Resale Pricing in the Contact Lens Industry

A Case Study of Regulation Undermining Pro-Consumer Resale Pricing Strategies

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Executive Summary

More than 30 million Americans wear contact lenses. In recent years, contact lens technology has improved, offering greater convenience and comfort to consumers. As contacts have grown more popular, the companies that manufacture them have experienced increased sales, and the contact lens market is expected to continue its expansion. At the same time, the rise of discount and Internet-based retailers has pressured traditional sellers of contact lenses—especially eye care professionals, many of whom both prescribe and sell contacts to their patients. These professionals typically invest a considerable sum in the equipment used to prescribe contact lenses, and they recoup this cost by selling contacts to the patients whom they also bill their services.

Several leading contact lens manufacturers have announced that they will not distribute to retailers that sell their contacts below a specified price. This practice has drawn the ire of some policy makers who view efforts by manufacturers to influence the price at which their products are sold as anti-competitive. Such skepticism, however, is rooted in outdated economic assumptions about how the interplay between manufacturers and retailers affects consumers. When manufacturers are free to influence how retailers sell their products, they can focus on competing against one another to offer consumers the best product and buying experience.

The American contact lens industry is a case in point. Contact lens manufacturers established uniform pricing

policies to address a key reason why consumers buy contacts from big-box stores: to avoid buying contact lenses from eye care professionals in hopes of finding a better deal. Consumers cannot be faulted for seeking the best price on their contacts, but manufacturers believe that competition from discounters undermines the eye care professionals who play a key role in the contact lens buying process—which, by law, requires the expertise of a trained professional with costly medical equipment. Eye care professionals could raise their upfront examination prices to make up for lost sales to discount retailers, but this might undermine the value of the entire fitting and purchasing experience. Instead, manufacturers impose pricing uniformity across retailers for a given type of contact lens as a way to improve consumers' experience without raising prices overall.

This essay reviews the history of resale price maintenance under federal antitrust laws, and the way recent economic thinking has altered the approach taken by courts in reviewing the legality of vertical price restraints, or price-related agreements between entities at "different levels of the same production-distribution-consumption process," to quote a classic antitrust text. It takes a close look at the contact lens industry, which has experienced significant innovation in recent years, addresses criticisms of unilateral pricing, and highlights the role of retailers in the contact lens marketplace, focusing on eye care professionals who not only sell contacts but also examine consumers' eyes and write contact lens prescriptions.

Introduction

To many consumers, anything that limits unfettered price competition, whether due to government regulation or a business decision, may sound harmful at first glance. But when manufacturers are allowed to influence how their products are retailed, they can focus on competing with one another to deliver the best possible products and the best buying experiences. The American contact lens industry is a case in point.

As anyone who regularly purchases contact lenses in the United States has surely noticed, the price of any particular brand of contacts is often the same regardless of the retailer. This consistency stems from efforts by major contact lens manufacturers to set a minimum price for their contacts, and to sell them only to retailers that do not undercut this price. Such pricing policies are not unusual. In fact, they exist in many markets, from smartphones to golf clubs to luxury fashion items. However, manufacturers are not always allowed to restrict retail prices. Federal antitrust laws and a panoply of state laws regulate the ability of firms to control the prices at which their wares are ultimately sold to consumers.1

Typically, patients are free to purchase contact lenses directly from their eye care professionals or take their prescriptions and buy contact lenses elsewhere, such as a big-box store or online retailer. Although some

contacts are sold by larger discount retailers at a lower price than that offered by eye care professionals, the nation's biggest contact lens manufacturers have sought to prevent such pricing disparities by insisting that retailers do not sell certain brands or types of contact lenses below a specified price.

Contact lens manufacturers established these pricing policies to address a key reason why consumers buy contacts from big-box stores: to avoid buying contact lenses from eye care professionals in hopes of finding a better deal. Consumers cannot be faulted for seeking the best price on their contacts, but manufacturers believe that competition from discounters undermines the eye care professionals who play a key role in the contact lens buying process which, as a matter of state and federal law, requires the expertise of a trained professional with costly medical equipment.

Individuals who wear contact lenses must intermittently visit an eye care professional, such as an optometrist, to receive an updated prescription. But these professionals do not merely give each patient a prescription; they also assist patients in determining which brand and type of contact lenses fit best and offer the ideal combination of comfort, visual acuity, and features.

