' argument conflated the distinction between two elements – the existence of an agreement and the reasonableness of the agreement – required to prove liability under Section 1 of the Sherman Act.[138)] Accordingly, the court noted that no part of *Leegin's* reasoning casted the slightest bit of doubt on the underpinning rule of *General Electric*, which confirmed that a genuine agent relationship was not an agreement for antitrust purposes under the rule.[139)] In evaluating the relationship at issue, the court looked at the facts in *General Electric*. In that case, GE sold its lamps to consumers via a consignment arrangement with retail and wholesale merchants.[140)] Prices were set by GE, and the dealers received fixed commissions.[141)] GE retained title to the lamps in the possession of the agents until they were sold to actual consumers.[142)] The manufacturer also assumed the risk of loss from fire, flood, obsolescence, and price decline, paid the taxes on the lamps, and carried insurance on the stock.[143)] The agents were required to pay for all expenses related to storage, transportation, sale, and distribution of the lamps, and were responsible for lost or damage while in the agent's care.[144)] The agents collected payments from customers and remitted the proceeds to the manufacturer, less their commission.[145)] Specifically, the Supreme Court in *General Electric* stressed the fact that agents were not required to pay for the lamps until they had been sold to customers and that the title of the lamps passed directly from the manufacture to the consumer at the time of sale.[146)] The Court did not find the agents were obligated to pay for lost or damaged lamps or to pay for storage, transportation, sale, and distribution expenses inconsistent with a genuine agency relationship.[147)]

The Fourth Circuit also cited *Simpson*[148)] as another major case regarding an agency defense to a claim of RPM. In that case, an oil company's scheme to set the resale price of its gasoline sold to customers by gas stations, was at issue. Under the purported consignment agreement, retailers received commissions on gasoline sold, the title to the consigned gasoline passed directly from the oil company to the consumer at the time of sale, and the oil company paid property taxes on the gasoline held by the retailers.[149)] But, unlike *General Electric*, the retailers were required to carry personal liability and property damage insurance and were responsible for virtually all losses of the gasoline in their possession. As a result, the Supreme Court in *Simpson* held that the purported consignment agreement was not a genuine agent relationship which did not violate the Sherman Act, and therefore constituted unlawful RPM.[151)]

In examining Bayer's and BASF's contracts with Univar, the Fourth Circuit found that both Bayer and BASF retained title on their respective products while in Univar's possession, and the defendants (not Univar) bore the risk of loss on their products until they were delivered into the hands of PMPs.[152)] Beyond the formal labels in the agreements, the court found that a number of facts supported the conclusion that the defendants bore the risk of loss of the substance.[153)] The court also found that the defendants used the agency sales method for legitimate business reasons, such as introducing an entirely new product[154] and staying competitive.[155] Moreover, the court found that there was no evidence that the agency agreements were the product of coercion like those in *Simpson*.[156] Unlike the gasoline retailers in *Simpson*, Univar was not dependent on the agency contracts for its livelihood, and distributors like Univar could actually adopt the agency sales method at their own will.

For the foregoing reasons, the Fourth Circuit concluded that *Leegin* did not eliminate the agency defense to a claim of RPM and found that the agency relationship between the defendants and their distributors were genuine in this case.

C. Federal Legislative Proposal

1. Bills to Repeal *Leegin*

As early as October 30, 2007, about four months after *Leegin*, a bill short-titled "Discount Pricing Consumer Protection Act" was introduced by Senator Kohl in the Senate of the United States.[157] According to the bill, the purpose of the Act was to correct the Supreme Court's "mistaken" interpretation of the Sherman Act in *Leegin*, and to restore *per se* rule against RPM which had survived nearly a century after *Dr. Miles*. The bill's intent was to negate the *Leegin* decision by adding after the first sentence of Section 1 of the Sherman Act the following: "Any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act."[158] The simple rule made it clear that a manufacturer would unquestionably violate the Sherman Act if it entered into such an agreement with its retailers. The bill was read twice and referred to the Committee on the Judiciary, but afterwards no further action was taken. So, Senator Kohl decided to reintroduce the identical bill in the next Congress session.[159] Although the second bill was reported favorably by the Committee and placed on the Senate Legislative Calendar,[160] it turned out to be dead at the end of Congress' session. On the other hand, in the United States House of Representatives, "Discount Pricing Consumer Protection Act of 2009" was introduced by Representative Johnson in July 2009.[161] The purpose and the contents of the bill were identical to those introduced in the Senate, aiming "[t]o restore the rule that agreements between manufacturers and retailers, distributors, or wholesalers to set the price below which the manufacturer's product or service cannot be sold, violates the Sherman Act."[162] The House bill was reported favorably by the Committee on the Judiciary and placed on the Union Calendar,[163] but it also did not become law in the end.[164] On January 25, 2011, Senator Kohl introduced, for the third time in three consecutive Congresses, the same bill which was discarded in the previous sessions.[165]

In his introductory remarks on measure, Senator Kohl stated several reasons for the legislation. At first, he pointed out the danger of allowing manufacturers to set minimum retail prices for the very existence of discounting and discount stores, as it would lead to higher prices for consumers, depriving discounters of opportunities to offer consumers a wide array of highly desired products at the most competitive prices.[166] Considering the studies conducted by the DOJ in the 1960s, when so-called "fair trade" laws were enacted by many States, Senator Kohl warned that the higher prices caused by RPM would force consumers to pay a tremendous amount of money today, citing Justice Breyer's dissenting opinion in *Leegin*.[167] Secondly, the Senator noted the experience of the last three years since *Leegin*, referring to the Wall Street Journal's report that more than 5,000 companies had implemented RPM policies, and a new business known as "internet monitors", had materialized for companies that scour the Internet in search of retailers selling products at a bargain.[168] Thirdly, in response to the argument that today's giant retailers have sufficient market power to fight manufacturer efforts to impose retail prices, Senator Kohl expressed his particular concern about the effect of the new rule permitting RPM on the next generation of discount retailers, who were still relatively small and weak in markets. Specifically, he stated as follows: "If new discount retailers can be prevented from selling products at a discount at the behest of an established retailer worried about the competition, we will imperil an essential element of retail competition so beneficial to consumers."[169) Fourthly, given that parties complaining about RPM are likely to be small discount stores or consumers with limited resources to engage in lengthy and complicated antitrust litigation, Senator Kohl pointed out a particular situation in which a plaintiff in an antitrust case would have to bear onerous burdens for establishing the anticompetitive effects of the RPM at issue.[170) Lastly, Senator Kohl mentioned two extensive hearings, conducted by the Antitrust Subcommittee in the last two Congresses, into the *Leegin* decision and the likely effects of abolishing the ban on RPM.[171) He noted, among other things, that both the former FTC Chairman[172) and former FTC Commissioner[173) strongly endorsed restoring the ban on RPM.[174) Moreover, he referred to the statements of CEO of Syms Corp.[175) and a Senior Executive of Burlington Coat Factory[176) , both of which insisted that abolishing the rules against RPM would make it difficult for discounters like themselves to survive because it would be difficult to prove anticompetitive effects of RPM.[177)

