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DISCOUNT PRICING CONSUMER PROTECTION ACT

JULY 21, 2010.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 148]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 148), to restore the rule that agreements between manufacturers and retailers, distributors, or wholesalers to set the minimum price below which the manufacturer's product or service cannot be sold violates the Sherman Act, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

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I. BACKGROUND AND PURPOSE OF THE DISCOUNT PRICING CONSUMER PROTECTION ACT

This legislation is intended to restore the automatic (“*per se*”) ban on manufacturer setting of minimum resale prices (a practice known as “minimum resale price maintenance”). Minimum resale price maintenance results in higher prices to consumers. Until the recent Supreme Court decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹ these agreements had been *per se* illegal for nearly a full century under the antitrust laws. This legislation reinstates that *per se* ban.

The antitrust laws forbade manufacturers from setting minimum resale prices.² Three years ago, in its 5–4 decision in *Leegin*, the Supreme Court overturned this *per se* prohibition. Instead, the narrow majority in *Leegin* directed that minimum resale price maintenance be evaluated on a case-by-case basis under the “rule of reason” approach, pursuant to which the anticompetitive effects of the conduct are weighed against its likely pro-competitive benefits.

The *per se* rule banning minimum resale price maintenance by manufacturers enabled retail discounting and permitted vigorous price competition to flourish. The dissenting opinion in *Leegin* predicted that, if only 10 percent of manufacturers imposed resale price maintenance policies under the new interpretation of the law, the average family of four’s retail bills would increase between \$750 and \$1000.³ Since the *Leegin* decision, it has been reported that over 5,000 manufacturers have implemented minimum price policies.⁴ These policies have appeared in various industries, including electronics, apparel, toys, home furnishings, and others. If minimum resale price maintenance continues to be permitted, prices for a myriad of consumer goods are likely to increase, consumer access to discounted products will decline, and retail competition will be inhibited.

This legislation is necessary to prevent this consumer harm. Rule of reason analysis, adopted by the *Leegin* court, is insufficient to prevent anticompetitive minimum resale price maintenance agreements, given the practical difficulties that plaintiffs face in bringing a successful case. In antitrust cases, rule of reason requires “the factfinder [to] weigh all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”⁵ “Appropriate factors to take into account ‘include specific information about the relevant business’ and ‘the restraint’s history, nature, and effect.’”⁶ Whether the businesses involved have “market power” is a “further, significant consideration.”⁷ Further, the “plaintiff bears the burden of proving that a restraint has a substantial anticompetitive effect.”⁸ The restraint’s anticompetitive effect must be “significant” to estab-

¹551 U.S. 877 (2007).

²*Dr. Miles Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

³*Leegin*, 551 U.S. at 926 (Breyer, J., dissenting).

⁴Joseph Pereira, *State Law Targets ‘Minimum Pricing’*, Wall St. J. at D1 (E. ed. April 28, 2009).

⁵*Leegin*, 551 U.S. at 885 (quoting *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).

⁶*Id.* at 885 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

⁷*Id.* at 885–86.

⁸ABA Section of Antitrust Law, *Antitrust Law Developments*, at 55 (4th ed. 1997) (citing *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n. 5 (1967)).

lish liability under the rule of reason,⁹ and the plaintiff must prove that “the restraint is likely to have a substantial, adverse effect on competition by engaging in an analysis of the [relevant] market to predict the restraint’s effect. . . .”¹⁰

The likely antitrust plaintiffs in minimum resale price maintenance cases—small discount retailers and consumers likely will not have the economic resources to successfully bring these actions. Given the substantial legal burdens, requiring litigants to prove minimum resale price maintenance illegal under the rule of reason is both costly and time consuming.¹¹ Testimony from economic experts regarding the market, the market power of the parties to the restraint, and the likely impact on competition is typically required in such a case; oftentimes involving highly complex economic modeling.¹²

Two prominent discount retailers that testified in hearings on this issue before the Judiciary Committee’s Subcommittee on Antitrust, Competition Policy and Consumer Rights (“Antitrust Subcommittee”) stated their companies did not believe the rule of reason standard would be effective in halting anticompetitive behavior, as they would be unlikely to bring a rule of reason case challenging minimum resale price maintenance.¹³

These concerns are supported by evidence that the current law is not deterring resale price maintenance agreements. While it has been less than three years since the *Leegin* decision, more than 5,000 companies have reportedly implemented minimum pricing

⁹*Id.* at 55.

¹⁰*Id.* at 59 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (noting that the rule of reason is “an inquiry into market power and market structure designed to assess the combination’s actual effect”).

¹¹See H. Hovenkamp, *The Antitrust Enterprise* 105 (2005) (litigating a rule of reason case is “one of the most costly procedures in antitrust practice”). See also, M.A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 *Geo. Mason L. Rev.* 827, 830 (finding that out of 222 reported Federal antitrust cases decided under the rule of reason in the last decade, the plaintiff prevailed in only one).

