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Economic Law - Vertical Minimum Pricing in Leegin - Adrift with the Rule of Reason: Sinking with Stare Decisis; Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S.Ct. 2705 (2007)

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CASE NOTE

ECONOMIC LAW—Vertical Minimum Pricing in *Leegin*—Adrift With the Rule of Reason; Sinking With Stare Decisis; *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.,*127 S. Ct. 2705 (2007).

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Introduction

Antitrust law in the United States sprouted from the Sherman Act of 1890.[1] Congress passed the Sherman Act out of a growing concern over increasing prices caused by concentrated businesses, monopoly power, and cartels.[2] Typical American values such as entrepreneurial independence, freedom to contract, and free competition created the idealistic support for the Act's passage.[3]

The spring of 1911 provided the opportunity for the U.S. Supreme Court to decide four cases addressing the scope of the Sherman Act.[4] One of these decisions, *Dr. Miles Medical Company v. John D. Park & Sons Co.*, changed the analytical landscape of antitrust litigation.[5] The Court held it per se illegal for "a manufacturer to agree with its distributor to set the minimum price the distributor can charge for manufacturer's goods."[6] Nearly 100 years later, the Court faced this issue once again in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[7] The *Leegin* Court rejected the established precedent of *Dr. Miles*, and directed a return to the rule of reason for governing vertical minimum price fixing.[8]

Leegin Creative Leather Products, Inc. (Leegin) sold women's clothing and accessories.[9] Leegin, under the Brighton brand, sold a wide variety of women's

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[1] E. Thomas Sullivan & Jeffrey L. Harrison, Understanding Antitrust And Its Economic Implications 3 (Matthew Bender & Co. 4th ed 2003).

[2] *Id.*

[3] *Id.*

[4] Rudolph J.R. Peritz, *"Nervine" and Knavery: The Life and Times of* Dr. Miles Medical Company, *in* Antitrust Stories 61-62 (Eleanor M. Fox & Daniel A. Crane eds., Foundation Press 2007).

[5] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[6] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2710 (2007).

[7] *Leegin*, 127 S. Ct. at 2710.

[8] *Id.*

[9] *Id.*

fashion accessories to over 5,000 retail stores throughout the United States.[10] Leegin believed that by selling to small and independent boutiques, rather than large retailers, customers received more service and a better shopping experience.[11] Beginning in 1995, PSKS sold Brighton goods at Kay's Kloset located in Lewisville, Texas.[12] To promote the Brighton brand, Kay's Kloset invested thousands of dollars in television, newspaper, and direct mail ads.[13] As a result, Kay's Kloset became their market's premier place to buy Brighton products.[14]

In 1997, Leegin instituted the Brighton Retail Pricing and Promotion Policy forcing retailers to sell Brighton products at Brighton's suggested prices at all times.[15] In accordance with this policy, Leegin refused to do business with retailers who discounted Brighton products.[16] After instituting this policy, Leegin pursued Brighton Heart Store Agreements with all of their retailers.[17] In these agreements, Leegin offered retailers incentives to sell Brighton products at the suggested price every day of the year.[18] Leegin hoped this would prevent retailers from discounting their brand, thus harming its image and reputation as a high-quality product.[19] Leegin believed this would also induce retailers to use the extra funds, generated by a higher price, to improve customer service.[20]

In late 2002, after discovering that Kay's Kloset sold Brighton Products at a discount, Leegin stopped supplying Brighton goods to Kay's Kloset.[21] This resulted in damages to Kay's Kloset, including nullifying the benefit of all of Kay's Kloset's advertising.[22] PSKS filed suit in the United States District Court for the Eastern District of Texas, and argued Leegin violated the Sherman Act by entering into vertical minimum price fixing agreements.[23] The district court

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[10] *Id.*

[11] *Id.* at 2710-11.

[12] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2711 (2007).

[13] Brief of Respondent-Appellee at 4, Leegin Creative Leather Prod. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 621855.

[14] *Id.*

[15] *Leegin*, 127 S. Ct. at 2711.

[16] *Id.*

[17] *Id.*

[18] Brief of Respondent-Appellee at 1, Leegin Creative Leather Prod. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 621855.

[19] *Leegin*, 127 S. Ct. at 2711.

[20] *Id.* In a letter establishing this policy, Leegin stated: "In this age of mega stores . . . consumers are perplexed by promises of product quality and support of product which we believe is lacking in these large stores. . . . We, at Leegin, choose to break away from the pack by selling [at] specialty stores." *Id.*

[21] *Id.*

[22] Brief of Respondent-Appellee at 5, Leegin Creative Leather Prod. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 621855.

[23] *Leegin*, 127 S. Ct. at 2712.

held the economic justifications for vertical minimum pricing are irrelevant under the *Dr. Miles* per se rule.[24] Thus the court refused to consider any possible pro-competitive justifications for this anti-competitive behavior.[25] The jury found PSKS had agreed to fix Brighton Products' retail price and injuring PSKS's.[26] Therefore, the jury awarded damages of $1.2 million.[27] The district court trebled damages and entered a judgment for $3,975,000.80.[28]

Leegin appealed to the United States Court of Appeals for the Fifth Circuit arguing the court should adjudicate vertical minimum price restraints using the rule of reason, and not the per se rule.[29] The court did not accept this argument and upheld the per se rule.[30] The court based its ruling on the United States Supreme Court's application of the per se rule to vertical minimum price fixing.[31]

The U.S. Supreme Court granted certiorari to determine whether courts should continue applying the per se rule for vertical minimum price fixing.[32] Ultimately, the U.S. Supreme Court reversed the Fifth Circuit and, in a five-four decision, overruled the precedent established in *Dr. Miles*.[33] The Court held vertical minimum price fixing is no longer per se illegal, but courts must analyze these types of agreements under a rule of reason test.[34]

This case note examines the significance of this decision.[35] First, this case note introduces a few basic economic principles, which principles are essential to understanding the decision in *Leegin*.[36] Second, this case note addresses the significance and potential impact of *Leegin* by comparing it to an earlier decision, which is strikingly similar.[37] Based upon that analysis, this case note evaluates how

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[24] *Id.*

[25] *Id.*

[26] *Id.*; Brief of Respondent-Appellee at 1, Leegin Creative Leather Prod. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 621855.

