Leegin, Ten Years Later: Did Vertical Agreements Remain Unlawful Per Se Where Adopted to Facilitate a Price-Fixing Horizontal Scheme?

James Mulcahy and Filemon Carrillo

Mr. Mulcahy

Mr. Carrillo

I. Introduction

In June 2007, in its *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[1] decision, the U.S. Supreme Court overruled its century-old rule applying per se illegality to vertical agreements to fix minimum resale prices. They are now subject to the rule of reason analysis.

Some anticipated that the *Leegin* decision would catalyze the proliferation of resale price maintenance (RPM) agreements nationwide. However, because some states still consider RPM agreements as per se violations of their respective antitrust statutes, this phenomenon has been largely unseen.[2] For instance, California courts continue to uphold per se condemnation under the Cartwright Act, the California antitrust statute[3]; this is unlikely to change soon.[4] Also, Maryland rejected the *Leegin* holding by statute.[5] And although New York state appellate courts have not addressed the

1. 551 U.S. 877 (2007).
2. However, note that Kansas has adopted the *Leegin* holding by statute. *See* KAN. STAT. ANN. § 50-163(b) (2017 Reg. Sess.).
3. *See* Alsheikh v. Superior Court, No. B249822, 2013 WL 5530508, at *3 (Cal. Ct. App. Oct. 7, 2013); CAL. BUS. & PROF. CODE §§ 16720(c), (e)(2).
4. *See* Alan Darush MD APC v. Revision LP, No. CV 12-10296 GAF AGRX, 2013 WL 1749539, at *6 (C.D. Cal. Apr. 10, 2013) (citing Mailand v. Burckle, 20 Cal.3d 367 (1978) ("Under current California Supreme Court precedent, vertical price restraints are per se unlawful under the Cartwright Act. There is no indication that precedent is changing.")).
5. MD. CODE ANN., COM. LAW § 11-204.

James Mulcahy (jmulcahy@mulcahyllp.com) is the managing partner of Mulcahy LLP, a boutique firm specializing in competition litigation. Filemon Carrillo (fcarrillo@mulcahyllp.com) is an associate at Mulcahy LLP.

issue, New York's attorney general has challenged RPM agreements.[6] This suggests a willingness to continue to file such cases, leaving companies unsure about whether they should enter into RPM agreements. With this in mind, it is no surprise that companies have been unwilling to test the waters.

Still, following the *Leegin* decision, the federal courts have been asked to address the potential anticompetitive effects of vertical agreements that have *horizontal* effects in that they reduce competition among competitors. *Leegin*, of course dealt only with a purely vertical price restriction that existed to *increase* interbrand competition. Nevertheless, the *Leegin* Court recognized that RPM *might* harm consumers if it has a horizontal effect by facilitating cartels that reduce interbrand competition.[7] According to the Court:

> A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. [Citations]. To the extent a vertical agreement setting minimum resale prices is entered upon to *facilitate* either type of cartel, it, too, would need to be held unlawful *under the rule of reason*. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.[8]

But what exactly does this language mean? Section 1 of the Sherman Act bars unreasonable restraints, and the rule of reason typically applies to vertical agreements between entities at different levels. But what is the test for price restraints that do not fit neatly into the standard taxonomy because, while vertical in nature, they restrict competition between horizontal entities (vertical/horizontal hybrid restrictions)?[9] Are these vertical agreements still subject to the rule of reason under *Leegin*? Consider the following hypotheticals:

One: A retailer—call it Retailer A—wants to enter the eBook market. But Retailer A cannot compete at the below-cost prices offered by another retailer, Retailer B, which holds over 90 percent of the eBook market. To combat the below-cost price, the Retailer A approaches all of the eBook publishers to orchestrate a horizontal price-fixing agreement among them. Retailer A devises an elegant vertical agreement whereby the publishers convert their eBook retailers to an agency model. Through this new model, the publishers set the retail price of the eBooks, and Retailer A is guaranteed a 30 percent commission. The vertical agreements also include a provision that allows Retailer A to match the lowest price on the market for these books. In effect, this provision requires the publishers to enter into the same agency model with Retailer B, which the publishers accomplish in short order. Is Retailer A's conduct of entering into vertical agreements to

6. State v. Herman Miller, Inc., No. 08-2977, 2008 WL 2310292 (S.D.N.Y. Mar. 21, 2008); People v. Tempur-Pedic Int'l, Inc., 95 A.D.3d 539, 540 (N.Y. App. Div. 2012).

7. *Leegin*, 551 U.S. at 892–93.

8. *Id.* at 893 (emphasis added).

9. For clarity, the term "vertical/horizontal hybrid restrictions" is used to refer to cases where the allegedly anticompetitive scheme includes vertical agreements with *horizontal* effects—i.e., hub and spoke cases and group boycott cases.

organize a horizontal price-fixing cartel subject to per se condemnation or will it be judged under the rule of reason?

Two: A franchisor-manufacturer of heavy-duty trucks grants franchises with non-exclusive territories. To assist its franchisees in competing with other brands, the franchisor offers transaction-specific discounts. One franchisee is selling the trucks with an additional discount in the non-exclusive territories of other franchisees. In response, the non-discounting franchisees pressure the franchisor to adopt a policy that denies the franchisor's transaction-specific discounts to sales within other franchisees' territories. This policy effectively stops the discounted sales into their territories. Are the franchisor's vertical agreements with the non-discounting franchisees that facilitated a horizontal price-fixing cartel per se unlawful?

These hypotheticals represent the facts under which the Second Circuit and the Third Circuit decided this question. And they arrived at opposite conclusions. The Second Circuit in *United States v. Apple, Inc.* held that the vertical agreements were entered into as a part of the horizontal scheme, and thus the vertical participant must suffer the same per se fate as the horizontal colluders.[10] The Third Circuit in *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.* held that, under *Leegin*, the vertical agreements are subject to the rule of reason even when they are entered into to enforce a horizontal price-fixing cartel.[11] Which is correct?

This conflict presents an important question, the outcome of which will have a tremendous impact. If vertical participants in a scheme designed to fix prices or decrease output are subject to rule of reason analysis, it is possible that the very *sine qua non* of the price-fixing cartel gets off scot-free. In fact, this was the very outcome of the Third Circuit decision—the vertical participant was found not liable by the jury in a rule of reason trial. With these conflicting decisions, the antitrust plaintiff now faces a heightened standard to plead and prove a case alleging vertical/horizontal hybrid restrictions.