2. Opposition to the Bills

The attempt in the previous Congress to enact legislation to repeal the *Leegin* decision and reinstate *per se* ban on RPM, ended in the reports by the Committees on the Judiciary in both chambers of Congress.[178) Each report respectively recommended that the bills do pass in the Senate or the House. However, the decisions were not made unanimously in both chambers of Congress. In the Senate report, following the majority views of the Committee similar to those stated by Senator Kohl in the bill's introduction, three Senators in the Committee passionately argued and facilitated a spirited discussion about how the antitrust laws should be shaped and applied to protect consumers from anticompetitive behavior, taking into consideration the Supreme Court's relative precedents and modern economics analysis of RPM.[179)

In the first place, the minority views casted doubt on the bill's blanket ban of RPM agreements, insisting that the *per se* rules in antitrust violations should be reserved only for manifestly anticompetitive conduct in light of the Supreme Court's precedents.[180) They stated, citing *Leegin*, that *per se* rules were appropriate only if court could predict with confidence that the practice at issue would be invalidated in all or almost all instances under the ordinary rule-of-reason antitrust analysis.[181) They continued, citing *Business Electronics*,[182) that such *per se* rules had been traditionally confined to restraints that would be always or almost always tend to restrict competition and decrease output.[183) In addition, considering the guiding principle shown in *Sylvania*[184) that a departure from the rule-of-reason standard must be based on demonstrable economic effect rather than formalistic line drawing, they repeated *Leegin*, which stated that the Supreme Court found that *per se* rules were appropriate only after courts had considerable experience with the type of restraint at issue.[185) Furthermore, citing *Kahn*,[186) they confirmed that the Supreme Court had appropriately been reluctant to adopt *per se* rules with regard to restraints imposed in the context of business relationship where the economic impact of certain practices was not immediately obvious.[187) In terms of the *Leegin* decision, they found that the Supreme Court reviewed a considerable body of antitrust economic literature dealing with RPM and concluded that the *per se* rule of *Dr. Miles* was not supportable.[188] Therefore, they noted that the traditional rule-of-reason approach of the Sherman Act, which evaluated RPM agreements according to their actual economic effects, was the far wiser course. They criticized the bill, which proposed to ban all RPM agreements regardless of their actual effects on competition and consumer welfare, as lacking cautious consideration essential in dealing with RPM.[189]

As for economic analysis of RPM, the minority argued that RPM agreements could be procompetitive and benefit consumers and competition, citing many economists' theses, most of which were reflected in an amicus brief by economists in *Leegin*.[190] In addition, it refers to academic figures in the antitrust community, who had recommended before *Leegin* that the *per se* rule by *Dr. Miles* be overruled. For example, the Senators of the minority opinion warned that it would be no less of a mistake for Congress to repeat the *Dr. Miles* Court's error by recreating a *per se* rule that is unsupported by the economic evidence, relying on Judge Posner's book which stated that the old, judicially created *per se* rule against RPM, was "a sad mistake. There is neither theoretical basis, nor empirical support, for thinking the practice generally anticompetitive."[191] They also endorsed Professor Hovenkamp's idea shown in his book that "*Dr. Miles per se* rule was unfortunate" and "the wrong rule, given that much RPM is competitively benign in the great majority of situations when it is not being used to facilitate collusion."[192] Further, they confirmed that Professor Hovenkamp also concluded in his treatise on antitrust law, co-written with the late Professor Areeda, that "[to] the extent that *Dr. Miles* rested on the false categorical propositions that resale price maintenance never benefits manufacturers and always has the same effects as an illegal dealer cartel, its ruling is ripe for reexamination."[193]

Keeping in mind the above-mentioned arguments by economic and antitrust experts, the Senators criticized that the majority's report cited no economic or empirical evidence showing that consumer welfare had been harmed in the aftermath of the *Leegin* decision. They pointed out that the majority's reference to an economic prediction from Justice Breyer's dissenting opinion, who was not seen as an economic policy expert, is outweighed by the economic evidence demonstrated by many economic experts.[194] Although the minority's report noted that the majority's arguments were unconvincing and that the proposed bill was premature to enact, it also admitted that it was still too early to draw meaningful conclusions about the *Leegin* decision's economic consequences. Therefore, they suggested that Congress wait until the economic evidence had time to emerge through lower court cases.[195]

The minority's report acknowledged and embraced the *Leegin* decision and supported the trend of the Court in steadily moving away from *per se* rules in accordance with the development of sound economic principles.[196] And, considering that courts have been given the latitude to fine-tune their understanding of what is, and what is not, an unreasonable restraint of trade based on experience, and a continually developing understanding of economics, the minority's report strongly criticized the bill's aberrational designation of a specific type of agreement as an unreasonable restraint of trade.[197] The minority's report pointed out the danger of maintaining a mistaken view of RPM, which would treat price as the only consideration for measuring consumer welfare.[198] The Senators stated, in accordance with economic scholarship, that consumer-welfare and economic output were maximized when consumers were able to choose from a range of products with varying levels of quality and service, and that such diversity in the market could be unsustainable if RPM were to be flatly banned.[199]

For the foregoing reasons, the Senators of the minority view concluded that the *rule of reason* was the appropriate standard in RPM cases, and declined to join the majority's effort to recreate by statute a judicial rule which would contravene sound economic principles.[200)]

