

*O*verview and contents of the  
special issue: Antitrust analysis of  
resale price maintenance after *Leegin*

BY GREGORY T. GUNDLACH\*

**I. RESALE PRICE MAINTENANCE**

Resale price maintenance (RPM), otherwise known as vertical price fixing, refers to agreements between or other practices among marketers at different levels in a distribution channel establishing the resale price at which a product or service must be sold. As a vertical intrabrand restraint, RPM governs the resale price of products or services of a particular manufacturer.

RPM can take the form of either setting a price floor below which sales cannot occur, as in the case of minimum resale price

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\* Distinguished Professor, University of North Florida; Senior Research Fellow, American Antitrust Institute. I served as an expert for PSKS in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* and related cases.

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maintenance, or a price ceiling, as in maximum resale price maintenance. In its classic formulation, RPM involves directly controlling the retail transaction price for the manufacturer's products. However, RPM may also be accomplished through so-called *Colgate* programs under which a manufacturer announces unilaterally its recommended retail prices and stops dealing with retailers that do not follow its suggestions. Less direct variations are also found in practice as well.<sup>1</sup> At issue in the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>2</sup> was *minimum* RPM.

## II. THE SUPREME COURT'S DECISION IN *LEEGIN*

Except for overriding legislation<sup>3</sup> and judicial circumscription,<sup>4</sup> since 1911 and until the Supreme Court's 2007 decision in *Leegin*,

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<sup>1</sup> See Gregory T. Gundlach, *Resale Price Maintenance After Leegin: Topics and Questions for Research*, FTC Hearings on Resale Price Maintenance: Empirical Evidence on the Effects of Resale Price Maintenance 3 (May 20, 2009) ("RPM may also be accomplished indirectly. For example, the transaction price of a product may be controlled indirectly through *limiting free goods, occasion gifts, two-for-ones, etc.* . . . Prices and intrabrand price competition may also be controlled and restricted through *minimum advertising policies* (MAP) that target and restrict communications regarding lower than recommended prices. Other approaches include *restrictive distribution practices involving price* where, for example, a retailer is restricted from reselling its products on the Internet based on an assumption that it will be sold for a lower price if allowed. Other variations are likely employed as well.").

<sup>2</sup> 551 U.S. 877 (2007).

<sup>3</sup> See Miller-Tydings Act, Pub. L. No. 314, 50 Stat. 693 (1937) (permitting states to pass so-called fair trade laws legalizing RPM within their states) and McGuire Act, Pub. L. No. 542, 66 Stat. 631 (1952) (permitting states to pass fair trade laws allowing manufacturers to enforce RPM on all retailers if at least one retailer signed an RPM agreement). See also Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (repealing the Miller-Tydings Act and McGuire Act).

<sup>4</sup> See *United States v. General Electric*, 272 U.S. 476 (1926) (holding that the per se rule against RPM does not apply to agency relationships or where a good is sold on consignment); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (finding in relation to any inference of an illegal price fixing agreement and the Sherman Act "[i]n the absence of any purpose to create or

minimum RPM had been per se unlawful following the Court's decision in *Dr. Miles*.<sup>5</sup> *Leegin*, nearly a century later, formally reversed that decision, ruling that vertical minimum RPM is no longer per se illegal, but is now to be judged under the "rule of reason."

*Leegin* adds to the Court's decisions in *Sylvania*<sup>6</sup> and *Kahn*,<sup>7</sup> which held that other types of vertical intrabrand restraints are to be judged under the rule of reason. In *Sylvania*, the Court overruled *Schwinn*<sup>8</sup> to hold that vertical customer and territorial restrictions are to be judged by the rule of reason. In *Kahn*, the Court held that maximum vertical price fixing must also be evaluated under the rule of reason.

### III. ANTITRUST ANALYSIS OF RPM POST-LEEGIN

In the time since *Leegin*, the Court's decision and the process of establishing a workable structure for application of the rule of reason to cases involving RPM have been the focus of considerable interest

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maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell"); *Monsanto Co. v. Spray-Rite Serv. Corp.* 465 U.S. 752, 768 (1984) (articulating the standard under which a price fixing agreement may be inferred finding that "[t]he correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective"); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 727-28 (1988) (finding that "[t]here has been no showing here that an agreement between a manufacturer and a dealer to terminate a 'price cutter,' without a further agreement on the price or price levels to be charged by the remaining dealers, almost always tends to restrict competition and reduce output").

<sup>5</sup> *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). *Dr. Miles* was the genesis of a long line of decisions that held vertical minimum price fixing per se unlawful.

<sup>6</sup> *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

<sup>7</sup> *State Oil Co. v. Kahn*, 522 U.S. 3 (1997).

<sup>8</sup> *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

among members of the antitrust community. According to a high ranking antitrust enforcer “*Leegin* leaves many questions unanswered”<sup>9</sup> and as described by two antitrust commentators, “the challenge now becomes figuring out how to balance asserted procompetitive justifications and potential anticompetitive effects.”<sup>10</sup> As elaborated upon in this section, going forward, answers to the questions posed by *Leegin* and the challenge of applying the Court’s decision in practice will be impacted by various factors and developments.

A. *Theoretical basis and empirical relevance of explanations for RPM’s competitive effects*

As captured in the majority opinion and dissent in *Leegin*, ongoing discourse in antitrust surrounds the theoretical basis and empirical relevance of explanations offered to describe the competitive effects of RPM. Although some view the Court’s decision as consistent with the current “state of theory” in relation to RPM’s competitive effects, others disagree, contending that the Court overlooked or otherwise discounted important explanations of RPM’s anticompetitive effects. At the same time, terse debate surrounds many of the individual explanations that describe RPM’s competitive effects. There is a lack of consensus as to the theoretical validity and empirical relevance of many explanations, with only limited empirical evidence and few contemporary studies available to facilitate resolution of these differences.<sup>11</sup> In addition, although some are accepting of the Court’s

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<sup>9</sup> Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Antitrust Federalism: Enhancing Federal/State Cooperation*, Remarks Prepared for the National Association of Attorneys General 8 (Oct. 7, 2009).

