Antitrust In Retail: Rude Awakening For FTC In Tempur Sealy

By **David Kully** (February 24, 2025)

This article is part of a quarterly column that explores recent antitrust developments in the retail industry and their potential impacts on competition. In this installment, we discuss the recent action aimed at the market for mattresses.

David Kully

Vertical mergers, which do not eliminate a competitor from the market, can still harm competition if the effect is to weaken competitors by limiting their access to services — like distribution services — on which they depend to compete.[1]

This was what was at issue in the Federal Trade Commission's challenge to the proposed $4 billion acquisition by Tempur Sealy International Inc. of Mattress Firm Group Inc.

The FTC asserted that control by Tempur Sealy, the "world's largest bedding provider,"[2] of Mattress Firm, the "nation's largest mattress retailer,"[3] would empower Tempur Sealy to harm competition by blocking or limiting access by rival mattress manufacturers to critical space in Mattress Firm stores.

However, to block the transaction, the FTC had to come forward with evidence to support its view of the transaction and, when called to do so, failed to produce the goods.

After a seven-day preliminary injunction hearing in November 2024 involving testimony from 18 fact witnesses and three experts, the U.S. District Court for the Southern District of Texas on Jan. 31 denied the FTC's motion, emphatically rejecting both the importance of Mattress Firm as a critical gatekeeper for mattress distribution and that there was a market for premium mattresses priced above $2,000 in which the transaction would harm competition.

While Tempur Sealy bears significant similarities to the U.S. District Court for the Southern District of New York's Oct. 24, 2024, decision for the FTC in its challenge to Tapestry Inc.'s acquisition of Capri Holdings, it arrives at a different outcome for the agency.

The case also bears a striking resemblance to the facts in Brown Shoe v. U.S.,[4] a foundational 1962 U.S. Supreme Court decision concerning how courts assess relevant markets, but that also involved a vertical merger between a manufacturer and a retailer, again coming out differently than it did for the FTC in Tempur Sealy.

The reasons for the different outcomes provide useful guidance for future cases involving markets defined around price segments and manufacturer-retailer mergers.

Establishing the existence of a relevant market based around just a segment of products demands reliable evidence of industry recognition and distinct product features.

A principal basis for the court's rejection of the FTC's effort to stop Tempur Sealy from acquiring Mattress Firm was the FTC's failure to prove the existence of the market in which it thought competition would be harmed — a relevant market for "premium" mattresses,

defined to be mattresses priced $2,000 and above.[5]

The court recognized that price and quality differences can define market boundaries when supported by commercial realities.[6] But the court found that the "problem" for the FTC's market of "premium" mattresses priced $2,000 and above was the lack of evidence for such a "bright-line distinction ... based so rigidly on price."[7]

To determine whether the FTC had proven its market, the court relied principally on the Brown Shoe practical indicia,[8] focusing most closely on whether the industry and public recognized a market for mattresses priced $2,000 and above and on whether mattresses within the proposed market had distinct characteristics.

Although the FTC identified some ordinary-course Tempur Sealy documents that segmented the market as the FTC proposed, other Tempur Sealy documents looked at the market differently and, more importantly to the court, the $2,000-and-above distinction was not recognized by other industry participants, including notably by Mattress Firm itself, which defined a "premium" segment around mattresses priced above $1,000.[9]

Mattress purchasers also did not distinguish between mattresses within the FTC's proposed market and outside it and instead "shop across price points."[10]

And retailer pricing and promotional practices led to significant differences in pricing in some instances for the same mattress, leading the court to observe that "it's simply the pricing predilection of mattress retailers at a given moment that dictates whether any particular mattress is within or outside the market," rendering pricing distinctions "economically meaningless."[11]

The court also found no "special" characteristics "unique" to mattresses priced at $2,000 or above, such as particular features or materials that "clearly differentiate" those mattresses from mattresses priced below $2,000.[12]

To the contrary, the FTC's proposed delineation of the market around a specific price point led to "bizarre results" in which a king-sized version of a mattress might be in the "premium" mattress market while the queen-sized version of the same mattress — with identical quality and materials — would be outside of the relevant market.[13]

In concluding that the FTC failed to prove its proposed relevant product market,[14] the court specifically distinguished the recent conclusion in FTC v. Tapestry Inc.[15] that the FTC had established a market for "accessible luxury" handbags that sat between lower-priced mass-market handbags and more expensive true luxury handbags.[16]

Price differences were one basis on which "accessible luxury" handbags were distinguished from other handbags but, unlike in Tempur Sealy, the FTC did not divide market segments at a specific price point and instead defined the market around a range of prices that generally excluded mass-market and luxury products.[17]

Also unlike in Tempur Sealy, the court in Tapestry found the FTC's proposed affordable luxury handbag market was supported both in Tapestry documents and in widespread recognition by the industry, and also that there were distinct features of handbags in that market segment that distinguished them from other handbags.

