October 27, 2009

Via Facsimile

The Honorable John Conyers
Chairman, House Judiciary Committee
United States House of Representatives

The Honorable Lamar Smith
Ranking Member, House Judiciary Committee
United States House of Representatives

Re: Support for the Discount Pricing Consumer Protection Act of 2009 (H.R. 3190)

Representatives:

We, the undersigned Attorneys General, support “The Discount Consumer Protection Act of 2009,” H.R. 3190, which prohibits a vendor and a vendee from agreeing to the minimum price at which a product can be resold (“minimum resale price-fixing”). The bill would undo the United States Supreme Court’s decision in *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007) that overruled the long-honored precedent of *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373 (1911), which established that minimum resale price-fixing is illegal per se under the Sherman Antitrust Act. This letter reiterates the opposition of Attorneys General to minimum resale price-fixing, as illustrated by the states’ amicus in *Leegin* and a letter last year in support of an earlier version of this legislation, S. 2261. We urge you to pass H.R. 3190.

H.R. 3190 states the very clear rule that “[a]ny agreement setting a price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate section 1 of the Sherman Act (15 U.S.C. § 1).” Passage of such a bright line law would preserve and foster both intrabrand and interbrand competition at every level of commerce, yielding a benefit for consumers from both cost efficiencies within the distribution chain as well as product qualities promoted by sellers and manufacturers of branded goods.

As one would expect, empirical studies show that agreements on minimum resale prices raise consumer prices, often significantly. And despite economic theories cited by the Supreme Court about how those agreements could enhance consumer welfare, we are not aware of any empirical study that shows enhanced consumer welfare in the form of services or other customer benefits. Sufficient experience with state “fair trade laws” during the middle of the last century evidenced that consumers paid significantly more for goods when manufacturers could maintain prices at the retail level. The added costs imposed by manufacturers, possibly
inuring to the benefit of some large retailers wishing to protect their own higher retail prices, reduces consumer welfare. With the *Leegin* decision now two years behind us, there remains no evidence that consumers are provided any tangible benefits, let alone benefits that outweigh the higher prices that result from minimum resale price fixing.

Congress has every right to reverse the *Leegin* decision. The Supreme Court rejected 96 years of antitrust jurisprudence that had served this nation’s consumers well. The Court rejected arguments that Congress had endorsed the per se rule in the Consumer Goods Pricing Act of 1975 and otherwise. This legislation provides an opportunity for Congress to overcome the Court’s view that Congress has been silent on and does not care about this issue. In any case, Congress, not the Court, is better positioned to evaluate the detrimental impact of resale price fixing on consumers and the underlying public policy of the nation’s antitrust laws.

Finally, we, as well as the proponents of minimum resale price fixing, know that the treatment of such practices under a “rule of reason” analysis will dramatically chill any challenge by individual retailers challenging resale price-fixing agreements. Our offices have all pursued such actions under the pre-*Leegin* per se rule and recovered more than $200 million in monetary relief for consumers. Since *Leegin*, lower courts have dismissed on the pleadings various challenges to minimum resale price fixing, which illustrates that our offices will need more resources and encounter significantly greater risks trying to achieve similar relief.

We encourage your passage of this legislation. Thank you for your consideration of this very important matter. Please contact us if you have any questions or comments.

Sincerely,

Richard Cordray
Attorney General of Ohio

Tom Miller
Attorney General of Iowa

Terry Goddard
Attorney General of Arizona

Edmund G. Brown, Jr.
Attorney General of California

Chris Koster
Attorney General of Missouri

Gary King
Attorney General of New Mexico

Dustin McDaniel
Attorney General of Arkansas

Richard Blumenthal
Attorney General of Connecticut
Joseph R. Biden, III
Attorney General of Delaware

Alicia G. Limtiaco
Attorney General of Guam

Lawrence Wasden
Attorney General of Idaho

Steve Six
Attorney General of Kansas

Janet T. Mills
Attorney General of Maine

Martha Coakley
Attorney General of Massachusetts

Jim Hood
Attorney General of Mississippi

Bill McCollum
Attorney General of Florida

Mark J. Bennett
Attorney General of Hawaii

Lisa Madigan
Attorney General of Illinois

James D. Caldwell
Attorney General of Louisiana

Douglas Gansler
Attorney General of Maryland

Lori Swanson
Attorney General of Minnesota

Steve Bullock
Attorney General of Montana
Catherine Cortez Masto  
Attorney General of Nevada

Anne Milgram  
Attorney General of New Jersey

Roy Cooper  
Attorney General of North Carolina

W.A. Drew Edmondson  
Attorney General of Oklahoma

Tom Corbett  
Attorney General of Pennsylvania

Patrick C. Lynch  
Attorney General of Rhode Island

Mark L. Shurtleff  
Attorney General of Utah

Michael A. Delaney  
Attorney General of New Hampshire

Andrew Cuomo  
Attorney General of New York

Wayne Stenehjem  
Attorney General of North Dakota

John R. Kroger  
Attorney General of Oregon

Antonio Sagardia  
Attorney General of Puerto Rico

Henry McMaster  
Attorney General of South Carolina

William H. Sorrell  
Attorney General of Vermont
Vincent F. Frazer  
Attorney General of the U.S. Virgin Islands

William C. Mims  
Attorney General of Virginia

Rob McKenna  
Attorney General of Washington

Darrell V. McGraw, Jr.  
Attorney General of West Virginia

Bruce A. Salzburg  
Attorney General of Wyoming

Cc:

Members of House Judiciary Committee:
Hon. Howard L. Berman
Hon. Rick Boucher
Hon. Jerrold Nadler
Hon. Bobby Scott
Hon. Mel Watt
Hon. Zoe Lofgren
Hon. Shelia Jackson Lee
Hon. Maxine Waters
Hon. Bill Delahunt
Hon. Robert Wexler
Hon. Steve Cohen
Hon Hank Johnson
Hon. Pedro Pierluisi
Hon. Mike Quigley
Hon. Judy Chu
Hon. Luis V. Gutierrez
Hon. Tammy Baldwin
Hon. Charles A. Gonzalez
Hon. Anthony Weiner

Hon. Adam Schiff
Hon. Linda Sanchez
Hon. Debbie Wasserman Schultz
Hon. Dan Maffei
Hon. Jim Sensenbrenner
Hon. Howard Coble
Hon. Elton Gallegly
Hon. Bob Goodlatte
Hon. Dan Lungren
Hon. Darrell Issa
Hon. J. Randy Forbes
Hon. Steve King
Hon. Trent Franks
Hon. Louie Gohmert
Hon. Jim Jordan
Hon. Ted Poe
Hon. Jason Chaffetz
Hon. Thomas J. Rooney
Hon. Gregg Harper