Ⅲ. *LEEGIN* ON REMAND

In *Leegin*, the Supreme Court reversed the judgment of the Fifth Circuit which had held the application of the *per se* rule to RPM, remanding the case for further proceedings under the *rule of reason*. After receiving the case, the Fifth Circuit sent the case back to the district court which had initially depended on the *per se* rule.[201)] The district court, applying the new *rule of reason* standard, dismissed the case this time in favor of the defendant Leegin.[202)] Against the plaintiff PSKS, the Fifth Circuit affirmed the district court's holding that PSKS failed to adequately allege a relevant market. The Fifth Circuit also found that PSKS failed to demonstrate anticompetitive effects of the Leegin's RPM policy in the absence of Leegin's market power. The following were the main issues raised at the remand stage.[204)]

A. *Market Definition and Market Power*

As the district court stated on remand, like many other courts before it, the first step in a rule-of-reason analysis was to determine the relevant market. In terms of antitrust claims for anticompetitive RPM, plaintiffs had to plausibly define the proper relevant market under the *rule of reason*. According to *Du Pont*, relevant market was determined by considering all reasonably interchangeable alternatives based on price, use, and quality.[205)] The Fifth Circuit on remand affirmed the citation regarding market definition by the district court and cited again the same precedent more explicitly than the district court. In *Apani*, the Fifth Circuit had held that, "[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and a motion to dismiss may be granted."[206)]

In its second amended complaint, PSKS alleged that the relevant product markets at issue in the case were the "retail market for Brighton's women's accessories" and the "wholesale sale of brand-name women's accessories to independent retailers." In response to the former claim that Brighton's products had their own market, Leegin opposed the market definition, arguing that countless brands were reasonably interchangeable in use with Brighton products. The district court associated PSKS's market definition with a single brand market argument and stated the difficulty of insisting on such a single market as a relevant market in the light of previous cases including precedent from within the Circuit. In *Domed Stadium*, the Fifth Circuit held that absent exceptional market conditions, one brand in a market of competing brands could not constitute a relevant product market.[207)] Referring to *Kodak*,[208)] the court of appeals also held that, in rare circumstances, a single brand of a product could constitute a relevant market for antitrust purposes. According to *Kodak*, that possibility was limited to situations in which consumers were "locked in" to a specific brand by the nature of the product.[209)] The "locked in" situations could be caused by a structural barrier in the market, but no such structural barrier was found in terms of interchangeability of Brighton products with other competing manufacturers' products, nor had PSKS alleged any such structural barriers at trial.

With regard to the single brand market definition, PSKS argued that Brighton-brand products were unique and distinct from other manufacturers' products, enough to constitute its own submarket. The district court, although acknowledging precedents which recognized the existence of economically significant submarkets, held that PSKS failed to allege a tenable broader market to its alleged submarket. To be precise, the district court mentioned, "[w]hile PSKS may have pleaded facts sufficient to define a submarket, that alone will not get PSKS past the clear law that a single brand cannot be its own market." [210] As for the alleged submarket definition, the Fifth Circuit held that such submarket must exist within a broader economic market and that the requirements for pleading a submarket were no different from those for pleading a relevant broader market.[211]

In response to the PSKS's second proposed market definition, the "wholesale sale of brand-name women's accessories to independent retailers," Leegin argued that the "gerrymandered" product market definition lacked rationale in terms of interchangeability with Brighton's products. By breaking the market definition down into four components (wholesale sale, brand-name, women's accessories and independent retailers), Leegin argued that the PSKS's claim regarding product market was wholly inappropriate.[212] Both the district court and the Fifth Circuit agreed with Leegin's argument on all the four components above, and concluded that the PSKS's market definition was inadequate for analyzing anticompetitive effect under the *rule of reason*. Firstly, both courts pointed out that the relevant markets had to be defined in terms of the product itself without regard to the distribution level against PSKS's "wholesale sale" market contention. Secondly, as for the PSKS's argument that the relevant product should include a "brand name" factor, both courts denied the argument because PSKS failed to sufficiently allege why Brighton products were not interchangeable with non-brand name products.[213] Thirdly, both courts confirmed that "women's accessories" was too broad and vague to constitute a market and it grouped together products that were not interchangeable with each other.[214] Lastly, neither of the courts could find any reason for including "independent retailers" in the market definition because PSKS had not alleged facts that could establish why independent retailers did not compete with other types of retailers selling exactly the same products.[215]

As for the relevant geographic market, PSKS alleged that the Greater Dallas Area was appropriate for its definition because it principally served customers in the area, purchased its products from the Dallas Market, and competed with other retail stores which also had their products sold at the Dallas Market. The district court held that the geographic market matters little in the circumstances in which a tenable product market has not been defined.[216] In affirming the district court's holding in this regard, the Fifth Circuit found nothing about the relevant geographic market in its decision.

Regarding the necessity of market power in relevant markets, on remand, there was a dispute between the parties whether the Supreme Court in *Leegin* intended that a showing of a defendant's market power as a requisite to establish a vertical price fixing arrangement had anticompetitive effects. PSKS, the plaintiff, argued that defining relevant market and pleading market power were not necessarily required under the reasoning in *Leegin*. On the other hand, Leegin, the defendant, argued that a manufacturer with market power was one of the specific scenarios in *Leegin* where vertical price restraints could limit interbrand competition and thus be anticompetitive. In fact, according to *Leegin*, "a manufacturer with market power might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants."[217] On remand, the district court, although recognizing the need to reach the issue, could not assess the alleged vertical price restraint's anticompetitive effect because PSKS had not defined a relevant market properly. The Fifth Circuit, after mentioning that a market power screen was compatible with *Leegin*,[218] and the Circuit's precedents, and the precedents of its sister Circuits, held that a plaintiff must plausibly allege the defendant's market power to allege a vertical restraint claim sufficiently.[219]

B. Anticompetitive Effects

In support of its claim of anticompetitive effects caused by Leegin's RPM, PSKS alleged a few points, which were all rejected by the Fifth Circuit in the end. One of them was the high prices of Brighton products caused by the RPM. The court pointed out the deficiency of the claim in light of basic laws of economics, stating that an artificial price hike by Leegin would merely cause it to lose sales to its competitors in the absence of market power. Another point related to a limitation of intrabrand competition among retailers. According to PSKS's allegation, Leegin's RPM policy deprived consumers of "free and open competition in the purchase of Brighton-brand product." Regarding the argument, the Fifth Circuit pointed out the importance of interbrand competition, which forced Brighton retailers to offer a combination of price and service to attract consumers away from other competing brands' products.[220] The court also cited *Leegin*, which stated that robust intrabrand competition on service could exist even in the absence of price competition, and that retailers could seek to attract customers with better service, more knowledgeable staff, more appealing stores, and other non-price-oriented strategies.[221]

