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**Testimony before the Subcommittee on Courts and Competition Policy,
House of Representatives, Judiciary Committee**

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I. INTRODUCTION

Chairman Johnson and Members of the Subcommittee, I appreciate this opportunity to share with you my personal views on minimum vertical price fixing,¹ sometimes also referred to as resale price maintenance, RPM, or margin maintenance.

The Supreme Court's 2007 *Leegin* decision² gave manufacturers the right to set minimum resale prices for consumer goods, which typically thwarts discounting and leads to higher prices for consumers. This conduct used to be *per se* illegal under longstanding Supreme Court precedent.³ The *Leegin* majority in effect legitimized the conduct, even though the Court was given no reasonable assurances that consumers actually benefit from RPM.

I believe this outcome is contrary to good economic and legal policy. It gives excessively short shrift to consumer preferences, which are supposed to be the driving force behind healthy,

¹ Several other published sources provide a more complete statement of my views on minimum vertical price fixing. See especially Pamela J. Harbour, *A Tale of Two Marks, And Other Antitrust Concerns*, 20 LOYOLA CONSUMER L. REV. 32 (2007); Pamela Jones Harbour, Commissioner, Federal Trade Commission, *Open Letter to the Supreme Court of the United States, Subject: The Illegality of Vertical Minimum Price Fixing* (Feb. 26, 2007), available at <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf>.

This testimony express my personal views. It does not necessarily reflect the position of the Federal Trade Commission or any other individual Commissioner.

² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

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

competitive markets. Post-*Leegin*, and absent action by Congress, consumer preferences will be subordinated to the interests of manufacturers and merchants of branded consumer goods.

Lawyers working for a U.S. firm in Brussels recently observed that the debate over the proper treatment of RPM “has been hijacked by the concerns of the luxury goods industry.”⁴ I could not agree more, especially since the negative effects on consumers stretch far beyond luxury goods. In these tough economic times, it is especially wrong to saddle consumers with higher prices for daily necessities, with no countervailing benefits.

II. LESSONS FROM THE PAST: CONSUMER INTERESTS SHOULD BE PARAMOUNT

When we talk about the overarching purpose of the antitrust laws, I think everyone, on all sides of the debate, would agree that the goal is to do what is best for consumers. There is significant disagreement, however, on how to accomplish this objective.

A. Economic Theory

I turn to Adam Smith, the progenitor of modern economic thought, whose teachings provide a firm foundation for my belief that consumer interests should be paramount in the marketplace. Smith himself made two observations that are particularly relevant to the RPM debate.

First, Smith noted that consumers are best off when they can purchase the goods they desire at the cheapest price. Indeed, he went so far as to observe that this proposition was so self-evident that it would never have been questioned, “had not the interested sophistry of merchants and

⁴ Stephen Kinsella & Hanne Melin, *Who’s Afraid of the Internet? Time to Put Consumer Interests at the Heart of Competition*, GCP, THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY 2 (Mar. 12, 2009), available at <http://www.globalcompetitionpolicy.org/index.php?&id=1607&action=907>.

manufacturers confounded the common sense of mankind.”⁵ I would argue that the *Leegin* majority opinion reflects just such sophistry.

Smith’s second observation is equally at odds with the *Leegin* decision:

Consumption is the sole end and purpose of all production; and the interests of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. . . . But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and it seems to consider production, and not consumption, as the ultimate end and object of all industry and commerce.⁶

Adam Smith seems to have anticipated some of the arguments that we now refer to generally as “supply-side economics,” where the focus is on maximizing the welfare of producers, with an assumption that consumers ultimately will receive downstream benefits.

B. Legislative History of the Antitrust Laws

With that economic background in mind, I next turn to the legislative history of the federal antitrust laws themselves. This history strongly corroborates my belief that the antitrust laws are intended to promote the interests of consumers over those of manufacturers. There is virtually no credible support for any assertion that Congress intended to prioritize producer welfare over consumer welfare.⁷

⁵ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 461 (Edward Cannan ed., The Modern Library 1937) (1776).

⁶ *Id.* at 625.

⁷ To the extent that the legislative history expresses a desire for “efficiency,” legislators were referring to productive efficiency (*i.e.*, how effectively a factory produces widgets), not some sort of “total welfare” approach that weights producer welfare as heavily as consumer welfare. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 83 (1982). Even Judge Bork – whose version of “consumer welfare” primarily means producer welfare – cited legislative history that overwhelmingly supports his conclusion that Congress passed the antitrust laws to make consumers better off. See, *e.g.*, ROBERT H. BORK, THE ANTITRUST

With respect to RPM specifically, it is difficult to reconcile the legislative history with the *Leegin* Court’s casual disregard for Congressional intent. Congress has *never* adopted or endorsed a preference for RPM at the federal level. Even when faced with intense lobbying pressure by the National Association of Retail Druggists early in the 20th century, Congress did not step in to overturn the Court’s 1911 *Dr. Miles* decision.⁸

During the depths of the Great Depression, Congress did create an antitrust exemption for RPM programs governed by state “fair trade” statutes.⁹ However, Congress ultimately looked back on the nation’s 37-year natural experiment with RPM, graded it a monumental failure, and, in 1975, repealed that exemption to restore a national rule of *per se* illegality under *Dr. Miles*.¹⁰ This decision was based on express factual findings that “fair trade” was fair only to manufacturers and retailers, not to consumers. The Congressional record painted RPM as a dismal, if not disastrous, detour from sound public policy. Specifically, Congress compared economic data from states that had permitted fair trade with data from states that did not. Congress concluded that RPM:

- caused consumers to pay as much as 37 percent higher prices;
- reduced levels of sales per outlet;
- produced significantly higher rates of business failures;
- provided fewer entry opportunities for new products or manufacturers;
- distorted retailer incentives to provide consumers with objective comparisons of the competing products on their shelves; and

PARADOX 20-21 (1978).

⁸ JOSEPH C. PALAMOUNTAIN, JR., *THE POLITICS OF DISTRIBUTION* 94 (1968).

⁹ Miller-Tydings Resale Price Maintenance Act (Act of Aug. 17, 1937, Pub. L. 314, ch. 690, Title III, 50 Stat. 693); *see also* McGuire-Keogh Fair Trade Enabling Act (Act of July 14, 1952, Pub. L. 543, ch. 745, 66 Stat. 631).

¹⁰ The Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801.

- diminished competition both within a brand (intra-brand competition) and between competing brands (inter-brand competition).¹¹

In short, Congress's negative opinion of RPM in 1975 could not have been clearer.¹²

Beyond its repeal of the fair trade laws, Congress has affirmatively expressed its distaste for RPM on at least four other occasions. Speaking in the dialect of appropriations, Congress has imposed limits on the budgets of the federal antitrust enforcement agencies, prohibiting them from spending any funds to advocate for the reversal of *per se* illegality for RPM. Language in one appropriations bill expressly criticized the Department of Justice's *Vertical Restraint Guidelines* because their lenient approach to vertical restraints did not accurately reflect federal antitrust law or good competition policy.¹³

¹¹ See H.R. REP. NO. 94-341 (1975); S. REP. NO. 94-466 (1975).

