Private Litigation and Government Rhetoric Signal Increased Legal Headaches Under the Robinson-Patman Act

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After decades of dormancy, the Robinson-Patman Act (RPA), a Depression-era antitrust statute prohibiting price discrimination, has recently become the subject of renewed interest from both private plaintiffs and government enforcers. Litigation in the Ninth Circuit has resulted in two significant plaintiff-friendly decisions — including a rare judgment against defendants that awarded hundreds of thousands of dollars in damages and injunctive relief. In parallel, agency enforcers have delivered numerous public statements signaling their desire to revitalize enforcement of the RPA. Given these developments, the RPA may prove a more active area of litigation and enforcement activity in the near future, and companies should take care to review their pricing and discount programs to ensure compliance with it.

Background on the RPA

The RPA was originally enacted in 1936, during the Great Depression when the widespread failure of businesses left many Americans skeptical of free market competition and at the height of populist panic about the introduction of chain stores — now widely taken for granted as commonplace in the modern economy but then a novel model of distribution.[1] Responding to these concerns, the RPA prohibits sellers of commodity products from engaging in a variety of practices when selling their goods to competing resellers. Section 2(a), which has historically been the most frequently invoked provision of the RPA, makes it unlawful "to discriminate in price between different purchasers of commodities … where the effect of such discrimination may be substantially to lessen competition … or to injure, destroy or prevent competition."[2] The RPA also prohibits a variety of other practices involving unequal treatment of purchasers. Section 2(d), for example, makes it unlawful for a seller to pay a buyer for any services in connection with a sale unless the payment "is available on proportionally equal terms to all other customers competing in the distribution of such products."[3]

Although both the Federal Trade Commission (FTC) and U.S. Department of Justice Antitrust Division (DOJ) have jurisdiction to enforce the RPA, the agencies abandoned enforcement in the 1980s recognizing that the RPA is inconsistent with the consumer welfare standard — a bedrock principle of antitrust law that considers the impact of economic practices on consumers.[4] Though the RPA's provisions may be understandable in the context of the 1930s, evolving economic understanding has revealed the RPA as antithetical to core antitrust principles because price discrimination often benefits consumers by yielding lower prices and innovative methods of distribution.[5] In spite of this history, recent developments indicate that the RPA could reemerge as a source of considerable legal hassle in the hands of private plaintiffs and current agency enforcers.

Plaintiffs' Rare Victory in *Prestige Brands*

In May 2024, a district court in the Central District of California confirmed a significant plaintiff-side victory in private litigation brought under the RPA, upholding a jury verdict awarding $680,000 in damages and granting a permanent injunction against the defendant manufacturers. The litigation, captioned *L.A. International Corp. v. Prestige Brands Holdings, Inc*., was brought in 2018 by nine wholesalers of the Clear Eyes branded eye drops manufactured and distributed by defendants Prestige Consumer Healthcare, Inc. and

[1] *See* DOJ, Report on the Robinson-Patman Act, at 101-103 (1977).
[2] 15 U.S.C. § 13(a).
[3] 15 U.S.C. § 13(d).
[4] *See id.* at 99-100 (explaining negative impacts of RPA enforcement on consumers).
[5] *See* Antitrust Modernization Committee, Report and Recommendations 311-12 (April 2007).

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Medtech Products Inc. (together, Prestige).[6] In addition to selling to plaintiffs, Prestige also sells Clear Eyes to Costco and Walmart's Sam's Club division.[7] In its sales to Costco, Prestige participated in Costco's DOW (or delivery, operations and web services) program, under which Prestige made quarterly payments in exchange for Costco performing various advertising and promotional services.[8] Critically for plaintiffs' case, Prestige never made or offered similar payments to plaintiffs in connection with their sales of Clear Eyes.