<sup>10</sup> Scott Martin & Fiona Schaeffer, *A Rule of Reason for Vertical Price Fixing—Part II*, METROPOLITAN CORP. COUNS. (Nov. 1, 2007), available at <http://www.metrocorp.counsel.com/current.php?artType=view&artMonth=November&artYear=2007&EntryNo=7404>.

<sup>11</sup> For empirical research, see Thomas Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* (FTC Bureau of Economics Staff Report 1983) and Pauline Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J.L. & Econ. 263 (1991)—both cited by

nearly exclusive reliance on theory to inform its decisionmaking, others are less sanguine, having concerns about the Court's decision to alter RPM's per se status in the absence of stronger consensus and available empirical evidence.

The debate is magnified by differences in the underlying assumptions at the foundation of the alternate perspectives that have evolved to inform antitrust understanding of RPM.<sup>12</sup> The perspectives differ with respect to how the complexity of competition found downstream of manufacturers within a distribution system should be treated. These differences result in different and at times opposing conclusions as to: (1) a manufacturer's interests in adopting RPM,<sup>13</sup>

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the Supreme Court in *Leegin*. For other scholars who have examined RPM employing empirical based methodologies, see Ward S. Bowman, Jr., *Resale Price Maintenance—A Monopoly Problem*, 25 J. BUS. U. CHI. 141 (1952) (examining RPM for liquor sales) and Robert L. Steiner, *Manufacturers' Promotional Allowances, Free Riders and Vertical Restraints*, 36 ANTITRUST BULL. 383 (1991) (examining RPM drawing upon distribution experience as an executive for a major toy manufacturer).

<sup>12</sup> As widely characterized and applied in the antitrust literature concerning RPM, one perspective contends that the retail market and retailing may be best understood through economic theory, which conceives of both as static and perfectly competitive unless cartelized or monopolized. Alternately, the other perspective argues that the retail market and retailing may be best understood, in addition, through the added guidance of economic theories of imperfect competition. See especially Robert L. Steiner, *Does Advertising Lower Consumer Prices?*, 37 J. MARKETING 19 (1973); Robert L. Steiner, *Basic Relationships in Consumer Goods Industries*, 7 RES. MARKETING 165 (1984); Robert L. Steiner, *The Inverse Association Between the Margins of Manufacturers and Retailers*, 8 REV. INDUS. ORG. 717 (1993); Robert L. Steiner, *Vertical Competition, Horizontal Competition and Market Power*, 53 ANTITRUST BULL. 252 (2008).

<sup>13</sup> See Gundlach, *supra* note 1, at 5 ("Although both schools of thought agree that manufacturers and consumers benefit from intrabrand competition that keeps the cost of distribution and retail prices low, given their differing perspectives they diverge as to the extent to which these interests maintain their alignment in the real-world. One school sees that unless a market is cartelized or monopolized, the interests of manufacturers and consumers are generally aligned when it comes to the use of RPM. This leads to the conclusion that RPM is more often adopted by a manufacturer for the procompetitive purpose of increasing its sales because it otherwise would

(2) the likelihood of circumstances leading to RPM's abuse,<sup>14</sup> and (3) the relevance of differing forms of competition for safeguarding against RPM's adverse effects.<sup>15</sup> These differences, in turn, translate to alternate perspectives as to the theoretical and empirical significance given to explanations that describe RPM's procompetitive and anticompetitive effects as well as the appropriate metrics and methods for understanding these effects.

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make little sense—RPM would just result in excess profits to retailers and higher prices to consumers. The other school sees the interests of manufacturers and consumers diverging at times and in significant ways. This leads to the conclusion that a manufacturer may adopt RPM voluntarily for anticompetitive purposes as well as involuntarily leading to anticompetitive effects.”).

<sup>14</sup> See *id.* (“The two schools of thought also possess different views concerning the likelihood that circumstances required for the abuse of RPM will be found in practice. Both acknowledge the prospect that RPM may facilitate a manufacturer cartel or be abused by a powerful manufacturer. However, because they draw different conclusions concerning the degree to which manufacturers’ and consumers’ interests tend toward alignment in practice they differ as to the potential for the abuse of RPM by retailers through retail collusion and the exercise of retail market power.”).

<sup>15</sup> See *id.* at 6 (“The two schools of thought also differ as to the importance of differing forms of competition for safeguarding against competitive abuses of RPM. One school emphasizes *interbrand* competition, assigning less importance and effect to *intra*brand competition. Subscribing to the logic that ‘when interbrand competition exists . . . it provides a significant check on the exploitation of intra brand market power because of the ability of consumers to substitute a different brand of the same product,’ interbrand competition between brands is thought to sufficiently safeguard against abuses of RPM. Sacrificing competition among retailers to invigorate competition between brands is therefore considered a welfare-enhancing tradeoff. The other school emphasizes the importance of both inter- and intra brand competition (as well as ‘vertical competition’ between channel participants). Viewing consumers’ substitution processes to be subject to market imperfections, each is considered to play an important safeguarding role. Citing evidence that it is competition among retailers that primarily disciplines retail margins, intra brand competition is viewed as critically important for safeguarding against abuses of RPM. Sacrificing competition among retailers to invigorate interbrand competition is therefore not seen to be automatically a welfare enhancing tradeoff.”).

The Court's decision has thus reinvigorated ongoing debate over the theoretical foundations of RPM as well as renewed calls for empirical research to better understand its nature and effects. Outcomes from this debate together with the results of related research is likely to significantly influence application of *Leegin* going forward.

*B. Practical implications of applying the rule of reason to cases involving RPM*

Discourse in antitrust also surrounds the practical implications of applying the rule of reason to cases involving vertical practices in general and now to those involving RPM. In this respect, some see the rule of reason and even a "truncated" version of it as well suited for distinguishing anticompetitive instances of RPM harmful to consumers from instances of RPM that stimulate competition and are in the consumer's best interest. Others, however, are much more skeptical of the rule's utility and therefore disagree as to these prospects.

Skeptics point out that plaintiffs face significant costs and burdens in mounting a prima facie case under the full rule of reason. As a result, they contend that in practice the rule of reason operates as a rule of de facto per se legality. To back their claims they cite longitudinal studies that examine the outcomes of cases involving other vertical practices evaluated under the rule of reason. These studies report very a low incidence of success on the part of plaintiffs.

