Leegin Creative Leather Products, Inc. v. PSKS, Inc.
127 S. Ct. 2705 (2007)

I. INTRODUCTION

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[1] the Supreme Court determined whether vertical minimum resale price maintenance agreements should be judged by the rule of reason or the *per se* rule.[2] The Court had previously decided in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[3] that maintenance agreements should be judged by the *per se* rule, but after determining that these agreements could result in either procompetitive effects or anticompetitive effects, the Court held that *Dr. Miles* should be overruled and that vertical minimum resale price maintenance agreements should be judged by the rule of reason.[4]

II. STATEMENT OF FACTS

A. The Factual Background

Leegin Creative Leather Products, Inc. ("Leegin") distributes leather goods and accessories throughout the United States under the brand name "Brighton."[5] Leegin only distributes to small retailers because its president, Jerry Kohl, believes that these types of stores "treat customers better, provide customers more services, and make their shopping experience more satisfactory than do larger, often impersonal retailers."[6] PSKS, Inc. ("PSKS") operates one of these small retailers operating under the name "Kay's Kloset."[7] At one time Kay's Kloset sold and promoted the Brighton brand, which accounted for forty to fifty percent of its profits.[8]

In 1997, Leegin introduced the "Brighton Retail Pricing and Promotion Policy," which denied Brighton goods to retailers who sold them below the suggested prices.[9] Because Leegin felt the reputation of its products was dependent on the appearance of the retail stores as well as superior customer service and support, it adopted this pricing policy to allow retailers to gain

1. 127 S. Ct. 2705 (2007).
2. *Id.* at 2710.
3. 31 S. Ct. 376 (1911).
4. *Leegin*, 127 S. Ct. at 2710.
5. *Id.*
6. *Id.* at 2710-11.
7. *Id.* at 2711.
8. *Id.*
9. *Leegin*, 127 S. Ct. at 2711.

sufficient margins to provide for these services.[10] Leegin was also concerned that by discounting Brighton products, retailers would damage the brand's image and reputation.[11]

In 2002, Leegin realized that Kay's Kloset was not abiding by its pricing policies and was discounting all Brighton products by twenty percent.[12] Kay's Kloset claimed that these prices were reduced in order to compete with other retailers who were discounting Brighton products.[13] Kay's Kloset then denied Leegin's request to cease the discounting, and Leegin subsequently stopped selling Brighton products to Kay's Kloset.[14] The loss of the Brighton brand negatively impacted the sales revenue of Kay's Kloset by a significant amount.[15]

B. The Procedural History

In the United States District Court for the Eastern District of Texas, PSKS brought suit against Leegin claiming that Leegin violated § 1 of the Sherman Act[16] by "entering into agreements with retailers to charge only those prices fixed by Leegin"[17] and that Leegin's pricing policies "demonstrated [that] Leegin and its retailers had agreed to fix prices."[18] Leegin attempted to introduce evidence to show that its pricing policies had procompetitive effects, but this was denied by the district court based on the *per se* rule established by *Dr. Miles*.[19] Leegin then claimed that its policies were lawful under § 1 because their actions were not concerted.[20] The jury however, did not agree with Leegin's argument and awarded $1.2 million to PSKS, and the district court trebled the damages and awarded attorney's fees.[21]

Leegin appealed to the Court of Appeals for the Fifth Circuit and admitted that it did in fact enter into vertical pricing agreements with retailers.[22] Leegin went on to argue that the vertical price agreements should be judged based on the rule of reason, and that its evidence showing the

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Leegin*, 127 S. Ct. at 2711.
15. *Id.*
16. Sherman Act § 1, 15 U.S.C. § 1 (2008).
17. *Leegin*, 127 S. Ct. at 2711.
18. *Id.*
19. *Id.* at 2712.
20. *Id.* (citing United States v. Colgate & Co., 39 S. Ct. 465 (1919)).
21. *Id.*
22. *Leegin*, 127 S. Ct. at 2712.

procompetitive effects of its pricing policies should have been allowed.[23] The court of appeals rejected these arguments because it said it was bound by *Dr. Miles*, which held that the *per se* rule applies to the issue of vertical pricing agreements.[24] The court of appeals upheld the decision of the district court.[25]

