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The FTC considers reviving Robinson-Patman enforcement

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- The FTC may be looking for a test case to revive Robinson-Patman Act enforcement. As with other FTC test cases in recent years, the FTC will look for what it views as a clear violation that it can use to create precedent and build enforcement momentum.
- The FTC has the power to enforce the Robinson-Patman Act by obtaining injunctive relief through administrative proceedings. Although the Act has a criminal enforcement provision, the DOJ has not sought criminal penalties since the 1960s and even rarely then. The Clayton Act also creates private rights of action, which frequently follow federal enforcement actions, raising the prospect of businesses also facing litigation costs, treble damages, and attorneys' fees.
- Despite the FTC's enthusiasm, it is unlikely to receive a warm welcome in federal court. The Robinson-Patman Act has been whittled down by courts to a shadow of its former self. And while the law has never been repealed, winning a Robinson- Patman case can be exceedingly difficult. The FTC has not litigated a case in decades, so it must overcome scarce institutional knowledge on litigating Robinson-Patman issues.

The FTC's renewed interest in Robinson-Patman

News about a purported Robinson-Patman investigation by the FTC follows two years of aggressive and controversial initiatives at the enforcement agencies.

These include:

(1) prosecuting no-poach agreements as criminal violations of the Sherman Act § 1 for the first time in history,[1]

(2) bringing criminal charges for a violation of the Sherman Act § 2 for the first time in nearly half a century,[2] and

(3) proposing a ban under § 5 of the Federal Trade Commission Act on nearly all noncompete agreements between employers and workers,[3] the first time the agency has exercised its rulemaking authority under that provision since the 1970s.

The reports of a Robinson-Patman investigation are notable because it would be the first time in more than two decades that the FTC has shown interest in enforcing the Act. According to the Antitrust Modernization Committee, "the FTC has issued only one [Robinson-Patman] Act complaint since 1992."[4]

Since then, the DOJ and FTC has shown little interest in price discrimination. As recently as 2007, the Antitrust Modernization Committee[5] concluded "the act is fundamentally inconsistent with the antitrust laws and harms consumer welfare."

Because "it is not possible to reconcile the provisions of the Act with the purpose of antitrust law," "repeal of the entire Robinson- Patman Act is the best solution."[6]

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Several current FTC commissioners would fundamentally disagree with that assessment. In his September 2022 remarks at the Midwest Forum on Fair Markets, Commissioner Alvaro M. Bedoya criticized the prevailing antitrust focus on market efficiency and alluded to the Robinson-Patman Act as a tool to level the playing field for small business and underserved rural consumers.[7]

In 2017, Commission Chair Lina Khan penned a law review article advocating for a shift in antitrust policy from a focus on consumer welfare to a focus on the "competitive process" and "structure" of the market as a whole. The article reads as an invitation to revisit the use of the Robinson-Patman Act and other abandoned enforcement tools.

Commissioners Bedoya and Khan have the backing of the Biden Administration, which cited the Robinson-Patman Act in its July 2021 Executive Order on Promoting Competition in the American Economy as a solution "to improve farmers' and smaller food processors' access to retail markets."

The history & purpose of the Robinson-Patman Act

Passed in 1936 as an amendment to the Clayton Act, and signed into law by Franklin D. Roosevelt, the avowed purpose of the Robinson-Patman Act was to level the playing field for mom-and-pop shops and curtail the economic power of food markets and other big box chain stores.[8] Congress sought to achieve that purpose through the Act's general prohibition of sales of similar commodities at different prices.[9]

The Robinson-Patman Act's focus on small business makes it a somewhat unique — and controversial — fixture of the U.S. antitrust laws. As the Supreme Court adage goes, "the antitrust laws were passed for the protection of *competition,* not *competitors,*"[10] and critics deride Robinson-Patman as flipping this axiom on its head.[11]

The Robinson-Patman Act's fall from grace roughly coincides with the rise of the consumer-welfare movement that reached its zenith the 1980s. The Robinson-Patman Act, the movement theorized, can actually harm consumer welfare by discouraging price discounting that is passed on to consumers in the form of lower prices.

