DR. MILES'S ORPHANS: VERTICAL CONSPIRACY AND CONSIGNMENT IN THE WAKE OF *LEEGIN*

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INTRODUCTION

When the Supreme Court overturns a well-established case, the impact extends well beyond that ruling. Cases that have survived for extended periods of time typically spawn complementary cases. These complementary cases protect the ruling in the principal case from erosion by the imagination of business planners, lawyers, scholars, and judges. Or, these complementary cases may be the cases that narrow the rule in the principal case when the Court wants to temper the effect of—but not overrule—its prior decision. When the principal case is, however, overturned, both of these types of cases become orphans. Without the parent case, it is not clear what the complementary cases stand for.

This scenario is currently playing out in the field of antitrust. In 2007 the Supreme Court took a step many thought overdue and many more expected. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[1] overturned a nearly hundred-year-old case, *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*[2] In *Dr. Miles*, the Court established that resale price maintenance ("RPM") was a per se violation of section 1 of the Sherman Act.[3] Post-*Leegin*, RPM may still violate the Sherman Act, but only after a plaintiff prevails under the more difficult and economically meaningful "rule of reason" standard.[4] Since *Leegin*, there has been a great deal of

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1. 551 U.S. 877 (2007).
2. 220 U.S. 373 (1911).
3. *Id.* at 408 ("[A]greements or combinations between dealings, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void."). Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1 (2006).
4. In brief, under the per se standard, a practice is unlawful without further inquiry if it can be shown that the parties engaged in the practice. *See* BLACK'S LAW DICTIONARY 1257 (9th ed. 2009). Under the rule of reason, the plaintiff must also demonstrate that the practice had an anticompetitive effect. Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006). In actuality, the rule of reason does not represent a single standard; there may be varying degrees of proof

activity as legislation is produced at both the state and federal level to effectively overrule its holding and declare as a legislative matter that RPM is per se unlawful.[5] And, as one would expect, there has also been a great deal of scholarly commentary.[6] To some extent, the level of commentary about *Leegin* is surprising because the Court had already taken a number of steps that raised barriers to a successful antitrust claim based on RPM, even under the per se standard.[7] In fact, from a practical standpoint, *Dr. Miles*, if not

depending on the practice. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779–80 (1999).

5. On April 14, 2009, Maryland became the first state to enact legislation making RPM unlawful despite *Leegin*. *See* MD. CODE ANN., COM. LAW § 11-204(b) (LexisNexis 2009). At the federal level, a bill introduced in July 2009, provides: "Any agreement setting a price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate section 1 of the Sherman Act (15 U.S.C. 1)." H.R. 3190, 111th Cong. 2 (2009). Numerous state attorneys general have joined in support of the bill. *See* Letter from Nat'l Ass'n of Atty's Gen. to John Conyers, Chairman, House Judiciary Comm. & Lamar Smith, Ranking Member, House Judiciary Comm. 1–5 (Oct. 27, 2009), *available at* http://www.naag.org/assets/files/pdf/signons/20091027.HR_3190.pdf (urging the House to pass H.R. 3190 and bearing signatures of forty-one state attorneys general). By the summer of 2010 California, Michigan, and Illinois had joined Maryland in making RPM per se unlawful. For an excellent survey, see Richard Liebeskind & Joseph R. Tiffany, *Two Years After* Leegin*, Questions Remain on Lawfulness of Resale Price Maintenance*, ADVISORY (Pillsbury Winthrop Shaw Pittman, LLP, New York, NY), July 31, 2009, *available at* http://www.pillsburylaw.com/siteFiles/Publications/053986E13BCE687E8E0CA 54E89372048.pdf. In March 2008, after *Leegin*, New York, Illinois, and Michigan settled an RPM dispute (via consent decree) with furniture manufacturer Herman Miller. *See* Stipulated Final Judgment and Consent Decree, New York v. Herman Miller, Inc., No. 08-CV-02977 (S.D.N.Y. Mar. 24, 2008), *available at* http://www.oag.state.ny.us/bureaus/antitrust/pdfs/Signed _FJ.pdf.

6. *See generally* Thomas C. Arthur, *The Core of Antitrust and the Slow Death of* Dr. Miles, 62 SMU L. REV. 437 (2009); Jordan A. Dresnick & Thomas A. Tucker Ronzetti, *Vertical Price Agreements in the Wake of* Leegin v. PSKS*: Where Do We Stand Now?*, 64 U. MIAMI L. REV. 229 (2009); Warren Grimes, *The Path Forward After* Leegin*: Seeking Consensus Reform of Antitrust Laws of Vertical Restraints*, 75 ANTITRUST L.J. 467 (2008); Thomas A. Lambert, Dr. Miles *Is Dead. Now What?: Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance*, 50 WM. & MARY L. REV. 1937 (2009); Lance McMillian, *The Proper Role of the Courts: The Mistakes of the Supreme Court in* Leegin, 2008 WISC. L. REV. 405; Jason A. Casey, Note, *The Rule of Reason After* Leegin*: Reconsidering the Use of Economic Analysis in the Antitrust Arena*, 42 SUFFOLK U. L. REV. 919 (2009); Scott Looper, Note, *Reading Roberts: A Critical Framework for Analyzing the Supreme Court's Decision in* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 46 HOUS. L. REV. 177 (2009); Julie M. Olszewski, Note, *Overruling a Nearly Century-Old Precedent: Why* Leegin *Got It Right*, 94 IOWA L. REV. 375 (2008).

7. See *infra* Part II.B. The Court had narrowed the definition of what constitutes RPM in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) and raised the bar for summary judgment for resellers claiming to have been terminated as a result of RPM in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

officially overruled, had already become far less important as a case and less influential in affecting business strategy.[8]

Despite this outpouring of discussion, a critical element of *Leegin* has not been explored: What is the continuing influence, if any, of nearly one hundred years of Supreme Court decisions that were complementary to *Dr. Miles*? Do they now play the same role they played in the era of *Dr. Miles*? For example, are consignment agreements ever the type of agreements that could lead to antitrust liability? This Article explains why they should not play the same role they did in the era of *Dr. Miles* and the danger of adhering to the analyses found in those cases. Indeed, if the complementary cases are not reconsidered, or if their lack of relevance is not at least understood, they could very well have the effect of undercutting the new direction *Leegin* signals.

An assessment of *Dr. Miles*'s orphans is not a simple one.[9] The task of predicting their future is difficult because the orphaned cases are not themselves consistent. In fact, they represent two different approaches depending on how broadly or narrowly the Court wanted the prohibition of RPM to be applied and the types of antitrust errors to be avoided. For example, in the period from *Dr. Miles* in 1911 to *Continental T. V. Inc. v. GTE Sylvania Inc.* in 1977,[10] the Court, with one major exception,[11] devoted itself to protecting the per se rule. In other words, the Court generally reacted firmly and negatively to efforts to avoid *Dr. Miles*'s prohibitions.[12] This objective can be viewed as avoiding the error of treating as lawful a practice that is actually anticompetitive.[13] After 1977, the Court reversed course and delivered a series of opinions that favored undermining the rule that RPM is a per se violation of section 1 of the Sherman Act.[14] Here, the objective clearly was to avoid condemning a practice that actually was pro-competitive. In effect, the orphans created by *Leegin* have sharply differing characteristics. This difference, as will be explained, reflected a change in the Court's view of vertical restraints more generally.

Part I briefly describes *Dr. Miles* and *Leegin*.[15] Part II explores the cases decided before and after *Sylvania* from the perspective of

8. *See infra* notes 140–41 and accompanying text (explaining that, after recent cases, "findings that firms have engaged in per se unlawful RPM are rare").

9. *See infra* Part II.

10. Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

11. *See infra* notes 95–108 and accompanying text (discussing United States v. Park, Davis & Co., 362 U.S. 29 (1960)).

12. *See infra* Part II.A.

13. *See generally* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Richard S. Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEX. L. REV. 41 (1984).

14. *See infra* Part II.B.

15. For a good comprehensive description of *Leegin*, see Dresnick & Ronzetti, *supra* note 6, at 235–49.

what it means to *agree* to fix resale prices. It also assesses the importance of those cases in the aftermath of *Leegin*. As a general matter, those cases are characterized by formalistic line drawing largely in service of the Court's varying conviction about the correctness of the per se standard. Part II concludes that, insofar as *Leegin* signals a more substantive economic approach to RPM, those cases have the potential to retard this development and thus must evolve to fit the new approach.

Part III then examines another set of cases that sought to distinguish RPM from consignment agreements. This important distinction—between instances in which goods are sold on consignment, as opposed to being resold—was for a time a possible way to avoid the prohibitions of *Dr. Miles*. The continued importance of this distinction is examined. Part III also pulls this analysis together in light of a limited number of post-*Leegin* cases. It suggests that the types of errors these sets of cases were designed to avoid are no longer a serious concern. Yet, if this is not recognized by lower courts, the full beneficial effects of *Leegin* may not be realized.[16]

I. FROM *DR. MILES* TO *LEEGIN*

There is probably little to be said about any hundred-year-old case that has not been said before.[17] This may go double for *Dr. Miles,* which has been a focal point of antitrust debate. The case itself is, however, a bit more complex than simply standing for the per se status of RPM. In fact, Dr. Miles Medical Company, the retail price-fixing firm, was the plaintiff that sought to enjoin a wholesaler who was acquiring Dr. Miles's products from other wholesalers and retailers at prices below the resale price those wholesalers had contractually agreed to and then reselling them at "cut-rate" prices.[18] In effect, the defendant, John D. Park, was interfering with the contracts Dr. Miles had with its buyers.

