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S. 75

To restore the rule that agreements between manufacturers and retailers, distributors, or wholesalers to set the minimum price below which the manufacturer's product or service cannot be sold violates the Sherman Act.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 5), 2011

Mr. KOHL (for himself, Mrs. FEINSTEIN, Mr. DURBIN, Mr. WHITEHOUSE, Ms. KLOBUCHAR, Mr. FRANKEN, and Mr. WYDEN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To restore the rule that agreements between manufacturers and retailers, distributors, or wholesalers to set the minimum price below which the manufacturer's product or service cannot be sold violates the Sherman Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Discount Pricing Con-
5 sumer Protection Act".

1 **SEC. 2. STATEMENT OF FINDINGS AND DECLARATION OF**
2 **PURPOSES.**

3 (a) FINDINGS.—Congress finds the following:

4 (1) From 1911 in the Dr. Miles decision until
5 June 2007 in the Leegin decision, the Supreme
6 Court had ruled that the Sherman Act forbid in all
7 circumstances the practice of a manufacturer setting
8 a minimum price below which any retailer, whole-
9 saler or distributor could not sell the manufacturer’s
10 product (the practice of “resale price maintenance”
11 or “vertical price fixing”).

12 (2) The rule of per se illegality forbidding re-
13 sale price maintenance promoted price competition
14 and the practice of discounting all to the substantial
15 benefit of consumers and the health of the economy.

16 (3) Many economic studies showed that the rule
17 against resale price maintenance led to lower prices
18 and promoted consumer welfare.

19 (4) Abandoning the rule against resale price
20 maintenance will likely lead to higher prices paid by
21 consumers and substantially harms the ability of dis-
22 count retail stores to compete. For 40 years prior to
23 1975, Federal law permitted states to enact so-called
24 “fair trade” laws allowing vertical price fixing. Stud-
25 ies conducted by the Department of Justice in the
26 late 1960s indicated that retail prices were between

1 18 and 27 percent higher in states that allowed
2 vertical price fixing than those that did not. Like-
3 wise, a 1983 study by the Bureau of Economics of
4 the Federal Trade Commission found that, in most
5 cases, resale price maintenance increased the prices
6 of products sold.

7 (5) The 5–4 decision of the Supreme Court ma-
8 jority in *Leegin* incorrectly interpreted the Sherman
9 Act and improperly disregarded 96 years of antitrust
10 law precedent in overturning the per se rule against
11 resale price maintenance.

12 (b) PURPOSES.—The purposes of this Act are—

13 (1) to correct the Supreme Court’s mistaken in-
14 terpretation of the Sherman Act in the *Leegin* deci-
15 sion; and

16 (2) to restore the rule that agreements between
17 manufacturers and retailers, distributors or whole-
18 salers to set the minimum price below which the
19 manufacturer’s product or service cannot be sold vio-
20 lates the Sherman Act.

21 **SEC. 3. PROHIBITION ON VERTICAL PRICE FIXING.**

22 (a) AMENDMENT TO THE SHERMAN ACT.—Section 1
23 of the Sherman Act (15 U.S.C. 1) is amended by adding
24 after the first sentence the following: “Any contract, com-
25 bination, conspiracy or agreement setting a minimum

1 price below which a product or service cannot be sold by
2 a retailer, wholesaler, or distributor shall violate this
3 Act.”.

4 (b) EFFECTIVE DATE.—The amendment made by
5 subsection (a) shall take effect 90 days after the date of
6 enactment of this Act.

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