[27] *Leegin*, 127 S. Ct. at 2712.

[28] *Id*; The Sherman Act, 15 U.S.C. § 15(a) (2000).

[29] *Leegin*, 127 S. Ct. at 2712.

[30] *Id.*

[31] *Id.* The U.S. Supreme Court in its opinion validated the Fifth Circuit's holding in this case. *Id.* The Court determined the Fifth Circuit correctly upheld the per se rule based upon the law at that time. *Id.*

[32] *Leegin*, 127 S. Ct. at 2712.

[33] *Id*. at 2710, 2712, 2725.

[34] *Id.* at 2720.

[35] *See infra* notes 36-39 and accompanying text.

[36] *See infra* notes 39-60 and accompanying text.

[37] *See infra* notes 168-179 and accompanying text.

Leegin may affect lower courts and practitioners.[38] Finally, this case note examines why courts so often ignore or discount stare decisis in antitrust decisions.[39]

BACKGROUND

The Sherman Act is the first and foremost antitrust doctrine in the U.S.[40] This Act seeks to avoid, "business concentration, acquisition of monopoly power, and cartels that might lead to increased prices and overcharges to consumers."[41] Section I of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[42] From the broad brushstrokes of the Sherman Act, courts endeavored to create workable rules and guidelines for determining the legality of various agreements.[43] This section discusses how the Court historically analyzed vertical restraints under the Sherman Act, how that analysis transformed over the last 100 years and *Leegin's* place in that metamorphosis.

Vertical Restraints of Trade

From the Sherman Act's broad brushstrokes, the Court struggled to find the acceptable boundaries for vertical restraints of trade.[44] These restraints begin with a vertical commercial relationship that consists of the chain of supplier, manufacturer, distributor, and retailer.[45] Minimum price fixing, in a vertical relationship, "refers to an agreement between manufacturers and retailers under which the retailers are obligated to sell that manufacturer's products to consumers only at or above the prices specified by the manufacturer."[46] These agreements are

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[38] *See infra* notes 180-86 and accompanying text.

[39] *See infra* notes 187-214 and accompanying text.

[40] *See* Stephen Labaton, *Sherman's Act's 100 Years of Protecting* Competition, N.Y. TIMES, July 6, 1990, at A12, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C0CE1DF163CF935A35754C0A966958260.

[41] *See* Sullivan & Harrison, *supra* note 1, at 3.

[42] The Sherman Act, 15 U.S.C. § 1 (2000).

[43] *See generally* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2714 (2007) (example of the court attempting to create workable guidelines for governing vertical restraints).

[44] *See infra* notes 55-86 and accompanying text.

[45] ANDREW I. GAVIL, WILLIAM E. KOVACIC & JOHNATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 340 (2002).

[46] An Open Letter to the U.S. Supreme Court of the United States from Commissioner Pamela Jones Harbour, 2 n.5, (Feb. 26, 2007) (citing Thomas K. McCraw, *Competition and "Fair Trade": History and Theory,* 16 RES. IN ECON. HISTORY, 185, 185 (1996)), *available at* www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf. Ms. Harbour explained:

> Those who favor vertical minimum price fixing agreements often refer to them using less pejorative terms, such as resale price maintenance, margin maintenance, or even retailer incentives. *Id.* ("It is no accident that proponents of legalizing resale price

also known as resale price maintenance.[47] After *Dr. Miles*, the Court considered these agreements per se illegal, regardless of the possible competitive benefits.[48]

In addition to vertical minimum price restraints, there are other types of vertical restraints such as vertical maximum price restraints, and non-price restraints.[49] Vertical maximum price restraints occur when a manufacturer sets a maximum price at which the distributor or the retailer can sell its goods.[50] Vertical non-pricing agreement occurs when a manufacturer enters into an agreement with a retailer based on something other than price.[51] The U.S. Supreme Court historically held vertical maximum price fixing and vertical non-pricing agreements were per se illegal.[52] However, it relaxed this standard in favor of the rule of reason, requiring courts distinguish between unreasonable and reasonable restraints.[53] Courts balance factors, such as the agreement's competitive effects, on a case by case basis.[54]

> maintenance have used 'fair trade' as a synonym, while opponents have preferred terms such as 'vertical price fixing'").

Id.; see also Gavil, Kovacic & Baker, *supra* note 45, at 341-343 (providing additional clarification on what vertical minimum price fixing requires of manufacturers and distributors).

[47] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705 *passim* (2007).

[48] *Leegin,* 127 S. Ct. at 2712-13. The Supreme Court introduced per se illegality and its counterpart the rule of reason in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Legally a per se rule establishes that once two parties reach an agreement, "the anticompetitive effect is presumed." Gavil, Kovacic & Baker, *supra* note 45, at 96-98. Economically, the per se rule exhibits a decision that the cost of identifying a few exceptions to the rule "outweigh[s] the cost of occasionally condemning conduct that might upon further inspection prove to be acceptable . . . ." *Id.* at 96.

[49] Gavil, Kovacic & Baker, *supra* note 45 at 343.

