

## WSGR ALERT

JANUARY 2011

# THREE YEARS AFTER *LEEGIN*, CALIFORNIA REMAINS TOUGH ON RESALE PRICE MAINTENANCE

California Attorney General Kamala D. Harris announced last week that the Office of the Attorney General (OAG) successfully had halted an illegal online vertical price-fixing scheme coordinated by Bioelements Inc., a Colorado-based cosmetics company that sells its products in stores across California as well as on the Internet.

On January 11, 2011, Judge Harold W. Hopp of the Superior Court of California signed the parties' stipulated court judgment, which prohibited Bioelements from agreeing with its online retailers to fix resale prices. Further, the settlement required Bioelements to pay \$51,000 in penalties and attorneys' fees and to inform any third parties with whom the company had entered price-fixing contracts that, going forward, Bioelements considers these contracts void and will not enforce them.

According to the complaint, since 2009 Bioelements had entered into dozens of "Internet Only Accounts Agreements" with third-party companies for the distribution and sale of its products on the Internet. By agreeing to the terms of these contracts, retailers were prohibited from selling Bioelements products online at prices below (or above) the Manufacturer's Suggested Retail Price (MSRP). These agreements were limited to online sales and did not touch upon pricing for products sold in stores.

In the OAG press release, Harris explained that this practice prevented retailers from selling products online at a discount: "Bioelements operated a blatant price-fixing scheme by requiring online retailers to sell its

products at high prices. Price manipulation harms consumers, competition and our business community. We will continue to be vigilant in protecting our markets from these kinds of abuses."

Resale price maintenance (RPM) was considered per se illegal under federal antitrust law until 2007, when the Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS* held that it was not illegal for a manufacturer to enter agreements with its retailers about minimum resale price.<sup>1</sup> This decision removed RPM from the realm of automatic antitrust violations, and required the application of a rule-of-reason analysis to determine the legitimacy of a particular RPM practice.

However, under state law, RPM *still* can be deemed per se illegal. The Bioelements settlement is, in fact, one of the first applications of California's strict antitrust law after the *Leegin* ruling. According to the official press release, *Leegin* "sharply curtailed federal antitrust law pertaining to vertical price-fixing, but did not affect California's strict state antitrust law."

In fact, post-*Leegin*, the California OAG has sent two open letters to Congress urging them to pass legislation to reinstate federal safeguards against vertical price-fixing schemes. Additionally, in February of 2010, the OAG successfully obtained an injunction under California law against another cosmetics company—DermaQuest, Inc.—to strike down a similar vertical price-fixing scheme.

An unusual aspect of the case is that Bioelements is based in Colorado. Although the company has significant sales and other contacts in California, the effect of the settlement is to apply California's strict view of RPM law to Bioelements' operations on the Internet, which involve sales to customers through the rest of the United States—including the many states where RPM is not illegal.

For more information on the Bioelements case or related topics, please contact any member of Wilson Sonsini Goodrich & Rosati's antitrust practice.



Wilson Sonsini Goodrich & Rosati  
PROFESSIONAL CORPORATION

This WSGR Alert was sent to our clients and interested parties via email on January 25, 2011. To receive future WSGR Alerts and newsletters via email, please contact

Marketing at [wsgr\\_resource@wsgr.com](mailto:wsgr_resource@wsgr.com)  
and ask to be added to our mailing list.

This communication is provided for your information only and is not intended to constitute professional advice as to any particular situation. We would be pleased to provide you with specific advice about particular situations, if desired. Do not hesitate to contact us.

650 Page Mill Road  
Palo Alto, CA 94304-1050  
Tel: (650) 493-9300 Fax: (650) 493-6811  
email: [wsgr\\_resource@wsgr.com](mailto:wsgr_resource@wsgr.com)

[www.wsgr.com](http://www.wsgr.com)

© 2011 Wilson Sonsini Goodrich & Rosati,  
Professional Corporation  
All rights reserved.

<sup>1</sup> 127 U.S. 2705 (2007).