

Franchising After *Leegin*: A License to Fix Prices?

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For decades, many franchisors and manufacturers have struggled with how to prevent discounting by franchisees, dealers, and distributors. This has been especially true in industries where low margins and free riding by discounters make it difficult for other franchisees, dealers, and distributors to meet their suppliers' standards for product promotion and support. Efforts by franchisors and manufacturers to police discounting, however, risk running afoul of antitrust law prohibitions against resale price maintenance, i.e., vertical¹ minimum price fixing. For nearly a century, resale price maintenance agreements have been held to be per se unlawful in violation of § 1 of the Sherman Act.² In other words, agreements fixing the minimum resale prices of franchisees, dealers, and distributors have been presumed to be unreasonable restraints of trade "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."³



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On June 28, 2007, however, the Supreme Court issued its long-awaited decision in *Leegin Creative Products, Inc. v. PSKS, Inc.*⁴ By a five-to-four margin,⁵ the Supreme Court overturned the per se condemnation of minimum resale price maintenance, opining that minimum vertical price fixing should instead be scrutinized under the rule of reason. The rule of reason is the "traditional framework of analysis" under § 1 of the Sherman Act.⁶ It requires the court to determine on a case-by-case basis whether the restraint in question "is one that promotes competition or one that suppresses competition."⁷

For antitrust law groupies, this change could not be more significant. But just how significant is this change, as a practical matter, for franchisors? Will it (or should it) really make a difference in the way in which they do business? Similarly, what effect will this change have on manufacturers that, like defendant in *Leegin*, sell their products through dealers, distributors, and other retail outlets that are not company-owned?

The dissent in *Leegin* predicted that this change "will likely raise the price of goods at retail and . . . create considerable legal turbulence as lower courts seek to develop workable principles." Although lucrative for trial lawyers, legal turbulence is not the desired objective of most franchisors and

manufacturers. It may be possible after *Leegin*, however, for franchisors and manufacturers to be more aggressive and effective in policing discounters without generating the legal equivalent of a hurricane, tropical storm, or other turbulence.

To help franchisors and manufacturers evaluate the risk of changing their practices in the wake of *Leegin* and understand why some changes may be riskier than others, this article first addresses (1) the context in which *Leegin* was decided, including just how much of a change from prior law it actually does and does not represent; and (2) exactly what the Supreme Court did and did not say in deciding *Leegin*. This article concludes with some recommended best practices for franchisors and manufacturers that have determined that discounting will undermine rather than strengthen their franchising and distribution systems.

Leegin in Context: Evolutionary or Revolutionary?

Many franchise lawyers, even when they have not just lost a case, often complain that judges do not understand franchising. From the reported decisions, however, it appears that at least some courts understand exactly what franchising is all about: "a sophisticated form of trademark licensing"⁸ in which the franchisee is licensed to use the franchisor's trademark to identify "a network of stores whose very uniformity and predictability attracts customers."⁹ These cases recognize that when a customer patronizes an establishment identified by the franchisor's trademark, the customer expects to have the same experience,¹⁰ regardless of where the business is located and regardless of whether it is operated by the franchisor or by an independent franchisee.

As a result, courts routinely allow franchisors to require that franchisees adhere to uniform system standards and, thus, a uniform appearance. Franchisors can require their franchisees to carry a uniform product offering, often purchased exclusively from the franchisor, its affiliate, or other designated suppliers. Franchisors can require franchisees to adhere to uniform hours of operation. Franchisors can even require their franchisees to wear uniform uniforms.

Historically, however, there has been one glaring exception to the uniformity that is otherwise characteristic of a franchise. When customers patronize a national chain that is completely company-owned and company-operated, they can expect that nationally advertised prices will, in fact, be available nationally. Yet that may not be true when they patronize a national chain that includes franchised outlets. To the contrary, many sales and other promotions advertised by franchisors (and by manufacturers whose products are sold through independent dealers and distributors) feature a disclaimer that the advertised prices are "available only at participating locations."

