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Testimony before the Subcommittee on
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 Court[1] 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 dissent[3] 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

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[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.

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 rule-of-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.

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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).

[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).

[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

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.