¹²As Justice Breyer pointed out in dissent in *Leegin*, requiring proof of “market power” “invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to ill-defined markets.” 551 U.S. at 917 (Breyer, J., dissenting).

¹³Marcy Syms, CEO of Syms discount clothing stores, stated in an answer to a written question from Senator Kohl as to whether she would be likely to bring a rule of reason case challenging minimum resale price maintenance, that “[i]t would be *very* unlikely for SYMS to bring an antitrust suit [under the rule of reason]. We would not have the resources, knowledge or a strong enough position in the market place to make such action prudent.” *The Leegin Decision: The End of the Consumer Discounts or Good Antitrust Policy?: Hearing Before Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary*, S. Hrg. 110–342 (2007) at 40 (August 24, 2007 letter to Sen. Herb Kohl from Marcy Syms). Likewise, Stacy Haigney, counsel to Burlington Coat Factory, testified that “the cost [of pursuing a rule of reason antitrust case] is more than likely to be well into the seven figures. Burlington Coat Factory cannot afford that kind of expenditure and disruption of its business in a litigation which . . . is far from certain to succeed. Thus, as a practical matter, the *Leegin* case deprives Burlington Coat Factory of any remedy should it become a victim of vertical price fixing.” *The Discount Pricing Consumer Protection Act: Do We Need to Restore the Ban on Vertical Price Fixing?: Hearing Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary*, S. Hrg. 111–267 [hereinafter 2009 Antitrust Subcommittee Vertical Price Fixing Hearing] at 33. Haigney also described the considerable hurdles that a discount retailer would need to overcome to establish a rule of reason case challenging minimum resale price maintenance. According to Haigney, in light of the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*, 55 U.S. 544 (2007), requiring an antitrust plaintiff to plead a “plausible” antitrust claim, “without any discovery, a plaintiff must undergo the effort and expense of putting together a complex economic analysis of the market, the history of the restraint, the relative market shares of the product and the parties, *etc.*, simply to survive a motion to dismiss. Assuming that this hurdle can be surmounted, the plaintiff would then have to embark upon years of document-rich discovery and motion practice against a well-heeled adversary with numerous depositions, including of multiple experts on both sides.” *Id.* at 20 & 33.

policies.¹⁴ A new industry referred to as “internet monitors” has emerged since the *Leegin* decision. As part of their efforts to enforce minimum resale pricing policies, manufacturers hire these companies to monitor retail prices on the Internet. After noticing low prices, the internet monitors report the low prices to manufacturers, who then demand the retailer raise their prices to the manufacturers’ minimums.¹⁵

In addition, at the Antitrust Subcommittee’s May 2009 hearing on S. 148, former FTC Commissioner Pamela Jones Harbour testified that since the *Leegin* decision “the number of companies using RPM has substantially increased,” “some discounters had been terminated by as many as a quarter of their suppliers,” and other discounters (including PSKS, Inc., the plaintiff in the *Leegin* case) have gone out of business, unable to get the courts to “even consider the merits of their claims under the rule of reason.”¹⁶ This testimony is supported by reports received by Antitrust Subcommittee staff from Internet retailers that manufacturers are implementing policies forbidding Internet retailers from listing discounted prices on the Internet retailer’s web page for that product. Only after potential customers add the product to their Internet “shopping cart” does that customer see the discounted price. Among other things, this prevents web applications that identify low prices on the Internet for consumers from finding the sale price for the product. This has the effect of stifling price competition on the Internet.

There are many other examples of the implementation of minimum resale price maintenance since the announcement of the *Leegin* decision, including Sony’s decision to implement a program mandating minimum retail prices on certain high end electronics,¹⁷ efforts to forbid retailers from discounting toys during the 2008 holiday shopping season,¹⁸ and Avis’ Rent-A-Car policy forbidding its independently owned franchisees from renting cars below Avis’ minimum prices in Alaska.¹⁹

Past empirical studies further demonstrated the negative effect of minimum price agreements. In 1975 Congress repealed the Miller-Tydings Fair Trade Act²⁰ and the McGuire Act²¹ which permitted individual States to enact “fair trade” laws authorizing minimum resale price maintenance agreements. At the time of the repeal, 36 States permitted minimum resale pricing. A study conducted by the Department of Justice found minimum resale price maintenance policies in the States that permitted this practice

¹⁴Joseph Pereira, *State Law Targets ‘Minimum Pricing’*, Wall St. J. (E. ed.), April 28, 2009, at D1.

