

## The Reach of *Leegin*: Will the States Resuscitate *Dr. Miles*?

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*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>1</sup> in which the Supreme Court ended per se treatment of minimum resale price agreements in favor of a rule of reason analysis, no longer qualifies as breaking news. While the Court's opinion undoubtedly offers companies greater flexibility to impose minimum resale price maintenance programs under federal law,<sup>2</sup> thoughtful commentators have noted that the continuing uncertainty about the states'<sup>3</sup> treatment of minimum resale price maintenance could slow the business response to *Leegin*.<sup>4</sup>

Businesses have good reason for moving cautiously. Although relatively few private plaintiffs have brought minimum resale price maintenance cases under state law,<sup>5</sup> many of the same features of federal antitrust law that encourage civil litigation have state law equivalents. Every state empowers its attorney general to enforce its state antitrust laws through civil actions.<sup>6</sup> Fifty-one U.S. jurisdictions permit private actions under their antitrust statutes.<sup>7</sup> Forty-seven of those fifty-one jurisdictions allow for the recovery of enhanced damages,<sup>8</sup> and forty provide for the automatic recovery of reasonable attorney's fees.<sup>9</sup> Although in practice nearly all states have looked to federal law in crafting their own antitrust jurisprudence, we know from experience with *Illinois Brick*'s<sup>10</sup> ban on indirect-purchaser suits that states can reject federal precedent—particularly where they

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<sup>1</sup> 127 S. Ct. 2705 (2007).

<sup>2</sup> *Leegin*, of course, does not render minimum resale price agreements per se legal under federal law. A recently filed class action alleges that *Leegin*'s conduct violates the Sherman Act under the rule of reason. Complaint, *Spahr v. Leegin Creative Leather Prods., Inc.*, No. 2:07-CV-00187 (E.D. Tenn. May 15, 2007).

<sup>3</sup> Unless otherwise designated, this article includes the District of Columbia, the Commonwealth of Puerto Rico and the territories of the U.S. Virgin Islands and Guam in its description of "state" antitrust issues.

<sup>4</sup> See Beth L. Fancsali & Paul Olszowka, *How Wide Did the Supreme Court Open the Door to Minimum Resale Pricing?*, 15 ANDREWS ANTITRUST LITIG. REP. No. 6 Sept. 6, 2007; Maria L. Fiala & Scott A. Westrich, *Leegin Creative Leather Products: What Does the New Rule of Reason Standard Mean for Resale Price Maintenance Claims*, ANTITRUST SOURCE, Aug. 2007, <http://www.abanet.org/antitrust/antitrustsource/07/08/Aug07-Westrich8-6f.pdf>; Theodore C. Whitehouse, David K. Park & Emma-Ann L. Deacon, *Minimum Resale Price Restraints Need Extra Attention*, COMPETITION LAW 360, July 23, 2007, <http://competition.law360.com/Secure/ViewArticle.aspx?id=30372>.

<sup>5</sup> Our research has uncovered fewer than 30 reported state-court decisions on resale price maintenance.

<sup>6</sup> Only Connecticut, North Dakota, and Washington do not also provide for criminal antitrust enforcement.

<sup>7</sup> See, e.g., MD. CODE ANN., COM. LAW § 11-209(b)(2)(i) (2000 & Supp. 2007); S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1985 & Supp. 2002); TEX. BUS. & COM. CODE ANN. § 15.21(a)(1) (Vernon 2002).

<sup>8</sup> The great majority of states provide, like the Clayton Act, for automatic treble damages. See, e.g., CONN. GEN. STAT. § 35-35 (2005); 79 OKLA. STAT. ANN., tit. 79, § 205(A)(1) (West 2002). A few others require a showing of wilful, flagrant, or per se violations of the statute. See, e.g., MICH. COMP. LAWS ANN. § 445.778 Sec. 8(2) (West 2002); N.H. REV. STAT. ANN. § 356:11 (2002 & Supp. 2007).

<sup>9</sup> See, e.g., HAWAII REV. STAT. § 480-13(a)(1) (2002 & Supp. 2006); MINN. STAT. § 325D.57 (2004).

<sup>10</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

believe that consumer welfare is at stake. *Leegin's* requirement that federal courts analyze resale price maintenance under the rule of reason could therefore shift the battleground from federal to state law.

