A Tale of Two Coasts: Recent RPM Enforcement in New York and California

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Two recent enforcement actions in California and New York illustrate the continuing uncertainty that businesses face in designing and implementing resale price maintenance (RPM) programs.[1] In *People v. Bioelements, Inc.*, the California Attorney General obtained a consent decree against a Colorado company that had RPM agreements with its independent resellers.[2] But in *People v. Tempur-Pedic, International Inc.*, the New York Attorney General sought to enjoin an RPM program—and lost a contested trial court proceeding. What can companies learn from these two enforcement actions?

Bioelements

Bioelements sells skin-care products for various needs, such as cleansing, anti-aging, and hydration. Bioelements sells these products through two channels—salon spas and authorized Internet resellers—with written agreements for dealers in each channel. Before the December 2010 challenge 2010, salon spas signed Bioelements agreements with an explicit minimum RPM provision: "Accounts shall not charge less than the Manufacturer's Suggested Retail Price (MSRP)."[3] The Internet-only dealers' agreement had both a minimum and maximum RPM provision: "Accounts are prohibited from charging more or less than the Manufacturer's Suggested Retail Price (MSRP)."[4] According to the California Attorney General's press release about the case, however, the problematic provisions dealt only with online sales: the agreements required vendors "to sell Bioelements' products *online* for at least as much as the retail prices prescribed by Bioelements. (There were no express pricing requirements for products sold in person or in shops.)"[5]

The California Attorney General alleged that the agreements constituted "vertical price-fixing in per se violation of the Cartwright Act."[6] (There was no question that Bioelements had satisfied the "agreement" element of a Cartwright Act violation.[7]) In addition, the attorney general alleged

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[1] *See generally* Joan Biskupic, *States Try to Counter Supreme Court's Minimum-Price Ruling*, USA TODAY, Dec. 22, 2010, *available at* http://www.usatoday.com/news/washington/judicial/2010-12-22-robertscourt22_CV_N.htm.

[2] People v. Bioelements Inc., File No. 10011659 (Cal. Super. Ct. Riverside County, filed Dec. 30, 2010) (*Bioelements* Complaint). The consent decree was filed January 11, 2011 (*Bioelements* Consent Decree).

[3] *Bioelements* Complaint, *supra* note 2, ¶ 5.

[4] *Id.*

[5] Attorney General Halts Online Cosmetics Price-Fixing Scheme (Jan. 14, 2011) (emphasis added), *available at* http://oag.ca.gov/news/press_release?id=2028&m=0.

[6] *Bioelements* Complaint, *supra* note 2, ¶ 15.

[7] CAL. BUS. & PROF. CODE § 16720 et seq.

that "vertical price-fixing" also constituted "unfair competition" in violation of California's Unfair Competition Law.[8]

The case was resolved by consent decree. Bioelements was enjoined from making any agreements with a third party to "increase the price of merchandise or any commodity," or "to fix at any standard or figure, whereby its price to the public or consumer shall, be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, barter, use or consumption in this State." In addition, Bioelements was enjoined from making agreements with third parties by which Bioelements and third parties bound themselves "not to sell . . . any commodity . . . below a common standard figure, or fixed value," or "to keep the price of such . . . commodity . . . at a fixed or graduated figure," or "establish or settle the price of any . . . commodity . . . between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such . . . commodity." Bioelements also agreed to pay $15,000 in civil penalties and $36,000 for the state's attorney's fees.

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The consent decree also required Bioelements to send a letter "to each entity that, since January 1, 2005, made any agreement with Bioelements to maintain in any manner resale prices established or set by Bioelements for any Bioelements products." The letter had to state that "Bioelements is immediately, unilaterally disavowing all parts of Bioelements's distributor or resale agreement with you that purportedly obligated you to maintain certain resale prices for Bioelements products. As far as Bioelements is concerned, you do not have an agreement with Bioelements to maintain any resale prices for Bioelements products."

Just how far do the consent decree's injunctive provisions extend? More specifically, do the injunctive provisions apply to "interstate" sales?[9] The consent decree states that its injunctive provisions are issued "[u]nder [California] Business & Professions Code sections 16750, 16754.5 and 17203," which presumably means that the injunction extends no further than the statute allows. Unless the California statute is preempted by federal law,[10] California clearly can prohibit a minimum RPM agreement that applies to sales by a California-based reseller to a California resident—whether or not the manufacturer is a California resident. Just as clearly, California has no power to enjoin minimum RPM agreements that apply to sales by a non-California reseller to a non-California resident (even if the manufacturer is subject to California's jurisdiction).

