Statement of

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Before the

SENATE JUDICIARY COMMITTEE

SUBCOMITTEE ON ANTITRUST, COMPETITION POLICY

AND CONSUMER RIGHTS

Regarding

THE DISCOUNT PRICING CONSUMER PROTECTION ACT:

DO WE NEED TO RESTORE THE

BAN ON VERTICAL PRICE FIXING?

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TESTIMONY TO THE SENATE JUDICIARY COMMITTEE

BY STACY J. HAIGNEY, ESQ.

Good day, Senators. My name is Stacy J. Haigney, General Attorney to Burlington Coat Factory. I greatly appreciate this opportunity to testify in support of S.148 which, if passed, will restore nearly a century of antitrust jurisprudence and greatly benefit American consumers and the economy as a whole.

I have represented Burlington Coat Factory in antitrust matters since 1981. At that time, Burlington Coat Factory was a burgeoning off-price retail chain of approximately 13 stores. We have since grown to a nationwide retailer with nearly 400 stores in 44 states. The Company's success is due to its ability to consistently adhere to the retail philosophy that our founder, Monroe G. Milstein, inaugurated when he started the Company in 1972:

> Offer the customer full lines of in-season, nationally-known brands of merchandise at prices that are at

least 25% below those charged at department stores for the same brands.

As simple as this approach may sound, there are only a handful of retail chains that have been able to implement it successfully. It is a certainty, moreover, that neither Burlington Coat Factory nor any other retailer, employing a comparable off-price structure, would have gotten off the ground in the 1970's if the <u>Leegin</u> court's holding permitting minimum price-fixing had been in force then. We know this because off-price merchants with a business model like Burlington Coat Factory's did not exist until after the so-called "Fair Trade Laws" were repealed. These state laws were permitted by Congress as an emergency measure during the Depression. In essence, the states were granted exemptions from the application of the Supreme Court's 1911 decision in <u>Dr. Miles</u> which forbade vertical price-fixing.

After the Second World War, some states repealed their Fair Trade Laws, but it was not until 1975 that President Ford signed a bill which did away with the exemption altogether. This law was passed after extensive economic studies by Congress conclusively proved that consumer prices were much lower, and retail competition much more intense, in states that had repealed their Fair Trade Laws than in states that hadn't done so.

Promptly following that repeal, Burlington Coat Factory's business took off from one outlet store in Burlington, NJ to the nationwide, retailing giant it has become. It is not difficult to understand why the end of legal resale price-fixing made it possible for Burlington Coat Factory to prosper.

When Burlington Coat Factory's business commenced in 1972, nearly all merchants of branded apparel charged the so-called "keystone mark-up," i.e., they sold their products to the public at double their wholesale cost. Unsurprisingly, many established retailers were less than enthusiastic about Burlington Coat Factory's sale of the same products at 25% below "keystone."

Accordingly, during the early 1980's, Burlington Coat Factory encountered numerous incidents where department stores pressured vendors to stop selling Burlington Coat Factory because of its low prices.

Fortunately for Burlington Coat Factory and its customers, those anticompetitive retailers could not legally coerce their suppliers to impose high-pricing structures throughout the industry once the Dr. Miles prohibition against resale price-fixing was back in force. However, post-Leegin, there is no practical way to stop such retailer-imposed price-fixing schemes from being put in place.

I anticipate the objection that Leegin supposedly does not legalize resale price-fixing; it merely renders it subject to the "Rule of Reason." In the real world, this argument is a complete red herring. One of the reasons the United States Supreme Court established the per se rule to govern certain hardcore anticompetitive conduct is that the Court recognized that satisfying the Rule of Reason constitutes an insuperable hurdle for a small, non-governmental business entity. To prove a Rule-of-Reason violation requires plaintiff to offer voluminous and sophisticated economic evidence showing that the defendants' conduct materially harmed, not just plaintiff's business, but the entire relevant product and geographical markets.

As the opponents of the per se rule know, very few, if any, companies whose business has been destroyed by anticompetitive behavior can afford a multi-million dollar, multi-year evidentiary analysis of an entire industry. The per se rule, by contrast, has allowed entities of modest means to gain redress merely by proving the existence of the price-fixing scheme and that it harmed plaintiff. To put it plainly: under the Rule of Reason, a modest-sized victim of price-fixing is out of court.

The Leegin case not only brushes aside the time-honored doctrine of stare decisis and nearly a century of antitrust jurisprudence and expressions of congressional intent in the area of vertical restraints, it flies in the face of perhaps the most essential tenet of American antitrust law, <u>i.e.</u>, that, at least since the <u>Socony</u> case, price competition is the central nervous system of a free market. Why would a majority of the Supreme Court, after nearly a century of a well-functioning economy subject to <u>Dr. Miles</u>, decide to deep-six this concept in favor of a nebulous "maybe-price-fixing can be beneficial sometimes" theory? It is difficult for one to summarize the "reasoning" behind the <u>Leegin</u> doctrine without sounding like one is mocking its proponents. Nevertheless, let me try and do so, as politely as possible.