Eye care professionals could raise their upfront examination prices to make up

for lost sales to discount retailers, but this could also undermine the value of the entire fitting and purchasing experience. Instead, manufacturers impose pricing uniformity across retailers for a given type of contact lens as a way to improve consumer experiences without raising prices overall. In fact, the empirical evidence suggests that manufacturer pricing policies have resulted in an overall decrease in the price of affected contact lens brands, even as some large retailers charge more than they did previously.²

However, retailers have pushed back, urging state legislators to prohibit contact lens manufacturers from distributing their contacts only to retailers that sell above a specified price. One of the largest sellers of contact lenses—the Utah-based 1-800 CONTACTS—has enjoyed particular success on this front.

In 2015, Utah passed a law targeting contact lens pricing policies, which led several contact lens manufacturers to file a federal suit that remains ongoing at the time of this publication. However, since Utah's law went into effect in late 2015, one major contact lens manufacturer—Johnson & Johnson—has abandoned its minimum pricing policy. Meanwhile, 1-800 CONTACTS and other retailers, such as Costco, continue to push for states to enact laws restricting

manufacturer efforts to set minimum retail prices.³

This essay reviews the history of resale price maintenance under federal antitrust laws, and the way recent economic thinking has altered the approach taken by courts in reviewing the legality of vertical price restraints, or price-related agreements between entities at "different levels of the same production-distribution-consumption process," to quote a classic antitrust text.4 It takes a close look at the contact lens industry, which has experienced significant innovation in recent years, addresses criticisms of unilateral pricing, and highlights the role of retailers in the contact lens marketplace, focusing on eye care professionals who not only sell contacts but also examine consumers' eyes and write contact lens prescriptions.

Skepticism toward vertical price restraints imposed by contact lens manufacturers is misplaced and unsupported by empirical evidence.

Although pricing is an important aspect of the contact lens industry, as it is in all markets, both the economic literature and empirical evidence suggest that consumers benefit from voluntary arrangements that limit retail price competition. Manufacturer policies that promote consistent pricing of particular contact lens brands appear to improve consumer access to affordable, high-quality eye care while

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promoting innovation in the contact lens industry. States should not seek to restrict the ability of manufacturers to set the prices at which their products are sold, whether unilaterally or through agreements with retailers.

From *Dr. Miles* to *Leegin*: Courts Rethink Vertical Restraints under the Antitrust Laws.

For much of the 20th century, courts interpreted antitrust laws to sharply restrict manufacturers' and suppliers' ability to control how their products were distributed to consumers. Attempts by manufacturers to influence where particular retailers could sell their products,⁵ or the prices at which they were sold,⁶ were proclaimed to be restraints of trade barred by the Sherman Act⁷ as per se illegal.⁸

More recently, however, modern economic theory and a series of decisions by the U.S. Supreme Court have recognized that unfettered downstream competition among resellers and distributors of a particular product is not always best for consumers, given its potential to hinder competition among manufacturers or suppliers of competing products.

Beginning with its 1977 decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*, ocntinuing with *State Oil Co. v. Khan* in 1997, ond culminating in *Leegin Creative Leather Products, Inc. v. PSKS* in 2007, the Court declared,

respectively, that vertical territorial restraints, maximum pricing restraints, and minimum pricing restraints are not necessarily illegal, reasoning that each type of conduct can have procompetitive effects. 12 Therefore, the Court concluded, these restraints should be evaluated on a case-by-case basis pursuant to the "rule of reason," 13 a doctrine under which a particular vertical arrangement is allowed unless it specifically is shown as likely to harm competition.¹⁴ This rethinking of vertical restraints, requiring in each case the abandonment of decades-old Supreme Court jurisprudence, 15 was widely regarded as so obviously in order that it is now generally accepted in both the economic and legal fields. 16

Vertical restraints were once assumed to be so obviously anti-competitive that courts did not bother reviewing any economic evidence of their merits. However, now that the real-world effects of these practices are examined on a case-by-case basis, it has become clear that they generally redound to consumers' benefit. As many economists have explained, and as courts have recognized, purely vertical arrangements do not restrict competition, as they do not bind competitors. Therefore, litigants challenging vertical restraints in court have rarely prevailed in recent years.17

