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REPORT
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DISCOUNT PRICING CONSUMER PROTECTION ACT OF 2009

DECEMBER 8, 2010.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 3190]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3190) to restore the rule that agreements between manufacturers and retailers, distributors, or wholesalers to set the price below which the manufacturer's product or service cannot be sold violates the Sherman Act, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 3190, the Discount Pricing Consumer Protection Act of 2009, is intended to undo the harm to consumers stemming from the Supreme Court's 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[1] In *Leegin*, the Supreme Court overturned 96 years of antitrust jurisprudence by reversing its 1911 decision in *Dr. Miles Med. Co. v. John D. Park & Sons, Co.,*[2] which had expressly prohibited agreements between manufacturers and distributors or retailers establishing a minimum retail price for the manufacturers' products. Critics of the *Leegin* decision expect it to result in increased prices charged to consumers.[3] H.R. 3190 would negate the *Leegin* decision by again making any such agreements a violation of section 1 of the Sherman Act.[4]

BACKGROUND AND NEED FOR THE LEGISLATION

RETAIL PRICE FIXING AND THE LEEGIN DECISION

"Rule of Reason" Analysis vs. "Per Se" Prohibition

Alleged antitrust offenses are generally subject to one of two classes of review, either a *per se* or rule-of-reason analysis. The category of analysis is significant both in terms of a policy judgment and as an evidentiary burden of proof.

Per se offenses[5] consist of a limited number of business practices deemed so harmful to competition that proof of the practice itself establishes an antitrust violation without further analysis. *Per se* prohibitions are generally limited to "conduct that is manifestly anticompetitive,"[6] that would "always or almost always tend to restrict competition and decrease output."[7]

On the other hand, rule-of-reason offenses reflect a recognition that some types of business practices are not always anticompetitive, and may be, on balance, either procompetitive or anticompetitive depending upon the factual circumstances.

Rule-of-reason analysis requires a more in-depth look at the practice in question in order to weigh the competitive effects.[8] Such an analysis generally involves expensive and time-consuming economic research and analysis.

Leegin Overturns the Per Se *Precedent Set By* Dr. Miles

In its 1911 decision in *Dr. Miles,*[9] the Supreme Court held that an agreement between a manufacturer of proprietary medicines

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[1] 551 U.S. 877 (2007).
[2] 220 U.S. 373 (1911).
[3] In his dissent in Leegin, Justice Breyer estimated that even if only 10 percent of manufacturers engaged in minimum retail price fixing, the annual retail bill for the average family of four would increase by between $750 and $1,000. 551 U.S. at 926.
[4] 15 U.S.C. § 1.
[5] The Supreme Court first crafted the per se standard in the context of horizontal agreements, i.e., agreements among competitors. See e.g., United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899).
[6] Continental T.V. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977).
[7] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–20 (1979).
[8] Factors to be considered in a rule-of-reason analysis include the facts peculiar to the business to which the restraint is applied, the condition of the business before and after the restraint was imposed, and the nature of the restraint and its actual and probable effects. The history of the restraint, the threat posted, the reasons for adopting the remedy, and the ends sought to be obtained are also to be taken into consideration. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).
[9] 220 U.S. 373 (1911).

and its dealers to fix the minimum price at which its medicines could be sold was illegal under section 1 of the Sherman Act.[10] For the next 96 years, *Dr. Miles* stood for the proposition that agreements between manufacturers and retailers that established a minimum price for the manufacturers' products were illegal on their face. In antitrust parlance, the case established a *per se* prohibition on vertical minimum price restraints, alternately referred to as "resale price maintenance," or minimum retail price fixing.

In its 2007 *Leegin* decision, the Supreme Court overturned *Dr. Miles*, holding that minimum retail price fixing would henceforth be judged under the rule of reason, on a case-by-case basis. In a 5–4 decision, Justice Kennedy, writing for the majority, acknowledged that setting minimum retail prices could have anticompetitive effects, but concluded that it could also have procompetitive benefits, and that a *per se* prohibition could not be justified, as it could not be "stated with any degree of confidence that retail price maintenance 'always or almost always tend[s] to restrict competition and decrease output.'" [11] The Federal Trade Commission (FTC) and the Department of Justice (DOJ) filed a joint amicus brief in favor of overturning *Dr. Miles' per se* prohibition; 37 State attorneys general filed one in favor of affirming it.[12]

The effect of *Leegin* is that minimum retail price agreements are no longer *per se* prohibited by law. This does not mean that these agreements are now necessarily always legal; they are instead subject to a case-by-case rule-of-reason analysis.

