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The Robinson-Patman Act — Issues Presented by the Club Channel: The Clorox Case

Analysis of a decision addressing a section of the RP Act that has rarely been the subject of judicial commentary.

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In a recent case, *Woodman's Food Market, Inc. v. Clorox Co.*, a U.S. District Court in Wisconsin addressed a claim under Section 2(e) of the Robinson Patman Act ("RP Act") arising from alleged discrimination by Clorox among customers regarding package sizes. Woodman's claimed Clorox violated the RP Act by no longer offering "large pack" products to grocers such as Woodman's, even though it offers "large pack" products to "club" retailers such as Costco. According to Woodman's, the "large pack" products are sold to club stores at a lower price. The district court denied Clorox's motion to dismiss, concluding that Woodman's had pled a viable RP claim under Section (e).

The decision addresses a section of the RP Act that has rarely been the subject of judicial commentary. The most commonly invoked provision of the RP Act is Section 2(a), which prohibits the sale of two products of similar grade and quantity at different prices to two different buyers if the price difference may result in injuring competition. While Woodman's objective is no doubt to gain access to the same pricing as the club stores, Woodman's claim was brought under Section 2(e) which deals with sellers offering services to promote the resale of its products, unless those same services are offered to all customers on proportionally equal terms.

In response to Clorox's motion that Woodman's had failed to plead a Section 2(e) claim, arguing that "package size" is not a service, Woodman's argued that package size is a service, citing two half-century-old Federal Trade Commission (FTC) administrative rulings. One matter involved offering one customer, and not another, a smaller size cosmetic product which was more convenient to carry and arguably promoted the freshness of the product. In the other matter, the FTC held that Maxwell House Coffee must offer an institutional-sized package of coffee to all customers to avoid Section 2(e) liability. Woodman's also relied on recently revised FTC "Fred Meyer" guidelines listing activities that the FTC considers promotional services under Section 2(e) including "package sizes."

Given the absence of recent court or FTC administrative challenges under Section 2(e), Clorox was unable to cite any case undermining the continued viability of these prior rulings or of the intended scope of the FTC's guidelines. Accordingly, the court denied Clorox's motion to dismiss.

In response to the court's decision, Clorox discontinued selling its products to Woodman's and argued that Woodman's claim was now moot because it was no longer a purchaser. The court rejected this argument because both the FTC and Supreme Court define "customer" to include buyers who purchase a seller's product through a wholesaler or other intermediate reseller. Since Woodman's declared it would purchase Clorox products through wholesalers, the court found that Woodman's claim was not moot.

The RP Act was originally intended to protect smaller competitors — such as "mom-and-pop" stores — against larger grocers such as A&P. But as antitrust practitioners know, the RP Act has been frequently criticized by economists and academics as failing to achieve the goal of our antitrust laws — promoting and protecting competition and consumers rather than protecting individual competitors. Recognizing the shortcomings of the RP Act, the Supreme Court has advised lower courts that it should be read narrowly. Indeed, in the most recent RP claim before the Supreme Court, Justice Ginsberg advised courts that interpretations of the RP Act must not be "geared more to the protection of existing competitors than to the stimulation of competition." It should therefore come as no surprise that government antitrust enforcers have not embraced the RP Act. The FTC has filed only one RP Act claim in the last two decades and the Department of Justice has not filed a case since 1972.

The concern with the RP Act is that it has the effect of shielding competitors from competition by denying more efficient firms the ability to buy and resell goods at a lower price point — ultimately to the detriment of consumers. The RP Act may also inhibit more efficient competitors from bargaining for better prices or services for fear that any price differential or offer of additional services may be challenged as

a violation of the Act. Though competitors may defeat an RP claim if they can show they were meeting the terms of their competitors, other bargained-for discounts or promotional services may not meet a competitor's offer and thus may deter parties from bargaining altogether.

Club stores such as Costco promote themselves as providing greater efficiencies than rivals in other channels. For instance, Costco contends that it carries a limited number of brands often in larger sizes in order to achieve greater supply-chain efficiencies. By limiting the brands sold, Costco spends less time and effort negotiating with different suppliers while saving time and money by having fewer— but larger — deliveries. Those larger deliveries also create efficiencies for suppliers, who can offer Costco better terms, such as the one offered by Clorox. Claims by smaller chains that they are entitled to the same packaging discounts as Costco potentially put these efficiencies at risk.

It remains to be seen whether the *Clorox* decision — and other challenges that may follow — will impact the way manufacturers have approached packaging and pricing in the club and grocery channels. While counsel should be careful to advise their clients on offering price differentials and other promotional services, counsel should consider some defenses to RP Act claims. First, a seller may be shielded from liability if it can show it was offering special package sizes to meet a competitor's offer. Second, a seller may avoid liability if it can show it made proportionally equal alternatives available to all purchasers. Finally, a seller may defend a RP Act claim if the challenged sale occurred in a different time period.

Even though criticized in many quarters, the RP Act remains a federal statute that manufacturers must consider in evaluating the prices and services it offers to different channels of trade. Thus, counsel should familiarize themselves with the FTC's "Fred Meyer" guidelines and the limited available precedent in advising clients how to proceed.

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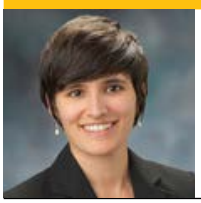

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