THE ROBINSON-PATMAN ACT: EVERYONE OLD IS NEW AGAIN

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Originally passed in the mid-1930s to protect small grocery businesses in the face of fast-growing chain supermarkets that could negotiate steep discounts for bulk purchases, the Robinson-Patman Act prohibits price discrimination to protect against unfair competition. Over the past several decades as efficiency and consumer welfare took center stage in the antitrust academy, policy and common law, the Robinson-Patman Act has become a disfavored relic of antitrust law, with DOJ and FTC enforcement effectively ceasing more than twenty years ago. The Biden administration's DOJ and FTC appointees have signaled an intent to brush the dust off of the Robinson-Patman Act and renew enforcement of *unfair* as opposed to *inefficient* practices. This note considers potential Robinson-Patman Act enforcement action against certain e-commerce giants of today, such as Amazon and Walmart, and analyzes the strength of a *prima facie* case of price discrimination, as well as the viability of available affirmative defenses.

The Biden Administration's antitrust enforcement leaders, the Federal Trade Commission's Lina Khan, and the Antitrust Division of the Department of Justice's Jonathan Kanter, have announced themselves as aggressive, policy-driven, outcome-determinative antitrust enforcers. This is consistent with the Biden's administration's preferences. But these preferences are prompted by a confluence of realities.

· First, the almost unchecked growth of the e-commerce, tech, and digital sectors, including their domination in the everyday lives of most Americans. The public's dissatisfaction big tech data breaches, price increases, and disruption of traditional socialization, are causes for genuine concern.
· Second, the FTC and DOJ have for many years been conservative in their court case selection, preferring to compromise via consent degrees and settlements, letting most major tech combinations go through with minimal changes.
· Third, the agencies' conservatism reflects, in pertinent part, the pro-business common law established by federal courts over the past few decades, and Chicago School tenets that razed Brandesian principles.
· Fourth, the comparatively more potent EU antitrust regulatory regime, has underscored the relative weakness of U.S. antitrust enforcement.
· Finally, certain U.S. states are moving to pass more aggressive antitrust laws in response to perceived weakness in the federal regime. And so the FTC and DOJ are looking for new ways to win. Even if that means reviving older, mostly forgotten laws like the Robinson-Patman Act. In this sense, the old may well be "new." At least to the current crop of antitrust agency staff, practitioners, and businesspeople.

I. OVERVIEW AND HISTORY OF THE ROBINSON-PATMAN ACT

The Robinson-Patman Act ("RPA"), also called the Anti-Price Discrimination Act, was enacted in 1936 as an amendment to the Clayton Act. Its purpose was to protect small businesses from being driven out of the marketplace, and also to protect wholesalers from being excluded from the purchasing chain. Its core feature is the prohibition of price discrimination by sellers among purchasers of commodities. The impetus for the act was the growth of large grocery chains that essentially eliminated the middleman wholesalers used by smaller grocery firm competitors. This enabled large firms such as A&P to buy goods directly from sellers in large quantities, and negotiate a discount for bulk-purchases, unavailable to smaller retailers. The sheer size of the chain stores enabled them to command discounts even when the discounts were unrelated to lower production and distribution costs. Smaller competitors that could not match the price were driven out of business. At the time, chain stores accounted for one in every ten physical stores, and one in five dollars' worth of merchandise sold.[2] Between 1920 and 1930, the top twenty chain stores grew by more than 250 percent.[3] In keeping with the prevailing antitrust policy at the time, the Robinson-Patman Act sought to aid smaller businesses to compete with larger retailers. The Act has been referred to as the "Magna Carta of small businesses."[4]

The central provision of the act, Section 2(a) makes it unlawful "for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality" when the effect may be to injure competition at either the seller or customer levels.[5] Such price discrimination is expressly permitted, however, when it is justified by cost savings, the need to meet a competitor's equally low price, or changing conditions.[6] Certain jurisdictional elements are required to establish a price discrimination claim under the RPA: the defendant seller must have made: (1) at least two consummated sales, (2) of commodities, (3) of like grade and quality, (4) at discriminatory prices, (5) by the same seller, (6) to different purchasers, (6) that occurred contemporaneously or within the same approximate period, and (7) that occurred "in commerce."[7]

Price discrimination claims under section 2(a) involve allegations of either primary-line or secondary-line injury. Primary line cases involve competitors of the seller and secondary line cases involve competitors of the favored purchasers who buy from the seller.

