

Dr. Miles: Will the Supreme Court Find a Cure?

Donald M. Barnes and David T. Fischer

On December 7, 2006, the U.S. Supreme Court agreed to hear *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹ which presents the Court with an opportunity to address the per se minimum resale price rule established almost a century ago in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*² Resale price maintenance is a vertical restraint that occurs when a seller of goods conditions the sale upon the buyer's agreement to not resell the goods below (or above) a specified price. *Dr. Miles* held that if the seller sets a *minimum* resale price, then the activity is considered per se illegal under the Sherman Act. Although some economists and lawyers—many from the “Chicago School”—have criticized *Dr. Miles* based on the rationale that minimum resale price maintenance is often beneficial to consumers,³ others have argued that minimum resale price maintenance results in inefficiencies and higher prices for consumers and facilitates cartelization of either manufacturers or resellers.⁴

Now the Supreme Court will determine whether the *Dr. Miles* “cure” has become a competition “disease.”

The Supreme Court's Treatment of Vertical Restraints

At the time of the *Dr. Miles* decision, the Sherman Act was only 13 years old and antitrust jurisprudence was in its infancy. The Indiana-based Dr. Miles Medical Company sold its patent medicine products to wholesalers and retailers. Its contracts with wholesalers required resale pricing equal to or greater than the price the Dr. Miles Medical Company charged the wholesaler.⁵ The contracts with retailers prohibited the retailers from selling “at less than the full retail price as printed on the packages.”⁶ The plaintiff, John D. Park & Sons Company, was a wholesaler that had previously purchased products from the Dr. Miles Medical Company but later refused to accept Dr. Miles's contract with the minimum resale prices and sold the products below cost.

The Supreme Court, relying in part upon the doctrine that “restraints upon alienation have been generally regarded as obnoxious to public policy,” found 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. They are not saved by the advantages which

¹ 171 F. App'x 464 (5th Cir.), cert. granted, 127 S. Ct. 763 (2006).

² 220 U.S. 373 (1911).

³ See, e.g., Barbara O. Bruckmann, *Revisiting Dr. Miles: Reinstating a Modern Rule of Reason for Vertical Minimum Resale Price Agreements*, ANTITRUST SOURCE, Feb. 2007, <http://www.abanet.org/antitrust/at-source/07/02/Feb07-Bruckmann.pdf>.

⁴ See, e.g., Matthew Moloshok, *Dr. Miles—A Rock of Ages*, ANTITRUST SOURCE, Feb. 2007, <http://www.abanet.org/antitrust/at-source/07/02/Feb07-Moloshok.pdf>.

⁵ 220 U.S. at 396–97.

⁶ *Id.* at 399 (quoting form of contract at issue).

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**Donald M. Barnes and
 David T. Fischer** are
 attorneys at Porter
 Wright Morris & Arthur,
 LLP in Washington, D.C.

the participants expect to derive from the enhanced price to the consumer.”⁷ As a result, minimum resale prices were to be treated as per se violations of the Sherman Act.

Shortly after *Dr. Miles* was decided, the Court limited its scope and its effect. In 1918, in *United States v. Colgate & Co.*, the Court was confronted with a manufacturer which, among other things, provided its dealers with a suggested “uniform price[] to be charged” and “urg[ed] them to adhere to such prices and notices, stating that no sales would be made to those who did not” comply.⁸ The manufacturer also stopped selling to those dealers who failed to sell at its suggested price. The Court rejected the government’s argument that this resulted in “an unlawful combination . . . resulting from restrictive agreements” in which the dealers agreed to resell the products only at the suggested price.⁹ Because the dealer was free to resell the goods at any price (or even give them away) there was no agreement and, thus, no violation. The distinction drawn by the *Colgate* court, i.e., the lack of a formal contract, has been criticized by many commentators.¹⁰

