April 28, 2010

In This Issue

What Do Terri Seligman, Sweepstakes, Contests and Spring Cleaning Have in Common?

They are all part of the New York City Bar's program, "Understanding & Complying With Sweepstakes, Promotions & Marketing Laws." In the session she is presenting this Friday, April 30, Manatt partner Terri Seligman will encourage marketers to clean house and take a fresh look at the fundamentals involved in structuring a legally compliant prize promotion. Dust off your official rules and register here to attend.

back to top

Special Focus
New York Sues Tempur-Pedic For Alleged Vertical Price-Fixing

Authors: Christopher Cole | Lauren A. Teitelbaum

New York Attorney General Andrew Cuomo recently brought suit against Tempur-Pedic, the maker of luxury foam mattresses, for conduct that allegedly amounts to vertical price-fixing. The state's complaint alleges that Tempur-Pedic secured

UPCOMING EVENTS

May 19, 2010

Beverly Hills Bar Association

agreements from its retailers to prohibit any discounting of the mattresses by means of its imposition of a draconian Minimum Advertised Price ("MAP") policy. The lawsuit represents the latest effort by state officials to combat practices that are arguably allowed under federal law.

The Growing Popularity of Resale Price Maintenance Policies
As the economy has struggled, and discounters have proliferated, makers of high-end consumer products have sought to discourage unrestrained discounting of their products. Such discounters may free-ride off the work of brand-name retailers that provide extensive marketing, sales, and service support for the products that discounters often cannot match. The classic example of this problem in action is the consumer who shops brand-name electronics at a major retailer, taking time to compare features and ask questions of sales staff, who then exits the store to buy the same product online through a discounter. A common strategy to combat this is for the manufacturer to impose a MAP policy, under which the manufacturer unilaterally suggests a retail price coupled with a refusal to deal with any authorized reseller who advertises prices lower than the manufacturer's suggested price or who sells the product for resale.

MAP policies have enjoyed a resurgence thanks to a landmark 2007 decision of the United States Supreme Court. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,* 127 S.Ct. 2705 (2007). In *Leegin* the Court overturned nearly a century of antitrust precedent when it held that Resale Price Maintenance ("RPM") agreements between manufacturers and retailers about what price to charge are no longer considered per se illegal under federal antitrust law, but should instead be analyzed under the so-called "rule of reason." The decision gave additional breathing room to manufacturers concerned about whether a MAP policy created the appearance of collusion with retailers to fix prices. Under the rule of reason analysis articulated in *Leegin*, the plaintiff bears the burden of showing that the RPM agreement or MAP policy, as implemented, has harmed or is likely to harm competition. The Court held that, when reviewing the manufacturer's actions under the rule of reason analysis, courts should attempt to determine whether a given RPM agreement would stimulate or harm competition by looking at such factors as the history of the restraint, the nature of the restraint, and whether the businesses involved have market power, among other factors, rather than focusing only on the presence of an agreement or the appearance of collusion.

Nevertheless, by doing away with the per se illegality rule in this context, the *Leegin* decision greatly hindered the Federal Trade Commission enforcement program, which has been reflected in a dearth of federal RPM cases in the last two years. The decision was broadly unpopular in the states, as well as with Congress, which have characterized it as harming consumers by permitting manufacturers to

Entertainment Law Committee

Topic: "Brand Integration"

Speaker: Jordan Yospe

Beverly Hills, CA

for more information

June 10-12, 2010

Natural MarketPlace 2010

Topic: "The Claim Game- Vegas Edition"

Speaker: Ivan Wasserman

Las Vegas, NV

Las Vegas Convention Center

for more information

June 15-16, 2010

American Conference Institute Litigating and Resolving Advertising Disputes

Topic: "The Realities of Bringing and Defending a Lanham Act case in Federal Court Part 2: Litigating and Proving the Case"

Speaker: Tom Morrison

New York, NY

The Helmsley Park Lane Hotel

for more information

June 15-16, 2010

American Conference Institute Litigating and Resolving Advertising Disputes

Topic: "Pushing the Envelope: Case Studies Examining Advertising that has been the Focus of Recent Adversarial Proceedings"

Speaker: Linda Goldstein

adopt policies that artificially inflate prices. Maryland has passed legislation to ban the practice, and other states are considering doing the same. Congress has also been moving a bill that would legislatively overrule the *Leegin* case.[1]

The New York Tempur-Pedic Complaint

As these statutory "fixes" wind their way through the state and federal legislatures, state attorneys general are looking at aggressive enforcement under existing state laws to rein in abusive RPM-related practices. New York's challenge to Tempur-Pedic's Retail Price Policy is the most recent example.