2 4 The Legislative History of the Federal Antitrust Laws and Related Statutes at 2958 (Earl W. Kintner ed., 1980)

3 See Mark A. Glick, David G. Mangum & Lara A. Swensen, *Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent*, 60 Antitrust Bull. 279, 282 (2015) (citing Godfrey Lebhar, *Chain Stores in America*, 1859–1962, at 55–56 (1958) (noting that the top twenty chains grew by more than 250 percent— from 9,912 to 37,524 stores—between 1920 and 1930)).

4 Earl W. Kintner & Joseph P. Bauer, *The Robinson-Patman Act: A Look Backwards, a View Forward*, 31 ANTITRUST BULL. 571, 571 (1986).

5 Section 2(a), codified at 15 U.S.C. § 13(a).

6 *Id.*

7 See Hugh C. Hansen, *Robinson- Patman Law: A Review and Analysis*, 51 Fordham L. Review 1113, 1125029 (1983) (discussing jurisdictional elements with case citations).

In one of the early Supreme Court cases construing the Robinson-Patman Act, FTC v. Morton Salt Co.,[8] the court identified the competitive injury contemplated by RPA as injury to the *"competitor victimized by discrimination,"*[9] highlighting the protectionist nature of the RPA in contrast to other antitrust laws concerned only within injury to *competition*. The Court went on to establish a "self-evident" inference of injury to competition in cases in which the difference in price is substantial or "sufficient in amount to influence . . . resale prices." Later cases have referred to this *Morton Salt* rule as one in which "injury to competition is established *prima facie* by proof of a substantial price discrimination . . . over time."[10]

In the 1980s and early 1990s, the Supreme Court ruled on several Robinson-Patman Act cases, which collectively made it harder for a price discrimination claim to succeed.[11] The expansion of affirmative defenses included cost justification (the lower price is justified by the different costs faced by the seller), functional availability (the lower price would have been available to competing purchasers), changing conditions (the price was lowered in response to changes in the market, such as seasonal nature of goods) and meeting competition (the price was lowered in good faith to meet — but not undersell — a competitor's lower price).

Over time, the "injury to competitor" feature of the RPA was given less prominence, as jurisprudence heightened the standard for competitive injury, sometimes apparently requiring injury to competition (and not just to competitors). For example, in 1993, in *Brooke Group Ltd v. Brown & Williamson Tobacco Corp*, the Court instructed that the Act be construed "consistently with broader policies of the antitrust laws" and wrote that the Act prohibits "price discrimination only to the extent that it threatens to injure competition."[12]

In 2006, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,[13] the Court again tightened the competitive injury required for RPA liability, and ruled that the requirement was not met where Volvo gave smaller concessions to the Plaintiff (Reeder) than to other car dealers for *different sales*. Only direct "head-to-head" competition for the same customers (or sales) could support an RPA violation, but because the evidence in the case showed the loss of only one such sale, it was insufficient to establish competitive injury.

While the *Volvo* court heightened the standard by conducting this transaction-specific analysis and discounting similar sales which were not head-to-head, the decision still reaffirmed the central holding of *Morton Salt*, that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price deduction over a substantial period of time.[14]

II. FROM PROTECTING THE SMALL BUSINESS TO PROTECTING THE CONSUMER

Federal Trade Commission ("FTC") enforcement of RPA peaked in the 1960s, when it brought more than 500 cases. But the tide turned as antitrust analysis shifted to protection of competition, rather than protection of competitors.[15] While the concern that animated the RPA was survival of the mom-and-pop shop, the focus of most other laws, and the trend in antitrust analysis has sought to protect market efficiencies and procompetitive behavior, even at the expense of (inefficient) mom-and-pop market participants. Efficiency gained ground as the goal of antitrust law. In the consumerist view of society, low prices were almost always beneficial, and protection of producers and small businesses fell out of favor.