Plaintiffs alleged that Prestige's participation in the DOW program violated Sections 2(a) and 2(d) of the RPA as well as California's Unfair Practices Act and Unfair Competition Law. Prestige argued that its favorable pricing for Costco was justified as a functional discount in exchange for the marketing services Costco performed for Clear Eyes. Prestige also argued that it should not be liable because the DOW program was initiated by Costco, and because plaintiffs never offered similar programs. But after a six-day trial in December 2023, the jury found in favor of plaintiffs and awarded a total of $680,000 in damages.[9]

On May 20, 2024, Judge Michael Fitzgerald denied defendants' request for a new trial and granted a permanent injunction largely along the lines plaintiffs requested. Notably, Judge Fitzgerald expressly held that Section 2(a) liability does not require a showing of "substantial" harm to competition, and that even a *de minimis* impact on competition is sufficient to violate the RPA.[10] Applying traditional equitable factors to conclude that injunctive relief was appropriate, the court also issued a permanent injunction with the following requirements:

- Defendants must allow plaintiffs that compete with Costco to purchase Clear Eyes on the same price terms and conditions as the Costco Business Centers.
- Defendants must allow plaintiffs that compete with Costco to participate on proportionally equal terms in all promotional programs and payments (including the DOW program) that defendants make available to Costco.
- Defendants must allow the plaintiff that competes with Sam's Club to purchase Clear Eyes on the same price terms and conditions as Sam's Club.
- For the next five years, defendants must submit a semi-annual report to plaintiffs' attorneys stating the prices and price terms of defendants' sales of Clear Eyes to Costco and Sam's Club.[11]

Although the court did not agree with plaintiffs that defendants should be required to fairly allocate Clear Eyes during times of limited supply, it otherwise ordered the relief plaintiffs sought — even while recognizing that the reporting requirements "may be burdensome."[12]

The Ninth Circuit's Plaintiff-Friendly Analysis in Innovation Ventures

Plaintiffs also secured a significant legal win in the Ninth Circuit's December 2023 opinion in *U.S. Wholesale Outlet & Dist., Inc. v. Innovation Ventures*,[13] which also addressed the applicability of the RPA to a case involving Costco Business Centers. *Innovation Ventures* concerned an RPA challenge to the terms on which Living Essentials sold 5-hour Energy to Costco as compared to plaintiff wholesalers. After a trial on the issue of whether there was harm to competition as a result of rebates offered only to Costco, the jury delivered a verdict for defendants on plaintiffs' Section 2(a) claim, and the court denied injunctive relief under 2(d).[14]

On appeal, the Ninth Circuit vacated the denial of injunctive relief, holding that the district court erred by finding that Costco and the wholesaler plaintiffs were not in actual competition.[15] Although the manufacturer defendants argued that Costco did not compete with the wholesalers because it is primarily a retailer, the Ninth Circuit focused on evidence that the Costco Business Centers at issue in the case, as opposed to Costco Warehouses, primarily sold 5-hour Energy to the same types of retailers targeted by wholesalers.[16] The Ninth Circuit further explained that operational differences are not significant in determining whether purchasers compete for purposes of the RPA, and that it would continue to apply the test it articulated in 1964 in *Tri-Valley Packing Association v. FTC*, which required proving only that: (1) customers have outlets in "geographical proximity" to each other, (2) customers "purchased goods of the same grade and quality from the seller within approximately the same period of time" and (3) the customers operate "on a particular functional level such as wholesaling or retailing."[17] Significantly, the Ninth Circuit's analysis cabined and distinguished the Supreme Court's holding in *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*,[18] a 2006 decision determining that the RPA did not apply to differing price terms offered by manufacturers of specially ordered goods.

[6] *L.A. Int'l Corp. v. Prestige Brands Holdings, Inc.*, No. 18-6809-MWF (MRWx), ECF No. 373, at 3 (C.D. Cal. May 20, 2024) ("Findings of Fact").

[7] *Id.*

[8] *Id.* at 5.

[9] *L.A. Int'l Corp. v. Prestige Brands Holdings, Inc.*, No. 18-6809-MWF (MRWx), ECF No. 372, 2024 WL 2272384, at *2 (C.D. Cal. May 20, 2024).

[10] *L.A. Int'l Corp. v. Prestige Brands Holdings, Inc.*, 2024 WL 2272384, at *4.

[11] *Id.* at *14-15.

[12] *Id.*

[13] 89 F.4th 1126 (9th Cir. 2023).

[14] *Id.* at 1134-35.

[15] *Id.* at 1147-48.

[16] *Id.* at 1145-46.

[17] *Id.* at 1142. (quoting *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 668, 708 (9th Cir. 1964)).

