



The American Antitrust Institute

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**ALREADY STRUGGLING CONSUMERS HIT HARD THIS HOLIDAY SEASON BY
LACK OF DISCOUNTS ON PRICE-FIXED GIFTS AND OTHER PRODUCTS**

Recent Supreme Court Decision Has Eliminated Competitive Pricing and Many Discounts by Legalizing Price-Fixing, Leaving Consumers with Higher Prices and Fewer Choices

(WASHINGTON D.C.) Antitrust experts from the government, legal and academic communities joined retailers, “e-tailers” and consumer advocates in Washington, D.C. today to discuss the sweeping anti-consumer effect that newly legal price-fixing, also known as ‘resale price maintenance’ (RPM), has had on the cost of consumer products. Despite widespread discounting in parts of the market where competition is being allowed to work, holiday shoppers are finding fewer discounts this season on price-fixed products ranging from toys to baby strollers.

For nearly a century, manufacturers were prohibited from punishing businesses for selling their products at discounted prices. But last year, the Supreme Court overturned this critical consumer protection, potentially changing the face of U.S. discount retailing forever.

Calling on lawmakers and regulators to immediately address the significant anti-competitive and anti-consumer implications of legalized price-fixing, American Antitrust President Bert Foer said, “The Supreme Court underplayed the magnitude of the anticompetitive risks of price-fixing. The Court did not account for the fact that it leads to higher prices, reduced efficiency and lost innovation in retailing. They failed to recognize how those risks have grown with increasing retail concentration.”

For the 2008 holiday shopping season, many manufacturers are embracing their broad new legal powers, enacting price-fixing policies by setting minimum prices on their products and forcing retailers to refrain from discounting. These price-fixing policies have resulted in less competitive pricing for the products that are being subjected to resale price maintenance.

Small and medium-sized businesses have been hit especially hard by these policies. “For the small businesses that have a kitchen-table for a boardroom – and smarts and sweat for a line of credit – the Internet is the way to break through to the consumer and give them choice with low prices and quality products,” said Tod Cohen, vice president of global government relations, eBay Inc. “But make no mistake. Entrenched retail interests see those choices as a threat – and they will use the courts and business arrangements to squelch challenges to their very comfortable status quo.”

“In these tough economic times, consumers need retailers competing more than ever to offer them the best prices for their hard-earned money,” added Jacob Weiss, President of BabyAge.com, whose

small business has been targeted by manufacturers for trying to offer consumers good deals on pregnancy, infant and juvenile products. “These price fixing policies aren’t just putting small businesses like mine in peril, they’re also leading to higher prices at stores and little to no discount options for middle class shoppers who need those savings the most.”

Dictating minimum prices to retailers had been per se unlawful since 1911 under the Supreme Court’s decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* The Court’s 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* reversed that decision, ruling that price fixing be evaluated by applying a “rule of reason” analysis.

“Under current methods of applying the rule of reason, it is nearly impossible to mount a successful challenge against RPM abuses,” said Gregory T. Gundlach, guest editor of the Antitrust Bulletin’s special issue on RPM and Coggin distinguished professor of marketing at the University of North Florida. “The Court’s finding relied on untested economic theories and controversial assumptions concerning the marketplace. It leaves in its wake limited guidance to those in the business community and considerable uncertainty as to the future of price-oriented retailers in the U.S. retailing landscape.”

The panel of policymakers, including FTC Commissioner Pamela Jones Harbour, offered possible courses of action to address the impact of price fixing. Harbour announced that, beginning in January, the FTC will hold a series of four to six workshops exploring how to best distinguish between uses of RPM that benefit consumers and those that do not. Representatives from both House and Senate Judiciary committees announced their intention to hold hearings to address the issue in the spring.

Audio of the press conference will be available at www.antitrustinstitute.org.

About the American Antitrust Institute

The American Antitrust Institute is an independent non-profit education, research and advocacy organization. Since its formation in 1998, the AAI’s mission has been to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economy. To learn more about the AAI, please visit www.antitrustinstitute.org

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