

**A Step Back from Substantive Competition Policy Convergence:  
The International Implications of *Leegin Creative Leather  
Products, Inc. v. PSKS, Inc.*<sup>1</sup>**

*“Designer blue jeans. PING® custom-fit golf clubs. Breitling watches. Producers of these and other high-end consumer goods have at one time or another tried to insist that retailers adhere to minimum resale prices in order to preserve their images in the marketplace. For 96 years, those manufacturers have faced a Hobson’s Choice in the United States: impose an inflexible, unilaterally determined resale pricing policy, or have no policy at all. In Canada, the U.S.’s largest trading partner, those same manufacturers have been denied the opportunity to control, or even attempt to control, resale prices through anything more forceful than a mere suggestion about the resale price. For companies that do business in the United States and Canada, managing these legal differences raised some difficult issues, but at least the rules in both countries were fairly straightforward. Recent developments suggest that this may no longer be the case.”<sup>2</sup>*

I. INTRODUCTION

In a speech before the Antitrust 1996 Conference, Former Federal Trade Commissioner Roscoe B. Starek, III commented on the trend of many of the U.S.’s trading partners to enact new antitrust laws, stating that “[a]ny firm engaged in international transactions ignores these developments at its peril.”<sup>3</sup> These words of caution gained even more relevance when, on June 28, 2007, the United States Supreme Court decided *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>4</sup> in which the Court overturned nearly a century of antitrust law in the area of minimum resale price maintenance (RPM).<sup>5</sup>

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1. 127 S. Ct. 2705 (2007).

2. M. Russell Wofford, Jr. et al., *Leegin: Challenge or Opportunity for Cross-Border Trade?*, METROPOLITAN CORP. COUNSEL, Oct. 2007, at 53.

3. Roscoe B. Starek, III, Comm’r, Fed. Trade Comm’n, Prepared Remarks before the Antitrust 1996 Conference: International Aspects of Antitrust Enforcement (Sept. 29, 1995), available at <http://www.ftc.gov/speeches/starek/starekda.shtm>.

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

5. See Michael Komenda, *Recent Development: The Course Correction A Century in the Making: Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), 31 HARV. J.L. & PUB. POL’Y 855, 856 (2008) (stating *Leegin* reversed 96-year-old rule). “Vertical RPM is a business practice whereby a

As a result of *Leegin*, United States federal courts now evaluate minimum RPM under a “rule of reason,” as opposed to the longstanding rule of per se illegality.<sup>6</sup> This decision places United States RPM policy at odds with the policies of many important trading partners, including Canada and the European Union (EU).<sup>7</sup>

In the wake of *Leegin*, companies engaged in cross-border transactions face a great deal of uncertainty regarding how to take advantage of the increased freedom afforded by this new United States policy.<sup>8</sup> A company either undertakes to manage different pricing policies in each jurisdiction, risks the threat of prosecution in certain jurisdictions, or follows the strictest policy in all jurisdictions—none of which are ideal options.<sup>9</sup>

This Note will examine the potential complications of the fact that *Leegin* now sets the United States at odds with many of its major trading partners in the area of RPM, and the ramifications of that divide.<sup>10</sup> Part II.A reviews the development of United States antitrust law in the area of RPM.<sup>11</sup> Part II.B discusses the details of the *Leegin* decision, and Part II.C addresses both federal and state reaction to the outcome of the case.<sup>12</sup>

Part II.D then explores international competition law and the implications of *Leegin* in a global sense, focusing on the interplay between United States

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manufacturer sets a minimum price that retailers must observe as a condition of selling a product.” Ashley Doty, Note, *Leegin v. PSKS: New Standard, New Challenges*, 23 BERKELEY TECH. L.J. 655, 657 (2008) (defining vertical minimum RPM).

6. See *Leegin*, 127 S. Ct. at 2720 (holding rule of reason appropriate standard for minimum RPM). A “rule of reason” in the area of antitrust law is characterized by weighing all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. See *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) (defining rule of reason). Conversely, a “per se rule” is a rule that treats categories of restraints as necessarily illegal, thus eliminating the need to study the reasonableness of an individual restraint in light of the real market forces. See *Bus. Elect. Corp. v. Sharp Elect. Corp.*, 485 U.S. 717, 723 (1988) (defining per se rule).

7. See *infra* notes 69-76 and accompanying text (explaining *Leegin* widens gap between U.S. RPM policy and other countries’ policies).

8. See Thomas B. Leary & Erica S. Mintzer, *The Future of Resale Price Maintenance, Now that Doctor Miles is Dead*, 4 N.Y.U. J.L. & BUS. 303, 333 (2007) (explaining speculative nature of attempts to predict future of RPM after *Leegin*). The United States has not seen a significant influx in companies attempting to take advantage of the flexibility afforded by the new policy since the *Leegin* decision. See Matthew E. Moloshok, *A Year of Living with Leegin*, GLOBAL COMPETITION REVIEW, 2009, available at <http://www.globalcompetitionreview.com/reviews/9/sections/29/chapters/353/a-year-living-leegin/> (stating little has changed since *Leegin* to resolve uncertainty). While *Leegin* offers new opportunities to reformulate retail pricing policies, conflicting international antitrust policies make the footing potentially treacherous for U.S. companies engaged in cross-border activities. See Wofford et al., *supra* note 2 (stating conflicting international antitrust policies potentially problematic for companies engaged in cross-border transactions).

9. John M. Majoras, *Harmonizing the Globalization of Antitrust Laws*, METROPOLITAN CORP. COUNSEL, Oct. 2007, at 6, available at <http://metrocorpcounsel.com/pdf/2007/october/06.pdf> (asserting conflicting policies defaults to most aggressive enforcement).

10. See *infra* Parts II-III (addressing problematic international consequences and potential solutions of *Leegin* decision).

11. See *infra* Part II.A (covering Sherman Act and major federal case law on RPM).

12. See *infra* Parts II.B-C (describing *Leegin* decision and potential resistance in states and Congress).

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antitrust laws and the laws of both Canada and the EU.<sup>13</sup> Parts II.D.1-2 focus on the substantive antitrust law on RPM in Canada and the EU.<sup>14</sup> Part II.D.3 discusses the mechanics of the exposure of a United States company when engaging in practices that violate foreign antitrust laws.<sup>15</sup> Part II.E then surveys the general trend toward harmonization of international antitrust policy and the efforts of jurisdictions such as Canada and the EU to conform with United States practices.<sup>16</sup>

Part III analyzes the challenges posed by the divergence of United States and international law, and the possibilities for resolution.<sup>17</sup> Part III.A focuses specifically on the options available to companies engaged in cross-border trade and interested in taking advantage of the new federal law in the United States.<sup>18</sup> Part III.B examines the likelihood for resolution and convergence of substantive law on minimum RPM.<sup>19</sup> Part III.B.1 discusses the potential that the states or Congress will overturn *Leegin* in the United States.<sup>20</sup> Part III.B.2 evaluates the possibility that either Canada or the EU will modify their laws to align with the United States.<sup>21</sup> Part III.B.3 explains that, because of the focus on international convergence of competition policy, the United States domestic response to *Leegin* will likely play a role in determining the actions of Canada and the EU.<sup>22</sup>

This Note concludes by asserting that the recent emphasis on convergence will likely motivate Canada and the EU to reconsider their RPM policies in light of the *Leegin* decision, though the uncertainty in the domestic application of *Leegin* will likely require a waiting period for both the United States and foreign jurisdictions to observe the effects of this precedent.<sup>23</sup>

## II. HISTORY

### A. *Development of United States Antitrust Law in the Area of Resale Price Maintenance*

Antitrust law in the United States is largely based on the Sherman Act of

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13. See *infra* Part II.D (discussing complications arising from Canada and EU retaining per se rule after *Leegin*).