¹⁵2009 Antitrust Subcommittee Vertical Price Fixing Hearing, supra at n.13, (Written Testimony of FTC Commissioner Pamela Jones Harbour [hereinafter Harbour Written Testimony]) at 119; *Id.* at 13 (Tod Cohen, eBay Vice President and Deputy General Counsel for Government Relations, testified that since the *Leegin* decision, one internet monitoring company, alone, has sent over 1.2 million “notice and takedown” requests to the eBay site); Joseph Pereira, *Discounters, Monitors Face Battle On Minimum Pricing*, Wall St. J. (E. ed.), Dec. 4, 2008, at A1.

¹⁶Harbour Written Testimony, at 119–120.

¹⁷Cecile Kohrs Lindell, *Sony Upsets Holiday Shoppers, Antitrust Attorneys*, The Deal, Nov. 24, 2008, http://www.thedeal.com/dealscape/2008/11/sony_upsets_holiday_shoppers_a.php (last visited Dec. 3, 2008).

¹⁸Joseph Pereira, *Why Some Toys Don’t Get Discounted—Manufacturers Set Price Minimums That Retailers Must Follow Or Risk Getting Cut Off; Shopping Around for ‘Rock Band 2’*, Wall St. J. (E. ed.), Dec. 24, 2008, at D.1.

¹⁹Joseph Pereira, *Price Fixing Makes Comeback After Supreme Court Ruling*, Wall St. J. (E. ed.), Aug. 18, 2008, at A.1.

²⁰50 Stat. 693.

²¹66 Stat. 631.

raised prices by 19% to 27%.²² Additionally, in 1983, the Federal Trade Commission staff, after studying numerous pricing surveys, concluded that the surveys “indicate[d] that [resale price maintenance] in most cases increased the prices of products sold.”²³

The Supreme Court’s rationale for subjecting resale price agreements to a rule of reason analysis, rather than a *per se* ban, is to promote competition among manufacturers selling different brands of the same type of product.²⁴ However, banning minimum resale price maintenance itself may actually enhance this “interbrand competition.” If a manufacturer of a product bans its retailers from selling its products at a discount, then competing manufacturers will not feel the competitive pressure to reduce the retail price of their competing products. Allowing resale price maintenance could actually make it easier for competing manufacturers to collude. As Justice Breyer explained in his dissenting opinion in *Leegin*:

Resale price maintenance agreements can help to reinforce the competition-inhibiting behavior of firms in concentrated industries. In such industries firms may tacitly collude, *i.e.*, observe each other’s pricing behavior, each understanding that price cutting by one firm is likely to trigger price competition by all. . . . [R]esale price maintenance agreements will tend to prevent price competition from “breaking out” and they will thereby tend to stabilize producer prices.²⁵

Thus, allowing resale price maintenance makes it very easy for the formation of implicit agreements between competing manufacturers to keep prices artificially inflated.²⁶ Such collusion is nearly impossible to prove and ultimately harms the consumer.²⁷

A ban on minimum resale price maintenance is essential to maintaining vibrant competition among retailers. Indeed, the ban on minimum resale price maintenance greatly aided the rise of today’s low price, discount retailers—stores such as Target, Walmart, and Syms—as well as giant Internet discounters such as Amazon and eBay—which have been so successful in challenging incumbent retailers. All of these companies offer consumers a wide array of highly desired products at discount prices. Eliminating the ban on minimum resale price maintenance runs the substantial risk of blocking new discount retailers from getting a competitive foothold necessary for their survival. If new discount retailers are prevented from selling products at the behest of large, incumbent retailers because of the pressure these incumbents put on manufacturers to

²² *Leegin*, 551 U.S. at 912 (opinion of Breyer, J., dissenting) (citing Hearings on H.R. 2384 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 94th Cong., 1st Sess., 122 (1975) (statement of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division)).

²³ T. Overstreet, Bureau of Economics Staff Report to the FTC, Resale Price Maintenance: Empirical Theories and Empirical Evidence 160 (1983).

²⁴ *Leegin*, 551 U.S. at 889.

²⁵ *Id.* at 911 (opinion of Breyer, J., dissenting) citing 8 P. Areeda and H. Hovenkamp ¶ 1632d, at 321–323 (2d ed. 2004).

²⁶ The majority opinion in *Leegin* noted that “[r]esale price maintenance may, for example, facilitate a manufacturer cartel.” *Leegin*, 551 U.S. at 892 (citing *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725 (1988)).

²⁷ Additionally, the *per se* rule of liability for minimum resale price maintenance has the strong advantage of being a bright line rule, eliminating all of the uncertainty associated with a lengthy and complicated litigation inherent in rule of reason antitrust cases. The *per se* rule enables businesses to more clearly understand what is permissible and what is not with respect to vertical price restraints; the rule of reason, by contrast, may lead to uncertainty as to what conduct is forbidden and what is allowed, and under what circumstances.

forbid discounting, then an essential element of retail competition so beneficial to consumers may be imperiled. Enactment of S. 148 will keep discount retail competition alive.²⁸

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

The Discount Pricing Consumer Protection Act was first introduced in the 110th Congress by Senator Kohl on October 30, 2007 (S. 2261). The bill had three cosponsors (Senators Biden, Clinton, and Whitehouse). It was referred to the Committee on the Judiciary. No further action was taken on S. 2261 in the 110th Congress.