Minimum Retail Price Fixing in the Wake of Leegin

Nearing the 3-year anniversary of *Leegin*, there are a number of indications that mandatory minimum retail price policies are becoming more common, with an adverse impact on consumer prices.[13]

- ConsumerWorld.org, which provides price comparisons for consumers, has found numerous minimum retail price policies imposed upon retailers by manufacturers of baby goods, consumer electronics, home furnishings, and pet foods.[14]
- BabyAge.com reported that 100 of its 465 suppliers dictate minimum retail prices.[15] As a result, the Internet retailer had to increase prices 20 to 40 percent on several popular products.[16]
- Demand Inc., an Internet-only retailer of ergonomic office accessories, reported that at least 50 percent of its products now have a manufacturer-imposed minimum retail price, compared to 10 percent in 2006.[17]

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[10] The Sherman Act, 15 U.S.C. §§ 1–7, prohibits contracts, combinations, and conspiracies in restraint of trade, as well as acts of monopolization.

[11] Leegin, 551 U.S. at 894, quoting Business Electronics, 485 U.S. at 723.

[12] The State attorneys general who filed the amicus brief were from AK, AR, CT, DE, FL, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NV, NH, NJ, NM, NY, NC, OH, OK, OR, PA, SC, SD, UT, VT, WA, WV, and WY.

[13] Joseph Pereira, Price-Fixing Makes Comeback after Supreme Court Ruling, Wall St. J., Aug. 18, 2008, at A1.

[14] Id.

[15] Id.

[16] E-Tailers Take on Price Fixing, Consumer Electronics Daily, Dec. 5, 2008.

[17] Don Davis, How the Supreme Court Fractured Online Pricing, InternetRetailer.com, Nov. 2008, http://www.Internetretailer.com/article.asp?id=28293.

- Seventy-five percent of eHobbies' products now have a manufacturer-imposed minimum retail price.[18]
- HomeCenter.com has lost millions of dollars in sales because of minimum retail price policies imposed by manufacturers, such as lighting manufacturer L.D. Kichler, that have made the Internet-based retailer less competitive than it used to be.[19]
- Two lawsuits have been brought against eBay by manufacturers for selling their products below a manufacturer-dictated minimum price.[20]

Congress' Previous Involvement in the Retail Price-Fixing Issue

Congress has involved itself directly in the formulation of enforcement policy in the area of minimum retail price fixing on a number of occasions.

First, during the Depression, a number of States, as part of a general move toward price controls in response to the distressed business climate, enacted so-called "fair trade" laws permitting a manufacturer to enter into agreements with retailers stipulating the minimum price at which its products could be sold. Congress passed the Miller-Tydings Act[21] in 1937 to exempt agreements permitted under the State fair trade laws from the antitrust laws, followed by the McGuire Act[22] to extend coverage of the exemption to imposition of a "fair trade" price agreement even on retailers who had not signed it.

By the 1970's, State fair trade laws had come under increasing disrepute as anticompetitive, and unwarranted by any legitimate business purpose.[23] Studies conducted by the DOJ under President Nixon indicated that retail price fixing sheltered by State fair trade laws inflated prices for the affected goods by between 18 and 27 percent, and that eliminating the fair trade laws would save consumers $1.2 billion.[24] The Ford Administration's DOJ called for repealing the fair trade laws, as did the FTC. Ronald Reagan, then a columnist for the Copley News Service, condemned retail price fixing in a column reprinted in the Congressional Record, arguing that it stifled competition, added to inflation, and was bereft of consumer benefits.[25]

In the Consumer Goods Pricing Act of 1975, Congress repealed the Miller-Tydings Act and the McGuire Act.[26] In doing so, it examined and rejected various asserted justifications for minimum retail price fixing, including assertions that it helped encourage retailers to provide additional services, helped protect small businesses, and helped new businesses enter the market. Congress con-

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[18] Id.
[19] Id.
[20] Greg Beck, Companies Claim Right to Interfere with eBay Auctions for Charging Too Little, Consumer Law & Policy Blog, July 17, 2007, http://pubcit.typepad.com/clpblog/2007/07/leegin-and-ebay/comments/page/2/.
[21] 50 Stat. 693 (1937).
[22] 66 Stat. 632 (1952).
[23] In the interim, many States had repealed or curbed their fair trade statutes; in four States, the statutes had been declared unconstitutional; and in five States, "non-signer" clauses had been declared unconstitutional. See P. Areeda, Antitrust Analysis, 517 (1974).
[24] S. Rep. No. 94–466, 94th Cong., 1st Sess., pp. 1–3 (1975).
[25] 1212 Cong. Rec. 1268 (Jan. 23, 1975).
[26] 89 Stat. 801 (1975).

cluded that minimum retail price fixing served little purpose other than to inflate prices.