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Franchisors and manufacturers routinely reserve the contractual right to control virtually every other aspect of the operations of their franchisees, dealers, and distributors; yet many franchise, dealer, and distributor agreements expressly state that the manufacturer or franchisor does not control resale prices. Rather, pricing decisions are made independently by the franchisee, dealer, and distributor (or so the contracts say).

For most consumers, price is a key factor that determines what they will buy and where they will buy it. So why allow franchisees, dealers, and distributors to march to a different drummer when it comes to price? The answer is obvious, at least until recently. Most franchisors and manufacturers are savvy enough to avoid agreeing in writing to commit a felony: it is a federal crime to violate § 1 of the Sherman Act.¹¹ And private plaintiffs and their attorneys can recover awards of treble damages plus costs and attorney fees from those found to have violated the antitrust laws.¹²

Since 1911, when the Supreme Court decided *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, it has been per se unlawful under § 1 of the Sherman Act for franchisors to control the resale prices of their franchisees.¹³ “That *per se* rule,” according to the dissent in *Leegin*, “is one upon which the legal profession, business, and the public have relied for close to a century.” A review of antitrust jurisprudence suggests, however, that *Dr. Miles*, including not only its holding but also its rationale, had been steadily eroded by other Supreme Court decisions long before *Leegin*.

When it decided *Dr. Miles*, the Supreme Court did not distinguish between horizontal price fixing, i.e., agreements among firms at the same level of distribution, such as collusion among franchisors or manufacturers or collusion among competing franchisees, dealers, and distributors,¹⁴ and vertical price fixing, i.e., restrictions imposed by a firm at one level on firms at a different level, such as franchisor restraints on its franchisees. The ink was barely dry on *Dr. Miles*, however, when the Court announced the doctrine of *United States v. Colgate & Co.*¹⁵ In its 1919 decision in *Colgate*, the Supreme Court held that the Sherman Act § 1 does not prohibit a manufacturer from announcing a resale pricing policy and then refusing to do business with distributors that fail to adhere to the policy.¹⁶ This distinction between unilateral conduct and concerted activity is certainly faithful to the text of § 1 of the Sherman Act, which prohibits only “contracts, combinations, and conspiracies in restraint of trade.”¹⁷ However, there has been plenty of legal turbulence over the years as the courts have wrestled with whether various efforts to control resale prices are unilateral rather than the result of an unlawful contract, combination, or conspiracy in restraint of trade.

The end result has arguably been a trial lawyer’s dream and a client’s nightmare. From the case law, the distinction between permissible unilateral conduct and impermissible concerted action has not always been clear. For example, franchisors have been exonerated of claims for unlawful resale price maintenance if they merely engage in “exposition, persuasion, argument, or pressure” to encourage franchisees to decide independently to observe suggested resale prices.¹⁸ Other courts have held that a franchisor crosses the line

between permissible “exposition, persuasion, argument, or pressure” and impermissible “coercion” by making “threats of termination, as long as they secure adherence to the fixed price.”¹⁹ In other cases decided under the *Colgate* doctrine, courts have found no unlawful coercion where a franchisor merely suggests resale prices, or even where a franchisor advertises suggested resale prices.²⁰ Courts have found unlawful coercion, however, where a franchisor threatens sanctions for noncompliance with suggested prices,²¹ actually imposes sanctions for noncompliance,²² polices compliance with suggested resale prices,²³ or uses short-term leases and contracts that make it easier to terminate discounters.²⁴

Notwithstanding such precedents, is it really inconsistent with *Colgate* for a franchisor to threaten to terminate, or even to actually terminate, a discounter that deviates from suggested resale prices? Here is what the Supreme Court ultimately said on this issue in its 1984 decision in *Monsanto Co. v. Spray-Rite Service Corp.*: “Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer’s demand in order to avoid termination.”²⁵