On January 6, 2009, Senator Kohl introduced the Discount Pricing Consumer Protection Act in the 111th Congress (S. 148). The bill has 10 cosponsors (Senators Durbin, Feinstein, Feingold, Franken, Kaufman, Klobuchar, Schumer, Specter, Whitehouse, and Wyden). It was referred to the Committee on the Judiciary. The Committee held a hearing titled “The Discount Pricing Consumer Protection Act: Do We Need to Restore the Ban on Vertical Price Fixing?” on May 19, 2009. Testimony was received from Pamela Jones Harbour, Commissioner, Federal Trade Commission; Tod Cohen, Vice President and Deputy General Counsel, eBay; Stacy Haigney, General Attorney, Burlington Coat Factory; and James Wilson, Partner, Vorys, Sater, Seymour & Pease, LLP.

The Senate Judiciary Committee considered the legislation on March 18, 2010, and voted to report the Discount Pricing Consumer Protection Act, without amendment, favorably to the Senate by voice vote.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1. Short title

This section provides that the legislation may be cited as the “Discount Pricing Consumer Protection Act.”

Section 2. Congressional findings and declarations of purposes

This section contains congressional findings and declarations of purposes.

Section 3. Prohibition on vertical price fixing

Subsection (a) amends Section 1 of the Sherman Act by adding a provision stating that “[a]ny contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler or distributor violates this Act.”

Subsection (b) provides that this Act shall take effect 90 days after the date of enactment.

²⁸ Nothing in this legislation will alter the rule of *U.S. v. Colgate & Co.*, 250 U.S. 300 (1919), that a manufacturer does not violate antitrust law by refusing to do business with distributors, including distributors that fail to adhere to a unilaterally announced pricing policy, nor is it the intent of this legislation to do so. Thus the opposition to the bill on the grounds that certain high end manufacturers will not be able to control where their products are sold, and that the reputation of these brands will suffer if their products are sold at a discount outlet, is not well founded. Under the *Colgate* doctrine, a manufacturer is always free to choose which retailers may or may not sell its products. Enactment of this bill will not force any manufacturer to have its product sold at any store it finds undesirable.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S. 148, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

MARCH 25, 2010.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 148, the Discount Pricing Consumer Protection Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 148—Discount Pricing Consumer Protection Act

S. 148 would prohibit agreements between manufacturers and wholesalers, distributors, or retailers to set minimum prices for a product or service. The bill would negate the effects of a 2007 Supreme Court decision (*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)) that permits minimum price agreements in certain cases.

Based on information from the Department of Justice, CBO estimates that implementing the bill would have no significant effect on the department's spending to handle cases involving minimum price agreements.

Pay-as-you-go procedures would apply to the legislation because violators of the bill's provisions could be subject to civil and criminal fines. Criminal fines are deposited as revenues in the Crime Victims Fund and later spent. However, CBO estimates that any additional revenues and direct spending would not be significant in each year.

S. 148 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Prohibiting agreements between manufacturers and wholesalers, distributors, or retailers to set minimum retail prices would impose a private-sector mandate as defined in UMRA. Any existing or future agreements that set such prices would be a violation of anti-trust law.

The cost of that mandate would be the forgone net income resulting from prohibiting such agreements; however, how such prohibitions would affect industry income is uncertain for several reasons. Although a large number of firms could be affected by the mandate, contracts involving pricing policies are confidential and can vary widely across markets. Further, the cost of the legislation would be mitigated to some extent because several states already prohibit such contracts and because firms could continue to use noncontractual policies that have the effect of setting minimum resale prices. Consequently, CBO cannot determine whether the cost of the man-

date would exceed the annual threshold established in UMRA for private-sector mandates (\$141 million in 2010, adjusted annually for inflation).

On March 5, 2010, CBO transmitted a cost estimate for H.R. 3190, the Discount Pricing Consumer Protection Act of 2009, as ordered reported by the House Committee on the Judiciary on January 13, 2010. The two bills are similar, and the cost estimates are the same.

The CBO staff contacts for this estimate are Mark Grabowicz (for federal costs) and Marin Randall (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 148.

VI. CONCLUSION

The Discount Pricing Consumer Protection Act, S. 148, will restore the antitrust rule that manufacturer setting of minimum resale prices is *per se* illegal under the Sherman Act. In so doing, it will overturn the Supreme Court's 2007 *Leegin* decision. This legislation, by expressly banning minimum resale price maintenance in all circumstances, will eliminate the harm to competition created by the *Leegin* decision and substantially benefit consumers by enhancing their ability to obtain discount prices.