¹² The Consumer Goods Pricing Act of 1975 did not expressly require that RPM be treated as *per se* unlawful – presumably because it was unnecessary, given that RPM already was *per se* unlawful under *Dr. Miles*. Yet, the *Leegin* Court interpreted the lack of an express declaration of *per se* illegality as a deliberate omission, and concluded that Congress did not intend the *per se* rule to apply. This is particularly puzzling, given that the *Leegin* Court liberally cited the Court's 1977 *GTE Sylvania* opinion with approval. *GTE Sylvania* expressly held that Congress *did* intend RPM to be *per se* illegal. *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (“... Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by” the passage of the Consumer Goods Pricing Act.).

¹³ Departments of Commerce, Justice, and State, the Judiciary, and Related Appropriations Act, 1984, § 510, Pub. L. No. 98-166, 97 Stat. 1102-03 (1983); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1986, § 605, Pub. L. No. 99-180, 99 Stat. 1169-71 (1985). The provisions of the latter act expressly cited *Dr. Miles* with approval, and cited the then-just-released Department of Justice Vertical Restraints Guidelines with disfavor. Finding the Guidelines inconsistent with existing law and not in the interests of the business community, the appropriations statute expressly stated that those Guidelines “shall not be accorded any force of law or be treated by the courts of the United States as binding or persuasive,” and called for their recall. *Id.* at 99 Stat. 1170; Continuing Appropriations for Fiscal Year 1987, § 605, Pub. L. No. 99-500, 100 Stat. 1783-77 (1986); Continuing Appropriations, Fiscal Year 1988, § 605, 101 Stat. 1329-38 (1987).

**C. Congress’s Justifications for Declaring RPM Illegal in 1975
Are Still Valid Today**

I have closely reviewed the factual findings upon which Congress relied in repealing the fair trade exemption in 1975, and I still find those findings extremely persuasive today. How, or why, the *Leegin* majority overlooked this critical part of the legislative record is difficult to understand.

In his *Leegin* dissent, Justice Breyer asked whether any changed circumstances might justify reversal of *Dr. Miles*. He did identify a few things that changed between 1975 and 2007. Retailing became more concentrated. Concentration also increased in manufacturing industries that previously used RPM. Discount marketing expanded tremendously. Justice Breyer concluded – correctly, I believe – that none of these changes supported the Court’s decision to reverse course on RPM. Why would the Court believe that a new experiment with RPM would succeed today, where the last one failed?

III. LOOKING AHEAD: CONSUMERS NEED RELIEF FROM LEEGIN

Are we falling into a *Groundhog Day*¹⁴ vortex, where we are doomed to endlessly repeat the same mistakes over and over again? Competition policy can, and should, do a better job of protecting consumers.

I was struck recently by a cartoon in the March 22nd edition of the *Sunday Washington Post*; the punch line equated “insanity” with “doing the same thing over and over but expecting different results.” I worry what will happen if Congress fails to take prompt action to reverse the *Leegin* decision. Congress may, someday, be called upon to write another report detailing the disastrous harm inflicted on consumers during the Supreme Court’s newest experiment with RPM. And who

¹⁴ GROUNDHOG DAY (Sony Pictures 1993).

will pay for this experiment, which seems just as likely to fail as the last one? The American consumer.

In fairness to the *Leegin* Court, the majority correctly noted that RPM sometimes has a beneficial impact on competition, which may offset the harm to consumers. The ultimate question is, when does this happen? When manufacturers impose RPM, how often (if ever) will the value of the beneficial impact exceed the cost of the RPM premium that consumers pay?

A. Existing Case Law May Rest On Flawed Foundations

The antitrust laws promise consumers the ability to buy goods and services in competitive markets, at competitive prices. Both interbrand and intrabrand competition contribute to fulfilling that promise.¹⁵ Existing case law, however, obfuscates the importance of intrabrand competition, which is the type of competition that RPM virtually eliminates. In a footnote in the Court's 1977 *GTE Sylvania* opinion, Justice Powell stated that interbrand competition is the primary focus of the antitrust laws.¹⁶ This bald proposition was devoid of any citation of authority, and was not supported by any legislative history. Yet, the Court repeatedly has relied on Justice Powell's phrase (and no more) to justify its holdings in subsequent cases.¹⁷

Rote recitations of other, supposedly unquestionable aphorisms from *GTE Sylvania* have been included in most of the Court's recent RPM cases, even when they did not actually apply to

¹⁵ LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 322-23 ("But economists as far back as Alfred Marshall recognized that competition at all levels of the distribution system is beneficial to the efficient allocation of goods and services.").

¹⁶ *GTE Sylvania*, 433 U.S. at 52 n.19 ("Interbrand competition is . . . the primary concern of antitrust law.").

¹⁷ See Warren S. Grimes, *The Path Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, *ANTITRUST L.J.* 467, 471-80 (2008).

the pending case.¹⁸ Most notably, virtually every opinion, including *Leegin*, invokes free-riding by discounters who do not provide “necessary” additional services. In reality, however, none of these cases seem to have involved free-riding problems.¹⁹ In *Leegin*, for example, the plaintiff (Kay’s Klostet) appeared to be an otherwise acceptable distributor in every way, except for the fact that it discounted.²⁰

Ideally, and as I will discuss in further detail later in my remarks, additional scholarship would be devoted to establishing whether the underlying principles articulated in *GTE Sylvania* are correct or not. At the very least, the courts should not rely “on unthinking recitations of tired language that may have no relevance to competitive analysis”²¹ when analyzing RPM. Otherwise, no matter what legal standard is applied to RPM in the post-*Leegin* era, the courts will never get it right. In *GTE Sylvania*, the Court was rebelling against the Warren Court’s alleged formalistic line-drawing to support liability. The current Court appears to have drawn similarly formalistic lines to short-circuit the RPM inquiry in the opposite direction and to suggest a presumption of legality. When line-drawing is devoid of substance, and labels replace rigorous analysis, the law suffers – as do consumers.²²

¹⁸ *Id.* at 504 (“ . . . *Sylvania* aphorisms . . . are widely used but seldom linked to the facts in the case before the court.”).

¹⁹ See Warren S. Grimes, *The Sylvania Free Rider Justification for Downstream-Power Vertical Restraints: Truth or Invitation for Pretext?*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 192* (Robert Pitofsky ed., Oxford Univ. Press 2008) (“The jury found that Business Electronics was terminated not for free riding but because it was discounting Sharp calculators. Nonetheless, Scalia, writing for the Court, repeatedly referred to *Sylvania* free riding theory as a reason for declining to apply the *per se* rule governing vertical minimum price-fixing.”).

²⁰ *Id.* at 480.