Ironically, Dr. Miles invoked a free-rider argument to justify its

16. One possibility is that RPM will become effectively per se lawful. In fact, since nonprice vertical restraints were moved from the per se category to the rule of reason category, almost no suits challenging these restraints have been successful. *See infra* Part III.B. The Supreme Court in *Leegin* strongly suggests that this should not be the case. *See infra* notes 144–46 and accompanying text.

17. The articles cited in note 6, *supra*, represent a small percentage of articles in which *Dr. Miles* is of importance. A search of Westlaw, conducted on August 18, 2010, reveals that the terms "Dr. Miles," "RPM," or "resale price maintenance" have appeared just in the titles of articles 164 times. The terms have appeared in text of articles over 5000 times.

18. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 374–82 (1911).

restrictions.[19] According to the complaint:

> [C]ertain retail establishments, particularly those known as department stores, had inaugurated a "cut-rate" or "cut-price" system which had caused "much confusion, trouble and damage" to the complainant's business and "injuriously affected the reputation" and "depleted the sales" of its remedies; that this injury resulted "from the fact that the majority of retail druggists as a rule cannot, or believe that they cannot realize sufficient profits" by the sale of the medicines "at the cut-prices announced by the cut-rate and department stores," and therefore are "unwilling to, and do not keep" the medicines "in stock" or "if kept in stock, do not urge or favor sales thereof, but endeavor to foist off some similar remedy or substitute, and from the fact that in the public mind an article advertised or announced at 'cut' or 'reduced' price from the established price suffers loss of reputation and becomes of inferior value and demand."[20]

In short, Dr. Miles was disadvantaged as far as interbrand competition because the resellers of its products were unwilling to promote them, given the intensity of the intrabrand competition.

It is all history now, of course, but ultimately the Court rejected a number of justifications offered by Dr. Miles, including the contentions that secrecy of the formulas gave it the right to control subsequent sale prices[21] and that as manufacturer it could control the resale price.[22] The Court noted that restraints on alienation had long been held to be unlawful.[23] The decision of the Court was not, however, completely void of a rudimentary economic analysis. The restraint, according to the Court, may be reasonable if it is advantageous to the parties and not harmful to the public.[24] Here, the Court asked whether the restriction was comparable to the sale of good will.[25] In some sense, the instincts of the Court were correct in terms of asking whether it is possible that the public could be better off by virtue of the agreement. Of course, we now know that the public may be better off if the intrabrand restraint leads to greater interbrand competition.[26] In 1911, however, this analysis

19. For those unfamiliar with antitrust law, the irony is that the free-rider argument eventually became the theoretical basis for permitting vertical restraints, including RPM.

20. *Dr. Miles*, 220 U.S. at 375.

21. *See id.* at 400–04.

22. *See id.* at 404–08.

23. *See id.* at 409.

24. *Id.* at 406.

25. *Id.* at 407.

26. This is, however, an empirical question that turns largely on the preferences consumers have for the features added by a firm in order to compete once it can no longer engage in price competition. The baseline presentations on RPM are William S. Comanor, *Vertical Price-Fixing, Vertical Market*

was not in the cards and the Court analogized the agreement to one between competitors and explained, "[A]greements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void."[27]

Between *Dr. Miles* and *Leegin*, the pivotal case, philosophically speaking, is *Sylvania*.[28] Indeed, it is rightly regarded as the turning point for antitrust law more generally. *Sylvania* stands out for a number of reasons well known to any antitrust scholar, but three of which are of particular importance.[29] First, the decision changed the law as it then existed with respect to *non*price vertical restraints on distribution.[30] Prior to that time, albeit for only a short period, these types of restraints were viewed as per se unlawful.[31] The strength of the Court's determination to make the change is indicated by the fact that the decision could have been much narrower in scope.[32] Second, and most importantly, the case signaled, quite loudly in fact, that the Court was adopting a more economically sophisticated approach to antitrust law, and, specifically, that it was accepting the view that increases in interbrand competition may necessitate decreases in intrabrand competition.[33] Third, in a footnote that was to become something of millstone around the Court's neck until *Leegin* was decided thirty

Restrictions, and the New Antitrust Policy, 98 HARV. L. REV. 983 (1985) and Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960).

27. *Dr. Miles*, 220 U.S. at 408.

28. Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

29. Commentaries in the aftermath of *Sylvania* include Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984); Victor P. Goldberg, *The Law and Economics of Vertical Restraints: A Relational Perspective*, 58 TEX. L. REV. 91 (1979); Wesley J. Liebeler, *Intrabrand "Cartels" Under* GTE Sylvania, 30 UCLA L. REV. 1 (1982); Robert Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restraints*, 78 COLUM. L. REV. 1 (1978).

30. These restraints are those placed by a seller on those to whom it sells with respect to their own sales. For example, the seller may restrict the area or the types of customers to whom the resellers may sell.

31. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 378, 382 (1967).

32. The Court could have distinguished *Schwinn* and not overruled it. *Schwinn* involved a defendant with a much higher market share than the defendant in *Sylvania* and that was employing a greater network of restraints than found in *Sylvania*.

33. The central point of the Court's reasoning was the recognition of free-rider effects. These effects occur when a firm is not able to fully internalize or profit from its own efforts. The classic example in antitrust would be a full-service seller of audio equipment that offers information, listening rooms, and comfortable surroundings to would-be shoppers who then leave the store only to purchase the same equipment online. *See generally* E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 212–15 (5th ed. 2009).

years later, the Court rejected the idea that the analysis involved in nonprice vertical restraints could be applied to vertical restraints on price. According to the Court:

> As in *Schwinn*, we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. As MR. JUSTICE WHITE notes . . . some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment.[34]

The Court did not elaborate on what the differences were between price and nonprice restraints other than to note that Congress had not reacted to the per se status of RPM in the rule's then sixty-six years of existence.[35] Perhaps the Court really could not think of any economic distinction—possibly because it is hard to describe one—but was unwilling to overturn a decades-old decision.

The reasoning applied in *Sylvania* led, of course, to *Leegin*—albeit thirty years later. Whether *Leegin* means effective per se legality for RPM, as *Sylvania* did for nonprice vertical restraints,[36] cannot be determined yet. Nevertheless, without any mention of its footnote in *Sylvania*, the Court (finally, some would observe) accepted the fact that the interbrand/intrabrand free-rider analysis that was persuasive in *Sylvania* was applicable to RPM.[37] The Court noted and described the possible anticompetitive

34. Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977).

35. *See id.*

36. *See* E. THOMAS SULLIVAN ET AL., ANTITRUST LAW, POLICY AND PROCEDURE 460 (6th ed. 2009) (citing Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 68 (1991)).

37. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007). It bears noting that *Leegin* was hardly delivered with the conviction of *Sylvania*. *Sylvania* was a 6–2 decision with Justices Marshall and Brennan dissenting and with then-Justice Rehnquist abstaining. *See Sylvania*, 433 U.S. at 37. *Leegin* was a 5–4 decision, with Justices Breyer (probably the most economically sophisticated member of the Court), Stevens, Souter, and Ginsburg dissenting. *See Leegin*, 551 U.S. at 880.

In addition to alleviating the free-rider impediment to increased interbrand competition, the Court discussed the potential of RPM to lower entry barriers and to encourage resellers to engage in nonprice promotional efforts whether or not they were discouraged by free riders. *See id.* at 890–92.

It should also be noted that, since *Sylvania*, the Court has become clearer with respect to the relative importance of interbrand and intrabrand competition, indicating that interbrand competition has a significantly higher priority. *See* Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180–81 (2006) ("Interbrand competition . . . is the 'primary concern of antitrust law.'" (quoting *Sylvania*, 433 U.S., at 50 n.19)).

consequences of RPM.[38] For example, in an industry populated by a small number of producers or manufacturers, the ability to engage in successful price fixing could be affected by the ability to control price cutting by resellers.[39] In addition, RPM might be established at the behest of a cartel of retailers desiring to avoid price competition independent of any positive effects on the interbrand market.[40] Similarly, a particularly powerful retailer could use its leverage as a buyer to insist on RPM, as the Court put it, "to forestall innovation in distribution that decreases costs."[41] Compared to its decision in *Sylvania*, the Court expressed itself in ways that suggest greater concern that vertical price restraints have greater anticompetitive potential than nonprice restraints. Consequently, the *Leegin* Court cautioned that "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated."[42] As already noted, it is impossible at this juncture to know whether RPM will evolve to be de facto per se legal. The cautionary language in *Leegin*, however, invites or even instructs lower courts to ensure this does not occur.

II. *DR. MILES*'S ORPHANS AND THE CONCEPT OF AN AGREEMENT ON PRICE

A. *Pre-*Sylvania *Cases: Is There an Agreement?*

As noted in the Introduction, prior to *Sylvania* the Supreme Court sought to define *Dr. Miles*'s parameters in a way that fully condemned even indirect ways to accomplish RPM. The cases actually concern two matters that can be intertwined. First, was there an agreement?[43] Second, did the agreement pertain to the resale price?[44] Five cases in the pre-*Sylvania* period are particularly important.

Eight years after *Dr. Miles*, the Court began deciding a series of

38. *Leegin*, 551 U.S. at 892–94.

39. *Id.* at 892.

40. *Id.* at 893.

41. *Id.* Presumably the Court means that there would be little incentive for a retailer to seek lower costs if it could not then compete on the basis of price. Of course this would not mean the more innovative retailer would not profit by virtue of its lower costs. The Court also suggests that a powerful manufacturer would use RPM as a way to discourage its resellers from selling the products of the manufacturer's competitors. *Id.* at 894.