The United States Supreme Court granted certiorari to "determine whether vertical minimum resale price maintenance agreements should continue to be treated as *per se* unlawful."[26] The Court overruled the decision in *Dr. Miles* and ruled that "[v]ertical price restraints are to be judged according to the rule of reason."[27] The judgment of the court of appeals was reversed.[28]

III. Decision and Rationale

A. The Majority Opinion of the Court

The Supreme Court began its opinion by noting that § 1 of the Sherman Act "'outlaws only *unreasonable* restraints'" on trade.[29] The Court defined "[t]he rule of reason [as] the accepted standard for testing whether a practice restrains trade in violation of § 1."[30] After addressing these two issues, the Court examined *Continental T.V., Inc. v. GTE Sylvania Inc.*[31] In that case, the Court defined the rule of reason by saying "'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'"[32] The Court's task in applying this rule was to distinguish between restraints that have harmful anticompetitive effects and restraints that have procompetitive effects which benefit consumers.[33]

Although the rule of reason is the standard for determining whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition, some restraints are governed by the *per se* rule.[34] The *per se* rule only applies to restraints that would always or almost always tend to restrict competition and decrease output and therefore it does not require a

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23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Leegin*, 127 S. Ct. at 2725.
28. *Id.*
29. *Id.* at 2712 (quoting State Oil Co. v. Khan, 118 S. Ct. 275 (1997)).
30. *Id.* (citing Texaco Inc. v. Dagher, 126 S. Ct. 1276 (2006)).
31. 97 S. Ct. 2549 (1977).
32. *Leegin*, 127 S. Ct. at 2712 (quoting Continental T.V. Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549 (1977)).
33. *Id.* at 2713.
34. *Id.* (citing *Khan*, 118 S. Ct. 275).

study of the restraint's reasonableness.[35] The Court stated that this rule is only appropriate when courts have an in-depth knowledge of a specific type of restraint and when the restraint at issue will "be invalidated in all or almost all instances under the rule of reason."[36] The Court then referred to its reluctance in the past to adopt the *per se* rule for restraints of which the economic impacts are not obvious.[37]

After defining the competing rules, the Court addressed the *Dr. Miles* decision, which held that a manufacturer's control of resale prices is *per se* illegal.[38] The Court pointed out that this decision was "based on 'formalistic' legal doctrine rather than 'demonstrable economic effect.'"[39] Because the *Dr. Miles* decision relied on a treatise published in 1628 and because the opinion contained no discussion of the then-applicable reasons for a company's engagement in resale price controls, the Court found the *Dr. Miles* justification for a *per se* rule on these restraints to be unwarranted.[40] Although a *per se* rule was not justified by reasons given in the *Dr. Miles* decision, the Court was still obligated to determine if a *per se* rule was nonetheless applicable.[41]

To make this determination, the procompetitive and anticompetitive effects of resale price maintenance had to be analyzed.[42] Beginning with the procompetitive analysis, the Court found it undisputed that there is economic evidence as to the possibility of procompetitive effects on the market due to minimum resale price maintenance.[43] The Court went on to note that one possible economic benefit which can arise from minimum resale price maintenance is the stimulation of interbrand competition.[44] In the Court's opinion, this was important because "'the primary purpose of the antitrust laws is to protect [this type of] competition.'"[45] Minimum resale price maintenance can increase interbrand competition by allowing new manufacturers to enter markets and use price restrictions to force retailers to make the investments that are required to promote new brands.[46] When new brands can enter the

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35. *Id.* (quoting Bus. Elec. Corp. v. Sharp Elec. Corp., 108 S. Ct. 1515 (1988)).
36. *Id.* (citing Arizona v. Maricopa Co. Med. Soc., 102 S. Ct. 2466 (1982); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 99 S. Ct. 1551 (1979)).
37. *Leegin*, 127 S. Ct. at 2713 (quoting *Khan*, 118 S. Ct. 275).
38. *See id.* at 2713-14.
39. *Id.* at 2714 (quoting *GTE Sylvania Inc*., 97 S. Ct. at 2549).
40. *Id.*
41. *Id*. (citing *Sharp Elec. Corp*., 108 S. Ct. 1515).
42. *Leegin*, 127 S. Ct. at 2713-14.
43. Brief for Economists as Amicus Curiae at 16, *Creative Leather Prods., Inc. v. Leegin*, 127 S. Ct. 2705 (2007) (No. 06-480).
44. *Leegin*, 127 S. Ct. at 2715 (citing *GTE Sylvania Inc*., 97 S. Ct. 2549).
45. *Id.* (quoting *Khan*, 118 S. Ct. 275).
46. *Id.* (quoting *GTE Sylvania Inc*., 97 S. Ct. 2549).

