AntitrustConnect Blog

Consumers' Price Fixing Claims Against Mattress Maker Did Not Meet Twombly Pleading Requirements

Jeffrey May (Wolters Kluwer) · Friday, December 10th, 2010

A decision from a divided U.S. Court of Appeals in Atlanta earlier this month continues the debate over the appropriate pleading standard for antitrust plaintiffs under *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544.

The appellate court held that consumers failed to support their resale price fixing and horizontal price fixing claims against the manufacturer of visco-elastic Tempur-Pedic foam mattresses. The majority affirmed judgment for the defendants, dismissing the plaintiffs' complaint with prejudice (**2008-1 Trade Cases ¶76,005**).

According to a dissent, "While *Twombly* was a sea change in the standards governing pleading in federal court, the majority goes too far when it interprets *Twombly* to require a plaintiff to include actual evidence in the complaint."

Vertical Price Fixing

The consumers challenged the manufacturer's practice of setting the minimum retail prices the distributors could charge for its mattresses and adhering to those minimum prices in the sales it made through its website.

The appellate court explained that, since *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (2007) 551 U.S. 877, vertical resale price maintenance claims had to be evaluated using rule of reason analysis. Under rule of reason analysis, the complaining consumers had to show either actual or potential harm to competition. Regardless of whether the consumers alleged actual or potential harm to competition, they had to identify the relevant market in which the harm occurred.

Relevant Market

The consumers' skimpy allegations of the relevant submarket limited to visco-elastic foam mattresses were legally insufficient to support vertical resale price maintenance claims, the majority ruled. The consumers argued that, because their complaint was dismissed on a Federal Rule of Civil Procedure 12(b)(6) motion, they did not have the chance to add facts in discovery which would have established visco-elastic foam mattresses as a separate relevant product submarket.

The consumers nevertheless had the obligation to indicate that they could provide evidence

plausibly suggesting the definition of the alleged submarket, the majority explained. The complaint alleged, without elaboration, that "[v]isco-elastic foam mattresses comprise a relevant product market, or submarket, separate and distinct from the market for mattresses generally, under the federal antitrust laws."

This conclusory statement merely begged the question of what, exactly, made foam mattresses comprise this submarket. The complaint provided no factual allegations of the cross-elasticity of demand or other indications of price sensitivity that would indicate whether consumers treated visco-elastic foam mattresses differently than they did mattresses in general.

The dissent argued that the relevant market issue could not be decided on a motion to dismiss. The plaintiffs "cannot be expected to provide factual allegations of cross-elasticity of demand, or other indications of price sensitivity, absent access to discovery."

Horizontal Price Fixing

The consumers' horizontal price fixing claims against Tempur-Pedic were also rejected by the majority. The consumers argued that the mattress maker's dual-distribution system—under which its mattresses were sold both through its authorized distributors and directly to consumers through the manufacturer's own website—constituted a horizontal price fixing conspiracy.

The consumers did not, however, meet their burden to present allegations showing why an inference that the manufacturer and its distributors entered into a price fixing agreement was more plausible than an inference that the manufacturers and distributors set prices independently and happened to set the same price because it made economic sense to do so.

Potential costs to the manufacturer of fixing prices with its distributors would outweighed any benefits that the manufacturer would have realized by doing so, particularly where independent economic activity would have yielded the same benefits with none of the costs, the majority reasoned.

An inference that the mattress manufacturer and its distributors set prices independently of each other was "totally implausible," according to the dissent. "Horizontal price-fixing is still a *per se* violation, and this allegation satisfies the plausibility pleading standard: it is entirely plausible that this uniformity in pricing is the result of collusion rather than market forces."

The December 2, 2010, decision is *Jacobs v. Tempur-Pedic International, Inc.*, No. 08-12720, **2010-2 Trade Cases ¶77,250**.

This entry was posted on Friday, December 10th, 2010 at 7:26 pm and is filed under Price Fixing, Resale Price Maintenance
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.