



Antitrust Law Alert

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H.R. 3190: Will Resale Price Maintenance Revert Back to the *Per Se* Rule?

On December 8, 2010, the House Judiciary Committee reported out of committee H.R. 3190, the Discount Consumer Pricing Protection Act of 2009, and recommended that it be considered by the House as a whole.

The bill is designed to revive the *per se* rule first established in 1911 in *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 272 (1911), which held that minimum resale price agreements between manufacturers and retailers, distributors or wholesalers were unlawful on their face. The *per se* rule was applied to resale price maintenance for almost a century before it was overturned in 2007 by the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), which rejected the *per se* approach and required that a manufacturer's minimum resale prices be evaluated under the rule of reason.

H.R. 3190, by its terms, provides 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." The proposed legislation is predicated on the concern that abandonment of the *per se* rule against resale price maintenance would "likely lead to higher prices paid by consumers and substantially harm the ability of discount retail stores to compete."

The House Committee Report justified "overturning" the Court's decision in *Leegin* by noting that critics of the *Leegin* decision, including Justice Breyer, who issued a dissenting opinion in that case, expect it to result in increased prices charged to consumers. Those disapproving of the Court's decision have ranged from Federal Trade Commission members to state attorneys general to a coalition of retailers and consumer advocates who assert that the decision, which allows manufacturers to set minimum resale prices, has led to higher prices for consumers. In December 2008, the coalition held a meeting sponsored by the American Antitrust Institute, urging Congress and regulators to take action to negate the decision's rejection of the *per se* rule.

The House Judiciary Committee has placed H.R. 3190 on Calendar No. 403. Although it has been placed on a calendar of business, the order in which legislation is considered and voted on is determined by the majority party leadership and thus it is uncertain when or whether the bill will come up for a vote.