[50] *Id*.

[51] *Id.* These restrictions are typically territorial restrictions or customer allocations amongst manufacturers or distributors. *Id.*

[52] U.S. v. Arnold, Schwinn & Co., 388 U.S. 365, 373-74 (1967) (holding vertical non-price restraints are subject to a per se rule); Albrecht v. Herald Co., 390 U.S. 145, 151-52 (1968) (holding vertical maximum price restraints are subject to a per se rule).

[53] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977) (holding vertical non-price restraints are no longer subject to a per se rule, and the rule of reason now applies); State Oil Co. v. Khan, 522 U.S. 3, 7, 22 (1997) (finding vertical maximum price fixing is no longer a per se violation but should be judged based upon the rule of reason); Sullivan & Harrison, *supra* note 1, at 127-28.

[54] The best case to explain the rule of reason is *Chicago Board of Trade v. United States,* 221 U.S. 1 (1911). Justice Brandeis explained the broad rule of reason test as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business . . . ;its conditions before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts.

Id. at 238.

Vertical Minimum Price Restraints Initially Ruled Per Se Illegal

Before *Leegin* and the rule of reason, the Supreme Court, in *Dr. Miles Medical Company,* held a distributor or manufacturer could not fix the minimum resale price.[55] The Dr. Miles Medical Company sold different types of medicines throughout the United States, utilized various wholesale dealers, and attempted to fix the price wholesalers and retailers could charge for Dr. Miles's products.[56] Dr. Miles Medical Company maintained those prices by using serial numbers to track product's pricing.[57] The Court found this behavior restrained trade as the Dr. Miles Medical Company attempted to control the entire trade of their product.[58] The Court in *Dr. Miles* emphasized these types of restraints are related to the restraints on alienation.[59]The Court stated:

> The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand.[60]

In establishing vertical minimum price fixing as per se illegal, the Court in *Dr. Miles* noted there is very little public policy support for vertical minimum price fixing.[61]

Court Overturns Per Se Illegality In Favor of the Rule of Reason for Vertical Non-price Restraints

After *Dr. Miles*, the Court determined what rules should govern other forms of vertical agreements, such as vertical non-price restraints.[62] In 1967, the Supreme Court ruled non-price restraints were also per se illegal in *United States v. Arnold, Schwinn & Co*.[63] Nevertheless, ten years later, in *Continental T.V., Inc. v. GTE Sylvania*, the Court overruled that decision and determined non-price restraints were subject to the rule of reason analysis.[64]

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[55] *Id.*; Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 384-85 (1911).

[56] *Dr. Miles*, 220 U.S. at 374-75.

[57] *Id.* at 395-96.

[58] *Id.* at 400.

[59] *Id.* at 404.

[60] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404 (1911) (quoting John D. Park & Sons Co. v. Hartman, 153 F. 24, 39 (6th Cir.)).

[61] *Dr. Miles*, 220 U.S. at 408.

[62] *Id.*

[63] U.S. v. Arnold, Schwinn & Co., 388 U.S. 365, 372-73 (1967).

[64] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

Like *Leegin*, *GTE Sylvania* overruled established precedent in *Schwinn* and decided the rule of reason governed non-price vertical restraints.[65] The *GTE Sylvania* decision created tension and controversy in antitrust law by drawing a distinction between vertical non-price restraints and vertical minimum price restraints.[66] It left *Dr. Miles's* per se rule against vertical minimum *price* restraints unchanged.[67] However, *GTE Sylvania* determined courts should adjudicate vertical *non-price* restraints under the rule of reason rather than a per se rule.[68] Because of these similarities, many commentators and scholars struggled to justify different rules for non-price and minimum price restraints.[69]

Justice White's concurring opinion in *GTE Sylvania* recognized this strain and predicted this decision could pressure the Court to overrule *Dr. Miles*.[70] Justice White recognized "the per se illegality of price restrictions . . . involves significantly different questions of analysis and policy" and the Court would struggle to justify the distinction between vertical price and non-price restraints.[71] Ultimately Justice White correctly predicted "[t]he effect, if not the intention, of the Court's opinion is necessarily to call into the question the firmly established per se rule" of *Dr. Miles*.[72]

Court Overturns Per Se Illegality in Favor of Rule of Reason for Vertical Maximum Price Restraints

The Court in *Albrecht v. Herald Co.* extended the per se rule of *Dr. Miles* to apply to vertical maximum price fixing.[73] As with *GTE Sylvania*, the Court later, in *State Oil Co. v. Khan*, overruled the per se rule of *Albrecht* in favor of the rule of reason.[74] The Court justified its decision for many of the same reasons as *GTE Sylvania* and *Leegin.*[75] These justifications included the possible pro-competitive effects of maximum price restrictions, increased economic knowledge and subsequent decisions weakening *Albrecht*'s precedential underpinnings.[76]

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[65] *Id.* at 58.

[66] *Id.* at 56.

[67] *Id.* at 57-58.

[68] *Id.*

[69] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 48 nn.13-14 (1977).

[70] *Id.* at 69-70 (White, J., concurring).

[71] *Id.* (White, J., concurring)

[72] *Id.* at 70.

[73] Albrecht v. Herald Co., 390 U.S. 145, 148 153-54 (1968).

[74] State Oil Co. v. Khan, 522 U.S. 3, 7 (1997).

[75] *Id.* at 13.

[76] *Id.* at 13-15.