14. See *infra* Parts II.D.1-2 (covering substantive RPM law in Canada and EU).

15. See *infra* Part II.D.3 (discussing foreign legal exposure for anti-competitive conduct).

16. See *infra* Part II.E (describing international emphasis on harmonization of antitrust law).

17. See *infra* Part III (opining current situation impracticable).

18. See *infra* Part III.A (asserting options are ignore foreign law, ignore *Leegin*, or attempt to follow both).

19. See *infra* Part III.B (evaluating potential for change in substantive RPM law in United States, Canada, or EU).

20. See *infra* Part III.B.1 (opining states likely to resist *Leegin*, while federal legislation less likely).

21. See *infra* Part III.B.2 (noting competition policy revisions more likely for Canada than EU).

22. See *infra* Part III.B.3 (suggesting U.S. reaction to *Leegin* may influence EU and Canadian policy changes).

23. See *infra* Part IV (concluding resolution on RPM policy likely left unsettled for near future).

1890.<sup>24</sup> Congress enacted the Sherman Act, which effectively prohibits monopolies and contracts that unreasonably interfere with free trade, to promote competition in commerce.<sup>25</sup> Minimum RPM is one type of trade restraint regulated by section 1 of the Sherman Act, which makes illegal “every contract . . . or conspiracy, in restraint of trade or commerce . . . .”<sup>26</sup> Though it is possible to interpret that language to render all contracts in any context unlawful, the Supreme Court has never taken such a “literal approach.”<sup>27</sup>

While the Sherman Act sets the basic framework, actual enforcement under the statute arises primarily through judicial interpretations.<sup>28</sup> Based on the common-law standard that a restraint on alienation is void if unreasonable, courts traditionally applied the rule of reason when testing whether a practice restrains trade in violation of the Sherman Act.<sup>29</sup> Nevertheless, some types of restraints are deemed per se unlawful.<sup>30</sup> Courts evaluated minimum RPM under the rule of reason until 1911, when the Supreme Court decided *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, holding that vertical RPM is per se illegal under both the Sherman Act and at common law.<sup>31</sup> The Court stated that “agreements 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.”<sup>32</sup>

Only eight years later, the Court limited the effects of its strict holding in *Dr. Miles* when it decided *United States v. Colgate & Co.*<sup>33</sup> In *Colgate*, the Court held that a manufacturer has the right to exercise unilaterally its discretion as to with whom it will deal, and can refuse to deal with distributors that do not

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24. See generally Sherman Act, 15 U.S.C. §§ 1-7 (2009) (codifying law against trade restraints in United States).

25. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (stating Sherman Act “designed to . . . preserv[e] free and unfettered competition”); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (explaining Sherman Act prohibits monopolies, contracts, and combinations interfering with free trade and commerce). The Sherman Act is based on the idea that unrestrained competition will result in the best allocation of resources, lower prices, and higher quality. *N. Pac. Ry. Co.*, 356 U.S. at 4.

26. 15 U.S.C. § 1 (2009) (outlining federal antitrust laws).

27. See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (stating Court traditionally interprets § 1 to outlaw only unreasonable restraints).

28. See *infra* notes 29-36 and accompanying text (describing major Supreme Court RPM decisions).

29. See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 406 (1911) (explaining earlier common law doctrine).

30. See *Leegin*, 127 S. Ct. at 2712-13 (stating rule of reason generally accepted standard under § 1). The Court has, reluctantly, applied the per se rule to certain restraints but only in particular circumstances—when the courts have had much experience with the particular type of restraint and when it would be invalidated in almost all instances under the rule of reason. See *id.* at 2713 (describing appropriate circumstances for adopting per se standard). One type of restraint that is per se unlawful is a horizontal agreement among competitors to fix prices or to divide markets. See *id.* at 2717 (differentiating horizontal agreements from vertical agreements).

31. See *Dr. Miles*, 220 U.S. at 408 (holding minimum RPM per se illegal).

32. *Id.* The *Dr. Miles* Court distinguished RPM from other post-sale restraints such as the sale of a business or the grant of a right to use a process of manufacture, which were typically analyzed under a rule of reason. See *id.* at 407 (explaining difference between price fixing and other restraints on alienation).

33. See generally 250 U.S. 300 (1919) (narrowing *Dr. Miles* holding).

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follow pricing suggestions.<sup>34</sup> The Court distinguished *Colgate* from *Dr. Miles* by reasoning that *Dr. Miles* involved contracts that prevented dealers from freely exercising the right to sell, whereas *Colgate* involved no such contracts.<sup>35</sup>

### B. *The Leegin Decision*

Beginning with *Colgate*, and for the next several decades, the Supreme Court chipped away at the foundation of *Dr. Miles*, finally overruling that precedent in its 5-4 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>36</sup> Leegin Creative Leather Products (Leegin) designed, manufactured, and distributed women's fashion accessories under the brand name "Brighton" to over five thousand small boutiques and specialty stores across the United States.<sup>37</sup> Kay's Kloset was one such specialty store that sold Brighton goods.<sup>38</sup>

In 1997, Leegin instituted the "Brighton Retail Pricing and Promotion Policy," through which Leegin refused to sell to retailers who discounted Brighton goods below suggested prices.<sup>39</sup> In December 2002, Leegin discovered Kay's Kloset had been marking down Brighton's entire line by twenty percent.<sup>40</sup> When Kay's Kloset refused to stop discounting, Leegin refused to continue selling to the store.<sup>41</sup>

PSKS sued Leegin for engaging in the then-prohibited practice of minimum RPM.<sup>42</sup> The District Court for the Eastern District of Texas refused to allow

34. *See id.* at 307-08 (distinguishing *Colgate* from *Dr. Miles* because no contract involved in *Colgate*). In *Colgate*, the United States charged the defendant, Colgate & Company, with engaging in minimum RPM and therefore violating the Sherman Act. *See id.* at 302-03. Colgate & Company, which manufactured and sold soap and toilet products, supposedly urged its retailers and dealers to adhere to certain sales prices, on the condition that no sales would be made to non-adherents.. *See id.* at 303. However, Colgate did not enter into contracts with any of the retailers to set resale prices, and it is upon that fact that the Court based its holding that Colgate had not violated the Sherman Act. *See id.* at 307.

35. *See id.* at 307 (holding no Sherman Act violation in absence of price fixing contract).

36. *See* Leary & Mintzer, *supra* note 8, at 323 (stating *Leegin* outcome not surprising given precedent of past thirty years). In 1977, the Court held that non-price vertical restraints will be evaluated under a rule of reason. *See* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59 (1977) (advising against departing from rule of reason based on "formalistic line drawing"). Then, in 1984, the Court held that a manufacturer's termination of a dealer soon after the dealer's competitors complained to the manufacturer of the dealer's lowered resale prices is insufficient, on its own, to establish concerted action. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 758 (1984) (finding defendant nevertheless liable because other evidence to support claim existed). In 1997, the Court further undercut *Dr. Miles* by holding that courts should evaluate a resale agreement establishing maximum resale prices under a rule of reason, not a per se rule of illegality. *See* State Oil Co. v. Khan, 522 U.S. 3, 7 (1997) (holding maximum RPM not per se illegal).

37. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007) (describing Leegin's business).

38. *Id.* at 2711 (explaining PSKS operates Kay's Kloset).

39. *See id.* (explaining pricing policy Leegin adopted allowed retailers to provide better service).

40. *See id.* (noting Kay's Kloset argued discounting Brighton brand necessary to compete with other retailers).

41. *See Leegin*, 127 S. Ct. at 2711 (describing reason for termination of relationship between Kay's Kloset and Leegin).

42. *Id.* at 2712 (explaining Kay's Kloset sued Leegin for contracting with retailers to charge prices fixed

Leegin to introduce evidence of the pro-competitive effects of its pricing policy, relying on the *Dr. Miles* per se rule.<sup>43</sup> The Supreme Court, however, displaced the per se rule and promulgated a new “rule of reason,” allowing parties to introduce evidence that a particular pricing policy is not anti-competitive.<sup>44</sup>

Having set aside the *Dr. Miles* precedent as based on “doctrines from antiquity but of slight relevance,” the Court engaged in an extensive discussion regarding the effects of RPM on competition.<sup>45</sup> The majority conceded that “each side of the debate can find sources to support its position.”<sup>46</sup> While espousing the benefits of a rule of reason, the majority did acknowledge that per se rules may decrease administrative costs.<sup>47</sup> Rule of reason cases have

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by Leegin).

43. See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2711 (2007) (recounting lower court history in *Leegin* case).

44. See *id.* at 2720 (holding federal courts will evaluate minimum RPM under rule of reason).

45. See *id.* at 2714. On one hand, minimum RPM has the potential to shape interbrand competition by encouraging retailers to invest in promotional efforts that aid the manufacturer’s position and improve customer service because they do not have the option of competing on price alone. See *id.* at 2716-17. To highlight the pro-competitive justifications, during oral argument the following exchange ensued between Theodore Olson, Esq., on behalf of the Petitioner, and Justice Scalia:

Justice Scalia: . . . [I]s the sole object of the Sherman Act to produce low prices?

Mr. Olson: No.

Justice Scalia: I thought it was consumer welfare.

Mr. Olson: Yes, yes it is.

Justice Scalia: And I thought some consumers would prefer more service at a higher price.

Mr. Olson: Precisely.

Justice Scalia: So the mere fact that it would increase prices doesn’t prove anything. It doesn’t prove that it’s serving consumer welfare. If, in fact, it’s giving the consumer a choice of more service at a somewhat higher price, that would enhance consumer welfare, so long as there are competitive products at a lower price, wouldn’t it?

Transcript of Oral Argument at 6-7, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). On the other hand, the Court also acknowledged the possible anti-competitive effects of RPM, and the dissent emphasized those factors. See *Leegin*, 127 S. Ct. at 2719 (acknowledging competing manufacturers adopting RPM may eliminate meaningful choice between high service and low price); *id.* at 2727 (Breyer, J., dissenting) (warning RPM may eliminate price competition among dealers and facilitate tacit collusion among producers).