Skeptics also point to the more stringent pleading requirements now required by the Court in *Twombly*<sup>16</sup> as further basis for their contention that the rule of reason places unfair burdens and costs on

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<sup>16</sup> See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (holding that a complaint must "contain enough factual matter (taken as true) to suggest that an agreement was made," *id.* at 1965; that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality," *id.* at 1966; and in conclusion, "[w]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face," *id.* at 1974.)

plaintiffs in practice. This decision requires that going forward plaintiffs must plead “enough facts to state a claim to relief that is plausible on its face” before they are entitled to discovery.<sup>17</sup> *Twombly* is considered to have increased the challenges for plaintiffs to successfully mount an antitrust case.

In general, skeptics argue that something less than a full rule of reason is more appropriate given the practical challenges of applying the rule to instances of RPM’s alleged abuse. The most skeptical contend that as a result of these limitations RPM should be returned to its prior status as per se illegal. Others take the position that the rule of reason should be applied in a “structured” fashion and/or include some type of presumption of illegality. Various proposals have been advanced or have appeared for a rule of reason of this form. Those espousing a presumption of illegality for RPM contend that by definition the practice restricts intrabrand price competition, and therefore, when it is found, defendants rather than plaintiffs should carry the burden of justifying its use.

The Court’s decision has thus also prompted considerable debate over the proper approach for applying the rule of reason in practice. This debate and its outcomes will surely affect application of *Leegin* going forward.

### C. Innovation affecting retail institutions and retailing

Another factor that will impact application of the Court’s decision in *Leegin* involves the innovation affecting retail institutions and retailing and most particularly that occurring through development and application of the Internet and related information technologies. The Internet has had a substantial impact on business and retailing, especially through Internet retailers. Growing at an annual rate in excess of 20% for most of the last decade and prior to the economic recession, e-retail sales accounted for \$129.8 billion in sales during 2009.<sup>18</sup> Consumers who use the Internet are often able to easily find, compare,

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<sup>17</sup> *Id.* at 1974.

<sup>18</sup> COMSCORE, THE 2009 U.S. DIGITAL YEAR IN REVIEW (Feb. 8, 2010), available at [http://www.comscore.com/Press\\_Events/Presentations\\_Whitepapers/2010/The\\_2009\\_U.S.\\_Digital\\_Year\\_in\\_Review](http://www.comscore.com/Press_Events/Presentations_Whitepapers/2010/The_2009_U.S._Digital_Year_in_Review).



and purchase products as a result of the Internet's convenient access to information. At the same time, Internet retailing enhances competition through effectively widening and deepening the market for goods and services. Although not addressed in *Leegin*, considerable discourse exists as to the impact of Internet retailing on the relevance of arguments for and against RPM. Since *Leegin*, this discourse has evolved to include the implications of the Court's decision for retail innovation.

Some contend that the use of the Internet and Internet retailers by an increasing number of consumers supports the primary justification for RPM—the so-called free rider explanation.<sup>19</sup> Extending the free rider theory, those espousing this view argue that online retailers who offer products at discounted prices but provide little else free ride on traditional brick-and-mortar retailers when consumers first visit the latter to learn about a product but subsequently purchase the same product from the former at a lower price. They contend that the use of RPM under such circumstances is justified to avoid the adverse consequences of free riding to interbrand competition. Accordingly, they approve of the Court's decision in *Leegin* to reject the per se rule against RPM in favor of the rule of reason for evaluating RPM's use.

Others, however, argue that justifications for RPM based on the adverse effects of free riding by online retailers are not supportable in fact and that brick-and-mortar retailers often free ride on online

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<sup>19</sup> See Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1 COL. BUS. L. REV. 1, 11 (1995) (As applied in antitrust, free riding occurs when "a firm is able to capture the benefits of investments that another firm has made without paying for them."); Richard M. Brunell, *Overruling Dr. Miles: The Supreme Trade Commission in Action*, 52 ANTITRUST BULL. 475, 502 (2007) ("The principal theory discussed by the [*Leegin*] Court and relied upon by resale price maintenance advocates is the "free rider" theory, under which resale price maintenance can benefit consumers because the higher prices may induce retailers to provide pre-sale services that promote interbrand competition and otherwise would not be provided."). The free riding explanation was first popularized by Lester Telser. See Lester Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960). The foundational thinking and economic reasoning upon which the concept of free riding resides can be found in the earlier work of T.H. Silcock & F. W. Taussig. See T. H. Silcock, *Some Problems of Price Maintenance*, 48 ECON. J. 42 (1938) and F.W. Taussig, *Price Maintenance*, 6 AM. ECON. REV. PAPERS & PROCEEDINGS 170 (1916).

retailers. Moreover, they argue that the use of RPM dampens the progress of retail innovation, especially innovation currently underway as a result of the Internet and related information technologies. Those espousing this view contend that (1) many Internet retailers provide valued information to consumers, (2) consumers more often first visit Internet retailers to learn about products prior to subsequently purchasing them at a brick-and-mortar retailer, and (3) prices found on the Internet are not always lower than those found in brick-and-mortar stores. Thus, they argue that accusations that online retailers are free riders are unfounded or otherwise exaggerated. Instead, they contend that RPM is more often used to protect incumbent brick-and-mortar retailers against competition by more innovative forms of retailing brought about through the Internet or advances in other channels of distribution. Citing historic accounts of RPM's use over time, they contend that Internet retailing is just the latest innovation in a long line of retail formats to which RPM has been applied in an effort to protect the status quo. Accordingly, they disapprove of the Court's decision in *Leegin* to reject the per se rule in favor of the rule of reason.

The confluence of the Internet and the Court's decision in *Leegin* has thus ignited debate over the consequences of RPM for innovation and the future of retailing. This debate will play a role in shaping how *Leegin* will be applied in future cases.