This article analyzes whether *Leegin* overruled a series of cases holding that where a vertical participant joins in the unlawful horizontal cartel, the vertical participant is also per se liable for a violation of Section 1 of the Sherman Act. The article also analyzes the standard that the antitrust plaintiff must now satisfy to plead and prove that a vertical participant should be liable per se in a case alleging vertical/horizontal hybrid restrictions. First, it will lay out the statutory scheme and historical trend toward the elimination of per se condemnation of vertical restraints. Second, this article outlines the Supreme Court's case law in cases alleging vertical/horizontal hybrid restrictions. Third, it will set forth the facts and holdings of the conflicting decisions of the Third Circuit and the Second Circuit. Fourth, the article presents the argument for upholding the Supreme Court's long history of treating both vertical and horizontal participants equally in a case alleging

10. 791 F.3d 290, 323 (2d Cir. 2015).
11. 530 F.3d 204, 225 (3d Cir. 2008).

vertical/horizontal hybrid restrictions. Fifth, the article analyses recent decisions to articulate the burden that antitrust plaintiffs now have to meet to subject a vertical participant to per se liability.

II. The Sherman Act—Per Se v. Rule of Reason Analysis

To successfully plead a claim under Section 1 of the Sherman Act, a plaintiff must plead evidentiary facts to show:

> (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition.[12]

It is now a legal axiom that a bare assertion of the existence of an unlawful agreement is not entitled to the presumption of truth.[13] Requiring proof of a potential agreement is essential to the claim.

In limited circumstances, certain conduct may be per se unlawful. Per se condemnation under the Sherman Act is reserved for "conduct that is manifestly anticompetitive . . . that is, conduct that would always or almost always tend to restrict competition and decrease output."[14] Consequently, where a plaintiff proves facts that establish a business practice that has been declared per se unlawful, liability is established as a matter of law.

Because of the severity of per se condemnation, "most antitrust claims are analyzed under the rule of reason."[15] Under this framework, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect."[16] Although the rule of reason has been synthesized from several past decisions, the contemporary rule of reason analysis has been "cast[] in terms of shifting burdens of proof."[17] Under the rule of reason:

> The plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition. If the plaintiff meets this burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct. If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner. Ultimately, if

12. Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–58 (2006)).

13. *Twombly*, 550 U.S. at 555.

14. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) (quoting Northwest Wholesale Stationers Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289–90 (1985)).

15. *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

16. *Id.* (citing Arizona v. Maricopa Cty. Med. Soc., 457 U.S. 332, 342–43)).

17. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1988).

these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.[18]

Needless to say, as a practical matter, it is far more cumbersome (and costly) to litigate an antitrust action judged under the rule of reason than under the per se rule. In the per se realm, a plaintiff need only establish that the conduct occurred—i.e., horizontal price-fixing cartel. Once the conduct is established, so is liability.

In the rule of reason realm, establishing that the underlying agreement existed is only step one. The plaintiff would be required to satisfy the burden shifting set forth above and show that the conduct is an unreasonable restraint of trade. From a purely practical standpoint, "it is very difficult for a plaintiff (whether the government or a private party) to win a rule of reason case."[19] Indeed, one academic survey found that from 1977–2009, plaintiffs won very few rule of reason cases to reach a judgment.[20] For this reason, where a court decides that alleged anticompetitive conduct is judged under the rule of reason, it is tantamount to handing the defendants a "get out of jail free" card.

III. The Court Slowly Chips Away at the Per Se Treatment of Vertical Restraints

A. *A Brief History of the Court's Treatment of Vertical Non-Price Restraints*

The Supreme Court was hostile toward non-price restraints for a long time but did not condemn them per se until its 1967 decision in *United States v. Arnold Schwinn & Co.*[21] In *Schwinn*, the United States challenged Arnold Schwinn & Company's distribution policy that (1) restricted distributors to selling to franchised retailers in a restricted territory and (2) restricted franchised retailers to selling to consumers and not to non-franchised retailers.[22] The Court held that "[u]nder the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer *has parted with dominion over it*."[23] Thereafter, vertical non-price restrictions were a

18. Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1310 (10th Cir. 2017).

19. Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per se *Rule Against Vertical Price Fixing*, 71 Geo. L.J. 1487, 1489 (1983). Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 Vand. L. Rev. 1, 48–49 (2016) (review of cases indicates that judges "seek out rules and doctrines that make it especially difficult for the plaintiff to carry its initial burden").

20. *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. Rev. 1265 (2006); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827 (2009).

21. 388 U.S. 365 (1967)

22. *Id.* at 371–72.

23. *Id.* at 379 (emphasis added).

per se violation if the products were sold to retailers, but subject to the rule of reason if the products were sent on consignment.[24]

Of course, this is a distinction without difference and is economically irrational. The intent and competitive impact of the policy is the same whether or not distributors and franchisees take title to the products. The goal of geographic restrictions and of disallowing sales to non-franchised retailers is to eliminate intrabrand competition among franchisees in a given market. This, in turn, promotes interbrand competition because retailers of the same brand will not need to compete with one another. Instead, the consumer's choice will be between brands and/or ancillary services that retailers may offer. The transaction between a manufacturer and the distributor or retailer has no bearing on the competitive effects of the underlying policy. After all, the aim of antitrust law is to protect competition for the good of the consumer.[25]

The Court recognized that its decision in *Schwinn* was untenable and overruled it ten years later in *Continental T.V., Inc. v. GTE Sylvania Inc.*[26] There, GTE Sylvania Inc. found its market share declining to one to two percent of national television sales.[27] To combat its falling market share, Sylvania adopted a franchise system. Its purpose was to decrease intrabrand competition to attract successful retailers and incentivize investment into the franchisee's business. To achieve this, "Sylvania limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised."[28] A discontented franchisee challenged this geographic restriction as a violation of the Sherman Act under *Schwinn*.[29]

In overruling its *Schwinn* decision, the Court recognized that "the distinction drawn in Schwinn between sale and nonsale transactions is not sufficient to justify the application of a per se rule in one situation and a rule of reason in the other."[30] The Court also recognized that scholarly and judicial authority supported the "economic utility" of vertical non-price restrictions.[31]

B. *A Brief History of the Court's Treatment of Vertical Price Restraints*

In 1911, the U.S. Supreme Court issued its decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[32] in which the Court held that RPM agree-

24. *Id.* at 382.
25. Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("The antitrust laws, however, were enacted for "the protection of *competition*, not *competitors*.") (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))).
26. 433 U.S. 36 (1977).
27. *Id.* at 38.
28. *Id.* at 38–39.
29. *Id.* at 40.
30. *Id.* at 57.
31. *Id.* at 57–58.
32. 220 U.S. 373 (1911).

ments were a violation of the antitrust laws.[33] While the Court did not use the "per se" label in its decision, the Court and lower courts interpreted *Dr. Miles* as holding that vertical price restraints are unlawful per se.