In addition to treating *minimum* resale price agreements as a per se violation, the Court also found that *maximum* resale price agreements were per se violations as well. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons* involved another Indiana “drug concern,” Kiefer-Stewart, an alcohol wholesaler that brought a lawsuit against liquor companies that set a maximum resale price above which their resellers, including Kiefer-Stewart, could not sell their products.¹¹ The Court found that an agreement setting a maximum resale price was also a per se violation. It reaffirmed this decision in *Albrecht v. Herald Co.*,¹² but, as discussed below, the Court later reversed itself in *State Oil Co. v. Khan*.¹³

The Court also addressed nonprice vertical restraints. In *United States v. Arnold, Schwinn & Co.*,¹⁴ the Court ruled that Schwinn’s practice of limiting the territory within which its wholesalers could resell Schwinn bicycles was a per se violation of Section 1 of the Sherman Act. The Court’s extension of per se treatment to nonprice vertical restrictions was short-lived; it overturned *Schwinn* ten years later in *Continental T.V., Inc. v. GTE Sylvania Inc.*, and held that such restraints should be judged under the rule of reason because *Schwinn* was based “upon formalistic line drawing” and there was no evidence “that vertical restrictions have or are likely to have a ‘pernicious effect on competition’ or that they ‘lack . . . any redeeming virtue.’”¹⁵

Eleven years after the Court decided *Continental T.V.*, in 1977, the Court returned to resale price restraints in *Business Electronics Corp. v. Sharp Electronics Corp.*¹⁶ Sharp sold its electronic calculators to two dealers in the Houston area: Business Electronics, the petitioner, and Hartwell.

⁷ *Id.* at 404, 408 (citations omitted).

⁸ 250 U.S. 300, 303 (1919).

⁹ *Id.* at 306.

¹⁰ See, e.g., 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1445d (2d ed. 2003) (explaining that “[a]lthough it may be too late to reappraise *Colgate*, let us consider how it might be reconciled with the adoption of the implied acceptance or coercion theories of agreement” and taking 4 pages to do so); Hanno Kaiser, *May Dr. Miles Finally Rest in Peace?*, ANTITRUST REV., Sept. 9, 2006, <http://www.antitrustreview.com/archives/687>.

¹¹ 340 U.S. 211, 213 (1951), *overruled on other grounds*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

¹² 390 U.S. 145, 152 (1968).

¹³ 522 U.S. 3 (1997).

¹⁴ 388 U.S. 365, 375 (1967).

¹⁵ 433 U.S. 36, 58–59 (1977) (citation omitted).

¹⁶ 485 U.S. 717 (1988).

Sharp “published a list of suggested minimum retail prices, but its written dealership agreements with petitioner and Hartwell did not obligate either to observe them, or to charge any other specific price.”¹⁷ After receiving numerous complaints from Hartwell about Business Electronics’s pricing of the electronic calculators below the suggested retail prices, Sharp terminated Business Electronics’ dealership. The Court, relying in large part upon *Continental T.V.*, held that the *per se* rule only applies to vertical restraints if there is an agreement on price or price levels, which was absent here.¹⁸

Continuing its (roughly) once-a-decade consideration of resale price maintenance issues, the Court returned to maximum resale price restraints. In *State Oil v. Khan*,¹⁹ Khan, a gas station operator, purchased gasoline from State Oil. Under their agreement, Khan purchased gasoline “at a price equal to a suggested retail price set by State Oil, less a margin of 3.25 cents per gallon.”²⁰ Khan could charge any price for the gasoline it resold, but if the price was higher than the suggested retail price, the amount over the suggested retail price was rebated to State Oil. After a lengthy review of the Court’s resale price jurisprudence, the Court found it “difficult to maintain that vertically imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation” and reversed *Kiefer-Stewart* and *Albrecht* by holding that maximum resale price maintenance should warrant rule of reason scrutiny instead of *per se* treatment.²¹

Will Dr. Miles Spell “Bad Medicine” for Leegin?

Leegin Creative Leather Products, founded in 1966 in California, manufactured and sold products under its own brands and manufactured belts for other belt companies and for “private label retailers (belts sold under the retailer’s own label name) such as: Lands’ End, L.L. Bean, Eddie Bauer, [and] J. Crew.” In 1991, Leegin launched its Brighton brand of belts and later expanded this product line to include numerous other accessories. Today, Leegin sells its Brighton products in 50 Brighton stores and in approximately 6,000 specialty stores. No direct sales are made over the Internet or to department stores.²² The plaintiff, PSKS, is a women’s clothing and accessories store doing business as Kay’s Closet in Flower Mound, Texas.