The Supreme Court's 2007 decision in *Leegin*¹⁸ eliminated the last leg of judicial hostility to vertical restraints:

the previously sacrosanct *per se* prohibition against minimum resale pricing arrangements. ¹⁹ Building on *GTE Sylvania* and *Khan, Leegin* recognized that vertical price restraints can promote competition among manufacturers by supporting resellers that provide value-added services that benefit the manufacturer and, in turn, its ultimate customers ²⁰—unlike resellers that do not provide those services and instead compete primarily on price. ²¹

A decade after the Court's 1997 decision in State Oil, its 2007 decision in Leegin aligned the Court's treatment of maximum pricing restraints with its approach to both *minimum* and territorial pricing restraints.²² Ending the per se ban on minimum resale price maintenance should not have been a difficult decision for the Court, given its prior recognition that when the competitive implications of a particular business practice depend on specific evidence regarding market dynamics, applying the rule of reason is a step in the right direction.²³ Thus, Leegin and the other Supreme Court cases recognizing the merits of vertical restraints were fundamentally deregulatory in nature, empowering market participants to experiment with a wide array of distribution arrangements.

In the wake of these decisions, similar pricing strategies have been adopted in many sectors of the economy, often with relatively little controversy. One famous example involves Apple, which effectively allows third-party retailers to profitably sell its products to consumers only if they do not undercut the minimum advertised price for any Apple product.²⁴ This has resulted in nearly homogenous pricing for iPads and other Apple devices²⁵—a major reason the company's Apple Stores lead the nation in sales per square foot.²⁶ Apple has invested heavily in these stores, which showcase the company's latest gadgets and are staffed by employees who must undergo rigorous training.²⁷ If patrons could count on significant savings on Apple products from online retailers, some potential customers would visit the Apple Store to browse devices or query employees, but then purchase an Apple device elsewhere. Apple's vertical pricing policy prevents this, thus preserving the company's ability to recoup the costs of its highly popular retail operations.

Thanks to *Leegin* and related cases, manufacturers and brand owners have revolutionized vertical arrangements in recent years, transforming them from simple transactional relationships into win-win partnerships capable of expanding sales and market share.²⁸ This has benefited the public and intensified competition, facilitating the development of business models that give consumers choice and quality, in addition to low prices.²⁹

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Hostility to vertical price restraints has persisted since *Leegin*, especially in the contact lens industry

In the nine years since the Court handed down Leegin, the decision has remained particularly controversial by the standards of antitrust jurisprudence due to a powerful force in American commerce—the discounting retail community—both on the brick-andmortar side and in the burgeoning e-commerce world.³⁰ This constituency has strongly opposed any restrictions on product discounting and price competition.³¹ The industry is also at the center of an ongoing controversy over pricing practices that have flourished in the contact lens industry since Leegin. This fight has pitted retailers such as Costco³² and 1-800 CONTACTS against both independent eye care professionals and their retailing operations.³³

At issue is a business practice adopted in 2014 by the four largest U.S. contacts lens manufacturers³⁴—Alcon,³⁵ Bausch & Lomb,³⁶ CooperVision,³⁷ and Johnson & Johnson³⁸—known as a unilateral pricing policy (UPP). This entails a manufacturer announcing a price below which its goods may not be sold to consumers and then refusing to sell to any retailer that undercuts the announced minimum price.

Unlike traditional resale price maintenance, in which a manufacturer enters into an explicit contractual agreement with retailers about pricing, a UPP is adopted by a manufacturer acting independently, without any coordination with retailers.³⁹ Before the Supreme Court held in *Leegin* that minimum resale price maintenance should be subject to the rule of reason, adopting a UPP was the only lawful means for a manufacturer to control the price at which retailers sold its goods, as unilateral action cannot by its nature constitute a "contract, combination ... or conspiracy"—a prerequisite for liability under Section 1 of the Sherman Act.⁴⁰