Notably, the Court's decision in *Dr. Miles* was not based on an economic analysis of RPMs generally. Instead, the Court's holding was based on the common law belief that the "right of alienation is one of the essential incidents of a right of general property" and that "restraints upon alienation have been generally regarded as obnoxious to public policy."[34] Nevertheless, this decision sparked the Court's analysis of vertical restraints, both price and non-price.

It did not take long before the Court reined in its per se condemnation of RPM in *Dr. Miles*. In 1919, the Court in *United States v. Colgate*[35] announced that the Sherman Act "does not restrict the long recognized right of . . . [the] manufacturer . . . freely to exercise his own *independent discretion* as to parties with whom he will deal."[36] Distinguishing *Colgate* from *Dr. Miles*, the Court noted that in *Dr. Miles* "the unlawful combination was effected through *contracts* which undertook to prevent dealers from freely exercising the right to sell."[37] Consequently, under *Colgate*, even anticompetitive conduct with no redeeming value escapes Section 1 liability if there is no "contract, combination or conspiracy."[38] The so-called *Colgate* doctrine continues to apply today.[39]

After *Colgate*, the central question was whether a plaintiff could plead and prove an agreement. In the 1980s, the Supreme Court reaffirmed the importance of establishing an agreement as opposed to unilateral conduct. In *Monsanto Co. v. Spray-Rite Service Corp.*,[40] a discounter-distributor brought an action alleging that Monsanto (the manufacturer) conspired with its distributors to fix the resale prices and terminated the discounter-distributor in furtherance of the conspiracy.[41] The Court held that "[t]here must be evidence that tends to exclude the possibility" of independent action.[42] "[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objec-

33. *Id.* at 408–09.
34. *Id.* at 404.
35. 250 U.S. 300 (1919).
36. *Id.* at 307.
37. *Id.* (emphasis added).
38. *See generally* United States v. Colgate, 250 U.S. 300 (1919); 15 U.S.C. § 1. A *Colgate* policy remains subject to antitrust scrutiny under Section 2 of the Sherman Act. *See* 15 U.S.C. § 2.
39. *See, e.g.*, *Monsanto Co.*, 465 U.S. at 763; *Leegin*, 551 U.S. at 902–03 ("A manufacturer can exercise its *Colgate* right to refuse to deal with retailers that do not follow its suggested prices."); N. Tex. Specialty Physicians v. Fed. Trade Comm'n, 528 F.3d 346, 358 (5th Cir. 2008) (recognizing that *Colgate* remains a viable defense to antitrust liability); *In re* Pool Prods. Distrib. Mkt. Antitrust Litig., 940 F. Supp. 2d 367, 395–96 (E.D. La. 2013) (same).
40. 465 U.S. 752 (1984).
41. *Id.* at 757.
42. *Id.* at 764.

tive."[43] The plaintiff in *Monsanto* satisfied this standard.[44] Moreover, the Court declined the United States' and *amicus curiae*'s request that the court overrule *Dr. Miles*.[45]

Fast forward to 2007. In *Leegin*,[46] a leather belt manufacturer instituted an RPM policy and offered compliant retailers various incentives.[47] PSKS, a retailer, refused to comply and insisted upon selling belts below the mandatory minimum resale price. The manufacturer refused to continue providing incentives to PSKS and litigation ensued.[48] The case made it to the Supreme Court, which overruled *Dr. Miles* and announced that RPM agreements are subject to the rule of reason analysis.[49] Procompetitive justifications, such as stimulating *interbrand* competition, incentivizing investment by retailers, and diversifying products available to consumers were the economic bases for applying the rule of reason.[50] The Court overruled *Dr. Miles*, stating that the "reasons upon which *Dr. Miles* relied do not justify a per se rule."[51] From that point on, RPM agreements were to be analyzed under the rule of reason, at least under federal law.

By overruling the century-old law, the Supreme Court brought its decades-long contraction of the per se condemnation of vertical restraints to full circle. Yet, although the Court conclusively stated that RPM agreements are subject to the rule of reason, it by no means established a framework of analysis going forward. Delegating this task to the lower courts, the Court stated: "As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[52] Now, ten years later, one may ask: have the lower courts taken steps to establish such a "litigation structure" designed to efficiently apply the rule of reason so as to eliminate anticompetitive vertical price restraints? Unfortunately, the answer is "no."

IV. The Court's Historical Treatment of Vertical/Horizontal Hybrid Restrictions

It goes without saying that the antitrust laws reach both horizontal and vertical agreements. "Horizontal restraints are agreements between competitors at the same level of market structure, whereas vertical restraints are

43. *Id.* (internal quotations and citations omitted).
44. *Id.* at 765.
45. *Id.* at 769 (Brennan, J. concurring).
46. 551 U.S. 877.
47. *Id.* at 883.
48. *Id.* at 884.
49. *Id.* at 907.
50. *Id.* at 889–90.
51. *Id.* at 889.
52. *Id.* at 898.

combinations of persons at different levels of market structure such as manufacturers and distributors."[53]

Much of the antitrust case law has centered on this distinction. However, although these categories seem dichotomous, they are not. As the Seventh Circuit noted, "[s]ometimes . . . it can be hard as a matter of fact to be sure what kind of agreement is at issue" because many cases have been brought alleging both vertical and horizontal components to the collusive scheme.[54] The cases summarized below illustrate the Supreme Court's treatment of vertical/horizontal hybrid restrictions.

A. *Interstate Circuit v. United States* (1939)

In *Interstate Circuit, Inc. v. United States*,[55] theater chain companies operated motion picture theaters at which they showed movies they obtained from distributors. Both the theater chain companies and the distributors were defendants. The theater chain defendants wrote a letter to each of eight movie distributors asking them to meet certain conditions in exchange for the theater company's "continued exhibition of the distributors' films in its . . . first-run theatres" at a prescribed price of admission.[56] The effect of the conditions was to restrict the pricing terms under which the distributors could license their films to the theater chain's competitors. Because the letter listed all eight distributors as addressees, the court found that "from the beginning each of the distributors knew that the proposals were under consideration by the others."[57] The distributors accepted the theater chain company's proposed terms. The district court found this evidence proved concerted action by the distributors (horizontal agreement) and the theater chain (vertical agreements) in violation of Section 1 of the Sherman Act, and the Supreme Court affirmed.[58]

B. *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (1959)

In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[59] a retailer brought a Section 1 claim against a competing retailer and against manufacturers and their distributors alleging a group boycott. Klor's, Inc. alleged that the colluders conspired to prevent it from purchasing the merchandise it sold to the public. The Supreme Court characterized the collusion as a "wide combination con-

53. Am. Steel Erectors v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 815 F.3d 43, 62 (1st Cir. 2016) (internal quotations and citations omitted).