#### *D. Changes in the use of RPM and related strategies in practice*

Following *Leegin*, debate existed as to whether the Court's decision would lead to an increase in the use of RPM in practice. Given the decision and following modern trends in application of the rule of reason, some predicted that RPM would increase post-*Leegin*. Others disputed these predictions contending that judicial decisions since *Dr. Miles* had effectively circumscribed the per se prohibition against RPM by permitting manufacturers to deploy such strategies through *Colgate* programs, under which a manufacturer may announce unilaterally its recommended retail prices and stop dealing with retailers that do not follow its suggestions. Since *Leegin*, however, findings and anecdotal reports suggest that business

practitioners have in fact increased their use of RPM and related practices such as minimum advertised prices.

One content analysis of popular and trade press publications containing the opinions of legal and industry commentators made shortly after *Leegin* found over ninety-five percent contained statements and views that RPM would increase post-*Leegin*.<sup>20</sup> Half of the forty-two articles analyzed contained opinions referencing fourteen different industries, suggesting that any increase in RPM post-*Leegin* would not be limited to a few industries. Diverse industries were included in the list: automotive products, baby products, bicycles, consumer electronics, furniture, health and beauty aids, imaging and pictures, kitchen and bath, personal computers, wireless communications, and women's wear. The list also included luxury and premium brands of products in general, and franchising and Internet retailers as distinct models of retailing.

Anecdotal reports describing RPM practices since *Leegin* confirm the predictions of legal and industry commentators that RPM would increase post-*Leegin*. One series of articles in the *Wall Street Journal* by a leading consumer journalist extensively documents how businesses have responded to the Court's decision in practice.<sup>21</sup> According to the

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<sup>20</sup> Gregory T. Gundlach, Kenneth C. Manning & Joseph P. Cannon, *Will Leegin Lead to an Increase in Resale Price Maintenance? An Examination of Published Reports and Opinions* (2009) (on file with author).

<sup>21</sup> See Joseph Pereira, *Price Fixing Makes Comeback After Supreme Court Ruling*, WALL ST. J., Aug. 18, 2008, at A1; Joseph Pereira, *Why Some Toys Don't Get Discounted—Manufacturers Set Minimums That Retailers Must Follow or Risk Getting Cut Off*, WALL ST. J., Dec. 24, 2008, at D1; Joseph Pereira, *Discounters, Monitors Face Battle on Minimum Pricing*, WALL ST. J., Dec. 4, 2008, at A1; Joseph Pereira & John R. Wilke, *Instruments, Audio Gear Scrutinized in Price Probe*, WALL ST. J., Oct. 23, 2008, at B1; Joseph Pereira, *State Law Targets "Minimum Pricing,"* WALL ST. J., Apr. 28, 2009, at D1; Joseph Pereira, *Group Hits Manufacturers' Minimum Pricing*, WALL ST. J., Dec. 4, 2008, at A4; Joseph Pereira, *Minimum-Price Foes to Use eBay in Effort*, WALL ST. J., Dec. 5, 2008, at B7; Joseph Pereira & John R. Wilke, *Instrument Industry Settles Pricing Case*, WALL ST. J., Mar. 5, 2009, at B3; Joseph Pereira, *eBay Backs Curbs on Pricing Accords*, WALL ST. J., May 20, 2009, at B6; Joseph Pereira, *Toys "R" Us Faces Class Action—Suit Alleges Price-Fixing with Manufacturers on Strollers, Other Products*, WALL ST. J., Jul. 16, 2009, at B3; Joseph Pereira, *Toys "R" Us Faces Federal Antitrust Inquiry—Regulators Probe Whether Retailer Stifled Discounting*

author, since *Leegin*, “the practice has surged,”<sup>22</sup> “retail-pricing norms have . . . changed significantly,”<sup>23</sup> and “[i]n the wake of the decision, many manufacturers have instituted pricing minimums for advertising or sales.”<sup>24</sup> The *Wall Street Journal* reporter cites one expert’s account that “[t]oday there are an estimated 5,000 companies that have implemented minimum-pricing policies, much of it happening in the wake of the Supreme Court decision.”<sup>25</sup> Anecdotes of minimum pricing policies include products sold in well-known and popular retailers such as Wal-Mart,<sup>26</sup> Best Buy, Circuit City, and Toys “R” Us,<sup>27</sup> as well as a diverse number of Internet retailers.<sup>28</sup> Products now reported to be subject to minimum pricing policies appear in a wide range of product categories, including popular brands of video game equipment and video games,<sup>29</sup> bassinets, strollers and baby products,<sup>30</sup> maternity and baby gear,<sup>31</sup> lighting and home improvement products,<sup>32</sup> flat-screen TVs, power tools, car parts, photographic equipment, handbags, appliances, and audio equipment.<sup>33</sup> The spike in interest in minimum pricing policies has

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*by Rivals, Violating an 11-Year-Old Order; Baby Products are an Issue*, WALL ST. J., Oct. 17, 2009, at A3.

<sup>22</sup> Pereira, *State Law Targets “Minimum Pricing,”* *supra* note 21, at D1.

<sup>23</sup> Pereira, *Price Fixing Makes Comeback,* *supra* note 21, at A1.

<sup>24</sup> *Id.* at A1.

<sup>25</sup> Pereira, *State Law Targets “Minimum Pricing,”* *supra* note 21, at D1.

<sup>26</sup> *Id.* at D1.

<sup>27</sup> Pereira, *Price Fixing Makes Comeback,* *supra* note 21, at A1.

<sup>28</sup> See Pereira, *Why Some Toys Don’t Get Discounted,* *supra* note 21, at D1.

<sup>29</sup> *Id.* at D1.

<sup>30</sup> See Pereira, *State Law Targets “Minimum Pricing,”* *supra* note 21, at D1; Pereira, *Toys “R” Us Faces Class Action,* *supra* note 21, at B3; Pereira, *Toys “R” Us Faces Federal Antitrust Inquiry,* *supra* note 21, at A3.

<sup>31</sup> See Pereira, *Price Fixing Makes Comeback,* *supra* note 21, at A1.

<sup>32</sup> See *id.* at A1.

<sup>33</sup> See Pereira, *Group Hits Manufacturers’ Minimum Pricing,* *supra* note 21, at A4.

reportedly even spawned new businesses, including companies like NetEnforcers, that use electronic technology to scour the Internet and help manufacturers keep track of what prices retailers are advertising for their products.<sup>34</sup> Other reports similarly document the increasing occurrence of RPM post-*Leegin*.<sup>35</sup>

The Court's decision in *Leegin* has thus prompted changes in the use of RPM and related strategies with many marketers adopting the practice. This increase in the use of RPM will also impact application of *Leegin* in the future.