In a 1977 report, the DOJ described the RPA as reflecting "questionable economic assumptions prevalent in the 1930s," and stopped RPA enforcement actions. The FTC followed suit and FTC actions waned over the years. The FTC has not brought an RPA price discrimination suit in over 20 years.[16]

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8 334 U.S. 37 (1948).

9 *Id.* at 49-51 (emphasis added).

10 *Falls City Indus. v. Vanco Beverage*, 460 U.S. 428, 435 (1983).

11 See *Brooke Group Ltd. v. Brown & Williamson*, 509 U.S. 209 (1993); *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990); Falls City, 460 U.S. 428 (1983); *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979).

12 *Brooke Group*, 460 U.S. at 420.

13 546 U.S. 164 (2006).

14 *Id.* at 177 ("A hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser… We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time.")

15 See, e.g. *Brooke Group*, 509 U.S. at 224 ("It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.") (internal citations omitted).

16 Prepared Remarks of Commissioner Alvaro M. Bedoya Federal Trade Commission, September 22, 2022 available at https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

In 1998, the Secretary of the Federal Trade Commission[17] discussed interpretation of the Act against the backdrop of the objectives of "consumer welfare and economic efficiency," pointing to Supreme Court language in *Brooke Group* urging interpretation consistent with "broader policies of the antitrust laws."[18] Thus, he concluded, "the best way to effectuate this objective is to interpret the Act so as to emphasize the prohibition of discriminatory practices that injure or threaten to injure competition."

As a result of this shift, FTC actions waned and ultimately stopped —In addition, in recent years, the FTC has supported narrower construction of the RPA in private cases.[19]

III. A NEW SHERIFF IN TOWN

The Biden administration has demonstrated a renewed interest in vigorous antitrust enforcement, calling for a review of all enforcement tools, including statutes that have fallen into disuse by the enforcement agencies, among them the RPA.[20]

FTC Commissioner Alvaro Bedoya recently called for renewed enforcement of the RPA. In prepared remarks, he called for a return to "fairness," rather than "efficiency" as the lodestar of antitrust law:[21]

> If efficiency is so important in antitrust, then why doesn't that word, "efficiency," appear anywhere in the antitrust statutes that Congress actually wrote and passed?
>
> If efficiency is the goal of antitrust, then why am I charged by statute with stopping unfair methods of competition, and not "inefficient" ones?
>
> We cannot let a principle that Congress never wrote into law trump a principle that Congress made a core feature of that law. I think it is time to return to fairness…
>
> Certain laws that were clearly passed under what you could call a fairness mandate –laws like Robinson-Patman – directly spell out specific legal prohibitions. Congress's intent in those laws is clear. We should enforce them.

IV. POTENTIAL RPA CLAIMS AGAINST RETAIL GIANTS

With no enforcement of the RPA for decades, giant e-retailer market players were permitted to grow unchecked, by demanding discounts and forcing suppliers to guarantee their margins.[22] E-Commerce giants like Amazon, Walmart and Target use their scale to command more favorable supply terms and lower pricing. It is common for these firms to use their purchasing clout to extract discounts from suppliers, unavailable to their smaller rivals, squeezing the suppliers and eliminating small businesses.[23] The situation is not all that different than it was in the 1920s and 1930s when chain grocery stores used their power to exploit suppliers and win market share. In essence it is the exact situation — arguably on a larger scale —that the Robinson-Patman Act was designed to combat.

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17 See Donald S. Clark, Secretary of the Commission, *The Robinson-Patman Act: Annual Update*, April 2, 1998.

18 *Brooke Group*, 460 U.S. at 420.

19 See e.g. *Brief of Amicus Curiae The Federal Trade Commission, Woodman's Food Market, Inc. v. The Clorox Co.*, No. 14-cv-00734-slc, available at https://www.ftc.gov/system/files/documents/amicus_briefs/woodmans-food-market-inc.plaintiff-appellee-v.clorox-co.clorox-sales-co.defendants-appellants/151102woodmanvscloroxamicusbrief.pdf.