²¹ *Id.*

²² See *GTE Sylvania*, 433 U.S. at 47 (quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360, 377 (1933) (“ . . . realities must dominate the judgment . . . [the] Anti-Trust

B. Rule of Reason Treatment Is Insufficient To Protect Consumers

Technically, the *Leegin* Court did not foreclose the possibility that RPM might be anticompetitive under some circumstances.²³ The *Leegin* Court noted that it intended for the lower courts to be diligent in their application of the rule of reason to weed out competitively harmful uses of RPM.²⁴ But good intentions will not cure a bad rule of law. Throughout antitrust law, the rule of reason tends to be a euphemism for the absence of liability.²⁵ So too with respect to RPM, the rule of reason is quickly beginning to prove itself to be incapable of sorting out the good and bad

Act aims at substance.”).

²³ *Leegin*, 127 S. Ct. at 2716-18.

²⁴ *Id.* at 2719-21. The Court, however, provided no guidance to the lower courts regarding how the rule of reason might be used to weed out the harmful uses of RPM. Basic concepts – such as the nature of the market power inquiry for RPM analysis – went unaddressed. See Jessica L. Taralson, Note, *What Would Sherman Do? Overturning the Per Se Illegality of Minimum Vertical Price Restraints Under the Sherman Act in Leegin Creative Leather Products, Inc. v. PSKS, Inc. Was Not As Reasonable As It Seemed*, 31 *HAMLIN L. REV.* 549, 590 (2008) (“In summation, had the *Leegin* Court given sufficient weight to market power, both as an element of analysis and as a concept, the Court would have recognized that the amount of market power necessary to impose a minimum vertical price restraint should justify holding all such restraints . . . illegal.”).

²⁵ We already see the beginnings of this problem in the *Leegin* case on remand. Based on the conjunctive use of the Court’s *Leegin* decision and the strict antitrust pleading standards articulated by the Court in *Bell Atlantic Corp. v. Twombly*, 127 U.S. 1955 (2007), PSKS’s case against *Leegin* has been dismissed on the pleadings. Neither the merits of the RPM claim, nor the horizontal price fixing claim raised by PSKS on remand, have ever been reached. *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, Docket No. 2:03 CV 107 (TJW) (E.D. Tex. Apr. 6, 2009), *citing Spahr v. Leegin Creative Leather Products, Inc.*, 2008 WL 3914461 (E.D. Tenn. 2008) (dismissing RPM and dual distribution price fixing claims on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)). See also *Valuepest.Com of Charlotte, Inc. v. Bayer Corp.*, 2009 WL 756901 (4th Cir.2009) (court declined to reach merits of RPM claim against defendant manufacturers of termite control chemicals).

uses of RPM, and consumers will be the poorer for it. Threshold presumptions must be established to draw workable contours for rule-of-reason analysis of RPM.²⁶

1. Lack of Empirical Research

The lack of empirical research regarding the effects of RPM is a further complication, especially under a rule of reason standard.²⁷ There are economic theories praising RPM, and other theories condemning it, but none of these theories (on either side) are supported by any systematic body of empirical evidence. At best, we have strongly held beliefs about the effects of RPM, sometimes bordering almost on the religious. But we are missing facts, which are the building blocks of litigation.

The realities of litigation dictate that when the facts are equally probative of guilt or innocence (depending on which theory is adopted to evaluate them), the outcome is heavily determined by the allocation of the ultimate burden of proof. If full-blown rule of reason analysis is applied in RPM cases, the burden of proof will be placed on the victims (or, in some cases, government enforcers working on behalf of the victims), not on the defendants who imposed the RPM policies. In other words, the burden will be borne by the consumer who paid more for the price-fixed goods. The burden will be borne by the terminated discounter who refused to go along with the fixed price. And these plaintiffs likely will lose, because they will be unable to present sufficient factual evidence that RPM has, on balance, harmed competition.

²⁶ Grimes, *supra* note 17, at 492.

²⁷ Both the majority and dissent in *Leegin* recognized the absence of empirical support for any of the theories that claim RPM harms or benefits competition. *Compare Leegin*, 127 S. Ct. at 2717 (“although the empirical evidence on the topic is limited . . .”) (Kennedy, J.) *with id.* at 2729 (“[h]ow often, for example, will the benefits to which the Court points occur in practice? I can find no economic consensus on this point.”) (Breyer, J., dissenting).

2. The Commission's RPM Workshops

President Truman once asked for a “one-armed economist” because he was frustrated by the tendency of economists to hedge their conclusions with “on the one hand...on the other hand” disclaimers.²⁸ Likewise, the Commission cannot rely on a mythical one-armed economist to provide us with a definitive answer regarding the proper legal treatment of RPM. Therefore, the Commission is doing its best to further the development of real-world facts about the effects of RPM.

The Commission recently initiated a series of workshop sessions to explore the economic and legal realities of RPM. I have annexed a copy of the Federal Register Notice announcing the workshops, as well as a copy of my opening remarks during the first workshop session. As these documents explain, the Commission seeks empirical insight into when consumers are more or less likely to be helped, or harmed, by RPM.²⁹

I am quite optimistic that our workshop series will make an important contribution to RPM scholarship. Ideally, these workshops will enable the Commission to identify empirical research projects that might be undertaken to prove or disprove the assumptions underlying the various economic theories regarding RPM. But even if the workshops succeed on this front, it will be years, if not a decade or longer, before this research generates any consensus on the proper economic and legal treatment of RPM. Consumers should not have to wait this long to obtain relief from the flawed *Leegin* decision.

²⁸ See TODD G. BUCHHOLZ, *NEW IDEAS FROM DEAD ECONOMISTS* 34 (2d ed. 2007).

²⁹ Both documents are available on the RPM workshops page of the Commission's website, <http://www.ftc.gov/opp/workshops/rpm>.

IV. CONCLUSION

When it comes to the RPM debate, one simple fact is indisputable: RPM guarantees that consumers will pay higher prices. Until it is proven otherwise, I will continue to believe that consumers are very unlikely to gain any countervailing benefit in return for these elevated prices. The tremendous growth of discount chains, at the expense of higher-end specialty stores, tends to support my view.

Proponents of RPM say that it benefits consumers more than it harms them. If so, let the champions of RPM prove it. More specifically, if a firm makes a business judgment to use RPM, that firm should bear the burden of proving that consumers will not be harmed. The likely victims of the RPM policy should not shoulder the burden of proving anticompetitive effects.

Given the state of our economy right now – as we wait anxiously for our financial markets to “self-correct” – a general belief in self-correcting markets likely is frayed, at best. I am extremely skeptical, therefore, that markets will self-correct in ways that curb the mistaken uses of RPM in situations that do not benefit consumers. The promise of self-correction ought to be a hard sell to American consumers.

I began my testimony today by quoting lawyers in Brussels. In closing, let me suggest that the Europeans may have better ideas about RPM than the *Leegin* Court. Under EC law, RPM is presumed unlawful, and thus prohibited, unless the RPM proponent can show that the “restriction is indispensable to the attainment of clearly defined pro-competitive efficiencies *and* that consumers demonstrably receive a fair share of the resulting benefits.”³⁰ American consumers are entitled to the same benefit of the doubt.

