

Statement of

The Honorable Herb Kohl

United States Senator
Wisconsin
July 31, 2007

STATEMENT OF SENATOR HERB KOHL
SENATE JUDICIARY COMMITTEE
HEARING ON "THE LEEGIN DECISION: THE END OF CONSUMER DISCOUNTS
OR GOOD ANTITRUST POLICY"
JULY 31, 2007

Good morning. Today's hearing examines an issue with profound implications for the prices consumers pay for everything from clothing to electronics, and to everyone who likes to get a bargain when shopping. Last month, in the Leegin decision, a narrow 5-4 Supreme Court majority overturned a century old ban on a manufacturer setting a minimum price below which a retailer cannot sell the manufacturer's product.

Many fear that allowing manufacturers to set minimum retail prices will threaten the very existence of discounting and discount stores, and lead to higher prices for consumers. For nearly a century the rule against vertical price fixing permitted discounters to sell goods at the most competitive price. Many credit this rule with the rise of today's low price, discount retail giants - stores like Target, Best Buy, Walmart, and the internet site Amazon, which offer consumers a wide array of highly desired products at discount prices.

From my own personal experience in business I know of the dangers of permitting vertical price fixing. My family started the Kohl's department stores in 1962, and I worked there for many years before we sold the stores in the 1980s. On several occasions, we lost lines of merchandise because we tried to sell at prices lower than what the manufacturer and our rival retailers wanted. For example, when we started Kohl's and were just a small competitor to the established retail giants, we had serious difficulties obtaining the leading brand name jeans. The traditional department stores demanded that the manufacturer not sell to us unless we would agree to maintain a certain minimum price. Because they didn't want to lose the business of their biggest customers, that jeans manufacturer acquiesced in the demands of the department stores - at least until our lawyers told them that they were violating the rule against vertical price fixing.

So I know first hand the dangers to competition and discounting of permitting the practice of vertical price fixing. But we don't need to rely on my own experience. For nearly 40 years until 1975 when Congress passed the Consumer Goods Pricing Act, federal law permitted states to enact so-called "fair trade" laws legalizing vertical price fixing. Studies the Department of Justice conducted in the late 1960s indicated that prices were between 18-27 % higher in the states that allowed vertical price fixing than the states that had not passed such "fair trade" laws, costing consumers at least \$ 2.1 billion per year at that time.

The likely harm to consumers if vertical price fixing were permitted is even greater today. In his dissenting opinion in the Leegin case, Justice Breyer estimated that if only 10 % of manufacturers engaged in vertical price fixing, the volume of commerce affected today would be \$ 300 billion dollars, translating into retail bills that would average \$ 750 to \$ 1,000 dollars higher for the average family of four every year.

I am particularly worried about the effect of this new rule permitting minimum vertical price fixing on the next generation of discount retailers, the next Sam Walton. If new discount retailers can be prevented from selling products at a discount at the behest of an established retailer worried about the competition, we may imperil an essential element of retail competition so beneficial to consumers.

In the last few decades, millions of consumers have benefited from an explosion of retail competition from new large discounters in virtually every product, from clothing to electronics to groceries, in both "big box" stores and on the internet. We will need to carefully examine whether the Supreme Court's abrupt change to the settled antitrust rule forbidding vertical price fixing will threaten today's vibrant competitive retail marketplace and the pocketbooks of consumers, and consider whether legislation will be necessary to protect the continued existence of consumer discounts.

I look forward to the testimony of our distinguished panel of witness on this important topic.