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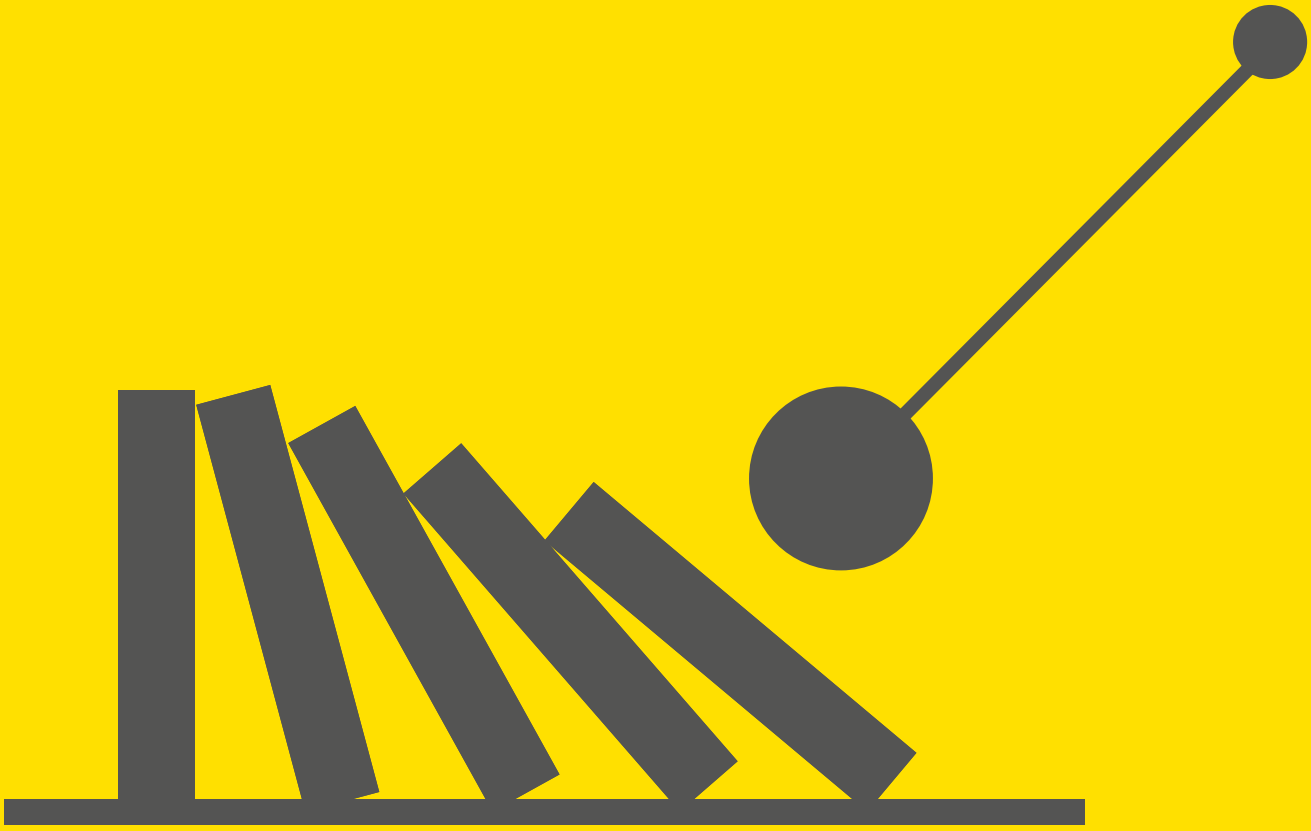

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RESUMED FTC ENFORCEMENT AGAINST PRICE DISCRIMINATION, AND RAMIFICATIONS OF A CONSCIOUS UNCOUPLING OF PRICE DISCRIMINATION FROM ROBINSON-PATMAN

By Lawrence D. Silverman

In September of 2022, FTC Commissioner Alvaro Bedoya gave a speech in which he discussed the resumption of Robinson-Patman enforcement by the FTC. In November of 2022, the FTC issued a Policy Statement where it indicated a desire to restore "rigorous enforcement" of Section 5 of the FTC Act. That Policy Statement included a willingness to challenge "price discrimination" in circumstances where the conduct does not technically violate Robinson-Patman. The article discusses the ramifications of these developments, including (1) potential FTC Section 5 challenges to practices which do not violate Robinson-Patman (such as price discrimination for non-tangible products); and (2) the impact of the Policy Statement in creating private causes of action for price discrimination claims under state DUTPA statutes.