Congress Addresses Vertical Restraints

Congress engaged in determining the legality of vertical minimum price fixing.[77] In 1937, Congress passed the Miller-Tydings Fair Trade Act and the McGuire Act, which allowed individual states to adopt laws that permitted vertical minimum price fixing.[78] However, in 1975, Congress repealed both acts.[79] When Congress repealed the Acts, thirty-six states had legalized vertical minimum price fixing.[80]

Trend From Per Se Illegality to Rule of Reason

Since the Sherman Act, the Court moved from the per se rule to the rule of reason in analyzing vertical restraints.[81] Initially, the Court determined the per se illegality governed cases like *Dr. Miles, Schwinn* and *Albrecht*.[82] Slowly, as discussed above, the Court whittled away per se illegality until it is inapplicable to nearly any vertical agreements.[83] Congress contributed by attempting to legislate the most effective way to deal with vertical agreements.[84] With this backdrop and with weakened precedential underpinnings, the *Leegin* Court took the stage to determine whether the per se rule still applied to vertical minimum price fixing.[85] Many recognize this decision as being a potential watershed case in antitrust law with broad and wide-reaching effects.[86]

PRINCIPAL CASE

In *Leegin Creative Leather Products Inc. v. PSKS, Inc.*, the Court considered overturning nearly 100 years of precedent established by *Dr. Miles.*[87] In *Dr. Miles,* the Court decided vertical minimum pricing fixing was per se illegal under

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[77] *See infra* notes 78-80 and accompanying text (stating the laws Congress adopted to address vertical restraints).

[78] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2727-28 (2007).

[79] *Id.*

[80] *Id.*

[81] *See supra* notes 40-72 and accompanying text (stating the trend away from the per se rule in antitrust litigation).

[82] *Leegin*, 127 S. Ct. at 2714.

[83] *See supra* notes 59-65 and accompanying text (explaining the disintegration of the per se rule in antitrust litigation).

[84] *See supra* notes 66-70 and accompanying text.

[85] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2710 (2007).

[86] *Id.* at 2714; An Open Letter to the U.S. Supreme Court of the United States from Commissioner Pamela Jones Harbour, 2 n.5, (Feb. 26, 2007) *available at* www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf.

[87] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2714 (2007).

the Sherman Act, Section One.[88] In a five-four split decision, the *Leegin* Court overruled *Dr. Miles* and decided to judge vertical minimum price fixing by the rule of reason.[89]

Rule of Reason and Per Se Tests

Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, wrote the majority opinion.[90] The Court began by discussing the rule of reason's purpose.[91] According to the Court, the rule of reason appropriately governed whether behavior restrains trade and violates section one of the Sherman Act.[92] When applying the rule of reason, the Court instructed, a court "weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[93] The rule of reason analysis, according to the *Leegin* Court, balances the pro-competitive or anti-competitive effects of the behavior.[94]

Pro-competitive Justifications for Vertical Minimum Price Fixing

While acknowledging the divergence of economic consensus, the Court found numerous situations where vertical minimum price fixing may have pro-competitive effects.[95] The Court justified vertical minimum price fixing based upon inter- and intra-brand competition.[96] Inter-brand competition occurs between competing brands such as Burger King's "Whopper" and McDonald's "Big Mac."[97] Intra-brand competition is between "sellers of the same brand —such as rival . . . Burger King franchises."[98] The Court determined vertical minimum restraints eliminate competition between sellers of the same brand or inter-brand competitors.[99] Thus, the Court supposed eliminating this type of competition encouraged retailers to provide additional customer service to assist the manufacturer competition against rival manufacturers.[100]

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[88] *Id.* at 2713.

[89] *Id.* at 2710.

[90] *Id.* at 2710.

[91] *Id.* at 2712-13.

[92] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712 (2007).

[93] *Id.* (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)).

[94] *Leegin*, 127 S. Ct. at 2713.

[95] *Id.* at 2714-15.

[96] *Id.* at 2715.

[97] Gavil, Kovacic & Baker, *supra* note 44, at 340.

[98] Gavil, Kovacic & Baker, *supra* note 44, at 341.

[99] *Leegin*, 127 S. Ct. at 2715.

[100] *Id.* at 2715.

The Court also discussed another possible benefit vertical minimum price fixing, the elimination of "free riding."[101] Free riding occurs when a retailer receives the benefit of another's investment.[102] An example of free riding is when a consumer learns about a product from a retailer who invested in high-quality showrooms and superior customer service and then the customer purchases the product from a different discount retailer.[103] According to the Court, vertical agreements would help to eliminate this problem by preventing a discount retailer from undercutting the high quality service provider.[104]

Economic Effects of Vertical Minimum Price Fixing

The Court proceeded to analyze whether the per se rule should apply given its various economic effects.[105] As discussed above, vertical minimum price fixing has both pro-competitive and anti-competitive effects depending on the circumstances.[106] Therefore, the Court held the per se rule is not appropriate for cases of vertical minimum price fixing.[107] The Court asserted the per se rule should only apply where price fixing would always or almost always tend to restrict competition and decrease output.[108] This is clearly not the case with vertical minimum price fixing, the court declared in its opinion.[109]

Although the Court found the per se rule inappropriate for vertical price fixing, it also recognized its potential for economic danger.[110] As a result, the Supreme Court cautioned the lower courts to exercise diligence in applying the rule of reason to these restraints.[111] Factors to consider include the size of the market, whether competing manufacturers adopt the restraint, the source of the restraint, and the relative market power of the restraining firm.[112]

According to the Court, as lower courts apply the rule of reason they will build a litigation structure that allows the pro-competitive effects of vertical minimum price restraints while eliminating the possible anticompetitive side effects.[113]

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[101] *Id.*

[102] *Id.*

[103] *Id.* at 2715-16.

[104] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2716 (2007).

[105] *Id.* at 2717.

[106] *Id.* at 2717-18.