VII. MINORITY VIEWS

MINORITY VIEWS FROM SENATORS SESSIONS, HATCH, AND KYL

We fully agree with the majority that the antitrust laws should protect consumers from anticompetitive behavior. But this bill exposes a disagreement over how the antitrust laws should be shaped and applied to serve that shared goal. For decades, the federal courts and antitrust scholars have understood that antitrust law should be grounded in sound economics so that the law prohibits conduct that is actually anticompetitive but does not deter conduct that is in fact procompetitive. That is the approach that we believe our laws should continue to follow. Unfortunately, this bill would amend the substantive language of Section 1 of the Sherman Act for the first time, without sound economic justification.

In short, because economic scholarship shows that resale price maintenance agreements can benefit competition and consumers, the bill's blanket ban of such agreements is misplaced. The Supreme Court's holding in the *Leegin* case that these agreements should be judged based on a rule of reason test, which the bill would overturn, is sound legal and economic policy. We believe a wiser course at this time would be to follow this tradition of allowing court interpretation of the law to continue, fully recognizing that Congress may act in the future if court decisions prove unworkable or unwise.

Background

On the surface, the debate over this bill is about the proper way to police resale price maintenance agreements to protect competition and maximize consumer welfare. We agree with the majority that some resale price maintenance agreements can have anticompetitive consequences that outweigh any benefit to consumers. But the economic evidence accumulated over several decades strongly indicates that some resale price maintenance agreements benefit consumers and improve competition. We are concerned that a per se ban will block procompetitive behavior, harming competition in the marketplace and making consumers worse off.

At a more fundamental level, we are concerned that this bill reveals a confusion over the proper aims and uses of antitrust law. The Sherman Act was drafted in broad terms and courts have applied it for over a century with an eye toward new developments in economic understanding so as to bar "unreasonable restraints of trade." As the Supreme Court has repeatedly held in cases going back decades, "per se rules of illegality are appropriate only when

they relate to conduct that is manifestly anticompetitive.”¹ This bill proposes to amend the Sherman Act by creating an absolute ban on retail price maintenance agreements, without regard for their real-world impact on competition or consumer welfare. As the conclusory and overtly political “findings” included in this bill show, the majority has chosen to ignore the great weight of economic scholarship, and would freeze in amber a legal rule that economic analysis shows is already obsolete.

Per Se Antitrust Violations Should Be Reserved Only for Manifestly Anticompetitive Conduct

This bill openly states that it is intended “to correct the Supreme Court’s mistaken interpretation of the Sherman Act” in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*² This suggests a misunderstanding of both the Sherman Act and the Court’s *Leegin* decision.

The *Leegin* Court held that vertical agreements between a manufacturer and a distributor to set a minimum resale price (“resale price maintenance agreements”) should be evaluated under ordinary “rule of reason” antitrust analysis. Prior to *Leegin*, resale price maintenance agreements had been treated as “per se” illegal under the Court’s 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*³ The decision in *Dr. Miles*, however, was not based on economic analysis of the effects of vertical price agreements, and it has been roundly criticized in antitrust literature for decades.

Under the Supreme Court’s precedents, “[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive,”⁴ where the practice “lack[s] any redeeming virtue,”⁵ and “only if courts can predict with confidence that [the practice] would be invalidated in all or almost all instances” under ordinary “rule of reason” antitrust analysis.⁶ Such per se rules have traditionally been confined to restraints “that would always or almost always tend to restrict competition and decrease output.”⁷

Moreover, because a “departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing,”⁸ the Supreme Court has held that per se rules are appropriate “only after courts have had considerable experience with the type of restraint at issue.”⁹ And the Court has appropriately been “reluctan[t] to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.”¹⁰

¹See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 (1977).

²551 U.S. 877 (2007).

³220 U.S. 373 (1911).

⁴*GTE Sylvania*, 433 U.S. at 49–50.

⁵*Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (internal quotation marks omitted).

⁶*Leegin*, 551 U.S. at 886–87.

⁷*Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988)

⁸*GTE Sylvania*, 433 U.S. at 58–59.

⁹*Leegin*, 551 U.S. at 886.

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

In *Leegin*, the Court reviewed the considerable body of antitrust economics literature dealing with vertical price restraints and concluded that the per se rule of *Dr. Miles* was not supportable. The Court did not hold that *all* resale price maintenance agreements were legal. Rather, the Court found that the per se ban was unjustified, and that antitrust challenges to such arrangements should instead be evaluated under the “rule of reason” analysis that has long been the standard approach in enforcing the Sherman Act.