In two intermediate cases, however, the result may not be as clear: (a) sales by a California reseller to a non-California resident, and (b) sales by a non-California reseller to a California resident. As a practical matter, these cases generally would arise in Internet sales, not bricks-and-mortar. The *Bioelements* consent decree does not distinguish between Internet resellers and brick-and-mortar resellers, although it plainly applies to both, and it does not distinguish between in-state and out-of-state resellers. Arguably the consent decree's reference to the applicable state statute means that the injunction applies only to in-state resellers (and possibly only to in-

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[8] *Id.* ¶ 12; CAL. BUS. & PROF. CODE §17200 et seq. Section 17200 defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code [which deals with various kinds of advertising]."

[9] Bioelements itself is an Illinois corporation "physically headquartered" in Colorado, although its president (who founded the company) lives in California's Riverside County. *Bioelements* Complaint, *supra* note 2, ¶ 5.

[10] I have discussed federal preemption of state prohibitions of minimum RPM agreements in *State Resale Price Maintenance Laws After* Leegin, ANTITRUST SOURCE, Oct. 2009, at 5–6, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct09_Lindsay10_23f.authcheckdam.pdf, and *Resale Price Maintenance and the World After* Leegin, ANTITRUST, Fall 2007, at 1, 33.

state sales by in-state resellers). But the consent decree also required Bioelements to notify all distributors and resellers with whom it had RPM agreements—seemingly without regard to whether the reseller or its customers were located in California.

Tempur-Pedic

Tempur-Pedic sells premium mattresses and related bedding products with visco-elastic memory foam. These products are sold primarily through specialty stores, furniture stores, and department stores,[11] although they can also be purchased directly from Tempur-Pedic for home delivery and from Internet resellers.[12] Unlike the Bioelements dealers' agreement, the Tempur-Pedic reseller agreement did not include any provision establishing a minimum resale price, although it did include provisions relating to *advertised* price (including, for example, prohibitions on advertising rebates, gift cards, free gifts, and store credits).[13] Tempur-Pedic also adopted a *Colgate*[14] policy: Tempur-Pedic had "announce[d] a policy to suspend doing business with any retailer who does not adhere substantially to [its] suggested retail price ranges."[15] The policy was enforced through shipment suspensions if a retailer was substantially deviating from Tempur-Pedic's suggested retail prices (other than an isolated incident or a liquidation sale of discontinued merchandise). The policy included the standard disclaimers—that the policy was Tempur-Pedic's "unilateral decision" and was "not negotiable," that Tempur-Pedic "neither seeks nor will . . . accept its retailers' agreement with the policy," and that retailers may set prices at whatever level they believe to be in their best interests.[16]

The New York Attorney General challenged Tempur-Pedic's practices under section 369-a of the Donnelly Act.[17] The Verified Petition alleged that Tempur-Pedic products were "sold at virtually uniform, high prices by all New York retailers of Tempur-Pedic products," and that this resulted from "contractual provisions that prohibit and restrain discounting contrary to New York law."[18] The Verified Petition alleged that Tempur-Pedic had sent letters to all of its accounts "explicitly stat[ing] that it will not do business with any retailer that charges retail prices that differ from the prices set by Tempur-Pedic," and that Tempur-Pedic retailers "have accepted the contractual requirement that discounting is not permitted by Tempur-Pedic, and comply with that requirement in violation of law."[19]

The trial court rejected the attorney general's challenge. First, the court found that section 369-a did not prohibit minimum RPM agreements. Although the caption for the statute reads "Price-fixing prohibited," the actual text of the statute does not say this. The statute says "Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity

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[11] Verified Petition, People v. Tempur-Pedic International, Inc., 400837/10 (N.Y. Sup. Ct. N.Y. County filed Mar. 29, 2010) (*Tempur-Pedic* Petition). The Decision, Order, and Final Judgment (*Tempur-Pedic* Order) was filed on January 14, 2011.

