

111TH CONGRESS  
1ST SESSION

# S. 148

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.

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IN THE SENATE OF THE UNITED STATES

JANUARY 6, 2009

Mr. KOHL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## 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”.

6       **SEC. 2. STATEMENT OF FINDINGS AND DECLARATION OF**  
7       **PURPOSES.**

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

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

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

13          (3) Many economic studies showed that the rule  
14          against resale price maintenance led to lower prices  
15          and promoted consumer welfare.

16          (4) Abandoning the rule against resale price  
17          maintenance will likely lead to higher prices paid by  
18          consumers and substantially harms the ability of dis-  
19          count retail stores to compete. For 40 years prior to  
20          1975, Federal law permitted States to enact so-  
21          called "fair trade" laws allowing vertical price fixing.  
22          Studies conducted by the Department of Justice in  
23          the late 1960s indicated that retail prices were be-  
24          tween 18 and 27 percent higher in States that al-  
25          lowed vertical price fixing than those that did not.

1 Likewise, a 1983 study by the Bureau of Economics  
2 of the Federal Trade Commission found that, in  
3 most cases, resale price maintenance increased the  
4 prices of products sold.

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

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

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

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

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

20 (a) AMENDMENT TO THE SHERMAN ACT.—Section 1  
21 of the Sherman Act (15 U.S.C. 1) is amended by adding  
22 after the first sentence the following: “Any contract, com-  
23 bination, conspiracy or agreement setting a minimum  
24 price below which a product or service cannot be sold by

1 a retailer, wholesaler, or distributor shall violate this  
2 Act.”.

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

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