WINSTON & STRAWN LLP

BLOG

Price Discrimination in Disguise: Promotional Service Discrimination Claims Under the Resurging Robinson-Patman Act

JULY 13, 2023

With a potential comeback in store for the Robinson-Patman Act (RPA), companies need to be able to identify, address, and ideally avoid risks that may be embedded in complex pricing structures and supply chain relationships. This is especially true for those companies that have not had a regimented compliance system in place during the RPA's years of dormancy. Companies need to be aware that the RPA forbids certain veiled price discrimination accomplished by paying for or directly providing promotional services.

This is the third post in a Competition Corner series discussing recent updates on RPA enforcement, as well as risks and best practices.[1]

Recall that prohibited price discrimination, under section 2(a) of the RPA, occurs where a seller completes two or more contemporaneous sales of commodities to two separate purchasers for different net prices, presenting a threat of injury to competition.

The RPA also targets certain side benefits provided to preferred customers that function as potential workarounds for more explicit price discrimination. For example, Section 2(d) of the RPA forbids a seller from paying for services or facilities connected to a favored customer's resale of the seller's commodity (or processing/handling thereof) unless this payment is available on proportionally equal terms to other competing customers. These services and facilities include advertisements, demonstrations or demonstration materials, special packaging, and in-store displays when they are used to facilitate the buyer's resale of the seller's commodities to consumers. Similarly, Section 2(e) forbids a seller itself from providing promotional services unless such services are available on proportionally equal terms to other competing customers. These provisions seek to address the risk that manufacturers will provide valuable services to preferred purchasers to effectively offer a discount despite technically selling their products to the preferred and non-preferred customers at the same price. Note also that while a price discrimination claim under Section 2(a) requires allegations of a competitive injury, those allegations are *not* required for claims under Sections 2(d) or 2(e).

The requirement that services or facilities be provided to competing customers on a "proportionally equal" basis does not require that the seller provide the exact mathematically same allowance to each customer. Rather, a seller is permitted to have a single policy that grants different services to customers based on the customer's size and capacity, provided that policy is applied uniformly. The Fred Meyer Guides, published by the Federal Trade

Commission (FTC), note that the easiest way to accomplish this goal is by basing allowances or services on the dollar volume or on the quantity of the commodity purchased during a specified period. For example, as the Guides provide, "[a] seller may offer to pay a specified part (e.g., 50 percent) of the cost of local advertising up to an amount equal to a specified percentage (e.g., 5 percent) of the dollar volume of purchases during a specified period of time."

Keep in mind that these promotional services or allowances are to aid in the buyer's *resale* of the seller's commodities. Consider the following examples of potential violations of Sections 2(a), 2(d), and 2(e).

- 2(a): A seller charges customer-resellers the same net invoice price, but the seller covers the cost of delivery to some customer-resellers and not to others.
  - This discrimination would fall under Section 2(a) because the benefit is provided in connection with the *initial* sale, rather than to aid the *resale* by the customer-reseller. The seller can likely comply with the RPA by setting a delivery allowance formula and applying it uniformly to customer-resellers.
- 2(d): A car manufacture paid rent for the facility of a favored dealer but did not pay rent for the facility of a disfavored dealer. This could be a violation of 2(d).[2]
- 2(e): A producer of dextrose (a candy sweetener), which the producer sold to candy manufacturers, engaged in advertising that the candy manufactured by one of its large customers was "rich in dextrose." This advertising was to aid in that customer's resale of its candy, and the dextrose producer did not provide the same advertising for the benefit of its other customers. This arrangement was found to violate Section 2(e).[3]

On the other hand, at least according to the Seventh Circuit, *larger packaging* is not, by itself, a promotional service. Accordingly, selling the largest-sized containers of commodities only to wholesale discount clubs would *not* constitute promotional services discrimination.[4] Still, when packaging is promotional in nature and dedicated to facilitating resale of commodities to end-consumers—for instance, football-shaped packages just before the Superbowl or Halloween-branded candies near Halloween—offering such promotional packaging in an unequal manner may violate the RPA.[5]

TAKEAWAYS

Manufacturers cannot conceal price discrimination by providing promotional services in connection with the resale of the manufacturer's commodities only to favored customers. As Robinson-Patman enforcement ramps up, companies should examine their practices to ensure that their promotional service or allowance programs allow access on proportionally equal terms.

Stay tuned for more Competition Corner posts to come, discussing defenses to RPA claims, compliance issues, and actionable best practices. Winston & Strawn attorneys are available to help by auditing existing compliance programs, designing new ones, or providing training to your pricing and sales professionals tailored to the needs and challenges of your business, or if necessary, to defend against or prosecute an RPA action.

---

[1] The first post in this series (overviewing the recent resurgence of the RPA) can be found here, and the second post (walking through the elements of an RPA claim) can be found here.

[2] *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 145 (2d Cir. 1998).

[3] *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 744 (1945).

[4] *Woodman's Food Mkt. v. Clorox Co.*, 833 F.3d 743 (7th Cir. 2016).

[5] *Id.* at 750.

4 Min Read

Authors

Conor Reidy

Adam I. Dale

Mike Toomey

Garrett C. Heller

Related Locations

Chicago | New York | San Francisco

Related Topics

Antitrust Basics | Federal Trade Commission (FTC) | Robinson-Patman | Private Civil Antitrust Litigation

Related Capabilities

Antitrust/Competition

Related Regions

North America

Related Professionals

Conor Reidy

Adam I. Dale

Mike Toomey

Garrett C. Heller

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.