market, this has a procompetitive effect on the economy.[47] Minimum resale price maintenance is also a much more efficient way for manufacturers to ensure that retailers are providing certain services as opposed to entering contractual agreements that obligate retailers to do so.[48]

According to the Court, minimum resale price maintenance can also reduce intrabrand competition, which will ultimately lead to greater promotion and customer services.[49] Moreover, the absence of minimum resale price restraints can allow for free riding.[50] Free riding occurs when one retailer discounts products and relies on other retailers to provide things like ad campaigns to increase its own profits.[51] This is essentially a way for discounting retailers to steal sales from other retailers, and it results in all retailers cutting certain customer services.[52]

The Court also discussed situations in which minimum resale pricing can have anticompetitive effects.[53] Anticompetitive effects occur when manufacturers fix resale prices to obtain monopoly profits or to form a manufacturing cartel.[54] These effects also come about when dominant retailers request minimum resale prices for the purpose of keeping costs high.[55] Depending on the retailer's dominance, manufacturers may feel obligated to honor these requests in order to distribute their brands.[56] Of course, powerful manufacturers can also stifle competition by using minimum resale price maintenance to "give retailers an incentive not to sell the products of smaller rivals or new [market] entrants."[57] The Court concluded that these anti-competitive uses of minimum resale price restrictions can cause serious economic problems and must be taken into consideration.[58]

After discussing both the procompetitive and anticompetitive effects of minimum resale price maintenance, the Court determined that these restraints could possibly result in positive economic benefits.[59] The Court also pointed out the existence of empirical evidence which demonstrated that these

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47. *Id.*
48. *See id.* at 2716.
49. *Leegin*, 127 S. Ct. at 2715.
50. *Id.*
51. *See id.* at 2715-16.
52. *See id.* at 2716.
53. *Id.*
54. *Leegin*, 127 S. Ct. at 2717.
55. *Id.*
56. *See id.*
57. *Id.* at 2717.
58. *Id.*
59. *Leegin*, 127 S. Ct. at 2717.

restraints can have efficient uses.[60] Based on these findings the Court determined that "these agreements appear ill-suited for *per se* condemnation."[61]

Next, the Court addressed the argument that the *per se* rule should apply to minimum resale price maintenance on the basis of administrative convenience.[62] This argument was based on the idea that a *per se* rule will reduce the amount of litigation required regarding minimum resale price maintenance while also providing a certain amount of guidance to businesses.[63] The Court pointed out that although administrative convenience is a benefit of a *per se* rule, it would be counterproductive to have antitrust laws that disallowed procompetitive activities, since these are the activities that antitrust laws are meant to protect.[64]

Respondent's next argument was that minimum resale price restraints ultimately lead to higher prices and therefore a *per se* rule is justified.[65] The Court declared this reasoning to be flawed based on the fact that antitrust laws, like the Sherman Act, are not meant to directly keep prices low, but are intended to allow for competition which in turn can lead to lower prices.[66] The Court went on to say that because minimum resale price maintenance can have procompetitive effects, it can also lead to more competition and lower prices.[67] To further invalidate Respondent's argument, the Court noted that there are several practices that manufacturers may participate in that could result in higher prices, such as contracting with new suppliers or increasing advertising, but these activities are not *per se* illegal.[68] Ultimately, the Court opined that an end result of higher prices is not a valid reason to declare a business practice to be *per se* illegal.[69]

The Court then acknowledged that although resale price maintenance can pose anticompetitive threats, it is possible for courts to recognize these dangers and remove them from the market.[70] The Court illustrated certain situations for courts to analyze when determining the objectives of manufacturers who use resale price maintenance.[71] First, courts should look at the number of manufacturers and their respective market shares when