[107] *Id.*

[108] *Id.* at 2713.

[109] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2717 (2007).

[110] *Id.*

[111] *Id.* at 2719.

[112] *Id.* at 2719-20.

[113] *Id.* at 2720.

Stare Decisis and Overturning Dr. Miles

The Court acknowledged stare decisis could justify upholding *Dr. Miles.*[114] The Court recognized, "stare decisis reflects a policy judgment that in most matters, it is more important that the applicable rule of law be settled than that it be settled right."[115] However, the Court suggested stare decisis is applied differently to common-law statutes, such as the Sherman Act.[116] Therefore, the Sherman Act's application should change in response to a changing economic landscape.[117] Consequently, the Court examined the current economic views of vertical minimum price restraints, and asserted that many economic scholars believe vertical minimum price fixing has widespread benefits.[118] In addition, the Department of Justice and the Federal Trade Commission both advised the Court to abandon the per se rule in favor of the rule of reason.[119] These agency's significant antitrust expertise persuaded the Court to accept their advice.[120] Ultimately, the Court concluded the economic landscape justified using the rule of reason in evaluating vertical minimum price fixing.[121]

Justice Breyer's Dissent

Justice Breyer wrote the opinion for the dissent.[122] The dissent recognized *Dr. Miles* made it illegal, under Section One of the Sherman Act, for a manufacturer and the dealer to fix prices.[123] The dissent found the Court had "consistently read *Dr. Miles* as establishing a bright-line rule that agreements fixing minimum resale prices are per se illegal."[124] In fact, the dissent pointed out, stare decisis not only compels support for the per se rule, but Congress has also continually and consistently refused to overturn that per se rule.[125] The dissent asserted the Court mistakenly overturned *Dr. Miles* and the per se rule.[126]

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[114] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2720 (2007).

[115] *Id.* at 2720 (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

[116] *Leegin,* 127 S. Ct. at 2720.

[117] *Id.*

[118] *Id*. at 2721.

[119] *Id.* at 2721.

[120] *Id*.

[121] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2725 (2007).

[122] *Id.* (Breyer, J., dissenting).

[123] *Id.* (Breyer, J., dissenting).

[124] *Id.* (Breyer, J., dissenting).

[125] *Id.* at 2725-26. (Breyer, J., dissenting).

[126] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2725-26 (2007) (Breyer, J., dissenting).

The Benefit of the Per Se Rule over the Rule of Reason

The dissent began its discussion with an analysis of the per se and rule of reason tests.[127] The dissent acknowledged courts often applies the "rule of reason" in these situations by balancing the possible anticompetitive effects with other justifications.[128] However, when the probable anticompetitive risks are so severe and the justifications so hard to prove, the Court imposed per se unlawfulness, which "instructs courts to find the practice unlawful all (or nearly all) the time."[129]

The dissent examined the methods by which courts analyze questions of vertical minimum price fixing.[130] The dissent discussed three typical arguments for and against using the per se rule.[131] Those arguments involve three considerations: 1) possible anticompetitive effects and higher consumer prices, 2) potential benefits, and 3) administration.[132]

Vertical Price Agreements Means Higher Consumer Prices

The dissent looked at historical data regarding the repeal of the Miller-Tydings Fair Trade Act and the McGuire Act to support the argument against vertical minimum price fixing.[133] These acts gave states the power to authorize vertical minimum price fixing.[134] In states that allowed vertical minimum price fixing, the price rose by nineteen to twenty-seven percent.[135] Following the 1975 repeal of these acts, the Federal Trade Commission and economists generally agreed, "resale price maintenance tends to produce higher consumer prices than would otherwise be the case."[136]

Stare Decisis and Retaining Dr. Miles

The dissent stated the precedent for the per se rule began with *Dr. Miles* and continued for a century, resulting in great reliance from attorneys, their clients, and business executives.[137] The dissent noted *Dr. Miles* has "been cited dozens of

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[127] *Id.* at 2726 (Breyer, J., dissenting).

[128] *Id.* (Breyer, J., dissenting).

[129] *Id.* (Breyer, J., dissenting).

[130] *Id.* (Breyer, J., dissenting).

[131] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2726 (2007) (Breyer, J., dissenting).

[132] *Id.* at 2726-27 (Breyer, J., dissenting).

[133] *Id.* at 2727.

[134] *Id.* (Breyer, J., dissenting). When Congress repealed these acts in 1975 thirty-four states allowed minimum resale price maintenance. *Id.* (Breyer, J., dissenting).

[135] *Leegin*, 127 S. Ct. at 2728 (Breyer, J., dissenting).

[136] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2728 (2007) (Breyer, J., dissenting).

[137] *Id.* at 2731 (Breyer, J., dissenting).

times in this Court and hundreds of times in lower courts."[138] In fact, the dissent pointed out it was unaware of another case where the Supreme Court overturned such a well-established precedent.[139]

The dissent argued that while a change in economic or legal circumstances could justify the Court's position, no such change occurred.[140] In fact, according to the dissent, the most relevant change supports the maintenance of the per se rule.[141] This change occurred in 1975 when Congress repealed the McGuire and Miler-Tyding Acts.[142] The dissent argued that by repealing those Acts, Congress intended a return to the *Dr. Miles*' per se rule, making vertical minimum price fixing per se illegal.[143]

The dissent concluded the only certainty from this decision is that the price of goods will rise at retail and "it will create considerable legal turbulence as lower courts seek to develop workable principles."[144]

ANALYSIS

Introduction

Unfortunately a law student, judge or, a practitioner trying to master antitrust litigation is "in an *Alice and Wonderland* world where words do not always mean what they say. Nowhere is this more true [sic] than with respect to what is known as the rule of reason."[145] This analysis section explores that Wonderland.[146] First, this case note will argue the rule of reason in *Leegin* will become a standard of "de facto" per se legality, as it has with other vertical restraints.[147] Second, stare decisis in antitrust litigation is not a potent argument for keeping legal precedent.[148]

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[138] *Id.* (Breyer, J., dissenting).

