

Statement of
The Honorable Herb Kohl

United States Senator
Wisconsin
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Senate Judiciary Committee

Subcommittee on Antitrust, Competition Policy and Consumer Rights Hearing on May 19, 2009

"The Discount Pricing Consumer Protection Act: Do We Need to Restore the Ban on Vertical Price Fixing?"

Today's hearing examines an issue with far-reaching impact on the prices consumers pay for everything from clothing to electronics, and to everyone who likes to get a bargain when shopping. Two years ago, we held a hearing on the Supreme Court's 5-4 decision in the Leegin case in June 2007 which abolished a fundamental antitrust rule that manufacturers cannot set minimum retail prices. At that hearing, we heard warnings that this decision would imperil discount shopping that consumers have learned to take for granted. Our experience since the Leegin decision is giving credence to these fears, and it comes at exactly the wrong time - just as millions of consumer face a serious recession and depend on bargain shopping more than ever to balance the family budget. That is why I have introduced legislation to overturn this misguided Supreme Court ruling.

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 outlets - stores like Burlington Coat Factory, and the internet site eBay - both witnesses today - not to mention such retail giants as Target, Best Buy, and Walmart, all of which offer consumers a wide array of highly desired products at discount prices.

We have already begun to see manufacturers set minimum retail prices resulting in higher prices for consumers. Some antitrust experts suggest that there are an estimated 5,000 companies using minimum-pricing policies. Last November, at the outset of the holiday shopping season, Sony announced a no-discount rule prohibiting retailers from cutting the price on a number of its most in-demand top end products, including some flat screen TVs and digital cameras. The Wall Street Journal has reported that a new business has materialized for companies that scour the internet in search of retailers selling discount products. When such bargain sellers are detected, the manufacturer is alerted so that it can demand that the discounting stop. Even the discounting of toys at pre-Christmas sales was targeted.

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I know from my own experience in the retail industry decades ago that established retailers can take advantage of vertical price fixing to halt discounting dead in its tracks. In order to eliminate low price competition from smaller retailers, large retailers can demand that manufacturers forbid discount pricing. These large retailers have the bargaining power with manufacturers to make these demands stick, all to detriment of upstart discount competitors and consumers.

Our common sense worry is that allowing manufacturers to bar discounting will lead to higher prices is borne out by basic economics. In his dissenting opinion in Leegin, Justice Breyer estimated that if only 10% of manufacturers engaged in vertical price fixing, retail bills would average \$ 750 to \$ 1,000 dollars higher for the average family of four annually. For this reason, I have introduced the Discount Pricing Consumer Protection Act, co-sponsored by Senator Whitehouse. Our bill - which is endorsed by 35 state attorneys general and all major consumers' organizations -- will simply make clear that when manufacturers prohibit discounting, they violate the antitrust laws, and thereby restore a clear legal rule that had stood since 1911.

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 have all taken for granted our ability to walk into discount retailers and buy brand name products at sharply discounted prices. It is essential that Congress act swiftly to enact the Discount Pricing Consumer Protection Act to once again make the setting of minimum retail prices illegal.

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