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ANTITRUST

Expert Analysis

Mattress Maker Averts Resale Price Maintenance Challenges

By
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While the U.S. Court of Appeals for the Eleventh Circuit rejected resale price maintenance claims against a mattress maker under federal law, a suit brought by the Attorney General of New York against the same mattress company, based on a novel interpretation of a New York statute, was dismissed by a state trial court, and the California Attorney General obtained a settlement of its enforcement action asserting that a cosmetics company's online distribution pricing policy constituted a per se violation of California's antitrust law.

Other recent antitrust developments of note included the U.S. Court of Appeals for the Seventh Circuit's guidance on pre-merger information exchanges in its opinion rejecting a claim that two health insurers unlawfully restrained trade in the months leading up to their merger and the Department of Justice's challenge of Comcast and NBC Universal's joint venture.

Mattresses—Federal Law

Consumers who purchased Tempur-Pedic mattresses brought an antitrust suit under federal law alleging that the mattress maker entered into unlawful minimum vertical price-fixing agreements (often referred to as resale price maintenance) in violation of §1 of the Sherman Act by setting the minimum prices its distributors can charge. A district court dismissed the complaint, and a split panel of the Eleventh Circuit affirmed.

The appellate court noted that vertical price-fixing claims must be evaluated under the rule of reason after the Supreme Court's 2007 decision, *Leegin Creative Leather Products Inc. v. PSKS Inc.*, 551 U.S. 877 (overturning the 1911 decision that declared resale price maintenance per se unlawful, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373), and decided that plaintiffs failed to sufficiently plead a relevant market and harm to competition.

The Eleventh Circuit majority stated that the complaint's "skimpy" allegations of a separate relevant market or submarket that was limited to foam mattresses and excluded innerspring mattresses did not satisfy the pleading standard set forth in the Supreme Court's 2007 decision, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544. The majority added that plaintiffs' assertion that foam mattresses were more expensive than traditional innerspring mattresses and had unique attributes was not enough to plausibly allege that foam mattresses are not reasonably interchangeable with other mattresses. Instead, the complaint should have addressed the degree to which consumers prefer foam over traditional mattresses and their cross-elasticity of demand.

A dissenting judge wrote that the majority went too far and essentially required the plaintiffs to prove their case at the pleading stage and that requiring "demonstrable empirical evidence" in a complaint is improper. The dissent also observed that the complaint was filed before *Leegin* and *Twombly* were handed down.

Jacobs v. Tempur-Pedic International Inc., 2010-2 CCH Trade Cases ¶77,250

Mattresses—New York Law

The New York Attorney General also challenged Tempur-Pedic's policies, the subject of the lawsuit reported immediately above, as unlawful resale price maintenance in violation of state law. New York alleged that the manufacturer required its retail distributors to adhere to a suggested retail price and prohibited discounting. Notably, the state did not assert that the challenged conduct violated the Donnelly Act, New York's antitrust law (codified at N.Y. General Business Law §340 et seq.), but rather §369-a of the General Business Law, titled "Price-Fixing Prohibited."

A New York state trial court rejected the Attorney General's argument that §369-a prohibited resale price maintenance arrangements and restrictions on reseller discounting. The court determined that the statute's plain language merely declared such price restraints unenforceable, not illegal. The court noted that, as it saw no ambiguity in the text of the statute, there was no need for further inquiry into legislative intent.

The court stated that, in any event, the state's submissions did not support the existence of a contract to fix prices, but rather suggested a permissible unilateral policy not to deal with discounting retailers.

New York v. Tempur-Pedic International Inc., 2011-1 CCH Trade Cases ¶77,311 (Sup. Ct. N.Y. County)

Cosmetics—California Law

In yet another resale price maintenance case, California's Attorney General charged Bioelements Inc., a cosmetics company that sells "cosmesceuticals," skin products with quasi-medical properties, with per se violations of the Cartwright Act, California's antitrust law. The Attorney General asserted that the company prohibited online distributors from selling its products at a discount and that California's "strict, pro consumer antitrust law" bans vertical price fixing.

The claims were resolved in a settlement that requires Bioelements to refrain from resale price maintenance and pay civil penalties plus attorneys fees.

California v. Bioelements Inc., 2011-1 CCH Trade Cases ¶77, 306 (Cal. Superior Ct., Riverside County); Press Release: "Attorney General Halts Online Cosmetics Price Fixing Scheme" (Jan. 14, 2011), available at oag.ca.gov/news

Comment: The three developments reported immediately above illustrate various methods employed by state antitrust enforcers to fill the space created by the Supreme Court's

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disposal in 2007 of nearly a century of per se condemnation of resale price maintenance arrangements, reflecting a deeply held hostility to those practices.

Pre-Merger Coordination

Omnicare, the nation's largest institutional pharmacy, brought suit claiming that in the months leading up to the merger of UnitedHealth Group and PacifiCare Health Systems, the two health insurers coordinated their business strategies in violation of §1 of the Sherman Act. The pharmacy alleged that during their merger discussions, the health insurers were both negotiating contracts with the pharmacy and that the insurers conspired to have the acquired insurer obtain the lowest possible price from the pharmacy and then switch the acquiring insurer's plan over to the more favorable contract after the merger was consummated.

A district court ruled for the insurers on their summary judgment motion, and the Seventh Circuit affirmed. In a thorough opinion addressing intricate antitrust issues arising from discussions about commercially sensitive topics between competitors planning a transaction, the appellate court ruled that the plaintiff-pharmacy did not bring forth evidence to prove the existence of an agreement in restraint of trade between the insurers and relied on circumstantial evidence, primarily related to the parties conducting due diligence for the merger.