Congress strongly reaffirmed its bipartisan support for the *per se* prohibition against minimum retail price fixing during the 1980's. After the Reagan Administration DOJ filed an amicus brief in *Monsanto Co. v. Spray-Rite Service Co.*[27] urging the Supreme Court to overturn *Dr. Miles*, Congress, as part of the FY 1984 appropriations bill that included DOJ funding, expressly prohibited the DOJ from using any funds to advocate overturning the *per se* prohibition.[28] The prohibition was reinstated as part of the FY 1986 appropriations resolution[29] and remained in every DOJ-funding appropriations bill thereafter until FY 1992, when the prohibition was dropped only after personal assurances from the Assistant Attorney General for Antitrust that the Department would not revive its effort to undermine the *per se* prohibition.

With the change of Administration in 1993, the Department quieted the issue by reaffirming its support for the *per se* prohibition and its intent to actively enforce it.[30] Only two-and-a-half years before the Court decided *Leegin*, the Antitrust Modernization Commission, tasked in legislation sponsored by then-House Judiciary Committee Chairman James Sensenbrenner with conducting a comprehensive review of the state of the antitrust laws,[31] declined to examine retail price fixing because there was "a relatively low level of controversy on the subject."[32]

HEARINGS

On April 28, 2009, the Judiciary Committee's Subcommittee on Courts and Competition Policy held 1 day of hearings on the effect of the *Leegin* decision on competition in the retail environment. Testimony was received from Pamela Jones Harbour, Commissioner, Federal Trade Commission; Thomas G. Hungar, Partner, Gibson, Dunn & Crutcher LLP; Tod Cohen, Vice President and Deputy General Counsel, Government Relations, eBay, Inc.; and Richard Brunell, Director of Legal Advocacy, American Antitrust Institute, with additional material submitted by the National Consumers League; the Consumer Federation of America; Consumers Union; U.S. Public Interest Research Group; Amazon.com, Inc.; the American Bar Association Section of Antitrust Law; and the Consumer Electronics Association.

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[27] 465 U.S. 752, 762–63 (1984).

[28] Departments of Commerce, Justice, and State, the Judiciary, and Related Appropriations Act, 1984, § 510, Pub. L. No. 98–166, 97 stat. 1102–03 (1983).

[29] Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1986, § 605, Pub. L. No. 99–180, 99 stat. 1169–71.

[30] Antitrust Enforcement, Some Initial Thoughts and Actions, Address by Assistant Attorney General Anne K. Bingaman before Antitrust Section of the American Bar Association, August 10, 1993.

[31] Pub. L. No. 107–273, §§ 11051–60, 116 Stat. 1856.

[32] The Leegin Decision: The End of the Consumer Discounts or Good Antitrust Policy? Before the Subcomm. On Antitrust, Competition Policy and Consumer Rights of the H. Comm. On the Judiciary, 110th Cong. 6 (statement of Richard M. Brunell, Director of Legal Advocacy, American Antitrust Institute), available at http://www.antitrustinstitute.org/archives/files/aai-%20Leegin,%20'senate%20test%20by%20RB,%207-30-07_080120071016.pdf (quoting Memorandum from the Antitrust Modernization Comm. Single-Firm Conduct Working Group 16 (December 21, 2004)).

COMMITTEE CONSIDERATION

On July 30, 2009, the Subcommittee on Courts and Competition Policy met in open session and ordered the bill H.R. 3190 favorably reported, with an amendment, by voice vote, a quorum being present. On January 13, 2010, the Committee met in open session and ordered the bill H.R. 3190 favorably reported without amendment, by a voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 3190.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3190, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 5, 2010.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3190, the "Discount Pricing Consumer Protection Act of 2009."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226-2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 3190—Discount Pricing Consumer Protection Act of 2009.

H.R. 3190 would prohibit agreements between manufacturers and wholesalers, distributors, or retailers to set minimum prices for a product or service. The bill would negate the effects of a 2007 Supreme Court decision (*Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877 (2007)) that permits minimum price agreements in certain cases.

Based on information from the Department of Justice, CBO estimates that implementing the bill would have no significant effect on the department's spending to handle cases involving minimum price agreements.

Pay-as-you-go procedures would apply to the legislation because violators of the bill's provisions could be subject to civil and criminal fines. Criminal fines are deposited as revenues in the Crime Victims Fund and later spent. However, CBO estimates that any additional revenues and direct spending would not be significant in each year.

H.R. 3190 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Prohibiting contracts between manufacturers and wholesalers, distributors, or retailers to set minimum retail prices would impose a private-sector mandate as defined in UMRA. Any existing or future contracts that set such prices would be a violation of anti-trust law.

The cost of that mandate would be any forgone net income resulting from prohibiting such agreements; however, how such prohibitions would affect industry income is uncertain for several reasons. Although a large number of firms could be affected by the mandate, contracts involving pricing policies are confidential and can vary widely across markets. Further, the cost of the legislation would be mitigated to some extent because several states already prohibit such contracts and because firms could continue to use noncontractual policies that have the effect of setting minimum resale prices. Because of those uncertainties, CBO cannot determine whether the costs would exceed the annual threshold established in UMRA for private-sector mandates ($141 million in 2010, adjusted annually for inflation).