Nevertheless, until the Supreme Court clarified the legality of unilateral action with its 1984 decision in Monsanto Co. v. Spray-Rite Service Corp., courts would often infer the presence of concerted action even when manufacturers engaged in putatively independent conduct under a UPP, reasoning that such a policy could not be truly unilateral given that a manufacturer is in "constant communication" with its distributors.41 Despite Leegin and Monsanto, some manufacturers—including contact lens manufacturers—continue to prefer UPPs over resale price maintenance, not only because the former remains less vulnerable under the Sherman Act, but also because minimum resale price maintenance is illegal or restricted by local laws in several U.S. states.⁴² Still, as the Supreme Court acknowledged in Leegin: "The economic effects of

unilateral and concerted price setting are in general the same."⁴³

Large discount retailers of contact lenses, including 1-800 CONTACTS and Costco, oppose the manufacturers' unilateral pricing policies because they undercut the retailers' key competitive advantage over smaller resellers—the ability to compete on price. But for manufacturer-imposed restrictions, these large retailers argue, they could leverage their scale, purchasing power, and minimal overhead costs to sell contact lenses to consumers at lower prices than eye care professionals, who regularly sell contacts directly to their patients. 44 Discount retailers have responded with an extensive series of lawsuits,45 while their lobbying efforts46 have led to congressional hearings,⁴⁷ federal and state government investigations, 48 and, in one case, state legislation.⁴⁹ In the wake of this backlash, one major contact lens manufacturer, Johnson & Johnson, recently abandoned its UPP,50 though other manufacturers, such as Bausch & Lomb⁵¹ and CooperVision, have reiterated that they plan to continue their current pricing policies.⁵²

A recent American Antitrust Institute (AAI) working paper focuses on the way vertical pricing policies adopted by various contact lens manufacturers have affected competition between eye care professionals and discount retailers, concluding that the adoption of UPPs by contact lens manufacturers

may harm consumer welfare because of their adverse effect on pricing and retail innovation.⁵³ The paper recounts at length the lawsuits,⁵⁴ congressional hearings,⁵⁵ federal and state government investigations,⁵⁶ and state legislation that was spurred by manufacturers' pricing policies.⁵⁷ AAI's lengthy dissertation on the contact lens controversy is so replete with quotes and citations to investigations,⁵⁸ testimony,⁵⁹ and legislative enactments⁶⁰ —and so thin on citations to concrete market evidence—that it appears to proceed from the premise that smoke generated by an active and well-financed campaign by contact lens discounters must be reflective of a fire generated by the anti-competitive effects of those pricing practices.61

As both *Leegin*⁶² and sound economic theory recognize, 63 it is impossible to evaluate whether vertical pricing practices in the contact lens industry promote or damage consumer welfare without examining the industry itself.⁶⁴ Observing that minimum pricing policies tend to favor eye care professionals (ECPs) to the detriment of discount retailers is hardly meaningful, given that all vertical pricing practices tend to affect competition among retailers.65 From the consumer's standpoint, what matters is overall satisfaction with the purchasing experience, regardless of the margins enjoyed by competing retailers.65 The manufacturer's challenge is to determine

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which relationships it should form with retailers to most effectively serve consumers. In other words, when a manufacturer enters into vertical arrangements with retailers, it hopes to better compete against rival manufacturers by improving the buying experience for end users.

Moreover, competition among manufacturers remains robust. Although the contact lens industry is dominated by four manufacturers,67 each manufacturer developed a somewhat different flavor of UPP,68 while one of them, Johnson & Johnson, recently abandoned its UPP.69 Even among manufacturers that have maintained their UPPs, they must decide whether and when to enforce the policy, given that is not feasible to catch every instance of a retailer selling contacts below the manufacturer's minimum price.⁷⁰ Competition between manufacturers will reward those that adopt UPP terms and select enforcement strategies that result in positive-sum relationships with retailers, and ultimately with consumers, while minimizing sales to retailers that undermine the broader system.

