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Competition Close-Up

The Robinson-Patman Act: Public Enforcement Rejoins the Private Bar

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Building upon developing momentum in the courts and among commentators, government enforcers and the private bar have seen recent successes in litigation involving the **Robinson-Patman Act (RPA)**. The **FTC** in April **notched a win** in its **first case** brought under the RPA in over 20 years in a case against Southern Glazer's Wine and Spirits. At the same time, in mid-May, a court in the Central District of California revised its prior findings of fact to conclude that private plaintiff sellers proved competition with a large retailer for sales of the product 5-hour ENERGY under the RPA. **The decision** came after the Ninth Circuit had instructed the court to reexamine its prior conclusion.

The FTC's action brought significant attention to RPA in late 2024 when it was filed. The RPA, however, has been anything but a dormant statute. In the United States, private litigants are key enforcers of antitrust laws and bring the majority of antitrust claims in the United States. Unlike the FTC, private plaintiffs never stopped bringing RPA claims. Even before the FTC brought its claims against Southern Glazer's, a Central District of California judge confirmed an arbitrator's award for plaintiffs against the company for allegations of similar conduct. The FTC's action, in turn, may influence and potentially re-invigorate private antitrust enforcement of the RPA depending on its outcome. And, with a potentially favorable Ninth Circuit, the potential for future RPA actions is unknown.

The RPA Explained

The RPA prohibits "any person engaged in commerce...to discriminate in price between different purchasers of commodities of like grade and quality" where the effect would be to harm competition. It was passed in 1936 with the intention to protect small retailers from **unfair competition with larger chains**. The scope of the RPA is not, however, limited only to retail industries, but applies more broadly to any sale of goods.

Sellers who discriminate between purchasers are liable under the RPA; however, there are **three types** of injury to consider. First, primary line injury is harm to a seller's competitors. Second, secondary line injury is harm to a purchaser of the seller, often called the disfavored purchaser. Lastly, tertiary line injury is harm to the customers of a disfavored purchaser. The FTC's case and the other private cases discussed in this article are secondary line injury cases where a seller charges a lower price to a favored purchaser over the disfavored purchasers.

Under the RPA, a plaintiff must show that the sales: (1) were in interstate commerce; (2) were of goods of like grade and quality; and (3) constituted (a) a discrimination in price between favored and disfavored buyers, and (b) that "the effect of such discrimination may be ... to injure, destroy, or prevent competition to the advantage of a favored purchaser".

Price discrimination can happen directly by price charged or indirectly through discounts, marketing programs, and payment of services which are called functional discounts. The RPA also explicitly prohibits price discrimination in exchange for payment of commissions or for use of or in exchange for **services and facilities**. Further, disfavored purchaser plaintiff proves competitive injury by showing (1) that they and a favored buyer are competitors in the resale market for the commodity at issue and (2) there was actual injury in the form of diversion of consumers. However, in cases of inducement in exchange for the discount, a plaintiff does not need to show competitive harm since the inducement without a proper business purpose is per se unlawful.

RPA claims are among the most difficult in the antitrust laws. What it means for a seller's customers to be similarly situated as to "like grade and quality" or for the charging of different prices to different buyers to cause a "harm to competition" within the meaning of the RPA is a source of significant debate in the caselaw. Moreover, defendants can provide economic explanations for discrimination as an acceptable defense to liability. It is well established, for **example**, that a price concession given in good faith to meet competition will not give rise to liability and is a primary defense in RPA cases. Additional defenses include proof that goods were not sold contemporaneously to the favored and disfavored buyers and that the differences are attributable to changed market circumstances. Equally, cost justifications are expressly contemplated by the **RPA** as an acceptable basis for discrimination.

Unsurprisingly, when enforcement of the U.S. antitrust laws turned toward emphasizing the consumer welfare standard in the 1970s, both government and private enforcement under the **RPA began to decline**. But these cases are not impossible and private litigation has consistently taken enforcement action over the past 20 years of government inaction.

Private RPA Claims Have Seen Success in Recent Years

Despite the difficulty of RPA claims, private litigation remained active during the FTC's period of inaction, developing the law and building a foundation and momentum for more vigorous enforcement.

In 2023, the Ninth Circuit in ***U.S. Wholesale Outlet & Dist., Inc. v. Innovation Ventures*** expanded on the test to see if favored and disfavored purchasers are competitors, giving RPA plaintiffs more guidance and potentially more opportunities to claim protections. In *Innovation Ventures*, retailer plaintiffs sued defendant seller of single-shot energy drinks to a wholesale retailer as a favored buyer. The Ninth Circuit in an order with plaintiff-friendly reasoning reversed the trial court's denial of injunctive relief, which **stated** that plaintiffs and the alleged favored buyer were not competitors since they sold on different distribution levels.

The Ninth Circuit held that two buyers are competitors if: "(1) one customer has outlets in geographical proximity to those of the other; (2) the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time; and (3) the two customers are operating on a particular functional level such as wholesaling or retailing."

Underscoring the role of private plaintiffs, shortly before the FTC "re-activated" the RPA, a private plaintiff won a sizable jury award and injunctive relief under the RPA in ***L.A. International Corporation v. Prestige Brands Holdings, Inc***. There, plaintiff wholesalers who purchased eye drops were awarded a $680,000 jury verdict against defendant eye drop manufacturers. In their motion for a new trial, defendants argued errors in jury instructions because (1) wholesalers were not competitors with the favored chain retailers purchasing the same product; (2) the lower prices were justified by economic principles; and (3) the lower prices were unlikely to harm competition. The court on a motion for new trial rejected these arguments on all counts, basing its reasoning primarily on the test in *Innovation Ventures*. The court also rejected defendants' assertions because the jury was instructed on available defenses and still found for plaintiffs. The district court affirmed the jury award and granted plaintiffs' injunction to prevent future pricing discrimination.

What do These Developments Mean for the Future of the RPA?

The RPA, an often overlooked antitrust law, has seen enormous interest and movement of late. The FTC's **Southern Glazer's action** and the development of appellate law on the issue present opportunities for robust enforcement to prevent discrimination against disfavored purchasers who are often small or regional businesses. Both public enforcers and the private bar can (and do) follow on the work of the other. In another case, the Department of Justice similarly filed its suit over price-fixing in the **broiler chicken industry** after private plaintiffs filed and aggressively pursued their claims. Cases are adjudicated in the same court system under common legal precedent, sometimes following each other, sometimes in parallel, and sometimes even in coordination.

With both government and private plaintiffs utilizing a sometimes overlooked law, practitioners and litigants should keep a close eye on the development of antitrust law under the RPA in the coming years.