More recently, in *McDonough v. Toys "R" Us, Inc.*, 638 F. Supp. 2d 461, 466–68, (E.D. Pa. 2009), the claim was that a large retailer pressured manufacturers to impose RPM to limit competition by online discounters.

42. *Leegin*, 551 U.S. at 894.

43. The fact of an agreement is necessitated by section 1 of the Sherman Act. *See* 15 U.S.C. § 1 (2006).

44. For most of this period nonprice vertical restraints were not per se unlawful, meaning that classification of the activity as price or nonprice was critical. *See supra* notes 30–31 and accompanying text.

cases that fell squarely in the area of form versus substance. The first of these was *United States v. Colgate & Co.*, which was inconsistent with the theme of protecting the per se rule and became something of a judicial headache for many years.[45] The decision is generally cited for the proposition that a manufacturer can announce a resale price and refuse to deal with or terminate a reseller that does not adhere to that price. In more specific terms, under section 1 of the Sherman Act, announcements and refusals to deal with those who do not adhere to those prices does not establish the existence of an agreement.[46]

What *Colgate* reflects about the Court's view of RPM is unclear. On one hand, the outcome is driven by the fact that section 1 does require an agreement. On the other hand, the actual practice of one party announcing terms and another one adhering to those terms, from the perspective of basic contract law, may very well establish the existence of an agreement. The proper interpretation of *Colgate* is made difficult because it deals with a criminal charge and the interpretation of an indictment.[47] The indictment listed a variety of Colgate's practices that would fall short of an agreement.[48] It also listed practices that did indicate the existence of an agreement. Thus, according to the indictment, Colgate was involved in "investigation and discovery of those not adhering [to resale prices and] requests to offending dealers for assurances and promises of future adherence to prices, which were often given."[49] For some unexplained reason, despite this language, the trial court concluded that the indictment included "no charge . . . that any contract was entered into by . . . the defendant, and any of its retail customers."[50] Later in the same opinion the trial court said, "In the view taken by the court, the indictment here fairly presents the question of whether a manufacturer . . .is subject to criminal prosecution . . . because he agrees with his wholesale and retail customers, upon prices."[51]

Against this backdrop, the Supreme Court viewed its task as "ascertain[ing], as accurately as may be, what interpretation the trial court placed on the indictment."[52] In examining the indictment and the trial court opinion, the Court concluded that ultimately the trial court had interpreted the indictment to mean no more than the defendant had requested adherence to price, sometimes in advance, and then refused to sell to those who did not adhere to those

45. *See* United States v. Colgate & Co., 250 U.S. 300, 306–07 (1919).
46. *See id.* at 307.
47. *See id.* at 302.
48. *See id.* at 302–04.
49. *Id.* at 303.
50. *Id.* at 304.
51. *Id.*
52. *Id.* at 306.

prices.[53] This was a questionable interpretation given that the indictment also said dealers were requested to promise they would adhere to the resale prices and in many instances provided that assurance.[54] In fact, in still another passage, the trial court observed:

> The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstances that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition . . . .[55]

One reading of this passage, offered by Professor Thomas Arthur, is not that there is no agreement but that the only way to enforce the agreement was to refuse to supply.[56]

In many respects the lower court and the Supreme Court's definition of what constituted an agreement would not survive a more modern analysis. This can be understood by thinking of the announcement, "I will only sell to you if you will not resell for less than $10.00." The retailer thereafter adheres to the price. Under basic contract law principles, the outcome could easily be squared with the existence of an implied agreement. The initial assertion is an offer indicating the actions required of the offeree in order to ensure performance by the offeror. Under the facts of the case, it does not appear that retailers adhering to resale prices did so because it spontaneously occurred to them to do so. They were, in fact, complying in order to be assured of the reciprocal performance by the supplier.[57] Yet the *Colgate* Court and the lower court viewed the manufacturer as doing no more than exercising its rights to decide with whom it will deal.[58] The problem is that the company went further than merely exercising its right to decide with whom it will deal—the Court's choice was based on reciprocity by the resellers. *Colgate* thus can just as easily be read as exempting certain types of agreements from its prohibition of RPM as it can be read as a reaction to unilateral action. Indeed, in 1949 one commentator remarked, "The *Colgate* case virtually invited resale price maintenance."[59]

53. *Id.* at 306–07.
54. *Id.* at 303.
55. *Id.* at 305.
56. *See* Arthur, *supra* note 6, at 463.
57. *See Colgate*, 250 U.S. at 303–04.
58. *See id.* at 305–07. Of course the unilateral right to determine with whom one will deal is a fundamental characteristic of all contracts. *See* 17A AM. JUR. 2D *Contracts* § 222 (2004).
59. Comment, *Refusals To Sell and Public Control of Competition*, 58 YALE.

It is hard not to see the *Colgate* decision as being more trouble than it was worth. In fact, for three years in a row beginning in 1920, the Supreme Court attempted to "clarify" *Colgate* without conceding that it was simply wrong.[60] Ultimately, however, in 1964 the Court appeared to relent and characterized *Colgate* as a case in which it "assumed" there was no agreement.[61] Under that interpretation of the decision, the outcome is a necessary one. In the meantime, clarification was required because the *Dr. Miles/Colgate* distinction was far from obvious, especially to those attempting to apply basic contract law principles. In fact, to some courts, the only distinction appeared to be whether the agreement was in writing.[62]

In *United States v. A. Schrader's Son, Inc.*,[63] a 1920 case, the lower court described *Colgate* as a case in which a "combination or conspiracy" was "clearly disclosed"[64] and further observed that the difference between *Dr. Miles* and *Colgate* was a "distinction without a difference."[65] The lower court's description of the *Colgate* facts seemed directly on point:

> In the Colgate Case the predetermined purpose of the maker, known to all the wholesalers and retailers, was to market a product at certain fixed prices. Every wholesaler or retail dealer who acquiesced therein or acted in furtherance of the accomplishment of that purpose made himself a member of a conspiracy.[66]

In light of *Colgate,* and faced with perhaps even more compelling evidence of an agreement, the lower court felt constrained to rule that there had been no violation of the Sherman Act.[67]

L.J. 1121, 1127 (1948).

60. *See, e.g.*, FTC v. Beech-Nut Packing Co., 257 U.S. 441, 451–52 (1922). It does not appear that the Court had changed with respect to its conviction that RPM was per se unlawful. *See id.* Instead it just seemed unwilling to revisit *Colgate* in a manner that might be interpreted as dropping the agreement requirement. *See id.*

61. *See* Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 17 (1964).

62. *See*, *e.g.*, *Beech-Nut Packing*, 257 U.S. at 451 ("The Circuit Court of Appeals was of opinion that the only difference between the price-fixing condemned as unlawful in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, and the price-fixing plan embodied in the Beech-Nut policy was that in the former case there was an agreement in writing, while in this case . . . the plan depended upon a tacit understanding . . . ."); United States v. A. Schrader's Son, Inc., 264 F. 175, 183 (N.D. Ohio 1919), *rev'd*, 252 U.S. 85 (1920) ("I can see no real difference upon the facts between the Dr. Miles Medical Co. Case and the Colgate Co. Case. The only difference is that in the former the arrangement . . . was put in writing . . . .").

63. 252 U.S. 85 (1920).

64. *A. Schrader's Son*, 264 F. at 180.

65. *Id.* at 183.

66. *Id.* at 184.

67. *See id.* at 185. Interestingly, this holding placed the government in the

The Supreme Court, in a somewhat tersely worded opinion, reversed the lower court,[68] noting that the defendants in *Schrader* had gone beyond the actions found in *Colgate*.[69] Once again, the distinction was between announcing a policy then exercising unilateral rights and the existence of actual agreements.[70]

A year later the Court was required to clarify the issue again in *Frey & Son, Inc. v. Cudahy Packing Co.*, a civil case involving the effort by Cudahy to control the resale price of Old Dutch Cleanser.[71] The case first arose in the period between *Dr. Miles* and *Colgate* and resulted in a jury verdict for the plaintiff.[72] The case then reached the court of appeals after *Colgate*, and the decision was reversed.[73] The jury instruction was to the effect that an agreement can be inferred from repeated announcements by the manufacturer of the resale price and cooperation by the resellers by virtue of adherence to that price.[74] The appellate court reversed, noting that because there was no formal written or oral agreement and, in light of *Colgate,* there should have been a directed verdict for the defendant.[75] The Supreme Court affirmed, but not without noting that under *Colgate* and *A. Schrader's Son*, which was also decided by that point, no formal agreement was necessary.[76] Thus, an agreement "might be implied from a course of dealing or other circumstances."[77] Nevertheless, the Court held that an instruction that permitted the finder of fact to infer an agreement existed from repeated announcements and adherence to the resale price was incorrect.[78]

The next year the issue was considered yet again in *FTC v. Beech-Nut Packing Co.*[79] Beech-Nut had a practice of announcing resale prices and refusing to sell to those who did not adhere to those prices.[80] After "declarations, assurances, statements,

position of arguing that there was a meaningful distinction between the efforts by the manufacturers in *Dr. Miles* and *Colgate*. *See id.* at 183–84.