The New York Complaint ("Complaint"), filed at the end of March 2010, attacks the Retail Price Policy and implementation practices of premium mattress manufacturer, Tempur-Pedic. According to the Complaint, through its unilaterally adopted "Retail Price Policy," Tempur-Pedic engaged in price fixing, prohibited by New York law. The Complaint seeks injunctive relief, restitution, and disgorgement of all profits that Tempur-Pedic received due to its anti-discounting policies.

The core allegations are founded on N.Y. Gen. Bus. Law § 369(a), which states that "[a]ny contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law." While the language appears on its face to say that such "contract" provisions are not "enforceable," Attorney General Cuomo takes the position that the law affirmatively bans RPM agreements between a manufacturer and seller. In the state's view, violation of this ban gives rise to liability for statutory penalties.

According to the Complaint and accompanying filings, Tempur-Pedic's Retail Price Policy contains a litany of provisions that reflect a comprehensive choking off of any ability by Tempur-Pedic retailers to provide any consumer incentive or discount on the mattress. Practices banned under the Policy allegedly include providing discounts such as "free gifts with purchase" valued over $100, offering no sales tax, and providing gift cards, coupons, rebates, or in-store credits and cash equivalent offers that could be applied to Tempur-Pedic products. The Policy also allegedly banned offers of money back in return for old bedding (i.e., "Trade-in Sales") and offers of free mattress foundations.

The Complaint alleges that not only did Tempur-Pedic aggressively police retailers to ensure compliance with its policy, it actively encouraged a posse of its retailers to report on violators. It would stop doing business with any retailer found in willful violation of the policy.

Thus, the Complaint alleges, while retailers did not formally "agree" or "contract" to refrain from discounting, they all knew that any attempt to discount would be the end of their business with Tempur-Pedic, thus

New York, NY

The Helmsley Park Lane Hotel

for more information

Newsletter Editors

Jeffrey S. Edelstein
Partner
jedelstein@manatt.com
212.790.4533

Linda A. Goldstein
Partner
lgoldstein@manatt.com
212.790.4544

Terri J. Seligman
Partner
tseligman@manatt.com
212.790.4549

Our Practice

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... more

Practice Group Overview
Practice Group Members

Info, Resources & Links

Subscribe
Unsubscribe
Newsletter Disclaimer
Manatt.com

creating a de facto agreement.

Implications of Tempur-Pedic Case for the Permissibility of MAP Policies

Although the *Leegin* case has hindered federal administrative enforcement regarding resale price maintenance, it has been met with fierce opposition from more than half of the nation's attorneys general (including the New York Attorney General), state legislatures, and Congress, causing substantial uncertainty regarding the contours of permissible vertical RPM.

Even RPM policies that comply in writing with state and federal law can give rise to antitrust liability if implemented improperly. New York's complaint against Tempur-Pedic alleges that the company policy, along with its draconian enforcement practices, together constituted a de facto price-fixing "agreement," rather than a permissible, unilaterally imposed RPM policy. Not only did Tempur-Pedic's Retail Price Policy drastically restrict discounting, giving retailers little flexibility with respect to pricing and free offers, both Tempur-Pedic and its retailers assiduously monitored compliance with the policy, turning what was a unilateral policy into a de facto agreement not to deviate from prescribed minimum prices.

Why it matters: There are several key lessons from this case for manufacturers and retailers. *First*, compliance with state laws in the area of RPM policies is as important as compliance with federal law. The states will be aggressively policing the issue and looking for high-profile targets. *Second*, RPM policies must provide some degree of flexibility for discounting or other consumer incentives. Highly restrictive policies that ban all discounting are likely to run into trouble. *Third*, manufacturers should take care not to enter into "agreements" with retailers, whether by contract or by course of conduct, that definitively set minimum resale prices. *Fourth*, policies should be uniform in application and even-handedly administered. Special exceptions for some retailers but not others can create additional risks.

---

[1] S.B. 148, currently under consideration by the Senate, states as an express legislative purpose the intent to "restore the rule that agreements between manufacturers and retailers, distributors or wholesalers to set the minimum price below which the manufacturer's product or service cannot be sold violates the Sherman Act."

back to top

eBay Didn't Violate Tiffany's Trademark Rights – But Could Be Liable for False Advertising

eBay did not violate Tiffany & Co.'s trademark rights by allowing sellers to list used items from the retailer on its Web site, but the Web site could be liable for false advertising, the Second Circuit has ruled.