20 See *Executive Order on Promoting Competition in the American Economy*, July 9, 2021, which mentions the RPA by name.

21 See Alvaro M Bedoya, *Returning to Fairness*, prepared remarks of FTC commissioner Alvaro M Bedoya, September 22, 2022 available at https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

22 See Brian Callaci and Sandeep Vaheesan, *How and Old U.S. Antitrust Law Could Foster a Fairer Retail Sector*, Harvard; Business Review, Feb. 9, 2022.

23 See *id.*, describing how the squeeze is felt throughout the supply chain. For example, in 2003, Carolina Mills, a North Carolina textile company, blamed its collapse on Walmart squeezing the apparel manufacturers it had supplied with thread, yarn, and textile finishing. Amazon, for its part, has flexed its buyer power to squeeze suppliers. For example, its "Gazelle Project" targeted the smallest and weakest book publishers for the toughest price squeeze.

With growing concern about e-commerce giants, ranging from causing wage stagnation and labor abuses, poor working conditions at various stages in the supply chain, to locking consumers into an ecosystem of products and services and leveraging market power in one line of business to gaining monopolies in others, there are currently several ambitious proposals making their way through Congress. The RPA has been identified as one underused tool that could help rein in e-retailers such as Amazon and Walmart. But would it be successful?

Section 2(a) of the RPA is worded to prohibit a party from discriminating in price between different purchasers of commodities — this targets the supplier who offers price differentials. However, Section 2(f) imposes liability on favored buyers when the "knowingly…induce or receive a discrimination in price which is prohibited," putting the giant e-retailers squarely within the RPA's reach as favored buyers who induce price discrimination in a second-line form of antitrust claim.

A. The Prima Facie Case

Most of the jurisdictional requirements of a prime facie case discussed above would easily be met, except that enforcement might be limited to certain types of sales or certain goods. For example, one requirement is the showing of "two sales" — one at a higher price and one at a lower price — to competing retailers. In Volvo, the Supreme Court addressed a competitive bidding scenario. The Court raised but did not answer the question of the RPA's applicability to markets characterized by competitive bidding and special-order sales, as opposed to traditional sales from inventory.[24] Certain aspects of Amazon or Walmart's business, especially in the digital market, may be deemed not to satisfy this requirement, but most sales would fall under the RPA's ambit.

Establishing competitive injury may be a pressure point in any enforcement action against retail giants. To establish a prima facie violation of §2(a), one of the elements a plaintiff must show is a reasonable possibility that a price difference *may* harm competition. Notably, § 2(a) "does not require that the discriminations must in fact have harmed competition."[25]

Direct evidence of sales or profits diverted from a disfavored purchaser is one way to establish the competitive harm requirement.[26] However, this type of evidence is harder to marshal. It would require identifying customers who did not purchase a product from an Amazon or Walmart-competitor because of Amazon or Walmart's lower price, or some other proof of lost sales to those favored purchasers.

The other avenue to competitive injury is via the *Morton Salt* presumption, where indirect evidence of a prolonged and substantial difference in price between competing purchasers could also establish a rebuttable presumption that competition has been injured:[27] "injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time."[28] Volvo adds the requirement that the "competition" must be head-to-head for the same customer.[29]

Courts have sometimes looked to 16 C.F.R. § 240.5 for guidance on what constitutes "competing purchasers" for purposes of the *Morton Salt presumption*.[30] That regulation defines "competing customers" as "all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary." For example, in *Lewis v. Phillip Morris*, the Court of Appeals for the Sixth Circuit addressed the parties' dispute over whether vending machines distributing cigarettes competed at the same functional level of distribution as convenience stores selling the same. The Court ruled that while a cross-price elasticity study is not necessary to show competition, there must be some evidence of purchaser overlap.[31] While the argument that brick-and-mortar stores do not compete at the same functional level of distribution as giant e-retailers is conceivable, it would likely be rejected in the face of evidence of some consumer overlap. This is even more so for online retailers, where the comparison price shopping online is common and easily demonstrable.