Thank you. I would be happy to answer your questions.

³⁰ Kinsella & Melin, *supra* note 4 (emphasis in original).

consumer perceptions versus actual experiences. Although consumer recollection may be imperfect, its invocation is a common and accepted practice in survey research. Moreover, the FTC is surveying consumers about their relatively recent experiences when exercising their FACT Act rights. Their recollections should be relatively fresh, and the FTC believes it is appropriate to rely on them in this consumer research.

CDIA further asserted that the FTC's reliance on consumers who have reported data to the FTC's ID theft clearinghouse will skew the results because such consumers will not be representative of the general population. The FTC believes that reliance on consumers who have previously communicated with the agency is the only economically feasible means to generate a sample of identity theft victims and to gather information. The 2006 FTC Identity Theft Survey found that 3.7% of Americans had been victims of identity theft in the previous year. In order for a survey of the general population to reliably contact 4,000 identity theft victims,² over 100,000 consumers would have to be surveyed. The cost of such a large survey would be prohibitive. Sending the survey only to consumers who have reported data to the FTC's ID theft clearinghouse allows the FTC to reach the same number of identity theft victims for a fraction of the cost.

The FTC acknowledges that the survey will not be representative of the general population, and will not attempt to project its results beyond consumers who have reported to the FTC. Instead, the Commission will use the survey to examine the kinds of problems, if any, that such consumers experience while exercising their FACTA rights. The FTC thus intends to utilize a survey sample from consumers who have previously communicated with the agency and not incur the cost and burden of finding a sample from the general population.

Pursuant to the OMB regulations that implement the PRA (5 CFR Part 1320), the Commission is providing this second opportunity for public comment while seeking OMB clearance for the survey. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before December 5, 2008.

1. Description of the collection of information and proposed use

The Fair Credit Reporting Act ("FCRA") provides identity theft

victims with certain rights, such as the ability to place fraud alerts on their credit files, designed to assist them in avoiding or mitigating the harms they suffer as a result of the crime.

The Commission intends to use consumer survey research to advance its understanding of the experiences of identity theft victims who interact with CRAs and who seek to avail themselves of their FCRA remedies. The consumer research will include focus group interviews of 30 consumers, to be followed by a pretesting phase consisting of phone interviews of another 30 consumers, and then mail surveys sent to individual consumers. The Commission seeks information from consumers who have been victims of identity theft and who have contacted one or more of the three nationwide CRAs for assistance. The information from consumers will be collected on a voluntary basis and will be kept anonymous. The FTC staff will identify consumers to be contacted for each phase of the research from a random selection of consumers who have communicated with the FTC's Identity Theft Data Clearinghouse database between January 1, 2008 and May 30, 2008. Staff is seeking approximately 1,000 returned surveys because that input would enable it to project the results from the sample to the population from which the sample was drawn with a maximum error rate of 3%. Assuming a response rate of about 25%–30%, this would require staff to mail the survey to approximately 3,000–4,000 individuals.

Questions to identify theft victims in the research will address several topics, including but not limited to: their experiences when they contacted one or more CRAs and whether they received the required notice of rights from CRAs; their access to free credit reports; and their ability to place fraud alerts on their files, dispute inaccurate information, and block information due to identity theft. The results of the focus groups and mail surveys will assist the Commission in assessing the experiences of identity theft victims when they interact with CRAs. This assessment will help to inform and guide the FTC's future efforts to enforce provisions of the FCRA and to educate consumers and the consumer reporting industry of their rights and obligations under the FCRA.

2. Estimated hours burden

Absent public comments on the FTC's previously stated burden analysis, the FTC is retaining and restating here for further comment its prior burden estimates. The FTC staff proposes to

interview 30 consumers divided into three separate focus groups of 10 persons each, and estimates that each consumer will spend approximately one hour to participate. Thus, the estimated total burden imposed by the focus groups will be approximately 30 hours. Staff estimates that respondents to the mail survey will require, on average, approximately 8 minutes to answer the survey (based on anticipated variations among consumers when they interacted with CRAs). Staff will pretest the survey through phone interviews of approximately 30 respondents to ensure that all questions are easily understood. The pretest will total approximately 4 hours cumulatively (30 respondents x 8 minutes each). For the full survey, the staff intends to mail 3,000–4,000 surveys and anticipates receiving a response rate as high as 30% of the consumer recipients (i.e., 900–1,200 responses). Assuming 1,200 consumers respond to the survey, staff further estimates the final survey will require approximately 160 hours to complete (1,200 respondents x 8 minutes each). Thus, cumulative burden hours for the clearance would total 194 hours.

3. Estimated cost burden

The cost per respondent should be negligible. Participation is voluntary and will not require start-up, capital, or labor expenditures by respondents.

William Blumenthal,

General Counsel.

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FEDERAL TRADE COMMISSION

Consumer Benefits and Harms: Distinguishing Resale Price Maintenance that Benefits Consumers From Resale Price Maintenance that Harms Consumers; Public Workshops; Comment Request

AGENCY: Federal Trade Commission.

ACTION: Notice of Public Workshops and Opportunity for Comment.

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") will hold a series of public Workshop sessions at one or more locations to explore how best to distinguish between uses of resale price maintenance (RPM)¹

¹ RPM is typically an agreement between a manufacturer and retailer setting the prices at which the retailer will resell the manufacturer's goods to consumers. If the agreement requires the retailer to sell only at or above the price established by the manufacturer, it is said to be minimum RPM. Conversely, if the agreement requires the retailer to sell only at or below the price directed by the

² As explained further in the ensuing discussion of the proposed collection of information, staff anticipates mailing the survey to approximately 3,000 to 4,000 individuals.

that benefit consumers and those that do not, for purposes of enforcing Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (hereinafter “Sections 1 and 5”). Among other things, the Workshops will examine when and whether particular market facts or conditions make it more or less likely that the use of RPM will be procompetitive or neutral, and when or whether RPM may harm competition and consumers.

The FTC expects to focus on legal doctrines and jurisprudence, economic research (both theoretical and empirical), as well as business and consumer experiences. The FTC is soliciting public comment from lawyers, economists, marketing professionals, the business community, consumers groups, law enforcement officials, academics (including business and economic historians), and all other interested persons on three general subjects:

(1) The legal, economic, and management principles relevant to the application of Sections 1 and 5 to RPM, including the administrability of current or potential antitrust or other rules for the application of these laws;

(2) The business circumstances regarding the use of RPM that the FTC should examine in the upcoming Workshops, including examples of actual conduct; and

(3) Empirical economic studies or analyses that might provide better guidance and assistance to the business and legal communities regarding RPM enforcement issues.

