

How Cleary, Simpson Thacher Went To The Mattresses With FTC

By **Bryan Koenig**

Law360 (March 19, 2025, 5:07 PM EDT) -- The Federal Trade Commission's attempt to block Tempur Sealy's \$5 billion bid to acquire retailer Mattress Firm suffered a likely fatal blow when a Texas federal court refused to put the merger on hold.

The FTC said company documents showed Tempur Sealy scooped up Mattress Firm so it could limit rivals' access to crucial floor space, but attorneys for the companies say the agency got lost in "soundbites" that obscured "objective" market realities.

Tempur Sealy's attorneys with Cleary Gottlieb Steen & Hamilton LLP and Mattress Firm's with Simpson Thacher & Bartlett LLP managed to walk the deal over the finish line in early February, after convincing a Texas federal judge to deny the FTC a preliminary injunction blocking the transaction until an in-house case could decide its merits.

Key to the late January win, attorneys say, was in beating the FTC's claim that company documents showed Tempur Sealy planned to use its ownership of the retail network to limit its rivals' access to their "single most important retail channel," hurting their ability to compete and potentially leading to closure of rivals' factories.

One of the most significant lessons is that market realities are more convincing than soundbites, said Cleary's Ryan A. Shores.

"Objective facts here really won the day," said Shores.

Those facts, attorneys said, revealed severe limits on Mattress Firm's role as "kingmaker" when it comes to providing floor space to manufacturers, despite a company document describing it as such. Industry evidence, they said, showed that other mattress companies were able to compete successfully without Mattress Firm floor space or even turned down an offer to be featured in its stores.

"It was a linchpin to the judge's decision," Sara Y. Razi, a Mattress Firm attorney with Simpson Thacher, said of examples of success without Mattress Firm.

U.S. District Judge Charles Eskridge called Mattress Firm's "kingmaker" status "overrated" when mattress makers have many thousands of retailers to reach consumers, as well as direct sales.

"There's no doubt that Mattress Firm has carved out for itself an enviable position in the retail channel

of the mattress industry. But its self-referential accolades don't make them so, where the evidence puts its actual position in a far less-dominant context," the judge said in the 115-page opinion unsealed Feb. 4, a day before the companies closed the deal.

Ironically, Tempur Sealy was able to show it did just fine without space on the Mattress Firm floor. Judge Eskridge specifically noted the two-year breakdown in the relationship between Tempur Sealy and Mattress Firm, with no Tempur Sealy products appearing in the retailer's stores from 2017 to 2019.

"That experience showed Tempur Sealy's ability to achieve a recapture rate over one hundred percent, while also more than recapturing its profitability, even before it was welcomed back to Mattress Firm ... It did so by competing vigorously through other channels available to it, with no apparent barrier to entry preventing it from doing so," Judge Eskridge said.

According to Shores, the lessons of experience show the limits to relying on economic predictions for the future.

"There is a role for economists to predict the outcome of the merger in terms of the competitive effects. But some of the most compelling evidence can be natural experiments or things that you look to in the past, and the judge really relied on that here," he said. "I think the teaching from this is looking back in the past often provides you the answer to what is likely to occur in the future."

While Judge Eskridge refused to block the deal, and the FTC opted not to appeal that decision, the agency might not yet be done with the transaction. The commission opted Feb. 18 to withdraw its in-house merger case from adjudication, "in order to consider whether the public interest warrants further litigation." Pursuing merger cases purely in-house after a district court loss and without an appeal would be an extraordinary move the agency hasn't tried in decades, although the Biden-era FTC did flirt with the possibility.

The mattress challenge itself was approved on a 5-0 vote in July, with Republican Commissioners Andrew Ferguson (now chairman under President Donald Trump) and Melissa Holyoak joining with the agency's Democrats. Holyoak said in a statement at the time that while vertical mergers, or pairing firms at different points on the supply chain, "are more likely to generate efficiencies that prevent anticompetitive effects," she supported this challenge "based upon the substantial evidence generated by staff's thorough investigation, especially the parties' own ordinary-course documents."

The FTC declined to comment for this story, including on the fate of the in-house challenge.

Enforcers alleged that Tempur Sealy could use the deal to block rival mattress suppliers from selling in Mattress Firm's 2,300 stores, hurting competition, especially for mattresses that cost \$2,000 or more.

