



Federal Trade Commission

An Open Letter to the Supreme Court of the United States from Commissioner Pamela Jones Harbour¹

February 26, 2007

Subject: The Illegality of Vertical² Minimum Price Fixing

Mr. Chief Justice, and May It Please the Court:

Vertical minimum price fixing is almost always harmful to consumers. It creates no incentive for distributors and retailers to become more cost-effective in the delivery of goods and services to consumers. Indeed, it transfers to consumers the consequences of inefficient business practices: it typically leads to higher prices without bestowing countervailing benefits. A decision by this Court to overrule *Dr. Miles Medical Co.*³ would wrongly eliminate *per se* illegality for vertical minimum price fixing. Moreover, unless the Court replaces *Dr. Miles* with a clearly articulated legal framework that preserves (at a minimum) a strong presumption of illegality, vertical minimum price fixing will become beyond effective challenge under the federal antitrust laws. This outcome would contradict rational antitrust policy and decrease consumer welfare.

The Court is urged to keep these principles in mind as it considers the case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*⁴ Leegin is a manufacturer of women's fashion

¹ This letter reflects my own views. It does not purport to represent the views of the Commission or any other Commissioner.

² A vertical arrangement is one between actors at different levels of the distribution system, such as a retailer and a manufacturer. A horizontal arrangement is one between actors at the same level of the distribution system, including arrangements between competitors.

³ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

⁴ Docket No. 06-480 (Oct. 4, 2006). This matter is scheduled for oral argument on March 26, 2007.

accessories marketed under the Brighton[®] name. Leegin entered into vertical minimum price fixing⁵ agreements with downstream retailers, primarily specialty boutiques. These types of agreements have been illegal under the Sherman Act⁶ since this Court's 1911 decision in the *Dr. Miles* case. At trial, the jury awarded treble damages to PSKS, a former Leegin retailer that had been terminated for defying Leegin's unlawful vertical minimum price fixing scheme and selling Leegin's products at a discount.

Leegin and its *amici* ask the Court to reverse *Dr. Miles* and, in effect, legitimize vertical minimum price fixing, even though consumers inevitably will face higher prices as a result. The United States – with the concurrence of the Federal Trade Commission, acting on behalf of only three of its five Commissioners – has filed an *amicus* brief in support of Leegin's position.⁷ I was one of the dissenting Commissioners. I voted against the Commission's decision to join the government's *amicus* brief, and this letter explains why.

As discussed in greater detail below, overruling the decision in *Dr. Miles* case would be:

- bad as a matter of law (Part I);
- bad as a matter of economic policy (Part II);
- expressly contrary to Congressional findings and intent (Part III); and
- unsupported by the facts of the *Leegin* case itself (Part IV).

The Court need not enmesh itself in a debate over the right “label” to apply to the analysis of vertical minimum price fixing agreements (*per se* or rule of reason or something else). Rather, the Court should focus on questions that elevate function over form. When a particular restraint

⁵ Vertical minimum price fixing refers to an agreement between a manufacturer 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. Thomas K. McCraw, *Competition and “Fair Trade”: History and Theory*, 16 RES. IN ECON. HISTORY 185, 185 (1996). 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 maintenance have used ‘fair trade’ as a synonym, while opponents have preferred terms such as ‘vertical price fixing.’”); *see also Leegin*, Brief for Petitioner at 20 (vertical minimum price fixing “may be used by a manufacturer to provide its retailers with incentives to provide service or other promotional activities, where a retailer might otherwise have an inherent bias to rely too much on low prices . . .”).

⁶ 15 U.S.C. § 1 *et seq.*

⁷ *Leegin*, Brief for the United States As Amicus Curiae Supporting Petitioner (Jan. 22, 2007).