68. *A. Schrader's Son*, 252 U.S. at 100.
69. *Id*. at 98–100.
70. *See id.* at 99–100.
71. Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 209 (1921).
72. *See id.* at 209–10.
73. *See id.* at 210.
74. *Id.* at 210–11.
75. *Id.* at 210.
76. *Id.*
77. *Id.*
78. *Id.* at 211. Three Justices dissented, arguing that the repeated announcements and subsequent adherence to the announced resale prices would at least raise a question of fact to which the jury should be permitted to respond. *Id.* at 218. This view is more consistent with contract law principles. For example, it would be a relatively simple matter for the offer to be viewed as "I will sell to you as long as you resell for no less than $2.00," after which an acceptance is found in the fact that the buyer resells for no less than $2.00.
79. 257 U.S. 441 (1922).
80. *Id.* at 447–48.

promises, or similar expressions" that the prices would be adhered to, the dealer would be reinstated.[81] The Federal Trade Commission ("FTC") had issued a cease and desist order on this practice.[82] On appeal, the Second Circuit Court of Appeals reasoned that the distinction between *Dr. Miles* and the policy in question was that *Dr. Miles* involved a written agreement while the agreements in the case before the court were tacit.[83] It noted that there was no substantive distinction.[84] It reversed the FTC, reasoning that the case was governed by *Colgate*.[85] In effect, if there was no agreement in *Colgate*, the Beech-Nut policy also could not be held to involve an agreement.

Referring to both *Schrader's Son* and *Cudahy Packing*, the Supreme Court pointed out that the difference was not between written agreements and tacit agreements.[86] Instead, the Court noted that in *Colgate* it responded to a lower court's interpretation of an indictment.[87] According to the Court, the lower court in *Colgate* had found that the company did no more than announce under what conditions it would sell to resellers, but no agreement existed that obligated those resellers to observe the resale price once they possessed the goods.[88] After seeming to clarify *Colgate,* the remainder of the Court's reasoning is less than clear. The Court noted that the FTC had not found that Beech-Nut's conduct did not constitute a "contract or contracts whereby resale prices are fixed."[89] On the other hand, the Court reasoned that "The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose."[90] The distinction between an agreement, express or implied; suppression of freedom that is as effective as agreements; and the "unilateral" action in *Colgate* was never made by the Court.

In fact, the distinction, if it existed, would have been extraordinarily fine because Beech-Nut conditioned sales on the receipt of assurances that resale price would be observed. There appears no doubt that the Court desired to preserve *Colgate* but precisely what freedom those who desired to fix resale price enjoyed was exceptionally narrow. In the words of a writer at the time,

81. *Id.* at 450.
82. *Id.* at 443–44.
83. *Id.* at 451.
84. *Id.*
85. *Id.*
86. *Id.* at 452–53.
87. *Id.* at 451.
88. *Id.* at 451–52.
89. *Id.* at 455.
90. *Id.*

> [W]hatever the present status of the *Colgate* case, one thing seems clear—the passage to the legal methods of that case, which the Court has assumed to preserve between the Scylla and Charybdis of the subsequent decisions, is narrow and dangerous, and the manufacturer who would take advantage of the passage will need a truly skilful pilot.[91]

The final pre-*Sylvania* chapter of the *Dr. Miles/Colgate* saga came in a 1959 case, *United States v. Parke, Davis & Co*,[92] a decision that came close to overruling *Colgate* and, from some perspectives, did so.[93] Parke, Davis & Co. sold drugs to both wholesalers and retailers.[94] Retailers acquired the drug from wholesalers and, in the case of large orders, from Parke, Davis & Co. directly.[95] Parke, Davis & Co. announced resale prices for both wholesalers and retailers and warned that it would not sell to those who did not adhere to the price.[96] In addition, the wholesalers were told they would not be supplied if any of the retailers they sold to did not observe the minimum price.[97] The wholesalers would report the names of retailers violating the policy and Parke, Davis & Co. would terminate deliveries.[98]

The lower court determined that Parke, Davis & Co. activity fell within *Colgate* and ruled against the government.[99] The Supreme Court reversed once again, attempting to distinguish ultimately *Colgate* as well as *Dr. Miles* from the activities of Parke, Davis & Co.[100] This time, according to the Court,

91. Comment, *Price Maintenance and the* Beechnut *Decision*, 31 YALE L.J. 650, 655 (1922). In the words of another commentator, "It requires Herculean efforts to square [the decisions in *Cudahy* and *Schrader's Sons*], and the *Dr. Miles* decision, with the right to select customers, recognized by *Colgate*." Walter Adams, *Resale Price Maintenance: Fact and Fancy*, 64 YALE L.J. 967, 980 (1955).

92. United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

93. *See, e.g.*, Recent Case, *Sales to Wholesalers Conditioned on Their Refusal To Sell to Price Cutting Retailers Who Are Informed of Such a Policy Constitutes a Combination and Conspiracy*, 108 U. PA. L. REV. 1237, 1242 (1960). In addition, the dissenters in *Parke, Davis & Co.* seemed to feel the majority had effectively overruled *Colgate*. *See Parke, Davis & Co.*, 362 U.S. at 49 (Harlan, J., dissenting).

94. *Parke, Davis & Co.*, 362 U.S. at 31–32.

95. *Id.*

96. *Id.* at 32.

97. *Id.* at 33.

98. When confronted with the problem of price cutters, Parke, Davis & Co. consulted counsel who advised them that "we can lawfully say 'we will sell you only so long as you observe such minimum retail prices' but cannot say 'we will sell you only if you agree to observe such minimum retail prices.'" *Id.* at 33 (internal quotation marks omitted). Parke, Davis & Co.'s efforts met with limited success in that some retailers refused to adhere to the minimum price and were terminated. They were reinstated—temporarily—when they stopped advertising discount prices. *Id.* at 35–36.

99. *Id.* at 36.

100. *Id.* at 38, 45–46.

> [A]n unlawful combination is not just as such arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.[101]

In this case, the excessive conduct was evidently the fact that Parke, Davis & Co. "used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers."[102] The majority so narrowed *Colgate* that three dissenting Justices[103] and one concurring Justice[104] seemed to believe that the Court had effectively overturned *Colgate*. Exactly how much *Colgate* was narrowed is hard to assess. It appears, however, that at least for a time, any agreement with any party—even though that party had no interest in the success of the price-fixing efforts—would exceed *Colgate*'s limits.[105]

As noted earlier, the string of cases from *Dr. Miles* to *Parke, Davis & Co.* represents the pre-*Sylvania* approach of the Court to RPM. RPM was per se illegal, and the definition of an agreement was broadly defined. *Dr. Miles*, of course, is no longer applicable, but the cases that represented the Court's struggle to contain *Dr. Miles* remain. Although perhaps not correct as an economic matter, the Court seemed to be concerned that what it viewed as anticompetitive agreements would escape detection. In assessing them, there are two important factors to note. First, the continuing importance of the *Colgate* line of cases is not simply dependent on *Leegin* but on the post-1977 cases in which RPM was alleged. The next Subpart is devoted to these cases.

The second thing to note is that, although all the cases dealt with RPM, they dealt with a specific element of an RPM claim—whether there was an agreement. The agreement element is also necessary in the context of all vertical restraints, not simply those related to price. Thus, for a ten-year span these cases potentially

101. *Id.* at 43.

102. *Id.* at 45.

103. Justices Frankfurter, Harlan, and Whittaker dissented, arguing that the Court had "done no less than send to its demise the *Colgate* doctrine." *Id.* at 49 (Frankfurter, Harlan, and Whittaker, JJ., dissenting).

104. *Id.* (Stewart, J., concurring).

105. In the pre-*Sylvania* period, this is consistent with other announcements by the Court. For example, in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), *overruled on other grounds by* State Oil Co. v. Khan, 522 U.S. 3 (1997), a newspaper publisher sought to stop one carrier from charging above a desired maximum price. In order to accomplish this it hired another party to solicit away the carrier's customers. The party would not, however, take over the route and charge only the agreement maximum. In other words, it ultimately had little or no interest in the subsequent maximum price fixing scheme. Nevertheless, the Court held that the agreement with that party could satisfy the agreement requirement of section 1 of the Sherman Act. *Id.* at 149–50.

had increased importance. In the period between 1967 and 1977, nonprice vertical restraints joined RPM in the per se unlawful category.[106] Thus, the law during that period would have meant that simply announcing one's policy with respect to nonprice restraints would have been permissible, but an agreement, implied or express, or any "arrangement" that exceeded *Colgate* would have meant liability under section 1. In the post-1977 period, we now know that, under the rule of reason, it is virtually unheard of for a plaintiff to prevail on a claim based on nonprice restraint.[107] In effect, regardless of the difficulty or ease of showing an agreement existed, the plaintiffs lose and the agreement element has become of minor importance. That is not to say, as will be discussed below,[108] that the same is true of RPM.

*B. Post-*Sylvania*: What Does It Mean To Fix Prices?*

It appears it did not take the Supreme Court long after its footnote in *Sylvania* to have second thoughts about the legal status of RPM. In *Monsanto Co. v. Spray-Rite Service Corp.*,[109] decided seven years later, the Court confronted the problems of a dual approach to vertical restraints. Price restraints were per se unlawful while nonprice vertical restraints were subject to the rule of reason. The problem was that it is not always easy to detect the difference—particularly if one applies anything other than the narrowest possible definition of RPM.

In this respect there is a formalistic and a substantive approach. As a substantive matter, RPM refers to any agreement that stifles price competition among intrabrand competitors. This broader definition would be consistent with the Court's definition of price fixing in the context of horizontal arrangements. In that area the standard is to prohibit any action that has the effect of "raising, depressing, fixing, pegging, or stabilizing" price.[110] A more formalistic view is that price fixing does not occur unless the parties agree on an actual price. If that formalistic approach were applied to horizontal restraints, an agreement to restrict output,[111] discontinue credit terms,[112] or not to engage in competitive bidding[113] would not be price fixing because prices could still differ from seller

106. *See infra* notes 191–98 and accompanying text.
107. The exceptions are quite limited. *See generally, e.g.*, Graphic Prods. Distribs. v. Itek Corp., 717 F.2d 1560 (11th Cir. 1983); Eiberger v. Sony Corp., 622 F.2d 1068 (2nd Cir. 1980); Moecker v. Honeywell Int'l, Inc., 144 F. Supp. 2d 1291 (M.D. Fla. 2001).
108. *See infra* Part II.B–C.
109. 465 U.S. 752 (1984).
110. United States v. Socony-Vacuum Oil Co., 310 U.S. 220, 223 (1940).
111. This was in fact the activity in *Socony-Vacuum*. *Id.* at 220.
112. *See* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (per curiam).
113. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

to seller. All of these have been held to be price fixing[114] in the horizontal context but would not be in the vertical context under a formalistic approach.

