So Maybe the Robinson-Patman Act Isn't Dead After All

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Woodman's Food Market is a chain of warehouse-style grocery stores in Wisconsin. As such, its sales strategy was similar to that employed by Costco and Sam's Club: the ability to purchase groceries at lower prices by purchasing in large size containers. However, Woodman's did not charge a membership fee as a prerequisite to shopping at its stores.

On Sept. 9, 2014, Woodman's met with a representative of the Clorox Company who advised that as of Oct. 1, Woodman's would no longer be able to purchase these large packs of products, since the Clorox had decided that it would recategorize Woodman's into its "General Market" retailers, i.e., as an ordinary grocery store. This was part of Clorox's plan for a "Differentiated Products Offering" and was part of its plan to simplify its go to market strategy. Woodman's could continue to purchase products from Clorox in smaller package sizes, but the per-unit cost would be higher. On Oct. 28, 2014, Woodman's filed suit, alleging that this policy of selling large packs to Costco, Sam's Club and BJ's Wholesale was a violation of the Robinson-Patman Act.[1]

Woodman's alleged that the refusal to sell the large packs was a violation of the Robinson-Patman Act. In addition to being price discrimination, Woodman's alleged that Clorox's practice violated §§ 2(d) and (e) as a discriminatory promotional service. It pointed out in its complaint that the FTC in its "Fred Meyer" Guidelines on Advertising Allowances and Other Merchandising Payments and Services, 16 CFR Part 240, 79 Fed. Reg. 58245 (Sept. 29, 2014), had included special packaging

or package sizes as a promotional service.

Naturally, Clorox disagreed, and filed a motion dismiss. It argued that the large pack size was not a service, and that it should not be held liable merely for refusing to sell a certain product to a particular retailer. The court, however, thought that Woodman's had stated a claim, and denied Clorox's motion.[2]

The court noted that while there were no court decisions on point, two FTC decisions established that selling, or refusing to sell, a special package size was covered as a promotional service by the Robinson-Patman Act. In *In re General Foods Corp*.,[3] the Commission found that refusal to sell an institutional-size package of coffee was a discriminatory promotional service. Similarly, in *In re Luxor, Ltd*.,[4] the refusal to sell "junior" size cosmetics was also found to be discriminatory. "In both cases, the products at issue were of the same grade and quality irrespective of the size of the container in which they had been packaged."

The court noted that the FTC's guidelines on promotional allowance and services (most recently updated shortly before the suit was filed) had included special packaging as a promotional service covered by the Robinson-Patman Act. The Commission specifically considered whether to keep this provision in the 2014 edition of the Guides, and decided to do so, apparently in the absence of any persuasive reason why they should be removed. Clorox argued that the General Foods and Luxor cases were non-binding and antiquated, but did not provide any case support for its proposition that offering different sizes of packaging was not covered by the Robinson-Patman Act. The other cases cited by Clorox deal with resale price maintenance, and had nothing to do with the Robinson-Patman Act.

While this was only the denial of a motion to dismiss, it is instructive on several points. First of all, a seller of the same product in different size packages at different per-unit prices is incurring a risk when it tries to have its cake and eat it too. The court papers do not provide any particularly compelling business reason for why Clorox wanted to recast Woodman's as an "ordinary" grocery store when clearly it was a warehouse-type operation. If, for some reason, it did not want to sell large packs to it, then it probably would have been better off just by refusing to sell altogether. Since refusals to deal are specifically not actionable under the Robinson-Patman Act, a lawsuit might have been avoided.

Second, even with the recent trend to toughen-up pleading standards, it takes

more to defeat a claim than to say that decisions are “antiquated.” In this case, not only were there no intervening court decisions providing contrary guidance, there was the very recent reaffirmation by the FTC of the principle that package size can be a promotional service.

Third, although it did not play a part in the court’s decision, it seems that there is also a § 2(a) argument that sale of the identical product in a different sized container meets the like-grade-and-quality requirement and is the basis of a basic price discrimination case. Woodman’s may have wanted to emphasize the 2(e) liability due to the per se nature of the 2(d) and 2(e) violations, and avoid the proof of competitive injury under a 2(a) allegation. But it did set up the grounds for that claim by discussing the volume of goods sold, how customers may stop shopping for these products when they were no longer available at Woodman’s and instead turn to competitors Costco and Sam’s.

Is the Robinson-Patman Act dead? Not really. It is too soon to say who will win this case, but at the minimum both sides are going to have significant legal fees. As you counsel your clients regarding the Robinson-Patman Act don’t be too disdainful, regardless of your opinion of the economic policy behind it. It still can be a significant source of pain when it is disrespected.

1. Woodman’s Food Market, Inc. v. The Clorox Co., No. 14-cv-734-slc (W.D. Wis. Oct. 28, 2014).

2. Woodman’s Food Market, Inc. v. The Clorox Co., No. 14-cv-734-slc (W.D. Wis. Feb. 2, 2015) .

3. 52 F.T.C. 798 (1956).

4. 31 F.T.C. 658 (1940).