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Is the Robinson-Patman Act Returning? Or Was It Never Really Gone?

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The Federal Trade Commission (FTC) has heralded its increased antitrust scrutiny of price discrimination under the Robinson-Patman Act (RPA), though little has come of it to date. Yet, our review of trends in private enforcement reveals that price discrimination has long remained subject to private litigation, with real implications for businesses. Nonetheless, the prospect of greater government action in this area is cause for concern.

The Robinson-Patman Act

The RPA generally requires that a manufacturer treat all competing customers the same or in a proportionally equal manner. The RPA (15 U.S.C. § 13) was enacted in 1936 to protect smaller retailers' ability to compete against larger rivals. The RPA prohibits sellers from discriminating in price or promotional deals between two customers, when selling goods (not services) of "like grade and qualities" at roughly the same time in the same market, when the effect may be to substantially lessen competition between them.

Notably, buyers, like distributors or retailers, may also be liable under the RPA if they induce a seller to discriminate among competing buyers or knowingly obtain a discriminatory price from a seller.

In some ways, RPA claims are easier to bring than other antitrust claims. For most RPA claims, the plaintiffs must merely show harm to competition between a favored and disfavored buyer, rather than an adverse effect on competition generally in a properly defined market. The RPA's effect-on-competition element is thus usually easy for plaintiffs to meet, as receiving an unfavorable price compared with one's competitor will almost always have an adverse effect on competition with that favored competitor.

However, RPA claims have dissipated in the last few decades because two primary defenses have largely protected sellers from allegations of RPA violations:

1. Cost Justification –the price difference is justified by different costs in manufacture, sale, or delivery (including differences based on quantity purchased).
2. Meeting Competition –the price concession was given in good faith to meet a competitor's price.

Increased Government Enforcement?

Both the FTC and US Department of Justice (DOJ) have jurisdiction to enforce the RPA, though traditionally the FTC took the lead. Yet, neither agency has brought an enforcement action under the RPA for decades — indeed, the DOJ once advocated for RPA's repeal.

This may change. President Biden's July 2021 Executive Order on "Promoting Competition in the American Economy" called for the FTC Chair and Secretary of Agriculture to report practices violating the RPA to the White House Competition Council, particularly in the context of the food industry. Since then, FTC Chair Lina Khan and Commissioner Alvaro Bedoya have repeatedly foreshadowed increased enforcement under the RPA. In its June 2022 Enforcement Policy Statement, the FTC explained that Section 2(c) of the RPA is one of several legal options that can be used to combat the use of rebate and fee agreements offered by prescription drug manufacturers. The FTC also announced several investigations in the last year over potential price discrimination against companies in the beverage industry, and in March 2024, several members of US Congress submitted a letter to FTC Chair Kahn urging the agency to revive enforcement of the RPA in the food industry. Most recently, Commissioner Bedoya noted at the American Bar Association's meeting of antitrust lawyers that RPA's protection for small businesses is critical because there is "no competition without small competitors and new entrants."

Private RPA Lawsuits Remain a Constant

By contrast with the federal government's inaction, private lawsuits have been pursued on a relatively consistent basis over the last decade. About 100 new cases were filed in federal court with an RPA claim in the last few years. In each of the last three years, about six reported court decisions were issued addressing RPA claims. These recent cases have targeted a variety of industries, including the food and beverage and automotive industries.[1] The decisions highlight several key insights for businesses:

- Plaintiffs often target sellers for allegedly selling goods to "big box" integrated wholesalers/retailers at a lower price than to independent wholesalers who redistribute goods to retailers.[2]
- Plaintiffs have also targeted innovative rebate or discount programs, alleging that they constitute bribes or kickbacks.[3]
- Only two decisions in the last three years involved standalone RPA claims. Most RPA claims were brought alongside other antitrust claims under the Sherman Act, claims under consumer protection statutes, and contractual claims.
- Approximately half of the cases were dismissed, usually because plaintiffs were unable to show actual injuries or unable to show "antitrust injury," meaning that any actual injury was caused by the antitrust violation itself rather than some other cause.[4]
- The other half of the cases that proceeded past a motion to dismiss and into (expensive) discovery led to mixed results. For example, some plaintiffs were unsuccessful in finding

