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The Leegin Decision: The End of the Consumer Discounts or Good Antitrust Policy?: Hearing Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on the Judiciary, 110th Cong., July 31, 2007
(Statement of Robert Pitofsky, Geo. U. L. Center)

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Testimony of Robert Pitofsky

Professor, Georgetown University Law Center

Hearing: Supreme Court Decision on Retail Price Setting

July 31, 2007

U.S. Senate Committee on the Judiciary

Subcommittee on Antitrust, Competition Policy and Consumer Rights

Mr. Chairman and members of the Committee, As always, it is an honor to testify before this Committee, and I want to compliment the Committee in holding hearings so promptly on the important question of control by manufacturers of retailer discounting under the antitrust laws.

Only a few weeks ago, the United State Supreme Court, in a hotly- debated 5-4 (1) decision, overruled the ninety-five year old Supreme Court decision in *Dr.Miles*² which declared that agreements between upstream manufacturers and downstream dealers or retailers to maintain uniform minimum prices was illegal per se. I believe the majority decision was wrong and that otherwise healthy competition at the retailer level will be impaired. Virtually all agree that minimum resale price maintenance, if allowed, will result in higher prices to consumers. Arguments that the higher prices are worth it because consumers will receive desirable services are entirely speculative and lacking any empirical support. I have spelled out my reasons for that conclusion in a recently-published article that I have attached to this opening statement³.

One of the most striking features of the decision to overrule (not just modify or qualify) a 95-year old precedent is that many Supreme Court decisions had affirmed the original decision; Congress was aware of the decision and never moved to modify it, and to the extent that Congress addressed the issues in *Dr. Miles*, it appeared to condone its approach.

I look forward to an opportunity to discuss these issues more fully with inembers of the Committee.