In *Monsanto,* resellers complained that Spray-Rite, a competitor, was selling at discounted prices.[115] Monsanto terminated the resale contract with Spray-Rite, which claimed that the termination was in furtherance of a per se unlawful agreement to fix resale prices.[116] Spray-Rite prevailed at the trial court level and Monsanto appealed.[117] The Court of Appeals for the Seventh Circuit affirmed, reasoning that, if there had been complaints about price discounting and then termination, a jury would be entitled to infer the existence of a vertical agreement on price between Monsanto and the complaining resellers.[118] Monsanto, on the other hand, argued that the termination was due to Spray-Rite's failure to hire trained salesmen and to promote sales.[119] The dilemma was that even this requirement could cause resale prices to increase and possibly stabilize.

The Court was faced with the inevitable intertwining of two issues raised by section 1 of the Sherman Act. First, of course, was whether there was an agreement between Monsanto and its resellers. After *Sylvania*, simply showing the existence of a vertical agreement was not enough to establish a per se violation.[120] This meant addressing the second issue: distinguishing price from nonprice agreements. This second step was necessary to avoid the error of condemning pro-competitive nonprice vertical restraints that also had the effect of raising resale prices. Put differently, a view that priority was to be placed on discouraging RPM would mean adopting a policy that could chill lawful and pro-competitive efforts to employ nonprice vertical restraints. On the other hand, affording a wide berth to nonvertical restraints would mean that RPM agreements could go undetected.[121] Perhaps reflecting the view that it was hard to distinguish the effects of price and nonprice restraints,[122] the Court adopted a policy of decreasing the likelihood of condemning any pro-competitive restraints.[123] It did this not by

114. *See supra* notes 91–93.
115. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 758–59 (1984).
116. *Id.* at 757.
117. *See id.* at 757–58.
118. *Id.* at 758.
119. *Id.* at 757.
120. The Court expressly declined a request to remove RPM from the per se category. *Id.* at 752 n.7.
121. The choice is between the mistake of condemning pro-competitive activities and the mistake of allowing anticompetitive activities.
122. In fact, the Court observes, "the economic effect of . . . unilateral and concerted vertical price setting, agreements on price and nonprice restrictions . . . is in many, but not all, cases similar or identical." *Monsanto*, 465 U.S. at 762.
123. *Id.* at 764.

clarifying the distinction between price and nonprice restraints, but by raising the standard for plaintiffs to the requirement of showing an agreement existed. Consequently, the Court held that in order to avoid summary judgment, plaintiffs would be required to present evidence that "tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently."[124]

The choice the Court made here with respect to the way it framed and responded to the issue is noteworthy. The complaint alleged that the defendant had conspired to fix prices.[125] At the trial court level, the issue was precisely that, with the jury instructed that RPM was per se unlawful. The Court could have responded with a narrow holding that required courts to instruct juries about the distinction to be made between price and nonprice agreements. Instead, it opted to address the arguably broader issue of whether an agreement existed at all.[126] In *Monsanto*, the alleged agreement was to fix prices, but the Court's decision was not constrained to price fixing only.[127] Instead, it raised the bar with respect to all vertical restraints.[128]

The last of the Court's post-*Sylvania* decisions that undercut *Dr. Miles* and the Court's subsequent assertion in *Sylvania* that RPM was different from nonprice vertical restraints was *Business Electronics Corp. v. Sharp Electronics Corp*.[129] The theme in the case was similar to *Monsanto* in that it was made necessary by the different treatment of vertical nonprice and vertical price restraints. Business Electronics was initially the only seller of Sharp's calculators in Houston, Texas. An additional seller was appointed and eventually complained to Sharp that Business Electronics was pricing below the minimum prices suggested by Sharp.[130] Eventually, Business Electronics was terminated and claimed that Sharp had engaged in RPM. The Court of Appeals for the Fifth Circuit held that per se unlawful RPM existed only "if there is an expressed or implied agreement to set resale prices at some level."[131]

What distinguished *Business Electronics* from *Monsanto* is that in *Business Electronics*, defendant Sharp made no effort to argue that it had imposed nonprice vertical restraints on the non-terminated reseller that would have raised its costs. In other words, there was no argument that a restriction of RPM would actually have an impact on nonprice vertical restraints.

124. *Id.*
125. *Id.* at 757.
126. *Id.* at 763–65.
127. *See id.* at 765–68.
128. Interestingly, the Court then went on to find that there was sufficient evidence to support a holding that Monsanto had actually entered into per se unlawful pricing agreements. *Id.* at 765–66.
129. 485 U.S. 717 (1988).
130. *Id.* at 721.
131. *Id.* at 720.

The Supreme Court affirmed the Fifth Circuit, once again noting its concerns that the policies and economic priorities announced in *Sylvania* would be thwarted by a broad definition of price fixing.[132] It noted that nearly any nonprice vertical agreement could be cast as one having an impact on resale prices.[133] The Court also explained that the rationale for prohibiting RPM was that it could facilitate cartelization.[134] In other words, RPM was to be avoided not because it was inherently anticompetitive but because it could be a means to accomplish horizontal price fixing. The Court then used this premise as a means of narrowing *Dr. Miles*. Accordingly, it reasoned that if the principal concern was the creation of a cartel, this outcome would be less likely if the manufacturers and resellers, who were instruments toward this end, did not have agreements on actual price levels.[135] This idea is better understood by an example. Suppose all major oil refiners would like to engage in horizontal price fixing. If they all resell to service stations that are engaged in fierce competition, it will be more difficult to maintain the effectiveness of the cartel at the refinery level. There would be constant pressure from retailers for lower prices, and lower prices by one set of retailers may lead to the conclusion by other refiners that a competing refiner is cheating on the cartel. In effect, each member of the cartel can stabilize the cartel by agreeing with retailers on resale prices. In the Court's view, this objective could only be achieved if there were an actual agreement on price itself, something that was absent under the facts of *Business Electronics*.[136]

Business Electronics, for all practical purposes, ended the reign of *Dr. Miles*.[137] After *Business Electronics*, evidently the only way to engage in unlawful RPM was to not only have just an agreement stabilizing resale price, but also have an agreement on the actual price level. Even before *Business Electronics*, threats and subsequent capitulation by resellers had already escaped the prohibition of *Dr. Miles.* After *Business Electronics*, it was clear that agreements except those pegging a specific price were also exempt. Indeed, after *Monsanto* and *Business Electronics*, findings that firms have engaged in per se unlawful RPM are rare.[138]

132. *Id.* at 726, 736.
133. *Id.* at 727–28.
134. *Id.* at 725.
135. *Id.* at 727.
136. *See id.* at 721–27.
137. Forty-two state attorneys general filed briefs urging the Court to reverse the Fifth Circuit. *Id.* at 718 n.*.
138. One particular case in the last twenty years drew a great deal of attention because it did address RPM. *See* Nine W. Grp., Inc., No. 981-0386, 2000 WL 250227 (F.T.C. Mar. 6, 2000). The FTC order in *Nine West* was modified after *Leegin*. *See* Nine W. Grp., Inc., No. C-3937, 2008 WL 2061410 (F.T.C. May 6, 2008).

*C. Agreements Post-*Leegin

Leegin does not expressly overrule any of the cases discussed thus far. Technically, they do not address the issue of the per se or rule of reason status of RPM. What *Leegin* does do, in a way that is hard to ignore, is call into question the relevance and necessity of these cases. In fact, it may be that without a reinterpretation of these cases, they actually impede the more economically sensitive approach *Leegin* seems to offer.

The explanation for this requires once again noting that the pre-*Leegin* cases fall into two categories. The pre-*Sylvania* period was marked by an effort to narrow as much as possible the circumstances under which RPM could be imposed subject to the Sherman Act requirement that an agreement must be involved and the Court's reluctance to expressly overrule *Colgate*.[139] The process is the source of considerable irony. While narrowing the scope of methods allowed to establish resale pricing, the Court actually stopped far short of what might have been expected. Under the guise of upholding the requirement that an agreement be involved, it established the *Colgate* doctrine and either misread the actions of the lower court or ignored basic contract principles concerning implied agreements or understandings.[140] After *Sylvania*, either because the Court recognized the inconsistency of different treatment of RPM and nonprice vertical restraint or as a method of protecting possible pro-competitive nonprice vertical restraints, it changed course. With cases that seem to pull in opposite directions, it is quite difficult to confidently predict the future importance of the cases.

That, however, may not be the most important point. The most important point is that those two lines of cases may give rise to a new approach to the agreement question. To understand why, consider the types of antitrust errors the Court sought to avoid. The first group of cases—pre-*Sylvania*—were consistent with a view that RPM was anticompetitive, and the error to be avoided was to allow indirect methods of setting resale prices. As noted below, it is not clear that the actual decisions by the Court were the most well-considered with respect to achieving this goal, but that does appear to be the focus. Now, of course, that premise for the treatment of the agreement issue is no longer required because there is no need to protect the per se rule.

