

## FDA Law Update

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### [Banning "Pay-For Delay" Settlements and Resale Price Maintenance are Senate Antitrust Subcommittee's Top Legislative Priorities](#)

In a recent interview, Senator Herb Kohl (D-Wis.), Chairman of the Senate Judiciary Committee's subcommittee on antitrust, competition policy and consumer rights, discussed the subcommittee's legislative priorities for 2010. At the top of the list is passage of the Preserve Affordable Access to Generics Act, which would prevent anticompetitive "pay-for-delay" patent settlements in which a brand-name pharmaceutical company pays a generic drug maker millions of dollars in exchange for an agreement to stop selling a generic version of the drug.

According to Senator Kohl, generic drugs are often sold for more than 80% less than brand-name drugs. The Federal Trade Commission has calculated that pay-for-delay settlements will cost consumers \$3.5 billion per year over the next 10 years.

The legislation, which was approved by the Senate Judiciary Committee last fall, presumes that pay-for-delay settlements are illegal. The presumption can be overcome by clear and convincing evidence that the settlement is pro-competitive.

The subcommittee's next priority is the Discount Pricing Consumer Protection Act, which would overrule the Supreme Court's 2007 Leegin decision and restore the ban on manufacturers' setting minimum resale prices. Resale price maintenance or vertical price fixing was per se illegal under the Sherman Act for 96 years, until the Leegin decision held that the practice had to be evaluated under the rule of reason.

According to Senator Kohl, evaluating vertical price fixing under the rule of reason will leave most cases unchallenged because of how difficult and expensive it is to prove a rule of reason case. "If the Leegin decision stands, consumers will have less and less access to discount products, prices will rise and retail competition will be injured."

Also on the subcommittee's agenda is a bill that would eliminate the railroad antitrust exemption and the No Oil Producing and Exporting Cartels Act ("NOPEC"). NOPEC would remove sovereign immunity from nations that conspire to fix the price of oil. Senator Kohl noted that a NOPEC bill passed both the Senate and House by large majorities in the last Congress, but in different forms.

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