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Point/Counterpoint, New AT Protection:

~~PROX~~ Congress Should Enact The "Resale Price Maintenance" Legislation Now Before It *measures protect Retail Competition*

Sometime this year, the U.S. Senate should pass S. 430, a counterpart to H.R. 585 which has already been approved by the House of Representatives. Together, the bills codify the 77-year old judicial prohibition against "resale price maintenance" -- i.e., a vertical conspiracy between a supplier at the top of the product/service distribution chain and dealers at the bottom of that chain to fix the retail prices charged to consumers. The bills also clarify the quantum of proof necessary to establish such a legal violation.

Vertical price-fixing runs counter to the very principle of free enterprise on which the American economic system is founded. The basic premise of our economy is that every business, no matter how small, should be allowed to compete. Competition results in the production of the widest variety and highest quality of goods and services at the lowest prices -- all to the greatest benefit of consumers. The antitrust laws govern the operation of this process.

By robbing independent retailers of freedom to determine the prices they will charge, resale price maintenance restricts competition and adversely affects consumer welfare. In fact, studies have indicated that vertical price-fixing may inflate prices by 18 to 27 percent at a cost to consumers in excess of \$1 billion annually.

In light of the preceding, the U.S. Supreme Court has never waived from the conclusion that resale price maintenance is per se, or automatically, illegal under the antitrust laws. The proposed legislation represents a Congressional reaffirmation of

this view, and resolves two different but related problems.

One such problem is presented by the current administration's Antitrust Division, which has refused to enforce and has actively attempted to eradicate the legal rule against resale price maintenance. In the 7 years of the current administration the Division has not filed a single case against vertical price fixers, although state attorneys general and private parties have filed numerous such actions in that time, recovering millions of dollars in the process. Additionally, the Division has promulgated guidelines purporting to set forth its law-enforcement policies but which in fact constitute an attempt to narrow the per se approach to vertical price-fixing. Even worse, the Division -- the primary entity charged with responsibility for enforcing the antitrust laws -- has intervened in several vertical price-fixing suits on behalf of defendants, urging the courts to abandon the per se rule in such cases. By codifying the current law, the legislation eliminates any legal confusion resulting from the Antitrust Division's actions in this regard.

The other problem which the legislation resolves is judicial confusion in the wake of the Supreme Court's decision in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984). There the Supreme Court upheld a jury's determination that a vertical price-fixing conspiracy occurred when a supplier terminated a retailer after receiving complaints from competitors about the retailer's discounting. However, due to language in the Court's opinion, uncertainty has arisen as to the amount and

type of evidence that must be presented in a lawsuit before the existence of such a conspiracy may be decided by a jury. In particular, Monsanto has been misapplied by some courts to require that, before even attempting to prove the conspiracy itself, the terminated retailer must first disprove the existence of any and all possible lawful explanations for the supplier's conduct.

The legislation rectifies this situation by providing that a terminated retailer need only introduce sufficient evidence from which a jury could reasonably conclude that a price-related complaint was a "major contributing cause" of its termination. The retailer is then entitled to have the jury decide whether the supplier and the complaining dealers engaged in a vertical price-fixing conspiracy.

By codifying the long-established per se illegality of resale price maintenance and clarifying the proof necessary to obtain a jury decision in such cases, the legislation reaffirms this country's commitment to a competitive economic system. It should be speedily enacted.