Differences between state and federal statutory language, state court precedent on vertical minimum resale price agreements, and the varying degrees of deference that states give to federal antitrust precedent all suggest that—despite *Leegin*—minimum resale price agreements may remain per se illegal in at least some states. Predicting which states will reject *Leegin's* approach is difficult, but states representing some of the largest economies in the country appear to number among those most likely to retain the *Dr. Miles* rule. Until test cases compel these states to decide what rule they will apply, any business considering a minimum resale price agreement must weigh carefully the benefits of that action against the risks of starring in what could become a cautionary tale.

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### What We Already Know

Predictions about the states' reactions to *Leegin* can rely on more than mere guesswork. We know, for example, that thirty-seven states argued as amici in *Leegin* to retain the *Dr. Miles* rule.<sup>11</sup> We also know that forty-eight states typically defer to federal precedent when interpreting their own state antitrust laws, consistent with a statute or judicial precedent that either mandates or suggests that deference.<sup>12</sup> While virtually all states have looked to federal law in developing their antitrust jurisprudence, the language of many state statutes differs from the Sherman Act; in some cases, in ways that could suggest a legislative intent to hold vertical agreements on minimum resale prices per se illegal. We also know that courts in at least a dozen states have issued opinions addressing vertical minimum resale price maintenance under state law<sup>13</sup>—with one requiring the rule of reason as a matter of state law even before *Leegin*.<sup>14</sup> Finally, we know that a few states have almost no antitrust jurisprudence at all.<sup>15</sup>

### How Can We Predict a State's Response to *Leegin*?

States are, of course, free to legislate a state-law repeal of *Leegin*, preserving by statute per se treatment of minimum resale price agreements. Businesses will have warning of these legislative changes, however, and if statutory repeals of *Illinois Brick* are any guide, amendments may take years.<sup>16</sup> Of more immediate concern is state courts' ability to depart from *Leegin* before any legislative repeal, in response to a challenge to a particular minimum resale price agreement. The likelihood of this development in any given state could depend upon several factors: amicus par-

<sup>11</sup> See 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 Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 621851.

<sup>12</sup> See, e.g., *Berghausen v. Microsoft Corp.*, 765 N.E.2d 592, 594 (Ind. Ct. App. 2002); *Rozema v. Marshfield Clinic*, 977 F. Supp. 1362, 1374 (W.D. Wis. 1997).

<sup>13</sup> See *infra* notes 34–36.

<sup>14</sup> See *People ex rel. Scott v. Convenient Food Mart, Inc.*, 315 N.E.2d 124, 131–34 (Ill. App. Ct. 1974); see also *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp.*, 913 F. Supp. 1088, 1128–29 (N.D. Ill. 1995).

<sup>15</sup> For example, Georgia and Pennsylvania have no general civil antitrust statute similar to the Sherman Act.

<sup>16</sup> See, e.g., NEV. REV. STAT. § 598A.210 (amended 1999).

ticipation in *Leegin*, state-court precedent on resale price maintenance, the language of a state's antitrust statute, and the degree of deference a state accords federal antitrust precedent.

**Amicus Participation in *Leegin*.** In highlighting the uncertainty of state responses to *Leegin*, some commentators have noted that thirty-seven states unsuccessfully argued as amici to retain the per se rule.<sup>17</sup> Amicus opposition may not, however, foreshadow a state's response to *Leegin* as much as one might think.

First, the decision to appear as an amicus rests with the state attorney general.<sup>18</sup> It does not necessarily reflect the views of the state legislatures or courts—the only two bodies empowered to establish or change state law on minimum resale price maintenance. (Illinois' Attorney General, in fact, urged the retention of the *Dr. Miles* rule as a *Leegin* amicus despite state-law precedent requiring the rule of reason.<sup>19</sup>) If amicus participation indicates an attorney general's preference for the *Dr. Miles* rule, one might expect those same attorneys general to be more aggressive in bringing civil suits challenging minimum resale price agreements, or filing amici briefs urging state courts to continue to regard them as per se unlawful, or even lobbying the state legislature to repeal *Leegin*. Amicus participation does not, however, indicate whether a state attorney general is likely to succeed in those efforts.