In particular, the court noted the existence of "reams of ordinary-course documents" supporting use of "accessible luxury" and similar terms "frequently and consistently," not

only by the merging parties but also by other industry participants.[18] The market was also supported by testimony from "[n]umerous witnesses from all parts of the handbag industry."[19]

And, concerning differences in product characteristics, the court found "a significant difference in the materials and craftsmanship commonly used in accessible-luxury handbags compared to mass-market handbags."[20]

Tempur Sealy recognized that it is possible to define antitrust product markets based on specific price and quality segments of a larger market,[21] but the court refused to recognize the specific market proposed by the FTC because it lacked consistent industry recognition or product features that distinguished mattresses priced above $2,000 from other mattresses.

Defining antitrust markets around price or quality segments remains a viable path for the government, but differences between Tapestry and Tempur Sealy show that the antitrust agencies have to produce the goods and come forward with convincing evidence if they hope to succeed.

Reliable evidence of market foreclosure is essential to establish harm from a vertical merger.

In addition to rejecting the FTC's proposed market consisting of mattresses priced $2,000 or above, the Tempur Sealy court also found, as an independent basis for denying the FTC's motion to enjoin the transaction, that Tempur Sealy acquiring control of Mattress Firm's retail stores and the ability to deny floor space to other mattress manufacturers was not likely to harm competition.

The court observed that floor space at mattress retailers is a "particular constraint" because retailers are limited to available square footage,[22] that Tempur Sealy, after acquiring Mattress Firm, would clearly have the ability to deny that floor space to competitor manufacturers,[23] and that Tempur Sealy would also have the incentive to do so if it meant becoming more profitable.[24]

But other evidence led the court to conclude that even complete exclusion of rival mattress manufacturers from Mattress Firm would have little impact on competition.

Principal among this evidence was Tempur Sealy's exclusion from Mattress Firm from 2017 to 2019, a market event that did not cause Tempur Sealy to "suffer catastrophic loss" and instead caused it to "compete vigorously by redirecting its efforts and funds to sell mattresses through new channels."[25]

Tempur Sealy during that period "more than recaptured its profitability,"[26] and the court observed no harm to competition from the episode based on evidence that mattress prices declined slightly.[27] The court viewed Tempur Sealy's experience to have been unsurprising, noting that "rivals can thrive without relying on Mattress Firm" because 75% of sales of mattresses at prices above $2,000 took place at "thousands and thousands" of retail options other than Mattress Firm.[28]

The court further rejected as completely lacking in credibility concerns expressed by self-interested competitors that the merged firm would, in fact, proceed to remove them from Mattress Firm.

In particular, the court found "no credibility whatsoever" in testimony by the chairman of the board of Serta Simmons Bedding LLC, Tempur Sealy's largest competitor, that the merger posed an "existential threat" to Serta Simmons because the merged firm would "kick us off the floor completely."[29]

"[O]f considerable concern to the Court" were Serta Simmons' contemporaneous representations to a bankruptcy court that it expected its sales at Mattress Firm to increase.[30] The court questioned Serta Simmons' chairman about differences between his in-court testimony and the company's statements in bankruptcy and received no "coherent response."[31]

The court made it clear that the "unusually extreme" lack of persuasiveness of this testimony extended "equally to the testimony of all other rival suppliers" who stated that they too expected to be "removed outright" from Mattress Firm, and it even infected subsequent expert testimony for the FTC that relied on those predictions.[32]

The lack of reliable evidence of foreclosure distinguishes Tempur Sealy from the factually analogous vertical merger the Supreme Court reviewed in Brown Shoe.