With respect to the request for examples of real-world conduct, the FTC is soliciting discussions of the business reasons for, and the actual or likely competitive effects of, the use of RPM, including actual or likely efficiencies, as well as the theoretical underpinnings for whether the conduct had or has pro- or anticompetitive effects. When each individual Workshop session is announced, the FTC will solicit additional submissions regarding the topics to be covered at that particular session.

The FTC encourages submissions from businesses or business consultants from a variety of unregulated and regulated markets, recognizing that market participants can offer unique insights into how RPM affects competition, and that the effects of RPM may differ depending on industry context and market structure. The FTC

manufacturer, it is said to be maximum RPM. Thomas K. McCaw, *Competition and “Fair Trade”*: *History and Theory*, 16 Res. In Econ. Theory 185, 186 (1996).

seeks this practical input to provide a real-world foundation of knowledge upon which to draw as the Workshops progress. Respondents are encouraged to respond on the basis of their actual experiences.

The goal of these Workshops is to promote dialogue, learning, and consensus building among all interested parties with respect to the analysis of RPM under Sections 1 and 5, both for purposes of law enforcement and to provide practical guidance to businesses with respect to antitrust compliance. The FTC plans to hold four to six half-day Workshop sessions between January and March 2009. The FTC plans to publish a more detailed description of the topics to be discussed before each session and to solicit additional submissions about each topic. The sessions will be transcribed and placed on the public record. Any written comments received also will be placed on the public record. After the conclusion of the Workshops, the Commission may prepare a public report that incorporates the findings of the Workshops, as well as a description of other research that might be undertaken by the Commission or others.

DATES: Any interested person may submit written comments responsive to any of the topics addressed in this **Federal Register Notice**. Respondents are encouraged to provide comments and requests to participate in the workshops as soon as possible, but in any event no later than the final Workshop session. However, to assist the FTC in planning the Workshop sessions, respondents are encouraged to provide initial comments regarding the three general questions raised in the Summary above, as well as requests to participate in the workshops, to the FTC on or before December 12, 2008.

ADDRESSES: Interested parties are invited to submit written comments or requests to participate in the public workshop electronically or in paper form. Comments and requests should refer to “Resale Price Maintenance Workshop, P090400” to facilitate their organization. Please note that comments will be placed on the public record of this proceeding—including on the publicly accessible FTC website, at (<http://www.ftc.gov/os/publiccomments.shtml>)—and therefore should not include any sensitive or confidential information. In particular, comments and requests should not include any sensitive personal information, such as an individual’s Social Security Number; date of birth; driver’s license number or other state

identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments and requests also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments and requests should not include any “[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential. . . .” as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) (2008). Comments and requests containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c).²

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments and requests in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (<https://secure.commentworks.com/ftc-resalepricemaintenanceworkshop/>) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: (<https://secure.commentworks.com/ftc-resalepricemaintenanceworkshop/>). Additionally, you may inform the FTC of your desire to participate in the Workshop by emailing information regarding your interest in participation, as well as the issue(s) you might wish to address, to the FTC at rpmworkshop@ftc.gov. You may also visit the FTC website at <http://www.ftc.gov> to read the Notice and the news release describing it.

A comment or request filed in paper form should include the reference to “Resale Price Maintenance Workshop, P090400” both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-135 (Annex R), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if

² FTC Rule 4.2(d), 16 CFR 4.2(d). The comment or request must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment or request to be withheld from the public record. The request for confidential treatment will be granted or denied by the Commission’s General Counsel, consistent with applicable law and the public interest. See FTC Rule 4.9(c), 16 CFR 4.9(c) (2008).

possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments and requests to participate to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments and requests that it receives, whether filed in paper or electronic form. Comments and requests received will be available to the public on the FTC website, to the extent practicable, at (<http://www.ftc.gov/os/publiccomments.shtm>). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments and requests to participate it receives before placing them on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (<http://www.ftc.gov/ftc/privacy.shtm>).

The workshop will be open to the public, and there is no fee for attendance. For admittance to the building, all attendees will be required to show a valid photo identification, such as a driver's license. Pre-registration is not required for attendees, but persons desiring to participate as panelists must submit a request to participate and file a comment. Members of the public and press who cannot attend in person may view a live webcast of the workshop on the FTC's website. The workshop will be transcribed, and the transcript will be placed on the public record.

The workshop venue will be accessible to persons with disabilities. If you need an accommodation related to a disability, call Carrie McGlothlin at (202) 326-3388. Such requests should include a detailed description of the accommodations needed and a way to contact you if we need more information. Please provide advance notice of any needs for such accommodations.

FOR FURTHER INFORMATION CONTACT:

James C. Cooper, Deputy Director, Office of Policy Planning, 600 Pennsylvania Ave., N.W., Washington, DC 20580, telephone 202-326-3367, or John Yun, Staff Economist, Antitrust I Division, Bureau of Economics, 600 Pennsylvania Ave., N.W., Washington, DC 20580, telephone 202-326-2433; or by email at rpmworkshop@ftc.gov. Detailed agendas for the Workshops will be available on

the FTC Home Page (<http://www.ftc.gov>).

SUPPLEMENTARY INFORMATION: Section 1 of the Sherman Act condemns "every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade and commerce among the several States, or with foreign nations,"³ which includes violations of the Sherman Act.⁴ Although the FTC does not directly enforce Section 1 of the Sherman Act, Section 5 of the FTC Act condemns "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."⁵ In 1911, two U.S. Supreme Court decisions held, respectively, that RPM agreements were illegal as a matter of law (*Dr. Miles*);⁶ and that Section 1 of the Sherman Act prohibited restraints of trade that are "unreasonably restrictive of competitive conditions" (*Standard Oil*).⁷ Except to the extent that RPM was exempted from federal antitrust liability by the Fair Trade Laws from 1937 to 1975,⁸ minimum RPM was treated as *per se* illegal under the antitrust laws until the Supreme Court decided the *Leegin*⁹ case in June 2007.¹⁰

Leegin overruled the *Dr. Miles* decision, finding that the Court's more recent decisions were inconsistent with rationales upon which *Dr. Miles* was based.¹¹ The Court directed that the legality of minimum RPM would be determined under the rule of reason; however, the Court did not specify the contours of the rule of reason analysis that would be necessary or appropriate in all cases. Rather, it observed that:

As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the

market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote competitive ones.

Id. at 2720.

In the *Nine West* matter,¹² the Commission recently confronted the Court's lack of specificity, as follows:

As it abandoned the *per se* prohibition of *Dr. Miles*, the Court cautioned that it was not declaring RPM to be *per se* legal. *Leegin* summarized some of the possible procompetitive and anticompetitive consequences of resale price maintenance. The Court explained that RPM might stimulate interbrand competition and have a procompetitive effect on competition, so that RPM does not meet the *per se* illegality standard of a practice that "always or almost always tends to restrict competition and decrease output." At the same time, after reviewing the potential anticompetitive effects of RPM, the Court said, "[a]s should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated." In light of these potential adverse effects, the Court further observed that "[i]f the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market."