54. *See* Toys "R" Us, Inc. v. Fed. Trade Comm'n, 221 F.3d 928, 930 (7th Cir. 2000).

55. 306 U.S. 208 (1939).

56. *Id.* at 216–17.

57. *Id.* at 222.

58. It bears mentioning that, in truth, *Interstate Circuit* was not a per se case. *See Interstate Circuit*, 306 U.S. at 230–32; *see also* Royal Drug Co. v. Grp. Life & Health Ins. Co., 737 F.2d 1433, 1437 (5th Cir. 1984) ("the Supreme Court's analysis [in *Interstate Circuit*] was predicated upon the rule of reason").

59. 359 U.S. 207 (1959).

sisting of manufacturers, distributors and a retailer."[60] The Court held that if the combination between the competing retailer, several manufacturers, and their distributors could be proved,[61] it would be subject to the per se ban of group boycotts.[62] Whether the members of the boycott were vertical or horizontal components did not affect the analysis of the Court.

C. *United States v. General Motors Corp.* (1966)

United States v. General Motors Corp.[63] involved a car manufacturer-franchisor coordinating with its franchisee-dealers and franchisee associations to prevent a small group of franchisees from selling cars at discount prices.[64] Franchisees complained of the discounting practices to General Motors Corp. (GM). In response, GM gave notice to all franchisees that selling to discounting outlets was a violation of their franchise agreement. After this notice was announced, GM personnel called and met with the discounting franchisees, after which the franchisees abandoned the discounting practices. The policy against the discounting practices was enforced by GM, the franchisees association, and select individual franchisees. The Supreme Court held that this violated Section 1. In holding the vertical and horizontal participants liable per se, the court noted:

> And once the agreements were secured, [GM] both solicited and employed the assistance of its alleged *co-conspirators* in helping to police them. What resulted was a *fabric interwoven* by many strands of joint action to eliminate the discounters from participation in the market, to inhibit free choice of franchised dealers to select their own methods of trade and to provide *multilateral* surveillance and enforcement.[65]

As the above cases illustrate, although the Supreme Court has long distinguished between vertical and horizontal agreements in analyzing the competitive effect, the vertical/horizontal hybrid restrictions presented in *Interstate Circuit, Inc.*, *Klor's Inc.*, and *General Motors* were analyzed holistically. The horizontal agreements were not analyzed separately from the vertical agreements. According to the Court, "if the action of a manufacturer . . . is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the[re is] . . . a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level."[66] This further underscores the aim of the antitrust

60. *Id.* at 212–13.
61. The combination alleged in *Klor's* consists of vertical agreements between the retailer and the manufacturers and distributors and of horizontal agreements among the manufacturers.
62. *Id.* at 212–14.
63. 384 U.S. 127 (1966).
64. *Id.* at 130–33.
65. *Id.* at 144 (emphasis added); *see also Toys "R" Us, Inc.*, 221 F.3d 928 (holding Toys "R" Us per se liable where it "supervised" a horizontal agreement among manufacturers to reduce output by entering into exclusive dealing arrangements with each manufacturer).
66. *Business Elecs. Corp.*, 485 U.S. at 730 n.4.

laws to hold accountable all those co-conspirators with a "conscious commitment to a common scheme designed to achieve an *unlawful objective*."[67] In other words, the antitrust laws seek to prevent anticompetitive *effects*.

V. After *Leegin* Are Price Restraints That Are *Vertical* in Nature, But Have *Horizontal* Effects in That They Reduce Competition, Subject to Per Se Treatment?

As it turns out, lower courts have not interpreted *Leegin*'s language consistently when deciding cases alleging vertical/horizontal hybrid restrictions. Notably, the *Interstate Circuit, Inc.*, *Klor's Inc.*, and *General Motors* decisions were not mentioned in the *Leegin* decision. Consequently, courts are left to decide whether the Supreme Court tacitly overruled these precedents by stating: "To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful *under the rule of reason*."[68] So assuming that the horizontal agreement is unlawful per se, does the vertical participant in the unlawful scheme escape per se liability under *Leegin*? As illustrated by the two competing cases below, the answer is unclear.

A. *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*

One year after the Leegin decision, the Third Circuit decided *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*[69] There, Mack Trucks, Inc., a manufacturer of heavy-duty trucks and franchisor of Mack dealerships, granted franchises with nonexclusive geographic regions.[70] The conduct discussed below formed the basis of the Section 1 claim by franchisee Toledo Mack Sales & Service, Inc.

Mack trucks are "made to order" from the potential consumer's specifications. After the potential customer gives its specifications to the Mack franchisee-dealer, the dealer goes to Mack to obtain a price at which Mack is willing to sell the truck to the dealer. To assist its dealers in competing with other brands, Mack offers a "transaction-specific discount known as 'sales assistance.'"[71] The dealer then gives a quote to the consumer. If the consumer accepts the quote from the dealer, the dealer orders the truck to deliver to the consumer.[72]

Potential consumers will solicit bids from multiple Mack dealers and from Mack's competitors. Given that the "sales assistance" is transaction-specific, Mack gives its quote to each dealer. Consequently, Mack dealers competing

67. *Monsanto*, 465 U.S. at 764 (emphasis added).
68. *Leegin*, 551 U.S. at 893. *See e.g.*, *Apple*, 791 F.3d at 324 (stating that the Supreme Court had not overturned *General Motors* or *Klor's*).
69. 530 F.3d 204 (3d Cir. 2008).
70. *Id.* at 209.
71. *Id.*
72. *Id.* at 209–10.

for the same consumer may submit bids that differ based, in part, on the sales assistance offered to it by Mack.[73] Toledo's business strategy "focused on offering the lowest possible price to his consumers [and] aggressively pursued its low-price sales strategy throughout the country, competing on price against other Mack dealers for sales in other dealers' [nonexclusive geographic regions]."[74]

After other dealers complained, Mack adopted a policy that declined sales assistance on sales into another dealer's territory.[75] Toledo submitted evidence that Mack executives were aware of Toledo's discounting practices and that "[they] are not going to let this happen."[76] In fact, Mack executives and dealer representatives drafted the policy that denied sales assistance to sales into another dealer's territory.[77] The Third Circuit concluded that "Toledo presented direct evidence that Mack agreed with its dealers to support their anti-competitive agreements and that it did so by, among other things, refusing to offer sales assistance to dealers who sought to sell outside their [non-exclusive territories]."

