

No.

IN THE

Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,
Petitioner,

v.

PSKS, INC., doing business as Kay's Kloset . . .
Kay's Shoes,
Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that antitrust “*per se* rules are appropriate only for conduct that . . . would always or almost always tend to restrict competition.” Modern economic analysis establishes that vertical minimum resale price maintenance does not meet this condition because the practice often has substantial competition-enhancing effects. The question presented is whether vertical minimum resale price maintenance agreements should be deemed *per se* illegal under Section 1 of the Sherman Act, or whether they should instead be evaluated under the rule of reason.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

In addition to the parties named in the caption, Toni Cochran L.L.C., doing business as Toni's, was a plaintiff below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Leegin Creative Leather Products, Inc. is a wholly owned division of Brighton Collectibles, Inc. No publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Leegin Creative Leather Products, Inc. (“Leegin”) respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals’ opinion is unpublished but electronically reported at 2006 WL 690946. App., *infra*, at 1a. The order denying Leegin’s petitions for rehearing and for rehearing en banc is unreported. *Id.* at 16a. The opinion of the United States District Court for the Eastern District of Texas is unreported. *Id.* at 12a.

JURISDICTION

The district court had jurisdiction over respondent’s claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court’s final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on March 20, 2006. It denied Leegin’s timely petitions for rehearing and for rehearing en banc on July 19, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) provides, in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal.

STATEMENT

This case is an ideal vehicle for this Court to revisit its decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which relied upon the antiquated common-law rule against “restraints on alienation” to hold that a vertical agreement between a manufacturer and its retailers establishing minimum resale prices for the manufacturer’s goods is a *per se* violation of the Sherman Act. *Id.* at 404. This *per se* rule—on which the Fifth Circuit relied in affirming the district court’s judgment—squarely conflicts with accumulated economic knowledge, which recognizes that vertical minimum resale price maintenance can have significant *procompetitive* effects, and with this Court’s modern antitrust jurisprudence, including decisions revisiting and rejecting analogous *per se* rules prohibiting other vertical agreements. See *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). As in *Khan* and *Sylvania*, the *per se* rule at issue here has been subject to overwhelming criticism and lacks support under the economic approach that this Court’s recent antitrust jurisprudence has applied.

1. Leegin has built a successful family business in the crowded and intensely competitive marketplace for women’s fashion accessories. In 1990, Leegin introduced the “Brighton” brand with a line of women’s belts, and it later added other types of accessories to the Brighton line. Leegin has differentiated its products from the myriad other brands of leather goods and accessories available in department stores and mass merchandisers by focusing on boutique stores offering a level of service and personal attention that consumers often cannot find elsewhere. 6.R.5-11.¹

Leegin’s strategy has succeeded. Brighton has become a brand equated with quality, value, and customer service.

¹ “R” refers to the record on appeal. Citations to the record are to the volume of the record, followed by the page number in that volume.

Brighton products did not even exist until 1990, yet ten years later, despite competition from hundreds of other brands of women's accessories, Brighton products were sold in more than 5,000 specialty stores nationwide. 5.R.125-26; 6.R.17-20; 7.R.15. While Leegin has achieved impressive success from its humble beginnings, it is still a small company when compared to the much larger manufacturers and department stores with which it and its retailers compete. 3.R.813-20.

2. In 1997, Leegin instituted the "Brighton Retail Pricing and Promotion Policy," pursuant to which Leegin announced that it would do business exclusively with retailers who follow its suggested retail prices for Brighton products. 6.R.10.² There were two principal reasons for Leegin's adoption of the pricing policy. First, it was Leegin's view that the typical retail strategy of putting products on and off "sale" degrades a manufacturer's brand by causing customers to feel cheated when they buy at the wrong moment. 5.R.106-24. Leegin's policy instead furthered an "everyday fair price" approach. *Id.* Second, the pricing policy was designed to develop the Brighton brand by giving retailers incentives to provide special attention and service to Brighton customers. 5.R.115-27. In small specialty stores, attractive presentation and customer service are central to the shopping experience, but providing those services is not costless to retailers. *Id.* Through its pricing policy, Leegin ensured a sufficient margin to retailers to give them the incentive to focus on Brighton products and to provide high-quality service. *Id.*

Leegin's pricing policy was successful, and sales of Brighton products grew considerably after its inception. For example, sales of Brighton handbags increased from 125,609 units in 1996, to 375,480 units in 2003. *See* Expert Report of Kenneth G. Elzinga ("Elzinga Report") at 20 n.26 (App., *infra*, at 37a).