[139] *Id.* (Breyer, J., dissenting).

[140] *Id.* (Breyer, J., dissenting).

[141] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2731 (2007) (Breyer, J., dissenting).

[142] *Id.* (Breyer J., dissenting).

[143] *Id.* at 2732 (Breyer J., dissenting).

[144] *Id.* at 2737 (Breyer J., dissenting).

[145] Stephen Calkins, *California Dental Association: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L. J. 495, 520 (2000).

[146] *See infra* notes 149-188 and accompanying text.

[147] *See infra* notes 151-88 and accompanying text.

[148] *See infra* notes 189-216 and accompanying text.

The Leegin *Court Announced a Return to the Rule of Reason*

The *Leegin* Court determined "vertical price restraints are to be judged by the rule of reason."[149] In explaining the rule of reason standard, the Court cites to cases such as *GTE Sylvania* and *Chicago Board of Trade*.[150] These cases express a formal rule of reason.[151] In applying the rule of reason, the Court explained the fact finder should examine whether the vertical restraint is unreasonable on a case-by-case basis.[152] If a court determines the restraint is unreasonable, then it is illegal.[153] The *Leegin* Court energetically advises the lower courts in their application of the rule of reason, and encourages lower courts to develop "litigation structure" so the rule of reason can "eliminate anticompetitive restraints from the market and []provide guidance to businesses."[154] In addition, the Court predicts lower courts will strive for a rule of reason that is a "fair and efficient way to prohibit anticompetitive restraints and to promote pro-competitive ones."[155] Although the *Leegin* Court set forth the full rule of reason as a fair way to govern vertical minimum restraints, when applied the restraint is almost always reasonable, so the defendant almost always win.[156]

Lower courts will struggle to adhere to the *Leegin* Court's explanation of the rule of reason.[157] While the explanation of the rule of reason in *Leegin, GTE Sylvania* and *Chicago Board of Trade* appears to be "an elegant assignment of responsibilities," litigators, practitioners, and judges have difficulty applying the full rule of reason standard.[158] Examples of these difficulties include complex balancing of factors such as the market effects of the restraint, identifying pro and anticompetitive effects and predicting the consequences after the imposition of the restraint[159] Therefore, instead of applying the rule of reason, the lower courts developed different approaches or filters.[160] The use of these filters to adjudicate

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[149] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2710 (2007).

[150] *See, e.g.*, *id.* at 2712-13.

[151] *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

[152] *Id.*; S*ee, e.g., Leegin*, 127 S. Ct. at 2726 (Breyer J., dissenting); Nat'l Collegiate Athletic Assn. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109-110 & n.39 (1984); Nat'l Soc. of Prof'l Eng'r v. U.S., 435 U.S. 679, 688-92 (1978); Board of Trade of Chicago v. U. S., 246 U.S. 231, 238 (1918).

[153] *See Leegin*, 127 S. Ct. at 2712.

[154] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2720 (2007).

[155] *Id.*

[156] Calkins, *supra* note 145, at 521.

[157] *See infra* notes 159-162 and accompanying text.

[158] Calkins, *supra* note 145, at 521 (stating legal practitioners have problems identifying market effects of the restraint).

[159] Calkins, *supra* note 145, at 521.

[160] Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L. J. 67, 73-75 (1991).

these cases ultimately resulted in a de facto per se legality for vertical non-price agreements.[161]

One of the primary filters through which the lower courts apply the rule of reason is that of market power.[162] However, proving market power in an antitrust case challenges any plaintiff.[163] In addition, a plaintiff in market power litigation "faces the prospect of long, expensive discovery, extensive motions practice and then merger-like battle over market power."[164] The battle rages as defendants hire expert economists, who testify about factors such as lack of market power, ease of entry, powerful buyers, and market situations.[165] If the plaintiff fails to prove the defendant has market power, then many of the lower courts will find for the defendant without engaging in a full rule of reason analysis set out by the Court.[166] The use of filters such as market power have formed the basis for what has been identified as the "truncated," "quick look," "abbreviated, "structured," or "flexible" rule of reason.[167]

GTE Sylvania—*Rule of Reason*

GTE Sylvania is an example of lower courts applying filters when instructed by the U.S. Supreme Court to apply the full rule of reason.[168] Because the Court's analyzed and decided *GTE Sylvania* and *Leegin* in a similar manner, *GTE Sylvania* is useful to predict the impact of the *Leegin* decision on lower courts, practitioners, and business people.[169] The *GTE Sylvania* Court reversed precedent by overturning the per se rule and determined that vertical non-price restraints should be adjudicated under the rule of reason.[170] In the formal rule of reason, the *GTE Sylvania* Court advised lower courts in applying the formal rule of reason by balancing the circumstances of a case to determine "whether a

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[161] *See* Ginsburg, *supra* note 160, at 67.

[162] Ginsburg, *supra* note 160, at 74. "One approach is to use a market power screen: no power, no foul." *Id.*

[163] Calkins, *supra* note 145, at 521-22.

[164] Calkins, *supra* note 145, at 521.

[165] Calkins, *supra* note 145, at 521.

[166] Calkins, *supra* note 145, at 521.

