

--- N.Y.S.2d ----, 2012 WL 1583575 (N.Y.A.D. 1 Dept.), 2012 N.Y. Slip Op. 03557
(Cite as: 2012 WL 1583575 (N.Y.A.D. 1 Dept.))

■

Supreme Court, Appellate Division, First Department,
New York.

PEOPLE of the State of New York, etc., Petitioner–Appellant,
v.

TEMPUR– PEDIC INTERNATIONAL, INC.,
Respondent–Respondent.

May 8, 2012.

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.

[MAZZARELLI](#), J.P., [SAXE](#), [MOSKOWITZ](#), [RENWICK](#), [FREEDMAN](#), JJ.

*1 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, un-animously 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 argu-

ment, 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 U.S. Dist LEXIS 67798 [SD N.Y.2011]; [WorldHomeCenter.com, Inc. v. KWC Am., Inc.](#), 2011 WL 4352390, 2011 U.S. Dist LEXIS 104496 [SD N.Y.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 U.S. 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 U.S. 877, 901–902 [2007]; [Monsanto Co. v. Spray–Rite Serv. Corp.](#), 465 U.S. 752, 764 [1984]).

*2 We have considered the remaining arguments

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and find them unavailing.

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