The success rate of Robinson-Patman claims is very low in recent history.

As early as 1969, a Report of the White House Task Force on Antitrust Policy found "most price discrimination is affirmatively beneficial to competition, and the instances in which price discrimination harms competition are exceptional."[12] Enforcement dipped in the 1970s as that thinking spread, and the enforcement agencies of the Reagan Administration all but abandoned the Robinson-Patman Act.

However unpopular it may have become with government enforcers, the Robinson-Patman Act has never been repealed. Even to this day, there is a trickle of private Robinson-Patman cases, by our count at least sixteen since 2020.[13]

The challenges of Robinson-Patman enforcement

At its core, the Robinson-Patman Act makes it "unlawful for any person ... to discriminate in price between different purchasers of commodities of like grade and quality ... [if] the effect ... may be substantially to lessen competition or tend to create a monopoly."

However, the Robinson-Patman Act has many limitations and defenses, some derived from statutory language, others through the slow accretion of court decisions interpreting the surprisingly complicated nuances of price discrimination.

By its terms, the Robinson-Patman Act only applies where there are two (or more) contemporaneous sales of goods to different customers. Services and leases are not covered,[14] nor are discriminatory offers that do not result in a sale.[15] The devil is in the details on the "like grade and quality" element, as even minor differences between products can defeat a Robinson-Patman claim.[16]

There must also be harm to competition, which implicitly requires the "favored" buyer to compete with the "disfavored" buyer. There must also be proof of diverted sales or profits as a result of the discrimination, or at least a showing of a "substantial price differential over a lengthy period of time" to infer harm to competition.

Either way, proving harm can be an expensive and difficult endeavor, and the potential for a relatively small recovery, *i.e.*, diverted sales or profits, often makes undertaking the endeavor an unattractive proposition.

There are also several affirmative defenses to Robinson-Patman price discrimination claims, which courts have created or extrapolated over time from the Act's text:

- The meeting competition defense allows a seller to meet (but not beat) a competing seller's price. Good faith is the key, and even offers that beat a competitor's price are beyond the reach of the Robinson-Patman Act if there is a good faith belief that prices meet a competitor's prices.
- The cost justification defense allows a seller to charge a price based on the actual cost of manufacturing, sale, and delivery, even if it results in price discrimination. Litigation of this defense tends to result in tedious accounting questions about which costs qualify.
- The changing conditions defense allows for changes to pricing to respond to changes in market conditions. Think perishable goods that can spoil or last year's car models that are less popular.
- The functional availability defense allows for discounts where (i) the discount is known and available to all competing buyers and (ii) the discount is attainable by both buyers. This defense allows quantity discounts under some circumstances, which requires a fact-intensive inquiry.
- The functional discount defense allows a seller to charge a lower price to buyers that provide additional services that the seller would otherwise have to undertake, such as advertising and distribution.

As one can imagine, the success rate of Robinson-Patman claims is very low in recent history. Sellers have become adept at avoiding potential competitive harm by

(1) tracking non-competing buyers that can be charged different prices,

(2) segmenting products with slight variations to sidestep the "like grade and quality" element,

(3) packaging price differences as incentives in resale programs functionally available to all buyers, and

(4) documenting the rationale for price variations that can then be explained in terms of an affirmative defense.

Even detecting Robinson-Patman violations can be exceedingly difficult in industries where pricing is confidential, something the antitrust laws themselves encourage.

As the Antitrust Modernization Commission noted in 2007: "Of 200 reported cases with Robinson-Patman Act claims filed in federal court in the past ten years, only three jury verdicts in favor of plaintiffs were affirmed on appeal. One of these three was reversed by the Supreme Court."[17]

Possible next steps by the FTC

Recognizing the stiff challenge in reviving Robinson-Patman as an enforcement tool, the FTC will likely look for a test case it views as presenting a clear violation of the Act. This would involve finding a defendant with significant market share, selling a relatively uniform

product, to a large number of buyers located throughout the country. The beverage industry and a large retailer would fit the bill and are reportedly already under investigation by the FTC.