The Supreme Court’s 1919 decision in *Colgate* played a prominent role in its June 28, 2007, decision in *Leegin*. In fact, the Court arguably could have decided *Leegin* on the basis of *Colgate* alone. At trial, defendant in *Leegin* contended that it had established a “unilateral pricing policy” that was permitted under *Colgate*.²⁶ In its opinion, however, the Supreme Court stated that “[o]n appeal *Leegin* did not dispute that it had entered into vertical price-fixing agreements with its retailers. Rather, it contended that the rule of reason should have applied to those agreements.”²⁷ Ultimately, the *Leegin* majority did not base its decision on whether defendant had a unilateral pricing policy that was permissible under *Colgate* or whether it had vertical price fixing agreements with its retailers that were per se unlawful under *Dr. Miles*. In *Leegin*, the Supreme Court found this distinction established by its prior precedents unpersuasive because “[t]he economic effects of unilateral and concerted price setting are in general the same.”²⁸ These economic effects were, in the view of the *Leegin* majority, decisive because the per se rule is supposed to be reserved for restraints that “always or almost always tend to restrict competition and decrease output.”²⁹

With respect to vertical price fixing, *Colgate* may have been the very first Supreme Court decision to represent a retreat from *Dr. Miles*. The Supreme Court decision that eventually proved to be the death knell for the per se prohibition of resale price maintenance, however, was most likely the 1977 decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*³⁰ In *GTE Sylvania*, the Supreme Court held that vertical nonprice restraints would henceforth be judged under the rule of reason rather than the per se rule.³¹ More important than the holding of *GTE Sylvania* was its rationale. First and foremost, the Supreme Court in *GTE Sylvania* announced that interbrand competition, i.e., competition among sellers of different brands, is the primary concern of antitrust law.³² At the same time, the Supreme Court recognized in *GTE Sylvania* that

vertical nonprice restraints may “promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.”³³

Thirty years later, in deciding *Leegin*, the Supreme Court found that each of the potentially procompetitive justifications for vertical nonprice restraints that it had articulated in *GTE Sylvania* could apply with equal force to vertical price restraints as well. Like vertical nonprice restraints on intrabrand competition, the *Leegin* Court found, the elimination of intrabrand price competition “encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer’s position as against rival manufacturers.”³⁴ In addition, “[r]esale price maintenance [] has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.”³⁵ One of the principal procompetitive justifications for vertical nonprice restraints, the elimination of free riding by other franchisees, dealers, and distributors, applies with equal force to resale price maintenance, the *Leegin* Court found.³⁶ Resale price maintenance can also increase interbrand competition, according to the *Leegin* majority, “by facilitating market entry for new firms and brands”³⁷ and “by encouraging retailer services that would not be provided even absent free riding.”³⁸ The Supreme Court’s observations about retailer services are particularly germane to the system standards that franchisors typically seek to impose on franchisees:

It may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer’s market share by inducing the retailer’s performance and allowing it to use its own initiative and experience in providing valuable services.³⁹

During the thirty years between *GTE Sylvania* and *Leegin*, the Supreme Court decided four other cases that make the outright reversal of *Dr. Miles* perhaps not so surprising after all, at least in hindsight. These four decisions are as follows:

1. The 1984 decision in *Spray-Rite* holding that under the *Colgate* doctrine, the fact that a franchisee is terminated following complaints from other franchisees about its discounting is insufficient proof of concerted action.⁴⁰
2. The 1988 decision in *Business Electronics Corp. v. Sharp Electronics Corp.* holding that to be per se unlawful, a vertical restraint of trade must include some agreement on price or price levels.⁴¹
3. The 1990 decision in *Atlantic Richfield Co. v. U.S.A. Petroleum Co. (Arco)* holding that (1) competitors of a franchisor and its franchisees generally lack standing to pursue claims that a franchisor and its franchisees engaged in maximum resale price maintenance, as long as the franchisor and its franchisees were not selling below cost;⁴² and (2) a franchisor’s own franchisees also lack standing to assert vertical maximum price fixing

claims except under certain circumstances, including the inability of franchisees to provide necessary services in conjunction with the sale of products at the low prices allegedly fixed by the franchisor.⁴³

4. The 1997 decision in *State Oil Co. v. Khan* holding that maximum resale price maintenance is no longer per se unlawful.⁴⁴

Foreseeable or not, *Leegin* does not necessarily give franchisors carte blanche to fix minimum resale prices; that much is clear from what the majority opinion in *Leegin* actually said, as well as what it did not say.

