

A fight for pricing rights
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BY JOAN VERDON
NorthJersey.com
STAFF WRITER

Discounters and online retailers are facing off against manufacturers in a battle over who has the right to set prices on merchandise ranging from blue jeans to Blu-ray players.

The fight has been escalating since a June 2007 Supreme Court ruling that overturned earlier interpretations of the Sherman Antitrust Act's prohibitions on price fixing. And it is expected to spark even more debate this year, as a struggling economy has led to deep discounting by retailers.

Internet retailers, who have lower overheads and can survive with slimmer profit margins, have argued they should be allowed to sell merchandise at deep discount, and contend manufacturers frequently threaten to withhold merchandise if they don't respect minimum prices.

The battle has caused at least two New Jersey-based retailers to take sides. Toys "R" Us of Wayne has been named as a defendant in a lawsuit stating that it pressured baby car seat and crib manufacturers to enforce minimum prices to curb Internet competition. On the other side of the issue, Marcy Syms, head of the Secaucus-based off-price clothing chain Syms, testified before Congress in 2007 in favor of prohibiting price restrictions.

A bill to amend the Sherman Act and specifically prohibit price setting was introduced in January by Sen. Herbert Kohl, D-Wis., who said his family, the founders of the Kohl's department store chain, had to fight price fixing by jeans manufacturers in the 1960s. The Senate Judiciary Committee is expected to hold hearings on the bill later this year. The Federal Trade Commission plans to hold two days of workshops on the issue on Feb. 17 and 19.

"What's at stake is price competition and the aggressiveness of price competition," said Bert Foer, president of the Washington-based American Antitrust Institute. Following the Supreme Court's decision in the 2007 case *Leegin Creative Leather Products Inc. v. PSKS Inc.*, it became "much easier for a manufacturer, or a manufacturer in conjunction with very big retailers, to control the resale price of a good," Foer said. As a result of the ruling, it still "is not per se legal" to set prices, "but it used to be per se illegal," he said. The court's ruling means that accusations of price fixing will be decided on a case-by-case basis, with much of the burden of proof falling on retailers who complain they have been harmed by price fixing.

One such retailer is online baby products seller BabyAge.com, which three years ago filed a complaint in U.S. District Court in Philadelphia against Toys "R" Us and its Babies "R" Us division. BabyAge.com, which was in Secaucus until it moved to Wilkes-Barre, Pa., four years ago, claims that Babies "R" Us induced high-end manufacturers such as stroller maker Peg Perego and baby-carrier producer BabyBjorn AB to set fixed prices for their products.

BabyAge.com co-founder and President Jacob Weiss, in a conference on restrictive pricing last month in Washington, said roughly a third of the 400 manufacturers of baby products the company deals with have minimum pricing policies. These policies keep consumers from getting the best deals, Weiss said, noting that he is forced to sell certain car seats for "\$40, \$50, \$60 more" than he wants to in order to keep his prices the same as Babies "R" Us.

An attorney for BabyAge.com said the lawsuit is proceeding and is on target to follow the court timetable. That timetable shows the case going to trial later this year. A spokeswoman for Toys "R" Us said the company does not comment on pending litigation.

Antitrust experts say consumers believe that price fixing is legal because it is common for popular electronics brands, such as Sony, Apple and Bose, to require retailers to all charge the same prices.

Such companies "are able to announce to retailers: 'This is our product and if you want to sell our product, this is the price we would like you to sell it at,' " said Gregory Gundlach, the Coggin Distinguished Professor of Marketing at the University of North Florida. Manufacturers are allowed to decide whom they want to do business with, and setting price conditions upfront allows for what appears to the consumer to be price fixing, he said.

"Strong products, strong manufacturers are able to do that," Gundlach said.

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