

No. 400837/10

To be argued by:
STEVEN C. WU

Supreme Court, New York County

Supreme Court of the State of New York Appellate Division – First Department

PEOPLE OF THE STATE OF NEW YORK, by ANDREW M. CUOMO,
Attorney General of the State of New York,

Petitioner-Appellant,

-against-

TEMPUR-PEDIC INTERNATIONAL, INC.,

Respondent-Respondent.

REPLY BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

General Business Law (“GBL”) § 369-a declares resale price-fixing “prohibited.” In enacting § 369-a, the Legislature reversed a forty-year policy that had previously legalized resale price-fixing agreements in New York, and declared that going forward such price-fixing would be categorically eliminated to restore price competition and discounts for consumers. The Attorney General’s enforcement action in this case was brought to vindicate that legislative judgment and the pro-consumer policy it enacts under New York law.

Although the legislative record is clear, Tempur-Pedic insists that GBL § 369-a was not intended to protect consumers at all. Instead, Tempur-Pedic asserts that § 369-a protects only the *participants* to resale price-fixing contracts—not injured consumers compelled to pay higher prices—by giving those participants a contractual defense if their co-conspirators sue to enforce the “prohibited” price-fixing. Tempur-Pedic does not—and cannot—deny that such co-conspirator suits are highly unlikely and that, as a result, its reading of § 369-a would deprive the statute of its core consumer-protection function. Under Tempur-Pedic’s cramped reading, so long as the resale price-

fixing scheme is successful, and the parties to the scheme abide by their private contract without litigation, § 369-a would have no effect and serve no purpose (see AG Br. at 23-24)—a result that cannot be squared with the Legislature’s broad goals of protecting consumers and lowering consumer prices.

Federal antitrust law also does not compel this illogical and perverse result, as Tempur-Pedic contends. Even if Tempur-Pedic were correct in its description of federal antitrust requirements, its argument would not control the interpretation of GBL § 369-a, which is a specific, independent *state* statute, with no analogue under federal law, that categorically prohibits resale price-fixing. The Legislature’s choice to enact a different and more consumer-protective policy under New York law is entitled to enforcement even if it diverges from federal courts’ interpretation of federal antitrust statutes.

Finally, Tempur-Pedic is not entitled to dismissal of the Attorney General’s petition simply because the petition’s allegations and supporting evidence *could be* construed in a way that exempts Tempur-Pedic from liability. A factual dispute does not authorize dismissal of a special proceeding. Instead, the existence of triable issues of fact, if

any, should be resolved in a hearing before the court. Supreme Court’s outright dismissal was therefore error, and should be reversed.

ARGUMENT

SUPREME COURT’S JUDGMENT DISMISSING THE ATTORNEY GENERAL’S PETITION SHOULD BE REVERSED

A. GBL § 369-a Prohibits Resale Price-Fixing.

As the Attorney General’s opening brief explained, the language, history, and purpose of GBL § 369-a confirm that the statute does precisely what the Legislature specified—deem “[p]rice-fixing prohibited” under New York law. That is the only reading of the statute consistent with the Legislature’s goal of protecting consumers and eradicating resale price-fixing. See AG Br. at 19-25. Supreme Court’s contrary interpretation ignores § 369-a’s core rationale and implicitly allows a broad range of price-fixing activities that harm consumers.

As Tempur-Pedic acknowledges, Supreme Court’s reading would limit GBL § 369-a to a single function: giving retailers a defense against *damages* in a contract action by manufacturers to enforce the terms of a contract to fix resale prices. Under that interpretation, § 369-a would impose no bar to *voluntary* price-fixing schemes that artificially inflate

prices for consumers. Moreover, as Tempur-Pedic argued below and has not disputed on appeal, Supreme Court’s narrow reading of “enforceable or actionable at law” would permit manufacturers to enforce even involuntary price-fixing agreements *in equity*—enabling parties to obtain specific enforcement of contracts setting minimum retail prices for consumer goods. See AG Br. at 19-20. In short, rather than protecting consumers, § 369-a would protect only the participants to price-fixing schemes and would affirmatively allow for specific enforcement of price-fixing contracts—a powerful weapon to enforce such agreements—so long as no damages were sought.