Minimum Resale Price Maintenance

By holding that vertical minimum price fixing is no longer per se illegal, the Supreme Court did not hold that vertical minimum price fixing is always legal. To be sure, though, proving that a restraint of trade is unreasonable under the rule of reason is more difficult for a plaintiff than establishing a per se violation. The *Leegin* majority specifically identified several circumstances in which vertical minimum price fixing may be anticompetitive; these include resale price maintenance that

1. facilitates a horizontal cartel among franchisors or manufacturers;⁴⁵
2. facilitates a horizontal cartel among franchisees, dealers, or distributors;⁴⁶ or
3. makes it easier for a dominant seller (either a franchisor or manufacturer or a downstream franchisee, dealer, or distributor) to abuse its market power.⁴⁷

Under any of these three scenarios, an aggrieved consumer, an injured franchisee, or a competitor of a franchisee or franchisor that has suffered competitive injury has remedies under federal antitrust laws. These remedies are not necessarily limited to establishing a Sherman Act § 1 violation under the rule of reason. When resale price maintenance in fact facilitates a horizontal cartel, horizontal price fixing remains as per se unlawful today as it was back in 1911 when *Dr. Miles* was decided. A dominant seller with monopoly power faces liability for monopolization, attempted monopolization, or conspiracy to monopolize in violation of the Sherman Act § 2. And the abuse of market power can, under certain circumstances, establish liability for per se unlawful tying in violation of § 1 of the Sherman Act and exclusive dealing in violation of § 3 of the Clayton Act.

By holding that vertical minimum price fixing is no longer per se unlawful under § 1 of the Sherman Act, the Supreme Court did not necessarily change state antitrust law. Certainly, many states look to decisions under § 1 of the Sherman Act in interpreting state law prohibitions on restraints of trade and state Little FTC Acts. In fact, some state laws expressly reference their federal counterparts and state that they are to be construed similarly. Few, if any, state antitrust and unfair competition laws, however, must be construed consistently with their federal counterparts. After *Leegin*, state enforcement authorities still retain the discretion to prosecute vertical minimum price fixing. Some indication of states’ sentiments may be evident from the fact

that various state attorneys general, represented by the National Association of Attorneys General (NAAG), filed an amicus brief seeking a contrary result in *Leegin*. Of course, NAAG also favored retaining the per se prohibition against maximum resale price maintenance, yet its members did not seem particularly active in prosecuting vertical maximum price fixing after the Supreme Court decided *Khan*.

In terms of jury appeal and political popularity, however, there may be a significant downside for a prosecutor who goes after a franchisor that has tried to force its franchisees to charge lower prices. That downside risk may not be present when a prosecutor goes after a franchisor that wants to end discounting. Regardless of what the economic literature cited by the *Leegin* majority has to say, the potential benefits of minimum resale price maintenance may not be intuitively obvious to the jurors, judges, and/or arbitrators called upon to decide its legality. Indeed, these potential benefits were ultimately not persuasive for the four Supreme Court Justices that dissented in *Leegin*.

Last, but not least, the Supreme Court's decision in *Leegin* did not amend the numerous franchise, dealer, and distributor contracts proclaiming that the franchisor or manufacturer has no right to control resale prices. Many of these contracts are long-term or even evergreen, or have become perpetual in duration as the result of state relationship laws prohibiting termination or nonrenewal. The contractual recitals that franchisees, dealers, and distributors are free to make resale pricing decisions independently and unilaterally were obviously written in light of the per se prohibition against resale price maintenance. The fact that resale price maintenance is no longer per se unlawful, however, does not mean that parties cannot agree not to engage in resale price maintenance. When the Supreme Court held that resale price maintenance is no longer per se unlawful, it said nothing about contracts prohibiting resale price maintenance. There is no reason that private parties cannot agree to refrain from engaging in an activity, e.g., resale price maintenance, that may be permitted by federal antitrust law (or may not be, depending upon whether it passes muster under the rule of reason). In short, the Supreme Court's decision in *Leegin* may not provide a viable defense to a breach of contract claim.