[167] Calkins, *supra* note 145, at 522; s*ee, e.g.,* Veronica G. Kayne, *Vertical Restraints: Resale Price Maintenance, Territorial and Customer Restraints*, 1648 PLI/CORP 45, 52 (2008); Philip F. Zeidman, *Franchising and Other Methods of Distribution: Regulatory Pattern and Judicial Trends*, 1648 PLI/CORP 473, 646 (2008); Gosta Schindler, *Wagging the Dog? Reconsidering Antitrust-Based Regulation of IP-Licensing*, 12 MARQ. INTELL. PROP. L. REV. 49, 72 (2008); Marc Edelman & C. Keith Harrison, *Analyzing the WNBA'S Mandatory Age/Education Policy from a Legal Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape,* 3 NW. J. L. & SOC. POL'Y 1, 40 (2008).

[168] *See infra* notes 168-79 and accompanying text.

[169] *See supra* notes 170-79 and accompanying text.

[170] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 (1977).

restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[171] The Court cites with approval to Justice Brandies and his comprehensive explanation of the rule of reason in *Chicago Board of Trade*.[172] The *GTE Sylvania* Court evidently intended that lower courts should "return to the rule of reason that governed vertical restrictions prior to *Schwinn*."[173] In order to comply with the Court's decision in *GTE Sylvania,* lower courts needed to engage in a complex balancing test to determine the reasonableness of each restraint.[174]

However, the majority of lower courts have not engaged in the complex balancing test envisioned in *GTE Sylvania*.[175] From a statistical survey done in 1991 and summaries of cases decided under *GTE Sylvania*, "it is apparent that the courts of appeals are generally not engaging in the balancing . . . that the Supreme Court envisioned.[176] This commentator in 1991 examined the forty-five cases decided under *GTE Sylvania* which applied the rule of reason on its merits.[177] In forty-one, or more than ninety percent of those cases, the Court decisions favored the defendant.[178] In other words, the Court determined the restraint was reasonable in these cases.[179]

Leegin *"De Facto" Per Se Legal Test*

The *Leegin* Court's description of the "rule of reason" is similar to the description of the formal rule of reason in *GTE Sylvania*.[180] Despite the strong language of the *Leegin* Court, the lower courts will not apply the full rule of

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[171] *GTE Sylvania Inc.*, 433 U.S. at 49. The Court also cites to Justice Brandeis's explanation of the rule of reason in *Chicago Board of Trade*:

> The true test of legality is whether the restraint imposes is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 49 n.15 (quoting Chicago Board of Trade v. U.S., 246 U.S. 231, 238 (1918)).

[172] *GTE Sylvania Inc.*, 433 U.S. at 49.

[173] *Id.* at 59.

[174] *Id.*

[175] Ginsburg, *supra* note 160, at 76.

[176] Ginsburg, *supra* note 160, at 76.

[177] Ginsburg, *supra* note 160, at 70-71.

[178] Ginsburg, *supra* note 160, at 71.

[179] *See* Ginsburg, *supra* note 160, at 71.

[180] *See* Michael L. Denger & Joshus Lipton, *The Rule of Reason and "*Leegin *Policies": The Supreme Court's Guidance*, 22-FALL ANTITRUST 45, 45 (2007).

reason.[181] Instead the lower courts will judge vertical minimum resale price maintenance, as they do other vertical restraints, under a rule of "de facto" per se legality based upon filters such as market power.[182] *GTE Sylvania* and *Kahn* are two cases that exemplify the Court stating a rule of reason that in actuality becomes "de facto" per se legality.[183]

Because of the similarities between *Leegin*, *GTE Sylvania* and *Kahn,* law students, judges and practitioners can expect the significant majority of vertical minimum restraints will be "de facto" per se legal.[184] The formal rule of reason is now nothing but legal fiction in most situations.[185] The rule of reason has become a "toothless legal standard" most likely to be applied through a filter, such as market power, and in favor of the defendant.[186]

Stare Decisis—Weak Antitrust Argument

The Sherman Act, on its face, is a deceptively simple statute.[187] It makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[188] Antitrust litigation heaped complex layers of "judicial gloss" on this single sentence.[189] Lawyers and judges are not completely responsible for the increased complexity.[190] Economics, as a science, has also

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[181] *See generally supra* notes 158-169 and accompanying text (discussing the possible reasons lower courts will not apply the full rule of reason).

[182] *See* Ginsburg, *supra* note 160, at 76.

[183] State Oil Co. v. Khan, 522 U.S. 3, 22 (1997); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 (1977); *see generally supra* notes 144-183 and accompanying text (analyzing how these cases are likely to be "de facto" per se legal).

[184] Mark E. Roszkowski, *The Sad Legacy of* GTE Sylvania *and Its "Rule of Reason": The Dealer Termination Cases and the Demise of Section 1 of the Sherman Act*, 22 CONN. L. REV. 129, 134 (1989).

> [It] clearly indicate[s] the bankruptcy of GTE Sylvania and its rule of reason standard. . . . GTE Sylvania has further created a business climate: in which virtually any restraint of trade that arguably can be characterized as "vertical," except the barest and most blatant forms of resale price maintenance, is per se legal.

Id.

[185] *Id.*

[186] *Id.*

[187] *See* Andrew S. Oldham, *Sherman's March (In)To the Sea*, 74 TENN. L. REV. 319, 320 (2007).

[188] 15 U.S.C. § 1 (2000).

[189] *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977); Oldham, *supra* note 187, at 320.

