Talking Points on S. 148: The Discount Consumer Protection Act

Introduction

- While I believe that the sponsors of this bill have good intentions—to prevent anti-competitive conduct that would harm consumers—I am unable to support this bill.

- In explaining why I've reached this conclusion, let's be clear about what the Supreme Court's decision in *Leegin*[1] did. It said that a vertical agreement between a manufacturer and its distributor to set a minimum resale price for a product should be evaluated under a "rule of reason" analysis.

- What does this mean? It means that a court should look at the facts and circumstances of a case and decide whether the specific agreement in question is anti-competitive.

- In so holding, the *Leegin* court overruled a prior case that said such agreements were *per se* illegal. But the *Leegin* court did not say that minimum resale price agreements were always legal—just that a court had to look at each case on the merits.

- This bill would return the law to the pre-*Leegin* regime where all minimum resale price agreements are *per se* illegal, even if the actual agreement in question has a pro-competitive effect.

- As the Court explained in *Leegin*, *per se* violations of the Sherman Act have become increasingly disfavored and are only appropriate for activities "that would always or almost always tend to restrict competition and decrease output." The Court found—for good reason, I believe—that minimum resale price agreements are not "always or almost always" anti-competitive.

The *Leegin* decision is supported by a modern understanding of economics

- As the Court noted, numerous antitrust scholars and experts have acknowledged that minimum resale price agreements can be pro-

[1] *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877 (2007).

competitive. The list would take too long to go through, but they include people like antitrust scholar and judge Richard Posner and groups like the ABA Antitrust Section and the DOJ Antitrust Division.

- Now, these experts also acknowledge that minimum resale price agreements can be anti-competitive. But that's the point in the *Leegin* decision—the *per se* rule is a bludgeon where a scalpel is needed. The rule of reason is such a scalpel.

***Leegin* followed a trend in the Supreme Court's treatment of vertical restraints**

- If you look at the case that *Leegin* overruled—a 1911 case called *Dr. Miles*[2]—you find that economic analysis plays little, if any, role in the Court's decision to impose a *per se* rule on price maintenance agreements.

- But as scholarship in the field of economics begin to thrive in the mid-1900s, the Court began to divorce antitrust law from populism and move it towards an economics-driven discipline.

- As a result, the Court has been slowly, but consistently, moving away from *per se* rules, including in the context of vertical restraints between a manufacturer and retailer. For instance, in 1977, the Supreme Court overturned the *per se* rule for vertical non-price restraints.[3] And in 1997, the Court overruled precedent treating maximum price-fixing agreements as illegal *per se*.[4]

- The *Leegin* decision was, therefore, not an aberration. Nor was it "activist." It was a logical extension of the Court's recognition in prior cases that most restraints cannot be deemed either anti-competitive or pro-competitive without looking at specific facts and circumstances.

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[2] *Dr. Miles Medical v. John D. Park & Sons*, 220 U.S. 373 (1911).

[3] *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977).

[4] *State Oil v. Khan*, 522 U.S. 3 (1997).

- This bill, on the other hand, would ignore the last 100-years of economic scholarship and antitrust developments.

Conclusion

- The bill would also fundamentally change the nature of the Sherman Act by, for the first time ever, designating a specific type of activity as a restraint of trade. Since the passage of the Sherman Act, courts have been given the latitude to fine-tune their understanding of what is, and is not, an unreasonable restraint of trade based on experience and a continually developing understanding of economics. If this bill passes, it will freeze in time a view of resale price maintenance agreements that is, in many experts' opinions, already outdated.

- In conclusion, I can't support this bill because it would outlaw all resale price maintenance, even in those situations where such activity is likely to be pro-competitive—for instance, those situations where a new market entrant is trying to convince retailers to carry a new and unproven product by guaranteeing them a certain rate of return. Like the Court, I believe that the "rule of reason" is the appropriate standard in such cases.

- I hope that this legislation does not signal a broader desire within the Congress to jettison the strides that have been made over the past several decades to ground antitrust law in sound economics.