Like Tempur Sealy in mattress manufacturing, Brown Shoe was one of the "leading manufacturers of men's, women's, and children's shoes."[33] And like Mattress Firm in mattress retailing, Kinney's, which Brown Shoe had acquired, "operated the largest independent chain of family shoe stores in the Nation."[34]

Given their market positions, the court believed that "no merger between a manufacturer and an independent retailer could involve a larger potential foreclosure."[35]

Moreover, based on Brown Shoe's "avowed policy of forcing its own shoes upon its retail subsidiaries" along with evidence that Brown Shoe had in fact increased sales of its shoes through Kinney outlets at the expense of independent shoe manufacturers,[36] led the court to conclude that foreclosure and harm to competition was likely.[37]

There is no question that the value of Brown Shoe as indicative of how the government might succeed in proving foreclosure in mergers between manufacturers and retailers is severely limited by significant changes in antitrust law and economics since the case was decided in 1962.

At the time it acquired Kinney, Brown Shoe's nationwide market share in shoe production was only 4%; and Kinney as a retailer accounted for less than 2% of shoe sales.[38]

It is, of course, understood today that "'small' foreclosures cannot impair competition,"[39] as per the Tempur Sealy case, and there is no realistic chance that the FTC or the U.S. Department of Justice would today seek to block Brown Shoe's acquisition of Kinney based on those shares.

But under the prevailing standards at the time, the DOJ succeeded in providing convincing evidence that the transaction threatened foreclosure — an achievement the FTC failed to match in Tempur Sealy but that will remain the agencies' burden in future challenges to mergers of manufacturers and retailers.

Success by plaintiffs in merger litigation ultimately always comes down to supplying facts that will allow the reviewing court to support predictions about the transaction's likely effects. In Tempur Sealy, the FTC just failed to produce the goods.

David Kully is a partner at Holland & Knight LLP.

[1] See, e.g., U.S. Department of Justice and Federal Trade Commission, Merger Guidelines § 2.5.A (2023).

[2] FTC v. Tempur Sealy Int'l, Inc., No. 4:24-cv-2508, 2025 WL 384493, at *2 (S.D. Tex. Jan. 31, 2025).

[3] Id. at *41. See also id. at *47 ("Mattress Firm is the largest retailer of mattresses across all price points").

[4] 370 U.S. 294 (1962).

[5] Tempur-Sealy, 2025 WL 384493, at *1, *14.

[6] Id. at *15.

[7] Id.

[8] Id.

[9] Id. at *15-17.

[10] Id. at *17.

[11] Id. (emphasis in original).

[12] Id. at *18.

[13] Id. at *19.

[14] Id. at *27.

[15] See id. at *17 (citing FTC v. Tapestry, Inc., No. 1:24-cv-03109, 2024 WL 4647809 (S.D.N.Y. Oct. 24, 2024)).

[16] Tapestry, 2024 WL 4647809, at *10.

[17] Id. at *16 (noting an "entry price point" of approximately $100 and a top price of $1,000).

[18] Id. at *20. The court found testimony by Tapestry and Capri witnesses attempting to downplay the significance of their regular references to "accessible luxury" or to claim that the term lacked no meaning at all to lack credibility. Id. The court in Tempur Sealy shared skepticism of "self-serving attempts" by merging parties to "minimize [the] plain meaning" of ordinary-course documents. Tempur Sealy, 2025 WL 384493, at *27.

[19] Tapestry, 2024 WL 4647809, at *20.

[20] Id. at *12.

[21] Tempur Sealy, 2025 WL 384493, at *15.

[22] Id. at *4.

[23] Id. at *28-29.

[24] Id. at *31 ("The FTC successfully establishes that the combined firm will have a profit-aligned incentive to increase the sales of Tempur Sealy mattresses after acquisition by excluding rivals from the Mattress Firm floor. Ordinary-course evidence confirms both this profit potential and its recognition.").

[25] Id. at *4.

[26] Id.

[27] Id. at *48.

[28] Id. at *35-36.

[29] Id. at *6-8.

[30] Id. at *7.

[31] Id.

[32] Id. at *8.

[33] Brown Shoe, 370 U.S. at 331.

[34] Id.

[35] Id. at 331-32.

[36] Id at 304 & n.8

[37] Id. at 334.

[38] See id. at 302-03.

[39] See Tempur Sealy, 2025 WL 384493, at *43 (quoting Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1004f (5th ed. 2025)).