evidence sufficient to meet the required elements of an RPA claim, including the existence of comparable sales at reasonably contemporaneous times.[5] On the other hand, courts have been somewhat more willing to find that different types of sellers operate on the same functional level.[6] Because RPA claims require a showing of competitive injury — a largely individualized showing under the RPA — plaintiffs bringing these claims as class actions also face difficulties at the class certification stage.[7] Finally, the courts in these cases are reluctant to expand RPA claims beyond situations "resembling the original congressional intent for the statute, such as large retail stores or chain operations who obtain discounts not available to smaller independent stores."[8]

Should We Fear RPA Enforcement?

In sum, yes — both with respect to private suits which continue to be a risk, and now with the prospect of greater government involvement. Companies selling goods should review their pricing and marketing strategies, preferably with antitrust counsel, to ensure compliance with the RPA. A regular check-in for complicated reseller promotional programs is good practice. It's even better to consult with antitrust counsel during the early stages of new pricing programs. This allows for the maintenance of RPA-compliant documentation throughout the process. Creative antitrust counsel have developed many tactics to maintain RPA compliance within manufacturers' business strategies.

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[1] *See e.g. Roma Mikha, Inc. v. S. Glazer's Wine & Spirits, LLC,* No. 822CV01187FWSADS, 2023 WL 3150076 (C.D. Cal. Mar. 30, 2023); *New England Constr., L.L.C. v. Weyerhaeuser* Co., No. 22-60329, 2023 WL 2401587, at *1 (5th Cir. Mar. 8, 2023); *Arconic Corp. v. Novelis Inc.*, No. CV 17-1434, 2023 WL 5510574 (W.D. Pa. Aug. 25, 2023).

[2] *See e.g. US Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC,* 89 F.4th 1126 (9th Cir. 2023).

[3] *See e.g. In re Direct Purchaser Insulin Pricing Litig.,* No. CV203426ZNQRLS, 2023 WL 3431213, at *5 (D.N.J. May 12, 2023); *Dahl Auto. Onalaska Inc. v. Ford Motor Co.*, 588 F. Supp. 3d 929 (W.D. Wis. 2022); *Coyle Nissan, LLC v. Nissan N. Am., Inc.*, 2021 WL 4295730 (S.D. Ind. Sept. 21, 2021).

[4] *In re Direct Purchaser Insulin Pricing Litig.*, 2023 WL 3431213, at *5 (finding a lack of antitrust standing because "paying inflated purchasing prices to vendors, without more, is [not] an injury of the type the antitrust laws were intended to prevent" and because there were more direct victims than plaintiffs); *Power Buying Dealers USA, Inc. v. Juul Labs, Inc.*, No. 21-CV-03154, 2023 WL 6049936, at *2–3 (N.D. Ill. Sept. 15, 2023) ("the nature of the injury and relationship between the injury and the antitrust violation cuts against standing. Power Energy is not alleged to have purchased Juul products nor sell Juul products alone; its involvement extends to sales of the merchandise packages… PBD is best situated to remedy the alleged violations as the direct competitor with HS Wholesale and purchaser of the Juul Products. Power Energy, who contracts with PBD, is not.").

[5] *See Nasreen v. Capitol Petroleum Grp., LLC,* No. CV 20-1867 (TJK), 2023 WL 2734210, at *9 (D.D.C. Mar. 31, 2023) (granting summary judgment where plaintiff failed to "identify two 'consummated sales,' their closeness in time,… the prices paid" or that the products purchased were of "like quality and grade").

[6] *See US Wholesale Outlet & Distribution, Inc.,* 89 F.4th at 1145(finding that Costco and 5 Hour Energy wholesalers operated at the same functional level).

[7] *See Mad Rhino, Inc. v. Best Buy Co.,* 2008 WL 8760854, at *3-4 (C.D. Cal. Jan. 14, 2008); *ABC Distrib., Inc. v Living Essentials LLC*, 2017 WL 2603311, at *4-5 (N.D. Cal. Apr. 7, 2017).

[8] *Arconic Corp.*, 2023 WL 5510574, at *9.

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