#### *E. Response of antitrust authorities, legislators, and the courts*

In the wake of *Leegin* and against the backdrop of the above described developments, federal and state antitrust authorities, legislators, and judges are scrutinizing the Court's decision and deliberating on how best to proceed. Their deliberations and actions have led to a variety of public developments and outcomes that are shaping antitrust policy going forward.

1. FEDERAL At the federal level, antitrust authorities in the United States have taken various steps to better understand RPM and its effects and how best to apply the Court's ruling in *Leegin*.<sup>36</sup> In the spring of 2009, the Federal Trade Commission (FTC) held a series of public workshops to examine "how to best distinguish between uses

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<sup>34</sup> See Pereira, *Discounters, Monitors Face Battle*, *supra* note 21, at A1; Pereira, *Why Some Toys Don't Get Discounted*, *supra* note 21, at D1.

<sup>35</sup> See Greg Tarr, *Sony Adds New Premium-Goods Sales Policy*, TWICE: THIS WEEK IN CONSUMER ELECTRONICS, May 5, 2008, available at [http://www.twice.com/article/print/259090-Sony\\_Adds\\_New\\_Premium\\_Goods\\_Sales\\_Policy.php](http://www.twice.com/article/print/259090-Sony_Adds_New_Premium_Goods_Sales_Policy.php).

<sup>36</sup> International antitrust authorities have also taken note of the Supreme Court's decision in *Leegin*. See, e.g., Luc Peeperkorn, *Resale Price Maintenance and its Alleged Efficiencies*, 4 EUR. COMPETITION J. 201, 201 (2008) ("The recent opinion of the US Supreme Court in the *Leegin* case . . . is also stirring debate on the other side of the Atlantic and raises the question whether this should have relevance for EC competition policy."). The European Commission treats RPM as a "hardcore restriction" that presumptively violates article 81(1) of the Treaty of Rome. See Comm. Reg. 2790/1999, Art. IV, 1999 O.J. (L336) 21, 23.

of RPM that benefit consumers and those that do not.”<sup>37</sup> The multiday workshops included presentations by scholars from various disciplines, antitrust practitioners, and agency enforcement officials among others. The FTC has also issued two RPM-related orders since *Leegin*. The FTC released Nine West from a prior consent order prohibiting it from entering into RPM arrangements with its retailers.<sup>38</sup> The FTC also entered into a consent decree prohibiting the National Association of Music Merchants from aiding musical instrument manufacturers and retailers in the formation of anticompetitive agreements relating to price and minimum advertised prices.<sup>39</sup> The Antitrust Division of the Department of Justice has also been active in addressing *Leegin*. In remarks before the National Association of Attorneys General, Christine Varney, head of the U.S. Justice Department’s Antitrust Division, outlined a “structured rule of reason” approach to RPM. Describing the approach as consistent with modern development of antitrust analysis under section 1 of the Sherman Act, Ms. Varney detailed how such an approach could be applied by the courts for the analysis of RPM arrangements.<sup>40</sup>

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<sup>37</sup> FTC Workshops: Resale Price Maintenance Under the Sherman Act and the Federal Trade Commission Act (Feb. 17 & 19 and May 20–21, 2009), available at <http://www.ftc.gov/opp/workshops/rpm/>.

<sup>38</sup> In May 2008, the FTC modified a pre-existing order to allow shoe and clothing retailer Nine West “to engage in resale price maintenance (RPM) agreements with dealers and requir[ing] the company to provide periodic reports on its use of RPM agreements so the FTC can analyze the effects of such agreements on competition.” Press Release, FTC, FTC Modifies Order in Nine West Resale Price Maintenance Case (May 6, 2008), available at <http://www.ftc.gov/opa/2008/05/ninewest.shtm>. See *Nine West Group, Inc.*, No. C-3937, 2008 WL 2061410 (F.T.C.).

<sup>39</sup> Press Release, FTC, National Association of Music Merchants Settles FTC Charges of Illegally Restraining Competition (Mar. 4, 2009), available at <http://www.ftc.gov/opa/2009/03/namm.shtm>.

<sup>40</sup> See Varney, *supra* note 9, at 8–9. According to Ms. Varney, following the Antitrust Division’s approach, a lower court could require a plaintiff to make a preliminary showing of “ ‘the existence of the agreement and scope of its operation’ as well as the presence of structural conditions under which RPM is likely to be anticompetitive . . . to establish a prima facie case that

Federal legislators have also responded to the decision in *Leegin*. In January 2009, following introduction of an earlier bill in 2007,<sup>41</sup> the Discount Pricing Consumer Protection Act (S. 148) was introduced in the U.S. Senate.<sup>42</sup> After a hearing in April 2009 before the Subcommittee on Courts and Competition Policy of the Committee on the Judiciary, the Discount Pricing Consumer Protection Act of 2009 (H.R. 3190), was introduced in July in the U.S. House of Representatives.<sup>43</sup> Both bills are intended “[t]o restore the rule that agreements between manufacturers and retailers, distributors, or wholesalers to set the minimum price below which the manufacturer’s product or service cannot be sold violates the Sherman Act.”<sup>44</sup> As of this writing, the House bill has cleared the Judiciary Committee. The Senate bill is still in subcommittee.

Few federal cases have formally addressed *Leegin*. Although the original case continues on appeal following remand from the Supreme Court, in *Spahr v. Leegin Creative Leather Products, Inc.*,<sup>45</sup> a

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RPM is unlawful. Under such an approach, the burden would then shift to the defendant to demonstrate either that its RPM policy is actually—not merely theoretically—procompetitive, or that the plaintiff’s characterizations of the marketplace were erroneous.” She further stated that “[a] court adopting such an approach could impose a burden on a defendant that would vary with the strength of the showing made by the plaintiff. At a minimum, 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.”)

<sup>41</sup> See Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (2007).

<sup>42</sup> Discount Pricing Consumer Protection Act, S. 148, 111th Cong. (2009).