While Congress is not strictly bound by the Supreme Court’s careful approach to identifying per se violations of the Sherman Act, the concerns highlighted by the Court apply equally to the Legislative Branch and counsel the Congress to proceed with caution.

No such caution is evident in this bill, which proposes to ban all resale price maintenance agreements, regardless of their actual effects on competition and consumer welfare. The traditional “rule of reason” approach of the Sherman Act, which evaluates resale price maintenance agreements according to their actual economic effects, is the far wiser course.

Modern Economics Shows That Some Resale Price Maintenance Agreements Benefit Consumers and Competition

The economic and antitrust literature shows that procompetitive uses of resale price maintenance agreements are likely to be common.¹¹ As antitrust scholar and federal court of appeals Judge Richard Posner noted in his influential treatise on antitrust law, the old judicially created per se rule against resale price maintenance was “a sad mistake. There is neither theoretical basis, nor empirical support, for thinking the practice generally anticompetitive.”¹² It would be no less of a mistake for Congress to repeat the *Dr. Miles* Court’s error by recreating a per se rule that is unsupported by the economic evidence.

Professional economists appear to agree with near unanimity that resale price maintenance agreements can be procompetitive.¹³ As the majority opinion in the *Leegin* case noted, “economics literature is replete with procompetitive justifications for a manufacturer’s use of resale price maintenance.”¹⁴ This point was made forcefully in an amicus brief signed by 23 economists in the *Leegin* case:

¹¹ Howard P. Marvel, *Resale Price Maintenance and the Rule of Reason*, Antitrust Source, P.1 (June 2008) available at <http://www.abanet.org/antitrust/at-source/08/06/Jun08-Marvel6=26f.pdf> (“Economists have posited an ever-widening set of conditions under which RPM can increase efficiency.”).

¹² 3 Richard A. Posner, *Antitrust Law* 189 (2d ed. 2001).

¹³ See, e.g., G. Franklin Mathewson & Ralph A. Winter, *The Law and Economics of Resale Price Maintenance*, 13 Rev. Indus. Org. 57, 67 (1998); Kenneth G. Elzinga & David E. Mills, *The Economics of Resale Price Maintenance*, in 3 Issues in Competition Law and Policy 1841 (ABA Section of Antitrust Law 2008), available at <http://www.virginia.edu/economics/Workshops/papers/mills/RPM%20ABA%20volume%202008.pdf>; G. Franklin Mathewson & Ralph A. Winter, *The Incentives for Resale Price Maintenance Under Imperfect Competition*, 21 Econ. Inquiry 337 (1983); Andrew N. Kleit, *Efficiencies Without Economists: The Early Years of Resale Price Maintenance*, 59 S. Econ. J. 597 (1993); Raymond Deneckere et al., *Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition*, 87 Am. Econ. Rev. 619 (1997).

¹⁴ *Leegin*, 551 U.S. at 889.

In the theoretical literature, it is essentially undisputed that minimum RPM [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects. The disagreement in the literature relates principally to the relative frequency with which procompetitive and anticompetitive effects are likely to ensue. The critical issue is the boundaries of that dispute. Some believe that minimum RPM is almost always benign and thus should basically be ignored by antitrust law except when it is part of a cartel case. Others believe that RPM has been demonstrated to be anticompetitive in some cases and thus merits serious antitrust consideration. The position absent from the literature is that minimum RPM is most often, much less almost invariably, anticompetitive. Thus, the economics literature provides no support for the application of a per se rule.¹⁵

Leading antitrust authorities agree with this economic analysis and had called for the reversal of the *Dr. Miles* rule for years prior to the *Leegin* case. Professor Herbert Hovenkamp wrote that the “*Dr. Miles* per se rule was unfortunate” and “the wrong rule, given that much RPM is competitively benign in the great majority of situations when it is not being used to facilitate collusion.”¹⁶ In his treatise on antitrust law, co-written with the late Professor Phillip Areeda, Hovenkamp concluded that “[t]o the extent that *Dr. Miles* rests on the false categorical propositions that resale price maintenance never benefits manufacturers and always has the same effects as an illegal dealer cartel, its ruling is ripe for reexamination.”¹⁷

The large body of empirical academic evidence arguing that minimum resale price agreements can be procompetitive is supported and brought to life by the convincing anecdotal evidence offered by the manufacturer parties and amici in the *Leegin* case to explain the procompetitive reasons their businesses chose to establish minimum resale prices.¹⁸

The majority seems to argue that the economic experts cited above are wrong, and that all resale price maintenance agreements should be banned. But the majority’s arguments are unconvincing.

