

Insights

THE AMAZON REGROWS: DC HIGH COURT REVIVES SUIT AGAINST AMAZON'S PRICING PRACTICES

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On August 22, 2024, the DC Court of Appeals revived a suit brought by the District of Columbia Attorney General's Office (DC AG) against Amazon. The suit, which the superior court previously dismissed, alleges that Amazon's policies violated DC's antitrust laws. Specifically, the DC AG's suit challenged Amazon's "price parity provision," its "fair pricing policy," and its "minimum margin agreements." These policies allegedly forced sellers to maintain higher prices across all platforms to avoid penalties from Amazon, thus stifling competition, reducing consumer choice, and increasing prices.

The DC Court of Appeals made a few notable findings that all businesses operating on online marketplaces, or enforcing similar policies, should keep in mind.

First, the DC Court of Appeals rejected Amazon's argument that Amazon competes with brick-and-mortar retailers, joining several courts that have reached the same conclusion for Amazon and other tech platforms. This is a significant addition to the growing consensus that online shopping is simply a different type of "product" than brick-and-mortar—as any parent who has tried to go shopping with a small child can attest. The DC Court of Appeals had "little difficulty concluding" that the DC AG plausibly "allege[d] that Amazon exerts substantial market power in the online retail marketplace" despite the same products being available at brick-and-mortar retailers.

The DC Court of Appeals was also persuaded that Amazon's pricing conduct could violate DC's antitrust laws. The court held that allegations about Amazon's "fair pricing policy," Amazon's higher fees (which can be as high as forty percent of a product's total retail price), and Amazon's extensive online surveillance network combine to prevent a seller from offering lower prices than the seller offers on Amazon. Simply put, it is plausible that Amazon's policies prevent sellers from "cutting out the middleman"—or finding a cheaper, more-responsive middleman—and then passing on the savings to shoppers.

Separately, the DC Court of Appeals credited the DC AG's allegations about the impact of minimum margin agreements. These agreements allegedly result in potentially millions of dollars in "true up" payments to Amazon from sellers. While the effect is allegedly similar to the fair pricing policies,

this is a distinct set of allegations that raises its own concerns. However, it is yet to be seen how far-reaching these minimum margin agreements are.

In a climate of increasing enforcement at the federal and state level, these holdings serve as a critical reminder for businesses operating in online marketplaces to carefully evaluate their pricing and contractual practices to ensure compliance with federal and state antitrust laws. Likewise, these findings indicate that sellers of all sizes may be impacted by allegedly anticompetitive conduct. The case will proceed, providing an opportunity for further scrutiny of Amazon's market practices and their broader implications for the online retail industry.

If you have any questions about these issues and their impact to your business, please reach out to BCLP's Antitrust & Competition team for further guidance.

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