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CLIENT ALERT

Robust State Enforcement of Minimum Resale Price Maintenance May Require New Approaches to Pricing

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Two recent state enforcement actions that relied solely on state law to attack minimum resale price maintenance ("RPM") provide the latest indication that states are diverging from federal antitrust law in their increasingly strong efforts to police RPM agreements in the aftermath of the Supreme Court's decision in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

In *California v. Bioelements, Inc.*, case no. 10011659 (January 11, 2011), the California Attorney General accused Bioelements of engaging in a vertical price-fixing scheme. Bioelements, a manufacture of beauty products, had required its retailers to sign an agreement which stated that the retailers were required to sell the company's products for at least as much as the suggested retail prices prescribed by Bioelements. The California Attorney General alleged that this conduct constituted vertical price fixing, and was therefore a *per se* violation of the Cartwright Act, California's antitrust law. In a stipulated judgment, Bioelements agreed to cease this conduct and pay $51,000 in civil fines and attorneys fees. Thus, the ultimate issues remain unlitigated, but the case indicates the state Attorneys General's intent to contain the effects of *Leegin* as much as possible.

The New York Attorney General similarly pushed to limit the effects of *Leegin* in *New York v. Tempur-Pedic International, Inc.*, Index No. 400837/10. There, the New York Attorney General alleged that Tempur-Pedic's suggested resale pricing policy violated New York Executive Law § 63(12), which permits the New York Attorney General to obtain equitable relief where the defendant is "engage[d] in repeated fraud or illegal acts." Somewhat tellingly, New York Attorney General did not bring the case under either the Sherman Act or the Donnelly Act, New York's antitrust statute which has long been interpreted in light of federal precedent. On defendants' motion to dismiss, the court held that the Attorney General failed to sufficiently allege that a contract to fix prices was formed.

Prior to *Leegin*, RPM used to be *per se* illegal under federal antitrust laws. In *Leegin*, the Supreme Court held that a manufacturer may reach an agreement with its retailers as to minimum resale price without automatically violating federal antitrust laws. Such agreements are now analyzed under the rule of reason - a fact-specific inquiry that balances the anticompetitive effects and procompetitive benefits of the pricing restraint in the context of a relevant, inter-brand market. Efforts by state Attorneys General however, like those in *Bioelements* and *Tempur-Pedic*, as well as the passage of Leegin repealers, such as the one enacted by the State of Maryland, Md. Code Ann., Com. Law. § 11-204(a)(1) (2009) justify manufacturers being extremely cautious about entering into RPM agreements, or not abandoning well-established unilateral policies permitted under *U.S. v. Colgate*, 250 U.S. 300 (1919).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Robert A. Lipstein
Retired Partner – Washington, D.C.
Email: rlipstein@crowellretiredpartners.com

Daniel A. Sasse
Partner – Orange County
Phone: +1 949.798.1347
Email: dsasse@crowell.com

Chahira Solh
Partner – Orange County
Phone: +1 949.798.1367
Email: csolh@crowell.com