That tortured reading of the statute cannot be squared with the Legislature’s goal of making resale price-fixing “illegal, period,” Assembly Debates 2068, 2117 (1975) (Bill No. A3916), and categorically prohibiting such price-fixing to protect consumers and ensure lower consumer prices. See AG Br. at 22-25. Tempur-Pedic admits as much. It does not attempt to defend Supreme Court’s interpretation of GBL § 369-a as consistent with the Legislature’s purpose in enacting the statute, or with the specific heading the Legislature deliberately drafted—an unambiguous declaration that “[p]rice-fixing [is]

prohibited.” Instead, Tempur-Pedic argues that both sources of statutory meaning are “irrelevant.” Tempur-Pedic Br. at 27, 28. But in interpreting a statute, “[t]he Court’s primary goal is to . . . determin[e], and implement[], the Legislature’s intent,” *People v. Litto*, 8 N.Y.3d 692, 697 (2007), using “*all available interpretive tools* to ascertain the meaning of [the] statute,” *Riley v. County of Broome*, 95 N.Y.2d 455, 464 (2000) (emphasis added); *see also Matter of Sombrotto v. Christiana W.*, 50 A.D.3d 63, 68 (1st Dep’t 2008). This Court is not compelled to construe the text of a statute in isolation, ignoring other sources of statutory meaning—including, in particular, legislative history. *See Riley*, 95 N.Y.2d at 463; *Matter of Sutka v. Conners*, 73 N.Y.2d 395, 403 (1989).

Here, Tempur-Pedic contends that § 369-a unambiguously *authorizes* many resale price-fixing agreements simply because it does not use the specific terms “illegal” or “unlawful.” Tempur-Pedic Br. at 21. But there is no clear-statement rule that requires the Legislature to use particular talismanic language when it seeks to eliminate conduct that harms consumers—indeed, the General Business Law contains

many prohibitions on harmful practices that do not use the word “illegal” or “unlawful.” *See, e.g.*, GBL §§ 391-k(2)(a)-(b), 391-p.

When a statute declares that a prohibited agreement is “not enforceable,” as § 369-a does, the absence of the word “illegal” is entirely understandable and unexceptional. Contractual illegality and unenforceability are closely linked—particularly when the substantive terms of the agreement violate public policy, a baseline rule Tempur-Pedic does not contest. *See, e.g., Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 N.Y.2d 124, 127 (1992) (“Illegal contracts are, as a general rule, unenforceable.”). While the Legislature *can* make particular contracts unenforceable, but not illegal, Tempur-Pedic has provided no evidence from the history or purpose of GBL § 369-a that the Legislature intended to draw that technical distinction with respect to resale price-fixing. Nor has Tempur-Pedic explained how such a distinction fits with the Legislature’s broad goals of addressing consumer harm, high prices, and artificially restricted competition. Without such indicia of legislative intent, the mere absence of the word “illegal” is not dispositive and cannot prevent this Court from considering all other relevant sources of statutory meaning. *See N.Y. State Bankers Ass’n v.*

Albright, 38 N.Y.2d 430, 436 (1975) (“When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’”).

Tempur-Pedic’s proposed alternative interpretations of § 369-a impermissibly deprive the statute of *any* pro-consumer purpose. Tempur-Pedic argues, for example, that the Legislature could have meant § 369-a to do nothing “more than return [resale price-fixing] agreements to the realm of antitrust law.” Tempur-Pedic Br. at 31. But if that were all that the Legislature intended to do, then the repeal of New York’s Fair Trade Act would have been enough to accomplish that purpose—as the Supreme Court recognized in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* with respect to the analogous federal statute. *See* 551 U.S. 877, 905 (2007). Instead, unlike Congress, the Legislature enacted a specific provision regulating—and prohibiting—resale price-fixing (see AG Br. at 26-27), which state officials, including the then-Attorney General, uniformly understood as prohibiting resale price-fixing for the benefit and protection of New York consumers (see AG Br. at 22-25).