The second group of cases reflects an effort to avoid the error of mistaking a nonprice restraint for a price restraint. The theory was to protect the possibly pro-competitive nonprice vertical restraints from inadvertent per se treatment. Now, that too is no longer relevant. Even if a nonprice vertical agreement is classified as a

139. *See supra* Part II.A.
140. *See supra* notes 43–62 and accompanying text.

pricing agreement, the competitive assessment will be the same. In effect, both the pre- and post-*Sylvania* cases were designed to avoid errors that *Leegin* makes unlikely to occur. The point is that the error-avoiding goals of these two lines of cases are no longer relevant.

Further decreasing the relevance of the cases that sought to clarify when an agreement existed is that there is little reason for a firm to attempt to conceal vertical agreements. This might be compared to the pre-*Leegin* era in which a firm attempting to establish pro-competitive RPM would be wise not to do it at all, to do it indirectly, or to conceal it. Now concealment would seem to make sense in two instances only. First, the firm may believe that its RPM efforts are likely to be correctly or mistakenly viewed as anticompetitive under the rule of reason. Second, concealing the agreement may mean it raises the cost of discovery, which, at the margin, lowers the likelihood that a violation will be found to be unlawful.

In order to further assess the proper role of the agreement analysis post-*Leegin*, it is also useful to recall that the *Leegin* Court appeared to be more sanguine about the pro-competitive effects of RPM as opposed to nonvertical restraints. In this respect, it admonished that "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated."[141] In fact, as discussed above,[142] the Court lists a number of ways RPM may have little to do with increasing interbrand competition.[143] As a complement to the actual assessment of effects of RPM, one important step is to apply principles to the question of whether an agreement exists that are more consistent with contract law.

What this analysis suggests is that the agreement analysis should not be utilized to shelter vertical agreements. Instead, the emphasis should be shifted to the substantive economic analysis of the impact. More specifically, the Court should be more receptive to evidence of implicit agreements that can be inferred from suggestions (offers) and compliance (acceptance). In addition, while there should be some evidence to exclude the possibility of unilateral action, the idea that price fixing must be narrowly defined so as to include an agreement on an actual price, has no positive impact, and may serve simply to preclude the substantive scrutiny *Leegin* calls for.

To this point there are no cases in which a lower court has had to revisit the issue of what is required in order for the existence of an agreement to be shown. One of the few post-*Leegin* RPM cases is

141. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 894 (2007). The Court also noted that "courts . . . have to be diligent in eliminating [the] anticompetitive uses [of RPM] from the market." *Id.* at 897.

142. *See supra* notes 38–41 and accompanying text.

143. *Leegin*, 551 U.S. at 892–94.

Babyage.com, Inc. v. Toys "R" Us, Inc.[144] The allegation in the case was that the defendant, Toys "R" Us, doing business as Babies "R" Us, had conspired with manufacturers of baby products to fix the resale price of these products.[145] The manufacturers were selling to Internet discounters who were undercutting the prices offered at Babies "R" Us retail outlets.[146] Babies "R" Us was a powerful enough buyer to make demands on these manufacturers.[147] Indeed, it is noteworthy that the scheme fit precisely one of the possibilities that the *Leegin* Court had cautioned lower courts to be sensitive to. As described by the *Leegin* Court: "A dominant retailer . . . might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's distribution network."[148]

The *Babyage.com* court noted that the plaintiff's theory involved two agreements.[149] One was between Babies "R" Us and the manufacturers and the other between the manufacturers and the resellers who were originally discounting.[150] With respect to the first agreement, the court applied the *Monsanto* rule of requiring sufficient evidence to exclude the possibility of unilateral action.[151] It held that plaintiffs had stated a claim for conspiracy based on evidence that (1) Babies "R" Us was large enough to place the manufacturers under duress, (2) Babies "R" Us had threatened each manufacturer with a loss of business if the prices of their other customers were not controlled, and (3) the manufacturers had pursued a parallel course of action that would not be in their individual self-interest unless all manufacturers cooperated.[152] The standard applied by the court may reflect some of the loosening described here. For example, the scenario could be trimmed to its basics—Babies "R" Us announced a policy of not buying from manufacturers who did not control the resale prices of its other

144. 558 F. Supp. 2d 575 (E.D. Pa. 2008).

145. *See id.* at 579.

146. *Id.*

147. *See id.*

148. *Leegin*, 551 U.S. at 893–94 (2007) (citing THOMAS R. OVERSTREET, JR. RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 31 (1983), *available at* http://www.ftc.gov/be/econrpt/233105.pdf).

149. *Babyage.com*, 558 F. Supp. 2d at 582.

150. *Id.*

151. *Id.*

152. *Id.* at 582–83. In another opinion involving class-certification issues, the arrangements between Babies "R" Us and the manufacturers are described in a manner that is more consistent with express agreements. *See* McDonough v. Toys "R" Us, Inc., 638 F. Supp. 2d 461, 468–72 (E.D. Pa. 2009). Since these arrangements were, however, pre-*Leegin*, it seems more likely that they were the results of efforts to "influence" resale prices as opposed to reaching agreements on resale prices.

retailers. It is not at all clear that the parallel action analysis of the court was correct. Any manufacturer who refused would lose its best customers without regard for the actions of other manufacturers. Nevertheless, from a basic contract law perspective, Toys "R" Us made an offer that was accepted. The fact that it could be described as unilateral action is beside the point. In fact, every contract is in some sense an instance of unilateral action.

The second set of agreements—between the manufacturers and their other customers—according to the court, was also adequately alleged.[153] It is not clear whether these agreements were express or the result of announcements and threats to discontinue sales if minimum prices were not observed.[154] Given that the events occurred prior to *Leegin*, it is not surprising that the defendants argued that the outcome was not the result of agreements but was, instead, protected by *Colgate*.[155] Nevertheless, the scenario can be seen as a series of vertical agreements between Babies "R" Us and its manufacturers/suppliers that led to vertical agreements between those manufacturers and their customers. Ultimately the court avoided the formalistic line-drawing found in pre-*Sylvania* cases to avoid one type of antitrust error, on the one hand, and in *Monsanto* and *Business Electronics* to avoid another type of error. Adherence to those rules would have served little purpose except to detract the analysis from the real question of substantive economic impact.

III. THE CONSIGNMENT QUESTION

*A. Pre-*Leegin

One issue that was prominent in the wake of *Dr. Miles* was whether a manufacturer could maintain control over prices by using a middleman or agent who did not take title to the goods. Again, as

153. *Babyage.com*, 558 F. Supp. 2d at 583.

154. The more detailed descriptions found in the class-certification opinion are somewhat ambiguous. *See McDonough*, 638 F. Supp. 2d at 469–72. Nevertheless, since these arrangements were pre-*Leegin*, it seems likely that they were the result of announcements and threats by the manufacturers.

Interestingly, Toys "R" Us sought the same assurances from manufacturers of toys. *See* Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 931–32 (7th Cir. 2000). Instead of price restraints, however, Toys "R" Us demanded limitations on the amount sold to warehouse clubs. Facing resistance from manufacturers who were concerned about limiting their own sales unless other manufacturers did the same, Toys "R" Us eventually reached agreements with each manufacturer on the condition that other manufacturers complied. *Id.* This, according to the FTC, changed the agreement from vertical to horizontal. The Court of Appeals for the Seventh Circuit agreed that there was sufficient evidence to support this conclusion. *Id.* at 935.

155. *See* Defendant Peg Perego's Joinder in Motion to Dismiss of Toys "R" Us, Inc., Babies "R" Us, Inc., and Toys "R" Us-Delaware, Inc. at 2, Babyage.com, Inc. v. Toys "R" Us, Inc., 558 F. Supp. 2d 575 (E.D. Pa. 2008) (Nos. 2:05-cv-06792-AB, 2:06-cv-00242-AB), 2006 WL 5295345.

in the *Colgate* line of cases, the theme is to avoid the requirement of section 1 of the Sherman Act that there be an agreement to fix resale prices. Initially, the question *seems* to have an obvious answer. If a firm retains title and uses a network of sales agents, it is hardly fixing a *resale* price because there is no resale. Indeed, a rule that prevents setting the price at which the product would be sold for the first time makes little sense. On the other hand, section 1 of the Sherman Act can be (and is) broken into two parts. First, is there an agreement? Second, does the agreement restrain trade? Agreements with sales agents and consignees are in fact agreements. In fact, the only relationships that would seem to fall outside the reach of the Sherman Act are those involving employees or employees of related firms.[156] Put differently, the use of agents or consignees may not involve a resale but they are still agreements and may be anticompetitive.

Two fairly well-known cases form the basis for discussion of the issue. In *United States v. General Electric Co.*,[157] the defendant sold its light bulbs through more than 21,000 agents throughout the United States.[158] The agents were otherwise wholesalers and retailers.[159] The Court examined a number of factors, including the fact that payment for the bulbs came only after they were resold and that General Electric assumed some of the risks associated with the lamps, including that of a price decline.[160] Nevertheless, "agency" was defined broadly as the so-called "agents" bore most of the risks of ordinary resellers.[161] There can be little doubt that the plan was designed to produce the same results as RPM. But, since there was no resale, the arrangement did not fall within the per se prohibitions of *Dr. Miles*.[162]

General Electric appeared to create a sizeable hole in *Dr. Miles*'s prohibition of RPM. In 1964, in *Simpson v. Union Oil Co. of California*,[163] the Court revisited the issue and this time applied a

156. The plurality of actors is lost when a firm "agrees" with a related firm like a subsidiary or parent. *See* SULLIVAN & HARRISON, *supra* note 33, at 175–80.

157. 272 U.S. 476 (1926); *see generally* Adams, *supra* note 91, at 985–87.

