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CLIENT ALERT

Clorox Decision Breathes New Life into RPA Challenges to Promotional Packaging

FEBRUARY 27, 2015

In the first reported federal court decision of its kind, the Western District of Wisconsin recently declined to dismiss a case filed by a retail grocery chain claiming that a manufacturer violated the Robinson-Patman Act ("the Act") by providing big-box packaging only to big-box discount retailers. *Woodman's Food Mkt., Inc. v. Clorox Co*., No. 14-CV-734-SLC, 2015 WL 420296 (W.D. Wis. Feb. 2, 2015). In an effort to streamline its distribution, Clorox had informed the plaintiff, Woodman's Food Market ("Woodman's"), that although it would continue selling standard-sized salad dressings and other packaged goods to Woodman's, it would no longer sell Woodman's larger sizes of packaged goods that were sold to club discount stores.

Clorox argued that it could not be held liable for refusing to sell certain products to Woodman's because the Robinson-Patman Act does not prohibit a manufacturer from choosing the purchasers with which it will deal. Woodman's, however, argued that by selling the "large pack" products to some retailers, but not to Woodman's, Clorox violated Sections 2(d) and (e) of the Act, which prohibit a seller from providing promotional allowances and services to some, but not all, competing resellers on substantially equal terms. No federal court had previously decided the issue, leaving Woodman's to rely on FTC decisions from the 1940s and 1950s, which hold that special packaging constitutes a promotional service (*see In The Matter of General Foods Corporation*, 52 F.T.C. 798 (1956); *In the matter of Luxor, Ltd*., 3l F.T.C. 658 (1940)). The court credited these decisions and noted that the FTC's current guidelines include "special packaging, or package sizes" among a non-exhaustive list of examples of conduct that may be covered by Sections 2(d) and (e), which also include: "cooperative advertising; handbills; demonstrators, and demonstrations; catalogues; cabinets; displays; [and] prizes or merchandise for conducting promotional contests."

The decision in *Woodman's* is novel and potentially concerning to manufacturers and also retailers and other purchasers of such "large pack" products in that it is one of the few decisions in decades to expand the scope of the Robinson-Patman Act, arguably running afoul of recent Circuit and Supreme Court precedents, which have repeatedly limited reach of the Robinson-Patman Act for decades. In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc*., 546 U.S. 164, 168 (2006), for example, the Supreme Court explicitly stated that it was "declining to extend Robinson-Patman's governance" in order to continue to "construe the Act consistently with antitrust law's broader policies." The Supreme Court's concerns with the policy implications of the Act have been echoed even more vehemently by economists, scholars, and antitrust experts alike, who have expressed concerns that the Act promotes excessive price rigidity and even anticompetitive conduct, going so far as to vote for the repeal of the Act as part of the Antitrust Modernization Commission.

While the Robinson-Patman Act is unlikely to be enforced in the near future by government enforcement agencies, keeping with the enforcement practices of the last several decades, the *Woodman's* decision may breathe new life into private challenges to promotional practices. Indeed, unlike the more commonly litigated Section 2(a) of the Act, Sections 2(d) and (e) have traditionally been understood not to require a showing of harm to competition, which in recent years has proved the greatest hurdle for plaintiffs under the Act. Manufacturers should therefore carefully consider marketing and packaging strategies that result in differences across purchasers, even though they may appear justified based on the type of purchasers at issue. Big-box retailers and other stores that have traditionally benefited by such "large-pack" promotions should also carefully consider their demands to manufacturers because at least one court has held that favored purchasers may likewise be liable under Section 2(f) of the Act for knowingly receiving or inducing price discrimination where "promotional allowances received … do not bear a reasonable relationship to their actual advertising expenditures." *Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc*., 135 F. Supp. 2d 1031, 1067-68, 2001-1 Trade Cas. (CCH) ¶ 73222 (N.D. Cal. 2001).

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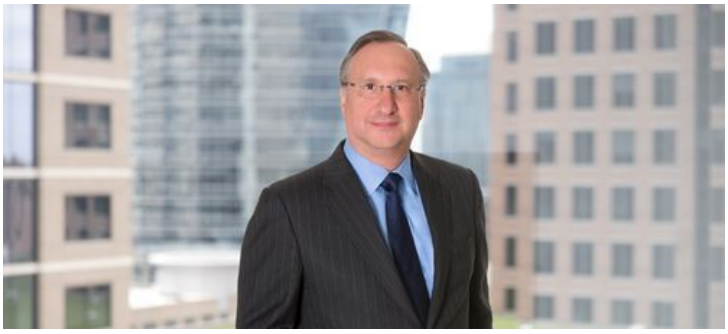

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