Tempur-Pedic attempts to give some independent meaning and effect to § 369-a—short of a general prohibition of resale price-fixing agreements—by arguing that the statute “permit[s] retailers to disregard” such agreements “without fear of suit for breach of contract and resulting damages.” Tempur-Pedic Br. at 31. But the Legislature intended to prohibit resale price-fixing *categorically* (see AG Br. 6-7)—not simply to permit retailers to selectively disregard individual price-fixing agreements if they so *chose*. Tempur-Pedic does not deny, nor could it, that consumers still suffer from higher prices and less competition when retailers are voluntary participants in a price-fixing scheme. The most successful price-fixing schemes, after all, do not result in contract suits. Indeed, as the Legislature expressly recognized when it enacted § 369-a, complicit retailers may be happy to charge consumers inflated prices. *See* Assembly Debate at 2081 (price-fixing “lock[s] in the profit of the retailer which in most circumstances is much too high to justify a reasonable price to the consumer”), 2130 (“the retailer . . . is always pushing the fair-traded item because it guarantees him a markup which is unconscionable”). And Tempur-Pedic’s hyper-technical reading would permit even *involuntary* price-

fixing schemes to survive, because (under its reading) the manufacturer could successfully “enforce” the agreement outside of court so long as it could successfully rely on extra-judicial coercion and threats.

Again, these are economic and practical realities—which Tempur-Pedic does not dispute—that would cripple § 369-a as a meaningful consumer-protection measure. Indeed, under Tempur-Pedic’s restrictive interpretation, § 369-a would essentially have *no effect* at restoring price competition. At best, it would prevent contract actions for damages, but it would still permit suits for *specific enforcement* of resale price-fixing agreements against non-consenting parties. That result protects no party except for price-fixing manufacturers, and it advances no coherent public policy of any kind—let alone one that is reflected in the legislative history.

Finally, Tempur-Pedic contends that a straightforward reading of GBL § 369-a, as “prohibit[ing]” resale price-fixing, is both contrary to precedent and unconstitutional. *See* Tempur-Pedic Br. at 22-24; 34-38. The recent federal district court cases Tempur-Pedic cites, however (*see* Br. at 22-24), rely upon a single state trial court decision—Supreme Court’s decision in this case—for their interpretation of § 369-a, and all

involved private lawsuits to which the Attorney General was not a party. *See Worldhomecenter.com, Inc. v. KWC America, Inc.*, No. 10-7781, 2011 WL 4352390, at *4 (S.D.N.Y. Sept. 15, 2011); *WorldHomeCenter.com, Inc. v. Franke Consumer Prods., Inc.*, No. 10-3205, 2011 WL 2565284, at *5 (S.D.N.Y. June 22, 2011).¹ Interpretations of state statutes by federal district courts are not authoritative or binding; nor is there any reason to expect that they will be correct without the benefit of guiding appellate decisions from this Court and the New York Court of Appeals.² *See, e.g., Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 80 A.D.3d 293, 301-03 (1st Dep’t 2010), *aff’d*, 18 N.Y.3d 341 (2011).

¹ A third district court decision that Tempur-Pedic cites in a footnote (Br. at 24 n.10), *WorldHomeCenter.com, Inc. v. PLC Lighting, Inc.*, No. 10-4092, 2011 WL 7416334 (S.D.N.Y. July 05, 2011), assumed that *Leegin* controlled the interpretation of § 369-a “[i]n the absence of any authority construing Section 369–a.” *Id.* at *5.