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24 546 U.S. at 180 ("Volvo and the United States argue [that] the Act does not reach markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory. We need not decide that question today.").

25 *Falls City*, 460 U.S. at 435, citing *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742 (1945).

26 *Volvo*, 546 U.S. at 177.

27 *Id.*, citing Morton Salt at 49-51.

28 *Falls City,* 460 U.S. 428, 435 (1983).

29 546 U.S. at 179-180.

30 See e.g. *Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 531 (6th Cir. 2004).

31 *Id.*

While this analysis holds for Amazon's retail, first-party seller business, Amazon's third-party marketplace line of business would likely fail this requirement. Under Amazon's third-party seller program, independent sellers sell directly to Amazon shoppers, and Amazon acts as an intermediary, charging commissions for sales. In this context, because Amazon is not acting as a retailer, but rather as a platform for other vendors to sell directly to consumers, Amazon would not likely be deemed a "competing purchaser," or even a purchaser at all.[32]

Next, to establish the *Morton Salt* presumption, evidence must establish that the favored buyer received "prolonged and substantially better pricing."[33] Neither the "prolonged" nor the "substantially better" prongs have been quantified into a precedential standard. Applications of the presumption to particular circumstances "does not depend on the large or small amount of the price discrimination *per se*. It depends on the large or small effect that the price discrimination has on business rivalry."[34] That said, any price reduction amounting to over five percent of the purchase price probably will be considered a significant or substantial discrimination.[35] But even smaller price differentials (as little as 2.3 percent over eleven months) can be sufficient in highly competitive and price-sensitive market with low profit margins.[36] The "prolonged" or "over time" requirement has been found met in as little as eleven months.[37]

The RPA claim would require evidence of sustained price differentials for a particular product on the wholesale level, where Amazon or Walmart paid a "substantially" lower price for a "prolonged" period of time. Studies comparing item-level price competition across the U.S. online retail industry shows a 2022 average price advantage across all categories of 13 percent for Amazon, 6 percent for Walmart, and 15 percent for Target.[38] Historically, Amazon's average retail price advantage was even higher — 16 percent in 2020, and 14 percent in 2021. While these are percentage differences in *retail* prices, and not the percentage difference in *supplier/wholesale prices* relevant to an RPA analysis, the numbers are still instructive as to the differential discounts e-commerce giants may be receiving. It may be an evidentiary challenge to obtain sufficient data of supplier pricing in order to survive dismissal before that data may be obtained via discovery.

This analysis is premised on the continuing viability of the *Morton Salt* presumption to establish competitive injury. It is probably safe to assume that a Court would apply the presumption, especially in light of the Supreme Court's 2006 affirming this central holding in *Volvo*. In particular, the *Volvo* Court did not require harm to *competition*, as it had previously hinted a decade earlier in *Brooke Group*. Thus, even if a wholesaler's discrimination has an overall effect of lowering prices for end consumers (which is the case with Amazon and Walmart as retailers), an RPA claim might still succeed.

However, any RPA enforcement action against a e-retail giant will likely bring this decades-long debate into focus, with the retailer giant arguing that consumer welfare is enhanced by low pricing, ease of access, convenient shipping, and other features that attract Amazon's 147 million U.S. annual subscribers.[39] In addition to the legislative history of the RPA and *Volvo's* affirmation of the *Morton Salt* doctrine, other counterarguments include other forms of consumer injury by eliminating smaller sellers, such as eliminating convenient locations, specialty stores, physical browsing opportunities, which also contribute to consumer welfare.

B. Affirmative Defenses

Even if a prima facie case can be made, an RPA claim will not be an easy win. Two significant affirmative defenses might defeat the claim: cost justification and meeting competition.

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32 See *Furniture Royal, Inc. v. Schnadig Int'l Corp*, No. 2:18-CV-318 JCM (CWH), 2018 U.S. Dist. LEXIS 210108, at *5 (D. Nev. Dec. 13, 2018) (finding plaintiff brick-and-mortar store failed to state a Robinson-Patman claim against supplier who sold directly to consumers via wayfair.com, because the RPA is inapplicable to price discrimination between retailers and ultimate purchasers, as "retailers are not in competition with end-use consumers.")