<sup>43</sup> *Bye Bye Bargains? Retail Price Fixing, the Leegin Decision, and its Impact on Consumer Prices: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009). See Discount Pricing Consumer Protection Act of 2009, H.R. 3190, 111th Cong. (2009).

<sup>44</sup> S. 2261 & S. 148.

<sup>45</sup> No. 07-CV-187, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), *appeal dismissed*, No. 08-6165 (6th Cir. Nov. 20, 2008). See Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, ANTITRUSTSOURCE, Oct. 2009, at 1, 3, <http://www.abanet.org/antitrust/at-source/09/10/Oct09-Lindsay10>

federal district court for the Eastern District of Tennessee dismissed a related complaint alleging that Leegin's RPM agreements with independent resellers violated section 1 of the Sherman Act.

2. STATE Following *Leegin*, "many states are reevaluating their legal oversight over RPM arrangements and considering whether state law may treat them as per se illegal."<sup>46</sup> Effective October 2009, Maryland became the first state to adopt a "*Leegin* repealer"—a statute expressly rejecting application of *Leegin* to the Maryland Antitrust Act.<sup>47</sup> Like many other states, Maryland had not only a general prohibition on contracts, combinations, and conspiracies in restraint of trade, but also a fairly strong federal harmonization statute and supporting case law, so in the absence of the legislature's action state courts might have adopted the reasoning of *Leegin* into Maryland law.<sup>48</sup> The new statute, however, expressly rejects *Leegin* through the addition of the definition: "[A] contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce."<sup>49</sup>

Courts have also considered application of the rule of reason to RPM under state law following *Leegin*. In both *Spahr v. Leegin Creative*

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-23f.pdf ("On the federal claims, the court first considered whether to apply the rule of reason or the per se approach. *Leegin* sold both directly through its own retail outlets and indirectly through resellers, and it had RPM agreements with the independent resellers. Although *Leegin* was thus engaged in "dual distribution" (i.e., it was both a supplier to and at least potentially a competitor of its independent resellers), the district court applied the rule of reason, rather than the per se approach. The court then held that plaintiff had not sufficiently alleged a relevant market or anticompetitive effects. ") (citations omitted).

<sup>46</sup> Varney, *supra* note 9, at 7.

<sup>47</sup> MD. CODE ANN., COM. LAW § 11-204(a)(1) (2009).

<sup>48</sup> See Lindsay, *supra* note 45. See also Michael A. Lindsay, *Overview of State RPM (Complete)* ANTITRUST, Fall 2007, at 1, available at <http://www.abanet.org/antitrust/at-source/07/12/LindsayFullChart11-29.pdf>.

<sup>49</sup> MD. CODE ANN., COM. LAW. § 11-204(a)(1) (2009).



*Leather Products, Inc.*<sup>50</sup> and *O'Brien v. Leegin Creative Leather Products, Inc.*,<sup>51</sup> courts considered whether *Leegin's* principles applied to claims made under state law. In *Spahr*, a federal district court concluded there was no good reason to believe that Tennessee courts would not follow *Leegin*.<sup>52</sup> In *O'Brien*, relying on two Kansas Supreme Court decisions, a trial court similarly concluded that the state Supreme Court would apply the rule of reason.<sup>53</sup>

Finally, state attorneys general have also expressed their opinions concerning *Leegin*. A letter signed by thirty-five state attorneys general and submitted to various members of Congress on May 14, 2008, expressed support of the earlier proposed federal Discount Pricing Consumer Protection Act (S. 2261).<sup>54</sup> Attorneys general from

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<sup>50</sup> No. 07-CV-187, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), *appeal dismissed* (6th Cir. Nov. 20, 2008) (No. 08-6165).

<sup>51</sup> No. 04-CV-1668 (Sedgwick Cty. Kan. July 9, 2008), *direct appeal to Kan. Supreme Court granted*, File No. 101,000 (Oct. 6, 2008).

<sup>52</sup> See Lindsay, *supra* note 45, at 3 (“[T]he federal district court for the Eastern District of Tennessee considered a Rule 12 motion to dismiss a complaint alleging that *Leegin's* RPM agreements with independent resellers violated Sherman Act section 1 and its Tennessee state law equivalent. After dismissing the federal claims, the court considered whether *Leegin's* principles applied to the Tennessee state law claim as well. The court found no pre-*Leegin* state court cases analyzing whether the Tennessee Trade Practice Act prohibited minimum RPM agreements. The court found that there was no good reason to believe that Tennessee courts would not follow *Leegin*. Consequently, the court applied the rule of reason and held that the plaintiff had not adequately pled a relevant market.”).

<sup>53</sup> *Id.* at 3 (“The trial court observed: ‘Whether competition is regulated by a contract dictating who can provide a service in a given territory . . . or by an agreement to set retail prices for manufactured goods (as is claimed in this case), the impact to the consumer is not sufficiently dissimilar to justify differing legal analyses.’ The case is now on appeal before the Kansas Supreme Court and will likely provide the first post-*Leegin* state appellate court decision on minimum RPM agreements.”) (citation omitted).

<sup>54</sup> See Alan M. Barr, *State Challenges to Vertical Price Fixing in the Post-Leegin World*, Federal Trade Commission, FTC Hearings on Resale Price Maintenance (May 21, 2009) (“In the letter, the attorneys general assert that consumers have been ‘well served’ by *per se* treatment of RPM and the lower prices it promotes. They warn: ‘The practical result of [*Leegin*] will be to

twenty-seven states also submitted comments opposing Nine West's petition seeking modification of the FTC's earlier order prohibiting Nine West from using vertical pricing agreements with its dealers.<sup>55</sup> State attorneys general from New York, Illinois, and Michigan also brought suit against furniture maker Herman Miller, Inc. (manufacturer of the Aeron chair) in March of 2008 alleging that its suggested resale price policy violated federal and state antitrust laws by preventing retailers from advertising discount prices that were below minimum prices set by the manufacturer.<sup>56</sup> The case was subsequently resolved by consent agreement.