Leegin established a manufacturer’s suggested retail pricing policy called the “Brighton Retail Pricing and Promotion Policy” (Pricing Policy) in which Leegin stated it would refuse to sell to retailers who sold its Brighton products for less than the suggested price. Leegin subsequently introduced a “Heart Store Program,” which provided incentives to stores that (1) pledged to follow the Pricing Policy at all times, and (2) promoted Brighton products within a separate section of the store.²³

In 2002, Leegin learned that PSKS had placed all of its Brighton products on sale, and immediately suspended shipments of Brighton products to PSKS. At trial, the jury found that Leegin and its retailers agreed to fix prices and that this resulted in antitrust injury to PSKS in the amount of

¹⁷ *Id.* at 721.

¹⁸ *Id.* at 726–27.

¹⁹ 522 U.S. 3 (1997).

²⁰ *Id.* at 8.

²¹ *Id.* at 15.

²² Brighton, “About Us,” <http://www.brighton.com/retail/history/index.htm>.

²³ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 171 F. App’x 464, 465 (5th Cir.), *cert. granted*, 127 S. Ct. 763 (2006).

\$1.2 million (which was later trebled by the trial court). On appeal, Leegin did not directly challenge the jury's conclusion that it entered into price-fixing agreements; instead it challenged the per se rule itself.²⁴

The Fifth Circuit rejected Leegin's argument that the Supreme Court had inconsistently applied the rule established by *Dr. Miles*. The Fifth Circuit found that the Court had consistently applied *Dr. Miles* because *Khan*, *Business Electronics*, and *Continental T.V.* all involved something other than "a vertical minimum price-fixing agreement." The Fifth Circuit also rejected Leegin's argument that the Pricing Policy "did not result in competitive harm" and therefore "qualifie[d] for an exception to the per se rule."²⁵ Leegin argued that *Broadcast Music, Inc. v. CBS, Inc.*, *Abadir & Co. v. First Mississippi Corp.*, and *United States v. Realty Multi-List, Inc.*,²⁶ established exceptions to the per se rule; the Fifth Circuit, however, stated that "none of these cases involved vertical minimum price fixing" and "[f]urthermore, each was decided before the Court reaffirmed the per se rule's application to vertical minimum price-fixing agreements" in *Business Electronics*, *Monsanto Co. v. Spray-Rite Service Corp.*,²⁷ and *Khan*.²⁸

Leegin appealed to the Supreme Court, which granted a stay and then granted certiorari.

Arguments For and Against Maintaining the *Dr. Miles* Rule

In its Supreme Court merits brief, Leegin argues that the per se rule against resale price maintenance "squarely conflicts with the modern economic understanding that resale price maintenance can have significant *procompetitive* effects," an understanding that "has been embraced by" the Court in its modern antitrust jurisprudence, which has rejected per se treatment of analogous vertical agreements because such treatment lacks an economic justification.²⁹

²⁴ *Id.* at 466. Leegin also challenged the trial court's exclusion of its economic expert, PSKS's antitrust injury, and certain issues related to damages calculations. Of note, Leegin's economic expert would have testified that the per se rule should not be applied and that "Leegin's pricing practices were pro-competitive, justifying the rule of reason's application." *Id.* at 467. The Fifth Circuit upheld the trial court's decision because "[w]ith the per se rule, expert testimony regarding economic conditions and the pricing policy's pro-competitive effects is *not* relevant." *Id.*

²⁵ *Id.*

²⁶ *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 8–9 (1979) (finding blanket licenses issued by organization representing thousands of copyright holders to television and radio stations, pursuant to a consent decree with the Department of Justice, is not unlawful per se price fixing); *Abadir & Co. v. First Miss. Corp.*, 651 F.2d 422, 428–29 (5th Cir. 1981) (applying, pursuant to *Continental T.V.*, the rule of reason to a vertical market-dividing agreement); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980) (holding that the membership criteria promulgated by a real estate multiple listing service which effectively allow the MLS to establish a group boycott of those real estate brokers who fail to qualify under the rules should be judged under the rule of reason).