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60. *Id.*
61. *Id.* at 2718.
62. *Id.*
63. *Id.* at 2718 (citing *GTE Sylvania Inc.*, 97 S. Ct. 2549).
64. *Leegin*, 127 S. Ct. at 2718.
65. *Id.*
66. *Id.* (citing *Khan*, 118 S. Ct. 275).
67. *Id.* at 2718.
68. *Id.* at 2719.
69. *Leegin*, 127 S. Ct. at 2718-19.
70. *Id.* at 2719.
71. *Id.*

determining if resale price maintenance is facilitating a manufacturing cartel.[72] If only a few manufacturers with little market power are using resale price maintenance, it is very unlikely that a manufacturing cartel exists.[73] Similarly, it is unlikely that a retail cartel exists when only a few manufacturers with little market power are using resale price maintenance.[74] If the opposite situation occurs and there are a large number of manufacturers or retailers with a large share of the market who are participating in resale price maintenance, courts should be on alert that a cartel might exist.[75] The origin of the resale price maintenance policies should be reviewed in the court's opinion as well.[76] This type of review must be done because if the policy is implemented as a result of a powerful retailer pressuring a manufacturer, then the retailer most likely has anticompetitive motives.[77] Alternatively, if a manufacturer independently implements a resale price maintenance policy, then the policy is more likely to be procompetitive in nature.[78] After laying out these necessary considerations, the Court stated that the rule of reason is viable for determining the legality of minimum resale pricing policies and that the rule of reason is more appropriate than the *per se* rule.[79]

Realizing the existence of prior case law on this issue, the Court then discussed the significance of *stare decisis*.[80] The Sherman Act has always been treated as a common law statute, and common law statutes have historically been easily adaptable.[81] The Court was of the opinion that there was no reason why the Sherman Act's "restraints on trade" could not be altered to fit modern economic theories.[82] The Court also alluded to recommendations from the Department of Justice, the Federal Trade Commission, and respected economists that the *per se* rule should be replaced.[83]

The Court then discussed a trend that "has continued to temper, limit, or overrule once strict prohibitions on vertical restraints."[84] This trend started only eight years after the *Dr. Miles* decision in *United States v. Colgate &*

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72. *Id.*
73. *Id.*
74. *Leegin*, 127 S. Ct. at 2719.
75. *See id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Leegin*, 127 S. Ct. at 2720.
80. *Id.* at 2720-23.
81. *Id.* at 2720 (citing Nw.Airlines, Inc. v. Transp. Workers Union, 101 S. Ct. 1571 (1981); Nat'l Soc. of Prof. Eng'rs v. United States, 98 S. Ct. 1355 (1978)).
82. *Id.* at 2720.
83. *Id*. at 2721.
84. *Leegin*, 127 S. Ct. at 2721.

Co.[85] and has continued through the 1980's with the *Monsanto Co. v. Spray-Rite Service Corp.*[86] decision.[87] The Court also stated that the *Dr. Miles* decision could not be upheld without calling into question the decisions of several other vertical restraint cases.[88] The Court worried that it might not make sense to challenge these more recent decisions when they have resulted in procompetitive benefits.[89]

The Respondent also relied on Congress's repeal of the Miller-Tydings Fair Trade Act[90] as a basis for its *stare decisis* argument.[91] This Act was passed in 1937 and "made vertical price restraints legal if authorized by a fair trade law enacted by a State."[92] Because Congress repealed this, the Respondent claimed that the *per se* rule in *Dr. Miles* was ratified.[93] The Court denied this argument by saying that the repeal simply meant that vertical price restraints were not *per se* legal.[94]

The final issue that the Court addressed dealt with reliance on the *Dr. Miles* decision.[95] The Court held that an inefficient rule cannot be allowed to stand simply because of reliance interests, especially when it is possible for manufacturers to set minimum prices through other means.[96] The Court then noted that "'no more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases, ever employed [resale price maintenance] in any single year in the [United States].'"[97] Because of this, the Court found that consumer demands for cheap goods could still be met if the rule of reason applied to minimum resale price maintenance.[98] Therefore, the Court held that *Dr. Miles Medical Co. v. John D. Park & Sons Co.* was overruled and that "[v]ertical price restraints [were] to be judged according to the rule of reason."[99]

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85. 39 S. Ct. 465 (1919).
86. 104 S. Ct. 1464 (1984).
87. *Leegin*, 127 S. Ct. at 2721-22.
88. *Id.* at 2722.
89. *See id.*
90. Law of Aug. 17, 1937, ch. 690, § 1, 15 U.S.C.A § 1 (repealed 1975).
91. *Leegin*, 127 S. Ct. at 2723.
92. *Id. See* Miller-Tydings Fair Trade Act, Law of Aug. 17, 1937, ch. 690, § 1, 15 U.S.C.A § 1 (repealed 1975).
93. *Leegin*, 127 S. Ct. at 2723-24.
94. *Id.* at 2724.
95. *See id.* at 2724-25.
96. *Id.*
97. *Id.* at 2725 (citing T. R. OVERSTREET, RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 6 (1984)).
98. *Leegin*, 127 S. Ct. at 2725.
99. *Id.*