Dos and Don'ts After *Leegin*

If a franchisor or manufacturer wishes to be relatively aggressive in availing itself of *Leegin*, it may have viable defenses; experienced antitrust counsel will likely be able to defend aggressive franchisor policing of discounters. For those franchisors and manufacturers that would prefer not to generate legal turbulence, however, it may be preferable to follow a belt-and-suspenders approach. In practice, that means adopting policies and practices for which there was a viable antitrust defense even before *Leegin* was decided. The following recommended best practices are consistent with such a conservative approach:

1. Verify that the effort to police discounting does not run afoul of any contractual provisions.

As previously discussed, the Supreme Court's decision in *Leegin* does not trump any contractual provisions that may prohibit resale price maintenance. Besides reviewing the

franchise or other distribution agreement, counsel should also review any documents incorporated by reference therein, such as operations and policy manuals that may or may not address resale price maintenance. Ideally, the franchise or distribution agreement will contain a merger and integration clause that hopefully will bar the introduction of parol evidence to vary its terms. It might, nevertheless, be prudent to interview key personnel simply to verify that there have been no such oral promises because franchisee counsel often attempt to use them to avoid the plain language of the contracts that their clients have signed.

2. Verify that the impetus for minimum resale price maintenance came from the top down (in other words, from the franchisor or manufacturer) rather than from franchisees, dealers, or distributors.

The reason for this recommendation should be obvious in light of the foregoing discussion of not only the antitrust jurisprudence that preceded *Leegin* but also *Leegin* itself. If the restraint comes from franchisees, dealers, or distributors, it may be considered horizontal.

It is tempting to assume that restrictions imposed by franchisors and manufacturers on their franchisees, dealers, and distributors are vertical, but this temptation should be resisted. One reason is that most franchisors and many manufacturers engage in dual distribution. Franchisors often have company stores in addition to franchisees. Manufacturers also may own retail outlets or otherwise sell direct on the Internet and through more traditional means. As a result, franchisors and manufacturers may have both a vertical relationship (as a supplier) and a horizontal relationship (as a competitor) with their franchisees, dealers, and distributors.

In most cases involving dual distribution, courts have at least presumed, if not explicitly held, that the relationship is vertical.⁴⁸ The Second,⁴⁹ Seventh,⁵⁰ Ninth,⁵¹ and Tenth⁵² Circuits analyze all dual distributorships as vertical restraints subject to the rule of reason. Before 1980, however, dual distributorships were treated as horizontal in the Second, Third, and Fifth Circuits. Of these courts, all but the Third Circuit has issued a later ruling that such arrangements could be vertical.⁵³

In some circuits, a factual analysis is required to determine whether a dual distributorship is horizontal or vertical. In determining whether dual distributorships are vertical, the Fourth,⁵⁴ Fifth,⁵⁵ Sixth,⁵⁶ Eighth,⁵⁷ and Eleventh⁵⁸ Circuits have examined the source, purpose, and effect of supplier-imposed restraints. In each case, the court found that the restraint's financial benefits to the supplier arose from increased interbrand competition, not reduced intra-brand competition. As a result of these factual findings, these courts found the dual distribution networks under review to be vertical. These courts have also recognized, however, that such agreements could be considered horizontal if the benefits accrued primarily to the dealers rather than to the manufacturer.⁵⁹

A second and related reason for verifying that the franchisor or the manufacturer was the source of the restraint is that even where there is no dual distribution, an apparently

vertical agreement could be viewed as a proxy for a per se unlawful horizontal agreement. For example, the Supreme Court found a per se illegal horizontal price fixing agreement where, having conspired to boycott discounting dealers, a group of General Motors dealers and their trade association procured an agreement from General Motors to boycott the discounters.⁶⁰ Horizontal agreements among competitors remain just as unlawful after *Leegin* as they were before.

3. Verify that there is no other potential basis for antitrust liability.

Although resale price maintenance is no longer per se unlawful, the per se rule is alive and well when it comes to other types of restraints, including horizontal market allocation, horizontal price fixing, group boycotts, and tying. If the franchisor or manufacturer has an unusually high market share, if virtually everyone else in the industry is also engaged in minimum resale price maintenance, or if the impetus for the restraint arguably came from downstream franchisees, dealers, or distributors, the franchisor or manufacturer could face per se liability after all. Also, as previously discussed, *Leegin* does not affect the prohibitions under Sherman Act § 2 against monopolization, attempted monopolization, and conspiracies to monopolize.