#### IV. ANTITRUST BULLETIN SPECIAL ISSUES

The current state of affairs surrounding the Supreme Court's decision in *Leegin* provides the impetus for two special issues of the *Antitrust Bulletin: Antitrust Analysis of Resale Price Maintenance after Leegin*. The objective of the two special issues is to inform antitrust analysis of RPM following *Leegin* by assembling and archiving the most recent knowledge and research on RPM and its competitive effects.

Each of the articles appearing in the special issues contributes to our understanding of RPM and its implications for competition. Together, their appearance in the *Antitrust Bulletin* is intended to provide a comprehensive resource for those interested in questions surrounding RPM and its analysis in antitrust. The articles have been reviewed by experts in the field and edited by their authors drawing upon input from the editorial process.

In addition to in-depth analysis of the Court's decision in *Leegin*, the special issues contain contributions addressing many aspects of the aforementioned topics destined to impact application of *Leegin*

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encourage manufacturers, distributors and retailers to act together to charge higher prices that will be borne by consumers.' The attorneys general urge 'immediate consideration and approval of this important legislation.'").

<sup>55</sup> See Amended States' Comments Urging Denial of Nine West's Petition, Nine West Group Inc., FTC Docket No. C-3937 (Jan. 17, 2008).

<sup>56</sup> New York v. Herman Miller, Inc., No. 08 Civ. 2977 (S.D.N.Y. 2008). See Lindsay, *supra* note 45, at 3-4.

going forward. As readers will detect, a diversity of perspectives informed through differing assumptions and at times advancing disparate and provocative viewpoints address these topics. The explicit intention across these topics was to purposefully include this diversity in the special issues so as to advance the most comprehensive and objective understanding of RPM going forward.

#### A. Volume I

The first of the special issues includes articles by antitrust scholars and antitrust enforcers. These articles address important aspects of the existing theoretical and empirical landscape that surrounds RPM, the proposed approaches for applying the rule of reason to cases involving RPM, and the implications for understanding and assessing RPM given retail application of the Internet and related technologies.

- In *The Leegin Factors—A Mixed Bag*, Robert L. Steiner examines the theoretical and empirical basis of the various factors and tests advanced by the Supreme Court in *Leegin* to assess RPM’s effects for competition and social welfare. The author critiques application of these factors and tests by the FTC in *Nine West* and the Supreme Court in *Leegin*. Steiner concludes by offering his assessment of the Court’s factors and the recommendation that a structured rule of reason be adopted for assessing RPM going forward.
- In *Antitrust Policy Toward Resale Price Maintenance Following Leegin*, William S. Comanor describes the two “economics” of RPM and examines their attendant implications for application of the rule of reason following *Leegin*. According to the author, RPM imposed by manufacturers to achieve increased sales and higher profits sometimes leads to enhanced consumer welfare. Alternatively RPM coerced by large distributors or collections of distributors is described as invariably leading to reduced competition and diminished consumer welfare. Relying on these distinctions, Comanor suggests appropriate standards to be applied to RPM following the rule of reason.
- In *Resale Price Maintenance and Resale Prices: Paying to Support Competition in the Market for Heavy Trucks*, Howard P. Marvel elaborates on the premise that RPM does not necessarily lead to higher retail prices. According to Marvel, suppliers who rely on the protected margins of RPM to compensate dealers for their promotional efforts will reduce their wholesale prices as a result of interbrand competition. The author illustrates the process by which this

occurs through examining two cases involving the sale of heavy trucks. Based on the illustrations, Marvel counsels against ignoring these effects in understanding and assessing RPM.

- In *A Dynamic Analysis of Resale Price Maintenance: Inefficient Brand Promotion, Higher Margins, Distorted Choices, and Retarded Retailer Innovation*, Warren S. Grimes responds to Benjamin Klein's thesis that RPM resolves the incentive incompatibility between a manufacturer and its retailers. Accepting Klein's premise that RPM is a way of encouraging retailers to carry and promote a manufacturer's brand, Grimes challenges Klein's use of a manufacturer profit/output test as inconsistent with the Sherman Act. Grimes also describes key features of RPM that challenge Klein's thesis including its inefficiency as a brand promotion tool, the inflated manufacturer margins commonly associated with RPM, and the stifling effect of RPM on innovative and efficient retailing. Through an analysis of six contemporary cases, Grimes illustrates these anti-competitive effects and finds support that RPM violates the Sherman Act.
- In *RPM Myths That Muddy the Discussion*, Pauline Ippolito addresses the ongoing discourse over the economic and legal changes that the Supreme Court's decision in *Leegin* represents. Focusing on the controversy, Ippolito compares statements advanced at times in discussions opposing *Leegin* to theoretical and empirical evidence found in economics. The author finds there is limited evidence to convince skeptics on either side of the debate on particular issues. Ippolito then highlights the benefits of further empirical research for resolving these issues and providing guidance to the courts and antitrust agencies in implementing the rule of reason.
- In *A Decision-Theoretic Rule of Reason for Resale Price Maintenance*, Thomas A. Lambert critiques four approaches for evaluating instances of RPM, including those that focus on the effects on consumer prices, the identity of the party initiating RPM, the susceptibility of the product at issue to free riding, and the approach favored by the FTC that applies factors deemed relevant by the Court in *Leegin*. Following a decision-theoretic perspective intended to minimize the sum of the error costs and decision costs expected to result from the governing liability rule, the author finds each deficient. Lambert then proposes an alternative evaluative approach that would minimize these costs, thereby maximizing the net social benefits of RPM regulation.

- In *RPM and the Rule of Reason: Ready or Not, Here They Come?* former FTC Commissioner Pamela Jones Harbour and Laurel A. Price argue that a structured rule of reason, anchored by a rebuttable presumption of illegality is the appropriate standard for analyzing RPM agreements. The authors contend such an approach is necessary in light of the transformative possibilities of e-commerce for promoting distribution efficiencies that lower prices and the likelihood that the spread of RPM to the Internet will retard such innovation and suppress efficiencies. They argue further that consumers undeniably benefit from intrabrand competition and that consequently RPM analysis focused solely on interbrand competition will be insufficient, misleading, and biased in favor of manufacturers. Harbour and Price conclude that, in any event, innovation competition is more important to economic progress than inter- or intrabrand competition.
- Finally, in *The Plight of Online Retailers in the Aftermath of Leegin: An Economic Analysis*, Roger D. Blair and Jessica S. Haynes offer an economic analysis of *Leegin's* impact on online retailers, specifically those who rely on discounting as an essential component of their business model. The authors begin with a brief discussion of *Dr. Miles, Colgate*, and the resulting search for proof of agreement. This leads them into an examination of the *Leegin* decision and its consequences for antitrust policy. Blair and Haynes then review the economics of RPM when used for promotional purposes. They follow with a discussion of the characterization of RPM in two recent complaints filed by online retailers and offer suggestions for how the courts should deal with RPM. According to Blair and Haynes, the key is to determine whether RPM is used to support a cartel or to promote a product.