²⁷ 465 U.S. 752 (1984). *Monsanto* concerned the evidence necessary to show that the manufacturer and other resellers were acting in concert. Of more significance to *Leegin*, in 1983 the Department of Justice, in an amicus brief filed with the Court in *Monsanto*, sought to advocate that the Supreme Court end the application of the per se rule to minimum resale pricing. The DOJ's position, however, met with disapproval from Congress, and a bipartisan alliance of 37 Senators banded together in an effort to force the DOJ to reverse its position. Those senators successfully cut off DOJ funding to advance that argument when they incorporated language into an appropriations bill that explicitly prevented the DOJ from expending any money to overturn or alter the existing prohibition against vertical price restraints. After President Reagan signed the bill, the Solicitor General, by letter, informed the clerk of the Supreme Court that the DOJ would not address the per se rule at oral argument. See generally, Lloyd Schwartz, *Justice Dept. Slapped for Antitrust Inaction*, 13 NEWS REC. (Los Angeles, Cal.), May 20, 1983, at 13; Lloyd Schwartz, *Action Time Arrives in Retail Pricing Row*, 13 NEWS REC. (Los Angeles, Cal.), Oct. 25, 1983, at 2; Robert Hershey Jr., *U.S. Will Limit Price Agreements*, N.Y. TIMES, Nov. 29, 1983, at D23.

²⁸ *Leegin*, 171 F. App'x at 467.

²⁹ Brief for Petitioner at 2, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 2007 WL 160780 (U.S. Jan. 22, 2007) (No. 06-480).

Leegin also asserts that *Dr. Miles* rested, in large part, upon the “outdated common-law prohibition” against restraints on alienation and the Court failed to consider any “economic analysis of resale price maintenance or judicial experience applying the rule of reason to such agreements.”³⁰ A concern with “restraints upon alienation” is no longer a valid justification for per se treatment in Leegin’s view. Additionally, later Supreme Court precedent, such as *Continental T.V.* and *Khan*, establishes that per se rules are only appropriate for conduct that is “manifestly anticompetitive,” such as “conduct that would always or almost always tend to restrict competition and decrease output.”³¹

Leegin also argues that modern economic analysis establishes that minimum resale pricing often has substantial procompetitive effects.³² Such modern economic analysis has impelled the Court to overturn other, older decisions relating to per se treatment of vertical nonprice and vertical maximum resale price restraints. Similarly, minimum resale pricing results in procompetitive effects, such as creating incentives for retailers to provide service and promote the manufacturer’s products, eliminating retailer free riding, and inducing retailers to invest in capital and labor that is usually required for innovation to develop new products beneficial to the consumer. Because these effects promote interbrand competition, the per se rule is inappropriate. Moreover, although minimum resale prices could be used by a cartel to enforce a horizontal agreement, empirical studies show that such situations are very rare (and would still be condemned under the rule of reason).

Although PSKS has, at the time of this writing, yet to file its merits brief, PSKS argued in its certiorari opposition brief that the per se rule regarding minimum resale prices is well-established and that the exceptions to the rule—including the conduct allowed under *Colgate*, *Continental T.V.*, and *Business Electronics*—are broad enough to allow companies the freedom necessary to arrange their businesses “to achieve permissible economies.”³³ Additionally, PSKS will point out that Congress has, on several occasions, “endorsed” the per se treatment of minimum resale price maintenance.³⁴ Finally, recent economic “literature has produced impressive arguments that certain market structures and certain types of collaborative activity are much more likely to have anticompetitive consequences than the Chicago School antitrust writers imagined.”³⁵ Minimum resale price maintenance has, PSKS argues, anticompetitive effects, such as higher prices for consumers, decreased efficiencies available from price flexibility, and promotion of cartels.³⁶

Numerous parties, including CITA-The Wireless Association, the National Association of Manufacturers, and a group of 25 economists filed amicus briefs supporting Leegin’s petition for certiorari.³⁷ CITA, Ping, Inc., the group of economists, and the Federal Trade Commission and the Department of Justice have recently filed amicus briefs on the merits supporting Leegin, and addi-

³⁰ *Id.* at 6.

