Testimony of

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Antitrust, Competition Policy and Consumer Rights
Senate Judiciary Committee
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Chairman Kohl and Members of the Subcommittee, I appreciate the opportunity to offer my personal views on the proper legal treatment of minimum vertical price fixing. As you know, based on my "Open Letter" to the Supreme Court1 in the Leegin case,2 I have strong opinions on this subject, and I would have preferred it if a majority of the Court had adopted Justice Breyer's cogent dissent3 instead.

I am a Commissioner of the Federal Trade Commission. But let me be very clear: the views I express today are entirely my own. If you were to compare my Open Letter to the government's amicus brief in Leegin,4 it would be obvious that my comments do not reflect the opinions of the Commission or my fellow Commissioners (although I note that Commissioner Leibowitz joined me in voting against the Commission's decision to sign on to the amicus brief).

I have submitted a copy of my Open Letter along with my written remarks, and I will not rehash the Leegin decision today. Instead, I want to focus my comments on a fundamental issue of antitrust policy: what should consumers expect from the American antitrust laws and, consequently, the American retailing system?

The Leegin opinion relies on at least two implicit assumptions:
? First, that manufacturers know what is best for consumers - even better than retailers, or consumers themselves;5 and
? Second, that retail competition is not important to the American economy or to consumers.

But these assumptions do not match the reality of the American marketplace. Consumers do not view retailers as mere sales agents for manufacturers. To the contrary, retailers serve an important function on behalf of consumers. Retailers are, in effect, purchasing agents for consumers.6 Retailers compete by trying to predict what consumers want, and at what price. Many retailers promote efficiencies, which are passed along in the form of lower prices. Other retailers may charge higher prices, but offer superior service or higher quality goods or other amenities. Consumers respond to this price and non-price competition by voting with their wallets, depending on their preferred mix of products, services, and quality at a given price.7 marketplace by denying the consumer the right to assign his own value to the intangible asset of trademark or image." H. Rep. 94-341, Consumer Goods Pricing Act of 1975 at 5 (1975) (quoting FTC Charman Lewis Engman).

This is the essence of market-based competition. It is based on consumer choice. And many - if not most - consumers respond strongly to aggressive price competition, because we all prefer a bargain. The rise of mass merchandisers like WalMart, Home Depot, and Burlington Coat Factory illustrates my point.

But let's think about the post-Leegin world. As a general matter of antitrust law, a person who can "profitably . . . maintain prices above a competitive level for a significant period of time" is said to possess actionable market power.8 But the Leegin majority articulates a more lenient ruleof-reason standard for minimum vertical price fixing. To quote Justice Kennedy's version of the rule, "pricing effects" are not enough to establish market power; the plaintiff must make a "further showing of anticompetitive conduct."9

To my mind, that is a virtual euphemism for per se legality,10 because it will be so difficult for any plaintiff to make out a case. Therefore, absent Congressional action, I envision a post-Leegin world where there is no effective check on minimum vertical price fixing.

What will this look like to consumers? Well, if you were to walk through a mass merchandiser's store, you would see thousands of items produced by hundreds of manufacturers.

Each of these manufacturers could require retailers to enter express agreements along the lines of, "you must sell my products at these prices." Manufacturers also would be able to dictate a variety of other aspects of retail sale, such as shelf location, display spacing, and presentation.
? Will the store owner be permitted to make any meaningful decisions?
? Who will really be running the store?
? How will retailers compete to offer consumers the best deal?
Intrabrand and interbrand competition may continue to exist, but only to the extent it benefits manufacturers, not consumers. In short, the American marketplace will no longer be driven by consumer preferences. And this is wrong.

As my Open Letter explains, our nation has been down the minimum vertical price fixing road before. Congress enacted the Consumer Goods Pricing Act of 197511 to end a decades-long experiment of its own design. The 1937 Miller-Tydings Act12 had created an antitrust exemption for minimum vertical price fixing authorized under state fair trade laws, after the Supreme Court's Dr. Miles decision13 had held this conduct to be per se illegal under federal law. But in 1975, Congress declared the experiment a failure, finding that minimum vertical price fixing harmed consumers by raising prices, decreasing distributional efficiencies, and deterring new entry, among other things.14 If Congress had not repealed the fair trade laws in 1975, it is doubtful that mass merchandisers would even exist today.15

As Justice Breyer observed in his Leegin dissent, the economic arguments in favor of minimum vertical price fixing have not changed appreciably over time.16 The defendant in Leegin made arguments strikingly similar to the ones the Court rejected in Dr. Miles and Congress rejected in 1975.17 There still is no body of sound empirical economic evidence to show that minimum vertical price fixing is, on balance, more likely than not to be beneficial to consumers.18

Congress repeatedly has turned down calls for legislation that would allow minimum vertical price fixing on a national scale. There is no justification for Congress to change course. Yes, minimum vertical price fixing may sometimes be good for consumers, under some limited circumstances. But that is no reason to subject all American consumers to higher prices, which is virtually certain to be the outcome of Leegin - unless Congress intervenes.