It is telling that the majority’s report cites no economic or empirical evidence showing that consumer welfare has been harmed in the aftermath of the *Leegin* decision. Instead, the majority cites to Justice Breyer’s *prediction* in his dissenting opinion that price increases would occur. This citation to an economic prediction from the dissenting opinion at the Supreme Court—not typically the branch to which one looks for economic policy expertise—is outweighed by the empirical economic evidence discussed above.

Indeed, insufficient time has elapsed since the *Leegin* decision to draw meaningful conclusions about the decision’s economic con-

¹⁵ Brief of Amici Curiae Economists at 16, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06–480) (internal citations omitted).

¹⁶ Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 186, Harvard University Press, 2005.

¹⁷ Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 217 (2d ed. 2004).

¹⁸ Brief for Petitioner at 22–24, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06–480); Brief of PING, Inc. as Amicus Curiae at 5–9, *Leegin* (No. 06–480).

sequences. Before codifying a per se ban in the Sherman Act, Congress should wait until the economic evidence has had time to emerge. This is especially so because, before the *Leegin* decision, the per se ban of *Dr. Miles* “hindered the development of an economic understanding of the rationales and effects of RPM” because “[t]he per se rule ma[de] proof of actual anticompetitive effects immaterial.”¹⁹ At the very least, therefore, this bill is premature.

Antitrust Law Should Be Based on Sound Economic Principles

The past thirty years have led to broad consensus among scholars, practitioners, and judges that antitrust should be grounded in sound economics and that “antitrust protects competition, not competitors, and that it does so to ensure consumer welfare.”²⁰ In the absence of these basic, guiding principles, there would be a significant risk that antitrust rules—some of which can have a profound impact on the market—would turn instead on the personal biases or political beliefs of judges.²¹

This consensus that antitrust law is most appropriately based on sound economics has led the courts to grow increasingly reluctant to treat vertical restraints as per se antitrust violations. As the majority opinion in *Leegin* discusses, this trend began almost immediately after the *Dr. Miles* case was decided, starting with the Court’s decision in *U.S. v. Colgate & Co.*²² That decision undercut *Dr. Miles* by permitting a manufacturer to announce suggested resale prices and refuse to deal with distributors who do not follow them.

Spurred by significant advancements and interest in the study of economics during the middle of the 20th Century, the Court began to rest antitrust law more firmly on economic principles. In 1977, the Court overturned the per se rule for vertical nonprice restraints (such as agreements on product placement) and adopted a rule of reason analysis.²³ In 1984, the Court required plaintiffs alleging an illegal vertical price restraint to produce evidence showing that a manufacturer and its distributors were unlikely to have acted independently.²⁴ And in 1988, the Court chipped away at *Dr. Miles* once again, holding that the per se rule did not apply to an agreement between a manufacturer and a distributor to terminate a contract if the distributor were to engage in price-cutting.²⁵ Finally, and as recently as 1997, the Court overturned a nearly 30-year old precedent that had made vertical maximum price-fixing agreements per se illegal.²⁶ The Court reached this conclusion, as the *Leegin* majority noted, after assessing “commentary and real experience.”

¹⁹Hovenkamp, *supra* note 16 at 186.

²⁰See, e.g., Antitrust Modernization Commission, Report and Recommendations 4 (2007).

²¹See Hon. Douglass H. Ginsburg, Gauer Distinguished Lecture in Law and Public Policy, AEI Legal Center for the Public Interest: Original Public Meaning of the Constitution: Out of Exile? (Sept. 23, 2008) (describing the pre-economic Supreme Court antitrust jurisprudence as an “ad hoc and incoherent” “assortment of vague and, ironically, anti-competitive social and political goals”).

²²250 U.S. 300 (1919).

²³*GTE Sylvania*, 433 U.S., at 57–59.

²⁴*Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

²⁵*Business Electronics Corp.*, *supra*, 485 U.S. 717 (1988).

²⁶*State Oil Co. v. Khan*, 522 U.S. 3 (1997).

The majority's report does not deny that the Court has been steadily moving away from per se rules, including in the context of vertical restraints between a manufacturer and retailer. The *Leegin* decision was not an aberration. Nor was it "activist." It was instead a faithful application of the scholarly view—recognized by the Court itself in a series of post-*Dr. Miles* cases—that most restraints cannot be deemed either anticompetitive or procompetitive without looking at specific facts and circumstances.

The majority argues that the costs of bringing an antitrust suit under the rule of reason standard will deter plaintiffs from challenging even anticompetitive agreements. But the antitrust law has mechanisms to encourage plaintiffs to bring suit, such as treble damages and fee shifting,²⁷ so that a fair hearing of arguments both for and against a resale price maintenance can occur.

We agree with the majority that a resale price maintenance agreement used to facilitate horizontal collusion would be anticompetitive. In the majority's example, of course, the primary antitrust violation is the horizontal collusion among manufacturers, not the vertical price maintenance arrangements that might facilitate enforcement of such horizontal collusion. Even so, a vertical price maintenance agreement used to facilitate horizontal collusion would fail under *Leegin's* rule of reason test.

