ROBINSON-PATMAN ASCENDANT?

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It almost goes without saying that Walmart gets the best prices, which are then passed on to customers in the store. You go to Walmart for deals because Walmart gets deals. But this wasn't always the prevailing American view. In the depths of the Great Depression, a distrust of competition festered, as well as an animosity to big business: primarily, the big chain stores of the day. Enter the Robinson-Patman Act (aka, "RPA"). The RPA's primary provision directly attacked the notion that buying more should lead to a lower price, prohibiting discrimination "in price … of commodities of like grade and quality" that substantially lessens competition. The RPA has never been an object of praise. Rather, it has spent its nearly 90 years on the books the subject of befuddlement ("a dense undergrowth of confusion") and even outright ridicule ("the misshapen progeny of intolerable draftsmanship"). The DOJ hasn't touched it since the 1960s, and the FTC has not brought an RPA case in over 20 years. Until this year, this was the story of the rise, fall, and languishment of the RPA. But the RPA could be entering a new chapter of prominence at the FTC. As FTC Commissioner Lina Khan recently said, "We're taking a fresh look at the Robinson-Patman [and] Robinson-Patman is absolutely going to be fair game." In this article, we pick up the story with the state of the RPA today, explore how the FTC might wield it going forward, and discuss whether the weight of the last 40 years of RPA jurisprudence might still keep the RPA down.

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Six years ago, we filed a brief in federal court with this opening: "You pay a lower price if you buy more stuff. It is as American as apple pie and drives the nation's economy." It was true then, and it remains true today. It almost goes without saying that Walmart gets the best prices, which are then passed on to customers in the store. You go to Walmart for deals because Walmart gets deals.

But this wasn't always the prevailing American view. In the depths of the Great Depression, a distrust of competition festered, as well as an animosity to big business: primarily, the big chain stores of the day. Enter the Robinson-Patman Act ("RPA"). First titled the "Wholesale Grocers Protection Act," it was originally proposed by a wholesale grocer seeking protection from competition. As Representative Patman would later testify, it was the Great Atlantic & Pacific Tea Company ("A&P") – the world's largest retailer at the time – at the heart of the concern. The RPA's primary provision directly attacked the notion that buying more should lead to a lower price, prohibiting discrimination "in price … of commodities of like grade and quality" that substantially lessens competition.[2]

The RPA has never been an object of praise. Rather, it has spent its nearly 90 years on the books the subject of befuddlement ("a dense undergrowth of confusion") and even outright ridicule ("the misshapen progeny of intolerable draftsmanship"). The DOJ hasn't touched it since the 1960s. The FTC, in contrast, dove in with gusto, leading to much of the defining RPA jurisprudence today. But by the 1980s, the FTC's fervor had waned, and it has not brought an RPA case in over 20 years. The country, it seemed, had moved on, from the RPA as well as from A&P. Competition, efficiency, and Walmart were ascendant.

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I. A BRIEF OVERVIEW OF THE ROBINSON-PATMAN ACT

While the RPA is most known for its prohibitions on price discrimination (§ 2(a) of the statute), the statute also prohibits commercial bribery (§ 2(c)). Both are potentially at play at the new FTC.

Section 2(a) provides:

> "It shall be unlawful … to discriminate in price between different purchasers of commodities of like grade and quality, … where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination…."

The RPA engenders a lot of debate, but perhaps the most consequential is what constitutes harm to competition under § 2(a). The antitrust laws are supposed to protect competition, not competitors, but RPA supporters repeatedly cast it as a protectionist statute. Representative Patman, for instance, said "the law … is a bulwark of protection for … small entrepreneurs." Indeed, there was a time that, relying on the "injure … competition with any person" clause of the RPA, some courts found injury to a single competitor sufficient to establish injury to competition, making price discrimination tantamount to a per se antitrust violation. But the most recent Supreme Court RPA decision – *Volvo Trucks* – seemingly put that debate to rest.[3] There, the Court said it would "resist interpretation geared more to the protection of existing competitors than to the stimulation of competition."[4] Most cases today hold that an RPA plaintiff must show injury to competition, which generally means evidence of diverted sales from disfavored to favored purchasers.

Consider an incentive program – a near-ubiquitous tool used by manufacturers to incentivize retailers to promote and sell their products. *If you sell more of our products, we'll give you a better deal.* A retailer that doesn't sell quite enough to quality for the incentive might lose some money and be harmed, but absence diverted customers, there is no harm to competition. It is almost universally recognized that the competition to achieve the incentive (and lower prices to do so) is good for consumers and good for competition.

2 15 U.S.C. § 13.