² Leegin's pricing policy permitted retailers to discount products that they did not wish to re-order from Leegin.

3. Plaintiff PSKS, which operated a retail store known as “Kay’s Klosest” in Lewisville, Texas, was one of the stores to which Leegin sold Brighton products. In December 2002, Leegin learned that PSKS was selling all Brighton products below the suggested prices, in violation of Leegin’s pricing policy. 6.R.112-13. In response, Leegin suspended all shipments of Brighton products to PSKS. 6.R.118-19; 7.R.102-09. PSKS then filed this suit, alleging that Leegin’s pricing policy constituted an unlawful agreement in restraint of trade.

The district court refused to allow Leegin to introduce evidence that its pricing policy promoted interbrand competition, and excluded the testimony of Leegin’s economic expert, Professor Kenneth G. Elzinga. 1.R.325-33. Professor Elzinga would have testified, *inter alia*, that Leegin lacks market power and that its pricing practices are procompetitive because they foster interbrand competition. Elzinga Report at 5-20 (App., *infra*, at 22a-37a). The district court also denied Leegin’s request for an instruction that would have allowed the jury to apply the rule of reason (1.R.190-92), which requires an antitrust plaintiff to demonstrate that the defendant’s conduct unreasonably restrains competition in a relevant market before it will be found unlawful (*see Texaco Inc. v. Dagher*, 126 S. Ct. 1276, 1279 (2006)), and instead instructed the jury that the alleged resale price maintenance agreement is *per se* unlawful (11.R.42).

The jury found that Leegin’s policy constituted a resale price maintenance agreement, and based on the verdict, the court awarded PSKS \$3.6 million in damages and \$375,000 in attorneys’ fees. App., *infra*, at 3a. Leegin renewed its motion for judgment as a matter of law and moved in the alternative for a new trial. The court denied Leegin’s motions, stating that “[w]hether the *per se* classification of such agreements is wise is not for this court to decide.” *Id.* at 12a.

The Fifth Circuit affirmed the district court’s decision, rejecting Leegin’s request for rule-of-reason treatment because lower courts “remain bound by [the Supreme Court’s]

holding in *Dr. Miles*.” App., *infra*, at 4a. The Fifth Circuit called for a response to Leegin’s petitions for rehearing and for rehearing en banc, but eventually denied the petitions.

After the Fifth Circuit refused to stay its mandate, Leegin applied to Justice Scalia for a stay pending the filing and disposition of a petition for a writ of certiorari. No. 06A179. Justice Scalia granted a temporary stay pending a response from PSKS. After a response was received, Justice Scalia referred the application to the Court, which granted the stay pending the filing and disposition of this petition.

REASONS FOR GRANTING THE PETITION

The *per se* rule against resale price maintenance squarely conflicts with this Court’s modern antitrust jurisprudence, which has rejected *per se* treatment of analogous vertical agreements because such treatment lacked an economic justification. *See Sylvania*, 433 U.S. at 47-48 (rejecting the *per se* rule against vertical nonprice restraints, and explaining that the “great weight of scholarly opinion ha[d] been critical of the” rule); *Khan*, 522 U.S. at 18 (unanimously overturning the *per se* rule against vertical maximum price-fixing because there was “insufficient economic justification” for the rule); *see also Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1290-91 (2006) (unanimously overturning the presumption of *per se* illegality of a tying arrangement involving a patented product because it was inconsistent with economic analysis). Like the *per se* rules rejected in *Sylvania*, *Khan*, and *Independent Ink*, the rule of *Dr. Miles* has no foundation in economic theory because it is well-established that vertical minimum resale price maintenance agreements often have substantial procompetitive effects. The validity of such agreements is therefore more appropriately determined under the rule of reason, rather than through application of a rigid *per se* rule.