The Majority's Concerns Over Resale Price Maintenance Do Not Justify the Extraordinary Step of Amending the Sherman Act

The Sherman Act has been a model of simplicity for over a century. Since its enactment in 1890, courts have been given the latitude to fine-tune their understanding of what is, and is not, an unreasonable restraint of trade based on experience and a continually developing understanding of economics.

The bill would set the Sherman Act on a different course by, for the first time ever, designating a specific type of agreement as an unreasonable restraint of trade. Worse yet, it will freeze in place a view of resale price maintenance agreements that is, in most experts' opinions, at least a half-century out of date—a view that mistakenly treats price as the only consideration for measuring consumer welfare and that ignores the well-documented free-riding problems that can drive competition out of the market, harming consumers in the long run. We readily acknowledge the importance of internet discounters to the growth of our economy and we recognize the valuable role that traditional discount retailers like Target, Walmart, Syms, or Kohl's play in the marketplace. But economic scholarship makes clear that consumer welfare and economic output are maximized when consumers are able to choose from a range of products with varying levels of quality and service; such diversity in the market may be unsustainable if resale price maintenance is flatly banned.

²⁷ See Abbott B. Lipsky, Jr., *Private Damage Remedies: Treble Damages, Fee Shifting, and Prejudgment Interest*, Testimony before the Antitrust Modernization Commission (2005), available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Lipsky.pdf ("Applying a damage multiple and a fee-shifting provision to antitrust litigation has had the demonstrable effect of encouraging private supplementation of public enforcement, thereby enhancing whatever deterrent, compensatory and exemplary remedial effects the system would have otherwise produced, ceteris paribus.').

We are also concerned that this legislation, by fundamentally changing the text of the law that the Supreme Court has called the “the Magna Carta of free enterprise,”²⁸ may have unintended consequences in other applications of the Sherman Act. We do not know, for instance, whether or how this bill might be read to affect the numerous pre-*Leegin* decisions that chipped away at the holding in *Dr. Miles*. The majority report claims, for example, that this legislation will have no impact on “the rule of *U.S. v. Colgate & Co.*, 250 U.S. 300 (1919), that a manufacturer does not violate antitrust law by refusing to do business with distributors, including distributors that fail to adhere to a unilaterally announced pricing policy.” But this assurance is not supported by the text of the legislation; a distributor who believes his contracts were terminated because of “excess” discounting would assuredly allege that he was the victim of a “conspiracy . . . setting a minimum price.”²⁹ And it is certainly conceivable that courts might interpret Congress’s actions in this area as exhibiting a generalized desire for the courts to move away from the historical use of the Sherman Act as a common law tool to promote competition. These issues, which are largely unaddressed by the majority’s report, highlight the need to exercise extreme caution before amending a statute that has been the cornerstone of antitrust jurisprudence for over a century.

Conclusion

This bill would outlaw all resale price maintenance, in contravention to the great weight of economic evidence, even in those situations where such activity is likely to be procompetitive. Like the Court, we believe that the “rule of reason” is the appropriate standard in such cases.

We decline to join the majority’s effort, under the false guise of being faithful to precedent, to ignore the economic scholarship and judicial decisions to recreate by statute a judicial rule that has long been seen as a relic from a pre-economic, populist era in antitrust law. We therefore cannot support this legislation, and we hope that this bill does not signal a broader desire within the Congress to jettison the strides that have been made to ground antitrust law in sound economics.

JEFF SESSIONS.
ORRIN HATCH.
JON KYL.

²⁸ *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

²⁹ Indeed, this claim that the bill will preserve the *Colgate* rule, thus allowing what amounts to back-door resale price maintenance through “minimum *advertized* prices” and other such machinations, further suggests that this legislation has less to do with antitrust law than with political posturing. As Marvel notes in his article for the ABA Antitrust Section, “Terminating dealers who discount one’s products is not a less restrictive approach than encouraging them to continue to sell the products at the preferred price.” Marvel, *Resale Price Maintenance and the Rule of Reason*, Antitrust Source, June 2008, at p.6. *Colgate* allows manufacturers to maintain an exclusive brand image by refusing to deal with certain retailers, but such efforts at product differentiation are less directly beneficial to consumers than resale price maintenance arrangements that require retailers to provide a higher level of customer service in exchange for a guaranteed minimum retail price.

VIII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 148, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE**TITLE 15—COMMERCE AND TRADE****CHAPTER 1—Monopolies and Combinations in Restraint of Trade****Subchapter I—Federal Trade Commission****SHERMAN ACT (15 U.S.C. § 1)****SEC. 1 (15 U.S.C. 1). TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; PENALTY.**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *Any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act.* Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