Toledo filed a lawsuit asserting, inter alia, claims for violation of Section 1 of the Sherman Act. It alleged that Mack and the Mack dealers had developed an unlawful conspiracy "to keep prices on Mack products artificially high."[78] The conspiracy had two parts:

> **First**, Toledo claims that, beginning in the mid–1980s, individual Mack dealers entered into "gentlemen's agreements" not to compete with each other on price. **Second**, Toledo alleges that, beginning in 1989, Mack entered into an agreement with its dealers that it would delay or deny sales assistance to any dealer who sought to make an out-of-[territory] sale, thereby protecting dealers that sell within their own [nonexclusive territories].[79]

After trial, the district court granted judgment as a matter of law in favor of Mack on Toledo's Section 1 claim. Toledo appealed. The issue before the Third Circuit was whether the evidence that Toledo presented at trial was "sufficient to allow a rational jury to conclude that Mack and its dealers committed . . . acts in furtherance of an illegal conspiracy or conspiracies."[80]

The court split its analysis of Toledo's Section 1 claim into two "purported agreements—the horizontal agreement among the dealers, and the vertical

73. *Id.*
74. *Id.*
75. *Id.* at 212.
76. *Id.* at 221.
77. *Id.* at 222.
78. *Id.* at 210.
79. *Id.* (emphasis added).
80. *Id.* at 218. The Third Circuit also addressed (1) whether Toledo was required to prove its case using evidence restricted to the statute of limitations period; (2) whether the district court erred in granting summary judgment in favor of Mack on its Robinson-Patman Act claim; and (3) whether Mack's misappropriation of trade secrets counterclaim was barred by Pennsylvania's "gist of the action" doctrine. *Id.* at 217. Relevant here, the Third Circuit held that "Toledo was not required to prove an illegal conspiracy with evidence restricted to the limitations period." *Id.*

agreement between Mack and the dealers."[81] First, the court found that direct evidence supported the existence of agreements among Mack dealers not to compete with one another.[82] Citing the *Leegin* Court's language, the court noted that horizontal price-fixing was per se unlawful.[83] The court found that, if such agreement exists, "it involved horizontal competitors colluding to control prices and, therefore, would be per se unlawful."[84]

Second, the court found that "Toledo's evidence was sufficient to allow a jury to conclude that Mack entered into a competition-restricting agreement with its dealers."[85] Finding that evidence supported the existence of an agreement, the court moved on to deciding whether that agreement was an unreasonable restraint of trade.

Here lies the point of distinction between this case and the *Apple* holding, discussed below. The court held that Mack only entered into the vertical agreements to facilitate the horizontal agreement among the competing dealers.[86] Citing *Leegin*, the court stated: "The rule of reason analysis applies even when, as in this case, the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers."[87]

The court analyzed the evidence at trial and found that, under the rule of reason, a jury could find that Mack entered into an illegal agreement with its dealers. The case was remanded to the district court for further proceedings.[88]

B. *United States v. Apple, Inc.*

In June 2015, the Second Circuit issued its decision in *United States v. Apple, Inc.*[89] There, the United States filed a civil suit against Apple, Inc. and five of the six largest publishers of trade books (the Publishers).[90] The government alleged that Apple and the Publishers conspired to raise and fix prices of new releases and *New York Times* bestselling books in violation of Section 1 of the Sherman Act, among other state law claims.[91] The facts giving rise to this suit are summarized below:

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81. *Id.* at 219. Before beginning its analysis, the Third Circuit noted that "special rules govern [its] analysis of Toledo's evidence for the existence of the agreements and their legality." *Id.*

82. *Id.* at 220.

83. *Id.* at 221 ("'A horizontal cartel among . . . competing retailers that . . . reduces competition in order to increase price is, and ought to be, per se unlawful.'" (quoting *Leegin*, 551 U.S. at 893)).

84. *Id.*

85. *Id.* at 224–25.

86. *Id.* at 225.

87. *Id.*

88. *Id.* at 226.

89. 791 F.3d 290 (2nd Cir. 2015).

90. *Id.* at 311. The publisher defendants were Simon & Schuster, Inc., Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Macmillan, and The Penguin Group. *Id.* at 296. The publisher defendants signed consent decrees to settle the claims with the Department of Justice. *Id.* at 311–12. Apple was the only defendant to go to trial. *Id.* at 312.

91. *Id.* at 311.

The sale of new releases and bestseller books was fairly consistent among the Publishers. The Publishers sold hardcover copies to retailers at a wholesale price, suggesting a retail list price.[92] In November 2007, Amazon.com, Inc. began to offer eBooks on its Kindle device. Although it followed the traditional wholesale business model on most books, Amazon sold eBook versions of new releases and *New York Times* bestsellers at a price of $9.99.[93] This price was equal to or slightly below the wholesale price that it paid to the publishers. Notably the hardcover version of these releases was "often priced . . . at thirty dollars or more."[94]

The Publishers saw Amazon's pricing policy as a threat to their business model. Their fear was the $9.99 price point for these eBooks would become engrained in the minds of the consumers and would drive down the price of print books. Although the Publishers made some attempts to negotiate with Amazon, their efforts proved futile.[95]

Enter their white knight—Apple. Looking to enter the eBook market, Apple approached the Publishers as its first step to creating its eBook store. Apple recognized that it could not compete with Amazon's below-cost price point. To combat Amazon's price, Apple suggested that the Publishers enter into an agency relationship where the publisher sets the retail price of each book and pays the retailer a commission from those sales. This did not solve the other problem Apple and the Publishers faced—Amazon's price. Apple needed to figure out a way to eliminate retail price competition. To that end, Apple devised the most-favored nation clause (the MFN clause). The MFN clause required that, if the price the publisher set for a particular book in Apple's iBookstore was higher than the price offered at another retailer, Apple would be allowed to match the lower price.[96] The MFN clause set price caps on eBooks at $12.99, $14.99, $16.99, and $19.99, depending on the price of the hardcover book. Of the proceeds, the Publishers would keep 70 percent and Apple would receive a commission of 30 percent of the price.[97]

Ostensibly, the MFN clause required the Publishers to match the iBookstore price to the price that Amazon offered. This meant that, in practice, the Publishers would need to move Amazon into the agency model, whereby they could set the price offered to consumers. Moreover, the court found that the Publishers all agreed that in order for this model to work, every Publisher would have to participate.[98] And the court found that "[u]nder Apple's proposed agency model, the publishers stood to make *less* money per sale