This Court “presumptively applies rule of reason analysis” to antitrust claims. *Dagher*, 126 S. Ct. at 1279. The Court has emphasized that a “departure from the rule-of-reason standard must be based upon demonstrable economic

effect.” *Sylvania*, 433 U.S. at 58-59. The *per se* prohibition on resale price maintenance, however, rests upon outdated common-law notions that are inconsistent with economic theory and that were expressly rejected by this Court in *Sylvania* and *Khan*. Not surprisingly, legal and economic commentators have leveled sharp criticism at this *per se* rule, pointing out that it lacks any economic justification. For example, Judge Posner has described the *per se* rule against resale price maintenance as “a sad mistake,” explaining that “[t]here is neither theoretical basis, nor empirical support, for thinking the practice generally anticompetitive.” Richard A. Posner, *Antitrust Law* 189 (2d ed. 2001) [hereinafter Posner, *Antitrust Law*]. Numerous other commentators are in accord. See, e.g., Thomas R. Overstreet, Jr., Bureau of Econ., Fed. Trade Comm’n, *Resale Price Maintenance: Economic Theories and Empirical Evidence* 164 (1983) (“the economic theories and the available empirical evidence rather clearly suggest that the rigid application of a strict standard of *per se* illegality for RPM [resale price maintenance] is inappropriate”).

Moreover, because of its overbreadth, the rule of *Dr. Miles* inflicts substantial harm on competitive market processes. In particular, the rule proscribes conduct that, if permitted, would frequently be used for procompetitive purposes and would enhance consumer welfare. In this case, for example, Leegin is a small competitor that used resale price maintenance to provide incentives for retailers to market its products effectively against its larger rivals. The antitrust laws should promote, not condemn, a small manufacturer’s efforts to expand its output through aggressive interbrand competition. The *per se* rule against resale price maintenance, however, undercuts this competitive tool and thus undermines interbrand competition—a result that is antithetical to the objectives of the antitrust laws.

This case, which is final in all respects, presents a singularly appropriate vehicle to reconsider the *per se* rule against resale price maintenance, which the Court has not squarely addressed under its modern antitrust jurisprudence. Review

by this Court is necessary to overturn this far-reaching and anachronistic *per se* rule and to bring the law of resale price maintenance into step with the law governing other vertical restraints.

I. THE RULE OF *DR. MILES* IS INCONSISTENT WITH THIS COURT’S MODERN ANTITRUST JURISPRUDENCE.

The *per se* rule against resale price maintenance is the lone remaining vestige of an antiquated antitrust regime that cannot be reconciled with either recent antitrust decisions or economic theory. This Court has abandoned the *per se* rules against other vertical arrangements—including vertical maximum price-fixing arrangements and all types of vertical nonprice restraints. Each of those other *per se* rules—like the rule of *Dr. Miles*—was based on the “ancient rule against restraints on alienation” (*United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967)), which has no grounding in economics. And each of the other vertical *per se* rules was rejected when the Court applied an approach to antitrust analysis grounded in real-world economics. This Court should reexamine the rule of *Dr. Miles* to resolve the conflict between that outdated and overbroad *per se* rule and the Court’s antitrust decisions of the last thirty years.

A. This Court Has Overturned Analogous *Per Se* Rules Against Other Vertical Agreements.

1. Nearly a century ago, this Court in *Dr. Miles* invalidated an agreement that required a manufacturer’s dealers to abide by a minimum resale price. Without considering the competitive consequences of the practice, the Court held that these arrangements are invalid under the Sherman Act because such “restraints upon alienation have been generally regarded as obnoxious to public policy.” *Dr. Miles*, 220 U.S. at 404. In his dissenting opinion, Justice Holmes rejected the majority’s approach and argued that, in many circumstances, the public would “be served best by the company being al-