[190] *See* Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, 22 FALL-ANTITR 21, 21-23 (2007); John McGaraghan, *A Modern Analytical Framework for Monopolization in Innovative Markets for Products With Network Effects*, 30 HASTINGS COMM. & ENT. L.J. 179, 184.

changed and evolved since the beginning of antitrust litigation in the United States as "over-time, empirical evidence and cutting edge research discredit old theories and supplant them with new ones."[191] Therefore, the courts are faced with divergent economic views that often contradict established precedent.[192] While the Sherman Act and economic decisions like *Dr. Miles* have existed unchanged for nearly a hundred years, since then, the knowledge and understanding of economics and antitrust has increased dramatically.[193] This increased understanding jeopardizes the safety and strength of these early precedents by putting them in conflict with modern reality.[194] This evolution in economics created tension in the Court seeking to maintain modern antitrust policy based upon current knowledge and prior rulings weighted with stare decisis.[195]

Changing Economic Circumstances Justifies Ignoring Stare Decisis

The Court in *Khan* recognized "the very nature of antitrust law creates a tension which puts it in conflict with the principle of stare decisis."[196] In this decision, the Court explained that in antitrust cases courts must balance the weight of precedent against "changed circumstances and the lessons of accumulated experience."[197]

The *Leegin* case exemplifies a Court dealing with that tension.[198] The *Dr. Miles* Court relied upon antiquated doctrines such as restraints on alienation.[199] However, since that time the Court and economic commentators determined that reliance upon this "ancient rule" is unfounded when applied to antitrust analysis.[200] In *Leegin*, the Court warned dispositive weight should not be placed

[191] Bruce Abramson, *Intellectual Property and the Alleged Collapsing of Aftermarkets*, 38 RUTGERS L.J. 399, 423 (2007).

[192] Abramson, *supra* note 191, at 423.

[193] Brief for Economists as Amici Curiae Supporting Petitioner, Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007), 2007 WL 173681.

[194] *See* Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 366-370 (2007).

[195] *See id.*

[196] Alan H. Silberman, *Vertical Price, Customer and Territorial Limitations*, 1602 PLI/CORP 421, 429 (2007); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

[197] *Khan*, 522 U.S. at 20.

[198] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2714 (2007).

[199] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-05(1911); *See* Harvard Law Review Association, *Minimum Resale Price Maintenance*, 121 HARV. L. REV. 425, 428 (2007); *See* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 687 (1962).

[200] *See Khan,* 522 U.S. at 13 (citing R. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 295-96 (1975)).

upon antiquated doctrines.[201] Citing *GTE Sylvania*, the Court reasserted "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today."[202] In *Leegin*, the Court relied upon current economic understanding to trump well-established and overwhelming precedent.[203]

There are Significant Benefits in Allowing Flexibility in Antitrust Litigation

There are significant benefits for flexibility in stare decisis for antitrust litigation.[204] While stare decisis is not a strict command, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[205] However, there are also benefits of setting stare decisis principles to the side in antitrust litigation.[206] By setting stare decisis aside the Court will modernize and put to rest aged antitrust law and adapt to new economic understanding which benefits consumers.[207] The Court can also adjust as knowledge of market conditions increase "and as alternative scenarios arise within different market conditions, courts [can] adapt antitrust law to account for and adjust to the different applications."[208]

It is therefore instructive to practitioners and businesses to realize that building upon stare decisis in antitrust litigation is building upon an unstable foundation.[209] It is much more reliable to stay abreast of modern economic scholarship.[210] It is increasingly likely the Court relies more upon modern economic thinking than principles of stare decisis.[211] While in many instances the law is better settled than right, in antitrust litigation it may be more important that something be settled right than settled at all.[212]

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[201] *See Leegin*, 127 S. Ct. at 2714.

[202] *Id.* (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53, n.21 (1977)).

[203] *Leegin,* 127 S. Ct. at 2714.

[204] *See infra* notes 207–13 and accompanying text.

[205] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (Brandeis, J., dissenting).

[206] *See infra* notes 207-13 and accompanying text.

[207] *See* Kathryn M. Fenton, *From the Section Chair*, 22 ANTITRUST 3 (2007); *see also* Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule*, 81 SCARL 69, 81 (2007).

[208] Richman & Murray, *supra* note 207, at 81.

[209] *See supra* notes 196-208 and accompanying text.

[210] *See supra* notes 196-208 and accompanying text.

[211] *See supra* notes 204-08 and accompanying text.

[212] *See supra* notes 196-212 and accompanying text; *but see* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting).

The Supreme Court likely anticipated the impending legal turbulence and recognized lower courts will have to "work out" the law in this area.[213] *Leegin,* while typifying a trend in antitrust law away from per se rules and toward the rule of reason, it is also another significant example of the instability of stare decisis in antitrust law.[214]

CONCLUSION

The rule of reason continues to be an area where courts struggle in a sea of complex and demanding legal standards.[215] Stare decisis is ill-equipped to anchor the antitrust litigation for the benefit of students, practitioners and judges.[216] The U.S. Supreme Court attempts to provide stability and flexibility through the comprehensive full blown rule of reason set forth in *Chicago Board of Trade*, but that test is difficult, if not impossible, to apply effectively.[217] Therefore, lower courts seized upon the spirit of the rule of reason by using different filters, such as market power.[218] However, until the U.S. Supreme Court provides additional stability and greater direction for the application of the rule of reason, the lower courts will drift in their application of this rule and continue to rule in favor of defendants without market power.[219]

[213] *Burnet*, 285 U.S. at 405-06.

[214] *See supra* notes 34-78, 180-95 and accompanying text.

[215] *See supra* notes 55-86 and accompanying text.

[216] *See supra* notes 187-214 and accompanying text.

[217] *See supra* notes 149-61 and accompanying text.

[218] *See supra* notes 156-61 and accompanying text.

[219] *See supra* notes 160-61, 174-86 and accompanying text.