To evaluate contact lens pricing practices, the crucial question to consider is whether manufacturer-imposed pricing policies can regulate downstream competition while enhancing output and consumer welfare.⁷¹ There is no industry-wide consensus on these policies—some retailers lobby for

such restrictions, while others lobby against them. And unless pro-restraint retailers possess monopsony power, at least some manufacturers will resist calls to impose vertical restraints, lest they lose out on discount retailing opportunities resulting from lower prices, which may lead to increased sales and purchasing frequency.⁷²

From a manufacturer's perspective, the allure of discounting will vary from market to market. The contact lens market is relatively inelastic because it is constrained by the number of eyes that can be fitted with contacts.⁷³ In other words, only so many consumers need corrective lenses in the first place, and only a subset of this group can afford contact lenses and is willing to wear them. At best, discounting might expand the contact lens market by attracting consumers who currently wear eyeglasses—or simply allow their vision to go uncorrected—but would wear contacts if they were cheaper. However, given the small size of these demographics, contact lens manufacturers do not compete against one another primarily by seeking greater market share or total sales, but by developing superior products that offer more comfort, visual acuity, or other features in hopes of convincing existing customers to switch to newer, potentially more expensive products.

Why would manufacturers invest in relationships with eye care professionals beyond the initial prescription process,

when any retailer can fill that prescription—especially because fulfilling small orders from thousands of ECPs is more costly than large volume bulk shipments to retailers? Indeed, the "favored" segment of manufacturers' UPP policies—ECPs is highly fragmented and composed largely of individual weaklings in terms of buying power,⁷⁴ particularly relative to the "disfavored" segment large discounters. 75 It appears that manufacturers view the costs and complexity of dealing with this highly fragmented eye care professionals market to be worthwhile because it improves firms' bottom line by enhancing customers' overall purchasing experience.

Response to AAI

The AAI working paper notes that contact lens users need a prescription from an ECP and that such a prescription must be brand-specific. However, this requirement arises not out of the antitrust laws, but the Federal Food, Drug, and Cosmetic Act, which is overseen by the U.S. Food and Drug Administration. Under federal law, ECPs are required to deliver the prescription to their patients, so the patient is free to choose among all the retail sources for the initial prescription and subsequent refills.

AAI suggests, but does not document—except through repeated references

to testimony and studies by the discounters—a variety of theories, such as manufacturer conspiracy, ECP conspiracy, and ECP threats. 80 But an examination of market dynamics suggests a variety of pro-competitive explanations for manufacturer UPPs. In fact, the contacts lens business may be a poster child for the wisdom of the *Leegin* decision, with manufacturers embracing the freedom afforded to them by the Supreme Court to develop pro-competitive market arrangements that might not have been viable in earlier years. 81

The best indicator of an industry's health and level of competition is output.82 Looking at the long-term vantage point, a generation ago, contact lenses were typically expensive, cumbersome to use, and risky to eye health if not precisely fitted and applied.83 Today, they are a convenient, everyday device, available to consumers at affordable prices, regardless of how severely an individual needs vision correction. The industry continues to grow, even in the post-Leegin UPP world, at a rate faster than population growth.84 All of the industry growth is driven by the development of products, known as stock keeping units (SKUs), with new combinations of contact lens features and specifications to better meet consumers' unique vision needs, ranging from correcting astigmatism and presbyopia to providing lightsensitive lenses.

A generation ago, contact lenses were typically expensive, cumbersome to use, and risky to eve health if not precisely fitted and applied. Today, they are a convenient. everyday device, available to consumers at affordable prices,

Two factors drive those trends. First, long-term contact lens users with stable vision characteristics represent an almost entirely inelastic market. Those users, unlike soda and beer consumers, will never augment their consumption of contacts by placing a third lens in their eyes or switching to disposables more frequently than necessary, as they can buy contacts at a lower price on the Internet. Like all volume-driven retailers, the 1-800 CONTACTS and Costcos of the world concentrate on fulfilling the inelastic demand of existing wearers (unlike most products sold by online and bricks and mortar discounters, which are much more elastic).85

Although these retailers' pricing practices may please price-conscious consumers who are satisfied with their contact lens prescriptions, their efforts do little to benefit manufacturers or drive output expansion in the contact lens industry—unlike in other industries, where discount retailers often drive significant output expansion.86 To be sure, some consumers who wear eveglasses might switch to contact lenses if they were cheaper, but with contacts typically costing between \$220 and \$260 annually, it is unlikely that this segment has the potential to significantly expand the contact lens market.87

In contrast to retailers in other industries, eye care professionals act as the gatekeepers of category expansion. Incremental demand for newer types of contact lenses is driven in large part by discussions between ECPs and consumers about whether a particular type of contact lens might better address the consumer's vision situation.88 Some consumers who have long worn eyeglasses may not even realize that contact lens manufacturers have developed solutions to vision needs for which earlier types of contacts were unsuitable. ECPs are uniquely well-positioned to inform individuals who currently wear contacts, or are candidates for contact lens wear, of developments in the contact industry. And because ECPs are based in communities across the nation, they are also well positioned to provide in-person support to patients who encounter issues with their contact lenses.