Vertical minimum price-fixing -- we are told -- <u>might</u> have pro-competitive results in <u>some</u> circumstances because the retailer <u>might</u> use the extra profit it <u>might</u> earn from artificially-high retail prices to improve the services it offers in connection with sales of the overpriced product. The retailers, <u>Leegin</u> suggests, <u>might</u> offer these services, even though the manufacturer does not require them to do so. The retailer will be all the more apt to <u>do</u> so, the specious reasoning continues, if the retailer knows his prices won't be undercut by that inevitable Chicago School of Economics bogey man, the "free rider." Finally, forcing the consumer to pay artificially-high prices, in the Leegin court's view, promotes "consumer welfare." I am not making this up.

Although there are innumerable ways to demonstrate the baselessness of this rationale, I will attempt to confine my comments to my own personal knowledge and experience. In the first place, Burlington Coat Factory's principal means of competing are its low prices. Conceptually, therefore, the argument that artificially-high fixed prices are good for competition and consumers appears grotesque on its face to Burlington Coat Factory.

In addition, unlike the members of the Leegin majority, I have spent the last twenty-eight (28) years in the company of real-life executives, buyers, vendors and consumers (not Chicago School abstractions) in the apparel industry while they are actually conducting business. I have witnessed retail executives and buyers' thought processes unfold while making merchandising decisions.

My observation is that these people make their decisions entirely based on what they think would be in the best interest of the company. If such real-life retailers were to earn a little extra money from a particular product, that money will go to the general coffers of the company to be applied as the company sees fit, very likely as corporate profit, or to make some needed expenditures. It is inconceivable that a flesh-and-blood retailer would, absent a prior agreement with the manufacturer, decide to dedicate the extra profit to the benefit of the manufacturer's business objectives. Thus, to describe the Leegin scenario is to expose it as a fantasy.

What is perhaps most astonishing about the Leegin holding is that -- since the Sylvania case of 1977 -- manufacturers have been free to contractually require their dealers and retailers to provide whatever services the manufacturer deems desirable. The Leegin court's notion that artificially-inflated retail prices might encourage a retailer to sua sponte provide services is not only illogical, it is a complete non sequitur in light of Sylvania: If a manufacturer wants its product to be sold in a certain manner, in certain surroundings and with certain services, it may lawfully require every retailer to do so. Under Sylvania, all of this can be done lawfully without any reference to retail pricing.

Putting in place such a Sylvania-endorsed distribution program does something else without price-fixing that the Leegin court thinks is important: such a program ipso facto eliminates the "free rider." If only retailers who provide the services required by the manufacturer are permitted to buy the product, there will be no non-service-providing price-cutters to play the "free-rider" role.

Thus, not only is price-fixing unlikely to achieve the benefits envisioned by the Leegin court (e.g., more services), those benefits were obtainable contractually under Sylvania for thirty (30) years before Leegin was decided.

I would like to mention in passing how bizarre the "free-rider" hypothesis appears to people in the apparel business. While I can imagine that certain sophisticated retail services might be desirable from the manufacturers' point of view in connection with the sale of, say, computers, apparel customers know how to choose and wear clothing without any instruction from our sales associates. Some apparel manufacturers wish to enhance the snob appeal of their products by confining their distribution -- unmolested by "free riders" -- to fancy boutiques and top-of-the-line department stores. They have every right to do that under Sylvania. The Leegin doctrine adds nothing to their right to control distribution and prevent "free-riding."

In short, it turns out that the Leegin majority's counterintuitive notion that price-fixing can be pro-competitive is counterintuitive for a reason. Antitrust doctrine, as developed by Congress and the courts during the Twentieth Century, was based, not on academic theories, but on real-life business practices as analyzed in innumerable congressional hearings and judicial proceedings.

It saddens me to see the Leegin court replace all that accumulated wisdom with an academic construct which does not even make sense on its own terms.

In closing, I note that Burlington Coat Factory has yet to feel the negative impact of the Leegin case. This is probably due to the dire economic conditions that the country has experienced since the decision. At the present time, overall weakening in consumer demand seems to have temporarily divested manufacturers of the power to dictate retail prices to companies such as Burlington Coat Factory. However, there is every reason to believe that such abuses will return when prosperity is restored: I doubt very much that the proponents of price-fixing would have spent so much money and energy on lobbying and legal argumentation if they did not plan to avail themselves of Leegin's holding at the first opportunity.

On behalf of Burlington Coat Factory, I hereby express my company's unequivocal support for S.148 which succinctly but fully addresses this vital issue.