4. Use vertical nonprice restraints instead of, or in addition to, vertical price restraints.

As previously discussed, the three decades of antitrust jurisprudence since *GTE Sylvania* have confirmed that vertical nonprice restraints generally survive rule of reason scrutiny. Many of these nonprice restraints, such as exclusive territories and location clauses, may be nearly as effective as resale price maintenance in prohibiting free riding and the other perceived evils of discounting. In some cases, such vertical nonprice restraints might be used in lieu of price restraints. At the very least, they provide a second line of defense for accomplishing the objectives of the franchisor or manufacturer.

5. Provide incentives for adherence to suggested resale prices instead of, or in addition to, sanctions for noncompliance.

Although the cases decided under the *Colgate* doctrine are not always consistent with one another, they do make clear that it is not unlawful to refuse to deal unilaterally with discounters or to provide incentives for franchisees, dealers, and distributors to comply with suggested resale prices. Adopting pricing policies that can be defended as unilateral and/or as incentive programs thus may help reduce potential antitrust liability. In addition, such carrots may be more effective than the stick of contractual provisions in securing compliance.

Time will tell whether the legal turbulence predicted by the dissent in *Leegin* will, in fact, materialize. Judge Scalia's dissent to the Supreme Court's 1992 landmark tying decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*,⁶¹ predicted that the majority's opinion "threatens to release a torrent of litigation and a flood of commercial intimidation."⁶² As it turned out, however, *Kodak* required few, if any, franchisors and manufacturers to start loading up the ark. *Kodak* spawned more articles

and speeches by franchise and antitrust lawyers, including the author, than it did reported cases. And most of the reported cases upheld the right of the franchisor or manufacturer to require purchases by franchisees, dealers, and distributors as long as the contractual right to do so had been disclosed and reserved up front.⁶³

Given the costs and risks of antitrust litigation, however, franchisors and manufacturers may want to take steps to help reduce the risk that their names will be part of the names of landmark antitrust cases.

Endnotes

1. Vertical restraints are imposed by a firm at one level of the market on firms at a different level. For example, restrictions imposed by a franchisor on its franchisees and restrictions imposed by a manufacturer on its dealers or distributors are more likely than not to be considered vertical. *See generally* *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 378–79 (1967); *United States v. Sealy, Inc.*, 388 U.S. 350, 352–54 (1967).

Horizontal restraints involve firms at the same level of the market, such as franchisors or manufacturers that compete with one another. Horizontal restraints can also result from agreements among competing franchisees, dealers, or distributors. Horizontal restraints are more likely to be per se unlawful under § 1 of the Sherman Act because they frequently are "naked restraints of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

2. 15 U.S.C. § 1.

3. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

4. 127 S. Ct. 2705 (2007).

5. The majority opinion, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined, was delivered by Justice Kennedy. Justice Breyer filed a dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined.

6. *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

7. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978).

8. *Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc.*, 754 F.2d 91, 97 (2d Cir. 1985).

9. *Principe v. McDonald's Corp.*, 631 F.2d 303, 309 (4th Cir. 1980).

10. *See, e.g., Susser v. Carvel Corp.*, 206 F. Supp. 636, 640 (S.D.N.Y. 1962) ("The cornerstone of a franchise system must be the trade name or trademark of a product. It is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for the product."), *aff'd*, 332 F.2d 505 (2d Cir.), *cert. granted*, 379 U.S. 885 (1964), *cert. dismissed*, 381 U.S. 125 (1965).

11. 15 U.S.C. § 1.

12. 15 U.S.C. § 15(a).

13. 220 U.S. 373 (1911).

14. *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

15. 250 U.S. 300 (1919).

16. *Id.* at 307.

17. 15 U.S.C. § 1.