B. *The Dissenting Opinion of Justice Breyer in which Justice Stevens, Justice Souter, and Justice Ginsburg Joined*

Justice Breyer began his dissent by describing some of the anti-competitive effects that can result from minimum resale price maintenance.[100] These descriptions were similar to those in the majority opinion including the concern over higher retail prices and the possibility of cartels at the manufacturing and retail levels.[101] Justice Breyer described procompetitive effects of minimum resale price maintenance which were similar to the majority's description including the reduction of free-riding and market accessibility to new entrants. [102]

Justice Breyer also pointed out that these procompetitive effects are derived from economic views. The study of economics differs from the study of law drastically because the law is run on an administrative system which depends on the actions of judges and juries.[103] This being said, Justice Breyer questioned if "free-riding" even exists, and if it does, if judges and juries could realistically determine whether it exists in a given case.[104] Justice Breyer also argued that some necessary considerations under the rule of reason, such as "market power," can be very intricate and that "[o]ne cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs."[105]

After presenting these arguments, Justice Breyer claimed that *Dr. Miles* should not be overruled because it is a statutory case and because "the Court applies *stare decisis* more 'rigidly' in statutory cases than in constitutional cases."[106] Justice Breyer indicated that when the Court has overruled its own decisions in the past, those decisions were relatively new, and the *Dr. Miles* ruling is nearly 100 years old.[107] Justice Breyer also mentioned the superior practicality of the *per se* rule as compared to the rule of reason, and he emphasized that the *per se* rule is well-settled law.[108]

Justice Breyer emphasized that this case had reliance issues and that this was a significant reason to uphold the *Dr. Miles* decision.[109] Justice Breyer criticized the majority for simply holding that these "reliance interests . . . ,

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100. *Id.* at 2727 (Breyer, J., dissenting).
101. *See id.* at 2727 (Breyer, J., dissenting).
102. *See id.* at 2728-29 (Breyer, J., dissenting).
103. *Leegin*, 127 S. Ct. at 2729 (Breyer, J., dissenting).
104. *Leegin*, 127 S. Ct. at 2729-30 (Breyer, J., dissenting).
105. *Id.* at 2730 (Breyer, J., dissenting).
106. *Id.* at 2734. *See* Glidden Co. v. Zdanok, 82 S. Ct. 1459 (1962).
107. *Leegin*, 127 S. Ct. at 2734.
108. *See id.* at 2734-35 (Breyer, J., dissenting).
109. *Id.* at 2735 (Breyer, J., dissenting).

like the reliance interests in *Khan*,[110] cannot justify an inefficient rule."[111] Justice Breyer describes the potential reliance of discount stores, which can then lead to the reliance of malls, which in turn can lead to the reliance of residents of communities near these malls.[112] This reliance, according to Justice Breyer, is not given proper weight in the majority opinion.[113] Justice Breyer further chastised the majority for underestimating the effect that minimum resale price maintenance can have on an economy.[114] The small fraction of manufacturers that participated in minimum resale price maintenance actually accounted for over $300 billion dollars in consumer purchases in the economy, which had a significant effect on American families.[115]

Justice Breyer ended his dissent by stating that when a law like the *per se* rule has been in place for a long time, it becomes a part of our "national culture," and it is relied upon by businessmen and lawyers alike.[116] With this in mind, the majority has not revealed any legitimate purpose for which such a well-established rule should be overturned.[117]

IV. ANALYSIS

A. Introduction

It is well-established among economists that it is possible for minimum resale price maintenance to result in either procompetitive effects or anticompetitive effects depending on the motivation of the parties involved. This has been acknowledged by the majority and the dissent.[118] It has also been established that other restraints, which are covered by the Sherman Act, are governed by the rule of reason because they can result in either pro-competitive or anticompetitive effects.[119] When determining if minimum resale price maintenance should continue to be governed by the *per se* rule, the questions that must be answered are:

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110. 118 S. Ct. 275 (1997).
111. *Leegin*, 127 S. Ct. at 2735 (Breyer, J., dissenting).
112. *Id.*
113. *Id.*
114. *See id.*
115. *Id.* at 2735-36 (Breyer, J., dissenting).
116. *See Leegin*, 127 S. Ct. at 2736 (Breyer, J., dissenting).
117. *Id.* at 2737 (Breyer, J., dissenting).
118. *Id.* at 1183.
119. *See* Molly S. Boast & Dina L. Hamerman, *Vertical Restrictions: Resale Price Maintenance, Exclusive Distributorships, Territoral, and Customer Restrictions*, *in* PRACTICING LAW INSTITUTE CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 1423 (2003).