Jewelry maker Tiffany & Co. sued Internet-based marketplace eBay claiming that it facilitated and advertised the sale of counterfeit "Tiffany" goods, which constituted direct and contributory trademark infringement, trademark dilution, and false advertising.

After a weeklong bench trial, U.S. District Court Judge Richard J. Sullivan ruled in favor of eBay on all claims. On appeal, the Second Circuit agreed that eBay had not violated Tiffany's trademark rights, either directly or contributorily.

"eBay's use of Tiffany's mark on its Web site and in sponsored links was lawful. eBay used the mark to describe accurately the genuine Tiffany goods offered for sale on its Web site. And none of eBay's uses of the mark suggested that Tiffany affiliated itself with eBay or endorsed the sale of its products through eBay's Web site," the court said.

Even though eBay knew or had reason to know that there was a substantial problem with the sale of counterfeit Tiffany jewelry on its Web site, that was "not a basis for a claim of direct trademark infringement against eBay, especially inasmuch as it is undisputed that eBay promptly removed all listings that Tiffany challenged as counterfeit and took affirmative steps to identify and remove illegitimate Tiffany goods. To impose liability because eBay cannot guarantee the genuineness of all of the purported Tiffany products offered on its Web site would unduly inhibit the lawful resale of genuine Tiffany goods," the court said.

Further, the court said that "[f]or contributory trademark infringement liability to lie, a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary." However, the court said that eBay's knowledge of counterfeit sales on its Web site could form the basis of liability for false advertising. The company advertised Tiffany goods on its Web site by providing hyperlinks to various keyword searches, and purchased advertising space on search engines. "It is true that eBay did not itself sell counterfeit Tiffany goods; only the fraudulent vendors did, and that is in part why we conclude that eBay did not infringe Tiffany's mark. But eBay did affirmatively advertise the goods sold through its site as

Tiffany merchandise. The law requires us to hold eBay accountable for the words that it chose insofar as they misled or confused consumers," the court said. The court remanded the case to the U.S. District Court to determine whether or not eBay's advertisements misled or confused consumers.

Why it matters: The victory is the second for eBay in the United States alleging trademark violations based on the resale of trademarked products. In the *Tiffany* case, the court noted that "private market forces" would give eBay and similar sites a strong incentive to minimize the sale of counterfeit goods because of the risk of alienating consumers (evidence at trial showed that 125 consumers had complained to eBay about counterfeit Tiffany items over just a six-week period). Tiffany disagrees; the company has indicated that it is considering an appeal to the U.S. Supreme Court.

back to top

Court: Communications Between Attorneys, Outside Ad Agencies Not Privileged

In a decision with significant ramifications for attorneys and their outside advertising agencies, the 7th Circuit rejected an argument that attorney-client privilege protected Whirlpool from disclosing communications between the company's attorneys and its outside ad agencies relating to allegedly false advertising.

Advertisers typically work closely with their agencies to produce ad campaigns. During the design and review process, counsel for the advertiser will often be asked to comment on the legality of ad claims. Typically, these exchanges will occur between the agency staff working on the project and the advertiser's lawyer and businesspeople via e-mail.

In the 7th Circuit case, LG Electronics filed suit against Whirlpool alleging trademark infringement of a dryer that used steam to reduce wrinkles. During the pre-trial discovery process, Whirlpool refused to produce communications between its attorneys and its outside advertising agencies relating to the dryer.

LG contended that the communications were not privileged, because the ad agency was a third party to whom the attorney-client privilege does not apply. Whirlpool argued that the agency account team worked so closely with its in-house counsel and businesspeople that they were like "de facto" employees. Some of the agency employees actually worked at Whirlpool offices or had Whirlpool security clearance. But the court rejected Whirlpool's argument, ordering that all of the communications be turned over to LG.

The court said that the agency had its own counsel and its own obligation to review ads, so its employees did not rely completely on the advice of Whirlpool in-house counsel in the same way that Whirlpool's own employees would. Further, the court rejected Whirlpool's argument that the communications should be privileged because it shared a "common interest" with its advertising agency to produce lawful advertisements. That interest amounted to a desire not to be sued, the court said, which was not enough to transform their mutual commercial interest in an advertising campaign into a coordinated legal strategy, especially because when the correspondence took place there was no litigation on the horizon.

