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BLOG

Price Discrimination Claims Under the Resurging Robinson-Patman Act

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In recent months, the Federal Trade Commission has signaled that it is reviving its enforcement efforts under the Robinson-Patman Act (RPA). With the federal government paying heightened attention to this formerly dormant area of law, so too should companies.

This is the second in a series of posts dedicated to providing guidance on Robinson-Patman risks and best practices.[1]

The Great Depression-era legislation known as the RPA is aimed at protecting small businesses, whose ability to compete is threatened by their larger rivals' ability to leverage their purchasing power to get larger discounts from suppliers. To achieve this, the RPA prohibits sellers from discriminating in price or promotional deals between two customers, when selling commodities of like grade and qualities at roughly the same time, when the effect of such discrimination may be to substantially lessen competition.

To break this down further, for a pricing practice to violate the Robinson-Patman Act, it must meet several requirements:

Two or more *completed sales*. The basis for an RPA claim is the occurrence of two or more completed sales, in which there was an allegedly favored purchaser and, correspondingly, an allegedly disfavored purchaser. "Completed sales" means that an *offer* that is discriminatory or a flat-out refusal to quote prices or sell altogether would ***not*** violate the RPA. The RPA does not create an obligation to be an equal-opportunity seller to all customers; it only prohibits ***actual sales*** at disparate prices, subject to the requirements described below. In other words, for the RPA to apply, there must be an actual sale—negotiation (or non-negotiation) is not enough.

Sales were of *commodities*. The RPA applies only to completed sales of ***tangible products***. Difference in prices for services does ***not*** constitute actionable price discrimination under the RPA.[2]

Commodities were of *like grade and quality*. The products subject to the two or more completed sales need to have been of "like grade and quality" for the price differential to be actionable under the RPA. Whether commodities are of like grade and quality is a highly fact-intensive inquiry. Products that look the same but are different in quality level can be priced differently. For example, a candy coated in a premium chocolate could be

priced differently than one coated in a non-premium chocolate without violating the RPA. However, merely changing the branding of a product (e.g., using different product numbers or names, selling the same product under a national as opposed to a private label, etc.) without significantly changing the tangible aspects of the product (e.g., the underlying formula, functional features, etc.) is ***insufficient to avoid liability***. Products that are identical are likely to be considered of like grade and quality even if they are sold in slightly different packages from one another. But, as another example, if the commodities at issue are perishable foods, the commodity approaching the end of its shelf life may be of lesser value than its fresher counterpart, distinguishing the "grade and quality" of these products.

Price differential. The difference in price charged, for commodities, between an allegedly favored and allegedly disfavored purchaser is the essence of an RPA claim. The prices being compared between these sales are the ***net prices***, taking into account all factors bearing on what is ultimately paid for the commodity, including any discount, rebate, or allowance. This is to say: list price is ***not*** where the inquiry ends, and focusing myopically on list price, at the exclusion of these other factors, is an easy trap that could lead even to inadvertent price discrimination. If one customer, for example, has negotiated a rebate for a large volume of sales, resulting in the sellers cutting a check back to that customer, then this customer has not paid the same net price as one who did not get the rebate. And if that rebate was not also made known and functionally available to the other customer buying the commodity at that same list price—such that the other customer had the realistic option to take advantage of the same rebate scheme—this could be the basis for an RPA enforcement action or private lawsuit.

Other contractual terms or policies, to the extent they affect net prices paid for commodities, could also form the basis of an RPA action if not applied equally across customers. For example, incentives for early payment, or penalties for late payment, are policies that affect the net price paid for commodities and thus can result in price differentials for commodities of like grade and quality. These policies can be implemented and applied with minimized risk by ensuring that these terms are applied indiscriminately across customers. For example, it would be impermissible to cover some of the costs of delivery for favored purchasers while requiring disfavored purchasers to pay for their delivery costs in full, as the ultimate net price of the commodity can be deemed to include delivery prices. But a delivery cost policy administered uniformly across customers (e.g., allowing customers to choose from a uniform set of delivery methods and times at uniform prices) may be okay, even if the result is that some customers ultimately pay more for delivery than others.

Contemporaneous sales. The completed sales subject to an RPA action must have occurred at reasonably contemporaneous times. The RPA does not itself provide concrete guidance, so this too can be a fact-intensive inquiry. The RPA explicitly permits price changes to reflect changing market conditions, so a price differential that is justified by demonstrably changed market conditions during whatever period elapsed would be a defensible price difference. Sellers also have full freedom to change their prices over time, as long as, at any given time, the same net price is being charged for the same commodities. This "contemporaneous sales" requirement becomes particularly salient when comparing prices for spot sales against prices charged under long-term contracts. Typically, a price charged in a spot sale will be considered to have been charged in the context of different market conditions than the price reflected in a long-term contract negotiated significantly earlier or later.

Threat of injury to competition. Recall that the intent of the RPA is to protect competition between resellers of different sizes and purchasing power. Thus, the buyers associated with the completed sales at issue must be *in competition with one another for resale of the commodity*, such that competition may be injured as a result of the discriminatory pricing. This means that sales to end-user consumers do ***not*** pose an RPA concern. That said, the competing purchasers need not compete at the same level of the distribution chain. For example, the sale of a commodity to a wholesale distributor and a brick-and-mortar store at different prices can create RPA exposure, if the two compete in the resale of the commodity at issue. Moreover, the threat of harm to competition, which must be demonstrated by the claimant, can either be a harm to competition in the marketplace where *sellers* complete (a "primary line injury"), or a harm to competition in the marketplace where their *customers* compete (a "secondary line injury"). Claims of secondary line injury succeed far more often than do claims of primary line injury.

Interstate Commerce. To be actionable under the RPA, at least one of the sales at issue must be across state lines (note, however, that many states have their own price discrimination laws applying to transactions occurring within the state). The sales must also be for use, consumption, or resale within the United States or a U.S. territory, so sales for immediate export would not be subject to an RPA action.

Stay tuned for Competition Corner posts to come that will discuss how promotional services fit into the RPA structure, defenses to RPA claims, and, finally, compliance issues and actionable best practices. Winston & Strawn attorneys are available to help by auditing existing compliance programs, designing new ones, or providing a training session to your pricing and sales professionals tailored to the needs and challenges of your business or, if necessary, defending against or prosecuting an RPA action.

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[1] The first post in this series can be found here.

[2] However, discrimination in promotional services connected with the resale of products may, under certain circumstances, be actionable. Our RPA series on Competition Corner will soon include an article on how the RPA applies to promotional services.

6 Min Read

Authors

Conor Reidy

Adam I. Dale

Garrett C. Heller

Mike Toomey

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Conor Reidy

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