18. *See, e.g.*, *Gray v. Shell Oil Co.*, 469 F.2d 742, 747 (9th Cir. 1972) (jury was properly instructed that “the ‘decisive’ issue before them was whether Shell dealers were free to make their own pricing decisions or whether Shell deprived its dealers of their free choice by use of affirmative conduct”), *cert. denied*, 412 U.S. 943 (1973); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 806 (9th Cir. 1976) (“Taken in its entirety, the letter does not amount to coercion, but relies on ‘individual self-interest to bring about general voluntary acquiescence.’”) (quoting *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46–47 (1960)), *cert. denied*, 433 U.S. 910 (1977).

19. *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 53 (2d Cir. 1980).

20. *See, e.g.*, *Martindell v. News Group Publ’ns, Inc.*, 621 F. Supp. 672 (E.D.N.Y. 1985); *Engbrecht v. Dairy Queen Co. of Mex., Mo.*, 203 F. Supp. 714, 719 (D. Kan. 1962).

21. *See, e.g.*, *Yentsch*, 630 F.2d at 53; *Bowen v. N.Y. News, Inc.*, 522 F.2d 1242, 1254 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976); *Girardi v. Gates Rubber Co. Sales Div., Inc.*, 325 F.2d 196, 198 (9th Cir. 1963).

22. *See, e.g.*, *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 38 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972).

23. *See, e.g.*, *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711, 716 (S.D.N.Y.), *aff’d per curiam*, 417 F.2d 621 (2d Cir. 1969).

24. *See, e.g.*, *Sahm v. V-1 Oil Co.*, 402 F.2d 69, 71–72 (10th Cir. 1968).

25. 465 U.S. 752, 761 (1984).

26. *Leegin Creative Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007).

27. *Id.*

28. *Id.* at 2722.

29. *Id.* at 2717 (quoting *Bus. Elecs. v. Sharp Elecs.*, 485 U.S. 717, 723 (1988)).

30. 433 U.S. 36 (1977).

31. *Id.* at 59.

32. *Id.* at 52 n.19.

33. *Id.* at 54.

34. *Leegin*, 127 S. Ct. at 2715.

35. *Id.*

36. *See id.* (“Consumers might learn, for example, about the benefits of a manufacturer’s product from a retailer that invests in the showrooms, offers product demonstrations, or hires and trains knowledgeable employees. . . . Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise. . . . If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer’s retailers compete among themselves over services.”) (internal citations omitted).

37. *Id.* at 2716.

38. *Id.*

39. *Id.* (internal citations omitted).

40. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (“The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.”).

41. 485 U.S. 717 (1988).

42. 495 U.S. 328 (1990).

43. *Id.* at 345. *See also* *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 37 F.2d 698, 708–09 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984); *Slowiak v. Hudson Foods, Inc.*, 1992 Trade Cas. (CCH) ¶ 69,821 (W.D. Wis. 1992), *aff’d on other grounds*, 987 F.2d 1293 (7th Cir. 1993).

44. 522 U.S. 3 (1997).

45. *See Leegin Creative Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2716 (2007) (“An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel’s fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers.”) (internal citations omitted).

46. *See id.* at 2717 (“A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement.”) (internal citations omitted).

47. *See id.* (“A dominant retailer, for example, 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. . . . A manufacturer with market power, by comparison, might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants.”) (internal citations omitted).

48. The Supreme Court has indirectly ruled that dual distributorships involve only vertical restraints. In *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), and *White Motor Co. v. United States*, 372 U.S. 253 (1963), the Court did not address the dual distribution aspect of the cases. Instead, its holdings were based on the premise that the distribution systems in question were vertical. “Both times it has faced the issue, the Supreme Court has, *sub silentio*, treated dual distribution systems as imposing only vertical restraints.” *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1355 (9th Cir. 1982). The Ninth Circuit noted, though, that “the

Court's silence is an unsteady foundation upon which to base a decision." However, in 1999, the Ninth Circuit directly cited *White Motor* to support its statement that dual distributorships were vertical: "[I]n *White Motor Co. v. United States*, the Supreme Court indicated that a similar system, where a truck manufacturer sold both to dealers and directly to certain customers while forbidding the dealer to sell to these customers, was a vertical system." *Compare id.* at 1355, with *Ajir v. Exxon Corp.*, 1999 U.S. App. LEXIS 11046, at *11 (9th Cir. May 26, 1999).