[18] 546 U.S. 164 (2006).

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While proceedings on remand in *Innovation Ventures* remain ongoing, the Ninth Circuit's analysis makes clear that sellers should carefully consider the business models of their customers to assess how they should be classified under the RPA.

Renewed Government Interest in the RPA

The recent developments in private litigation have occurred in parallel with rhetoric from the FTC signaling an intent to return to enforcing the RPA. In June 2022, for example, the FTC warned that rebates paid by drug manufacturers to pharmacy benefit managers (PBMs) may constitute commercial bribery under the RPA.[19] Only three months later, FTC Commissioner Alvaro Bedoya delivered an address at the Midwest Forum on Fair Markets criticizing the U.S. antitrust agencies' decision to stop RPA enforcement in the mid-1980s.[20] Commissioner Bedoya identified independent cattlemen, grocers and pharmacists as potential victims of decades of nonenforcement.

Since that address, Commissioner Bedoya has continued to double down on calls for renewed RPA enforcement, including in remarks on panels at the annual ABA Antitrust Spring Meeting in March 2023[21] and April 2024.[22] And FTC Chair Lina Khan also has indicated a commitment to revitalizing RPA enforcement, promising "swift action" against any discriminatory pricing harming independent grocers during an open meeting of the FTC on March 21, 2024.[23]

On March 28, 2024, a coalition of lawmakers including Senator Elizabeth Warren and Representative Mary Gay Scanlon supported these statements in a letter calling on the FTC to "use the RPA to combat price discrimination and concentration … in the food and retail industry."[24] These lawmakers also called on the FTC to use the RPA "to combat creative, subtler forms of price discrimination," including slotting fees and volume-based rebates.[25]

Although the agencies have yet to bring any enforcement actions following through on these comments, the FTC has recently launched investigations into potential RPA violations involving wine and liquor distribution,[26] and, reportedly, soda manufacturers.[27] As of June 2024, the FTC staff investigating alcohol distribution have reportedly recommended bringing a lawsuit under the RPA, which may be filed in the coming weeks pending a final decision by the FTC's commissioners.[28]

Conclusion

The recent plaintiff-friendly decisions from the Ninth Circuit and rhetoric from the FTC suggest that the upspring of interest in the RPA could become a source of increased legal frustrations for companies in the near future. To avoid potential antitrust liability, companies that sell commodity products to resellers (*e.g.*, manufacturers selling to wholesalers, or wholesalers selling to retailers) should regularly review their pricing terms and conditions to ensure compliance with the RPA. In the wake of the *Prestige Brands* verdict, companies should pay particular attention to any participation in advertising or promotional allowance programs, even if those programs are initiated by customers. Companies should also carefully consider the business models of their customers and whether they might compete with each other for RPA purposes.

Given the current climate of resurgent interest in the RPA, we will continue to monitor developments in private litigation and government enforcement as they unfold.

[19] Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower Cost Drug Products, FTC (June 16, 2022).

[20] Alvaro Bedoya, "Returning to Fairness": Prepared remarks of Commissioner Alvaro M. Bedoya, FTC (Sept. 22, 2022).

[21] Matthew Perlman, "FTC's Bedoya Says Oft-Ignored Pricing Statute Still Good Law," Law360 (March 29,2023).

[22] Matthew Perlman, "FTC's Bedoya Looking for Market Power in Pricing Cases," Law360 (April 11, 2024).

[23] FTC, Open Commission Meeting – March 21, 2024, at 1:04:37-1:05:16.

[24] Press Release, "Warren, Scanlon, Lawmakers Urge FTC to Revive Enforcement of Robinson-Patman Act to Promote Competition, Lower Food Prices," (Mar. 28, 2024).

[25] *Id.*

[26] Press Release, "FTC Takes Total Wine to Federal Court to Enforce Compliance with Antitrust Civil Investigative Demand," FTC (Oct. 20, 2023).

[27] Josh Sisco, "Pepsi Coke Soda Pricing Targeted in New Federal Probe," Politico, (Jan. 9, 2023).

[28] John Sisco, "FTC Preparing Lawsuit Over Alcohol Pricing," Politico, (June 3, 2024).

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