² Tempur-Pedic asserts that, almost twenty-five years ago, the Attorney General at the time submitted a brief suggesting—in a single sentence—that GBL § 369-a did not make resale price-fixing agreements illegal. *See* Tempur-Pedic Br. at 26. But the meaning of GBL § 369-a was not centrally at issue in that case, and the Court of Appeals made no mention of the statute in its decision. In any event, neither the Attorney General nor this Court is bound by a one-sentence, “summar[y]” rebuttal to a “subsidiary argument[]” made in an unrelated case a quarter of a century ago (R. 284).

Moreover, a straightforward reading of GBL § 369-a as prohibiting price-fixing, in accordance with the statute's language and history, would hardly be either unconstitutionally vague or unforeseeable, as Tempur-Pedic asserts. Section 369-a "clearly describe[s] the prohibited conduct" of resale price-fixing, and it expressly declares such price-fixing "prohibited." *State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 466 (1976). Moreover, unlike in *Mobil Oil*, Tempur-Pedic cannot claim that resale price-fixing has *never* been illegal in New York. *Compare id.* at 465 (noting that purported price discrimination at issue had not been declared illegal for eighty years). To the contrary, as Tempur-Pedic admits, the Legislature's repeal of the Fair Trade Act in 1975 was intended to make resale price-fixing "once more illegal *per se*" in New York. Tempur-Pedic Br. at 12. To be sure, thirty-two years later the Supreme Court overturned nearly a century of federal precedent and concluded that resale-price fixing should no longer be deemed *per se* illegal under federal law. *See Leegin*, 551 U.S. at 881-82. But when the New York Legislature enacted 359-a in 1975, it is undisputed that resale-price fixing was *per se* illegal under both state

and federal law, and when *Leegin* changed the federal rule in 2010 New York made no change in state law.

Thus, there is nothing “unforeseeable” or “unconstitutionally expansive” about interpreting § 369-a as making resale price-fixing agreements illegal. When GBL § 369-a was enacted, and for decades afterwards, resale price-fixing *was unlawful*. The only dispute in this case is whether such price-fixing was specifically prohibited under GBL § 369-a, or whether the statute merely enacted a private defense against damages claims based on contracts made unlawful by other provisions of law. Here, the text, history, and purpose of § 369-a all confirm the former reading: that § 369-a specifically prohibits resale price-fixing, and that the Legislature enacted a specific statute—despite the existence of other antitrust laws—to declare and enforce New York’s unique, independent, and compelling interest in protecting consumers. That choice should be honored here.

B. Judicially Created Federal Antitrust Doctrines Do Not Control This Court’s Interpretation of State Law.

Independently of the statutory text and legislative intent, Tempur-Pedic urges this Court to follow two judicially created federal

antitrust doctrines to narrow the scope of GBL § 369-a. First, Tempur-Pedic asserts that § 369-a cannot prohibit resale price-fixing under New York law because the U.S. Supreme Court recently held in *Leegin* that such price-fixing is not *per se* illegal under federal antitrust statutes. See Tempur-Pedic Br. at 32-34. Second, Tempur-Pedic contends that the existence of a “contract provision” under § 369-a should be determined, not by reference to New York contract law, but rather under the federal *Colgate* doctrine. See *id.* at 41-42 (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919)). Both arguments fail for a reason Tempur-Pedic cannot dispute: federal antitrust law does not override state law or control the interpretation of state statutes. See AG Br. at 26-29.

The New York Legislature is not bound by federal antitrust requirements or federal policy in deciding how best to protect New York consumers. See *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988); *California v. ARC Am. Corp.*, 490 U.S. 93, 102-03 (1989). GBL § 369-a is a New York-specific statute—with no federal analogue or counterpart—that enacts a specific pro-consumer state policy. See AG Br. at 26-27. Interpreting § 369-a to simply mirror federal law would

thus nullify the specific and unique choice the Legislature made as a matter of New York law. *Leegin's* discussion of the history of the federal antitrust statutes and federal regulation of resale price-fixing, 551 U.S. at 904-05, highlights the critical difference in this case: the New York Legislature enacted what Congress never attempted—a freestanding statutory prohibition of resale price-fixing in GBL § 369-a. That statute is entitled to enforcement on its own terms without reference to federal requirements that reflect fundamentally distinct policies.

