Overview of the special issues:
Antitrust analysis of resale price maintenance after Leegin

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I. INTRODUCTION

The current issue of the Antitrust Bulletin is the second of two special issues dedicated to the antitrust analysis of minimum resale price maintenance (RPM) following the Supreme Court’s landmark decision in Leegin Creative Leather Products, Inc. v. PSKS, Inc.¹ Otherwise known as minimum vertical price fixing, RPM involves 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. Except for

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¹ 127 S. Ct. 2705 (2007).
overriding legislation and judicial circumscription, since 1911 and until the Supreme Court’s decision, minimum RPM had been per se unlawful following the Court’s decision in Dr. Miles. Leegin, nearly a century later, formally reversed that decision, ruling that vertical minimum RPM is now to be judged under the rule of reason.

Since Leegin, the Court’s decision has been met with considerable interest on the part of the antitrust community. Leegin leaves many unanswered questions including interpretation of the decision and the development of a workable structure for application of the rule of


3 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 that “[i]n the absence of any purpose to create or 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 “[i]t 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”).

4 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.
reason to cases involving RPM. Various factors and developments will impact the questions posed by *Leegin* and affect application of the Court’s decision in practice. These include: (1) the theoretical basis and empirical relevance of explanations for RPM’s competitive effects, (2) the practical implications of applying the rule of reason to cases involving RPM, (3) the ongoing innovation affecting retail institutions and retailing, (4) evolving changes in the use of RPM and related strategies in practice, and (5) the response of antitrust authorities, legislators, and the courts to *Leegin*.

II. CONTENTS OF THE SPECIAL ISSUES

The current state of affairs provides the impetus for two special issues of the *Antitrust Bulletin: Antitrust Analysis of Resale Price Maintenance after Leegin*. The two issues assemble and archive some of the most recent thinking and research on RPM and its competitive effects. In addition to analysis of the Court’s decision, each contains a diversity of contributions that address many aspects of the aforementioned topics including important aspects of the existing theoretical and empirical landscape that surrounds RPM, proposed approaches for applying the rule of reason, implications for RPM that arise from retail application of the Internet and related technologies, and practitioner advice for clients entertaining the adoption of RPM policies post-*Leegin*. A summary of each article is provided below.

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6 For discussion of these factors and developments, see Gregory T. Gundlach, *Overview and Contents of the Special Issues: Antitrust Analysis of Resale Price Maintenance after Leegin*, 55 ANTITRUST BULL. 1 (2010).

7 For a longer summary, see id. at 19–21.
A. Special Issue I

- 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.

- 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*.

- 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.


- 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.

- 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*.

- 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.

- 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.
B. Special Issue II

- In *The Image Theory: RPM and the Allure of High Prices*, Barak Y. Orbach introduces the procompetitive “image” theory 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.

- In *RPM as an Exclusionary Practice*, Ittai Paldor challenges the conventional wisdom that, unlike the anticompetitive effects of RPM used in furtherance of a manufacturer or retailer cartel, RPM initiated by a single manufacturer is presumptively procompetitive.

- 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—finding it to exemplify theories that predict its procompetitive effects.

- In *Free Riding and Resale Price Maintenance: Insights from Marketing Research and Practice*, Gregory T. Gundlach, Joseph P. Cannon and Kenneth Manning examine research on multichannel distribution and retailing, finding contrary support for the free rider explanation of RPM.

- 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.

- 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.

- 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.

V. CONCLUSION

The decision of the Supreme Court in *Leegin* altered the longstanding per se rule against RPM, holding that going forward minimum RPM agreements shall be evaluated following the rule of reason. *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, the Internet. The ruling has also led to changes in the use of RPM and related strategies by businesses and has generated responses and actions by antitrust authorities, legislators, and the courts. The special issues of the Antitrust Bulletin provide a forum for discussion of antitrust analysis of RPM after Leegin through presentation of the most recent knowledge and research on RPM and its competitive effects.