The Court's comments about the possible harms of RPM, and its caution to lower courts "to be diligent in eliminating their anticompetitive uses from the market," can usefully be understood in the context of the debate between the *Leegin* majority and the dissent about the wisdom of abandoning the *per se* ban of *Dr. Miles*. The dissent argued that the majority had slighted the potential anticompetitive consequences of RPM. The majority's recitation of examples of some of the possible competitive harms and its call for "diligent" efforts by the lower courts to be attentive to these harms can be seen as an attempt to provide assurances that the Court foresaw a

³ 15 U.S.C. § 1.

⁴ See *Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953) (stating that Section 5 of the FTC Act "condemn[s] as 'unfair methods of competition' existing violations of 'the Sherman and Clayton Acts').

⁵ 15 U.S.C. § 45

⁶ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Subsequent cases referred to RPM as being *per se* illegal.

⁷ *Standard Oil of New Jersey v. United States*, 221 U.S. 1, 58 (1911)

⁸ McCraw, *supra* note 1, at 187.

⁹ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

¹⁰ The Supreme Court subjected maximum RPM to the rule of reason in 1997. *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

¹¹ *Id.* at 2712-25 (citing, *inter alia*, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("*GTE Sylvania*"); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); and *State Oil Co. v. Khan*, 522 U.S. 3 (1997)).

¹² *Nine West Group, Inc.*, Docket No. C-3937 (Apr. 11, 2000), Order Granting In Part Petition to Reopen and Modify Order Issued April 11, 2000 (May 6, 2008), available at: (<http://www.ftc.gov/os/caselist/9810386/080506order.pdf>)

useful role for continued antitrust scrutiny of RPM.

* * *

At this early stage of the application of *Leegin* by the lower courts and the Commission, the *Leegin* factors can serve as helpful guides to begin an assessment of when RPM deserves closer scrutiny. Through the Commission's own enforcement work, research, and external consultations such as workshops, we anticipate further refinements to this analysis, including the further specification of scenarios in which RPM poses potential hazards and those in which it does not.

Nine West, *supra* n. 11 at 9-14 (citations omitted).

By holding these Workshops, the FTC hopes to identify the market facts, circumstances, and conditions under which the use of RPM is likely to be procompetitive or benign, as opposed to anticompetitive and harmful to consumers. The Commission believes that an appropriate antitrust approach to RPM requires the means for distinguishing permissible from impermissible conduct in varied circumstances. Moreover, those means should provide reasonable guidance to businesses attempting to evaluate the legality of proposed conduct before undertaking it. The development of clear standards that both protect consumers and enable businesses to adopt strategies that comply with the antitrust laws presents some of the most complex issues facing the Commission, the courts, and the antitrust bar.

Given this challenge—and because antitrust analysis must reflect the particular market facts and circumstances within which a restraint has been adopted—the FTC encourages commenters to describe actual examples of RPM that the FTC should consider in the context of the Workshop, discuss the business reasons for the conduct, and the actual or likely competitive effects of the conduct.

Illustrative Questions for Consideration With Respect to the RPM Usages That the Commenter Discusses. Commenters should indicate whether responses would change if the conduct is an express RPM agreement or an RPM arrangement that achieves its outcome under a *Colgate* policy.¹³ Commenters

¹³ A manufacturer uses a *Colgate* policy when it does not ask retailers for any agreement regarding resale prices; rather, the manufacturer announces in advance that it will only sell its products to retailers that resell those products at or above the prices it specifies, and then enforces the policy by deciding unilaterally that it will refuse to make any future sales of its products to any retailer who has violated

should also indicate whether responses would differ if the arrangement were directed toward different industry levels (e.g., retail, wholesale, or manufacturer).

1. How should the structure of the market and the market shares of participants be taken into account in analyzing RPM?

2. Are there other specific market facts or circumstances that might have an impact on the likely competitive effects of RPM under the circumstances described? Without limiting the scope of this question, commenters are specifically invited to comment on the effect on marginal and inframarginal consumers.

3. What are the business reasons (e.g., management, marketing, financial, etc.) for the use of RPM? Are there alternative business strategies available to achieve the same results? What factors, including any cost savings, entered the decision to use RPM to achieve the desired result?

4. To what extent does uncertainty regarding the legality of RPM under state law affect the decision to use RPM?

5. What are the likely procompetitive and anticompetitive effects of RPM under the circumstances described?

6. What strategies might competitors use to respond to a loss of sales to a firm that uses RPM?

7. Under what market conditions is the use of RPM likely either to promote or hinder market entry by other manufacturers or retailers?

8. Are there industries where the use of RPM is prominent?

9. Are there any original theoretical, analytical or empirical studies on the nature or competitive effects of RPM or alternatives to RPM that should be brought to the attention of the Commission?

10. What tests or standards should courts or enforcement agencies use in assessing whether particular conduct violates Sections 1 or 5? Commenters are specifically requested to assess whether the test or standard applicable to a particular usage of RPM might vary based on particular market facts or circumstances. Additionally, are there particular market facts and circumstances where the approach established by the Court of Appeals for the District of Columbia Circuit in *Polygram Holding, Inc. v. Fed. Trade Comm'n*, 416 F. 3d (D.C. Cir. 2005), would or would not be appropriate?

its pricing policies. These arrangements take their name from the Supreme Court's decision in *United States v. Colgate & Co.*, 250 U.S. 300, 307-8 (1919) (distinguishing *Dr. Miles* on the ground that the "unlawful combination [in that case] was effected through contracts which undertook to prevent dealers from freely exercising the right to sell").

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E8-26404 Filed 11-4-08; 8:45 am]

BILLING CODE 6750-01-S

GENERAL SERVICES ADMINISTRATION

Multiple Award Schedule Advisory Panel; Notification of Public Advisory Panel Meeting/SUBJECT≤

AGENCY: U.S. General Services Administration (GSA).

ACTION: Notice.

SUMMARY: The U.S. General Services Administration's (GSA) Multiple Award Schedule Advisory Panel (MAS Panel), a Federal Advisory Committee, meeting scheduled for October 27, 2008 was cancelled.

Dated: October 30, 2008.

David A. Drabkin,

Deputy Chief Acquisition Officer, Office of the Chief Acquisition Officer, General Services Administration.

[FR Doc. E8-26323 Filed 11-04-08; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health; Decision To Evaluate a Petition To Designate a Class of Employees at the Linde Ceramics Plant, Tonawanda, NY, To Be Included in the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees at the Linde Ceramics Plant, Tonawanda, New York, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Linde Ceramics Plant.

Location: Tonawanda, New York.

Job Titles and/or Job Duties: All employees.

Consumer Benefits and Harms from Resale Price Maintenance: Sorting the Beneficial Sheep from the Antitrust Goats?¹

Commissioner Pamela Jones Harbour

Opening Remarks Resale Price Maintenance Workshop February 17, 2009

I. INTRODUCTION

Good morning. It is my great pleasure to welcome you to the first session of the Federal Trade Commission's Workshop on Resale Price Maintenance.