## B. Volume II

The second special issue includes articles by antitrust scholars and antitrust practitioners. As with volume I, these articles address important aspects of the existing theoretical and empirical landscape that surrounds RPM, the proposed approaches for applying the rule of reason to RPM, and the implications for RPM that arise from retail application of the Internet and related technologies. In addition, the second volume includes an article that provides advice to practitioners for advising clients entertaining the adoption of RPM policies post-*Leegin*.

- In *The Image Theory: RPM and the Allure of High Prices*, Barak Y. Orbach introduces a “new” theory to explain RPM’s procompetitive effects—the image theory. The author systematically builds on prior theorizing to explain that manufacturers use the higher uniform retail prices of RPM to maintain a branded product’s exclusive image and status, increasing their revenues through appealing to consumers who value image and status. Orbach distinguishes the image theory from related pricing theories, then examines the implications of the image theory for the legality of RPM under the rule of reason, concluding that antitrust law should not prohibit RPM that is devised to protect a brand’s image.
- In *RPM as an Exclusionary Practice*, Ittai Paldor challenges the conventional wisdom that, as opposed to the anticompetitive effects of RPM used in furtherance of a manufacturer or retailer cartel, RPM initiated by a single manufacturer is presumptively procompetitive. The author demonstrates that RPM can be used, and is likely to be used, as an exclusionary measure for the elimination of upstream competition. Consequently, according to Paldor, RPM has significant anticompetitive potential even when it is not introduced in furtherance of a cartel.
- In *Leegin and Procompetitive Resale Price Maintenance*, Kenneth Elzinga and David E. Mills review Leegin’s challenged pricing strategy and the business environment in which it arose, interpreting it in light of the relevant economic literature about RPM. The authors conclude that Leegin’s price policy fits none of the accepted economic theories of how RPM could be anticompetitive, but instead exemplifies a theory that predicts procompetitive effects. According to Elzinga and Mills, the most compelling explanation for Leegin’s conduct is that it sought to induce efficient retail services to support a product line that would otherwise be jeopardized by the occurrence of free riding and to increase inter-brand competition between the company and its many competitors.
- In *Free Riding and Resale Price Maintenance: Insights from Marketing Research and Practice*, Gregory T. Gundlach, Joseph P. Cannon and Kenneth Manning and examine research on multichannel distribution and retailing, finding contrary support for the free rider explanation of RPM. The authors report that although conditions favorable to free riding have increased over time, different viewpoints inform management philosophy concerning the competitive effects of multichannel distribution and thus thinking toward free riding. These differing viewpoints yield opposing strategies for managing multichannel systems, including those that “discourage”

consumer free riding behavior as well as those that “encourage” it. The authors also report evidence that managing multichannel systems in ways that yield uniform marketing efforts across channels encourages channel cannibalization, suggesting that some applications of RPM may have the unintended consequence of increasing rather than decreasing free riding’s adverse effects.

- In *Rethinking Antitrust Policy Toward RPM*, John B. Kirkwood proposes an alternative approach to the “full” rule of reason, one that combines a presumption of illegality with safe harbors. Given RPM’s mixed effects, according to the author, an ideal legal standard would distinguish between instances in which RPM is anti-competitive and those in which it is procompetitive. However, examining research and findings on application of the rule of reason over time, the author concludes that, in practice, application of a full rule of reason has operated as a standard of virtual per se legality, absolving almost every restraint examined. As a consequence, Kirkwood proposes an alternative approach and explains why it is likely to produce better results at lower cost.
- In *Resale Price Maintenance: The Internet Phenomenon and Free Rider Issues*, Marina Lao examines the characteristics of Internet retailing and explores how they affect the most widely asserted explanation for RPM—a means to control free rider problems. The author argues that the case for RPM as a means to control free rider problems is not strengthened by the advent of Internet retailers. In any case, according to the author, promotional allowances present a less restrictive alternative to RPM for inducing retailer services. Lao concludes consequently that consumers would be better served by a presumptive illegality rule than a rule of reason, which tends to operate as a per se legality rule in practice.
- In *Resale Price Maintenance for Beginners: Beware of the Pitfalls*, Salvatore A. Romano examines the obstacles confronting suppliers looking to adopt RPM programs post-*Leegin* and offers alternatives to be considered by practitioners when advising clients. The author contends that the decision in *Leegin* did not provide clear guidance for practitioners to advise clients, has faced resistance from its inception, and that the lower courts and enforcement agencies have thus far failed to devise clear guidelines for practitioners. Examining these obstacles, Romano recommends pragmatic alternatives for consideration by practitioners when advising clients entertaining the adoption of RPM policies.

## V. CONCLUSION

The decision of the Supreme Court in *Leegin* altered the longstanding per se rule against RPM holding that the rule of reason shall be applied to minimum RPM agreements going forward. The Court's decision has left many unanswered questions and the challenge of how to apply the rule of reason to RPM in practice. As a result, *Leegin* has reinvigorated debate over the theoretical basis and empirical relevance of explanations for RPM's competitive effects, prompted examination of the practical implications of applying the rule of reason to cases involving RPM, and focused increased attention on the innovation affecting retail institutions and retailing and, in particular, on the Internet. The ruling has also resulted in changes to the use of RPM and related strategies by businesses and has generated numerous responses and actions by federal and state antitrust authorities, legislators, and the courts. The two special issues of *The Antitrust Bulletin* provide a forum for discussion of these questions, challenges, and issues through presentation of the most recent knowledge and research on RPM and its competitive effects.



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