DISFAVORED RETAILERS TURNING UP THE VOLUME ON ROBINSON-PATMAN LITIGATION

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While volume discounts are a normal practice for business, few recognize that a pricing strategy based solely upon volume may be prohibited by U.S. antitrust laws. Specifically, the Robinson-Patman Act ("RPA"), enacted in 1936 as a New Deal regulation, makes it illegal for a manufacturer to sell the same or similar products at different prices to competing purchasers. While repeal of the RPA has been requested for decades[1] and government enforcement has been virtually non-existent, a recent spate of private litigation highlights the legal risk associated with volume-based pricing strategies. On February 8, 2018, a California-based wholesale distributor sued the manufacturer of 5-Hour Energy, claiming that it has offered favorable prices to wholesale club stores, also known as the "club-channel,"[2] for several years in violation of the RPA and California law.

Given the recent awakening of the plaintiff's bar on this issue, manufacturers must be aware of the heightened legal risk associated with volume-based pricing strategies and what can be done to mitigate RPA liability.

BRIEF BACKGROUND

The RPA prohibits price discrimination, in the form of volume discounts or rebates, between purchasers of goods of like grade and quality where the effect may be to substantially lessen competition or create a monopoly.[3] The RPA was enacted in response to the emergence and explosion of chain supermarket stores in the 1930s and was designed to protect small, neighborhood grocery stores. Because chain stores began purchasing in unprecedented quantities, manufacturers began rewarding them with lower prices than those offered to competing "mom and pop" stores. The Supreme Court recognized that in passing the RPA, "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."[4] While it may seem counterintuitive for the RPA to protect individual competitors by ensuring that small resellers pay the same price as large resellers for products, this is exactly the intended purpose and result of the RPA.

Although RPA lawsuits have been infrequent, it is controlling law today, and liability under the RPA has sharp teeth as successful plaintiffs are entitled to treble damages and reimbursement of attorney's fees.[5] In fact, in the past few years, RPA lawsuits have been filed against automobile manufacturers,[6] consumer product companies,[7] and other manufacturers.

THE 5-HOUR ENERGY LAWSUIT [8] – AN ATTACK ON CLUB-CHANNEL PRICING DISCOUNTS

On February 8, 2018, U.S. Wholesale Outlet & Distribution, Inc. ("U.S. Wholesale") sued the makers of 5-Hour Energy, Living Essentials, LLC ("Living Essentials") in the U.S. District Court for the Central District of California.[9] The crux of U.S. Wholesale's claim is that Living Essentials gives better prices (2%–20%) to a club-channel competitor of U.S. Wholesale. Even when combining discounts offered to U.S. Wholesale and other smaller wholesalers, U.S. Wholesale claims that the club-channel still receives lower list prices. Exacerbating this price difference, Living Essentials allegedly offers club-channel retailers a variety of discounts and rebates not offered to U.S. Wholesale or other similar wholesalers, ultimately resulting in a 15%–20% total price difference per bottle of 5-Hour Energy.

In support of its RPA claim, U.S. Wholesale quotes several emails from Living Essentials employees and executives. For example, U.S. Wholesale alleges a Living Essentials executive stated: "If I was an Independent retailer I would buy my 5 Hour Energy at [the club-channel distributor]…. They can get at [the club-channel distributor] for .27 cent less per bottle!" Further, because an RPA claim requires that a plaintiff demonstrate that it suffered harm as a result of discriminatory prices, U.S. Wholesale claims: "Faced with a cost of goods for 5-Hour Energy that was 15-20% higher than that paid by their competitor [], as a matter of mathematics Plaintiff has been unable to compete [] on price for 5-Hour Energy, and has accordingly lost hundreds of thousands of dollars in sales that it otherwise would have had in the absence of discrimination."

HEIGHTENED ROBINSON-PATMAN ACT SCRUTINY

As the allegations in the 5-Hour Energy lawsuit makes clear, "buyers" (as well as plaintiff's lawyers) have recognized that club-channel pricing may present price discrimination and RPA disputes. However, the club-channel is not the only sales channel where RPA issues can arise, and RPA concerns are not unique to the food and beverage industry.