46. See *Leegin*, 127 S. Ct. at 2714. The *Leegin* decision was a 5-4 decision, with the split of the Court as follows: the majority included Justices Roberts, Scalia, Alito, Thomas, and Kennedy, and the minority included Justices Ginsberg, Stevens, Souter, and Breyer. See generally *id.* When liberal Justice David Souter retired in 2009, many felt confident that President Barack Obama would likely appoint a Justice that would maintain the existing “conservative-liberal split.” See MSNBC, Politics, <http://www.msnbc.msn.com/id/30508968/> (opining on future of Supreme Court after Souter’s retirement); see also Editorial, *The Candidates and the Court*, N.Y. TIMES, Sept. 20, 2008, at WK8 (predicting future of Supreme Court makeup under either McCain or Obama administrations). In August 2009, the Senate confirmed Sonia Sotomayor to the U.S. Supreme Court, validating predictions that the balance of the Court would remain unchanged if a liberal Justice retired under the Obama Administration. See Editorial, *supra*.

47. See *Leegin*, 127 S. Ct. at 2718 (acknowledging per se rules provide guidance to businesses and minimize burden on courts). However, the Court dismissed the administrative convenience of per se rules as only “part of the equation,” reasoning that per se rules can also increase the total cost of the antitrust system by

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traditionally been lengthy and inefficient, and companies relying on the rule often run the risk of violating the Sherman Act.<sup>48</sup>

### C. Obstacles to National Implementation of Leegin

#### 1. State Resistance

It is important to note that the states have their own antitrust laws, and litigants may sue under either federal or state law.<sup>49</sup> In fact, states have historically been the more rigorous enforcers of antitrust principles.<sup>50</sup> While many state antitrust statutes require interpretations to be consistent with federal case law where practicable,<sup>51</sup> a significant minority of states are relatively unbound by federal precedent, and even those that do follow federal case law can often deviate if federal law varies from state objectives.<sup>52</sup> Independent of federal precedent, thirteen states have codified the rule that minimum RPM is per se illegal.<sup>53</sup>

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prohibiting pro-competitive conduct and encouraging frivolous suits. *Id.* at 2718.

48. See Brian Winrow & Kevin Johnson, *The Rule of Law Is the Rule of Reason*, 84 N. DAK. L. REV. 59, 64 (2008) (explaining rationale for using per se standard).

49. See Mark D. Bauer, *Whither Dr. Miles?*, 20 LOY. CONSUMER L. REV. 1, 25 (2007) (asserting litigants have choice of whether to bring antitrust suit in federal or state court); see also Plaintiff States' Second Amended Complaint at 4-5, In re: Compact Disc Minimum Advertised Price Antitrust Litigation, 2008 WL 2789362 (D. Me. July 17, 2008) (MDL Docket No. 1361) (alleging violations of both federal and state antitrust laws); Attorneys General of Forty-Two Jurisdictions, Comments in Response to the Antitrust Modernization Committee's Request for Public Comment, *Amended Comments Regarding Commission Issues for Study*, at 2 (asserting states play active part in enforcement of antitrust laws); Kevin J. O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 ANTITRUST L.J., Issue 2, at 413 (2002) (explaining plaintiff can opt to sue under state law and obtain additional remedy options).

50. See Leary & Mintzer, *supra* note 8, at 337 (stating states historically more proactive in prosecuting vertical agreements); see also Thomas Greene & Robert L. Hubbard, *43rd Annual Antitrust Law Institute: State Antitrust Enforcement*, 1311 PRAC. L. INST. 161, 1086 (May 2002), available at <http://www.oag.state.ny.us/bureaus/antitrust/pdfs/pli03-02final.pdf> (comparing enforcement of vertical restraints in federal and state courts); *Interview with State Antitrust Enforcer, Kevin J. O'Connor, Wisconsin Department of Justice*, ANTITRUST, Spring 1999, at 35 (advocating for concurrent enforcement of state and federal antitrust authorities). O'Connor explained that, in the 1980s, federal agencies did not actively enforce the per se rule, so the states stepped in to enforce the rule. See *Interview with Kevin J. O'Connor, supra*.

51. See Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 FRANCHISE L.J. 173, 174 (2008) (stating "thirty-six states adhere strongly or moderately strongly" to federal antitrust law). In Delaware, Hawaii, Idaho, and Iowa, for example, the state statutes dictate that state law "shall be construed" in accordance with federal law. *Id.*

52. See *California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989) (upholding state statute though contradictory to federal law); Leary & Mintzer, *supra* note 8, at 339 (stating federal antitrust laws usually do not preempt inconsistent state laws); Wofford et al., *supra* note 2 (stating only seventeen state statutes require strict adherence to federal antitrust law); Remarks by Jay L. Himes, Chief, Antitrust Bureau, Office of the Attorney General of the State of New York, *Federal "Unemption" of State Antitrust Enforcement*, May 14, 2004, at 4 (stating Supreme Court has often upheld individual state antitrust laws against federal preemption).

53. See Duncan & Guernsey, *supra* note 51, at 174 (listing states that have codified per se rule); Neal R. Stoll & Shepard Goldfein, *'Discount Pricing Act': Direct Rebuke to 'Leegin'*, 239 N.Y. L.J. 52 (2008) (predicting state reaction to *Leegin*); see also, e.g., FLA. STAT. ANN. § 526.307(1) (West 2009) (prohibiting RPM relating to resale of motor fuel); N.J. STAT. ANN. § 56:4-1.1 (West 2009) (codifying per se rule against RPM in New Jersey); N.Y. GEN. BUS. LAW § 369-a (2009) (codifying per se rule against RPM in New York).

New York submitted an amicus brief on behalf of thirty-seven states to the United States Supreme Court, supporting the *Leegin* respondents' position that the Supreme Court should preserve the per se rule against minimum RPM.<sup>54</sup> Now that *Leegin* has set the rule of reason as binding federal precedent, that rule directly conflicts with the laws of those states that had already codified the per se rule—resulting in a different law on RPM depending on the location of the activity.<sup>55</sup> It remains to be seen whether states that were stricter in rejecting RPM even before *Leegin* will now act to codify a per se rule against RPM.<sup>56</sup>

## 2. Federal Resistance

Historically, the federal government has also supported the per se rule and opposed adopting a rule of reason.<sup>57</sup> During the Great Depression, after *Dr. Miles*, Congress enacted an exemption for state “fair trade laws,” which authorized the states to conduct experiments in minimum RPM.<sup>58</sup> However, in 1975, deeming the state experiments a failure, Congress repealed these exemptions by adopting the Consumer Goods Pricing Act, for the express purpose of lowering prices for consumers.<sup>59</sup> Congress has since shown its continued support of the per se rule by repeatedly restricting funding for preparation of amicus briefs arguing against the per se rule.<sup>60</sup> In an “Open

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54. See generally Brief for the States of New York, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming as Amici Curiae Supporting Respondent, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480) (arguing Court should preserve per se rule).

55. See Bauer, *supra* note 49, at 25 (cautioning against “balkanization of the antitrust laws” when all states have different laws).

56. See Moloshok, *supra* note 8 (opining threat of state enforcement has slowed adoption of RPM policies after *Leegin*). It is possible that manufacturers are concerned that a surge of RPM agreements will induce a backlash by state courts and legislators to codify rules counteracting the *Leegin* decision. See *id.* For example, after the Supreme Court decided *Leegin*, authorities charged Herman Miller, Inc. with engaging in RPM from 2002 through 2005 and brought an action in federal district court. See Proposed Stipulated Judgment and Consent Decree at 1-2, *State v. Herman Miller, Inc.*, (S.D.N.Y. 2008) (No. 08-CV-2977). Herman Miller, Inc. stipulated to the charges and agreed to terminate the RPM policy without any further litigation. See *id.* at 2 (stating Herman Miller stipulated without admitting wrongdoing to avoid burden and costs of litigation). One potential interpretation of such quick acquiescence is a desire to avoid pushing state courts further toward a per se rule. See Moloshok, *supra* note 8.

57. See *infra* notes 58-61 and accompanying text (elaborating on federal support for per se rule).

58. See generally Miller-Tydings Fair Trade Act, Pub. L. No. 75-314, 50 Stat. 693 (1937) (permitting minimum RPM for states); see also Pamela Jones Harbour, *A Tale of Two Marks, and Other Antitrust Concerns*, 20 LOY. CONSUMER L. REV. 32, 43 (2007) (describing federal history regarding minimum RPM).

59. See generally Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (repealing fair trade exemptions). By the 1970s, most states had repealed their fair trade laws themselves, and Congress found that minimum RPM had increased pricing to consumers, reduced innovation, increased business failures, and generally decreased competition. See Harbour, *supra* note 58, at 43 (explaining rationale for enactment of Consumer Goods Pricing Act).