The Seventh Circuit observed that evidence of an information exchange between competitors can support an inference of a price-fixing agreement, but that such circumstantial evidence is "not on its own demonstrative of anticompetitive behavior, even when pricing data is what is exchanged." The court concluded that the information exchanged—high-level estimates and strategic plans—was more consistent with advancing the companies' legitimate business interests, such as valuations necessary for the merger. In addressing the unlawful information exchange claims, the Seventh Circuit agreed with the district court that the judiciary must walk a fine line between avoiding chilling business activity and condemning "sham" merger transactions, created by rivals to exchange competitively sensitive information.

Omnicare Inc. v. UnitedHealth Group Inc., 2011-1 CCH Trade Cases ¶77,304

Cable and TV Merger

The Department of Justice and five state attorneys general entered into a settlement with Comcast, NBC Universal (NBCU) and its parent GE, allowing the parties to form a joint venture incorporating all of NBCU's assets and Comcast's programming as well as some digital properties. Initially, Comcast will hold 51 percent and GE will hold 49 percent of the joint venture, which is expected to end up being wholly owned by Comcast.

The department and the states alleged that the transaction would reduce competition in the market for timely distribution to consumers of professional, full length video programming (e.g., television shows) by reducing NBCU's incentive to distribute its programming to Comcast's traditional and online rivals. The settlement requires the companies to license programming to online competitors of Comcast's cable TV services and impose no restrictions on content, sites or platforms on the Internet. The department cooperated with the Federal Communications Commission (FCC), which also has jurisdiction over telecommunications mergers. In addition to the relief required by the Department of Justice, the FCC required the joint venture to license NBCU content to Comcast's traditional competitors: cable, satellite and telephone companies.

> The Eleventh Circuit noted that vertical price-fixing claims must be evaluated under the rule of reason after the Supreme Court's 2007 'Leegin' decision.

United States v. Comcast Corp., No. 1:11-cv-00106, CCH Trade Reg. Rep. ¶50,987 (D.D.C. Jan. 18, 2011), also available at http://www.justice.gov/atr/cases/comcast.html; Memorandum Opinion and Order, *In re Applications of Comcast Corp., General Electric Co. and NBC Universal Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, FCC MB Docket No. 10-56, 2011-1 CCH Trade Cases ¶77,312 (Jan. 18, 2011), also available at http://www.fcc.gov/transaction/comcast-nbcu.html

Class Certification

Subscribers to online DVD rental services from Netflix sought to bring a class action on behalf of similarly situated subscribers claiming that Netflix conspired with Wal-Mart to monopolize and unreasonably restrain trade by arranging for Wal-Mart to exit the market for online DVD rentals. A district court granted the plaintiffs' motion for class certification over the defendants' objection that individualized issues predominated over common issues in the assessment of impact or injury and the determination of damages. The court stated that deciding whether a claim is suitable for class treatment sometimes requires examining issues that overlap with the merits but only to the extent necessary to rule on a class certification motion.

The defendants argued that plaintiffs' impact analysis disregarded the exponential growth in Netflix subscribers—whose numbers had increased from three million to over 14 million from the time of the agreement with Wal-Mart—and that many of the new subscribers would not have joined Netflix, and could not have been injured, if not for the technological improvements that came about as a result of the agreement. The defendants also claimed that the plaintiffs' expert failed to account for competitive alternatives to online DVD rentals such as "brick and mortar" retail chains and video-on-demand services in assessing Wal-Mart's impact on competition in the absence of the challenged agreement.

The court stated that although the defendants' arguments challenged plaintiffs' ability to prove that all members of the purported class suffered injury, they did not show that plaintiffs' methodology for proving injury would necessarily require individualized evidence rather than generalized class-wide proof.

The court added that plaintiffs' damage theories also satisfied the predominance requirement by proposing methods that depend on class-wide proof and stated that a "precise damage formula" was not required at the class certification stage.

In re Online DVD Rental Antitrust Litigation, 2010-2 CCH Trade Cases ¶77,295 (N.D. Cal.)

Airline Merger

The European Commission blocked the proposed merger of two Greek airlines, stating that it would have led to a quasi-monopoly on nine routes in Greece. The commission defined the relevant product market as air travel, to the exclusion of other modes of transportation, after finding that ferry service did not constitute a sufficiently close substitute for air travel between Athens and eight island airports. The commission also noted that no new airline was likely to enter the Greek air transport market.

Mergers: Commission blocks proposed merger between Aegean Airlines and Olympic Air, IP/11/68 (Jan. 26, 2011), available at ec.europa.eu/competition

Cartels

The European Commission fined six Asian LCD panel producers a total of €648 million for operating a cartel, contending that the producers agreed on prices and exchanged information on future production planning, capacity utilization, pricing and other commercial conditions. Samsung, the panel producer that initially brought the cartel to the commission's attention and provided information, received full immunity, paying no fine for the infringement.

Antitrust: Commission fines six LCD panel producers €648 million for price fixing cartel, IP/10/1685 (Dec. 8, 2010), available at ec.europa.eu/competition

Comment: An active and far-reaching criminal investigation by the U.S. Department of Justice into anticompetitive conduct in the LCD panel industry has resulted in hundreds of millions of dollars in fines and indictments of many executives and several companies.