Moreover, amicus participation might not indicate an interest or ability to pursue per se treatment of minimum resale price agreements following *Leegin*. Thirty-four of the thirty-seven amicus states have statutes or judicial opinions that express some preference to follow federal authority when interpreting their own antitrust statute.<sup>20</sup> Amicus participation could therefore suggest an attorney general's recognition, or at least expectation, that her state's courts will likely follow the federal rule, whatever that rule turns out to be.<sup>21</sup>

Conversely, a decision by a state's attorney general not to participate as a *Leegin* amicus says little about how that state will treat resale price maintenance in the future. Where the statutory language indicates that minimum resale price agreements could remain per se unlawful, an attorney general might have concluded that *Leegin* would have little impact on her enforcement options regardless of how the Supreme Court decided it. Other attorneys general might not have partici-

<sup>17</sup> See, e.g., Fiala & Westrich, *supra* note 4, at 2; Carole E. Handler & G. Michael Halfenger, *Licensees and Intellectual Property Owners Affected by Supreme Court Abandoning Century-Old Per Se Rule Against Resale Price Maintenance*, 9 E-COMMERCE L. REP. No. 8, Aug. 2007, at 7.

<sup>18</sup> See NAAG Antitrust Task Force, Protocol for State Consideration of Whether to Participate as Amicus Curiae or Engage in Competition Advocacy (Feb. 14, 2005), available at [http://www.naag.org/assets/files/pdf/at-amicus\\_protocol.pdf](http://www.naag.org/assets/files/pdf/at-amicus_protocol.pdf).

<sup>19</sup> See *supra* notes 11, 14.

<sup>20</sup> See, e.g., FLA. STAT. § 542.16 (2002); 740 ILL. COMP. STAT. ANN. 10/11 (West 2002); MO. REV. STAT. § 416.141 (2007); N.J. STAT. ANN. § 56:9-18 (West 2001); N.M. STAT. ANN. § 57-1-15 (LexisNexis 2000); UTAH CODE ANN. § 76-10-926 (2002); *Orr v. Beamon*, 77 F. Supp. 2d 1208, 1212 (D. Kan. 1999), *aff'd*, 4 Fed. Appx. 647 (10th Cir. 2001); *State v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 894 (Minn. Ct. App. 1992), *aff'd*, 500 N.W.2d. 788 (Minn. 1993).

<sup>21</sup> For example, under Connecticut law, state courts are required by statute to follow federal antitrust precedent when applying state law. See CONN. GEN. STAT. § 35-44b. Following *Leegin*, Connecticut Attorney General Richard Blumenthal said that the Supreme Court's decision "eliminates a vital antitrust protection." See Press Release, Attorney General Statement on High Court Ruling Ending Century-Old Antitrust Protection (June 28, 2007), available at <http://www.ct.gov/ag/cwp/view.asp?A=2788&Q=385328>. Although he promised that his office would "monitor the marketplace, and take action to protect consumers, if necessary," he did not suggest that Connecticut law allowed for per se treatment despite the *Leegin* decision, and his promise to "still take action" against minimum resale price agreements could suggest that, at least in his view, the *Leegin* decision limits his enforcement options. *Id.* (emphasis added). Florida's attorney general may have been similarly motivated. In a recent teleconference conducted by the ABA Section of Antitrust Law, Liz Leeds, Assistant Attorney General in the Antitrust Section of the Florida Attorney General's Office, acknowledged that Florida courts were likely to follow the Supreme Court's decision in *Leegin* in applying Florida's own antitrust statute. See *State Antitrust Enforcement After Leegin: The Enforcers Speak*, ABA Section of Antitrust Law (Sept. 25, 2007), audio available at <http://www.abanet.org/antitrust/at-bb/audio/07/09-07.shtml>.

pated because they agreed with the federal enforcement authorities that the Supreme Court should overturn the *Dr. Miles* rule.<sup>22</sup> Finally, an attorney general's absence from the amicus brief might just indicate a lack of interest in the issue altogether.

**Amicus Participation in Illinois Brick and Khan.** Apart from what amicus participation might say about the attorney general's position on minimum resale price agreements, two earlier cases illustrate the difficulty in relying on amicus participation as an indicator of what state courts or legislatures are likely to do.