(1) How is minimum resale price maintenance different from other restraints covered by the Sherman Act?
(2) Do these differences justify the use of a different rule for minimum resale price maintenance?

B. *Per Se Rule Is Well-Established*

Justice Breyer found the *per se* rule to be "well established" considering the holding of the *Dr. Miles* decision in 1911. Because countless attorneys and clients have relied on this decision, it should not be overturned.[120] This point does not seem to be accurate after looking at other antitrust law decisions that have been overturned. For example, *Albrecht v. Herald Co.*[121] declared that maximum resale price maintenance was to be governed by the *per se* rule. Twenty-nine years later in 1997, *State Oil Co. v. Khan*[122] overruled *Albrecht* and held that maximum resale price maintenance was to be governed by the rule of reason.[123] Because the *Dr. Miles* decision had been around for longer than twenty-nine years, it was fair to assume that a twenty-nine-year-old decision should be considered "well established" law. Under Justice Breyer's reasoning, many attorneys and clients relied upon the *Albrecht* decision in the twenty-nine years prior to 1997. It appears that "well established" antitrust laws can be modified when the Court feels that procompetitive practices are being prohibited, and the only difference between the law regarding minimum resale price restraints and other price restraints is that the law regarding minimum resale price restraints has been "well established" for a longer period of time.

The only justification for maintaining the *per se* rule is based on the fact that more attorneys and clients have relied on the *Dr. Miles* decision for a longer period of time. This justification has a fundamental flaw in that it fails to consider the main purpose of antitrust law. Although it is true that by overruling the *Dr. Miles* decision, many attorneys and businessmen will be forced to change their business practices, it is also true that antitrust laws are not designed to provide attorneys and businessmen with eternally uniform guidelines, nor are they designed to ban procompetitive business practices. "As legislative history and case law both disclose, the general objective of the antitrust laws is the maintenance of competition. Competition per se thus becomes the goal of the legal order."[124] By changing the *per se* rule to the rule

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120. *Leegin*, 127 S. Ct. at 2731 (Breyer, J., dissenting).
121. 88 S. Ct. 869 (1968).
122. 118 S. Ct. 275 (1997).
123. *Khan*, 118 S. Ct. at 285.
124. LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 5 (1977).

of reason, the Court allowed manufacturers to use minimum resale price maintenance for procompetitive purposes. This change will ultimately increase competition, which was the purpose of antitrust laws like the Sherman Act in the first place.

If it were proper to maintain *per se* rules on antitrust laws simply because they are "well established," there would be no benefit to economic studies on the effects of business practices governed by such "well-established" laws. Even if economists discovered new possibilities of procompetitive effects of these practices, the antitrust laws could not be changed because they would be considered "well established." This would mean that even if it were proven that the economy could benefit from certain practices, because the practices were "well established" as being *per se* illegal, businesses and citizens could not enjoy these economic benefits. Overall, it would be irresponsible and imprudent to retain the *per se* rule simply because it is a "well established" rule of law.

C. Complexity in Determining the Effects of Minimum Resale Price Maintenance

Justice Breyer claimed that considerations of "market power" are too complex for judges and juries to take into account when determining the legality of minimum resale price restraints using the rule of reason.[125] Justice Breyer also stated that these determinations, which would be required of courts under the rule of reason, would call for "lengthy time consuming arguments among competing experts," and that ultimately courts would make mistakes due to a lack of understanding of difficult economic concepts.[126]

These concerns about using the rule of reason to govern minimum resale price maintenance can be addressed by looking to the rule's application to maximum resale price maintenance. Courts must consider factors such as "market power" when determining whether maximum resale price restraints are legal under the rule of reason.[127] The *Khan* decision held that maximum resale price maintenance should be governed by the rule of reason, regardless of the fact that it would force judges and juries to make these difficult determinations.[128] Minimum and maximum resale price restraints should be governed by the same rule (the rule of reason) because they require courts to make very similar considerations when determining their procompetitive and anticompetitive effects.