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

4 *Id.* at 169.

Section 2(c), however, has continued to follow the *per se* approach of the RPA. It makes it "unlawful … to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods…." It does not require proof of harm to competition, just proof of the payment.

II. A NEW FTC, A REVITALIZED RPA?

Since the 1980s, antitrust enforcement and jurisprudence has largely focused on consumer welfare: basically, the idea that if conduct does not result in lower prices for the consumer, it is not an antitrust violation. In 2015, the FTC formalized this in a policy statement that its Section 5 enforcement would be "guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare."[5]

Section 5 of the FTC declares unlawful "[u]nfair methods of competition … and unfair or deceptive acts or practices….."[6] Unfair competition is undefined, leaving its contours to the FTC. The FTC has been issuing increasingly strong signals that it views the RPA not just as an antitrust statute but as an unfair competition statute to once again protect small businesses from competition with the giant corporations of today. First, the FTC rescinded the 2015 policy statement on consumer welfare. And a few months ago, Commissioner Bedoya said the FTC is looking to "reactivate" the RPA. Chair Lina Khan confirmed it is once again "fair game" for the FTC. On November 10, 2022, the FTC issued a new statement on Section 5, to "supersede all prior FTC policy statements and advisory guidance on the scope and meaning of unfair methods of competition under Section 5 of the FTC Act." It included in its list of potential Section 5 claims, "price discrimination" and "commercial bribery."[7]

The FTC cited six cases for the inclusion of price discrimination, all Robinson-Patman Act cases, all from the 1960s, 70s, or 80s, and none from the Supreme Court.[8] Interestingly, none involve § 2(a) liability on a manufacturer. Instead, they are exclusively cases challenging efforts at the middle of the supply chain – the big box retailers – to extract payments and other benefits from suppliers. The FTC brought those actions under sections 2(d) and (e) of the RPA, which prohibit the discriminatory provision of, or payment for, services. But given the change in antitrust and RPA jurisprudence since the 80s, is Section 5 really the FTC's road to expanded enforcement against price discrimination? We discuss.

The Case for the FTC. True, today's Supreme Court is quite wary of regulatory power. Last year, it rolled back the FTC's authority to seek equitable monetary remedies such as disgorgement and restitution,[9] and in January 2022, it agreed to hear a case challenging the constitutionality of the FTC's administrative review procedures.[10] But when it comes to the scope of its Section 5 enforcement purview, the FTC has both text and history in its favor, two things the current Supreme Court majority cares about a great deal.

First, the text. Section 5 is undeniably broad and imbued with discretion: "unfair competition" is barred. If the FTC decides to go after a practice it believes is unfair, Section 5 would seem to give it the authority to do so, even if it is to protect small businesses *from* competition rather than protecting competition itself. This broad textual playground was not available when the FTC lost its equitable monetary remedies. There, the FTC Act conferred the power to issue a "permanent injunction." The FTC read that provision to also empower it to seek other kinds of equitable relief, including monetary equitable relief, but the Supreme Court found that was not supported by the text. Not so with "unfair competition." From the plain language alone, the FTC has a much better textual position for broad Section 5 authority than for monetary equitable remedies. That, coupled with courts' historical (and Supreme Court-mandated) deference to agency interpretations of their own statutes, should give the FTC good grounds to go after price discrimination under Section 5.

Second, history. The FTC might argue its Section 5 authority is not bound or limited by cases narrowing the RPA. But even if it faced the question of what Congress meant by "unfair competition" and whether it included price discrimination, it would have good arguments. As noted above, it is hardly arguable that Congress passed the RPA to address what it viewed at the time as an unfair method of competition that advantaged big box retailers over mom-and-pops. It can even argue – and has been arguing since Khan took the reins – that the concerns mo-

5 FTC Statement of Enforcement Principles Regarding *Unfair Methods of Competition* Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

6 15 U.S.C. § 45(a)(1).

7 FTC Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

8 *Id.*

9 *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341 (2021).