Forty-nine states participated in *Illinois Brick*, arguing that indirect purchasers should have standing to recover damages under federal antitrust law: forty-eight as amici, and Illinois as a party.<sup>23</sup> After the Supreme Court rejected that view, thirty-six of those states (and the District of Columbia, which did not participate in *Illinois Brick*) provided for some right of action on behalf of indirect purchasers, either through their legislatures or the courts.<sup>24</sup>

Noting that thirty-six of the forty-nine participating states took action after *Illinois Brick*, however, may distort the magnitude of those states' disagreement with the decision. Only twenty-one of those states rejected *Illinois Brick* entirely by allowing for private rights of action by indirect purchasers under state law.<sup>25</sup> The remaining fifteen states repealed *Illinois Brick* only to allow indirect purchaser suits brought by the state attorney general<sup>26</sup>—a more limited divergence from the Supreme Court's decision. Of the original forty-nine state participants, therefore, a clear majority (twenty-eight) either took no action to repeal *Illinois Brick*, or limited its repeal to suits by the state attorney general. Only twenty-one of forty-nine states rejected *Illinois Brick* outright and preserved damages actions for indirect purchasers.<sup>27</sup> Although *Illinois Brick* repealers arguably represent the most significant contemporary conflict between federal and state antitrust policy,<sup>28</sup> amicus participation in that case did not clearly foreshadow a state's ultimate position on private indirect-purchaser suits.

Closer in subject matter to *Leegin*, thirty-four states and territories appeared as amici in *State Oil Co. v. Khan*, arguing that maximum resale price agreements should remain per se illegal under federal law.<sup>29</sup> After the Supreme Court held otherwise,<sup>30</sup> commentators speculated that the states

*Of the 49 states participating in Illinois Brick, only 21 later preserved damages actions by indirect purchasers under state law.*

<sup>22</sup> Brief for the United States as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 173650.

<sup>23</sup> See Brief for the States of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming, Commonwealths of Pennsylvania and Virginia and the National Association of Attorneys General as Amici Curiae, *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977) (No. 76-404), 1977 WL 189564; Brief of State of California Through Its Attorney General, Evelle J. Younger Amicus Curiae, *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977) (No. 76-404), 1977 WL 189565.

<sup>24</sup> See ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 269 (Apr. 2007) [hereinafter AMC REPORT], available at [http://www.amc.gov/report\\_recommendation/toc.htm](http://www.amc.gov/report_recommendation/toc.htm).

<sup>25</sup> The District of Columbia also repealed the *Illinois Brick* ban on private suits by indirect purchasers. See 740 ILL. COMP. STAT. § 10/7(2); D.C. CODE ANN., ch. 45, § 28-4509 (2007).

<sup>26</sup> See, e.g., IDAHO CODE ANN. § 48-108(2) (2007); R.I. GEN. LAWS § 6-36-12(g) (2007).

<sup>27</sup> Admittedly, as noted below, several of these states represent a significant portion of the U.S. economy.

<sup>28</sup> See, e.g., AMC REPORT, *supra* note 24, at 265–83.

<sup>29</sup> Brief of Thirty-Three States and the Territory of Guam in Support of Respondents, *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (No. 96-871), 1997 WL 221797.

<sup>30</sup> *Khan*, 522 U.S. at 22.

might not follow the decision.<sup>31</sup> We have found no reported decisions by state courts rejecting the *Khan* rule, however, and several courts have followed the decision in construing state laws.<sup>32</sup> State opposition to the *Leegin* decision, however, may be stronger than in *Khan* because *Leegin*—which poses a greater perceived threat of immediate price increases to the public—may more clearly implicate a state’s consumer protection policies.<sup>33</sup>

Although the states’ amicus brief in *Leegin* might imply that at least thirty-seven state attorneys general believe that minimum resale price agreements should be per se unlawful, wishing does not necessarily make it so.

**State Judicial Precedent on Resale Price Maintenance.** During *Dr. Miles’* ninety-six-year tenure, at least a dozen state courts addressed minimum resale price agreements under their state law. The majority relied on federal authority in holding them per se unlawful<sup>34</sup>—sometimes even where the state statutes appeared to limit per se treatment to horizontal agreements.<sup>35</sup> A few state courts, however, have relied on state statutory language or other non-federal authority to reach the same conclusion.<sup>36</sup> Although the state-court decisions that relied on *Dr. Miles* are now less persuasive, the cases that relied on other grounds provide an arguably undiminished basis to continue to hold minimum resale price agreements per se unlawful.

**State Statutory Language.** In the absence of clear judicial precedent, one might, of course, do something obvious: look at what the state antitrust statute says.