The CBO staff contacts for this estimate are Mark Grabowicz (for Federal costs) and Marin Randall (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3190 will negate the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* and restores the *per se* prohibition established in *Dr. Miles Med. Co. v. John D. Park & Sons., Co.*, holding any agreement between a manufacturer and a retailer, wholesaler, or distributor establishing a minimum price for the sale of a product or service is a violation of section 1 of the Sherman Act.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 3 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3190 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 designates the short title of the bill as the "Discount Pricing Consumer Protection Act of 2009."

Sec. 2. Prohibition on Minimum Resale Price Maintenance. Section 2 makes any agreement between a manufacturer and a retailer, wholesaler, or distributor establishing a minimum price for the manufacturer's product or service a violation of section 1 of the Sherman Act.

The term "agreement" is to be read synonymously with "contract, combination, or conspiracy" as used in section 1 of the Sherman Act, and is intended to be read consistently with the limitations on intra-enterprise conspiracy as held in *Copperweld Corp. v. Independence Tube Corp.*[33]

Sec. 3. Effective Date. This section establishes the bill's effective date as 90 days after the date of enactment. Thus, agreements subject to challenge under the bill will be *per se* illegal if entered into, or still in effect, 90 days after the date of enactment.

[33] 467 U.S. 752 (1984).

ADDITIONAL VIEWS

I have strong reservations about the effect of H.R. 3190 on the market. I believe this legislation is imprudent. It is a wholesale prohibition against any price agreements between a manufacturer and a retailer. This change in law lumps together all market participants, without regard to their pricing power in the marketplace. It is unfortunate, since there is a simple and effective solution to this shortcoming of the original bill that would provide for protection of consumers against unfair market practices while recognizing the needs of businesses, big and small, to protect their products in the marketplace.

At the time of the mark up of H.R. 3190, I offered an amendment to provide two standards of review for minimum price agreements between manufacturers and retailers. If the price setter had market power, the price agreement would be a per se violation of the Sherman Antitrust Act. If the price setter did not have market power, then the court must apply the rule of reason standard set by the Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* in 2007.

I think *Leegin* got it right, partially. But the court can only use the tools it is given. My amendment was the middle ground. It refined and curtailed the Supreme Courts' application of the rule of reason standard to recognize antitrust concerns regarding market participants with market power who negotiate minimum price agreements with retailers. My amendment recognized our desire and the need to protect the consumers from unfair price-setting and promote competitive pricing process.

On the other hand, my amendment also recognized that there more than one dynamic in the marketplace, not just consumer as a price-taker. Another dynamic is between the retailer/distributor and the manufacturer. A manufacturer in retail environment has but one product (i.e. a suitcase, a computer, an iPod). The retailer, on the other hand, has a plethora of choices. Normally, a retailer, if you don't go to the Apple store, has Apple, BlackBerry, Samsung, and so on. In fact, most retailers, particularly the large retailers and the retailers that are in support of this legislation, have all the brands.

If you are a retailer and you have the ability to take the most expensive brand, the best brand, the one that has the most demand and advertize it in limited quantities at a reduced price, and then when shoppers come in your store enticed by the low price, you have created traffic at the expense of the perceived value of that product. You have diluted the perceived value of the product in the process. You also, of course, have the ability to raise and lower that price to suit your whim. You have all the options.

A manufacturer, again, has but one product, the product that they are presenting in the way that they would like to present it. If that manufacturer—and this was the crux of my amendment—has market power, then we should hold that manufacturer to the higher standard. But for a small manufacturer, a start-up, the little guy, it may be the only way to get the attention of the market to price their product where it belongs, realizing that it may sell less but it will sell to a discerning customer who appreciates the advantage, the quality, the unique characteristics of their product.

If that is the decision of the manufacturer with their product, their intellectual property, the thing that they created and brought to market, if that manufacturer does not have antitrust considerations, if they have no market power, why shouldn't they be given some reasonable control over their own product, with a standard of review different from the standard of review we apply to manufacturer which has real market power? Under these circumstances, I believe the rule of reason standard set by the Supreme Court in *Leegin* is the right way to analyze the antitrust implications of the pricing agreements. The courts are well equipped to make this determination. Market power is not a vague standard. There is a huge body of settled antitrust law that tells us what market power is.

The unfortunate effect of this legislation is that it will decrease competition in the marketplace by benefitting large retailers and manufacturers to the detriment of the small retailers and manufacturers, with the ultimate result of less consumer choice and lower product quality. It is my hope that this Committee will reconsider this matter in the future to correct its shortcomings.

DARRELL E. ISSA.