Additionally, the FTC may target industries where there is political support for pricing reform, such as prescription drugs. This has already been foreshadowed by a recent FTC policy statement that drug manufacturers may run afoul of the Robinson-Patman Act by offering rebates and paying fees to pharmacy benefit managers and other intermediaries to favor high-cost drugs.[18]

The FTC is also likely to bring a Robinson-Patman claim for conduct that arguably also violates other statutes, such as § 5 of the Federal Trade Commission Act[19] or §§ 1 or 2 of the Sherman Act.[20]

The DOJ took this approach when it recently brought its first Sherman Act § 2 criminal monopolization case in 40 years for an agreement to allocate the asphalt market in several mountain states, conduct that is usually prosecuted as a conspiracy under the Sherman Act § 1.

Bringing such a "hybrid" case would provide a surer footing for reviving a controversial statute like Robinson-Patman.

After decades of being weakened and overlooked, the FTC faces an uphill battle in reviving the Robinson-Patman Act. But that has not stopped the current FTC from breaking new ground in recent years. Businesses should monitor these developments and stay tuned as the FTC continues its efforts to expand enforcement of competition issues.

Notes

[1] *United States v. VDA OC, LLC*, No. 2:21-cr-00098 (D. Nev. Oct. 27, 2022).

[2] http://bit.ly/3XAUswU; http://bit.ly/3RVUq1e.

[3] http://bit.ly/3jUMiBz; http://bit.ly/3lj0uha.

[4] https://bit.ly/3lsj25z at 316.

[5] The Antitrust Modernization Commission was created by the Antitrust Modernization Commission Act of 2002 to assess potential changes to the antitrust laws, solicit opinions from all interested parties, and present its findings to Congress.

[6] https://bit.ly/3lsj25z at 312.

[7] http://bit.ly/3XxOjkS.

[8] *Standard Motor Prod., Inc. v. Fed. Trade Comm'n*, 265 F.2d 674, 675-76 (2d Cir. 1959).

[9] *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175 (2006).

[10] *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993).

[11] As the Supreme Court explained in 1948: "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages ..." *Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 43 (1948). Because of this focus, the Antitrust Modernization Committee described Robinson-Patman in 2007: "An act that restricts price and other forms of competition is fundamentally inconsistent with the antitrust laws, which protect price and other types of competition that benefit consumers."

[12] https://bit.ly/3lsj25z at 318.

[13] http://bit.ly/3jRYxPn.

[14] *Innomed Labs, LLC v. ALZA Corp.*, 368 F.3d 148, 156 (2d Cir. 2004) ("The Robinson-Patman Act's prohibition on price discrimination extends only to transactions involving commodities. Courts have strictly construed this term, holding that it denotes only tangible products of trade."); *see e.g., SCM Corp. v. Xerox Corp.*, 394 F. Supp. 384, 385 (D. Conn. 1975) (Robinson- Patman held not to apply to lease of copier).

[15] *Bruce's Juices v. Am. Can Co.*, 330 U.S. 743, 755 (1947) ("Moreover, no single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination.")

[16] *Matter of Universal-Rundle Corp.*, 65 F.T.C. 924 (1964) (one-inch height difference in bathtubs rendered two sales not of different "grade and quality").

[17] https://bit.ly/3lsj25z at 316.

[18] https://bit.ly/3cr5Rh9.

[19] Section 5 prohibits, "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C.A. § 45.

[20] Section 1 prohibits "contract[s], combination[s] in the form of trust or otherwise, or conspirac[ies], in restraint of trade." Section 2 prohibits "monopoliz[ation]" and "attempts to monopolize."

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