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125. *Leegin*, 127 S. Ct. at 2730.
126. *Id.*
127. *See* Norman W. Hawker, *Maximum Price Resale Maintenance Under the Rule of Reason*, 51 BAYLOR L. REV. 441, 470-71 (1999).
128. *Khan*, 118 S. Ct. at 285.

Regardless of the similarities to other complex antitrust considerations, the Court cannot hold that minimum resale price restraints are *per se* illegal in order to avoid complex determinations. Many areas of the law require judges and juries to make decisions based on expert testimony they do not fully understand. Medical malpractice cases are perfect examples of this: It cannot be said that judges and juries can decide a medical malpractice case based on a doctor's testimony as to the appropriate medical standard of care, but that that same jury cannot decide an antitrust case based on an economist's testimony as to a manufacturer's relative market share.

Justice Breyer commented that the use of the rule of reason will lead to costly judicial error.[129] Justice Breyer, of course, failed to consider judicial error that would result from continued use of the *per se* rule and what those costs would be. Use of the *per se* rule to govern minimum resale restraints can only result in Type I error.[130] "Type I error refers to a 'false positive,' analogous in the legal context to mistakenly imposing liability on an innocent defendant."[131] This error is shown when minimum resale pricing policies that stimulate competition are determined to be illegal by the *per se* rule. "Type II error is a 'false negative,' or failing to punish a guilty party."[132] This can be seen if the rule of reason is used and a court mistakenly allows a manufacturer to use minimum resale price restraints, which have anti-competitive effects.

Type II error, which results from the rule of reason, will result in anticompetitive practices and ultimately higher prices, but when prices rise, new competitors will enter the market and offer substitute goods at a lower price.[133] This will in effect cause the Type II error to correct itself with no interference by the judicial system.[134] Type I error, which is caused by the *per se* rule, results in the punishment of innocent manufacturers. This error can only effectively be remedied by judicial or legislative action. [135]

The cost of a Type II error is relatively miniscule because such errors can correct themselves. But the cost of a Type I error is not only the loss of economic benefits derived from procompetitive resale price maintenance, but also the possibility of fewer manufacturers due to undeserved punishment.[136]

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129. *Leegin*, 127 S. Ct. at 2730.
130. Fred S. McChesney, *Talking 'Bout My Antitrust Generation: Competition For and In the Field of Competition Law*, 52 EMORY L.J. 1401, 1412 (2003).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. McChesney, *supra* note 130, at 1413.
136. *See id.* at 1412.

V. CONCLUSION

The dissent in *Leegin* acknowledges that minimum resale price restraints can result in procompetitive effects, but nevertheless relies on the fact that the *per se* rule is a "well established" rule of law for governing these restraints.[137] However, this fact alone cannot be determinative because other price restraints, which were once governed by the "well established" *per se* rule, are now governed by the rule of reason.[138] Some judges believe that it is "more important that the applicable rule of law be settled than that it be settled right,"[139] but this is not the case regarding antitrust laws because their sole purpose is to promote competition. The *per se* rule was disallowing procompetitive practices which were beneficial to the American economy and in turn were beneficial to American citizens.

The *Leegin* dissent also claimed that the *per se* rule should have been upheld to avoid complex judicial considerations;[140] however, this point is irrelevant because these same judicial considerations were already necessary to decide other antitrust cases.[141] The *Leegin* dissent also failed to realize that any judicial mistakes which may arise from the complexity of these issues will prove to be less costly than the definite and known mistakes that are associated with maintaining the *per se* rule.

Overall, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* was decided correctly on all issues. There are definite procompetitive effects of minimum resale price maintenance. "Well established" antitrust law can and should be overruled in order to implement the rule of reason and allow for procompetitive activity. Finally, complex judicial considerations should not be determinative in the type of rules that govern antitrust law.

BRUCE CLARK

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137. *Leegin*, 127 S. Ct. at 2728-36 (Breyer, J., dissenting).
138. *Khan*, 118 S. Ct. 275.
139. Burnet v. Colorado Oil & Gas Co., 52 S. Ct. 443, 447 (1932) (Brandeis, J., dissenting).
140. *Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting).
141. *See Khan*, 118 S. Ct. at 285.