New York’s Challenge To Mattress Maker’s Resale Pricing Policy Fails

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Jeffrey May (Wolters Kluwer)

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The State of New York was not entitled to an order enjoining mattress manufacturer Tempur-Pedic International, Inc. from restricting discounting by its authorized retailers, a New York state court has ruled. The New York Attorney General alleged that Tempur-Pedic violated New York General Business Law Sec. 369-a, which renders minimum resale price agreements unenforceable. These alleged violations, according to the state, constituted repeated and persistent illegal and fraudulent conduct in violation of New York Executive Law Sec. 63(12), which permits the state attorney general to seek an order enjoining such acts.

The state’s investigation into Tempur-Pedic’s retail pricing policies began after the attorney general received a letter in February 2007 from an unidentified customer who stated that while shopping for a Tempur-Pedic mattress a number of stores had informed him that Tempur-Pedic dictates the resellers’ prices for its mattresses and does not allow discounts. The letter stated, “[t]his sounds like illegal price fixing to me.”

It did not, however, sound like illegal price fixing to the court.

The state failed to allege an illegal act or repeated or persistent fraud, the court held. Under General Business Law Sec. 369-a, contracts for resale price restraints were unenforceable and not actionable, but they were not illegal. In addition, the pricing restraints did not amount to fraudulent conduct that deceived retailers or

consumers. The court rejected the attorney general's allegations that the company "misleads retailers into believing that restraints on discounting are enforceable, thus ensuring compliance to its demands" and that customers were deceived into believing that the retailer cannot discount the defending manufacturer's products, when retailers did have that right under the law.

The state also unsuccessfully argued that it had the power to enjoin the mattress maker's price restraints as unenforceable contracts under Executive Law Sec. 63(12). The court ruled that no contract provision to restrain discounting was established. Without demonstrating, by some evidence, that a contract to adhere to suggested minimum resale prices or prohibit discounting existed, the attorney general failed to plead all of the elements required to show a violation of General Business Law Sec. 369-a.

The evidence presented by the attorney general failed to demonstrate that the interactions between Tempur-Pedic and its retailers amounted to a meeting of the minds or consisted of harassment, threats to harm business, or concerted acts between the manufacturer and its retailers to harass other noncompliant retailers. Tempur-Pedic had informed retailers that it would suspend shipments to an account if it discovered that the account was substantially deviating from suggested retail prices and that the policy was the manufacturer's unilateral decision and not negotiable. While there were a number of instances in which Tempur-Pedic was communicating with its retailers regarding compliance with its set minimum prices, the communications did not demonstrate coercive tactics or threats to achieve compliance, in the court's view. Moreover, the manufacturer never ceased doing business with a New York retailer due to the retailer's refusal or failure to sell the manufacturer's products at recommended or suggested retail prices.

Tempur-Pedic's Retail Partner Obligations and Advertising Policies (RPOAP) also was not found to violate General Business Law Sec. 369-a. The RPOAP restrained the retailers from advertising certain coupons, rebates, and promotional items; however, it was not a contract to restrain discounting, only advertising of discounting.

The January 14, 2011, decision in *People of the State of New York by Andrew M. Cuomo, Attorney General of the State of New York, Petitioner v. Tempur-Pedic International, Inc., Respondent*, No. 400837/10, will appear at **2011-1 Trade**

Cases ¶77,311.

California Consent Decree

The decision in the New York case came just days after a cosmetics company–Bioelements, Inc.–agreed to settle a complaint brought by the State of California, alleging that the company engaged in vertical price fixing in *per se* violation of the California Cartwright Act. The state alleged that Bioelements had entered into dozens of contracts with other companies that required them to sell Bioelements' products online for at least as much as the retail prices prescribed by Bioelements. Under a consent decree signed by a state court judge on January 12, Bioelements agreed to: refrain from fixing resale prices for its merchandise, inform distributors and retailers that it will not enforce the challenged contracts, and pay a total of $51,000 in civil penalties and attorney fees.

The consent decree in *People of the State of California, Plaintiff v. Bioelements, Inc.*, Defendant, Case No. 10011659, will appear at **2011-1 Trade Cases ¶77,306**.

These two actions demonstrate the differing results that can follow from state antitrust enforcement directed at manufacturers' resale pricing policies in the aftermath of the U.S. Supreme Court's 2007 decision in *Leegin Creative Leather Products v. PSKS, Inc.* (2007-1 TRADE CASES ¶75,753). In that decision, the Court overruled the long-standing *per se* prohibition on resale price maintenance under the Sherman Act and held that under federal law resale price maintenance was subject to a more lenient standard, the rule of reason.