10 *Axon Enter., Inc. v. Fed. Trade Comm'n*, 142 S. Ct. 895 (2022).

tivating the RPA were not anomalous to the RPA. No less an authority than Professor Herbert Hovenkamp – though he believes the RPA should be repealed – has noted that "a belief that the legislative history of the Robinson-Patman Act reveals that the statute was motivated by different concerns than the ones that inspired the Sherman and Clayton Acts generally … is false." He notes that the 1950 amendments Section 7 of the Clayton Act – the provision outlawing anticompetitive mergers – were concerned with avoiding "larger firms that could undersell smaller ones." "In sum, a great deal of revisionism has gone into our interpretations of the Sherman Act. … Mergers are tolerated today that would never have been accepted by the framers of the 1950 Celler-Kefauver amendments to Section 7."[11] The FTC can even point to a Supreme Court case: *Jefferson County Pharm. Ass'n v. Abbott Labs.*, in which Justice Powell noted, "There is no reason … to think that [Congress] intended to deny small businesses … protection from the competition of the strongest competitor of them all."[12]

But the FTC does not need to be against competition in order to pursue price discrimination as an unfair business practice rather than as an anticompetitive one. There is nothing wrong, it can say, with the desire to help and protect small businesses, because small businesses help bring vibrancy and vitality to the marketplace. Allowing price discrimination may favor competition at the manufacturer level, because it allows manufacturers to potentially sell more product. And it arguably doesn't hurt competition among competing retailers to *purchase* goods for resale. But it does arguably impede downstream competition when big box retailers use their leverage to prevent their rivals from obtaining goods at similar prices, effectively "raising the costs" for competing, smaller retailers. This can eventually lead to smaller rivals going out of business, allowing the big boxes to recoup whatever (small) concessions they had to make – if any – to get the manufacturer to discriminate in price.

The FTC also argues that competition is not just about the lowest prices, it is also about quality. Small retailers can bring a level of individuality and distinctiveness to service and sales that big chains simply cannot. As Justice Brandeis put it in 1933:

> There is a widespread belief … that by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored … and … the moral and intellectual development which is essential to the maintenance of liberty.[13]

The FTC would argue those mom-and-pop benefits mean little if mom-and-pops cannot even maintain a toehold in the door because they can't get the same prices as their biggest competitors.

The Case for the Modern Status Quo. On the text, there is little chance the FTC can bring a so-called "stand-alone" Section 5 claim on price discrimination without grappling with the RPA and the cases interpreting it. The truth is, the RPA is where federal jurisprudence on price discrimination has developed. So if the FTC thinks Section 5 may be its ticket to avoid having to prove up harm to competition, it should think again. Courts have had nearly eight decades to consider what sort of price discrimination might be unfair and harmful to competition. In *Volvo Trucks* – the Supreme Court's latest word on the RPA – the Court wrote, "The Robinson-Patman Act signals no large departure from [antitrust law's] main concern" for "interbrand competition."[14] Further, "[W]e would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*."[15] Given this, it is difficult to see how the FTC could argue that a difference in price – even if it harms recipients of the higher price – is somehow "unfair" if it doesn't cause a diversion of customers, that is, harm to competition.

On history: History is worthy of study, but time is the greatest teacher. Stephen Hawking said, "We spend a great deal of time studying history, which, let's face it, is mostly the history of stupidity." And Pericles: "Time is the wisest counselor of all." Time has taught that vertical price restrictions are more often than not a good thing. It used to be that resale price maintenance was *per se* illegal. In recognizing the procompetitive benefits controlling from *where* distributors could sell products, the Supreme Court wrote in 1977, "[T]he state of the common law 400 or even 100 years ago is ***irrelevant*** to the issue before us: the effect of the antitrust laws upon vertical distribution restraints in the American economy

11 Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125, 125,132 (2000).

12 460 U.S. 150, 171 (1983).

13 *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 580 (1933) (Brandeis, J., dissenting).

14 546 U.S. at 180-81.

15 *Id.* at 181.

today."[16] Then, by 2007 the "economics literature [was] replete with procompetitive justifications for a manufacturer's use of resale price maintenance," and the Court overruled its prior cases treating RPM as *per se* illegal.[17] Time over history.

As noted, this process has already occurred with respect to the RPA. After *Volvo*, the RPA cannot be read to protect small retailers from competition

III. IMPLICATIONS OF A RENEWED RPA

Are we headed back to the heyday of RPA? Unlikely. Buying more stuff to get better prices is still quite American, and still a hallmark of competition. But a first-in-decades FTC enforcement action under the RPA, or a price discrimination case under Section 5, would be a significant event, and a momentous shift in priorities. It would mean the FTC found a case it thinks it can win, or one that it thinks would result in at least some good rulings for it. It will almost certainly be a case where the FTC thinks it can utilize the so-called *Morton Salt* presumption[18] – a rebuttable presumption of harm to competition where there is a large price differential over a significant period of time.

But that is just peering in the crystal ball. For now, because the law hasn't changed, there is little need to change RPA compliance programs. But companies that haven't thought about the RPA in a while would be well served to do so. Affirmative defenses – meeting competition and cost justification – will be important. And remember, both buyers and sellers can be targets. (Thinking of you, Amazon).

16 *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977).

17 *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007).

18 See *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

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