7TH CIRCUIT NOT CONVINCED THAT BULK PACKAGING CONSTITUTES A PROMOTIONAL SERVICE UNDER THE ROBINSON-PATMAN ACT

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ROBINSON-PATMAN ACT BACKGROUND

The Robinson-Patman Act (the "RPA" or the "Act") is designed to ensure fair competition among purchasers. The Act separately addresses different forms of unlawful discrimination between competing purchasers — section 2(a) prohibits price discrimination and section 2(e) prohibits discrimination in furnishing services to promote the resale of products. Although both forms of discrimination ultimately affect price, promotional services are more easily masked and often less apparent. For this reason, the competitive harm element required for a claim under section 2(a) is not present for one under section 2(e). Accordingly, there is no competitive or cost justification defense available for section 2(e) claims. All a section 2(e) plaintiff needs to show is that a seller provided promotional services or advertising on unequal terms and that these services promoted product resale.

ROBINSON-PATMAN PRICE VERSUS SERVICE DISCRIMINATION

Due to the significantly different burdens for claims under the Act, given a choice, a plaintiff would prefer the easier section 2(e) claim. This begs the question, where exactly is the line between RPA price and promotional services? This is the very issue being considered by the 7th Circuit as the Act relates to "bulk" or "large-pack" distribution.[1]

Woodman's Lawsuit

Woodman's, a regional grocery chain, sued Clorox in the U.S. District Court for the Western District of Wisconsin, asserting that Clorox has violated section 2(e) by refusing to sell to Woodman's large pack products that Clorox sold to "club" retailers, such as Costco and BJ's. The crux of Woodman's claim is that the bulk product sizes constitute a promotional service that is no longer offered to all competitors.

The district court denied Clorox's motion to dismiss and ruled that Woodman's had sufficiently stated a claim that package size could form the basis of a section 2(e) violation as a promotional service. In reaching this conclusion, the district court relied heavily upon two Federal Trade Commission ("FTC") decisions, each more than 50 years old, treating packaging as a promotional service because it is connected to the resale of Clorox products. In the two decisions, Luxor[2] and General Foods,[3] the FTC concluded that manufacturers violated section 2(e) by selling "junior"-sized cosmetic products and "institutional"-sized packages of Maxwell House

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Coffee to some customers but not others. The district court allowed Clorox to appeal the decision by certifying that its order involves controlling questions of law "as to which there is substantial ground for difference of opinion and that immediate appeal [would] materially advance the ultimate termination of litigation." The matter is now before the 7th Circuit.

Appeal and FTC Guidance

The FTC filed an amicus brief in November aligning with Clorox's position, that Woodman's should not be allowed to assert what is effectively a section 2(a) pricing claim in the form of a less stringent section 2(e) claim. The FTC argues that Luxor and General Foods are no longer good law, observing that 2(e) has subsequently been interpreted — most notably in the Supreme Court's decision in FTC v. Fred Meyer[4] and the FTC's subsequent Fred Meyer Guides — to cover special packaging or package sizes "only insofar as they primarily promote a product's resale." The FTC argues that section 2(e) does not bar non-promotional forms of discrimination. Otherwise, section 2(e) would be overly broad because it would reach non-promotional conduct that does not produce an anticompetitive effect.

The FTC asserts that Luxor was premised on the assumptions that: (1) there is public demand for different-sized packages, and (2) a retailer could lose sales and customers if it were unable to fill that demand. By that logic, however, manufacturers would have to sell customers "all popular types, styles, and sizes of a given product to every buyer . . . without any showing of harm to competition." The FTC asserts, that this would squarely contradict "the established antitrust principle that, absent monopoly, a seller may choose the parties with which it will deal." The FTC further asserts that section 2(e) should require a plaintiff demonstrate that a seller "provided a promotional service distinct from the product itself." Clorox and the FTC insist that Woodman's has effectively asserted a price discrimination claim.

7th Circuit Indicators at Oral Argument

Following briefing, the 7th Circuit panel, consisting of Circuit Judges Diane Wood and Ilana Rovner and U.S. District Judge John Blakey, heard oral argument. The panel seemed critical of Woodman's position, questioning whether packaging size alone constitutes a promotional service. Judge Wood opened her line of questions for Woodman's counsel by stating, "[i]t's hard for me to read this complaint without having the impression that fundamentally it's about price . . . . that is a [section] 2(a) claim." While Judge Wood acknowledged that the special packaging could be tied to promotion, she later stated, "I still don't see why the packaging itself, in its functional capacity, is either a service or facility . . . . Because that way you'd have a per se rule against all differences in packaging[.]"

Judge Rovner also expressed some doubt with Woodman's contention because it seemingly interferes with the antitrust principle that a seller has freedom to choose its purchasers and which products to sell them. She asked, "[I]f the result of treating package size as a service or facility for purposes of section 2(e), is to require a manufacturer to sell its bulk product line to all customers, isn't that really inconsistent with the cases that say that the manufacturer has the right to choose what product it sells to which customer?" Counsel for Woodman's responded by arguing that when a manufacturer chooses to sell a product to a customer, it must offer that product in all available packaging, which constitutes a service.

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BULK PACKAGING NOT LIKELY TO PROVIDE A BASIS FOR SECTION 2(E) CLAIMS

Although it will likely be months before the 7th Circuit issues a decision, the panel's comments and questions indicate that it seems likely to overturn the district court's decision that bulk packaging is a service under section 2(e) of the RPA. This would not be a surprise in light of the FTC's brief and also in the narrow focus courts apply to section 2(e). Overturning the district court makes sense because if section 2(e) is liberally interpreted, plaintiffs could potentially circumvent the competitive harm element and cost justification defense of a price discrimination claim under section 2(a) by instead asserting the claim under 2(e). Further, it could open the door for other price-based product issues to potentially fall within the realm of services or facilities. Given the prevalence of bulk packaging, affirming the district court's decision could create significant leverage for competing purchasers to demand access to a seller's full range of product offerings, which would contravene bedrock antitrust trust principles as noted by Judge Rovner. While discriminatory bulk packaging sales may give rise to RPA exposure under section 2(a), it seems unlikely that aggrieved purchasers will be able to pursue discriminatory bulk packaging claims under section 2(e).

Notes:

[1] Woodman's Food Market, Inc. v. Clorox Co., No. 15-3001.

[2] Luxor Ltd., 31 F.T.C. 658 (1940).

[3] General Foods Corp., 52 F.T.C. 798 (1956).

[4] FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968).

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