When it comes to close questions of competitive effect, American consumers deserve the benefit of the doubt. Therefore, I believe Congress should act to shift the burden of proof from consumers onto the producers who impose pricing restraints. I would be happy to work with the Subcommittee to draft statutory language, and I already have some ideas, if you would like more details.

In closing, in light of the current state of economic research, it remains speculative and theoretical to say that minimum vertical price fixing is almost always good for consumers. On the other hand, it is extremely likely that retail prices for thousands of products will go up in the wake of Leegin, with no countervailing benefits - which clearly is not good for consumers. The law should place the burden of proof where it belongs. The consumers I am sworn to protect deserve nothing less.

Thank you for your time today, and I would be pleased to answer any questions.

1 Pamela Jones Harbour, An Open Letter to the Supreme Court of the United States ... [Regarding] The Per Se Illegality of Vertical Minimum Price Fixing (Feb. 26, 2007), available at http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf.
2 Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S.Ct. 2705 (2007).
3 Id. at 2726 - 37.

4 Id., Brief for the United States as Amicus Curiae Supporting Petitioner (Jan 22, 2007), reported at 2007 WL 173650.
5 Robert Pitofsky, In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing, 71 GEO. L. J. 1487, 1493 (1983) ("Those opposing per se rules in this area implicitly assume that the manufacturer knows better than the market what will or will not work in the marketplace.").
6 See RUTH PRINCE MACK, CONTROLLING RETAILERS 91 (1936) ("Control of prices in part determined whether the retailer was the 'selling agent for the manufacturer' or 'the purchasing agent for the consumer.'").
7 "[A]uthorizing the manufacturer to decide what mix of products and services is desirable, instead of allowing the market to decide that question, is inconsistent with the nation's commitment to a competitive process." Pitofsky, supra note 5, at 1493. "Simply put the argument assumes an identity between cost and value and thereby begs the question of the competitive
8 United States Dep't of Justice and Federal Trade Comm'n, 1992 Horizontal Merger Guidelines (with April 8, 1997 Revisions) § 0.1, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 8, 1977).
9 Leegin, 127 S.Ct. at 2718.
10 See Richard A. Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 UNIV. CHI. L. REV. 6 (1981).
11 Pub. L. No. 94-145, 89 Stat. 80.
12 Miller-Tydings Resale Price Maintenance Act, Pub. L. 314, ch. 690, Title III, 50 Stat. 693 (1937).
13 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
14 See Open Letter, supra note 1, at 9-11.
15 Leegin, 127 S.Ct. at 2735 (Breyer, J. dissenting) ("The Consumer Federation of America tells us that large low-price retailers would not exist without Dr. Miles; minimum resale price maintenance, 'by stabilizing price levels and preventing low-price competition, erects a potentially insurmountable barrier to entry for such low-price innovators.' Brief for Consumer Federation of America as Amicus Curiae 5, 7-9 (discussing, inter alia, comments by Wal-Mart's founder 25 years ago that relaxation of the per se ban on minimum resale price maintenance would be a ' 'great danger' ' to Wal-Mart's then-relatively-nascent business).").
16 Id. at 2732.
17 S. Rep. 94-466, An Act to Repeal Enabling Legislation for Fair Trade Laws (1975), at 3-4; H. Rep. 94-341, Consumer Goods Pricing Act of 1975 (1975), at 4-5.
18 Compare Leegin, 127 S.Ct. at 2717 (Kennedy, J.) ("And although the empirical
evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical.") with id. at 2729-30 (Breyer, J. dissenting) ("I have already described studies and analyses that suggest (though they cannot prove) that resale price maintenance can cause harms with some regularity-and certainly when dealers are the driving force. But what about benefits? How often will the benefits to which the Court points occur in practice? I can find no economic consensus on this point. . . . All this is to say that the ultimate question is not whether, but how much, 'free riding' of this sort takes place. And, after reading the briefs, I must answer that question with an uncertain 'sometimes.'").