The landscape of retail has changed dramatically, especially with the growth, consolidation, and subsequent negotiating power of large e-commerce retailers and websites. Today, retailers and online commerce websites have grown large enough to maintain considerable negotiation leverage with manufacturers. There is a growing trend for retailers to demand margin guarantees or price concessions that would not have been acceptable to a manufacturer a decade earlier. As these negotiations are conducted independently with each retailer, they often result in one retailer receiving better pricing terms than another similarly situated retailer, even though both retailers are selling the same product. This type of piecemeal pricing negotiation with a retailer base can unknowingly result in increased antitrust liability under the RPA for a manufacturer.

For example, while a margin guarantee does not present an immediate RPA issue, it nevertheless creates potential RPA exposure if it is not given or offered to all similarly situated retailers. Under the RPA, it is necessary to compare the "net price" received by purchasers after all discounts have been taken.[10] Should the resale price

of a product fall below a certain price, a margin guarantee may result in a retailer effectively receiving the product at a lower cost than its competition. Thus, where a manufacturer provides a margin guarantee for one retailer but denies the same guarantee for a different retailer, the manufacture's antitrust exposure increases.

ROBINSON-PATMAN ACT DEFENSES

To be clear, however, not all price differences violate the RPA. To guard against potential RPA liability, manufacturers and other suppliers must be aware of several recognized RPA defenses. For example, a court likely will not impose RPA liability when a lower price or discount is made functionally available to other buyers. Sellers may also avoid RPA liability if there is a cost justification for the price difference. Resellers that perform warehousing, handling, return, or warranty services can receive preferential pricing in the form of a functional discount that is tied to the actual cost savings. In addition, manufacturers and other sellers may legally offer favorable prices in order to meet a low proposal of a competitor.

While these defenses exist, companies rarely document them. Instead, product pricing discussions are often left in the hands of the business teams, which can result in unfavorable emails from the sales team that only get revealed in discovery if an antitrust claim is litigated. To ensure documentation and compliance with these defenses, manufacturers should implement guidelines and protocols to document communications, decisions, or justifications for their pricing strategies. This is especially important when two similarly situated retailers receive different prices on the same product from the same manufacturer. With these procedures and protocols in place, the manufacturer can both assess its RPA concerns in real time as pricing decisions are made and ensure that its RPA defenses are properly documented should its pricing strategies ever be challenged.

For more information, please contact the professionals listed below or your regular K&L Gates contact.

Notes:
[1] *See* Antitrust Modernization Commission, *Report and Recommendations*, April 2007, at 313.
[2] The "club-channel" consists of wholesale club retailers selling a wide variety of consumer products in wholesale, bulk quantities and discounted prices. These stores may require customers to pay annual membership fees.
[3] 15 U.S.C. § 13(a). The U.S. Supreme Court has developed a four-prong test in order to establish a prima facie RPA violation:
1. the relevant . . . sales were made in interstate commerce;
2. the [commodities] were of "like grade and quality";
3. "discriminat[ion] in price between" . . . purchaser[s] . . . ; and
4. "the effect of such discrimination may be . . . to injure, destroy, or prevent competition" to the advantage of a favored purchaser, i.e., one who "receive[d] the benefit of such discrimination."
Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176-77 (2006).
[4] FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948).
[5] 15 U.S.C. § 15(a).
[6] *See e.g.*, Bedford Nissan, Inc. v. Nissan North America, Inc., 1:16-cv-00423 (N.D. Ohio Feb. 23, 2016); Napleton's Arlington Heights Motors, Inc. v. FCA U, LLC, 1:16-cv-00403 (N.D. Ill. Jan. 12, 2016).
[7] *See*, *e.g.*, Woodman's Food Market, Inc. v. The Clorox Co., 3:14-cv-00734 (W.D. Wis. Oct. 28, 2014).
[8] U.S. Wholesale Outlet & Distribution, Inc. v. Living Essentials, LLC and Innovation Ventures, LLC, C.A. No. 2:18-cv-01077 (C.D. Cal. Feb. 8, 2018).
[9] Several wholesalers previously sued Living Essentials for violations of the RPA. *See* ABC Distributing, Inc. v. Living Essentials, LLC, 15-cv-02064 (N.D. Cal. May 7, 2015). However, plaintiffs in that case were denied class

certification, leading to this most recent suit.
[10] *See* Conoco, Inc. v. Inman Oil Co., Inc., 774 F.2d 895, 902 (8th Cir. 1985).

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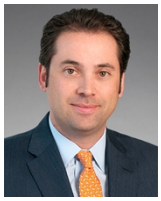

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