60. See Brief for Petitioner at 35, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480) (acknowledging Congress twice prohibited using appropriations to advocate reversal of

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Letter to the Supreme Court,” Federal Trade Commissioner Pamela Jones Harbour also urged retention of the per se rule.<sup>61</sup>

Since *Leegin*, federal authorities have persisted in promoting the per se rule.<sup>62</sup> In an article adapted from Commissioner Harbour’s remarks at the Seventh Annual Antitrust Colloquium at the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law on April 13, 2007, Harbour expressed her view that the “*Leegin* outcome is distressing.”<sup>63</sup> Harbour also appeared before the Antitrust Subcommittee of the Senate Judiciary Committee in July 2007 to warn against a post-*Leegin* world in which minimum RPM would go unchecked.<sup>64</sup> The Senate Subcommittee, chaired by Senator Herb Kohl, introduced a bill entitled the “Discount Pricing Consumer Protection Act,” which would amend the Sherman Act to make RPM per se illegal yet again.<sup>65</sup> However, in resurrecting the pre-*Leegin* standard in federal legislation, the bill would likely wipe out all case law on RPM since *Dr. Miles*, thus invalidating *Colgate* and *Monsanto* as well.<sup>66</sup>

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per se rule); Bob Hubbard & Emily Granrud, *37 States Submit Supreme Court Amicus Supporting Per Se Rule Against Minimum RPM*, A.B.A. ANTITRUST SECTION ST. ENFORCEMENT NEWSL., Spring 2007, at 3 (outlining Congressional restriction on funding); see also Act of December 13, 1985, Pub. L. No. 99-180, 99 Stat. 1136, 1169 (barring funds to alter per se prohibition); Act of November 28, 1983, Pub. L. No. 98-166, 97 Stat. 1071, 1102 (restricting use of funds to alter per se prohibition).

61. See generally An Open Letter to the Supreme Court of the United States from Pamela Jones Harbour, Comm’r, Fed. Trade Comm’n, *The Illegality of Vertical Minimum Price Fixing* (Feb. 26, 2007), available at <http://ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf> (arguing vertical price fixing almost always harms consumers).

62. See *infra* notes 63-65 and accompanying text (explaining federal efforts to return to pre-*Leegin* standard).

63. Harbour, *supra* note 58, at 33 (disagreeing with the *Leegin* outcome).

64. See *The Leegin Decision: The End of Consumer Discounts or Good Antitrust Policy?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. 342 (2007) (statement of Pamela Jones Harbour, Comm’r, Fed. Trade Comm’n), available at <http://www.ftc.gov/speeches/harbour/070731test.pdf> (warning against negative ramifications of RPM).

65. See Leary & Mintzer, *supra* note 8, at 340 (discussing possibility Congress will overturn *Leegin*). Senator Kohl, whose family owned and operated the Kohl’s discount chain until its sale in the 1980s, is chairman of the Senate Antitrust, Competition Policy and Consumer Rights panel, which conducted an extensive hearing into the *Leegin* decision and the potential effects of abolishing the per se rule. See Press Release, Sen. Herb Kohl, Kohl Introduces First Bills for 111th Congress (Jan. 6, 2009), available at [http://kohl.senate.gov/newsroom/pressrelease.cfm?customel\\_dataPageID\\_1464=2082](http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=2082) (announcing bill to overturn *Leegin*). Robert Pitofski, former Federal Trade Commission Chairman and current Federal Trade Commissioner Pamela Jones Harbour openly supported the bill. See Leary & Mintzer, *supra* note 8, at 340. On May 19, 2009, Senator Kohl appeared before the Senate Judiciary Committee Subcommittee on Antitrust Competition Policy and Consumer Rights for a hearing regarding the need to restore the ban on vertical RPM. See Statement of The Honorable Herb Kohl to the United States Senate, Committee on the Judiciary, May 19, 2009, available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3854&wit\\_id=470](http://judiciary.senate.gov/hearings/testimony.cfm?id=3854&wit_id=470) (reciting content of judiciary committee hearings).

66. See Stoll & Goldfein, *supra* note 53 (advising against federal legislation as neither necessary nor proper). Currently, the bill is still with the committee. See Molochok, *supra* note 8 (noting states still pushing Congress to overturn *Leegin*).

### D. Foreign Competition Law in the Area of RPM

Despite the various arguments regarding the competitive effects of *Leegin* within the United States, international law on RPM remains unchanged.<sup>67</sup> While minimum RPM was previously an area in which the United States was relatively aligned with many of its major trading partners, this is now an area of divergence, as many of these trading partners, including both Canada and the European Union, continue to follow a bright-line prohibition of RPM.<sup>68</sup>

#### 1. Canadian RPM Policy

Canadian antitrust law is based largely on the Canadian Competition Act.<sup>69</sup> Unlike the United States' Sherman Act, the Competition Act directly addresses RPM in Section 61, specifically prohibiting two forms of RPM: first, any agreement, threat, promise, or any like means that seems to supply or advertise a product in Canada, and second, refusals to supply or discrimination against any other person carrying on business in Canada due to that person's low pricing policy.<sup>70</sup> In effect, the Act prohibits RPM by both unilateral act and by contract.<sup>71</sup> A manufacturer can suggest a price, but once there has been an attempt to influence a retailer, per se criminal conduct may be at issue.<sup>72</sup>

#### 2. European Union RPM Policy

The EU takes a similarly strict approach to minimum RPM.<sup>73</sup> Agreements

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67. See Scott Martin & Fiona Schaeffer, *A Rule of Reason for Vertical Price Fixing—Part II*, METROPOLITAN CORP. COUNSEL, Nov. 2007, at 6 (stating *Leegin* has not altered RPM law in Canada and EU).

68. See *infra* notes 70-77 and accompanying text (explaining *Leegin* sets U.S. at odds with Canada and EU). Several other countries, including Japan and Brazil, also treat price fixing as a crime. See Joel I. Klein, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address at the Fordham Corporate Law Institute 24th Annual Conference on International Law and Policy, Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century (Oct. 16, 1997), available at <http://www.usdoj.gov/atr/public/speeches/1233.htm>. Japan considers RPM to be an unfair business practice and prohibits it under Article 19 of Japan's Antimonopoly Act of 1947, which Japan modeled after U.S. antitrust laws. See O'Connor, *supra* note 49, at 434 (describing Japanese competition law).

69. See generally Competition Act, R.S.C., ch. C-34 (1985) (codifying Canadian competition law). The Competition Act is a federal law, created and enforced by the Canadian Competition Bureau, which governs business conduct in Canada and aims to prohibit anti-competitive practices. See Competition Bureau, Our Legislation, [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00148.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00148.html) (last visited Aug. 7, 2009). The Competition Act replaced the previous and outdated Combines Investigation Act in 1986 and established the Competition Tribunal, a quasi-judicial administrative body comprised of both judges and expert members charged with reviewing the applications brought before it on an informal and expeditious basis. See George Addy & Mark Katz, *Canada's Competition Act Has Come a Long Way in 20 Years*, LAW. WKLY. (Canada), Feb. 6, 2009 (highlighting developments in Canadian competition law since enactment of Competition Act).

70. R.S.C., ch. C 34, § 61(1) (1985).

71. See *id.* (prohibiting price maintenance both by agreement and by refusal to supply because of low pricing).

72. See *id.* at § 61(3) (permitting suggestion of resale price); see also *id.* at § 61(9) (stating either fines or imprisonment punishment for contravention of § 61(1)).

73. See Martin & Schaeffer, *supra* note 67, at 6 (asserting Europe also follows "hard line" approach).

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to fix minimum resale prices are per se illegal under Article 81(1) of the Treaty Establishing the European Community (EC Treaty).<sup>74</sup> Though Article 81(3) sets forth some exemptions from per se illegality under 81(1), the European Commission's (EC) Block Exemption Regulation classifies minimum RPM as a hard-core restraint, and therefore ineligible for exemption.<sup>75</sup> Just as in Canada, a supplier can suggest a certain selling price, provided that this does not amount to an obligation through agreement, pressure, or incentives.<sup>76</sup>

### 3. *Legal Exposure to Foreign Antitrust Suits*

A company must tailor antitrust compliance to the jurisdiction in which it conducts business.<sup>77</sup> Companies must recognize that rules developed for one jurisdiction will likely require revision for implementation in another jurisdiction, both to avoid liability and to take full advantage of competition policy in each jurisdiction.<sup>78</sup> For example, even after *Leegin*, a United States company that practices minimum RPM in Canada may be subject to discretionary fines and/or imprisonment not exceeding five years.<sup>79</sup> Likewise, though the EU does not provide criminal penalties like the United States and Canada, monetary penalties for intentional or negligent antitrust violations within the EU can be as large as ten percent of a company's worldwide annual revenue.<sup>80</sup>

Jurisdictional issues may, however, insulate some international antitrust

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74. See Treaty Establishing the European Community, 2006 O.J. (C 321) E/73-74 [hereinafter EC Treaty]. The EC Treaty includes prohibitions on two forms of anti-competitive conduct: Article 81 prohibits agreements between two or more firms that restrict competition, including direct or indirect price fixing, and Article 82 prohibits abuse of power by firms in a dominant position. See generally EC Treaty, arts. 81-82 (setting forth competition law in EU). In 1992, the Treaty that originally established the European Community in 1957 was amended to include Articles 85 and 86, which are now Articles 81 and 82, and comprise the competition law in the EU. See O'Connor *supra* note 49, at 430 (outlining history of EC competition policy). The EC Treaty empowers both the European Commission and national competition authorities to apply these rules to ensure competition is not restricted. See European Commission, Antitrust Overview, [http://ec.europa.eu/competition/antitrust/overview\\_en.html](http://ec.europa.eu/competition/antitrust/overview_en.html).