On September 22, 2022, Federal Trade Commissioner Alvaro M. Bedoya ("Commissioner Bedoya") announced that the Federal Trade Commission ("FTC") would resume enforcement of the Robinson-Patman Act, 15 U.S.C. § 13(a) *et seq.* ("Robinson-Patman"), after a multi-decade period of enforcement inactivity. While surprising, this resumption of enforcement of Robinson-Patman would customarily only require the application of well-established legal methodologies to a new set of market realities.

However, the FTC's subsequent announcement creates the possibility of a paradigm shift for both private and governmental enforcement of Robinson-Patman and price discrimination. On November 10, 2022, the FTC announced that it would restore "rigorous enforcement" of Section 5 of the FTC Act.[2] In the formal FTC Policy Statement accompanying that announcement, the FTC indicated that price discrimination will be enforced under Section 5 even if the underlying conduct may not constitute a technical violation of Robinson-Patman.[3]

This article explores two related possibilities arising from these developments: (1) the FTC's enforcement of price discrimination principles beyond the limitations of Robinson-Patman; and (2) the potential broader availability of Robinson-Patman and Section 5 price discrimination claims to civil litigants through state deceptive and unfair practices act ("DUTPA") statutes.

I. THE FTC'S PROPOSED RESUMPTION OF ROBINSON-PATMAN ENFORCEMENT

As described by Professor Robert Bork, Robinson-Patman is "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory."[4] In 1977, the United States Department of Justice ("DOJ") issued a report criticizing Robinson-Patman, which led to a curtailment of governmental enforcement.[5] The DOJ Antitrust Division has neither enforced the Robinson-Patman Act since the 1970s nor brought a criminal case under Robinson-Patman since the 1960s.[6] The last FTC Robinson Patman enforcement action occurred in 2000.[7]

As a populist statute, concerns regarding the continuing relevance of Robinson-Patman in the modern age are well documented.[8] That said, the statute is still valid, and governmental enforcement of Robinson-Patman has been a long-standing interest and priority of FTC Chair Lina Khan.[9]

On September 22, 2022, Commissioner Bedoya presented a speech titled "Returning to Fairness."[10] As hinted by the title, Commissioner Bedoya outlined a desire for the FTC to seek fairness rather than just efficiency:

> I think we need to step back and question the role of efficiency in antitrust enforcement.
>
> 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.

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2 FTC Press Release, "FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition," November 10, 2022. https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition.

3 Fed. Trade Comm'n, 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/p221202sec5enforcementpolicystatement_002.pdf.

4 Robert Bork, The Antitrust Paradox 382 (1978).

5 U.S. Department of Justice, Report on the Robinson Patman Act (1977); Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo. Wash. L. Rev. 2064, 2075–76 (2015).

6 Antitrust Modernization Commission, Report and Recommendations 316 (2007).

7 See Order at 1, *McCormick & Co.*, Docket No. C-3939 (F.T.C. Apr. 27, 2000).

8 See generally Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P* (George Mason K. & Econ. Research Paper No. 18-15, 2018).

9 Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 716 (2017).

10 Alvaro M. Bedoya, Commissioner, Fed. Trade Comm'n, Remarks to the Midwest Forum on Fair Markets: What the New Antimonopoly Vision Means for Main Street Hosted by the Institute for Local Self-Reliance & the Open Markets Institute (Sept. 22, 2022).

