

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7572 People of the State of Index 400837/10
New York, etc.,
Petitioner-Appellant,

-against-

Tempur-Pedic International, Inc.,
Respondent-Respondent.

Eric T. Schneiderman, Attorney General, New York (Steven C. Wu of
counsel), for appellant.

Bingham McCutchen, LLP, Boston, MA (William N. Berkowitz of the
bar of the state of Massachusetts, admitted pro hac vice, of
counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York
County (Joan B. Lobis, J.), entered January 20, 2011, which
denied the Office of the Attorney General's (OAG) petition
seeking to enjoin Tempur-Pedic's alleged "price-fixing"
practices, prohibit Tempur-Pedic from destroying its records,
compel Tempur-Pedic to disgorge its profits, and provide
restitution to its consumers; granted Tempur-Pedic's motion to
dismiss the petition; and denied Tempur-Pedic's discovery motion
as moot, unanimously affirmed, without costs.

Following a complaint from a consumer, OAG launched an
investigation that culminated in the instant petition, which
alleged that Tempur-Pedic violated General Business Law § 369-a
by entering Resale Price Maintenance agreements (RPM) with its

retailers, setting the price of their products at an artificially high rate.

The motion court, in denying the petition and granting Tempur-Pedic's motion to dismiss, first found that General Business Law § 369-a does not make RPMs illegal as a matter of law. We agree. The plain language of § 369-a is dispositive of this argument, as it states that "contract provisions" that impose minimum resale prices "will not be enforceable or actionable at law." This statutory language makes clear that an action may not be maintained in a court of law to enforce such a provision. However, there is nothing in the text to declare those contract provisions to be illegal or unlawful; rather the statute provides that such provisions are simply unenforceable in the courts of this state (see e.g. *WorldHomeCenter.com, Inc. v Franke Consumer Prods.*, 2011 WL 2565284, 2011 US Dist LEXIS 67798 [SD NY 2011]; *WorldHomeCenter.com, Inc. v KWC Am., Inc.*, 2011 WL 4352390, 2011 US Dist LEXIS 104496 [SD NY 2011]).

Even if the plain language of General Business Law § 369-a could be held to render RPMs illegal as a matter of law, the OAG failed to adduce sufficient evidence to support its petition against Tempur-Pedic. First, we note that the IAS court followed the proper standard in evaluating the petition for summary disposition and Tempur-Pedic's motion to dismiss (see e.g. *Matter*

of National Enters., Inc. v Clermont Farm Corp., 46 AD3d 1180, 1183 [2007]).

Here, the OAG relies on, as evidence of the existence of an RPM, Tempur-Pedic's "Retail Partner Obligations and Advertising Policies," which, admittedly are signed by Tempur-Pedic and its retailers. However, this agreement pertains to advertising only. Advertising agreements cannot be the subject of a vertical RPM claim, because they do not restrain resale prices, but merely restrict advertising (*see e.g. WorldHomeCenter.com, Inc.*, 2011 WL 4352390 at *5-*6, 2011 US Dist LEXIS 104496 at *14-*15).

In any event, the evidence OAG tendered did not support a conclusion that RPM agreements were reached between Tempur-Pedic and its retailers, but merely that Tempur-Pedic enacted its minimum price policy and that its retailers independently determined to acquiesce to the pricing scheme in order to continue carrying Tempur-Pedic's products (*see e.g. Leegin Creative Leather Prods., Inc. v PSKS, Inc.*, 551 US 877, 901-902

[2007]; *Monsanto Co. v Spray-Rite Serv. Corp.*, 465 US 752, 764 [1984]).

We have considered the remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012


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