A minority of states address minimum resale price maintenance specifically.<sup>37</sup> Montana law, for example, prohibits a person from “enter[ing] into an agreement which binds any person not to . . . sell . . . article of commerce below a common or standard figure,”<sup>38</sup> and New York law specifically declares resale price maintenance agreements void.<sup>39</sup>

Although 34 states

appeared as

unsuccessful amici in

*Khan*, none rejected

the *Khan* rule.

<sup>31</sup> See, e.g., Robert T. Joseph, *Vertical Maximum Price Fixing After State Oil Company v. Khan*, 17 FRANCHISE L.J. 73, 88 (1998).

<sup>32</sup> See, e.g., *FF Orthotics, Inc. v. Paul*, No. D044226, 2006 WL 1980270, at \*5 (Cal. Ct. App. July 17, 2006) (not for publication) (applying California law); *Lubbock Beverage Co v. Miller Brewing Co.*, No. Civ. A. 5:01-CV-124-C, 2002 WL 31011266, at \*10 (N.D. Tex. June 4, 2002) (not for publication) (applying Texas law).

<sup>33</sup> See Brief of Thirty-Three States and the Territory of Guam, *supra* note 29, at \*17 (arguing that maximum resale price maintenance agreements should remain per se unlawful because they could disguise minimum resale price maintenance agreements).

<sup>34</sup> See, e.g., *State v. Lawn King, Inc.*, 417 A.2d 1025, 1035 (N.J. 1980); *Indep. Milk Producers Co-op v. Stoffel*, 298 N.W.2d 102, 104–06 (Wis. Ct. App. 1980).

<sup>35</sup> See *State v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 893–95 (Minn. Ct. App. 1992).

<sup>36</sup> See, e.g., *McCall Co. v. O’Neil*, 25 Ohio Dec. 591, 1914 WL 1669 (Ohio Com. Pl. Nov. 12, 1914) (holding agreements on resale prices void under Ohio antitrust statute); *State v. Miles Labs., Inc.*, 282 S.W.2d 564 (Mo. 1955) (finding vertical and horizontal price fixing agreements equally unlawful under prior version of the Missouri antitrust statute based upon legislative history of the act); *Ford Motor Co. v. State*, 175 S.W.2d 230, 233 (Tex. 1943) (“It is a violation of our anti-trust laws for one party to enter into a contract with another party, whereby it is agreed that goods or products . . . shall be resold at fixed or agreed prices . . .”) (citing state cases); Only in Illinois have courts used the rule of reason to analyze minimum resale price maintenance agreements. See *supra* note 14.

<sup>37</sup> In addition to state statutes that may address resale price agreements generally, a number of states have industry-specific statutes that govern such agreements with respect to particular products. See, e.g., FLA. STAT. ANN. § 526.307(1) (West 2007) (prohibits fixing of retail prices for motor fuel); N.Y. GEN. BUS. LAW § 370-f (McKinney 2007) (same); KAN. STAT. ANN. § 41-701(f) (2007) (prohibits fixing of resale prices of liquor or beer).

<sup>38</sup> See MONT. CODE ANN. § 30-14-205(h) (2002).

<sup>39</sup> See N.Y. GEN. BUS. LAW § 369-a (McKinney 2003) (“Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.”). New Jersey law is similar. See N.J. STAT. ANN. § 56:4-1.1 (West 2001) (“Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.”).

Other state statutes go beyond the Sherman Act's general prohibition against unreasonable restraints, but without specifically addressing minimum resale price agreements. New Hampshire and West Virginia, for example, both prohibit contracts "fixing, controlling or maintaining" prices.<sup>40</sup> These statutes do not indicate whether the prohibition extends to vertical as well as horizontal agreements, or whether the courts should analyze such contracts under a per se or rule of reason analysis. State courts could nevertheless consider these departures from the federal statutory language as an opportunity to treat vertical minimum resale price agreements differently as well.

**Deference to Federal Precedent.** Regardless of the language of state antitrust statutes, statutory or judicial admonitions to follow federal antitrust precedent could constrain a state court's ability to reject *Leegin*. As noted above, legislatures or courts in forty-eight states and territories have expressed some preference to follow federal antitrust precedent when interpreting their state statutes. For some, like Michigan, the instruction appears to be mandatory and directly on point: courts "shall give[] due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitations, the doctrine of per se violations and the rule of reason."<sup>41</sup> Elsewhere, as in the District of Columbia, courts "may use as a guide interpretations given by federal courts to comparable antitrust statutes."<sup>42</sup> In North Carolina, at least one court regards federal precedent "instructive only insofar as it reflects common law."<sup>43</sup> While these differences defy easy categorization, in *Leegin's* wake these state courts may face a stark choice: follow a state policy to protect residents from minimum resale price agreements or follow federal antitrust precedent in the interest of a national norm.

