House of Representatives, Judiciary Committee

April 28, 2009

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* decision[2] 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,

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[1] Several other published sources provide a more complete statement of my views on minimum vertical price fixing. 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.

Stephen Kinsella & Hanne Melin, *W*

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

Id

- diminished competition both within a brand (intrabrand competition) and between competing brands (interbrand 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]

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[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

[14] GROUNDHOG DAY (Sony Pictures 1993).

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 Kloset) 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

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[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. [illegible] Sylvania [illegible] *ification for Downstream-Power Vertical Restraints: Tru* [illegible] *ation for Pretext*?, in [illegible] CHICAGO SCHOOL OVERSHOT THE MARK 192 (Rober[illegible] ed., Oxford Univ. Pres[illegible] "The jury found that Business Electronics was terminated not for free riding but becaus[illegible] discounting Sharp calculators. Nonetheless, Scalia, writing for the Court, repeatedly ref[illegible] *ylvania* free riding theory as a reason for declining to apply the *per se* rule governing ve[illegible] nimum price-fixing.").

[20] *Id*. at 480.

[21] *Id.*

[22] *See GTE* [illegible] 433 U.S. at 47 (quoting Ap[illegible] Coals, Inc. v. United States, 288 U.S. 344, 360, [illegible]3) (". . . realities must dom[illegible] dgment . . . [the] Anti-Trust

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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 Rule of Reason in Leegin Creative Leather Products, Inc. v. PSKS, Inc. Was Not As Reasonable As It Seemed*, 31 HAMLINE L. REV. 549, 590 (2008)

uses of RPM, and consumers will be the poorer for it. Threshold presumptions must be established

[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).

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 final 12.0000 Tf 1.0000 0.0000 0.0000 1 Tm 0.0000 Tr 0.0000 TD(tit)Tj10.0800ng TD(to0000 TI

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

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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

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[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.

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

[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.

- 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."

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[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.).

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

[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*

[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 _tL/

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]

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[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.