



VIEWPOINT:

Will Congress Overrule *Leegin*?

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An eCCP Publication

November 2007

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By

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Senate Bill 2261, introduced on October 30, 2007 aims to overrule the U.S. Supreme Court’s holding in *Leegin Creative Leather Products Inc. v. PSKS Inc.*¹ The short statutory paragraph compares closely with language suggested in a letter to the Senate Judiciary Committee by FTC Commissioner Pamela Jones Harbour, a vocal opponent of applying the rule of reason to resale price maintenance claims.² One of two Democrats on the Commission (and with Commissioner Leibowitz one of two dissenters from the Commission’s decision to join the U.S. Government’s brief in *Leegin*), Commissioner Harbour has argued that reversing the rule from *Dr. Miles Medical Co. v. John D. Park & Sons Co.*³ will eliminate discounting.⁴

S. 2261 would add the following language to Sherman Act Section One: “Any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act.”⁵

The “findings” section of S. 2261 also reflects Commissioner Harbour’s comments, relying primarily on the experience of the “Fair Trade” laws—which permitted states legislatively to overrule the *Dr. Miles* rule and permit resale price

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¹ 127 S. Ct. 2705 (2007).

² See Hon. Pamela Jones Harbor, Supplementary Testimony Regarding *Leegin Creative Leather Prods. Inc. v. PSKS Inc.* 1 (Sept. 5, 2007).

³ 220 U.S. 373 (1911).

⁴ Hon. Pamela Jones Harbour, Testimony before the Subcommittee on Antitrust, Competition Policy & Consumer Rights (July 31, 2007).

⁵ S. 2261, § 3.

maintenance—to support the conclusion that *Leegin* was based on a faulty understanding of the economics of retail pricing.⁶

This anti-*Leegin* bill is misguided. It ignores strong evidence of actual discounting practices that take place with the approval of manufacturers, who even under the reign of *Dr. Miles* had tremendous power to decide what prices would be charged for their products. It restrains antitrust courts' flexibility to adjust to changing business methods through the common-law process, and could initiate an unfortunate trend of changing the simple Sherman One prohibition into a mish-mash of targeted regulation. Moreover, it ignores lessons of the harms of populist legislation in a regulatory scheme that is directed toward economic efficiency.

Discounting by retailers, whether or not approved by manufacturers, advances what are commonly thought to be the most fundamental goals of antitrust policy—reduced prices, and their corollary, increased output. Of course, discounting by retailers is commonplace. Box stores like Wal-Mart offer consumer goods much more efficiently than smaller competitors. The primary argument favoring anti-*Leegin* legislation is that eliminating the *per se* standard for resale price maintenance will eliminate discounting. Of course that is not so.

First, the question is not whether resale price maintenance should be *per se* illegal or *per se* legal.⁷ The majority opinion in *Leegin*, in line with most mainstream antitrust

⁶ See Harbour Test. 4-5. Testimony by Janet McDavid on behalf of the American Bar Association, in opposition to legislatively overruling *Leegin*, noted that the studies on the Fair Trade laws were fundamentally flawed. Janet McDavid, Testimony before the Subcommittee on Antitrust, Competition Policy & Consumer Rights (July 31, 2007).

⁷ Only one witness before the Senate Subcommittee considering S. 2261 made this observation. Stephen Bolerjack, Testimony before the Subcommittee on Antitrust, Competition Policy & Consumer Rights (July 31, 2007).

thinkers, does not accept the more extreme Chicago-school view of *per se* legality for vertical practices.⁸ Plaintiff PSKS Inc. has the ability to develop evidence on remand to overcome defendant Leegin's arguments that its practices are efficient. Second, discounting has flourished in recent decades although the exceptions to *Dr. Miles* long have been known to swallow its narrow rule. In its holdings in *United States v. Colgate Co.*⁹ (decided only eight years after *Dr. Miles*), *White Motor Co. v. United States*,¹⁰ and *Continental T.V., Inc. v. GTE Sylvania Inc.*,¹¹ the Supreme Court cabined *Dr. Miles* (and other cases including *United States v. Arnold, Schwinn & Co.*¹²) and subjected most vertical practices to rule of reason inquiry.

In fact, discounting is efficient and benefits manufacturers. As a price discrimination tool it reduces the size of the welfare triangle, enabling the manufacturer to recoup dead-weight loss caused by pricing at the profit-maximizing level in a market characterized by anything other than perfect competition.¹³ Again, experience bears this out. Through outlet stores manufacturers engage in discounting of their *own* products. With the Internet, discounting opportunities have increased. Finally, the opposition to *Leegin* proves too much. According to Commissioner Harbour, "consumers respond strongly to aggressive price competition, because we all prefer a bargain."¹⁴ Even in a world of *per se* legality, a manufacturer would ignore that observation at its peril.¹⁵

⁸ See Robert Bork, THE ANTITRUST PARADOX 288 (2d ed. 1993) ("Analysis shows that every vertical restraint should be completely lawful.")

⁹ 250 U.S. 300 (1919).

¹⁰ 372 U.S. 253 (1963).

¹¹ 433 U.S. 36 (1977).

¹² 388 U.S. 365 (1967).

¹³ See generally Robert Bork, *supra*, at 107-12.

¹⁴ Harbour Test. at 3.

¹⁵ See generally *Leegin*, 127 S. Ct. at 2725.

It is demonstrably false that Wal-Mart's business model will become unsustainable because it becomes more difficult to challenge claims of resale price maintenance. Circumstances of retailers exerting control over manufacturers are common.¹⁶ While Wal-Mart may have more difficulty suing to challenge resale price maintenance after *Leegin*, suits claiming unlawful resale price maintenance are not Wal-Mart's primary weapon. Its unparalleled bargaining power will overcome any efforts by manufacturers to impose unwanted price floors. Of course, manufacturers that may not want to deal with retailers like Wal-Mart may nonetheless be unable to fix minimum prices with their retailers, because their retailers are, in turn, constrained by competition with big box retailers.

S. 2261 is populist legislation. Two of its sponsors (Senators Clinton and Biden) are presidential candidates. The experience in antitrust with populist legislation is not good. In 1914, Professor (former President and later Chief Justice) Taft noted the preference for common-law development over legislative change and recommended against adoption of the Clayton Act.¹⁷ A prior example of populist antitrust legislation is the Robinson-Patman Act, which, according to Judge Bork, "while it does not prevent price discrimination, at least . . . has stifled a great deal of competition."¹⁸ The comparison of the anti-*Leegin* bill with the Robinson-Patman act exposes an irony. The populist concern underlying that statute was the need to protect small businesses from

¹⁶ Cf. Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000) (retailer with market power coordinated horizontal agreement among upstream sellers not to deal with retailer's competitors).

¹⁷ William Howard Taft, THE ANTI-TRUST ACT AND THE SUPREME COURT (1914). See also Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 345-346 (2007) ("efforts to reduce common-law principles to statute in th[e] antitrust] arena can produce perverse results").

¹⁸ Bork, *supra*, at 382.

chain stores. History and economic learning has proved that goal harmful, not beneficial, to consumers. In support of anti-*Leegin* legislation, Commissioner Harbour now cites chain stores like Wal-Mart, which would have been anathema in 1936.¹⁹ Perhaps 71 years from now populist sentiment will proclaim the need to protect manufacturers' power to determine prices.

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¹⁹ Harbour Test. at 3 (citing Wal Mart, Home Depot and Burlington Coat Factory).