Online retailers, by contrast, can do little to address patient needs after fulfilling an order based on a prescription from an ECP. Although consumers can access numerous sources of information about contacts on the Internet, the reliability and timeliness of such information is highly variable, and there is little reason to believe consumers who are generally satisfied with their contacts will devote their scarce time to monitoring trends in the contact lens industry.⁸⁹

However, whether an ECP can afford to devote scarce time to engaging in such dialogue with individual patients depends on the opportunity cost of foregoing additional eye examinations per hour. To promote demand for new and innovative products, contact lens manufacturers need output-expanding relationships with ECPs, who both create and fulfill demand. By contrast, discount retailers typically only fulfill demand. Given these market characteristics, it makes economic sense for a manufacturer to support one segment of its retailer community despite pressure from another segment.

Discount retailers, along with the authors of the AAI working paper, might claim that such favoritism comes at the expense of retailer innovation and that no law or policy demands that the public will benefit if ECPs continue in their retailing function. Such claims do not stand up to scrutiny, for two reasons.

First, at this stage of development of the retailing business, it is hard to characterize the availability of a category of contact lens SKUs at Costco as a meaningful innovation. Nor can online orders for a single category of products be characterized as the type of innovation that deserves special support under the antitrust laws (when thousands of such specialty online retailers exist for a panoply of products).

Second, new contact lens fittings need to occur in a professional's office to verify both efficacy and safety. Those ECPs need to stock or order a significant number of SKUs to start the process

of introducing those particular lenses to patients. Moreover, nearly all already operate in the largely overlapping market for retail eyeglass sales, which also require some level of professional evaluation.

Like any other medical device, the initial sale of a contact lens occurs in the context of professional services, in an environment of inelastic consumer demand. It is hardly surprising, then, that ECPs have long been major players in the eye care retailing business irrespective of the presence of UPPs. As a result, nearly all ECPs bundle their professional services with their retail services and rely almost entirely on the latter to cover their significant capital costs on the professional side and deliver vision care services at a price that could not, on its own, sustain their professional operations.

In some cases, ECPs even offer eye examinations at no cost, hoping to recoup the cost of this loss-leader service through the sale of contact lenses and other eyewear. Similar business models involving internal cross-subsidies are common in many markets, such as the cell phone industry—in which smartphones are often "sold" at a fraction of their actual cost to customers who commit to a multi-year service plan—and the video game console industry—in which consoles are often sold slightly below cost while many games are sold by

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third-party publishers who must pay a fee to the console manufacturer.

This strategy is not only commercially viable, it advances consumer welfare by lessening the sticker shock accompanying regular eye examinations—a potential impediment to consumer usage of ECP services while still offering plentiful retail options to patients, who are free to buy contacts from discount retailers. But unless ECPs can generate reasonable returns on their retailing operations, they will need to fully recover the costs of delivering professional services. If they cannot recover these costs from the sale of contact lenses, eye care professionals will be forced to raise the price of eye exams, which could discourage some patients from seeking regular check-ups, or by foregoing certain services, in turn losing out on the benefits of these services and possibly jeopardizing visual acuity or overall eye health.

Conclusion

No single business model should be set in stone by law. Instead, state and federal laws should allow manufacturers and retailers to experiment with creative relationships to discover how to best serve consumers in a manner that is both economically sustainable and conducive to innovation and growth. Given the unique role of eye care professionals, manufacturer policies that prevent discount retailers from undercutting ECPs' prices may well benefit consumers by lowering the cost of eye exams and promoting awareness of better contact lenses. This does not mean that such pricing policies are appropriate for all manufacturers, some of whom may well conclude that it makes more sense to forego vertical price restraints. Unwarranted antitrust attacks or state regulatory intervention into manufacturers' pricing decisions will constrain the industry's ability to adapt and innovate—and consumers will pay the price.