75. SEE COMMISSION REGULATION 2790/1999, APPLICATION OF ARTICLE 81(3) OF THE TREATY TO CATEGORIES OF VERTICAL AGREEMENTS AND CONCERTED PRACTICES, 1999 O.J. (L 336) § 4(B) (DESCRIBING HARD-CORE RESTRAINTS AS SEVERELY ANTI-COMPETITIVE.)

76. See generally EC Treaty, art. 81 (prohibiting only agreements, decisions, or concerted practices).

77. See Larry Bumgardner, *Antitrust Law in the European Union: The Law Is Changing—But To What Effect?*, 8 GRAZIADIO BUS. REP., 2005, available at <http://gbr.pepperdine.edu/053/euantitrust.html> (advising companies conducting business in multiple jurisdictions heed antitrust policy in all jurisdictions).

78. See AM. BAR ASS'N SECTION OF ANTITRUST LAW, ANTITRUST COMPLIANCE: PERSPECTIVES AND RESOURCES FOR CORPORATE COUNSELORS 171 (2006) (encouraging compliance program to reduce likelihood of breach of antitrust laws).

79. See Competition Act, R.S.C., ch. C-34, § 61(9) (1985) (creating penalties for violating Canadian competition policy).

80. See Bumgardner, *supra* note 77 (stating only civil penalties available for antitrust violations in EU); see also Council Regulation 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, art. 23, 2003 O.J. (L 1) 1, 16-17 (explaining potential fines for EC competition violations).

violations from the threat of prosecution.<sup>81</sup> In Canada, subject matter jurisdiction in criminal cases is based on a significant portion of activities constituting the offense occurring in Canada.<sup>82</sup> Therefore, it is unclear whether criminal liability would arise when no portion of the activities, other than anti-competitive effects, occurred in Canada—the Canadian Supreme Court has not yet determined the answer to this question.<sup>83</sup> The European Union, however, has adopted an effects test and can therefore assert jurisdiction over conduct that has an anti-competitive effect in the EU, though the conduct itself did not take place in the EU.<sup>84</sup>

One example of a United States supplier running afoul of cross-border RPM is the 2004 *R. v. John Deere Ltd.*<sup>85</sup> case, which involved an agreement made in the U.S. between Deere & Company and U.S.-based retailer Home Depot to sell a new line of garden tractors.<sup>86</sup> John Deere discouraged its Canadian dealers from selling tractors below the minimum suggested price.<sup>87</sup> Although such a practice would have been legal in the United States under the *Colgate* doctrine, it remained illegal under Canada's Competition Act.<sup>88</sup> The case concluded when John Deere agreed to a restitution payment of \$1.191 million, a five-year competition compliance program, and various changes to its sales practices.<sup>89</sup>

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81. See Graham Reynolds, *Contrasting Canadian and U.S. Plea Practices in Antitrust Cases*, ANTITRUST SOURCE, Mar. 2006, at 6 (warning Canada may lack jurisdiction over foreign antitrust violators).

82. See *id.* (noting Canada has not adopted "effects test" for extraterritorial conduct).

83. See *id.* (asserting potentially no liability without meeting, communicating, or exchanging pricing information in Canada); see also *Libman v. The Queen*, [1985] 2 S.C.R. 178 (Can.) (finding liability when activities preparatory to fraudulent scheme occurred in Canada).

84. See EC Treaty art. 81, 2006 O.J. (C 321) E/73-74 (addressing practices which may "affect trade" or have as their "object or effect" restriction of competition). In the 1972 *Chemical Industries* case, the European Court of Justice held that a company located outside the EU that engaged in price-fixing agreements that had anti-competitive effects within the EU was subject to the jurisdiction of the European Court of Justice. See generally *Imperial Chemical Industries Ltd. v. Commission of the European Communities*, 1972 E.C.R. 619 (applying effects test in EU case). A more recent example is the attempted merger of General Electric and Honeywell, which the companies arranged in the United States and American authorities approved, but which the EC blocked because it would result in the creation of dominant positions in various markets within the EU. See *EU Kills GE-Honeywell*, CNNMONEY, July 3, 2001, [http://money.cnn.com/2001/07/03/europe/ge\\_eu/](http://money.cnn.com/2001/07/03/europe/ge_eu/) [hereinafter CNNMONEY] (announcing failure of GE/Honeywell merger).

85. Federal Court Docket No. T-1836-04, slip op. (Oct. 19, 2004), available at [http://competitionbureau.ca/eic/site/cb-bc/nsf/ywapj/ct02965e\\_court1.pdf/\\$file/ct02965e\\_court1.pdf](http://competitionbureau.ca/eic/site/cb-bc/nsf/ywapj/ct02965e_court1.pdf/$file/ct02965e_court1.pdf).

86. See Press Release, Competition Bureau, Consumers To Be Reimbursed by John Deere Limited: Competition Bureau Settlement Results in \$1.19 Million in Rebates (Oct. 19, 2004) [hereinafter Competition Bureau Press Release], available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc/nsf/eng/00248.html> (outlining events leading to John Deere plea agreement).

87. See Competition Bureau Press Release, *supra* note 86 (explaining Bureau investigated allegations John Deere discouraged dealers from selling below suggested prices).

88. See David G. Butler et al., *Price Maintenance Remains Illegal in Canada*, COMPETITION LAW INT'L, Feb. 2008, at 45 (stating agreement with Home Depot included "unilateral minimum advertised price provisions").

89. See *R. v. John Deere Ltd.* (Federal Court docket T-1836-04, Oct. 19, 2004), Prohibition Order (outlining plea bargain between John Deere and Canada's Attorney General).

### *E. The Trend of Global Competition Policy Harmonization*

The globalization of antitrust and competition law has recently emerged as a significant trend.<sup>90</sup> Over the past thirty years, a significant increase in the number of countries adopting competition laws has stimulated cooperation among their various competition enforcement agencies.<sup>91</sup> In both policy and enforcement, many scholars agree that a movement toward convergence is underway.<sup>92</sup>

#### *1. Enforcement Cooperation*

Significant progress has already been made in the area of international antitrust enforcement cooperation.<sup>93</sup> For example, the International Competition Network (ICN) was formed in 2001 for the purpose of becoming a forum for ideas, education, and coordination among the world's competition enforcement agencies.<sup>94</sup> Today, the ICN's roster totals ninety nations and the EU, and includes a considerable number of countries where the concept of competition policy and enforcement did not exist ten years ago.<sup>95</sup> In addition, in 1994, the United States Congress enacted the International Antitrust Enforcement Assistance Act (IAEAA),<sup>96</sup> which permits the Federal Trade Commission to negotiate antitrust mutual assistance agreements applicable to both criminal and civil matters.<sup>97</sup>

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90. See O'Connor, *supra* note 49, at 414 (asserting interconnection of global economy necessitates consistent worldwide competition policies); Starek, *supra* note 3 (commenting on possibility of future multilateral agreement on international antitrust rules and procedures).

91. See Russell Wofford & D. Jeffrey Brown, *American and Canadian Antitrust/Competition Law: Convergence?*, METROPOLITAN CORP. COUNSEL, Oct. 2008, at 58 (stating number of countries adopting competition statutes has increased drastically). "[D]uring the past decade, market principles, deregulation, and respect for competitive forces have been broadly embraced, and many countries have created antitrust laws and agencies that are committed to enforcing them." Charles A. James, Assistant Att'y Gen., Antitrust Div., United States Dep't of Justice, *International Antitrust in the 21st Century: Cooperation and Convergence* (Oct. 17, 2001) (explaining over ninety countries have antitrust laws and twenty more in process of drafting).

92. See O'Connor, *supra* note 49, at 416 (remarking "surprising degree of international consensus" reached on substantive competition principles); see also *infra* text accompanying notes 93-104 (discussing progress in areas of substantive convergence and enforcement cooperation).

93. See *infra* notes 94-97 and accompanying text (outlining progress of international enforcement cooperation).

94. See O'Connor, *supra* note 49, at 440 (describing ICN as informal dialogue among national antitrust jurisdictions); see also ICN Web Site, <http://www.internationalcompetitionnetwork.org/index.php/en/about-icn> (last visited Nov. 14, 2009) (stating purpose of ICN).