³¹ *Id.* (quoting *Business Electronics*, 485 U.S. at 723).

³² *Id.* at 13 (citing ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW AND ECONOMICS OF PRODUCT DISTRIBUTION 76 (2006) (“[T]he ‘bulk of the economic literature on RPM . . . suggests that RPM is more likely to be used to enhance efficiency than for anticompetitive purposes.”)).

³³ Brief for Respondent in Opposition to Certiorari, 2006 WL 3244036, at *10 (Nov. 6, 2006).

³⁴ *Id.* at *11–*15 (citing, inter alia, the Consumer Goods Pricing Act, 15 U.S.C. § 1).

³⁵ *Id.* at *16 (quoting Herbert Hovencamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 270 (2001)).

³⁶ PSKS will also have arguments regarding stare decisis and, more interestingly, that because Leegin sold “Brighton” products via its own “Brighton” stores, its minimum resale pricing was part of a horizontal cartel.

³⁷ These briefs, as well as the amicus briefs on the merits described *infra*, are available at <http://www.abanet.org/antitrust/at-committees/at-df/knowledge-database.shtml>.

The Court's recent willingness to reconsider longstanding antitrust decisions in light of new economic and legal analysis, its large majorities in such cases, its reliance on contemporary economic analysis, and its acceptance of this case indicate that the Court—or at least four members of the Court—would like to revisit and likely reverse Dr. Miles.

tional parties are also expected to file amicus briefs on the merits. Ping's brief describes its recently adopted vertical minimum resale advertising and pricing policy (its "iFIT Pricing Policy") and the "extraordinary lengths" it went through in order to achieve a minimum resale price that complies with *Colgate* and avoids *Dr. Miles's* per se rule. CITA's and the economists' briefs, by contrast, focuses mostly on the procompetitive aspects of minimum resale pricing and relevant economic literature.

The most significant amicus brief was filed jointly by the Federal Trade Commission and the Department of Justice. The United States argues that "[b]ecause the effects of RPM can be either anticompetitive or procompetitive depending on the facts in a given case, a per se rule is clearly inappropriate."³⁸ The United States also argues that the underlying rationale of *Dr. Miles* is outdated and contradicts modern economics, the Court's more recent antitrust jurisprudence undermines the reasoning in *Dr. Miles*, and that stare decisis considerations do not justify the continued application of *Dr. Miles's* per se rule.

After a spirited discussion, the ABA Section of Antitrust Law recommended that the American Bar Association file an amicus brief arguing that Section 1 "should not be interpreted to apply a rule of per se illegality to agreements between a buyer and seller setting the price at which the buyer may resell goods or services purchased from the seller."³⁹ Were the House of Delegates to approve the recommendation, the ABA would file an amicus brief as well. On a related note, the Antitrust Modernization Commission's relevant working group has suggested that the Commission not recommend legislative action to overrule *Dr. Miles* but to "defer to the common law process."⁴⁰

Has the *Dr. Miles* "Elixir" Reached Its Expiration Date?

Over the last several years, the Court has decided a number of antitrust cases, while reducing its overall caseload. The Court has revisited, revised, and reversed longstanding antitrust doctrines. The Court's recent willingness to reconsider longstanding antitrust decisions in light of new economic and legal analysis, its large majorities in such cases, its reliance on contemporary economic analysis,⁴¹ and its acceptance of this case indicate that the Court—or at least four members of the Court—would like to revisit and likely reverse *Dr. Miles*.