Why it matters: In the past, many advertisers have routinely treated such communication as part of its attorney-client privilege or attorney work product material, such that if the advertiser was later sued for false advertising, they would not have to turn such internal deliberation materials over in litigation to the other side. The decision now casts a serious shadow over the common working style of advertisers and their agencies, and places them in a more cautious position regarding the sharing of information and advice. The advertiser will not be able to share "legal advice" without fear of later disclosure, while the agency will have to make sure its own counsel exercises independent oversight. This will place agencies and advertisers more at arm's length in their communications with one another.

back to top

Advocacy Groups File Complaint With FTC Over Behavioral Advertising

Led by the Center for Digital Democracy (CDD), a group of advocacy organizations asked the Federal Trade Commission to investigate companies that are merging online and offline data about Internet users in order to create very specific behavioral advertising. In addition to the CDD, the groups include the U.S. Public Interest Research Group and the World Privacy Forum.

The complaint asks the FTC to investigate Internet companies as well as companies that support the auctioning and data collection/targeting system, such as BlueKai and AppNexus. "Recent developments in online profiling and behavioral targeting – including the instantaneous sale and trading of individual users, which increasingly involve the compilation and use of greater amounts of personal data – have all contributed to what is now standard practice online. A vast ecosystem of online advertising and data auctions and exchanges, demand- and supply-side platforms, and the increasing use of third-party data providers that bring offline information to Internet profiling and targeting, operates without the awareness or consent of users," the complaint says. With real-time bidding the fastest-growing segment of

U.S. online advertising, the complaint says that consumers are facing "a veritable 'Wild West'" of data collection. "FTC inaction has contributed to decisions by the data collection and targeting industry that it can expand the use of consumer information for profiled targeting," the complaint alleges.

The complaint also argues that if data about them is used, consumers should see a financial benefit. "The availability of so-called free content is an insufficient return to a consumer for their loss of privacy, including their autonomy," the complaint says.

The complaint seeks to have the FTC create an opt-in requirement so that consumers must consent before companies can engage in "real-time online tracking and auction bidding, including providing related data optimization."

Why it matters: With privacy already a hot-button issue at the FTC, the complaint was timed just as the two new members – one with a background of working on consumer privacy issues – joined the Commission. The FTC has already responded, telling the organizations that it is "carefully reviewing" their complaint.

back to top

Washington Enacts Data Breach Law With Potential Liability for Retailers, Processors

The state of Washington enacted a new law that provides financial institutions with a cause of action against retailers and credit card processors who suffer data breaches after failing to comply with the Payment Card Industry (PCI) standards. The Protecting Consumers from Breaches of Security law takes effect July 1.

The law will allow financial institutions to recover certain costs and damages from credit card processors and retailers that suffer data breaches as a result of failing to comply with current PCI security standards. It applies to three groups: businesses (defined as an entity that processes more than six million credit and debit transactions and that "provides, offers, or sells goods or services" to Washington residents), processors (an entity that "processes or transmits account information for or on behalf of another person as part of a payment processing service"), and vendors (entities that manufacture or sell software or equipment designed to process, transmit or store account information, or that maintain account data they do not own).

Liability is imposed if one of the covered entities fails to "take reasonable care" to prevent unauthorized access to account information in its possession or control. Account information includes the unencrypted magnetic stripe of a credit or debit card, and the primary account number in combination with cardholder name, expiration date, or service code.

Under the law, a financial institution may recover reimbursement of "reasonable actual costs" related to the reissuance of credit or debit cards. Entities are exempt from liability, however, if the account information was encrypted, or if the entity was "certified compliant" with the PCI standards no more than one year prior to the data breach.

The PCI standards are a set of procedural and technological requirements for enhancing data security and include practices such as installing and maintaining a firewall, encrypting cardholder data, creating unique passwords for vendor-supplied computer systems, and assigning a unique ID to each person with access to the transaction systems.

Minnesota and Nevada have similar laws on the books.

Why it matters: While most states now have reactive notification statutes in place, the new laws are an attempt at requiring companies to take proactive measures to prevent or limit data breaches by shifting costs. Any retailer that collects credit card information in the course of business should ensure that the data is encrypted and/or is compliant with the PCI data security standards. The definitions in the law of "business," "processor," and "vendor" all reach beyond the borders of Washington State, giving the new law a national application. Although there are just three states that currently require such compliance, the new laws are a trend likely to be adopted in other states.

back to top