UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Commissioner Pamela Jones Harbour

September 5, 2007

The Honorable Herb Kohl
United States Senator
Chairman, Subcommittee on Antitrust, Competition
Policy and Consumer Rights
Judiciary Committee
330 Hart Senate Office Building
Washington, DC 20510

Re: Responses to Supplementary Questions Regarding the Supreme Court's Decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

Dear Senator Kohl:

In your letter of August 23, 2007, you asked me to respond to questions posed by members of Subcommittee on Antitrust, Competition Policy and Consumer Rights as a follow-up to my testimony on July 31, 2007, "The Leegin Decision: The End of Consumer Discounts or Good Antitrust Policy?"

During my testimony I stated that the *Leegin* decision should be legislatively overturned. Members have now asked for a description of legislation that I would recommend. The simple answer is that resale price maintenance should be unlawful.[1] A statute which might accomplish that result would simply state:

> Every contract, combination, or conspiracy within the meaning of Section 1 of the Sherman Act that restrains a vendee of a product or service from reselling such product or service at less than the price stipulated by the vendor or producer shall be illegal.

The form of the proposed statute parallels that of Section 1 of the Sherman Act and incorporates by reference both its jurisdictional reach and the judicial certainty already established by the courts with respect to such underlying issues as what constitutes "agreement" for purposes of

---

[1] This letter expresses my personal views and does not express the policy or position of the Federal Trade Commission or any other Commissioner of the FTC.

establishing liability under Section 1. It is in effect a simple directive to the courts of the United States advising that consumers deserve the benefit of the doubt whenever a commercial arrangement precludes merchants from competing with respect to the prices being offered to consumers.

The second question posed by members of the Subcommitte is in reality a series of questions which collectively inquire into whether the Congress rather than the Court was in a better position to decide what legal standards should now apply to resale price maintenance. The questions were prefaced by a brief summary of the history of Congress's repeal of the antitrust exemption for resale price maintenance in 1975, and subsequent occasions when the Congress imposed limitations on the appropriations for the Antitrust Division of the Department of Justice and the Federal Trade Commission which precluded their advocacy of abandoning the rule of *per se* illegality for minimum vertical price fixing. It also observed that the Congress in 1986 had expressly disapproved of the Department of Justice Vertical Restraint Guidelines. I note that those guidelines were subsequently withdrawn by the Department. I will respond separately to each of the questions then posed by your letter.

"Do you believe it was appropriate for the Supreme Court majority to reverse such a well-settled antitrust rule that business and consumers had come to rely on for nearly a century, especially in the face of its repeated reaffirmation by Congress?"

Answer: No, it was not appropriate for the Court to have ignored the fact that there has been substantial reliance on the settled proposition of antitrust law that resale price maintenance was *per se* illegal. Justice Breyer, on behalf of the dissenting Justices in *Leegin*, set forth a stinging refutation of the Court's basis for setting aside well-established legal precedent and Congressional reliance when nothing new had occurred. The business community has relied on the *per se* illegality of resale price maintenance in making substantial investment decisions since 1975. Changing a rule of law which may have profound effects on the structure and performance of the economy as a whole hardly seems appropriate. Indeed, the Court itself had repeatedly relied on the *per se* illegality of resale price maintenance to overturn state regulatory measures. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* 445 U.S. 97 (1980).

"If any changes were needed, shouldn't Congress be the ones to do so rather than five justices of the Supreme Court?"

Answer: In the case of minimum vertical price fixing, only Congress should have changed the standards of illegality for resale price maintenance. Unlike the Court, the Congress has the resources and power to hold legislative hearings and attempt to predict what, if any, changes might occur in the

economy as a whole in response to such a change in the law. The Constitution vests legislative discretion in the Congress, not the Court. Devising rules of law based on a broad-based inquiry, as opposed to one bounded by the interests of particular private parties, seems inherently non-judicial. I recognize that Congress has allowed the Sherman Act to grow over time through the accretion of experiential rules crafted by the courts, much in the manner of the common law; that, however, does not grant the Court a license to rewrite the very purposes for which Congress acted in adopting the federal antitrust laws. The Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 80, was adopted with the express Congressional intention that resale price maintenance should be and remain *per se* illegal under Section 1 of the Sherman Act. The Supreme Court itself recognized the prudence of leaving this issue to Congress in its decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n. 18 (1977) (". . . Congress recently has expressed its approval of a per se analysis of vertical price restrictions by" passage of the Consumer Goods Pricing Act of 1975.). The Court should have continued to follow its own *GTE* example.

"Isn't what the Supreme Court did here contrary to Congressional intent."

Answer: Clearly. Justice Kennedy's claim of "respect" for Congressional intent is at best a hollow reed. *Leegin*, 127 S. Ct. at 2724 ("Congress could have set the *Dr. Miles* rule in stone, but it" did not do so.). The claim that failing to adopt an express *per se* rule to memorialize an already *per se* rule is a plea for mindless redundancy that does the Court no credit. Similarly, the Court notes that several limitations on appropriations were only fleeting compromises rather than expressions of Congressional intent; that is akin to claiming blindness when the only cause for not seeing is the fact that the eyes are closed. *Id.* ("The conditions on funding are no longer in place . . . and they were ambiguous at best."). The *Leegin* majority seems only to recognize permanent statutory enactments as expressions of Congressional intent. I urge the Congress to give the Court an expression of intent that cannot be ignored. That is, amend the Sherman Act to state without equivocation that vertical minimum price fixing is illegal.

Respectfully submitted,

Pamela Jones Harbour
Commissioner