As most of you know, the Supreme Court's 2007 opinion in the *Leegin* case reversed the Court's 1911 *Dr. Miles* decision,² overruling almost a century of *per se* illegality for resale price maintenance. We are here today because, to be frank, the *Leegin* decision set the ship of antitrust law adrift on a sea of uncertainty. No one really knows how to apply the rule of reason to resale price maintenance, which is a form of price-fixing. Courts and enforcement agencies – including this agency – have no experience in assessing the antitrust “reasonableness” of retail prices that are established by manufacturers, rather than being set unilaterally by retailers themselves.

A principal purpose of this workshop series, therefore, is to explore the legal, economic, and business significance of resale price maintenance (“RPM”) under a variety of market circumstances, so that we can better understand how those different circumstances might affect an analysis of RPM under the rule of reason. The workshop will bring together some of the best and brightest minds in

¹ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2729 (2007) (Breyer, J., dissenting) (“How easy is it to separate the beneficial sheep from the antitrust goats?”).

² *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

this field, and I am hopeful that together the participants can begin to craft an appropriate framework for the analysis of RPM. I am excited to be part of this process, and I am grateful that you have all taken the time to attend, either in person or via webcast.

We are privileged to begin our workshop with today's distinguished panel of economic and antitrust scholars. They will examine various theories of how the use of resale price maintenance might enhance competition and benefit consumers. I will let our moderator, Dan O'Brien from the FTC's Bureau of Economics, provide introductions of the speakers. But before we begin today's session, I would like to take a few minutes to set the stage by describing the scope and focus of the workshop series, and by providing some insights into what the Commission hopes to accomplish by holding these sessions.

II. OUTLINE OF WORKSHOP PANELS

We are currently planning at least six panels addressing various aspects of resale price maintenance. The second panel is scheduled for this Thursday, February 19th; that panel will explore various theories of how the use of resale price maintenance can harm competition and consumers. A panel will be scheduled later this spring to explore the body of empirical evidence regarding the economic effects of resale price maintenance. We are also planning a panel, comprised mostly of businesspeople, to gather real-world industry perspectives on the use of RPM.

We anticipate holding three panels covering the legal treatment of resale price maintenance. One panel will focus on the history and evolution of the law of resale price maintenance in the United States prior to *Leegin*. In effect, this panel will survey American antitrust law on RPM, from the 1911 *Dr. Miles* decision up through the 1997 *Khan* decision,³ which eliminated *per se* liability

³ State Oil Co. v. Khan, 522 U.S. 3 (1997).

for vertical maximum price fixing. I expect that this panel also will assess the U.S. experience with resale price maintenance beginning in 1937 under the so-called Fair Trade Laws,⁴ and the effect on consumers when, in 1975, the Congress repealed the antitrust exemptions for the Fair Trade Laws and made resale price maintenance unlawful again.⁵

Another panel will look at the antitrust treatment of resale price maintenance in other jurisdictions around the world. In our highly globalized economy – characterized, in part, by the growth of multi-national manufacturers and retailers – it is critical that we gain an international perspective. Details are being finalized, but we expect that panel to take place in Europe.

A final panel will closely examine the Supreme Court’s decision in *Leegin*, and its impact thus far.

- What lessons have we learned from the lower courts’ application of *Leegin*?
- Should the legal treatment of vertical price restraints under the rule of reason be the same as that for vertical non-price restraints?
- Under what circumstances might it be appropriate to apply legal presumptions regarding the use of resale price maintenance?
- Does the likelihood of Type-I or Type-II errors vary with the stringency of the rule of reason analysis applied – for example, quick-look vs. full-blown rule of reason?
- To what extent should the rule of reason account for the elimination of intrabrand competition?

⁴ The Fair Trade Laws refer to state statutes permitting resale price maintenance agreements. These agreements were only enforceable because Congress created federal antitrust exemptions for them by enacting the Miller-Tydings Resale Price Maintenance Act (Act of Aug. 17, 1937, Pub. L. 314, ch. 690, Title III, 50 Stat. 693) and the McGuire-Keogh Fair Trade Enabling Act (Act of July 14, 1952, Pub. L. 543, ch. 745, 66 Stat. 631).

⁵ The Consumer Goods Pricing Act of 1975, Pub. L. 94-145, 89 Stat. 80.

- What should be the relationship between federal and state law? In states whose laws still condemn RPM as a *per se* violation, should *Leegin* preempt state law?

These are some of the questions that will be tackled during the final panel.

III. LEEGIN AND ITS AFTERMATH

In my mind, one of the most interesting things about *Leegin* is that the case provoked both strong disagreement *and* a surprising amount of agreement. The majority and dissent disagreed on many fundamental points – for example:

- whether to retain the *per se* rule for minimum resale price maintenance;⁶
- the role of *stare decisis* in antitrust analysis;⁷
- the extent to which investors have relied on the *Dr. Miles* rule, and the extent to which this reliance should be accommodated;⁸
- the extent and frequency of free riding, as well as its economic and legal significance;⁹
- the lessons to be drawn from this country’s experiment with resale price maintenance from 1937 to 1975;¹⁰ and

⁶ Compare *Leegin*, 127 S. Ct. at 2725 (Kennedy, J.) with *id.* at 2734 (Breyer, J., dissenting).

⁷ Compare *id.* at 2723 (Kennedy, J.) with *id.* at 2734 (Breyer, J., dissenting).

⁸ Compare *id.* at 2724 (Kennedy, J.) with *id.* at 2735 (Breyer, J., dissenting).

⁹ Compare *id.* at 2716 (Kennedy, J.) with *id.* at 2730 (Breyer, J., dissenting).

¹⁰ Compare *id.* at 2724 (Kennedy, J.) with *id.* at 2731-32 (Breyer, J., dissenting).

- the equally important lessons to be drawn to be drawn from our experience since the 1975 repeal of the fair trade antitrust exemptions – including lower consumer prices and the rapid expansion of discount retailing.¹¹

That is a significant list of disagreements, which will continue to fuel a great deal of discussion and debate. But I was even more impressed by the number of points on which the majority and dissent agreed.

It appears that both sides would have modified the *per se* rule to some extent. The dissent seemed willing to consider relaxation of the *per se* rule, at least temporarily, to facilitate “new entry.”¹²

Both the majority and the dissent agreed that minimum resale price maintenance can be harmful to competition and consumers.¹³ Indeed, the majority’s explicitly recognized this harm, and therefore expressly disclaimed any suggestion that rule of reason analysis should become a *de facto* rule of *per se* legality.¹⁴ The majority further directed that courts applying the rule of reason “would have to be diligent in eliminating . . . anticompetitive uses [of resale price maintenance] from the market,”¹⁵ and predicted that courts might “devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote competitive ones.”¹⁶

¹¹ Compare *id.* at 2725 (Kennedy, J.) with *id.* at 2735-36 (Breyer, J., dissenting).