C. The Petition Adequately Alleges Both a Contract to Fix Resale Prices and a Fraudulent Scheme.

Finally, even if federal requirements applied and factual disputes existed as to the existence, terms, or effect of the alleged resale price-fixing agreement in this case, Tempur-Pedic was not entitled to threshold dismissal of the Attorney General's petition. Tempur-Pedic contends that Supreme Court properly dismissed the petition because the court found *insufficient evidence* to support the Attorney General's allegations of (a) a "contractual provision" to fix prices, and (b) "persistent fraud" in compelling retailers and consumers to adhere to

Tempur-Pedic's minimum prices. Tempur-Pedic insists that outright dismissal was appropriate because the Attorney General moved for a summary determination "against Tempur-Pedic pursuant to CPLR 409(b)," seeking immediate injunctive relief based on the allegations in the petition. Tempur-Pedic Br. at 17.

Tempur-Pedic's argument betrays a basic misunderstanding of New York law. A special proceeding under C.P.L.R. article 4 is a summary procedure that permits the expeditious resolution of claims by streamlining motions practice and compressing pretrial matters. But article 4 does not deprive petitioners, including the Attorney General, of the right to proceed to trial if facts are disputed. To the contrary, a court may reach "a summary determination" upon the papers only if "no triable issues of fact are raised." C.P.L.R. 409(b). If there is a factual dispute, then the case "shall be tried forthwith." *Id.* 410; *see Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980) (opposing party defeats a request for summary determination by showing facts requiring a trial); *Thompson v. Cooper*, 91 A.D.3d 461 (1st Dep't 2012) (affirming denial of motion to dismiss in special proceeding when "the petition and the documentary evidence . . . raise[d] triable issues").

Supreme Court improperly ignored these rules in dismissing the Attorney General's petition, rather than simply denying the Attorney General's motion for summary determination and immediate injunctive relief. See AG Br. at 38. The court impermissibly rejected the Attorney General's allegation of a price-fixing contract between Tempur-Pedic and Tempur-Pedic's retail partners because "[t]he evidence presented by the [Attorney General] fails to demonstrate . . . a meeting of the minds" and because there was insufficient "documentation annexed to the petition" (R. 19). But the record contains substantial evidence and specific allegations that Tempur-Pedic and its authorized retailers entered into a "basic agreement" to fix minimum resale prices, *Kleinschmidt Div. of SCM Corp. v Futuronics Corp.*, 41 N.Y.2d 972, 973 (1977), and that Tempur-Pedic both communicated and regularly enforced "the rules of the game," *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 766 (1984) (quotation marks omitted). Such allegations and proof are sufficient to survive a motion to dismiss. See generally AG Br. at 31-35.

Likewise, Supreme Court improperly rejected the Attorney General's allegation that Tempur-Pedic defrauded retailers and

consumers into believing that its minimum-price policy was compulsory—again because of “[t]he scant evidence submitted by the [Attorney General] on this issue” (R. 15). The weight of the evidence is not a permissible ground for dismissing a petition outright. But in any event, the record demonstrates that numerous retailers felt compelled to “adhere to [Tempur-Pedic’s] pricing policy” (R. 154), despite Tempur-Pedic’s present claim that the policy was unenforceable; and that in visit after visit, consumers who asked for discounts were uniformly told that the retailers had no discretion to depart from Tempur-Pedic’s mandated prices (R. 178-234).

Supreme Court improperly inferred from the evidence that Tempur-Pedic did not engage in prohibited price-fixing or fraud, and it erred in denying the Attorney General’s request for summary determination and injunctive relief. But even if its inferences were supportable, which they were not, they at most create a disputed issue of fact. Instead of proceeding to trial, Supreme Court improperly dismissed the Attorney General’s petition altogether. This Court should reverse.

CONCLUSION

Supreme Court's order dismissing the Attorney General's petition should be reversed.

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Respectfully submitted,

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