NOTES

- 1 See *infra* pp. 2–4.
- See Joint Appendix, pp. A204–A206, *Johnson & Johnson Vision Care, Inc. v. Reyes*, Nos. 15-4071, 15-4072, 15-4073 (10th Cir. June 25, 2015), https://cei.org/sites/default/files/15-4071 Documents.pdf.
- 3 See *supra notes* 32–33.
- 4 Sun Oil Co. v. FTC, 350 F.2d 624, 633 n.15 (7th Cir. 1965) (quoting Heinrich David Kronstein and John Thomas Miller, "Modern American Antitrust Law," p. 145, n. 1 (1958), from Heinrich David Kronstein and John Thomas Miller, "Regulation of Trade," p. 850 (1953)).
- 5 United States v. Arnold, Schwinn & Co., 388 U.S. 365, 378–79 (1967), overruled by Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).
- 6 Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 381–82 (1911), overruled by Leegin Creative Leather Products, Inc. v. PSKS, 551 U.S. 877 (2007).
- 7 Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7).
- The Supreme Court has determined "Certain categories of agreements ... to be *per se* illegal" because they "always or almost always tend to restrict competition and decrease output." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988) (internal quotation marks omitted) (quoting *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289–90 (1985)).
- 9 433 U.S. at 59.
- 10 522 U.S. 3 (1997).
- 11 551 U.S. at 907.
- 12 Leegin, 551 U.S. at 889–890.
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- 18 Leegin, 551 U.S. at 881.
- 19 Ibid., p. 899.
- 20 Ibid., pp. 890–892 (citing *GTE Sylvania*, 433 U.S. at 51–52).
- 21 GTE Sylvania, 433 U.S. at 55.
- 22 Compare Khan, 522 U.S. at 3 (decided in 1997), with Leegin, 551 U.S. at 877 (decided in 2007).
- Some scholars have argued that purely vertical restrictions should actually be regarded as *lawful per se*. Richard A. Posner, "The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality," *University of Chicago Law Review*, Vol. 48 (1981), pp. 23–26.
- 24 Marco Tabini, "How Apple Sets Its Prices," *Macworld*, January 14, 2013, http://www.macworld.com/article/2024257/how-apple-sets-its-prices.html.
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- 30 Mark D. Bauer, "Whither Dr. Miles?" Loyola Consumer Law Review, Vol. 20 (2007), p. 9.
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About the Author

W. Thomas Haynes is the Founder and Chief Administrative Officer of Eagle Health Plans, and is Chairman of the Board of Directors of the Competitive Enterprise Institute. Previously, Haynes served as consultant at Hamilton Landing Beverage Advisors, LLC, which provides consulting and merger and acquisition advisory services in the beverage industry and the CEO of the Coca-Cola Bottlers' Association, Inc., where he built a \$100 million health care benefits business, which was sold to National General Insurance. He served as the CEO of that benefits business for a transition period. Previously he was general counsel of Coca-Cola North America. He is a veteran of the insurance, health care, and beverages industries and has testified before Congress on health care reform on four separate occasions. He holds a J.D. from the Boston College Law School and a B.A. from Dartmouth College.

Ryan Radia is Research Fellow and Regulatory Counsel at the Competitive Enterprise Institute, where he focuses on adapting law and public policy to the unique challenges of the information age. His research areas include intellectual property, information privacy, telecommunications, cybersecurity, competition policy, media regulation, and Internet freedom. Radia has published articles in major news outlets, including the *Seattle Times, Forbes, San Jose Mercury News, Newark Star-Ledger, Advertising Age, Investor's Business Daily*, and Ars Technica. He has been quoted in publications including *The New Republic, Los Angeles Times, Time, Fortune, Chicago Tribune, San Francisco Chronicle, Boston Globe, Politico, Baltimore Sun*, Bloomberg, and other outlets. He has appeared on dozens of television and radio programs, including "Marketplace" on National Public Radio, "Cavuto" on Fox Business Network, among others. His research has been cited scholarly journals such as the *Brooklyn Law Review, University of Pennsylvania Journal of Business Law*, and *Iowa Law Review Bulletin*. He holds a J.D. from The George Washington University Law School and a B.A. in Economics from Northwestern University.



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