> 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.
>
> But Congress did more than that. As Chair Khan explained last week at Fordham, Congress deliberately charged the FTC to go beyond the limits of the Sherman Act. And then, the Supreme Court came in and repeatedly reaffirmed the idea that our Section 5 authority goes beyond Sherman. So I support Chair Khan's goal to reactivate enforcement under our unfairness authority, and to issue a policy statement setting out the scope of that authority.[11]

While Commissioner Bedoya does not apologize for a desire for fairness, he disputes the premise that Robinson-Patman is contrary to the principles of efficiency. Specifically, Commissioner Bedoya states that to his "knowledge, some 86 years after its passage, there is not one empirical analysis showing that Robinson-Patman actually raised consumer prices."[12] In support of this statement, Commissioner Bedoya relies on a negative inference — he does not cite any articles that calculate the price impact or non-impact of Robinson-Patman, but instead cites other articles that note the lack of empirical studies or proof.[13] As noted by Thomas W. Ross, "[t]he Robinson-Patman ("R-P") Act has the distinction of being almost universally unpopular among antitrust scholars. This is probably because it looks less like an antitrust measure than like legislated relief for small business. That the law wears an antitrust cloak is probably a measure of the cunning of its original proponents. The statute's poor reputation owes more to theory than to evidence, however."[14]

II. SECTION 5 AS A DISTINCT TOOL FOR FTC "PRICE DISCRIMINATION" ENFORCEMENT

Commissioner Bedoya's call for resumed Robinson-Patman enforcement was soon followed by a November 10, 2022 FTC Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (the "Policy Statement").[15] The Policy Statement proclaims a strong desire to reaffirm the FTC's role as an active enforcer, and states that Section 5 enforcement will include:

> Conduct that violates the spirit of the antitrust laws. This includes conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a "gap" in those laws. As such, the analysis may depart from prior precedent based on the provisions of the Sherman and Clayton Acts. Examples of such violations, to the extent not covered by the antitrust laws, include:
>
> · price discrimination claims such as knowingly inducing and receiving disproportionate promotional allowances against buyers not covered by Clayton Act,[16]
>
> · *de facto* tying, bundling, exclusive dealing, or loyalty rebates that use market power in one market to entrench that power or impede competition in the same or a related market.

In the Policy Statement, the FTC cites prior decisions in which Robinson-Patman price discrimination violations "not covered by the Clayton Act" were determined to constitute Section 5 violations.[17] However, none of those decisions involved conduct that was outside the general definitions

11 *Id.*

12 *Id.*

13 See Daniel P. O'Brien, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets: The Case of Bargaining*, 45 Rand J. Econ. 92, 108 (2014) ("A formal study of the effects of the Robinson-Patman Act on prices has not been conducted, to my knowledge."); see also Marius Schwartz, *The Perverse Effects of the Robinson-Patman Act*, 31 Antitrust Bull. 733, 734 (1986) ("It is difficult to estimate accurately the effects of the Robinson-Patman Act . . . [M]any of the effects are unobservable and therefore particularly hard to estimate. . . . These conceptual problems are compounded by data problems."); Antitrust Modernization Commission, Report and Recommendations 322 (2007) ("In general, estimates of the effects of the Act have been based largely on anecdotal evidence and informed judgments about the way in which markets operate, rather than on systematically collected empirical evidence, which appears to be extremely limited.").

14 Thomas W. Ross, *Winners and Losers under the Robinson-Patman Act*, 27 J. L. & Econ. 243, 243–271 (1984).

15 Fed. Trade Comm'n, *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/p221202sec5enforcementpolicystatement_002.pdf.

16 Robinson-Patman is an amendment to Section 2 of the Clayton Act.

17 *Alterman Foods v. Fed. Trade Comm'n*, 497 F.2d 993 (5th Cir. 1974); *Colonial Stores v. Fed. Trade Comm'n*, 450 F.2d 733 (5th Cir. 1971); *R.H. Macy & Co. v. Fed. Trade Comm'n*, 326 F.2d 445 (2d Cir. 1964); *American News Co. v. Fed. Trade Comm'n*, 300 F.2d 104 (2d Cir. 1962); *Grand Union Co. v. Fed. Trade Comm'n,* 300 F.2d 92 (2d Cir. 1962); *In re Foremost-McKesson, Inc.*, 109 F.T.C. 127 (1987).