[12] For purchases from Tempur-Pedic, see http://www.tempurpedic.com/shopping-with-us/buy-from-us.asp. For purchases from Internet resellers, *see, e.g.*, http://www.backtobed.com/mattresses/tempur-pedic/.

[13] *Tempur-Pedic* Order, *supra* note 11, at 2–3.

[14] United States v. Colgate & Co., 250 U.S. 300 (1919).

[15] *Tempur-Pedic* Order, *supra* note 11, at 3.

[16] *Id.*

[17] N.Y. Gen. Bus. Law § 369-a.

[18] *Tempur-Pedic* Petition, *supra* note 11, ¶¶ 9–10.

[19] *Tempur-Pedic* Order, *supra* note 11, at 6.

at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law."[20] The court held that the meaning of the statutory language was plain: "Contracts for resale price restraints are unenforceable and not actionable, but not illegal."

Second, citing *Monsanto*, the court found that there was no evidence of a minimum RPM agreement between Tempur-Pedic and its resellers—no "meeting of the minds."[21] Even if an agreement could be formed when a reseller raised its price in response to threats or coercion (as Judge Posner had held in *Isaksen*[22]), the court found no evidence of such threats.[23]

Some Lessons

The *Bioelements* consent decree and the *Tempur-Pedic* decision come from major markets, and so firms with resellers in those jurisdictions need to pay close attention. But the two decisions also offer several broader lessons as well.

[In New York], [c]ontracts for resale price restraints are unenforceable and not actionable, but not illegal.

State laws—or at least a state's relative chances of success in challenging RPM agreements—vary significantly by state. State laws are by no means uniform, as the *Antitrust Source*'s fifty-state survey illustrates.[24] Some state statutes will give the state a stronger argument that minimum RPM is illegal, and some state statutes will give the state a weaker argument. For example, the Maryland's post-*Leegin* statute explicitly adopted, and specifically applies, the per se rule to minimum RPM agreements[25]—giving the Maryland Attorney General a strong position in challenging such agreements.

Smaller companies may be more attractive targets in some states. State attorneys general will not bring baseless actions, but resource limitations may influence decisions on which cases to bring. Given a choice between two potential defendants—only one of which has sufficient resources to mount a vigorous defense—there may be a temptation for a state attorney general to choose the less well-armed defendant. Other factors—the ease of proof and the clarity and magnitude of the violation, for example—will likely carry more weight in the decision-making.

Smaller companies should take particular care in program design and implementation. All companies should be cautious in adopting minimum advertised price (MAP) or RPM programs, but particularly companies doing business in California, Maryland, and other states with strong statutes. Moreover, companies that do not have the resources to defend a MAP or RPM program would be well advised to involve knowledgeable counsel in their program design and implementation.

Maximum RPM challenges are still "mostly dead."[26] A jury is more likely to believe that competition is harmed by a minimum RPM agreement than by a maximum RPM agreement.[27] Indeed, the

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[20] N.Y. Gen. Bus. Law § 369-a.

[21] *Tempur-Pedic* Order, *supra* note 11, at 9–11 (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U. S. 752 (1984)).

[22] Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1162–63 (7th Cir. 1987).

[23] *Tempur-Pedic* Order, *supra* note 11, at 11–12.

[24] The fifty-state survey is available at Antitrust Source, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_LindsayChart12_21f.authcheckdam.pdf.

[25] Md. Code Ann., Com. Law. § 11-204(a)(1) (2009). This statute is discussed in *State Resale Price Maintenance Laws*, *supra* note 10, at 2.

[26] With apologies to fans of *The Princess Bride*.

[27] For a discussion of mock jury deliberations in a minimum RPM case, see Michael A. Lindsay, *Resale Price Maintenance: Real Life Lessons from a Mock Trial*, Antitrust Source, June 2008, at 4–6, http://www2.americanbar.org/antitrust/Searchable%20Antitrust%20Library/Jun08-Lindsay6=26f.pdf.

post-*Leegin* Maryland statute applies the per se rule only to minimum price agreements. In a recent interview, California's Assistant Attorney General for Antitrust, Kathleen Foote, was not willing to say that the Cartwright Act applies only to minimum RPM agreements, but she did acknowledge that maximum RPM agreements are not an enforcement priority: "Given our limited resources, the cases that we are most likely to take on would be the minimum RPM ones first."[28] Still, although nothing in the *Bioelements* complaint, consent decree, or press release spoke of the specific evils of maximum RPM agreements, neither did they describe the case as only a minimum RPM case. A state challenge to a purely and truly maximum RPM agreement, though, still seems unlikely.