95. See ICN Web Site, Member Information Page, <http://www.internationalcompetitionnetwork.org/index.php/en/members> (last visited Nov. 14, 2009) (describing makeup of ICN).

96. 15 U.S.C. §§ 6201-6212 (1998).

97. See Federal Trade Commission, IAEAA Information Page, <http://www.ftc.gov/opa/1997/04/iaaaa.shtm> (last visited Nov. 14, 2009) (stating purpose of IAEAA).

## 2. Substantive Convergence

Unlike enforcement cooperation, progress in the area of substantive antitrust policy convergence is moving somewhat more slowly.<sup>98</sup> The failed General Electric/Honeywell merger is one example of a situation in which enforcement cooperation was not lacking, but substantive policy differences resulted in a less than ideal outcome.<sup>99</sup> Though the United States Department of Justice approved the \$42 billion merger of General Electric and Honeywell, the European Commission blocked the transaction.<sup>100</sup> The United States and EU worked together extensively regarding the merger, but a fundamental substantive difference in the two policies was the downfall.<sup>101</sup>

There have been discussions in past years regarding creation of an international antitrust code through the World Trade Organization (WTO), but those efforts have fallen flat, largely because of the impracticability of such an endeavor.<sup>102</sup> It would be very difficult for the members of the WTO, many of which do not have any competition policy, “to sort these issues out in a principled way.”<sup>103</sup> Despite the slow progress, however, substantive harmonization has nevertheless often been a consideration in jurisdictional development of national antitrust policy, in Canada and the EU in particular.<sup>104</sup>

### a. Canada’s Efforts to Modernize the Competition Act

Canada’s particularly strict RPM policy has been one of the few areas in which Canadian competition law differs from that of the United States, and even more so after *Leegin*.<sup>105</sup> Even before *Leegin*, Canadian competition

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98. See SIMON J. EVENETT ET AL., ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 23 (2000) (asserting there exists only “limited convergence of views” regarding future global agreement on competition policy); see also *infra* notes 99-122 and accompanying text (outlining steps toward international substantive policy convergence).

Indeed, there have been days when we thought (or hoped) that such cooperation itself would eventually minimize or resolve even the most serious of antitrust divergence. More recently, however, we have come to understand that cooperation alone will not resolve some significant areas of difference among antitrust regimes that must be addressed if we are to maintain the integrity of antitrust on a global stage.

James, *supra* note 91, at 5.

99. See CNNMONEY, *supra* note 84 (describing EC’s role in failed General Electric/Honeywell merger).

100. See James, *supra* note 91, at 5 (explaining EC blocked merger with same information available to U.S. authorities).

101. See *id.* at 6 (explaining U.S. law focuses on effect on competition, whereas EU focuses on effect on competitors).

102. Klein, *supra* note 68, at 11-13 (elaborating on impracticability of international antitrust code).

103. See *id.* at 12 (addressing futility of attempting to create uniform international competition code). The WTO includes over 120 members, half of which do not have a competition policy. *Id.*

104. See *infra* notes 105-22 and accompanying text (recognizing Canada and EU have often closely followed U.S. antitrust policy).

105. See Wofford & Brown, *supra* note 91, at 58 (describing effect of *Leegin* on policy convergence between U.S. and Canada).

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authorities had begun to consider abandoning the per se standard.<sup>106</sup> In 1999, when the United States still followed the per se rule, Canada's then-Commissioner of Competition issued "The VanDuzer Report," criticizing the price maintenance provisions in the Competition Act as overly strict.<sup>107</sup> Then, in a 2002 Canadian Parliamentary report entitled "A Plan to Modernize Canada's Competition Regime," the Standing Committee on Science and Technology recommended the decriminalization of vertical price maintenance, including abandonment of the per se standard.<sup>108</sup>

Some have criticized the Canadian policy as overly restrictive and, as a result, potentially anti-competitive.<sup>109</sup> In June 2007, a Competition Review Panel assembled to evaluate aspects of Canada's competition laws, including how they relate to similar laws in other jurisdictions.<sup>110</sup> In June 2008, the panel issued its report entitled "Compete to Win," which set forth a series of recommendations for updating and modernizing the Competition Act in line with best practices internationally.<sup>111</sup> The report suggests improving economic efficiency by amending certain outmoded or ineffective provisions of Canada's competition laws.<sup>112</sup> One of the Competition Review Panel's goals, as outlined in the report, was to conform Canadian legal requirements with those of the United States, "with a view to minimizing unnecessary procedural or substantive differences, given the high level of integration of business operations in the two countries."<sup>113</sup>

*b. Substantive Convergence Considerations in Development of EU Competition Policy*

Like Canada, the basic framework of the EC competition policy is in line

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106. See *infra* notes 107-08 (discussing Canada's movement toward rule of reason prior to *Leegin*).

107. See Butler et al., *supra* note 88, at 47 (stating report criticized Act for failing to consider particular characteristics of anti-competitive RPM); J. ANTHONY VANDUZER & GILLES PAQUET, *ANTICOMPETITIVE PRICING PRACTICES AND THE COMPETITION ACT: THEORY, LAW AND PRACTICE* (1999). Since the VanDuzer Report, there has been a change in controlling government from the liberal party to the conservative party, whose treatment of the competition policy does not receive same level of priority. See Butler et al., *supra* note 88, at 48 (explaining change in political climate since publication of VanDuzer Report).

108. See Industry Canada, Government Response to the Report of the House of Commons Standing Committee on Industry, Science, and Technology—"A Plan to Modernize Canada's Competition Regime," <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/00116.html> (last visited Nov. 14, 2009) (deferring government decision on price maintenance revisions to a later date).

109. See COMPETITION POLICY REVIEW PANEL, GOVERNMENT OF CANADA, *COMPETE TO WIN* 54 (2008) [hereinafter *COMPETE TO WIN*], available at [http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h\\_00040.html](http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html) (stating panel received submissions arguing Competition Act ineffective and obsolete).

110. See Press Release, Canadian Competition Bureau, Canada's New Government Creates Competition Policy Review Panel (July 12, 2007) (announcing appointment of Competition Policy Review Panel).

111. See generally *COMPETE TO WIN*, *supra* note 109, at 53-61 (recommending various revisions to Competition Act).

112. See *id.* at 53 (suggesting some competition laws outdated).

113. *Id.*

with United States policy.<sup>114</sup> While not all areas of EC and United States antitrust law are identical, the EC has gradually moved toward convergence with U.S. policy, though not quite as explicitly as Canada.<sup>115</sup> In 2004, the EC saw some significant changes in competition policy.<sup>116</sup> First, in 2004, Dutch businesswoman Neelie Kroes succeeded to the position of Competition Commissioner, a title Italian economist Mario Monti formerly held.<sup>117</sup> Then, an EC Treaty revision brought the EC standard for mergers closer to the United States standard.<sup>118</sup> In that same year, another new regulation further decentralized the EC's competition enforcement by empowering individual EU states to enforce violations, taking a step toward private antitrust suits as in the United States, where ninety percent of antitrust enforcement is through private suits.<sup>119</sup> It is also notable that in the 2006 EC case *Commission v. Volkswagen*, decided while the *Leegin* case was pending, the EC court held that Volkswagen's entreaty to dealers to maintain strict price discipline was a unilateral offer and not an agreement because it did not require their explicit acquiescence, which appears to some to be a movement away from a strict

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114. Compare Sherman Act §§ 1-2 (omitting any explicit reference to price maintenance), with EC Treaty arts. 81-82 (specifically addressing fixing purchase or selling prices); see also Neelie Kroes, Eur. Comm'r for Competition Policy, Speech: Antitrust in the EU and U.S. - Our Common Objectives (Sept. 26, 2007), available at [http://ec.europa.eu/commission\\_barroso/kroes/antitrust\\_eu\\_us.pdf](http://ec.europa.eu/commission_barroso/kroes/antitrust_eu_us.pdf) (stating EU and U.S. antitrust law similar in many respects). In her speech, Commissioner Kroes expounded on the many similar objectives of the EU and American antitrust systems, stating enforcement cooperation has only been possible because both systems are coming from essentially the same approach. See *id.* at 3.

115. Compare *supra* note 113 and accompanying text (outlining Canada's formal attempts to converge with United States policy), with *infra* notes 118-20 and accompanying text (describing EC's informal movements toward convergence with U.S.). In 1977, the U.S. Supreme Court held in *State Oil Co. v. Khan* that maximum RPM will be evaluated under the rule of reason. See *State Oil v. Khan*, 522 U.S. 3, 7 (1997) (holding maximum RPM no longer per se illegal). In 1999, the European Commission enacted its Block Exemption Regulation, specifically omitting maximum RPM from the blacklisted practices, therefore evaluating maximum RPM under the rule of reason, as in the United States. See European Commission Regulation 2790/1999, The European Commission's Block Exemption for Vertical Agreements, 1999 O.J. 4(b).