92. *Id.* at 298.
93. *Id.* at 299.
94. *Id.* at 299–300 (internal quotations and citations omitted).
95. *Id.* at 300–01.
96. *Id.* at 304.
97. *Id.* at 304–07.
98. *Id.* at 304–05.

than under their wholesale agreements with Amazon, but the Publisher Defendants were willing to stomach this loss because the model allowed them to sell new releases and bestsellers for more than $9.99."[99] But it would only work if the Publishers successfully moved Amazon to the same agency model. In short order, Amazon capitulated to the Publishers' agency model.[100]

Their plan worked, but at a steep price. The trial court found that Apple violated Section 1 of the Sherman Act by "orchestrat[ing] a conspiracy among the Publisher Defendants to eliminate retail price competition in the e-book market in order to raise the retail prices of e-books."[101] The trial court also found that "[b]ecause this conspiracy consisted of a group of competitors . . . assembled by Apple to increase prices, it constituted a 'horizontal price-fixing conspiracy' and was a per se violation of the Sherman Act."[102]

On appeal, Apple argued that its conduct should not be subject to per se condemnation, even if it orchestrated the horizontal conspiracy.[103] The Second Circuit found that the record supported that Apple had "conspired with the Publisher Defendants to eliminate retail price competition and to raise e-book prices."[104]

Next, the Second Circuit decided that the per se condemnation of the horizontal price-fixing agreement applied to Apple's conduct.[105] The court analyzed Apple's conduct in the aggregate rather than focusing on its posture as a vertical participant. It found that "the relevant 'agreement in restraint of trade' in this case is *not* Apple's vertical contracts with the Publisher Defendants (which might well, if challenged, have to be evaluated under the rule of reason); it is the horizontal agreement that Apple organized among the Publisher Defendants to raise e-book prices."[106] As far as the Second Circuit was concerned, the fact that Apple was a vertical participant did not mean that it had not participated in the horizontal agreement; in fact, it found that Apple orchestrated the whole thing. In support of its holding, the court cited the long line of "hub and spoke" cases and held that the *Leegin* Court had not overruled this precedent.[107]

99. *Id.* at 316.
100. *Id.* at 309.
101. *Id.* at 312.
102. *Id.*
103. *Id.* at 314.
104. *Id.* at 320.
105. *Id.* at 321–22.
106. *Id.* at 323.
107. *Id.* at 323–25. The court conclusively found that Apple's agreement was per se unlawful. However, beginning on page 329 of the decision, the majority also analyzed Apple's horizontal agreement under the rule of reason.

VI. *Mack Trucks v. Apple*: Which Court Correctly Interpreted *Leegin*?

The antitrust plaintiff is now left with uncertainty as to whether courts will impose per se liability on a vertical participant in a vertical/horizontal hybrid restraint. On the one hand, *Mack Trucks* held that where a horizontal agreement is found and is per se unlawful, the vertical agreements established to facilitate the illegal horizontal agreement are analyzed under the rule of reason. The Third Circuit separates the antitrust scrutiny of the horizontal from the vertical components of the collective scheme. On the other hand, *Apple* held that where a vertical participant orchestrates a horizontal agreement to fix prices and to that end adopts a series of vertical agreements, the vertical participant has joined the horizontal scheme. *Apple* follows the long-standing trend to analyze vertical/horizontal hybrid restraints by focusing on the intended goal of the co-conspirators rather than the posture of the participants.

As a practical matter, there is little doubt that the objective of both schemes was to stop discounting practices by agreement among competitors. The *Mack Trucks* and *Apple* courts both found that the horizontal agreements among competitors were subject to per se condemnation.[108] So under *Leegin* what fate should the vertical participants face?

Some may argue that because the Court announced in *Leegin* that RPM agreements entered upon to facilitate a horizontal cartel "would need to be held unlawful under the rule of reason,"[109] the end result would be the same under either standard. But that was not the outcome of the *Mack Trucks* decision. And therein lies the danger.

After remand, a jury returned a verdict for Mack, the franchisor.[110] Although the Third Circuit had found that there was sufficient evidence to establish an unlawful horizontal agreement to control prices,[111] the vertical participant in that price-fixing scheme escaped liability altogether. This result is anomalous to the century-old caselaw holding that all parties in a case challenging vertical/horizontal hybrid restraints are as liable as their co-conspirators. It is also contrary to the *Leegin* decision, which stated that this very type of vertical conduct should be unlawful.

A vertical/horizontal hybrid restraint most likely will be horizontal if it was "the product of a horizontal agreement" among the competing entities.[112] Participation by a party vertically related to the conspiring competitors does not lessen the anticompetitive dangers inherent in a horizontal

108. *Apple*, 791 F.3d at 327; *Mack Trucks*, 530 F.3d at 221.
109. *Leegin*, 551 U.S. at 893.
110. *See* Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 386 F. App'x 214 (3d Cir. 2010).
111. *Mack Trucks*, 530 F.3d at 221.
112. Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993) (quoting *Business Electronics*, 485 U.S. at 730, n.4).

price-fixing conspiracy.[113] Nor does that participation transform the horizontal conspiracy into a series of vertical restrains subject to the rule for reason.[114] Indeed, a vertically related party can "induc[e] the [competitors] to collude, rather than to compete independently."[115]

Although there are some points of distinction in the facts in *Mack Trucks* from the facts in *Apple*, these distinctions do not merit Mack escaping liability. Although Apple orchestrated and joined the price-fixing scheme, Mack agreed to facilitate it. Based on this, some may argue that a vertical participant that merely acquiesces to the conspiracy of its downstream or upstream co-conspirators does not deserve the same treatment as the vertical participant that orchestrates the whole scheme. However, the antitrust fate of a competitive scheme is judged by its consequences on the market. Under *Monsanto*, a plaintiff must show that the defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective."[116] A defendant cannot escape antitrust liability by waving its hands in the air and saying: "It was not my idea." After all, "parties who knowingly join an antitrust conspiracy, like any conspiracy, are liable to the same extent as other conspirators."[117]

And *Leegin* is not to the contrary. No horizontal price-fixing conspiracy was alleged in *Leegin*. While the Supreme Court held that vertical minimum price agreements were subject to the rule of reason, it recognized that a "horizontal cartel among compet[itors] . . . that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful."[118]

The *Leegin* Court also observed that "[t]o the extent a vertical agreement setting minimum resale prices is entered upon to facilitate [such a] cartel, it, too, would need to be held unlawful under the rule of reason."[119] Read in context, that statement is best understood to mean that a party who enters into a vertical agreement that facilitates a horizontal conspiracy, but does not join the horizontal conspiracy itself, would be subject to liability under the rule of reason. The Court in *Leegin* did not suggest that a horizontal price-fixing conspiracy escapes per se condemnation simply because it is facilitated by a vertical agreement. Nor did it suggest that the parties who did

113. *In re* Insurance Brokerage Antitrust Litig., 618 F.3d 300, 338 (3d Cir. 2010).