49. *See, e.g., Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods.*, 129 F.3d 240, 243 (2d Cir. 1997) ("[V]ertical restraints are generally subject to 'rule of reason' analysis. . . . This is so even if the distributor and manufacturer also compete at the distribution level."); *Copy-Data Sys. v. Toshiba Am.*, 663 F.2d 405, 409 (2d Cir. 1981) (citing "the Supreme Court's dictate that 'departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing'").

50. *See, e.g., Ill. Corporate Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751, 753 (7th Cir. 1989) ("Dual distribution . . . does not subject to the per se ban a practice that would be lawful if the manufacturer were not selling direct to customers; antitrust laws encourage rather than forbid this extra competition.").

51. *See, e.g., Ajir*, 1999 U.S. App. LEXIS 11046, at *11 ("Such hybrid [dual distribution] relationships are treated under the law as vertical relationships.").

52. *See, e.g., Dart Indus., Inc. v. Plunkett Co. of Okla., Inc.*, 704 F.2d 496, 499 (10th Cir. 1983); *Smalley & Co. v. Emerson & Cuming, Inc.*, 13 F.3d 366, 368 (10th Cir. 1993).

53. *See Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1975). *Compare Hobart Bros. Co. v. Gilliland, Inc.*, 471 F.2d 894 (5th Cir. 1973), with *Red Diamond Supply v. Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981), and *Midw. Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705 (11th Cir. 1984); *compare Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y. 1969), *aff'd on other grounds*, 417 F.2d 621 (2d Cir. 1969), with *Copy-Data Sys.*, 663 F.2d at 405.

54. *See Hampton Audio Elecs., Inc. v. Contel Cellular, Inc.*, 1992 U.S. App. LEXIS 13620, at *8 (4th Cir. Jun. 10, 1992) ("[Dual distributorship] restrictions are subject to the 'rule of

reason' analysis if the restrictions 'redound[] primarily to the benefit of the manufacturer as a result of increased interbrand competition.'"); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16-17 (4th Cir. 1981) ("We accept the district court's rule of reason discussion, which clearly indicates that the restraints were for the purpose of promoting interbrand competition.").

55. *See Abadir & Co. v. First Miss. Corp.*, 651 F.2d 422, 426 (5th Cir. 1991) ("The rationale for each per se rule is an economic analysis of . . . the potential economic advantages which might motivate the parties. . . . Because the potential economic advantages . . . are those characteristic of a vertical . . . agreement, the per se horizontal rule does not apply."); *see Red Diamond Supply, Inc.*, 637 F.2d 1001, 1004 (5th Cir. 1981) ("When the manufacturer is the source, the conspiracy is vertical.").

56. *See Int'l Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 906 (6th Cir. 1989) ("[T]he implemented marketing policies were 'vertical.' . . . [A]lthough some minimal horizontal competitive effects may have resulted, the marketing policies . . . were not directed toward . . . parties at the same competitive level even though Chrysler, the manufacturer, was also a distributor.").

57. *See Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1231 (8th Cir. 1987) ("If evidence is consistent with the hypothesis that the firm at the top of the vertical chain designed the restrictions for its own purposes, an inference of [horizontal] conspiracy is inappropriate.").

58. *See Midw. Waffles*, 734 F.2d at 721 ("Because there is no evidence [the restraint] . . . has the tendency to reduce interbrand competition, reduce the availability of services . . . , or artificially maintain prices, a rule of reason analysis is appropriate.").

59. *See, e.g., Donald B. Rice Tire Co.*, 638 F.2d at 16-17.

60. *United States v. Gen. Motors Corp.*, 384 U.S. 127, 146 (1966).

61. 504 U.S. 451 (1992).

62. *Id.* at 489 (Scalia, J., dissenting).

63. *See, e.g., Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 129 F.3d 724 (3d Cir. 1997); *Little Caesar Enters., Inc. v. Smith*, 34 F. Supp. 2d 459 (E.D. Mich. 1998); *Wilson v. Mobil Oil Corp.*, 984 F. Supp. 450 (E.D. La. 1997).