116. See Bumgardner, *supra* note 77, (suggesting gap between EC and U.S. could be closing due to developments in EU law).

117. See *id.* (comparing Kroes and Monti). Monti was known as a tough enforcer and feared regulator, particularly with regard to his rulings in cases such as the recent attempted GE merger. See *id.*; see also CNNMONEY, *supra* note 84 (describing failure of GE/Honeywell merger). Kroes' background, on the other hand, led many to believe that she would be more lenient toward businesses. See *id.* However, in Kroes' September 2007 speech regarding EU and American competition law, Kroes explained that the United States follows "Chicago school" economics, which espouses a more lenient view that markets are inherently efficient, while the EU follows the "post-Chicago school" viewpoint, which is inherently more suspect of the harms that anti-competitive behavior can have on an economy. See Kroes, *supra* note 114 (explaining theoretical differences between foundation of EU and U.S. competition policy). Kroes, when discussing her stance on monopolists, espoused the latter viewpoint. See *id.*

118. See Bumgardner, *supra* note 77 (stating 2004 EC revisions resulted in convergence between EU and U.S. law). Compare Clayton Act, 15 U.S.C. § 18 (1988) (prohibiting mergers when effect "may be substantially to lessen competition"), with EC Treaty art. 82 (allowing EU to block mergers that significantly impede effective competition).

119. See Bumgardner, *supra* note 77 (describing 2004 rule effecting division of power between EU and member nations' competition authorities).

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approach.<sup>120</sup>

Despite movement toward convergence, the practicalities of the development of the EU necessitate certain practices.<sup>121</sup> While many European countries originally permitted RPM agreements prior to creation of the EU, EC authorities cautioned that vertical RPM agreements may entrench national markets and hinder trade throughout the EU, and therefore RPM remains per se illegal.<sup>122</sup> Nevertheless, since the outcome of the *Leegin* case, discussions have slowly begun in the European Community to reevaluate the current European RPM policy in light of new United States policy.<sup>123</sup>

### III. ANALYSIS

#### *A. International divergence on RPM policy leaves businesses engaged in cross-border transactions with little opportunity to take advantage of the rule of reason*

It is generally agreed that substantive differences between the competition policies of significant trading partners has the potential to create an untenable situation.<sup>124</sup> With the recent change in U.S. law on minimum RPM after *Leegin*, United States companies that engage in cross-border trade with Canada, the EU, or any other nation that continues to evaluate RPM as per se illegal, must make a choice between three relatively undesirable options.<sup>125</sup> The first is the option to proceed at the company's own risk and ignore the law of the other

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120. See Case C-74/04, *Comm'n of the Eur. Communities v. Volkswagen AG*, 2006 E.C.R. I-6585 (holding EC failed to prove existence of illegal agreement).

121. See Mikheil Gogeshvili, *Resale Price Maintenance—A Dilemma in EU Competition Law*, 5 GEORGIAN L. REV. 281, 289 (2002) (explaining intrabrand competition particularly important in European Community). Intrabrand competition is competition between dealers of the same supplier. See *id.*

122. See Martin & Schaeffer, *supra* note 67, at 6 (explaining “more liberal approach” existed in Europe prior to establishment of EU); see also Gogeshvili, *supra* note 121, at 291 (explaining European competition authorities fear RPM may partition European market and erode Common European Market). While RPM has not always been unlawful in European nations, the development of EC competition law gradually eliminated the practice. See Gogeshvili, *supra* note 121, at 301.

123. See Summary of the Austrian Federal Competition on Authority Conference, *Resale Price Maintenance - An Issue for the European Agenda?* (Sept. 12, 2008), available at <http://www.bwb-conference.at> (hereinafter BWB Conference) (summarizing discussions at International Conference on RPM policy). At the BWB Conference, competition policy experts and practitioners from several different jurisdictions discussed the ramifications of *Leegin* on the future of the EC competition policy. See *id.* Speakers espoused various points of view, including the notion that EC and U.S. policy will eventually converge if Article 81(3) can be reinterpreted to allow RPM in certain cases. See Bernhard Heitzer, President of the German Bundeskartellamt, *Speech at the BWB Conference: Resale Price Maintenance in Germany and Europe—Then and Now* (Sept. 12, 2008) [hereinafter BWB Conference]. However, many other speakers simply debated the pro- and anti-competitive effects of RPM, as has been the debate throughout the United States. See generally BWB Conference, *supra* (listing presentations and panels included in conference).

124. See *supra* notes 98-101 and accompanying text (depicting failure of General Electric/Honeywell merger as example of problematic consequences).

125. See Wofford et al., *supra* note 2 (acknowledging no perfect options available to international companies after *Leegin*); see also *infra* text accompanying notes 126-32 (delineating obstacles companies face when managing different antitrust policies).

country, hoping that its actions will go unnoticed—a perilous route that few companies would choose.<sup>126</sup> Another more feasible option is to adjust the company's practices to accommodate the lowest common denominator and therefore adhere to the strictest policy.<sup>127</sup> Though certainly less risky than the first option, this is not a wise business decision as the company would likely miss out on important opportunities to maximize profits.<sup>128</sup>

The third, and arguably best, option is to undertake management of all different policies at once by creating an individualized compliance policy in each jurisdiction.<sup>129</sup> However, this option is far from ideal.<sup>130</sup> Attempting to manage all policies at once, while likely the best option, will be costly and complex.<sup>131</sup> The *John Deere* case is an example of a company implementing an antitrust compliance policy, though the impetus for such compliance was a lawsuit.<sup>132</sup> As part of its settlement program, John Deere agreed to develop a competition law compliance policy and implement changes to its administrative and sales practices in Canada, including annual training for employees responsible for pricing, sales, and marketing of its tractors in Canada.<sup>133</sup>

*B. Emphasis on competition policy convergence suggests potential for harmonization even after Leegin*

As many competition scholars and authorities agree, substantive competition law convergence on an international level is a worthwhile goal.<sup>134</sup> However, *Leegin*, whether pro- or anti-competitive in its economic ramifications, has moved the global competition community further from reaching that goal.<sup>135</sup> As companies struggle through managing multiple competition policies and cross-border litigation ensues, it remains possible that, given the existing

126. See *supra* notes 77-89 and accompanying text (outlining legal exposure in foreign jurisdictions for contravention of antitrust laws); *supra* note 89 and accompanying text (providing example of company implementing compliance policy).

127. See Majoras, *supra* note 9 (warning potential result of divergent competition policies is most aggressive enforcement will prevail).

128. See Wofford et al., *supra* note 2 (cautioning adopting "Canadian-style" pricing policy for all jurisdictions puts company at competitive disadvantage in U.S.); Doty, *supra* note 5 (defining RPM as agreement not to sell below a fixed price).

129. See Wofford et al., *supra* note 2 (suggesting intermediate option of adopting RPM policy in U.S. and only suggesting Canadian prices).

130. See *infra* notes 131-34 and accompanying text (highlighting practical complications of maintaining varying competition compliance policies).

131. See O'Connor, *supra* note 49, at 413 (warning divergent standards for RPM entails economic costs in economies like North America and Europe).

132. See *supra* notes 86-89 and accompanying text (discussing *John Deere* litigation).

133. See Butler et al., *supra* note 88 (stating modification of advertising, distribution channels, and pricing strategies necessary when dealing with multiple jurisdictions); *supra* note 89 and accompanying text (outlining compliance program for satisfaction of plea agreement).

134. See *supra* notes 98-104 and accompanying text (discussing general consensus in international competition community on importance of substantive convergence).

135. See Wofford et al., *supra* note 2 (stating *Leegin* widens gap between United States and Canadian RPM law).

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emphasis on convergence, one or more of the countries involved will move to resolve the situation.<sup>136</sup>

*1. Either state or federal resistance to Leegin may realign United States policy with Canada and the EU*

It is possible that state court resistance and federal legislation will prevent *Leegin* from becoming fully effectuated into United States law, making compliance with different international policies a moot point.<sup>137</sup> Regardless of whether that outcome would be more beneficial for the American consumer, it would certainly resolve the international divergence issue.<sup>138</sup>

One variable is the state response to *Leegin*.<sup>139</sup> States that mandated adherence to federal law prior to *Leegin* will continue to do so.<sup>140</sup> However, states that codified their own per se rule on RPM and states that do not mandate adherence to federal law will be less likely to follow federal precedent.<sup>141</sup> States were traditionally more aggressive enforcers of antitrust law to begin with, even when federal law included the per se rule.<sup>142</sup> Now that the country's highest court has abandoned the per se illegality standard, state courts will likely continue to hold fast to the per se rule for fear that the rule of reason will become overly permissible.<sup>143</sup> Thus, a situation similarly tenuous to that warned against on an international level will likely exist in the United States, forcing companies to manage different competition policies from state to state.<sup>144</sup> For national companies, this may prove unmanageable and effectively overturn *Leegin* in the United States because of companies' fear of exposure in more aggressive states.<sup>145</sup>

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136. See O'Connor, *supra* note 49, at 419 (explaining multi-jurisdictional businesses must adhere to basic competition policy concepts); *supra* notes 104-22 and accompanying text (describing steps Canada and EU have taken toward substantive competition law convergence with U.S.). However, compliance with competition policies across multiple jurisdictions becomes particularly difficult when even the most fundamental concepts of competition law differ among major trading partners. See O'Connor, *supra* note 49, at 419 (warning divergence of competition policies will decrease certainty for businesses).