¹² *Id.* at 2731 (Breyer, J., dissenting).

¹³ *Id.* at 2717 (Kennedy, J.), 2724 (Breyer, J., dissenting).

¹⁴ *Id.* at 2724 (Kennedy, J.).

¹⁵ *Id.* at 2719 (Kennedy, J.).

¹⁶ *Id.* at 2720 (Kennedy, J.).

Finally, both the majority and the dissent conceded a lack of rigorous empirical support, on either side of the debate.¹⁷ Economists frequently put forth theories to predict the likelihood of competitive harm, or benefit, when minimum resale price maintenance is used in retail markets. But as I see it, both of the *Leegin* opinions took these economists to task and called their bluff. The truth is, there is very little empirical evidence to support any of these conflicting economic theories of benefit or harm.

IV. MORE EMPIRICAL WORK IS NEEDED

This lack of empirical support is a major focus of the FTC's workshop. In antitrust circles these days, it has become axiomatic that economics should inform antitrust enforcement. I support that statement in principle. But facts, not theories, are supposed to be the grist for the law enforcement mill. What happens when economists do not agree on a theoretical basis for an antitrust rule – AND cannot offer evidence to support their conflicting theories? Under those circumstances, economics is not helpful to law enforcers, legal counselors, or antitrust tribunals, because it cannot serve as a meaningful basis for the development of real-world antitrust rules or sound enforcement policy. My good friend, and former Director of the Commission's Bureau of Economics, Michael Baye, once likened the resale price maintenance debate to discussions of religion. There are many fervently held beliefs, both for and against the use of resale price maintenance in the market. But there are few, if any, objective facts to provide policy guidance.

I am one of many public officials charged with a duty to make law enforcement decisions that benefit consumers. I, for one, am discomforted (to say the least) by the absence of an objective basis for making law enforcement decisions about resale price maintenance. Faced with too few economic

¹⁷ *Id.* at 2717 (Kennedy, J.), 2729-30 (Breyer, J., dissenting).

facts, decisions must be based on what we believe to be true regarding resale price maintenance, based on our reconciliation of conflicting theories, all shaped by our reading of antitrust law and policy as reflected by case law and Congressional intent.

The Commission wrestled with this dilemma last year, when Nine West asked the Commission to reopen and modify a 2000 order that prohibited Nine West from engaging in resale price maintenance. The Commission granted this request, in part.¹⁸ As the Commission recognized, Nine West could not provide the Commission with any factual basis for believing that its prospective use of resale price maintenance would benefit consumers more than it would harm them. Instead, the Commission looked closely at the factors, identified by the *Leegin* majority, that might warrant more stringent scrutiny of RPM, including:

- whether the manufacturer or retailers were the impetus for the use of resale price maintenance;
- whether either the manufacturer or the retailers possessed market power in a relevant antitrust market; and
- Whether Nine West's use of resale price maintenance was part of, or likely to facilitate, a horizontal cartel at any level of the distribution chain.

Id. at 14-15.

The Commission found nothing in the record to warrant either more stringent scrutiny of Nine West's actions, or the use of a highly structured version of the rule of reason. Therefore, the Commission granted in part Nine West's request for relief from the order, subject to a periodic

¹⁸ Nine West Group, Docket No. C-3937, Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000 (May 6, 2008), *available at* <http://www.ftc.gov/os/caselist/9810386/080506order.pdf>.

reporting requirement. These reports should provide the Commission with market details regarding the effects of Nine West's future use of resale price maintenance. *Id.* at 17.

In the meantime, this RPM workshop series will help the Commission explore the various theories of competitive harm and benefit from resale price maintenance, including the assumptions upon which the theories rely. Ideally, our panelists will help us identify testable propositions regarding these theories – the kinds of propositions that might be well-suited to empirical study. Additionally, we hope to gather evidence from the marketplace about the expectations of businesspeople regarding the use of RPM in retail markets, and whether the actual effects of RPM are consistent with those expectations. This process will not only provide the Commission with valuable insights to shape its law enforcement decisions, but also, hopefully, will inform business counseling and decisionmaking.

V. RETAILING: COMPLEMENT OR SUBSTITUTE?

Going back to Mike Baye's religion analogy, and given that I have this nice spot at the pulpit for a few more minutes, I cannot resist the opportunity to preach about a few of my own beliefs on RPM.

The following general principle is well-accepted in antitrust law: combining substitutes is bad, and combining complements is good, absent evidence to the contrary.¹⁹ But I am not sure how helpful this theorem is when we assess vertical relationships in general, and resale price maintenance

¹⁹ Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 80 (Konkurrensverket, Swedish Competition Authority, 2008), available at http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rap_pros_and_cons_vertical_restraints.pdf (last visited Feb. 18, 2009).

in particular. I am concerned that its use is likely to overgeneralize on the one hand, and undervalue on the other.

The problem is this: retailers and retailing may be categorized as either a complement or a substitute, especially in this age of Internet merchandising. From the viewpoint of the manufacturer, retailing is a complementary service – one that is useful and necessary to bring consumer goods to market. In agency terms, manufacturers tend to view retailers as their sales agents. But from the viewpoint of a consumer, retailing may be seen as providing alternative sources for competitively-priced goods. In other words, consumers tend to view retailers as their purchasing agents.

Both the sales and purchasing functions provide consumer benefits, and the antitrust treatment of resale price maintenance should recognize this. But at the end of the day, I naturally lean toward the outcome that encourages lower prices for consumers. Therefore, absent empirical evidence to the contrary, I believe the antitrust laws should prioritize retailers' role as purchasing agents for consumers. According to this view, we should cast a skeptical eye upon minimum resale price maintenance, because it tends to suppress discounting.

My current view is based, in part, on Adam Smith's admonitions: first, that consumers are generally better off when the goods they need are cheaper;²⁰ and second, that promoting consumption, not production, should be the primary object of our mercantile system and is in the best interest of consumers.²¹ My current view is bolstered by my enduring belief that the primary purpose of the antitrust laws is to prohibit the transfer of consumer surplus to persons with market power.²²

²⁰ Adam Smith, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 461 (Edwin Cannan ed., The Modern Library 1937) (1776).

²¹ *Id.* at 625.

²² Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 *ANTITRUST L.J.* 631 (1989).

And of course, it is based on my own experience as a shopper who knows and appreciates the value of a discount.

As I have tried to make clear, however, these are only my beliefs. I am not an economist. I cannot predict what the empirical evidence might actually show, were it to be systematically gathered and evaluated. I am actually somewhat agnostic regarding the outcome of the ongoing RPM debate among economists. Rather, my primary goal is to see the debate expand upon a more rigorous empirical foundation. Over the course of this workshop, I keenly anticipate an exchange of competing viewpoints, and I expect to gain a richer appreciation for all of these perspectives.

VI. CONCLUSION

Again, thank you all for being here today, and for taking this journey with me.

At this time, I will turn the microphone over to Dan, our moderator, who will introduce the participants in today's program.