114. *Denny's Marina, Inc.*, 8 F.3d at 1220.

115. *Toys "R" Us, Inc.*, 221 F.3d at 936.

116. *Monsanto*, 465 U.S. at 764.

117. MM Steel, L.P. v. JSW Steel (USA) Inc., 806 F.3d 835, 844 (2015) (citing United States v. All Star Indus., 962 F.2d 465 478 (5th Cir. 1992), and Spectators' Commc'n Network Inc. v. Colonial Country Club, 253 F.3d 215, 220–21 (5th Cir. 2001)) (holding that a vertical participant joined a horizontal conspiracy among distributors to exclude the plaintiff-distributor); *see also In re Insurance Brokerage, Antitrust Litig.*, 618 F.3d at 337 (defendant insurance broker orchestrated bid-rigging conspiracy with competing insurers); *Toys "R" Us, Inc.*, 221 F.3d at 936 (defendant toy store orchestrated group boycott with competing toy manufacturers); *Denny's Marina*, 8 F.3d at 1221–22 (defendant boat show operators joined price-fixing conspiracy with competing boat dealers).

118. *Leegin*, 551 U.S. at 893.

119. *Id.* at 893; *see also Mack Trucks*, 530 F.3d at 225.

join the horizontal conspiracy can escape per se liability simply because they do not compete with their co-conspirators or because the party is only vertically related.

Though monumental, the *Leegin* decision only overruled the per se condemnation of vertical pricing agreements. It did not provide a safe harbor for a vertical participant in a vertical/horizontal hybrid restraint. This is because a "hub and spoke" and group boycott scheme is not the practical equivalent of a purely RPM agreement. The procompetitive effects that removed per se condemnation from RPM agreements[120] are not present where the RPM agreement is adopted for the purpose of enforcing or facilitating an unlawful objective. For this reason, the Supreme Court did not tacitly overrule the doctrine espoused in *Interstate Circuit, Inc.*, *Klor's Inc.*, and *General Motors*. In those cases, the Court held that where a vertical participant joins an unlawful horizontal cartel by adopting vertical agreements, the vertical participant is as liable as its horizontal co-conspirators. This is still the law of the land.

The Supreme Court has established that both price and non-price vertical restraints are to be analyzed under the rule of reason, while agreements among competitors to fix prices or reduce output continue to be unlawful per se.[121] Courts can now formulate a new proof structure that should apply to the antitrust liability of vertical/horizontal hybrid restraints.

First, courts should establish whether there has been (1) an agreement among competitors (2) to fix prices or reduce output. Once the court finds such an agreement, then the scheme falls into the per se side of the dichotomy. *Second*, courts should decide whether the vertical participant(s) had a conscious commitment to the common scheme designed to achieve the unlawful objective of the colluding competitors. If so, the vertical participants should suffer the same fate as their co-conspirators. In fact, the Supreme Court so stated in *Leegin*.[122]

By doing this, courts will subject schemes designed to result in price-fixing cartels or group boycotts to the per se treatment, consistent with current Supreme Court law. And courts will allow cases that are purely vertical in nature—or where the horizontal agreement cannot be proved—to be judged under the rule of reason.

VII. The Antitrust Plaintiff's Burden Going Forward

Given the conflicting decisions in *Mack Trucks* and *Apple*, the antitrust plaintiff is left to persuade the court that its case merits the same treatment as in *Apple*. To do this, it is not enough to plead that a vertical participant

120. *Leegin*, 551 U.S. at 889–92.
121. *Id.* at 893.
122. *Id.* ("To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, *it, too, would need to be held unlawful* under the rule of reason." (emphasis added)).

entered into vertical agreements to facilitate an unlawful horizontal cartel. Such a strategy could end in the same result as in *Mack Trucks*—a win for the vertical participant in a rule of reason trial. So what must the antitrust plaintiff prove to avoid this?

The burden on the antitrust plaintiff is to plead and prove that the vertical participant *joined* in the unlawful horizontal cartel. That is, the plaintiff must convince a court that despite the vertical posture of the defendant, the end goal of the vertical agreements was to enter into the horizontal cartel. As the following cases illustrate, this can make or break a challenge to a vertical/horizontal hybrid restraint.

A. *MM Steel, L.P. v. JSW Steel (USA) Inc.*

In November 2015, the Fifth Circuit decided *MM Steel, L.P. v. JSW Steel (USA) Inc.*[123] There, MM Steel, L.P., a steel distributor, brought a Section 1 case against competing distributors and two steel manufacturers.[124] MM's sole theory of liability was that the conspirators were per se liable for joining a horizontal group boycott.[125] MM offered evidence at trial that the manufacturer defendants refused to sell them steel as a result of pressure from other steel distributors.[126] MM won at the jury trial and was awarded $6 million in damages.

The two manufacturers, Nucor Corp. and JSW Steel (USA) Inc., appealed,[127] arguing, *inter alia*, that as vertical participants, they were not subject to per se treatment under *Leegin*.[128] The Fifth Circuit responded by noting:

> [T]he crux of the group boycotts at issue in the cases in which per se liability has always applied is that members of a horizontal conspiracy *use vertical agreements anticompetitively to foreclose a competitor from the market*. . . . In these cases, the vertical participants, the manufacturers, actually join the horizontal conspiracy.[129]

The court "decline[d] to hold that the Supreme Court silently overruled this line of cases by stating that vertical agreements to *regulate prices* that facilitate horizontal agreements to *regulate prices* 'too, would need to be held unlawful under the rule of reason.'"[130]

Next, the court moved to deciding whether there was sufficient evidence supporting the jury's conclusion that JSW and Nucor had joined the unlawful group boycott. JSW argued that it did not knowingly join the conspiracy. However, the court found that the evidence showed otherwise. The evidence

123. 806 F.3d 835, 844 (2015).
124. *Id.* at 842.
125. SSAB, one of the manufacturers, settled before trial. *Id.*
126. *Id.* at 844.
127. The distributor defendants settled and dismissed their appeal. *Id.* at 842.
128. *Id.* at 848–49.
129. *Id.* at 849 (citing Nynex Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998)) (emphasis added).
130. *Id.*

supported that JSW had first agreed to supply steel to MM. However, after receiving threats from MM's competing distributors, JSW decided not to do business with MM. The court also concluded that, at the time JSW abruptly decided to no longer deal with MM, it already knew of the horizontal conspiracy to exclude MM from the market. Based on this, the Fifth Circuit affirmed JSW's per se liability for joining the horizontal group boycott scheme.[131]