of Robinson-Patman. Instead, those cases mostly imposed buyer liability for practices where Robinson-Patman restricted conduct was implicated but the rules would otherwise only impose seller liability.[18] For example, in *Alterman Foods*, the Fifth Circuit stated that "[t]he terms of the [FTC] order closely parallel the provisions of 2(d) and 2(e) but do not extend beyond them."[19] Similarly, in *Grand Union Co.*, the Second District stated that the FTC contended that the "petitioner's activity violates § 5 regardless of whether or not it may be a violation of the Clayton Act; we see no objection to consideration of this contention without an examination of § 2(f)."[20]

The FTC appears to have drafted the Policy Statement regarding price discrimination appears in an intentionally broad manner. The phrase "price discrimination claims such as disproportionate promotional allowances against buyers not covered by Clayton Act" is worded to encompass a multitude of potential claims that are not covered by Robinson-Patman. As a semantic canon, the use of "such as" is similar to a nonexclusive "include," which introduces examples.[21] For this reason, the antitrust community has generally interpreted the Policy Statement to mean that Section 5 can cover 'price discrimination that is not otherwise barred by the Robinson-Patman Act.' As discussed in further detail below, this could allow attacks on price discrimination practices (such as price discrimination of non-commodities or even non-physical goods) that are broader than Robinson-Patman and outside the expectations or prior legal policies of businesses and practitioners.

III. POTENTIAL GOVERNMENTAL ENFORCEMENT OF PRICE DISCRIMINATION BEYOND THE DEFINITION OF ROBINSON-PATMAN

Even under the recent lull in Robinson-Patman governmental enforcement, private Robinson-Patman litigation has not disappeared completely.[22] Accordingly, Robinson-Patman remains a mandatory compliance training item for many companies. Despite populist protestations, it is unlikely that sophisticated businesses are completely ignoring Robinson-Patman because of the lack of governmental enforcement. But existing training programs and policies focus on complying with what Robinson-Patman covers — not what it expressly does not cover.

One obvious example for concern is price discrimination of non-commodity or non-tangible products. As explained by Donald S. Clark, former Secretary of the FTC,

> The [Robinson-Patman] jurisdictional elements are interpreted strictly and technically, and three of them may be of particular interest. First, as the first element indicates, the plaintiff must establish that actual sales occurred. The Act does not apply, for example, to long term leases; to mere offers to sell; to acting as an intermediary between a seller and its customers; or to licensing computer software. Second, as the third element indicates, the Act applies only to commodities; it does not apply to intangible products. Thus, for example, electricity has been classified as a commodity subject to the Act, because "[e]lectric power can be felt, if not touched. It is produced, sold, stored in small quantities, transmitted, and distributed in discrete quantities."
>
> By contrast, courts have concluded that the Act does not apply to intangible products such as cellular telephone service and cellular telephone activation service; the printing of comic books; newspaper advertising; real estate leases; long distance voice telecommunications services; and cable television service. When a transaction involves both the sale of goods and the sale of services, the Act applies "only if the 'dominant nature' of the transaction is a sale of goods." [23]

18 The FTC made a similar threat in the Fred Meyer Guides, where it stated that "the Commission may proceed under section 5 of the Federal Trade Commission Act against a customer who knows, or should know, that it is receiving a discriminatory price." 16 C.F.R. § 240.13 (2023.

19 *Alterman Foods*, 497 F.2d at 1001.

20 *Grand Union Co. v. Fed. Trade Comm'n*, 300 F.2d 92, 96 (2d Cir. 1962). These cases involve discriminatory allowances or services under Robinson-Patman Section 2(d), rather than traditional price discrimination under Section 2(a). Antitrust practitioners frequently refer to Section 2(a) as price discrimination while referring to Section 2(d) violations as services or allowances violations. The two sections are separated in this manner because 2(a) requires a showing of injury to competition, while 2(d) does not. However, both forms of prohibition appear to fall under "price discrimination" in the Policy Statement.

21 See Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 132 (2012).

22 See, e.g. *Woodman's Food Mkt. v. Clorox Co.*, 833 F.3d 743, 746 (7th Cir. 2016), cert. denied, 137 S. Ct. 1213 (2017); *Cash & Henderson Drug, Inc. v. Johnson & Johnson*, 799 F.3d 202, 213 (2d Cir. 2015); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 227 (3d Cir. 2008); *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 864 (6th Cir. 2007); *Dahl Auto. Onalaska v. Ford Motor Co.*, 588 F. Supp. 3d 929 (W.D. Wis. 2022).

