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CLIENT ALERT

Do Different Size Packages Violate the Robinson Patman Act?

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Many companies sell products in varying product or packaging sizes to different retailers, but a recent challenge to that practice under the federal antitrust laws makes it prudent to re-examine current marketing and distribution policies. This is even more important given that the Federal Trade Commission's (FTC) newly revamped guidance on the Robinson-Patman Act (RPA) demonstrates that regulators' interest in the RPA endures, even though the FTC has not brought a new RPA case in years.

Unintended Comparative Claims and Lack of Clear Disclosures

Summary

- Manufacturer stopped selling large-pack products to "General Market" grocery stores but continued selling them to warehouse-style grocery stores.
- Customer categorized as "General Market" store sued for violation of the Robinson-Patman Act's prohibition on discrimination in the provision of promotional services, seeking declaratory and injunctive relief, as well as attorney's fees.
- Court determined that litigation could proceed because package sizes are subject to the discrimination provisions of the Robinson-Patman Act.

Analysis

Woodman's Food Market is a chain of warehouse-style grocery stores in Wisconsin and Illinois. Woodman's sales strategy is similar to other warehouse-styles stores, such as Costco and Sam's Club: customers can purchase groceries at lower prices by purchasing in large containers.

The Clorox Company told Woodman's it would no longer be able to purchase large packs of products, since Clorox had recategorized Woodman's from a warehouse retailer to a "General Market" retailer. While Woodman's could continue to purchase products from Clorox in smaller package sizes, these sizes carried higher per-unit cost. Woodman's sued Clorox, alleging that its policy of selling large packs to Costco, Sam's Club, and others – while refusing to sell similar-sized packages to Woodman's – constituted a form of discrimination that violated the RPA.

The RPA forbids certain forms of discrimination when manufacturers sell to retailers who compete with one another downstream. The statute has been criticized by some as antiquated, and enforcement actions by state and federal antitrust regulators, including the FTC, have become rare in recent years. Still, private litigants base complaints on the RPA on a regular basis. If a private litigant is able to prove that there was a violation of the RPA, and that the litigant suffered antitrust injury, the litigant is entitled to damages as well as injunctive relief.

Woodman's claimed Clorox's actions violated RPA Sections 2(d)'s and 2(e)'s prohibition on discrimination in the provision of promotional services. These sections prohibit manufacturers from paying for allowances or furnishing services, such as advertising and in-store demonstrations, that promote resale of their products unless those allowance or services are offered to all competing retailers on proportionally equal terms. Woodman's sought a declaration from the court that not offering

different package sizes to customers who compete with one another constitutes a violation of the RPA, an injunction preventing Clorox from doing so, and attorney's fees.

Clorox asked the court to dismiss the case on the grounds that offering large and multi-pack products are not promotional allowances or services under the statute. Clorox contended that as the different sizes did not somehow aid the buyer in reselling the product, as the way manufacturer funded advertising, packaging, and informational brochures do.

The court rejected Clorox's motion, relying on two decades-old FTC decisions finding that selling, or refusing to sell, a package size *is* covered as a promotional service contemplated by the RPA. In both cases, the products at issue were of the same grade and quality irrespective of the size of the container in which they had been packaged. The court also noted that the FTC's guidelines on promotional allowances and services (most recently updated in September 2014) had included special packaging as a promotional service covered by the RPA.

After the court's order, Clorox decided to stop selling all Clorox products to Woodman's, not just products of specific sizes. Clorox has again asked the court to dismiss the case, this time as moot since the injunctive relief Woodman's requested is no longer required.

The court's ruling is a cautionary tale for companies who reach their customers through more than one retail "channel," and who seek to treat these channels differently. As manufacturers weigh their management of those channels, they should bear in mind that:

- Although there has been little enforcement in recent years of the RPA, reports of its death have been greatly exaggerated. The RPA comes with a large number of technical elements and a potentially confusing array of defenses, which can enhance a manufacturer's chances of beating a suit. Considering those elements and defenses as a marketing and distribution plan is formulated or altered is time well spent on reducing litigation risk.
- Even though RPA is frequently criticized as "antiquated" by experts, and some relevant case law may be decades old, courts can and do still rely on applicable precedents that have never been overturned.
- A seller of the same product in different size packages at different per-unit prices incurs a risk, particularly where its customers are likely to compete against one another for consumer dollars downstream. Because a private RPA claim based on different-sized packaging can be made under sections 2(d) and 2(e) of the Act, the ability to employ certain statutory defenses may be more complicated because those sections of the Act do not specifically contemplate defenses, nor require a demonstration of competitive impact (leading some commentators to refer to discrimination under sections 2(d) and 2(e) as "per se illegal." In practice, courts have in some cases allowed defendants accused of violating sections 2(d) or 2(e) to assert, for example, the "meeting competition defense" contained in section 2(b) of the Act, and a plaintiff under the RPA cannot claim damages for a violation without demonstrating that the discrimination harmed competition and thereby caused its damages. Still, defense of a claim under sections 2(d) or 2(e) of the RPA may prove more complicated and involve more extensive and costly fact-finding than defense of a classic price discrimination claim brought under section 2(a).

Ultimately, the Clorox case stands as a reminder that enforcement of the RPA still poses a material legal risk to complex, multi-channel retail product distribution. To avoid the potential for large damages awards, as well as the cost and distractions of litigation, it is now as important as ever to design pricing and marketing programs with RPA compliance in mind.

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