

Amazon's Most Favored Nations Policies Scrutinized Under Sherman Act

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Antitrust claims in a class action case filed against [Amazon](#) in U.S. Federal District Court will largely proceed, after the Court allowed most of the consumers' pricing claims to survive a motion for summary judgment. The Court dismissed a Sherman Act claim, but allowed most other claims to proceed. Of particular note, Amazon's "most favored nation" (MFN) policy will continue to be under scrutiny, despite the fact that courts typically do not find MFNs to be anticompetitive. It is widely recognized that MFNs, in fact, often serve procompetitive purposes.

Amazon sells directly to consumers, but also allows third-party merchants to sell products through Amazon. Many of those merchants also sell the same products on other platforms. Amazon commonly negotiates MFN provisions in its agreements with its larger third-party sellers. The MFN protections are meant to ensure that Amazon's sellers do not undercut Amazon's own prices when they are selling elsewhere.

The proposed class alleges that Amazon's MFN policy, and later its "fair pricing policy" – which the court deems to have the same intents and effects as the MFN policy– bar or strongly discourage third-party merchants that sell on the platform from offering better terms or lower prices elsewhere, including their own website. As the court summarized, plaintiffs in this case asserted that "Amazon charges higher fees for third-party merchants than competitor marketplaces and that these inflated fees are passed on to customers like Plaintiffs through higher prices." The claim is based on the assumption that these merchants would otherwise be able to sell their products for less in competitor marketplaces. The suit contends that the way Amazon runs its platform blocks competition from other platforms that could offer lower merchant fees, savings that could then be passed to consumers.

As we have [discussed](#) – in the context of a separate but similar case against Amazon in Washington District Court – the antitrust implications of MFN protections do not align neatly with claims under price gouging laws. Price gouging laws restrict price increases, creating a price ceiling for sellers. MFNs tend to create a floor, limiting downward pressure on prices since sellers are bound to not offer

goods at lower prices. The pairing of these two theories is relatively novel, and in states (like Washington) with relatively broad unfair pricing laws, MFN provisions may be subject to greater scrutiny.

While the order acknowledged that, “no Court has ever found a policy like these to violate the Sherman Act,” that alone did not “render these claims implausible” at the motion to dismiss stage. The suit will proceed in federal district court under federal antitrust law.

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