After holding that the Leegin's termination of PSKS as a retailer should not be viewed as an anticompetitive effect in light of *Colgate*,[222] the Fifth Circuit found that PSKS had never alleged any relevant factors, especially those suggested in *Leegin*, that would indicate a plausible anticompetitive effect. In *Leegin*, the Supreme Court held that a dominant retailer and a retailer cartel could force a manufacturer to adopt RPM that it would not otherwise, and cause anticompetitive effects in the relevant market, in addition to a scenario where a manufacturer with market power could bring restriction on interbrand competition.[223] Moreover, the Supreme Court suggested anticompetitive concerns if many competing manufacturers adopted RPMs broadly in the relevant market. The Fifth Circuit on remand held, as noted above, that none of those anticompetitive concerns were alleged in PSKS complaints.[224]

C. Horizontal Restraint Claims

In its second amended complaint, PSKS alleged, for the first time, that Leegin had engaged in horizontal price fixing activities which were illegal *per se*. PSKS's horizontal restraint claims for *per se* analysis were summarized as arguments relying on the theories which were called "dual distribution system" and "hub and spoke conspiracy". Neither of them was accepted by the district court under the mandate rule, which prevented litigation of waived issues on remand because they had never been raised in the lower court. The Fifth Circuit affirmed the decision stating that the district court rightly dismissed the PSKS's horizontal restraint claim as barred by the mandate rule. Emphasizing that the Supreme Court in *Leegin* did not specifically allow PSKS to re-plead allegations it had previously abandoned, the district court on remand rejected PSKS's argument that the mandate rule did not apply in the case.[225] Moreover, the district court analogized the case on remand to the district court decision on remand in *Sylvania*,[226] in which the plaintiff was not allowed to plead horizontal allegations after the Supreme Court overruled *per se* illegality against vertical non-price restraints, and remanded the case to be tried under the *rule of reason*.

CONCLUSIONS

In the four years after *Leegin*, several RPM-related cases were brought to the federal courts, where the courts tried to determine the important factors to be considered in assessing RPM under the *rule of reason* as stated in Chapter IIB. Even though it is premature to draw any definitive conclusion from the discussion in lower courts, it might be possible to suggest a certain tendency for the courts to handle the RPM-related cases after *Leegin*. When reviewing lower court cases, it should be noted that *Twombly*, which was decided by the Supreme Court in the same year and a little earlier than *Leegin*, casts a long shadow over pleading a cause of action in federal courts. After *Twombly*, a plaintiff was required to allege sufficient facts to support a plausible argument claiming an antitrust violation in order to survive a motion to dismiss. Actually, in *Spahr* and *Jacobs*, the plaintiffs involved could not survive the motions to dismiss under the *Twombly* standard because they failed to plead plausible relevant markets and anticompetitive effects of RPM agreements at issue. In *Babyage*, on the other hand, the plaintiffs cleared *Twombly* standard as to relevant market. In those three cases, the evidence of cross-elasticity of demand and reasonable interchangeability of the products at issue, played a conclusive role in deciding whether the market definitions by the plaintiffs were plausible enough to withstand defendants' motions to dismiss. In fact, the plaintiffs in *Babyage* succeeded in pleading several high-end products' markets, which were distinct from those of ordinary products, by showing reasons and explanations based on cross-elasticity of demand and reasonable interchangeability of the products. As for anticompetitive effects at the pleading stage, *Spahr* and *Jacobs* confirmed that alleging only higher prices resulting from RPM as proof of actual harm to competition, was not sufficient to meet the *Twombly* standard. In this regard, the plaintiffs in *Babyage* were able to succeed in pleading anticompetitive effects of the RPM-related conduct in the case by alleging, with evidence, that the RPM raised retail prices beyond competitive level, reduced output lower than competitive level, and deteriorated quality and customer service than before.

McDonough has some points of similarity with *Babyage* not only in fact but also in result. In the class action involving a retail giant of baby products, the plaintiffs in *McDonough* succeeded in showing that the vertical restraints, including RPM to prevent retail discounting, were initiated and coerced by the dominant retailer contrary to each manufacturer's independent economic self-interest. The plaintiffs also succeeded in proving both actual and potential anticompetitive effects of the challenged vertical restraints. The district court in *McDonough* found the existence of anticompetitive effects in the fact that the dominant retailer coerced the manufacturers into adopting vertical restraints to prevent retail discounting through its market power. The trait of the case, incidentally, can be found in the analytical framework that the Third Circuit, within which the district court sits, employs when examining antitrust cases under the *rule of reason*. According to the burden-shifting analysis, once a plaintiff meets the initial burden of showing adequate evidence of market power of the defendant, or actual anticompetitive effects of the challenged conduct, the burden shifts to the defendant for procompetitive justification.

Toledo Mack was not a RPM case but rather a case in which certain vertical restraints between a manufacturer and its dealers were used in order to support illegal horizontal conspiracy among the dealers. But exploring the case may bring us some insight about the handling of vertical restraints by lower courts after *Leegin*. The Third Circuit in *Toledo Mack* stated, citing *Leegin*, that the rule-of-reason analysis would be applied even when a plaintiff alleged that the purpose of the vertical agreement between a manufacturer and its dealers was to support illegal horizontal agreements between multiple dealers. The court of appeals also pointed out that the two possibly illegal situations clarified in *Leegin* were true even in vertical restraints other than RPM.[227] As stated in Chapter I, *Leegin* showed that a retailer-driven vertical restraint created a more dangerous possibility of facilitating a dealer cartel.[228] Therefore, the Third Circuit in *Toledo Mack* actually examined the source of the restraints in the immediate case, finding that the vertical agreements at issue were the result of the dealers' pressure. The Third Circuit found that the manufacturer had market power in the relevant markets even though the vertical restraints challenged in the case were not RPM. The court based its reasoning on *Leegin* which stated that a dominant manufacturer with market power could abuse RPM for anticompetitive purposes and would cause a serious concern regarding competition.