The court next held that that MM failed to prove that Nucor had joined the horizontal scheme.[132] Nucor provided testimony that it decided not to deal with MM because it had a policy to remain loyal to its existing supply chain. Moreover, the court found that Nucor decided not to deal with MM long before it learned of the horizontal group boycott. Citing to *Monsanto Co.*, the court held that without knowing of the threats by a distributor or that other manufacturers were refusing to deal with MM, "Nucor could not consciously commit to a common scheme to foreclose MM from the market."[133]

The *MM Steel* case perfectly illustrates the proof structure suggested earlier. The court found that the plaintiff proved a horizontal scheme subject to per se liability. Next, it decided whether the vertical participants had joined into the goals of the horizontal scheme. This structure also applies to the pleading stage, as illustrated by the two cases below.

B. *Meyer v. Kalanick*

In *Meyer v. Kalanick*, a plaintiff filed a putative antitrust class action against Travis Kalanick, CEO and co-founder of Uber Technologies, Inc.[134] There, the plaintiff alleged that Kalanick orchestrated and facilitated an illegal price-fixing conspiracy between and among Uber and Uber drivers.[135] The agreement was implemented by Uber driver's agreement to use Uber's pricing algorithm to set prices for the rides they offer. The complaint also alleged that Kalanick was an occasional Uber driver.[136]

Kalanick moved to dismiss arguing, *inter alia*, that the agreements are only vertical agreements between each driver and Uber, and that there can be no horizontal agreement among the drivers.[137] The U.S. District Court for the

131. *Id.* at 844–45. *Accord* Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 486–87 (S.D.N.Y. 2012) ("where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade").

132. *MM Steel*, 806 F.3d at 845; Am. Steel Erectors v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 815 F.3d 43, 64 (1st Cir. 2016) (holding that where vertical agreements failed to "intersect with or give rise to an unlawful horizontal relationship," per se condemnation did not apply). *Cf.* Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 255 (3d Cir. 2010) ("even assuming the Plaintiffs have adequately identified the hub (Dentsply) as well as the spokes (the Dealers), we conclude that the amended complaint lacks any allegation of a [horizontal] agreement among the Dealers themselves. . . . In other words, the 'rim' connecting the various 'spokes' is missing.").

133. *MM Steel*, 806 F.3d at 845–47.

134. 174 F. Supp. 3d 817, 819 (S.D.N.Y 2016).

135. *Id.*

136. *Id.* at 824.

137. *Id.* at 823.

Southern District of New York declined to dismiss the Section 1 conspiracy claim. It held that the plaintiff had plausibly alleged that the drivers sign up for Uber with the understanding that other drivers are subject to the same pricing algorithm, and that the agreements went against the interest of the drivers unless all drivers joined.[138]

The court further dispelled Kalanick's argument that *Leegin* undermines the claim of an illegal horizontal agreement. Citing to *Interstate Circuit* and *Apple*, the court held that the plaintiff had alleged a plausible horizontal conspiracy that Kalanick had organized and facilitated. The court also held that Kalanick had joined the horizontal conspiracy as an occasional driver.[139]

C. *Ion v. Pizza Hut, LLC*

Franchisors are also target of these types of cases. Recently, Kristen Ion filed a putative class action against franchisor Pizza Hut, LLC. The complaint alleges that Pizza Hut "orchestrated, dispersed, and enforced" an agreement between and among it and its franchisees not to recruit or hire each other's management employees.[140] Pizza Hut, as a franchisor of pizza restaurants, includes an express non-solicitation clause in its franchise agreement that forbids franchisees from hiring management employees of other Pizza Hut restaurants.[141] Ion alleges that this no-hire clause evidences a horizontal agreement among competing franchisees and Pizza Hut to suppress wages of management employees of Pizza Hut restaurants.

The plaintiff cites to a provision of Pizza Hut's franchise agreement that states that "[e]ach franchisee has agreed that all other franchisees are 'intended beneficiaries of [the non-solicitation clause].'"[142] This clause provides potential direct evidence of a horizontal agreement among the franchisees. If such an agreement is found *and* the courts find it to be per se unlawful, it may establish a strong case for per se treatment of the franchisor's conduct. However, for this to happen, Ion must convince the courts that these provisions should be treated as per se unlawful—i.e., that they are of the same level of danger as group boycotts or price fixing agreements. To espouse this theory, the plaintiff cites Joseph Harrington, Wharton professor of business economics and public policy. Mr. Harrington claims: "In terms of suppressing competition, companies agreeing not to compete for each other's employees is the same as companies agreeing not to compete for each other's customers."[143]

Ion v. Pizza Hut LLC is still in the pleading stages. Pizza Hut has filed a motion to dismiss, arguing, *inter alia*, that per se liability does not apply to

138. *Id.* at 824.
139. *Id.*
140. Amend. Compl., ¶ 1, Ion v. Pizza Hut, LLC, No. 4:17-cv-00788, D.E. 22 (E.D. Tex. Mar. 1, 2018).
141. *Id.* ¶ 64-66.
142. *Id.* ¶ 7 (citations omitted).
143. *Id.* ¶ 29.

no-hire agreements.[144] If the case survives a motion to dismiss, the court will eventually decide whether to follow *Mack Trucks* or *Apple*.

VIII. Conclusion

So, post-*Leegin*, in evaluating vertical/horizontal hybrid restrictions, when is it appropriate for courts to apply the per se rule rather than the rule of reason? It stands to reason that talismanic labels that parrot "fickle and uncertain"[145] conclusions describing the vertical participant's conduct—such as is set forth below—is neither helpful nor sufficient:

The vertical participant:

- "orchestrated" the horizontal conspiracy
- "knowingly orchestrated and facilitated" the horizontal conspiracy
- "facilitated and implemented"
- "masterminded and directed"
- "participated" in the horizontal conspiracy

Instead, courts must engage in a fact intensive evaluation of the vertical restraint after reviewing the totality of the evidence. Where the totality of the factual evidence reveals that the vertical participant was *knowingly* an integral part of a horizontal price fixing conspiracy that has for its purpose and effect of raising prices, then the per se rule is properly applied to the vertical restriction. And, *Leegin* does not dictate otherwise.

144. Def.'s Mot. to Dismiss, No. 4:17-cv-00788, D.E. 30 (E.D. Tex Mar. 26, 2018).
145. *See* E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128, 139 (2d Cir. 1984).