U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 29, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Conyers:

Thank you for your letter to the Department of Justice regarding the United States Supreme Court's consideration of *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S. Ct. 28 (2006) (cert. granted). The case presents the question whether vertical minimum resale price maintenance agreements should be deemed *per se* illegal under section 1 of the Sherman Act, 15 U.S.C. 1, or whether they should instead be evaluated under the rule of reason. The brief on behalf of the United States was filed with the Supreme Court on January 22, 2007, and we sent the brief to your staff on that day.

The brief of the United States explains that vertical minimum resale price maintenance agreements can be either procompetitive or anticompetitive. In the antitrust area, *per se* treatment should be and is typically reserved for those agreements that almost always are anticompetitive and harm consumers. Over the years much scholarship has been devoted to examining and understanding rationales for vertical minimum resale price maintenance agreements, including promoting interbrand competition. The result of that scholarship has been to make clear that, consistent with antitrust principles articulated previously by the Supreme Court, minimum resale price maintenance should be evaluated under the rule of reason.

Your letter references the 1975 Consumer Goods Pricing Act, comments of Professor Warren Grimes and the FTC's action regarding minimum resale prices with respect to CDs. The 1975 Consumer Goods Pricing Act is discussed specifically in the brief at pages 21-22. To the extent that previous testimony failed to note the potential procompetitive justifications for resale price maintenance that can benefit consumers such as those explained in our *Leegin* brief, such testimony obviously did not reflect the academic and economic scholarship that has developed during the last 30 years. With respect to the comments of Professor Grimes, the brief cites one of his articles in which he acknowledges that the use of minimum resale price maintenance in particular circumstances can be beneficial and rejects the per se rule in favor of the rule of

reason, the same position the brief takes. See pages 26-27 and n.5. As our brief makes clear, minimum resale price maintenance can be anticompetitive, and the FTC found in its case that minimum advertised pricing regarding CDs was anticompetitive based on the particular facts before it. The possibility that in a particular case minimum resale price maintenance can be anticompetitive and in another case competitively benign or beneficial is precisely why such practices should not subject to a rule of per se illegality, but instead subject to the rule of reason. Under the rule of reason, anticompetitive minimum resale price maintenance would be unlawful and procompetitive resale price maintenance would be lawful. The brief extensively sets forth our views of these issues.

You also ask whether the Supreme Court should defer to Congress on this matter, given Congress' involvement in the issue in 1975 and 1983. The Supreme Court bears the responsibility of interpreting the laws passed by Congress. Congress has and will retain the power to legislate in this area as it deems appropriate.

Thank you for your interest in the enforcement of the antitrust laws. We would be happy to discuss these issues further with you or your staff.

Sincerely,

Richard A. Hertling

Richard A. Hertling
Acting Assistant Attorney General