Although *Valuepest* examined what types of relationship constituted agreements to set prices under Section 1 of the Sherman Act, it might be important to the extent of indicating that the *GE doctrine* is still alive after *Leegin*. In response to the argument that the *Leegin* Court denied the *GE doctrine*,[229] the Fourth Circuit in *Valuepest* held that *Leegin* did not eliminate the agency defense to a claim of RPM, and found that the agency relationship between the defendants and their distributors was genuine in the case.

It is still not clear when a RPM could be unlawful under the *rule of reason* even after the remand decisions of *Leegin*. As noted in Chapter III, the remand courts held that the plaintiff failed to allege properly defined relevant market for antitrust scrutiny.[230] In other words, no further antitrust analysis could be done in the remand decisions beyond market definitions. Nonetheless, the remand courts' approach confirmed that a plaintiff would have to allege and prove properly some classic and traditional elements of a rule-of-reason claim, to determine the existence of the defendant's market power in an adequately defined market, and the actual anticompetitive effects of RPM.

As supporters of *Leegin*, DOJ and FTC reacted very quickly to the decision. FTC was quick to review a previous consent order and released the company involved from the prohibition of adopting RPM policy, by carefully considering the factors indicated by *Leegin* as having possibility of bringing anticompetitive consequences. DOJ's remarks after *Leegin* included a highly suggestive proposal for dealing with RPM under the *rule of reason*, although its practical applicability might be unknown. The antitrust division of the department proposed a structured rule-of-reason approach which would (1) permit courts to engage in a truncated review of RPM, (2) detail the elements that a plaintiff could use to establish a *prima facie* showing that burden shifted to defendants, and (3) use for guidance the scenarios identified by *Leegin* as potentially anticompetitive. This approach seems to be similar to that shown in *McDonough*, in that, its purpose is to ease the plaintiffs' burden of proof under the *rule of reason* by shifting the burden to the defendants.

As for the ongoing attempt in Congress to legislatively negate the *Leegin* decision, it seems fair to mention that the prospect of enactment is not clear in the face of strong opposition both in and out of Congress. Considering the rigid expression against RPM in the proposed bill, there might be concern that it would be inharmoniously embedded in the current fairly flexible language of Section 1 of the Sherman Act. Even if the legislative solution would not give rise to a significant problem regarding the interpretation or the expression of the Section, it should be noted that the bill, if enacted, would fix the treatment of RPM until Congress itself repeals it. Therefore, at this moment, it could be a hasty conclusion to enact the bill before examining carefully how lower courts would decide RPM under the *rule of reason*. It seems fair to say that more time is needed to observe how the courts will rule in future cases on the issue at hand, and only then will we be able to ascertain whether the courts can adequately decide RPM based on empirical evidence, and whether their standards are convincing or not.

Notes

1) Leegin Creative Leather Prods, Inc. v. PSKS, Inc.,551 U.S. 877 (2007).
2) Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
3) *Leegin*, 551 U.S. at 897.
4) *Id.* at 898.
5) PSKS, Inc. v. Leegin Creative Leather Prods, Inc., No. 10-653, 2011 WL 588920 (Feb. 22, 2011).
6) *Leegin*, 551 U.S. at 882-85.
7) Kennedy, J. delivered the opinion of the Court, in which Roberts, C. J., Scalia, J., Thomas, J. and Alito, J. joined.
8) *Leegin*, 551 U.S. at 886. *See also* Broad. Music, Inc. v. Columbia Broad.Sys., Inc., 441 U.S. 1, 9 (1979).
9) *Leegin*, 551 U.S. at 886-87. *See also* Ariz. V. Maricopa Cnty. Med. Soc' y, 457 U.S. 332, 344 (1982).
10) *Leegin*, 551 U.S. at 887. *See also* Cont' l T.V., Inc. v. GTE Sylvania Inc., 443 U.S. 36, 58-59 (1977).
11) *Leegin*, 551 U.S. at 889.
12) *Id.*
13) *Id.* at 890.
14) *Id.* at 890-91.
15) *Id.* at 891.
16) *Id.*
17) *Id.* at 892.
18) *Id.* at 894.
19) *Id.*
20) *Id.* at 895.
21) *Id.* at 896.
22) *Id.* at 897.
23) *Id.*
24) *Id.*
25) *Id.* at 897-98.
26) *Id.* at 898.
27) *Id.*
28) Breyer, J. filed a dissenting opinion, in which Stevens, J., Souter, J. and Ginsburg, J. joined.
29) *Leegin*, 551 U.S. at 915.
30) *Id.* at 916.
31) *Id.* at 917-18.
32) *Id.* at 923.
33) Brief for the United States as *Amicus Curiae* Supporting Petitioner, Leegin Creative Leather Prods v. PSKS, 551 U.S. 877 (2007) (No. 06-480), 2007 WL 173650.
34) Cont' l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36.
35) State Oil Co. v. Khan, 522 U. S. 3 (1997).
36) *In re* Nine West Grp. Inc., No. 981386, 2000 WL 250227 (F.T.C.).

37）*In re* Nine West Grp. Inc., No.C-3937, 2008 WL 2061410（F.T.C.）.

38）2009 FTC Workshop:Resale Price Maintenance Under the Sherman Act and the Federal Trade Commission Act（Feb. 17 & 19, May 20-21, 2009）,
available at http://www.ftc.gov/opp/workshops/rpm/

39）OECD, DIRECTORATE FOR FIN. AND ENTER. AFFAIRS, COMPETITION COMM., ROUNDTABLE ON RESALE PRICE MAINTENANCE 2008, DAF/COMP（2008）37,
available at http://www.oecd.org/dataoecd/39/63/43835526.pdf

40）15 U.S.C. § 45.

41）*Id.* Section 5（b）.

42）*In re* Sharp Elecs Corp., No.C-2574, 84 F.T.C 743（1974）, 1974 WL 175833（F.T.C.）, *reopened and modified*, 112 F.T.C. 303（1989）, 1989 WL 1126770（F.T.C.）.

43）*Sylvania*, 433 U.S. 36.

44）*Leegin*, 551 U.S. at 897-98.

45）Thomas O. Barnett, *Assistant Attorney Gen., Antitrust Division, U. S. Dep't of Justice, Luncheon Address to the Federalist Society: Antitrust Update: Supreme Court Decisions, Global Developments, and Recent Enforcement*（Feb. 29, 2008）,
http://www.justice.gov/atr/public/speeches/230627.htm

46）Christine A. Varney, *Assistant Attorney Gen., Antitrust Division, U. S. Dep't of Justice, Remarks as Prepared for the National Association of Attorneys General Program, Columbia Law School: Antitrust Federalism: Enhancing Federal/ State Cooperation*（Oct. 7, 2009）,
http://www.justice.gov/atr/public/speeches/250635.htm

47）*Id.* at 8.

