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October 27, 2009

Via Facsimile

The Honorable Herb Kohl  
Chairman  
Senate Judiciary Committee Subcommittee on  
Antitrust, Competition Policy and Consumer Rights  
United States Senate

The Honorable Orrin G. Hatch  
Ranking Member  
Senate Judiciary Committee Subcommittee on  
Antitrust, Competition Policy and Consumer Rights  
United States Senate

**Re: Support for the Discount Pricing Consumer Protection Act (S. 148)**

Senators:

We, the undersigned Attorneys General, support “The Discount Consumer Protection Act,” S. 148, 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 S. 148.

S.148 states the very clear rule that “[a]ny 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.” 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

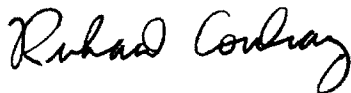
laws” during the middle of the last century evidenced that consumers paid significantly more for goods when manufacturers could maintain prices at the retail level. The added costs imposed by manufacturers, possibly inuring to the benefit of some large retailers wishing to protect their own higher retail 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



Chris Koster  
Attorney General of Missouri



Tom Miller  
Attorney General of Iowa



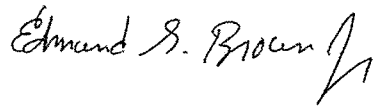
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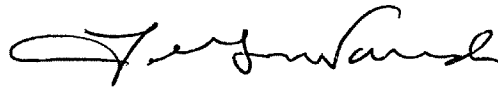
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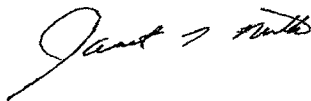
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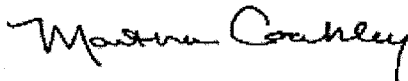
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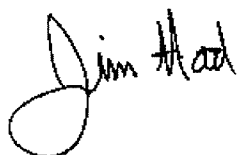
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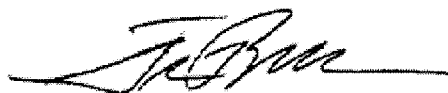
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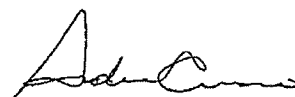
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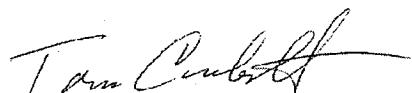
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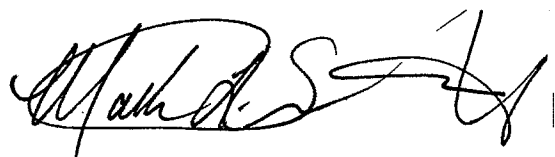
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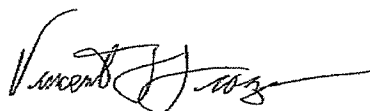
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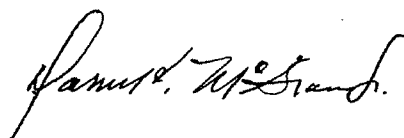
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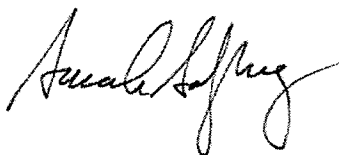
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Hon. Amy Klobuchar  
Hon. Edward E. Kaufman  
Hon. Arlen Specter  
Hon. Al Franken  
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