But the* Colgate *doctrine is alive and well. Tempur-Pedic used a *Colgate* policy in combination with a MAP agreement to achieve its business objectives. Although the *Tempur-Pedic* court had held that section 369-a did not prohibit minimum RPM agreements, the court also found that this *Colgate*-MAP combination did not constitute an agreement on actual selling prices. This outcome is not terribly surprising, but it is a useful reminder that the best use of *Leegin* may be to contain the damages if a *Colgate* policy or MAP agreement drifts into an agreement on actual selling prices. As *Tempur-Pedic* noted, threats and coercion can result in a price agreement, and as *Bioelements* demonstrates, there remain some states where enforcement officials will view the resulting agreement as a per se violation of state antitrust law.

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Uniformity may be achievable only with the lowest common denominator. Although some states may evaluate minimum RPM agreements under the rule of reason, other states will apply the per se rule. Indeed, Bioelements was evidently required to disavow minimum RPM agreements with *all* resellers, regardless of customer or reseller location. In theory, a manufacturer could design RPM agreements that do not apply to sales made into zip codes in states that pose the greatest legal risk, but that approach may not be practical or may be too costly to implement. Thus, a manufacturer with a national distribution network may not be able to have a uniform policy for all resellers across the country—unless that policy complies with the strictest (or at least most strictly enforced) state laws, such as California's.

Manufacturers should carefully consider their Internet sales and resale strategy. Internet sales and Internet advertising have national reach, and a discounting Internet reseller can have a disproportionate effect on a manufacturer's pricing. Given the differing state approaches (and for other commercial reasons as well), a manufacturer might choose to reserve the Internet sales channel to itself. Where that is not commercially feasible or desirable, then the manufacturer should consider other approaches, such as not dealing with Internet-only resellers, or adopting a *Colgate*-MAP strategy. *Tempur-Pedic* makes clear that a well-designed and well-implemented *Colgate*-MAP strategy can minimize market disruption while also controlling the manufacturer's legal risk. (Tempur-Pedic also took additional steps, such as requiring Internet sellers to have a bricks-and-mortar store.)

Manufacturers should continue to weigh the incremental risks and benefits of RPM agreements. Using minimum RPM agreements obviously will entail legal risk in a number of states, including some substantial markets (again, California in particular). If that risk materializes in a state or private-plaintiff enforcement action, the manufacturer will incur defense and settlement costs, but what gain (relative to alternative strategies) did the manufacturer originally believe would offset the risk and potential cost? If a manufacturer consciously considered the issue at the outset, the man-

[28] *Roundtable—Antitrust*, CAL. LAW. May 2010, *available at* http://www.callawyer.com/roundtable.cfm?eid=909465&evid=1.

ufacturer might believe that a minimum RPM agreement provides better tools for enforcing compliance with the RPM policy. For example, unlike noncompliance with a *Colgate* policy, noncompliance with an RPM agreement might provide legal cause for termination of an otherwise nonterminable distribution agreement, and it might provide a damages remedy for breach—although asserting either of those positions would invite an antitrust defense or counterclaim, at least in states with strict statutes. When asked to draft a minimum RPM provision, an attorney should counsel his or her client to weigh the relative costs and benefits of this approach and to consider the alternatives.

Conclusion

State minimum RPM law remains a minefield. Two of our largest states have demonstrated that they will pursue minimum RPM agreements aggressively—and, at least in California, successfully. In New York, the trial court's decision is not the final word; the attorney general has appealed, so we can expect further developments from that state. Moreover, the Kansas Supreme Court has had a *Leegin* case under advisement since September 2010.[29] Manufacturers continue to need caution and counsel when adopting and implementing RPM and MAP programs. ●

[29] O'Brien v. Leegin Creative Leather Prods. Inc., File No. 08-101000-S (Kan. filed Aug. 12, 2010). This case is discussed in Michael A. Lindsay, *An Update on State RPM Laws Since* Leegin, ANTITRUST SOURCE, Dec. 2010, at 4–6, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Lindsay12_21f.authcheckdam.pdf.