48）*Id.* at 9.

49）Nat' l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85（1984）.

50）F.T.C. v. Ind. Fed' n of Dentists, 476 U.S. 447（1986）.

51）*See Varney, supra note* 48.

52）*OECD*, DAF/COMP（2008）37 at 221.

53）*Id.*

54）*Id.*

55）*Id.* at 222.

56）*Id.*

57）*Id.*

58）*Id.*

59）*Id.*

60）*Id.*

61）*Id.* at 223.

62）*Id.*

63）*Id.*

64）Spahr v. Leegin Creative Leather Prods, Inc., No. 2: 07-CV-187, 2008 WL 3914461（E. D. Tenn. Aug. 20, 2008）, *appeal dismissed*, File No. 08-6165（6th Cir. Nov. 20, 2008）.

65）*Id.* at *9.

66) *Id.*

67) Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

68) *Spahr*, 2008 WL 3914461 at *9.

69) *Id.* at *11.

70) *Leegin*, 551 U.S. at 893.

71) *Spahr*, 2008 WL 3914461 at *12.

72) *Id.*

73) Jacobs v. Tempur-Pedic Int' l, Inc., No. 4: 07-CV-RLV, 2007 WL 4373980 (N.D. Ga. Dec. 11, 2007), *aff'd*, 626 F. 3d 1327 (11th Cir. 2010).

74) For simplicity, the singular form throughout this paper.

75) *Jacobs*, 2007 WL 4373980 at *2.

76) *Twombly*, 550 U.S. at 555-56.

77) *Jacobs*, 2007 WL 4373980 at *3.

78) *Id.*

79) United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

80) *Jacobs*, 2007 WL 4373980 at *4.

81) *Id.*

82) *Id.*

83) *Jacobs*, 626 F.3d at 1336.

84) *Id.* at 1337-38.

85) *Id.* at 1338.

86) *Id.* at 1338-39.

87) *Id.* at 1340-41.

88) *Jacobs*, 626 F. 3d at 1343.

89) *Id.* at 1341-42.

90) *Id.* at 1342.

91) *Id.*

92) *Id.*

93) *Id.*

94) *Id.* at 1345.

95) *Id.* at 1346.

96) Toledo Mack Sales & Serv., Inc., v. Mack Trucks, Inc., No. Civ. A. 02-CV-4373, 2005 WL 724117 (E.D. Pa. Mar. 29, 2005), 2006 WL 2385519 (E. D. Pa. Aug. 16, 2006), *aff'd*, 530 F. 3d 204 (3rd Cir. 2008). 2008 WL 6559607 (E. D. Pa. June 11, 2008), *rev'd*, 530 F. 3d 204.

97) *Toledo Mack*, 530 F.3d at 209. Procedurally, dealers' requests for sales assistance were submitted for approval by a Mack District Manager, a Regional Vice President, or Mack's Controller depending on their responsibility for authorization.

98) *Toledo Mack*, 2008 WL 6559607 at *1.

99) *Toledo Mack*, 530 F.3d at 220.
The evidence the court looked at were: Toledo Mack owner's testimony that other Mack dealers told him bluntly that dealers did not compete on price; Mack district manager's testimony that some Mack dealers had unwritten

understandings not to compete with each other and they were called gentlemen's agreements; Mack consultant testimony that a Mack employee told her that some Mack dealers engaged in selling Mack trucks in other Mack dealers' territories without honoring the gentlemen's agreement. *Id.*

100) *Id.* at 221.

The other evidence the court looked at were: Mack district manager's testimony that his immediate superior told him that Mack was ready to stop Toledo Mack from establishing discounts and selling trucks all over the places; Mack district manager's testimony that Mack executives used sales assistance to control dealers and that the real purpose of Mack's system of cross-checking was to give an in-AOR dealer the advantage over an out-of-AOR dealer; the fact that Mack does not contest that it issued Marketing Distribution Bulletin which eliminated sales assistance to dealers on sales outside their AORs; A recording of a phone call between Toledo Mack owner and Mack Vice President which showed the necessity of approving a new policy whose purpose was a *de facto* ban on out-of-AOR sales by dealers; A recording of a conversation between Toledo Mack owner and Mack's Vice President of Distribution Sales that explained the new policy was the reflection and the result of the voice of dealer organizations. *Id.* at 221-22.

101) *Id.* at 225. *See Leegin*, 551 U.S. at 893.

102) *Leegin*, 551 U.S. at 897-98.

103) *Id.* at 898.

104) *Toledo Mack*, 530 F.3d at 226. Unlike conventional straight trucks which have an engine placed out in front of the driver's cab, the low-cab-over engine trucks have an engine placed underneath the driver's cab. *Id.* As for relevant geographic markets, the court looked at the U.S. as a whole or the U.S., excluding the west. *Id.*

105) *Id.*

106) *Id.* On remand, the district court entered judgment on jury verdict in Mack's favor, and the court of appeals affirmed the district court's evidentiary rulings. Toledo Mack Sales & Serv., Inc., v. Mack Trucks, Inc., No. 09-3013, 386 Fed. Appx. 214, 2010 WL 2676391 (4th Cir. July 7, 2010).

107) Babyage.com, Inc. v. Toys "R" Us, Inc., 558 F. Supp. 2d 575 (E. D. Pa. 2008).

108) *Id.* at 579. In this case, not only claim for combination in restraint of trade (Section 1 of the Act) and claim for conspiracy to monopolize (Section 1 and 2 of the Act), but also monopolization claim (Section 2 of the Act) and attempted monopolization claim (Section 2 of the Act) were stated by the plaintiffs.

109) *Twombly*, 550 U.S. at 555.

110) *Babyage*, 558 F. Supp. 2d at 580.

111) *Id.* at 581.

112) *Id.*

113) *Id.* at 582.

114) *Id.* at 583.

115) *Id.*

116) *Ind. Fed'n of Dentists*, 476 U.S. at 460.

117) *Babyage*, 558 F. Supp. 2d at 583.