States could resolve this dilemma by legislating around it. Seventeen of the eighteen states that repealed *Illinois Brick* by statute did so in the face of statutes or case law urging deference to federal precedent.

Although long-standing admonitions to follow federal antitrust precedent will likely constrain state courts more than state legislatures, *Illinois Brick's* legacy demonstrates that determined state courts can reason around a policy to follow federal law—whether mandatory or not. The Iowa Supreme Court, for example, repealed *Illinois Brick* despite statutory language that required deference to federal precedent, interpreting that requirement to apply to prohibited conduct, but not to standing.<sup>44</sup> The Arizona Supreme Court drew the same distinction, but also relied on statutory language that courts "may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes."<sup>45</sup> Finding that the requirement to follow federal law was merely permissive, the Arizona court stated that it could "simply decline[] to follow *Illinois Brick's* guidance [because] the [statute's] plain language . . . would allow an indirect purchaser suit."<sup>46</sup> One North Carolina court felt free not to follow *Illinois Brick*, despite prior rulings that federal precedent

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<sup>40</sup> N.H. REV. STAT. ANN. § 356:2 (2002); W. VA. CODE § 47-18-3(b)(1)(A) (2002).

<sup>41</sup> MICH. COMP. LAWS ANN. § 445.784 §14(2) (West 2002) (emphasis added).

<sup>42</sup> D.C. CODE § 28-4515 (2001) (emphasis added).

<sup>43</sup> *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041, 1047–48 n.1 (E.D.N.C. 1979).

<sup>44</sup> *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 445–46 (Iowa 2002).

<sup>45</sup> ARIZ. REV. STAT. ANN. § 44-1412 (2002) (emphasis added); *Bunker's Glass Co. v. Pilkington, PLC*, 75 P.3d 99, 102–06 (Ariz. 2003).

<sup>46</sup> *Bunker's Glass Co.*, 75 P.3d at 103.

should be “persuasive” in construing the state statute,<sup>47</sup> because only the federal precedent in effect at the time the statute was passed in 1969 was relevant.<sup>48</sup>

As the response to *Illinois Brick* shows, statutory requirements or judicial admonitions to follow federal law will not necessarily prevent state courts from rejecting a precedent with which they disagree. The states’ responses to *Leegin* may well vary, but no one should assume that a mandatory—much less a discretionary—policy to adhere to federal precedent ensures a rule of reason regime in any particular state.

### Proceed with Caution

Many states offer conflicting signals about their post-*Leegin* treatment of minimum resale price agreements. Several, however, emerge as among the riskiest for businesses considering such agreements.

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**California.** California’s antitrust statute, the Cartwright Act, specifically prohibits agreements to fix prices or set minimum prices for the sale of any product,<sup>49</sup> and California courts construing this statute have applied a per se rule to minimum resale price agreements.<sup>50</sup> Although California courts have previously cited federal authority to support this rule, California law does not mandate that courts look to federal precedent in interpreting the Cartwright Act. In fact, that state’s Supreme Court has held that the Cartwright Act was not modeled on the Sherman Act, and that federal precedent, while helpful, is “not directly probative.”<sup>51</sup> California did not participate as an amicus in *Leegin*.

The statutory language prohibiting certain price agreements and local courts’ relative freedom to depart from federal precedent suggest considerable risk that minimum resale price agreements may continue to receive per se treatment in California.

**New York.** New York law declares minimum resale price agreements unenforceable,<sup>52</sup> and courts applying state law, known as the Donnelly Act, have employed a per se analysis.<sup>53</sup> No statute requires consistency with federal antitrust law, and New York courts have expressed some reservation about using federal precedent to interpret the Donnelly Act.<sup>54</sup> New York was the lead party in the states’ amicus brief.<sup>55</sup> As with California, New York may remain in the per se camp on minimum resale price agreements.

<sup>47</sup> See, e.g., *Madison Cablevision, Inc. v. City of Morganton*, 386 S.E.2d 200, 213 (N.C. 1989).

