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Claim That Different Size Packages Violate Robinson-Patman Survives Motion to Dismiss

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It is a common sight across America: Shoppers walking out of club stores like ***Costco*** or ***Sam's Club*** with large- or multi-pack versions of consumer goods sold by numerous manufacturers. If those manufacturers do not sell those same size packages to competing grocery stores, is that illegal discrimination under the ***Robinson-Patman Act***? ***Woodman's Food Market*** made that claim against The ***Clorox Company*** and last week survived a motion to dismiss. As a result, manufacturers should reexamine and reinforce their Robinson-Patman's compliance efforts.

Woodman's operates 15 retail grocery stores in Wisconsin and Illinois. Its stores are large, by grocery store standards, and its products, often large- or multi-pack versions, are displayed on pallets or industrial shelves. While it does not charge a membership fee, Woodman's considers warehouse clubs such as Costco and Sam's Club as key competitors.

Clorox sells numerous consumer products, from bleach to salad dressing, through various channels. In September 2014, Clorox told Woodman's that, as part of a streamlining of its distribution, it was reclassifying Woodman's as a general market, not club, retailer. As a result, Clorox would continue to sell smaller packages of its products to Woodman's but would no longer sell it such packages as 2-pack 40 ounce Hidden Valley ranch dressing. In October, Woodman's sued in the Western District of Wisconsin claiming Robinson-Patman violations.

Robinson-Patman (RP) is a Depression-era statute that forbids certain forms of discrimination when manufacturers sell to competing retailers. While criticized by experts and now rarely enforced by the ***Federal Trade Commission (FTC)***, RP still generates several private suits each year.

Woodman's current claim is not that Clorox's actions violated RP Section 2(a)'s more familiar prohibition of price discrimination. Instead, Woodman's claimed Clorox's actions violated RP Sections 2(d)'s and 2(e)'s prohibition of promotional service discrimination. Those sections prohibit manufacturers from paying for allowances [2(d)] or furnishing services [2(e)], such as advertising and in-store demonstrations, that promote resale of the products unless those allowance or services are offered to all competing retailers on proportionally equal terms. Unlike Section 2(a), these sections do not require the difficult proof of injury to competition, although any private plaintiff must prove injury to recover damages.

Clorox claimed that the large- and multi-packs are not promotional allowances or services; instead, they are different products and RP does not require manufacturers to sell all products to all retailers. In support, Clorox pointed out that no court had ever held that a special package size constituted a promotional allowance or service.

Woodman's, on the other hand, cited three FTC actions. Two cases, one from 1956 and one from 1940, found institutional size packages of coffee and junior size packages of cosmetics constituted promotional services. More recently, last year the FTC updated its guides on complying with these RP requirements and specifically decided to retain "special packaging or package sizes" in its non-exhaustive list of promotional allowances or services. The court found the two old cases to be directly on point and, though "antiquated", supported by the FTC's recent revision of its guidance. Therefore, the court denied Clorox’s motion to dismiss.

While not a final determination, the court's action offers at least two lessons. First, despite numerous reports of its death, RP is still alive. While its many technical elements and defenses can make a case difficult to prove, the better time for checking those technicalities is before the marketing scheme is introduced, not after the complaint is filed. Also, while the FTC has not brought a new RP case in years, it did show some interest in the statute by taking the time to update its guidance regarding 2(d) and 2(e) compliance. Second, a defense that RP is now held in disrepute and the cited cases are generations old might not convince a district court when those precedents are right on point and have never been overruled.

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