118) Angelico v. Lehigh Valley Hosp., 184 F.3d 268, 276 (3d Cir. 1999).

119) *Babyage*, 558 F. Supp. 2d at 583-84.

120) *Id.* at 583.

121) *Id.* at 584.

122) *Id.*

123) After the order by the district court, defendant Kids Line, one of the manufacturers in the case, moved for reconsideration of the court's explanation as to the issue of concerted action between BRU and Kids Line, alleging that the court committed a clear error of law. However, the motion for reconsideration was denied by the district court. Babyage.com Inc. v. Toys "R" Us, Inc., Civil Action Nos. 05-6792, 06-242, 2008 WL 2644207 (E.D. Pa. July 2, 2008).

In addition, the defendants in the case, moved to certify the ruling for interlocutory appeal, alleging that the relevant-market holding and harm-to-competition holding qualified for possible immediate review by the appellate court. The motion, however, was also denied by the district court. Babyage.com Inc. v. Toys "R" Us, Inc., Civil Action Nos. 05-6792, 06-242, 2008 WL 2746302 (E. D. Pa. July 15, 2008).

124) McDonough v. Toys "R" Us, Inc., 638 F. Supp. 2d 461 (E.D. Pa. 2009).

125) *Id.* at 468.Various baby-product manufacturers, such as BabyBjörn, Regal Lager, Britax, Kidsline, Maclaren, Medela, and Peg-Perego were accused of being parts of the conspiracy with BRU.

126) *Id.* at 471. Medela, a breast pump manufacturer, experienced severe retaliation from BRU when it relaxed its RPM policy for a product. Once BRU knew the fact that internet retailers were discounting again, it cancelled all orders from Medela. Afterwards, in a meeting with BRU, Meleda agreed once again to stop internet discounting in exchange for BRU's withdrawal of its cancellation.

127) *Leegin*, 551 U.S. at 890-92. According to the Supreme Court, RPM may encourage retailers to invest in consumer services or promotional efforts that help a manufacturer compete against rival manufacturers, promote interbrand competition by facilitating market entry for new brands, and induce retailers to perform services or promotions that would not be offered even absent free-riding.

128) *Id.* at 897-98.

129) *Id.* at 898.

130) *McDonough*, 638 F. Supp. 2d at 482. *See also* United States v. BrownUniv., 5 F.3d 658, 668-69 (3d Cir. 1993).

131) *McDonough*, at 482.

132) *Id.*

133) Valuepest.com of Charlotte, Inc. v. Bayer Corp., 561 F.3d 282 (4th Cir. 2009).

134) *Id.* at 286. The district court issued an order stating it would wait to rule on plaintiffs' summary judgment motion until after *Leegin* was decided.

135) *Id.*

136) United States v. Gen. Electric Co., 272 U.S. 476 (1926).

137) *Valuepest*, 561 F.3d at 286.

138) *Id.* at 288.

139) *Id.*

140) *Gen. Electric*, 272 U.S. at 481-83.

141) *Id.*

142) *Id.* at 482.

143) *Id.* at 483.

144) *Id.* at 482-83.

145) *Id.* at 482.

146) *Id.*

147) *Id.*

148) Simpson v. Union Oil Co. of Cal., 377 U.S. 13 (1964).

149) *Id.* at 15.

150) *Id.*

151) *Id.* at 24.

152) *Valuepest*, 561 F.3d at 291.

153) *Id.* For example, the Fourth Circuit mentioned the district court's conclusion that testimony from representatives of Bayer, BASF, and Univar confirmed that Bayer and BASF actually retained both title and the risk of loss on Premise or Termidor, respectively until sold to PMPs. The court made its findings based on the facts and evidence presented. When Termidor in Univar's possession was stolen on two occasions, BASF, not Univar, wrote off the losses; When Univar suffered a credit loss on a sale of Premise, Bayer reimbursed Univar; Invoices sent to PMPs buying Premise or Termidor stated that the products were owned by Bayer or BASF, not by Univar.

154) *Id.* at 293. According to the court, Aventis chose to use the agency method to retain more control over how Termidor was sold to PMPs than would have been possible under a more traditional distribution arrangement, when releasing a new product in a highly competitive marketplace.

155) *Id.* According to the court, Bayer was forced to switch the agency method in the wake of the rival product.

156) *Id.*

157) S. 2261, 110th Cong. (1st Sess. 2007).

158) *Id.* If enacted, Section 1 of the Sherman Act (15 U. S. C. §1) would have appeared as follows:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *Any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act.* Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

159) S. 148, 111th Cong. (2d Sess. 2009).

160) S. Rep. No. 111-227 (2010), Calendar No. 473.

161) H. R. 3190, 111th Cong. (2d Sess. 2009).

162) *Id.*

163) H. R. Rep. No. 111-676 (2010), Union Calendar No. 403.

164) During the Congressional Session, a hearing about the *Leegin* decision and its impact was held in the House. *Bye Bye Bargains? Retail Price Fixing, the Leegin decision & Its Impact on Consumer Prices: Hearing Before the Subcomm. on Courts & Competition Policy of the Comm. on the Judiciary*, H. Hrg. 111-37, 111th Cong. (2009).

165) S.75, 112th Cong. (1st Sess. 2011). The Senate Judiciary Committee held an executive business meeting and held over S.75 on October 20, 2011.

166) 157 CONG. REC. S185 (daily ed. Jan. 25, 2011) (Statement of Sen. Herb Kohl).

167) *Id.*

168) *Id.* at S185-86.

169) *Id.* at S186.

170) *Id.*

171) *The LeeginDecision : The End of the Consumer Discounts or Good Antitrust Policy? : Hearing Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the Comm. on the Judiciary*, S. Hrg.110-342, 110th Cong. (2007). *The Discount Pricing Consumer Protection Act : Do We Need to Restore the Ban on Vertical Price Fixing? : Hearing Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the Comm. on the Judiciary*, S. Hrg. 111-267, 111th Cong. (2009).

172) *See* Testimony of Robert Pitofsky, S. Hrg. 110-342, at 92-97.

173) *See* Testimony of Pamela Jones Harbour, S. Hrg. 110-342, at 46-51, S. Hrg. 111-267, at 113-126.

174) 157 CONG. REC. at S186.

175) *See* Testimony of Marcy Syms, S. Hrg. 110-342, at 98-102.

176) *See* Testimony of Stacy J. Haigney, S. Hrg. 111-267, at 100-112.