23 Donald S. Clark, *The Robinson-Patman Act: General Principles, Commission Proceedings, and Selected Issues*, Fed. Trade Comm'n (June 7, 1995), https://www.ftc.gov/news-events/news/speeches/robinson-patman-act-general-principles-commission-proceedings-selected-issues.

This Robinson-Patman summary reflects the understanding of the legal and business community as to the limits of Robinson-Patman and the FTC's scope of enforcement. It is unclear whether this still applies under the current Policy Statement. Moreover, the following common commercial transactions were explicitly excluded from Robinson-Patman (as acknowledged under the FTC's prior guidance) but could now be subject to reexamination under the category of "price discrimination claims . . . not covered by Clayton Act":

1. Leases (as opposed to sales);
2. Software;
3. Telephone, wireless and internet service; and
4. Advertising.[24]

An injection of price discrimination restrictions in these cutting-edge industries would be unexpected and disruptive.

IV. PRIVATE ENFORCEMENT OF SECTION 5 CLAIMS UNDER DUTPA AND "LITTLE FTC ACTS"

While there is no private right of action under Section 5 of the FTC Act, many states have enacted their own DUTPA or "Little FTC" statutes, which adopt Section 5 standards of unfairness while providing an avenue for private rights of action and class actions.[25] By adding "price discrimination" outside of Robinson-Patman as a potential Section 5 violation in an official policy document, the FTC inadvertently created a private state civil right of action for price discrimination untethered by Robinson-Patman.

Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA")[26] provides a good example of how the FTC Policy Statement could have a wide-reaching impact in private civil litigation. FDUTPA explicitly provides that:

> 501.204 Unlawful acts and practices
>
> (1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2017.[27]

The Florida Legislature specifically included language in FDUTPA to allow periodical updates to its adoption of FTC rules and interpretations. Florida requires these formal updates because "a statute simply adopting all future changes to federal law would be an unconstitutional delegation of the power to legislate."[28] Therefore, the Florida Legislature frequently updates its reference to the FTC interpretations. Once FDUTPA is updated to include 2022 FTC interpretations, the FTC's 2022 Policy Statement becomes the binding standard under which FDUTPA violations are measured.

FDUTPA does contain an exemption for "an act or practice required or specifically permitted by federal or state law,"[29] but the extent to which price discrimination of non-tangible or non-commodity products is "specifically permitted" under the intersection of Section 5 and Robinson-Patman is unclear.

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24 For a chart of state Little FTC Acts which expressly defer to the FTC's interpretations, see Appendix A, "Follow-On State Actions Based on the FTC's Enforcement of Section 5," Justin J. Hakala, https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00002/537633-00002.pdf.

25 The broad nature of state DUTPA civil litigation includes *Illinois Brick* repealer status, which allows indirect purchasers to make claims under antitrust laws. See, e.g. *Mack, et al. v. Bristol-Myers Squibb Co.*, 673 So. 2d 100 (Fla. 1st DCA 1996). The applicability of *Illinois Brick* to Robinson-Patman claims is an open question. See *Julius Nasso Concrete Corp. v. DIC Concrete Corp.*, 467 F. Supp. 1016 (S.D.N.Y. 1979).

26 Fla. Stat. § 501.204 et *seq.* (2023).

27 Similarly, FDUTPA provides that "'Violation of this part' means any violation of this act or the rules adopted under this act and may be based upon any of the following as of July 1, 2017:
(a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. ss. 41 et seq.;
(b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts; or (c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices."

28 *Porsche Cars N. Am., Inc. v. Diamond*, 140 So.2d 1090, 1097 (Fla. 3d DCA 2014).

29 Fla. Stat. § 501.212(1) (2023).

V. CONCLUSION

Pricing strategy is one of the most important decisions faced by any economic actor in a competitive economy. By injecting a new and uncertain legal framework over pricing, and then creating strong private enforcement mechanisms for that uncertain framework, the FTC has injected a disruptive force into the pricing calculus. In the short term, the demand for Robinson-Patman compliance assistance is sure to rise. The long-term results are less obvious.

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