158. *Gen. Elec.*, 272 U.S. at 478.

159. *Id.* at 483.

160. *Id.* at 484.

161. The agents were responsible for "all expenses in the storage, cartage, transportation, handling, sale and distribution of lamps." *Id.* at 482.

162. *Id.* at 486–88. Interestingly, General Electric had virtually total control over the electric light market. This raises the question of whether the practice, had it been held to involve agreements, could have even survived a rule of reason analysis.

163. 377 U.S. 13 (1964). Between *General Electric* and *Simpson*, the Court decided *United States v. Masonite Corp.*, 316 U.S. 265 (1942), which also dealt with the use of so-called agents as a method of controlling price. In this instance, however, the agents were fully independent firms who also sold the same product in competition with the defendant. It was correctly characterized

less formalistic approach. Union Oil supplied gasoline to service stations that were designated as "agents." Simpson was an "agent"/service station operator who was terminated for selling gasoline at below a designated price.[164] Without overruling *General Electric*, the Court found that the consignment agreement was a form of fixing resale prices.[165] The decision is not marked by a bright-line test for determining when the arrangement involves a legitimate consignment and when it does not.[166] In fact, Union Oil maintained title to the product as was the case in *General Electric*. Critical to the case was the idea that a seller could retain ownership but still constitute an entity separate from the party actually making the sale, arguably on behalf of the owner. On the other hand, the Court noted the importance of consignments in the context of smaller-scale marketing efforts.[167]

The Court noted a number of factors that pushed Union Oil's practice over the line. First, it referred to the limitations on manufacturers created by *Parke, Davis & Co.* and observed that the practice here went beyond a mere announcement and a refusal to deal with those who did not comply.[168] In addition, according to the Court, the consignment arrangement was on the increase[169] with the likelihood of "destroying competition in retail sales of gasoline."[170] This particular observation is reminiscent of the warning issued more recently in *Leegin*.[171] In addition, the Court indicated that the vastness of the arrangement made it in substance, if not form, RPM.[172] Finally, the Court relied on the extent to which the service station owners actually assumed risks.[173] In this respect, it offered this observation:

> Dealers, like Simpson, are independent businessmen; and they have all or most of the indicia of entrepreneurs, except for price fixing. The risk of loss of the gasoline is on them, apart from acts of God. Their return is affected by the rise and fall in the market price, their commissions declining as retail prices drop. Practically the only power they have to be wholly independent businessmen, whose service depends on their own

as an elaborate effort to fix prices horizontally.

164. *Simpson*, 377 U.S. at 15.

165. *See id.* at 23–24.

166. *See generally* Albert C. Bender, *Consignment Device for Retail Price Maintenance Invalidated by Supreme Court*, 17 STAN. L. REV. 519 (1965); *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 279, 279–82 (1964).

167. *Simpson*, 377 U.S. at 18.

168. *Id.* at 17.

169. *Id.* at 19.

170. *Id.* at 21.

171. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007).

172. *Simpson*, 377 U.S. at 21–22.

173. *See id.* at 20.

> initiative and enterprise, is taken from them by the proviso that they must sell their gasoline at prices fixed by Union Oil.[174]

The Court went on to distinguish *General Electric* in an unconvincing fashion. It noted that *General Electric*, unlike the case at hand, dealt with patented goods.[175] It discounted this as the relevant distinction[176] and concluded, rather cryptically, "whatever may be said of the *General Electric* case on its special facts, involving patents, it is not apposite to the special fact here."[177] Nine years after *Simpson*, the Justice Department once again challenged General Electric's "consignment" system. The court hearing the case granted summary judgment in favor of the Justice Department explaining, "it is plain that under *Simpson* price fixing is illegal per se even when, as here, it is coupled with a consignment agency system such as G.E.'s, involving agency agreements valid under private contract law."[178]

General Electric and *Simpson* represent what we know about the use of consignments and agents to control "resale" prices.[179] Obviously, now that RPM is assessed under the rule of reason, the distinction is not as critical as it once was. Nevertheless, the task of solving the puzzle of when an agent is to be regarded as an instrument in an effort to control resale prices has been left to the lower courts and for the most part they have followed the lead of the Supreme Court in *Simpson* by focusing on the independence of the resellers from their supplier.[180]

Some years after *Simpson*, Judge Richard Posner attempted to articulate a possibly more rational distinction between *Simpson* and legitimate consignments. First, he aptly stated that the problem in its bare bones is how "to reconcile *Simpson* with the proposition that a homeowner does not violate . . . the Sherman Act when he tells his broker at what price to sell his home."[181] Judge Posner's answer is

174. *Id.* at 20–21 (footnote call numbers omitted).
175. *Id.* at 23.
176. *Id.* at 22–23.
177. *Id.* at 23.
178. United States v. Gen. Elec. Co., 358 F. Supp. 731, 743 (S.D.N.Y. 1973).
179. This does not mean the status of these agreements is unambiguous. *See generally* Terry Calvani & Andrew G. Berg, *Resale Price Maintenance After* Monsanto*: A Doctrine Still at War with Itself*, 1984 DUKE L.J. 1163, 1177–81.
180. *See, e.g.*, Day v. Taylor, 400 F.3d 1272 (11th Cir. 2005).
181. Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1436 (7th Cir. 1986). The Seventh Circuit Court of Appeals seems to have developed a very broad version of how a manufacturer can avoid the per se standard through the use of agents. One lower court in that circuit has interpreted *Murray Biscuit* reading *Simpson* and a similar case as "narrow holdings prohibiting manufacturers from merely labeling dealers and competitors as agents in order 'to circumvent the rule against price fixing.'" *See* Ill. Corp. Travel, Inc. v. Am. Airlines, Inc., 700 F. Supp. 1485, 1493 (N.D. Ill. 1988) (quoting *Murray Biscuit Co.*, 797 F.2d at 1436). While the lower court quotes *Murray Biscuit* correctly, it is clear in

to ask whether the consignment "has a function other than to circumvent the rule against price fixing."[182] This particular observation seems to beg the question, and Judge Posner concedes, that there is no clear distinction to be made.[183] However, an important element in the analysis is to assess the number of functions the agent provides. This probably exists along a continuum. If the agent carries no inventory and is but a conduit, it is at one end of the continuum. On the other hand, if the so-called agent has substantial overhead, assumes the risk of price increases and decreases, and assumes responsibility for transportation, delivery, and insurance, it can be seen at the opposite end of the continuum. In those instances, according to Judge Posner, the eventual price will be determined largely by the agent's costs rather than by the costs of the goods sold. In addition, the supplier will be less knowledgeable about those costs.[184] In this latter case, it is unrealistic to view the agent as merely a tool of the supplier, and efforts to control the final price are more akin to conventional efforts at RPM.

*B. The Post-*Leegin *Opportunity*

To understand the possible impact of *Leegin* on the analysis, it is useful to focus on what makes the consignment/agency arrangement so difficult in the first place. In this respect it is important to recall again the two questions posed by section 1 of the Sherman Act: (1) Is there an agreement? (2) Is that agreement about price? In the context of agency and consignment, the answer to the first question is "yes" unless the agent is an actual employee.[185] And, the agreement is clearly designed to control the eventual price. The problem that was the focus before *Leegin* was whether or not there was a resale. If there was, the agreement was per se unlawful. On the other hand, if a resale was not involved, there is no reason, *a priori*, that the agreement could not still be anticompetitive.

This focus on form sidetracked the analysis. From the standpoint of antitrust policy, once the agreement threshold has been crossed the only relevant question is whether the effect of the practice, however labeled, is pro- or anticompetitive. A finding that it was or was not an actual consignment does not answer this question. A close reading of *Simpson* reveals that the Court was clearly on the right track by focusing on substance over form.

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the lower court's opinion that the "rule against" price fixing to which Judge Posner was referring was the per se rule. *See* Ill. Corp. Travel, Inc. v. Am. Airlines, Inc., 806 F.2d 722, 725 (7th Cir. 1986).

182. *Murray Biscuit*, 797 F.2d at 1436.
183. *Id.* at 1438.
184. *See id.* at 1438.
185. Another option is that the agent is the employee of a related firm.

Whether the Court got the answer to the substantive question right is, of course, an empirical question that courts of that era were not particularly adept at answering. Still, the bottom-line analysis was devoted to whether the net effect of the arrangement was to reduce competition in the gasoline market.

The question now, of course, is whether *Leegin* alters the consignment analysis. Obviously *Leegin* does not overturn *General Electric* or *Simpson* and, at first glance, it may seem not to have any impact at all. On the other hand, a closer look suggests that *Leegin* may prove to be relevant. At the most obvious level it should make the distinction between agent and reseller less important if not irrelevant. Prior to *Leegin*, that distinction seemed to make the difference between a rule of reason analysis and per se illegality.[186] Now, if applied correctly, as long as there is an agreement, whether with a purported reseller or an independent agent, the only question is the competitive impact. Of course if RPM now takes the path taken by nonprice restraints after *Sylvania*, this may be the equivalent of per se legality regardless of whether a consignment or resale is involved.