177) 157 CONG. REC. at S186.

178) Although several attempts were made to pass the bills, the attempts were futile, and so as they were born in Congress, they died in Congress.

179) *See* Minority views from Sens Session, Hatch, and Kyl, S. REP. NO. 111-227 at 9-15. In House, on the other hand, Rep. Issa expressed his opinion on the House Bill to repeal *Leegin*, not as opposition but as additional views for further consideration. Instead of totally prohibiting against any price agreements between a manufacturer and a retailer, he proposed two standards of review for minimum price agreements, focusing on the market power of the price setter. According to his words, "If the price setter had market power, the price agreement would be a per se violation of the Sherman Antitrust Act. If the price setter did not have market power, then the court must apply the rule of reason standard set by the Supreme Court in Leegin Creative Leather Prods., Inc. v. PSKS, Inc. in 2007." *See* Additional views by Rep. Issa, H. R. REP. NO. 111-676 at 9-10.

180) S. REP. NO. 111-227 at 10.

181) *Id. See Leegin*, 551 U.S. at 886-87. *See also Maricopa*, 457 U.S. at 344.

182) Bus. Elecs Corp. v. Sharp Elecs Corp., 485 U.S. 717, 723 (1988).

183) S. REP. NO. 111-227 at 10.

184) *Sylvania*, 433 U.S. at 58-59.

185) S. REP. NO. 111-227 at 10. See *Leegin*, 551 U.S. at 886. *See also BMI*, 441 U.S. at 9.

186) *Kahn*, 522 U.S. at 10.

187) S. REP. NO. 111-227 at 10.

188) *Id.* at 11.

189) *Id.*

190) *Id. See* Brief of *Amici Curiae* Economists at 16, Leegin Creative Leather Prods v. PSKS, 551 U.S. 877 (2007) (No. 06-480), 2007 WL 173681.

191) S. REP. NO. 111-227 at 11. *See* RICHARD A. POSNER, ANTITRUST LAW 189 (2d ed. 2001).

192) *Id.* at 12, *See* HERBERT HOVEMKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLES & EXECUTION 186, Harvard Univ. Press, 2005.

193) S. REP. NO. 111-227 at 12. *See* 8 PHILLIP E. AREEDA & HERBERT HOVEMKAMP, ANTITRUST LAW 217 (2d ed. 2004).

194) S. REP. NO. 111-227 at 12.

195) *Id.* at 13.

196) *Id.* at 14.

197) *Id.*

198) *Id.*

199) *Id.*

200) *Id.* at 15. In their strong rejection of the bill, the Senators of the minority opinion regarded the majority's effort to enact a law against the *Leegin* decision as a "false guise of being faithful to precedent", and viewed the *per se* rule by *Dr. Miles* as "a relic from a pre-economic, populist era in antitrust law." *Id.*

201) PSKS, Inc. v. Leegin Creative Leather Prods, Inc., 498 F.3d 486 (5th Cir. 2007).

202) PSKS, Inc. v. Leegin Creative Leather Prods, Inc., No. CV 2 :03 CV 107 (TJW), 2009 WL 938561 (E.D. Tex. Apr. 6, 2009).

203) PSKS, Inc. v. Leegin Creative Leather Prods, Inc., 615 F.3d 412, 418 (5th Cir. 2010).

204) *Id.* at 419.

205) *Du Pont*, 351 U.S. at 395-96.

206) Apani Sw. Inc. v. Coca-Cola Enters Inc., 300 F.3d 620, 628 (5th Cir. 2002).

207) Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 488 (5th Cir. 1984).

208) Eastman Kodak Co. v. Image Technical Servs, Inc., 504 U.S. 451 (1992).

209) *Id.* at 481-82.

210) *Leegin* on remand, 2009 WL 938561, at *3.

211) *Leegin* on remand, 615 F.3d at 418.

212) *Leegin* on remand, 2009 WL 938561, at *3.

213) *Id.* at, *4. In this regard, PSKS mentioned *Babyage*, which had allowed the products in the case to be defined as "high-end" baby products (strollers etc.), as a supporting decision for its "brand-name" market definition. The district court, however, decided that the case was distinguishable from the present case. According to the court's understanding, PSKS failed to allege facts that supported the point that "brand-names" were important to interchangeability in the present case; while in *Babyage*, the plaintiff succeeded in pleading why "high-end" baby products were not interchangeable with other types of baby products.

214) The district court cited a sister case, *Spahr*, in which the judge held "picture frames do not compete with women's handbags, and shoes do not compete with jewelry."

215) *Leegin* on remand, 2009 WL 938561, at *4, 615 F.3d at 418.

216) *Leegin* on remand, 2009 WL 938561, at *5. The district court mentioned that the geographic market definition based on where PSKS purchased its products was irrelevant.

217) *Leegin*, 551 U.S. at 894.

218) *Id.* at 898. The Fifth Circuit pointed out the *Leegin* holding, which had stated even anticompetitive uses of RPM had not created concern unless the relevant entity had market power.

219) *Leegin* on remand, 615 F.3d at 418.

220) *Id.* at 419.

221) *Id.*

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

223) *Leegin*, 551 U.S. at 893-94.

224) Further, the Fifth Circuit on remand held that no proof of a harm to interbrand competition had been provided by PSKS even though the alleged facts were true. The court emphasized the necessity of providing antitrust injury which was held in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), and additionally pointed out the insufficiency of PSKS's factual claim in order to state an offence under Sherman Act in light of the pleading standard shown in *Twombly*.

225) *Leegin* on remand, 2009 WL 938561, at *6.

226) Cont' l T.V., Inc. v. GTE Sylvania Inc., 461 F. Supp. 1046 (N.D.Cal. 1978), *aff'd*, 694 F.2d. 1132 (9th Cir. 1982). In that remand decision, the Ninth Circuit cited, Omni Outdoor Adver. v. Columbia Outdoor Adver., 974 F.2d 502 (4th Cir. 1992).

227) *Toledo Mack*, 530 F.3d at 220-21.

228) *See supra* p. 8.

229) *Gen. Electric*, 272 U.S. at 484. The *GE doctrine* enabled defendants in RPM cases to avoid the application of the Sherman Act by proving their contracts with distributors represented a genuine agency relationship.

230) *See supra* p.62-65.

(2011年11月25日掲載決定)