Regardless of how the Court ultimately rules, the decision will likely have little practical effect. In the almost 100 years since *Dr. Miles* was decided, astute businesses have developed practices to avoid the *Dr. Miles* per se rule, yet achieve a de facto minimum resale price. For example, as in *Colgate*, the manufacturer can pre-announce to dealers a suggested resale price and let them know that it would stop selling to those who fail to sell at that price. Manufacturers can also use nonprice vertical restraints and can set a maximum resale price to avoid the per se rules.

³⁸ Brief for the United States as Amicus Curiae Supporting Petitioner, 2007 WL 173650, at *3–*4 (Jan. 22, 2007). The Federal Trade Commission vote approving the filing of the joint brief was 3–2, with Commissioners Pamela Jones Harbour and Jon Leibowitz voting no (FTC File No. P062103).

³⁹ The Section's report to the ABA House of Delegates is available at <http://www.abanet.org/antitrust/at-comments/2006/reports/ANTITRUST-RPM-REPORT-12-06.pdf>.

⁴⁰ Single-Firm Conduct Working Group Memorandum 15, Dec. 21, 2004, <http://www.amc.gov/pdf/meetings/Single-FirmConduct.pdf>. See generally Roxane C. Busey, *U.S. Antitrust Modernization: A Preview*, ANTITRUST SOURCE, Dec. 2006, at <http://www.abanet.org/antitrust/at-source/06/12/Dec06-Busey12=19f.pdf>.

⁴¹ See, e.g., *Illinois Tool Works Inc. v. Indep. Ink*, 126 S. Ct. 1281 (2006) (overruling *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947) (finding that because a patent does not automatically vest the patent owner with market power in all cases involving a tying arrangement, the plaintiff must prove that the defendant, the patent owner, has market power)).

Another common technique to avoid per se treatment under *Dr. Miles* is the use of minimum advertised pricing (MAP). The most common form of MAP occurs where a manufacturer provides marketing subsidies to a retailer, but only if the retailer advertises the product at or above the price set by the manufacturer. MAP, however, has its own limitations. For example, MAP programs cannot contain overly strict penalties or simply be “cover” for a price-fixing agreement.⁴² Nevertheless, MAP programs are increasingly popular.

The dearth of minimum resale price cases in the last 25 years and the minimal efforts to overturn *Dr. Miles* legislatively suggest that manufacturers have been able to use alternatives to minimum resale price agreements and have not felt the need to challenge *Dr. Miles* directly.⁴³ As a result of the numerous “antidotes” that manufacturers already have, a reversal of *Dr. Miles* will have limited impact on the marketplace (although it would allow sellers to more efficiently establish a minimum resale price).

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Conclusion

We can only speculate as to the Court's motives for granting certiorari in *Leegin*, but extrinsic factors, including marketplace effect and contemporary trends in antitrust jurisprudence, point to the formal demise of *Dr. Miles*. There is no circuit split on this issue. The U.S. government was not a party in the underlying litigation, nor did it recommend certiorari (but, as stated previously, is an amicus supporting reversal of *Dr. Miles*). As discussed above, businesses have been able to work around *Dr. Miles* and establish de facto minimum resale pricing. All of these factors, along with Chief Justice Roberts's stated deference to stare decisis and judicial restraint during his confirmation hearings and during his time on the bench, lead to the reasonable conclusion that the Court would not grant certiorari in *Leegin* except to reverse *Dr. Miles*. ●

⁴² There are almost no cases involving MAP programs from the last decade. The notable exception was the FTC's investigation and later consent order with distributors of music CDs. The FTC's informative “Analysis to Aid Public Comment” from that case is available at <http://www.ftc.gov/os/2000/05/mapanalysis.htm>.

⁴³ See, e.g., Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 224 (2005) (noting that the FTC had no minimum resale price challenges during the Reagan or George W. Bush administrations and only “a few challenges in extreme circumstances” in the George H.W. Bush administration); *Hearing on the Allocation of Antitrust Enforcement Between the States and the Federal Government, Statement of Harry First Before the Antitrust Modernization Commission*, at 22 (2005) (chart showing that state Attorneys General filed only 7 resale price maintenance cases between 1995 and 2004), http://www.amc.gov/commission_hearings/pdf/Statement-First.pdf.