But Judge Eskridge rejected the existence of a market for "premium" mattresses pegged to a specific price point and said most vertical mergers do not generally harm competition. The judge cited testimony from various mattress suppliers and others in the industry that identified mattresses selling for \$1,000 or more as "premium" but also testified that customers shop across price points. The rejection of the FTC's proffered market definition proved to be a huge blow.

"On the whole, then, where a vertical acquisition such as this implicates a far wider range of products or services than a much smaller segment targeted as a concern by the FTC, it's appropriate to infer that the acquisition is either neutral or beneficial as to that much wider range," the judge said.

A key part of argument, Razi said, came down to how much of the market that the deal could foreclose by giving Tempur Sealy direct control over Mattress Firm as a distribution outlet. Judge Eskridge found that the deal at most risked cutting off 8.8% of the market for mattresses priced at \$2,000 or more, a percentage he called overstated.

"The foreclosure share was just lacking in magnitude," Razi said.

A critical part of the trial win, Shores said, was in undermining the testimony of a key FTC witness, Serta Simmons board chairman Mark Genender, who'd raised concerns Tempur Sealy could use the deal to kick Serta off the floor at Mattress Firm. On the witness stand, fellow Cleary attorney Heather S. Nyong'o confronted Genender with filings from Serta's 2023 bankruptcy in which the company never expressed this concern and even predicted in its restructuring plan that its sales at Mattress Firm would increase over the next five years. Judge Eskridge noted that Genender "had no coherent response" when confronted with the bankruptcy assertions.

"Not only did the judge not credit his testimony as one of the most significant third parties, but said that influenced the thinking around the experts too," Shores said. "Because it was also inconsistent with the expert testimony by the FTC that there would be foreclosure when you have one of the biggest suppliers through Mattress Firm saying, in fact, in a bankruptcy proceeding, 'We're going to grow.'"

To try and address enforcer concerns going in, Tempur Sealy had agreed to unload 180 stores to Mattress Warehouse ahead of the merger challenge. It had also offered to reserve 20% of Mattress Firm's floor space for rival brands for the next five years but revised the offer following questions from the court during closing arguments to preserve around 43% of Mattress Firm's "premium" slots for third-party brands.

Judge Eskridge said the challenge on its face failed. But even if it hadn't, those commitments resolve "any lingering concern," he said.

Shores said the judge handled the commitments cumulatively, offering a lesson for future merging parties who might employ multiple fixes to address enforcer antitrust concerns.

Mergers and acquisitions attorneys from both firms also had to game out a potentially lengthy challenge.

"The contract allowed us to have about 21 months between when we signed the deal and when we closed," in order to allow for time to argue the case, said Cleary's Kim Spoerri.

Taking part in the M&A negotiations for Mattress Firm was Simpson Thacher's Jonathan Corsico, who said the parties took the unusual step here of submitting the deal for review before signing the final acquisition agreement. While doing so created a risk of the deal's existence leaking to the public — which did happen here — Corsico said it also gave the companies key insight into what issues the FTC might raise. And based on the questions the agency asked in its in-depth probe, initiated before the deal closed, "everyone concluded that we had a good chance of winning" any challenge, Corsico said.

"The strategy of filing early certainly ... gave both companies more information about the risks that they were facing," he said.

The FTC is represented in-house by Stephen Rodger, Allyson M. Maltas, Amy Ritchie, Adam Pergament, Laura Krachman, Richard Mosier, Matthew E. Joseph, Xuan Ellen Gong, Arthur Durst, Ethan D. Stevenson, Noel Miller, William Sohn, Maggie Yellen, Clifford Sun Hwang, Jeanette Leary Pascale and JeanAnn Tabbaa.

Tempur Sealy is represented by D. Bruce Hoffman, Ryan A. Shores, Daniel P. Culley, Matthew I. Bachrack, Blair W. Matthews, Jacob M. Coate, Gabriel J. Lazarus, Heather S. Nyong'o and Lina Bensman of Cleary Gottlieb Steen & Hamilton LLP and Alex B. Roberts of Beck Redden LLP.

Mattress Firm is represented by Sara Y. Razi, N. Preston Miller, Lindsey C. Bohl, Avia Gridi, Nicholas Ingros and Geoffrey I. Schmelkin of Simpson Thacher & Bartlett LLP and Michelle E. Gray and Deborah C. Milner of Fogler Brar O'Neil & Gray LLP.

The case is Federal Trade Commission v. Tempur Sealy International Inc. et al., case number 4:24-cv-02508, in the U.S. District Court for the Southern District of Texas.

--Additional reporting by Matthew Perlman and Catherine Marfin. Editing by Jay Jackson Jr.

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