The analysis can, however, be taken to another level. To understand why, it is important to reconsider *Sylvania*.[187] *Sylvania* was a direct response to the Court's decision ten years earlier in *United States v. Arnold, Schwinn & Co.*,[188] in which nonprice vertical restraints were classified as per se unlawful. In making that decision, however, the Court distinguished resale from consignments.[189] Nonprice vertical restraints involving resale were per se unlawful; those involving the use of agents and consignment were to be assessed under the rule of reason.[190] Not only did *Sylvania* shift nonprice vertical restraints to the rule of reason analysis, it abolished this resale/consignment distinction.[191] It reasoned that the *Schwinn* Court had provided "no analytical support for [the] contrasting positions."[192]

When it comes to the agency/resale issue, there is an obvious parallel between vertical nonprice restraints and vertical price restraints. *Sylvania*, in the course of making nonprice restraints

186. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379–81 (1967). Of course, *Schwinn* was overruled by *Sylvania* but only with respect to the per se treatment of nonprice restraints. *See* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–58 (1977). Thus, the agency/resale distinction even up until *Leegin* should have been relevant only with respect to whether the practice was assessed under the rule of reason or the per se standard. Nevertheless, a rule of reason standard, when applied to vertical restraints, seems to work much like a standard of per se legality.

187. *See supra* notes 28–34 and accompanying text.

188. 388 U.S. 365.

189. *Id.* at 378–80.

190. *Id.* at 379–80.

191. *Sylvania*, 433 U.S. at 54, 57–59.

192. *Id.* at 54.

subject to the rule of reason, indicated that consignment sales and true resales would be treated under the same standard.[193] Properly understood, *Leegin* can play the same role in the context of RPM. Prior to *Leegin*, RPM was per se unlawful while the actual analysis of *Simpson* in many respects mirrors a rule of reason analysis. In other words, what was nominally a determination of when actual agents were used, as opposed to when sham agents were involved, had a strong substantive element. One inference from this is that the formalistic step of defining whether one is an agent or not is no longer relevant.[194]

What this means is that *Leegin* provides an opportunity to simplify the consignment issue by allowing a court to move directly to the issue of competitive impact once an agreement has been established. As long as independent business entities are involved, the issues of price and sham agencies become irrelevant. There is little downside risk in doing this.[195] The overarching question would remain whether the arrangement has an undesirable effect. If it does, the use of a formalistic distinction between consignment and nonconsignment hardly advances antitrust policy. And the necessity of using or the temptation to use sham agents would seem to decline. Prior to *Leegin*, a firm concerned that its efforts to control downstream prices would be per se unlawful might conceal its objectives by the use of agents. Even after *Simpson*, there was some probability of gaining a strategic advantage by doing so. After *Leegin*, however, any agreement automatically goes to a rule of reason analysis and an entire mistake-prone step of classification is eliminated.

One post-*Leegin* case addressed the issue, albeit somewhat indirectly, and it missed the opportunity to make use of this more streamlined approach. In *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*,[196] the plaintiffs were providers of pest-control services who purchased pesticides from distributors.[197] At some point, Bayer, the manufacturer, decided to sell through "agents" who did not take title to the pesticides.[198] To do this it did not engage a team of new agents but designated its former distributors as "agents."[199] The allegation was that the manufacturers of the pesticides had conspired with the distributors to fix the resale price of the

193. *Id.*
194. This is, however, a different question from whether the agent is an employee of the firm or of a subsidiary.
195. In this context a downside risk would be one of condemning an arrangement that is not actually anticompetitive.
196. 561 F.3d 282 (4th Cir. 2009).
197. *Id.* at 284–85.
198. *Id.* at 285.
199. Bayer evidently switched back to the use of distributors as resellers in 2005. *Id.*

pesticides.[200] The defendants relied on *General Electric* for the proposition that, in effect, there was no resale because the distributors were merely agents.[201] Interestingly, the plaintiffs claimed that *Leegin* had implicitly overruled *General Electric*.[202]

The *Valuepest* court began its analysis by noting that "*General Electric* addressed what types of relationships constitute agreements to set prices for purposes of the Sherman Act."[203] It also concluded that "*Leegin* has no bearing on the continued validity of *General Electric*."[204] While correct that *Leegin* did not overrule *General Electric* (or at least what was left of *General Electric* after *Simpson* and *Sylvania*), the court's characterizations are a bit simplistic and actually obfuscate matters.[205] This can be understood by noting that *General Electric* is more accurately characterized as a case determining when resale prices have been fixed. It is not necessary or appropriate to read *General Electric* as saying that any agreement that has an *impact* on prices is legal simply because it escapes the per se condemnation of RPM. In any case, having read too much into *General Electric* and ignoring the opportunity *Leegin* presented, the *Valuepest* court moved to the conventional formalistic analysis of whether the distributors could fairly be regarded as agents and thereby immunize both manufacturers and, apparently, the distributors themselves.[206] In fact, after *Leegin*, this question seems irrelevant.

Rather than the formalistic analysis, what *Leegin* allows is a more direct and substantive analysis. It is clear that the parties in *Valuepest* were sufficiently separate to create the plurality of parties to establish the existence of an agreement. There is no indication that the distributors, however classified, were employees of the manufacturer or partially or wholly owned by the manufacturers or subsidiaries of the same parent. In fact, as already noted, these "agents" were former distributors who had bought and resold pesticides, including those of the defendants. An understanding between separate entities involving no resale but setting a selling price is still an agreement. Having established the agreement, the next step in a section 1 Sherman Act analysis is whether it creates

200. *Id.* at 284.
201. *Id.*
202. *See id.* at 286.
203. *Id.*
204. *Id.* at 288.
205. The court also misinterprets the rule of patents in the *General Electric/Simpson* doctrine. According to the Fourth Circuit Court of Appeals, *Simpson* distinguished *General Electric* on the basis of the fact that the General Electric products involved patents. *Id.* at 289. In fact, the *General Electric* Court, as the *Simpson* Court correctly noted, indicated that its holding did not depend on whether the articles involved were patented. Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 23 (1964) (citing United States v. Gen. Elec. Co., 272 U.S. 476, 488 (1926)).
206. *Valuepest.com.*, 561 F.3d at 288–94.

an unreasonable restraint on trade—whether it is classified as a price restraint or nonprice restraint or anything in between that is, in fact, where an independent firm acting as an agent may fall.

Ironically, the United States Court of Appeals for the Fourth Circuit reasoned that the plaintiffs, by claiming that *Leegin* overruled *General Electric*, had "conflate[d] the distinction between the two elements required to prove liability under § 1" of the Sherman Act.[207] This may be true and, again, the court is obviously correct that *General Electric* was not overruled by *Leegin*. Nevertheless, the court was also guilty of conflating the issues.[208] The fact that two separate parties agree on the way in which a product will be marketed, but are not involved in a resale, does not mean the two requirements of section 1 are not met. Moreover, it seemed to miss the historical significance of *General Electric* and *Simpson*. At the core of those cases was an effort to protect from per se antitrust condemnation a type of distribution that could frequently be pro-competitive. Now the danger of erroneous per se condemnation is unnecessary as is reliance on formalistic solutions to the problem of "false positives."[209]

To some extent the danger of not recognizing that agents can be separate entities for section 1 purposes is exemplified by the *Valuepest* court's analysis. In this respect, it is important to note that the very same entities that were buying and reselling pesticide at one point were quickly switched to the status of agents. At that point it is hard to understand why the court searched any further to determine the independence of the agents.

CONCLUSION

To a significant degree, *Leegin* dots the "i" of the Supreme Court's revision of the application of the antitrust laws to vertical restraints.[210] In the wake of *Leegin*, what is left unclear is the status of the cases the Court decided during the hundred-year reign of *Dr. Miles* that initially had the effect of strengthening and then weakening the per se rule. Many of these cases involved formalistic line drawing done in service to the Court's view of the wisdom of *Dr.*

207. *Id.* at 288.

208. To some extent, the problem is the assumption that an agent by definition cannot form a contract for section 1 purposes. For example, in a 1964 article the authors write: "Because the retailer does not have title in the goods and sells them as an agent for the manufacturer, there can be no conspiracy." Calvani & Berg, *supra* note 179, at 1178. The authors do not appear to state, however, that this is the law. Instead, their conclusion is offered as the reasoning with which one would support the legality of agency agreements.

209. In other words, the danger of prohibiting pro-competitive practices.

210. In the context of horizontal restraints, the process of revision is somewhat behind. It appears to be only a matter of time before the Court announces new directions in the context of the so-called per se rule against tying and the per se status of territorial divisions.

Miles. Now those cases are obsolete with respect to their service of the goal of avoiding antitrust errors and could subtract from the promise of a more substantive approach.

One of the series of cases analyzed here focused on the issue of when there was an agreement to fix prices and drew the line initially at any effort that went further than announcing price and not selling to those who did not adhere to that price. In reality, all of these arrangements could have been viewed as contracts under section 1 of the Sherman Act, but the emphasis on form over substance meant never reaching the issue of possible anticompetitive effects. After *Sylvania*, this focus on the concept of agreement continued as the Court wrestled with the problem that price restraints and nonprice restraints were assessed under two different standards. In order to ensure a rule of reason approach to nonprice restraints, the Court very narrowly defined what constituted an agreement on price.

Another series of cases concerns whether a product is involved in a resale or is sold a single time under a consignment agreement. This distinction also meant that the analysis veered from a substantive evaluation to questions of whether a resale took place.[211] The focus was entirely without economic content and concerned a refined yet formalistic analysis of what it means for a party to be an agent.

Leegin creates an opportunity to move the analysis to a more economically meaningful level that avoids the risks associated with the more formalistic approaches. Under the pre-*Leegin* approach, almost certainly anticompetitive arrangements persisted because they were classified as not involving agreements. Similarly, especially under the per se standard, arrangements without negative competitive effects were condemned. *Leegin* eliminates those types of errors. A broad interpretation of what constitutes an agreement does not create a risk of an ultimately incorrect decision. In order to reach this goal, it needs to be understood that *Dr. Miles*'s orphans no longer serve the purpose they once did, and that continuing to follow their analysis squanders the opportunity that *Leegin* offers.

211. In other words, were the parties employers and employees or separate entities?