<sup>48</sup> *Hyde v. Abbott Labs., Inc.*, 473 S.E.2d 680, 683–86 (N.C. Ct. App. 1996).

<sup>49</sup> CAL. BUS. & PROF. CODE § 16720(d) & (e) (West 1997 & Supp. 2007).

<sup>50</sup> See *Miland v. Burckle*, 572 P.2d 1142, 1147 (Cal. 1978); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 369 (Cal. Ct. App. 2001).

<sup>51</sup> See *State ex rel. Van de Kamp v. Texaco, Inc.*, 762 P.2d 385, 395 (Cal. 1988); see also *Morrison v. Viacom, Inc.*, 66 Cal. App. 4th 534, 541 n.2 (Cal. Ct. App. 1998).

<sup>52</sup> N.Y. GEN. BUS. LAW § 369-a (McKinney 2003).

<sup>53</sup> See, e.g., *George C. Miller Brick Co. v. Stark Ceramics, Inc.*, 2 A.D.3d 1341, 1343, 770 N.Y.S.2d 235 (N.Y. App.Div. 4th Dept. 2003).

<sup>54</sup> See, e.g., *People v. Roth*, 420 N.E.2d 929, 930 (N.Y. 1981) (“the ruling of a Federal court interpreting a Federal Statute has no direct bearing upon a State court’s analysis of an analogous provision enacted by the State Legislature”); *State v. Mobil Oil Corp.*, 344 N.E.2d 357, 359 (N.Y. 1976) (“undoubtedly the sweep of Donnelly may be broader than that of Sherman”). Cf. *Anheuser-Busch, Inc. v. Abrams*, 520 N.E.2d 535, 539 (N.Y. 1988) (“the Donnelly Act . . . should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result”).

<sup>55</sup> Moreover, although not speaking in his official capacity, the NY State Attorney General’s Director of Litigation for the Antitrust Bureau has stated that “people need to be reminded that there is already state antitrust law on minimum RPM,” citing to the New York statutory provision that declares such agreements unenforceable. Posting of Robert Hubbard, to AT-CONVERSATION@MAIL.ABANET.ORG (July 13, 2007).

**New Jersey.** New Jersey law declares resale price agreements unenforceable.<sup>56</sup> Although required to “construe [state law] in harmony with ruling judicial interpretations of comparable Federal antitrust statutes,”<sup>57</sup> at least one court has refused to look to federal authority where the statutory language deviates from the Sherman Act.<sup>58</sup> New Jersey’s divergent statutory language could provide a basis for a state court to depart from *Leegin* and retain the per se rule.

## Conclusion

Unfortunately for many businesses, the states that appear most hostile to *Leegin* are also some of the most important to the U.S. economy. Nearly 65 million people live in New York, New Jersey, and California—more than 21 percent of the U.S. population.<sup>59</sup> Retail sales in those states totaled more than \$639 billion in 2002, almost 20 percent of the national total.<sup>60</sup> Regardless of how other states respond to *Leegin*, the desire to avoid liability in these economically important states could drive business policy on resale price maintenance.

Has *Leegin*’s importance been overstated? Only a series of test cases will reveal which states will acquiesce to the decision, as they did with *State Oil v. Khan*, and which will reject the ruling, as many did with *Illinois Brick*. Until then, businesses may be wise to consider the rumors of *Dr. Miles*’ demise to be greatly exaggerated. ●

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<sup>56</sup> N.J. STAT. ANN. § 56:4-1.1 (West 2001) (“Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.”).

<sup>57</sup> N.J. STAT. ANN. § 56:9-18 (West 2001).

<sup>58</sup> See *Kimmelman v. Henkels & McCoy, Inc.*, 506 A.2d 381, 386–87 (N.J. Super. Ct. App. Div. 1986). In other pre-*Leegin* cases, New Jersey courts have cited to federal precedent in declaring vertical price restraints per se illegal. See *State v. Lawn King, Inc.*, 417 A.2d 1025, 1032–33 (N.J. 1980); *EZ Sockets, Inc. v. Brighton-Best Socket Screw Mfg. Inc.*, 704 A.2d 1364, 1367 (N.J. Super. Ct. Ch. Div. 1996), *aff’d*, 704 A.2d 1309 (N.J. Super. Ct. App. Div. 1997).

<sup>59</sup> See U.S. Census Bureau, State and County QuickFacts, <http://quickfacts.census.gov/qfd/>.

<sup>60</sup> *Id.*