33 *Morton Salt*, 334 U.S. at 49-51.

34 *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1428 n. 20 (11th Cir. 1990)

35 3 Von Kalinowski, *Antitrust Laws and Trade Regulation* § 39.02[3][d][i](2d ed. 1996). *See e.g., Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 679 (5th Cir.), cert. denied, 382 U.S. 959, 15 L. Ed. 2d 362, 86 S. Ct. 435 (1965) (an approximate five percent advantage was sufficient, even though resale prices were not affected). *See also Allied Sales & Serv. Co. v. Glob. Indus. Techs., Inc.*, No. 97-0017-CB-M, 2000 U.S. Dist. LEXIS 7774, at *37 (S.D. Ala. May 1, 2000) (finding a 5 percent differential to be sufficient).

36 *Mathew Enter. v. Chrysler Grp. LLC*, No. 13-cv-04236-BLF, 2016 U.S. Dist. LEXIS 108693, at *1 (N.D. Cal. Aug. 2, 2016)

37 *Id.* See also *Foremost Dairies v. FTC*, 348 F.2d at 679 (two years was sufficient); *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 193 (1st Cir.), cert. denied, 519 U.S. 927, 136 L. Ed. 2d 214, 117 S. Ct. 294 (1996) (18 months was sufficient).

38 See profitero.com. Profitero's "Price War Study" has been conducted for the past 6 consecutive years, and compares everyday online prices on nearly 15,000 items in 15 categories across 13 leading retailers, including Amazon, Walmart, target, and specialists like Chewy, the Home Depot, Best Buy and Wayfair. Prices for the same items are collected within 24 hours of each other.

39 See https://www.businessofapps.com/data/amazon-statistics/.

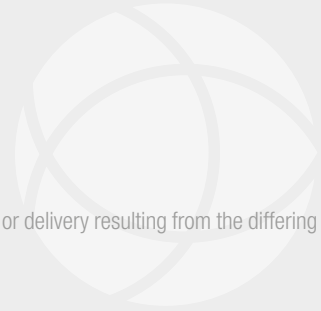
Per the statutory terms of the Robinson-Patman Act, if the favored purchaser can show cost justification for the price differential, then an RPA claim fails.[40] For example, cost differences resulting from freight and delivery, manufacturing, legal compliance, and methods of sale may justify the price discrimination.

The "meeting competition" defense, codified at 15 U.S.C. § 13(b), provides that a prima facie case may be rebutted "by showing that [the] lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." This defense requires "that the seller offer the lower price in good faith for the purpose of meeting the competitor's price, that is, the lower price must actually have been a good faith response to that competing low price."[41]

This defense may be specifically helpful to Amazon, in light of its third-party seller platform. For example, in any given product market, a wholesaler may be able to show that other sellers offer the product at a lower price on Amazon marketplace, and thus, it was forced to offer Amazon a lower price to induce it to purchase — just to meet the competition.

V. CONCLUSION

The contours of any antitrust litigation are driven by any number of variables. And so the analysis above is, of necessity, a thought exercise in the application of the RPA to Amazon. But the exercise is helpful in thinking about a possible revival of an Act passed with the express intent of helping "the little guy" competitor. This, in a current world where antitrust law continues to eschew the protection of any specific competitors and seeks to protect competition. In truth, however, it is not possible to protect competition, without simultaneously preferring certain competitors over others. This fact is underscored by the original purpose of the RPA. This tenet has been operative in antitrust policies for many years. By way of example, when the FTC or DOJ order a divestiture as a condition of permitting a merger to go forward, the agencies must approve the buyer. The approved buyer is almost always a competitor of the to-be-merged entities, and its purchase is almost always premised on its strength as a competitor. The divestiture seeks to preserve competition, but this is accomplished by preferring one competitor over all others in the market. The RPA may provide one avenue to level the playing field for all competitors.



40 "[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." 15 U.S.C. § 13(a)

41 *Falls City*, 460 U.S. 428, at 445–46.

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