137. See *supra* notes 49-68 and accompanying text (explaining state resistance to rule of reason and introduction of federal bill to overturn *Leegin*).

138. See *supra* note 47 (explaining debate over competitive effects of RPM in which Court engaged to decide *Leegin*).

139. See *supra* notes 48-55 and accompanying text (explaining state courts traditionally more aggressive in enforcing per se rule and opposed *Leegin* outcome).

140. See *supra* note 51 (listing some states required to comply with federal antitrust law).

141. See *supra* note 53 (explaining some states have already codified per se rule); *supra* note 54 (stating thirty-seven states filed amicus brief in favor of retention of per se rule).

142. See *supra* note 50 (explaining when federal enforcement became more lax in 1980s, state authorities increased enforcement).

143. See *supra* note 56 (suggesting company's stipulation to RPM charges may illustrate reluctance to provoke state courts); see also *supra* notes 58-59 and accompanying text (describing failure of states' previous experimentation with per se rule).

144. See *supra* notes 124-33 and accompanying text (explaining difficulties and costs associated with managing different antitrust policies in multiple jurisdictions).

145. See *supra* note 55 (cautioning *Leegin* may result in a different policy in each jurisdiction within

The other potential domestic barrier to *Leegin*'s acceptance in the United States is federal legislation.<sup>146</sup> However, this result is arguably less feasible in the short term than the possibility that the difficulties posed by the states will ineffectuate *Leegin*.<sup>147</sup> Many will likely find the proposed legislation too extreme.<sup>148</sup> It is more likely that Congress, and even potential proponents of the bill, would allow the states and lower courts to test the decision to see if fears that the rule of reason will become too permissible and anti-competitive come to fruition.<sup>149</sup> In addition, before legislatively overturning a Supreme Court decision, many would likely wait for a change in the makeup of the Court—a time in which the more liberal dissenters become the majority—and allow the Court itself to overturn its precedent.<sup>150</sup> While the country may eventually see a reaction similar to the Consumer Goods Pricing Act of 1975, which essentially deemed the fair trade laws experiment a failure, it is unlikely that this will happen in the immediate future as legislators gave even the fair trade laws several decades before repealing them.<sup>151</sup>

2. *Foreign emphasis on alignment with United States policy may instigate gradual changes in Canadian and EU RPM law*

The other options are that either the EU or Canada will revise their competition policies to conform with those of the United States.<sup>152</sup> Of the two jurisdictions, it appears more likely that Canada will make the move to converge.<sup>153</sup> The EU has more substantive reasons to maintain its current policy.<sup>154</sup>

While it is likely that Canada will eventually revise its competition laws, this will not be an immediate occurrence.<sup>155</sup> The movement toward revising and liberalizing the Competition Act has been underway for some time and will likely continue.<sup>156</sup> However, given the recent shift in governmental focus, this

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U.S.).

146. See *supra* note 65 and accompanying text (explaining introduction of "Discount Consumer Pricing Act" in Congress).

147. See *infra* notes 148-51 and accompanying text (predicting bill will not pass in near future).

148. See *supra* note 66 and accompanying text (warning bill reaches too far and threatens to overrule *Colgate*).

149. See *Harbour*, *supra* note 58, at 46 (suggesting *Leegin* decision marks beginning of another experiment with RPM).

150. See *supra* note 46 (listing *Leegin* dissenters as Souter, Stevens, Breyer, and Ginsberg).

151. See *supra* notes 58-59 (explaining fair trade laws given thirty-year opportunity to fail in states prior to repeal).

152. See *supra* notes 105-22 (explaining movements in Canada and EU to follow U.S. antitrust law).

153. See *infra* notes 155-59 (suggesting Canada will gradually revise Competition Act to conform with U.S.).

154. See *infra* notes 160-63 (opining EU changes, though possible, will occur more slowly).

155. See *Butler et al.*, *supra* note 88, at 48 (opining revision of Competition Act will not happen soon because of current political climate).

156. See *supra* notes 106-08 and accompanying text (outlining steps toward rule of reason for RPM in Canada); *supra* notes 109-13 and accompanying text (reviewing Competition Policy Review Panel

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will occur at a slower pace than in recent years.<sup>157</sup> Nevertheless, Canadian competition authorities have admitted that Canada's laws are antiquated and no longer practical.<sup>158</sup>

Despite policy discussions in the EU after the outcome of *Leegin*, the possibility that the EU will change its laws, especially in the foreseeable future, is less likely than in Canada.<sup>159</sup> First, Kroes has not demonstrated as much leniency toward businesses as many once predicted.<sup>160</sup> Additionally, the EC policy is newer and therefore less easily dismissed.<sup>161</sup> Finally, practicalities that exist within the EU, with regard to RPM in particular, would caution against a more permissible standard in that area.<sup>162</sup>

3. *It is likely that any changes in EU or Canadian policy will happen slowly, giving both jurisdictions a chance to evaluate the United States domestic reaction to Leegin*

As American federal authorities will watch the ramifications of *Leegin* in the lower courts and its effects on business and competition in the United States, both Canada and the EU will likely do the same.<sup>163</sup> In keeping with the trend toward convergence of competition policy worldwide, both jurisdictions have often used the United States as a model for development of their own competition policies, suggesting that these jurisdictions will observe closely the ramifications of *Leegin* on minimum RPM in the U.S. system.<sup>164</sup> If it appears that the fears regarding *Leegin* are coming to fruition—that the rule of reason is overly permissive toward RPM, that RPM is unreasonably driving up consumer prices, or that either state or federal resistance will effectively overturn *Leegin* in the United States—it is more likely than not that Canada and the EU will resist moving forward with any plans to mimic the *Leegin* decision.<sup>165</sup> However, if acceptance grows in the United States and ramifications of the decision appear

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recommendations for Competition Act revisions).

157. See *supra* note 107 and accompanying text (explaining Canadian federal government more conservative now than when VanDuzer Report published).

158. See generally *COMPETE TO WIN*, *supra* note 109 (delineating outdated and inflexible provisions of Competition Act).

159. See *infra* text accompanying notes 160-62 (outlining reasons EU less likely to change RPM policy than Canada).

160. See *supra* note 117 and accompanying text (comparing Monti and Kroes and predicting potential change in EC competition policy focus).

161. See *supra* note 74 (reviewing legislative history of Articles 81 and 82 of EC Treaty).

162. See *supra* note 121 and accompanying text (explaining EU competition law emphasizes maintaining common competition market and deemphasizing national entrenchment).

163. See *supra* note 149 (explaining U.S. federal authorities likely to observe state and lower court reaction to *Leegin*).

164. See *supra* notes 105-22 and accompanying text (describing emphasis on convergence with U.S. law in development of Canadian and EU policy).

165. See *supra* notes 46-66 (explaining concerns regarding *Leegin* case and potential federal and state resistance to decision); *supra* notes 99-101 and accompanying text (providing example of importance of substantive competition policy convergence among major trading partners).

positive, the likelihood of either jurisdiction moving to a rule of reason for minimum RPM increases.<sup>166</sup>

#### IV. CONCLUSION

Much of the debate surrounding the Supreme Court's 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* has centered around the effects that this decision may have on competition in the United States—whether it will drive up prices for consumers, provide a cover for oligopolistic collusion, or ultimately do what it intended and stimulate interbrand competition in cases deemed reasonable under the new standard. However, *Leegin* is also significant in the challenge this decision poses for companies engaged in cross-border transactions that may wish to take advantage of the new RPM standard.

While much of the international community is moving toward cooperation and convergence of competition policies, *Leegin* has moved the United States in the opposite direction of RPM law in both the EU and Canada. Although it is possible that all three policies will remain unchanged, leaving companies to manage varying pricing policies in different jurisdictions and risk the foreign exposure that may ensue, it is more likely that, in time, one or more of these jurisdictions will give way.

Ultimately, this presents a waiting game for all three jurisdictions. The United States will wait to see whether state courts reject the decision or federal legislation overturns it. Likewise, Canada and the EU, having traditionally attempted convergence with United States policy whenever feasible, will likely observe the American developments and, if the application of the rule of reason is successful in the United States, may take action to follow this precedent.

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166. *See supra* notes 99-101 (illustrating rationale for EU and Canada closely watching outcome of U.S. RPM policy debate).