Updates
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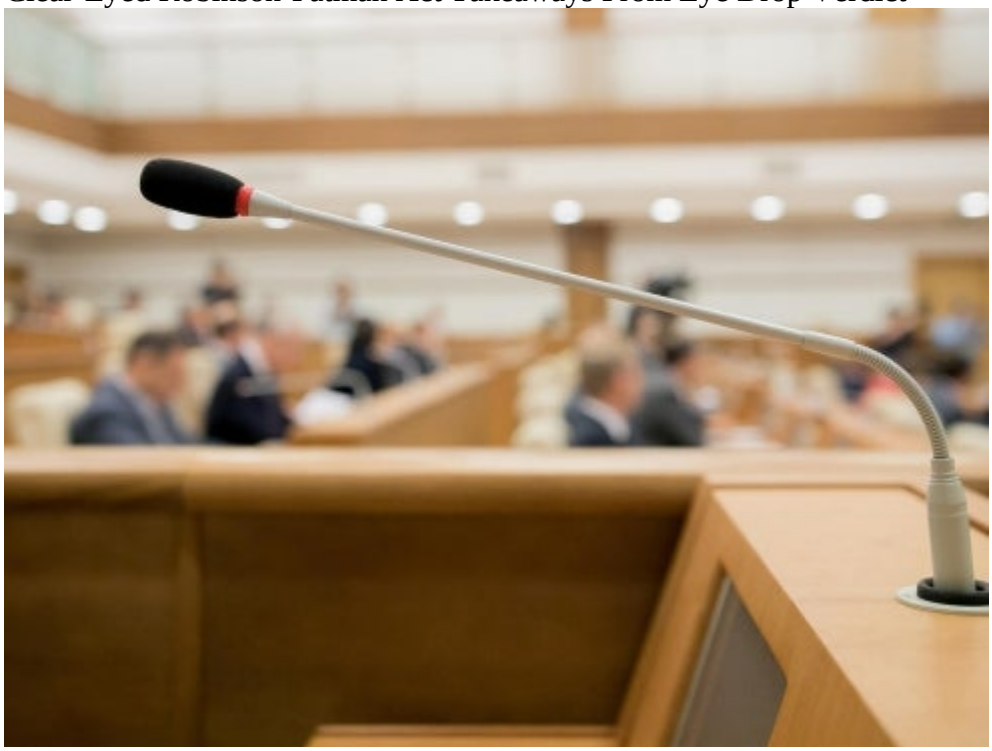
Clear-Eyed Robinson-Patman Act Takeaways From Eye Drop Verdict



A recent ruling condemning price discrimination for a popular eye drop brand is yet another reminder that companies cannot afford to ignore antitrust risk under the Robinson-Patman Act (RPA), a longstanding law that has made a comeback in recent years.

The RPA prohibits charging certain customers more than others without proper justifications. In *L.A. International Corporation v. Prestige Brands Holdings, Inc.*, plaintiff-wholesalers that purchased the eye drop Clear Eyes alleged that the manufacturer provided lower pricing to certain "favored" customers but not the plaintiff-wholesalers.[1] Late last year, a jury returned a six-figure verdict for the plaintiffs,[2] which the district court judge affirmed in May 2024.[3]

Prestige Brands offers valuable insights on the risks of price discrimination, particularly in light of federal antitrust enforcers' heightened rhetoric advocating for the revival of RPA prosecutions and aggressive and sophisticated private plaintiffs.

Return of the Robinson-Patman Act

The RPA is a New Deal-era statute that has been regaining traction during the Biden administration. In March 2024, Congresswoman Mary Gay Scanlon and Senator Elizabeth Warren wrote a letter to Federal Trade Commission (FTC) Chair Lina Khan urging the agency to revive RPA enforcement.[4] Additionally, FTC Commissioner Alvaro Bedoya[5] and Chair Khan[6] have argued that the RPA must be deployed to protect independent grocers and rural pharmacies. The FTC is reportedly building RPA cases in the soft drink and alcohol distribution markets, too.

Stated simply, the RPA prohibits sellers of commodity products from charging different prices to competing purchasers of those commodities.[7] Antitrust concerns arise when some competing resellers are given an edge in the market that has nothing to do with their superior efficiency or service. Specifically, a violation occurs

where a firm sells the same goods at roughly the same time at two different prices to two different competing customers, where the price difference creates a competitive injury.[8] In addition, discriminating in promotional allowances—such as marketing support—can also constitute a violation.[9] Buyers can also be liable along with the seller if the buyer knowingly induces and receives discriminatory pricing or promotional allowances.[10]

But not all forms of price discrimination are prohibited. The RPA does not apply to services. In addition, it permits differential pricing when the lower price is functionally available to competing customers, the promotional allowances were functionally available on proportionally equal terms, the discount is a volume discount justified by actual cost savings, downstream customers are not in competition with one another, or the discount is necessary for the seller in "meeting competition."[11]

Growing Trend or (Eye) Drop in the Bucket?

FTC scrutiny of price discrimination and the *Prestige Brands* litigation offer important lessons for understanding the RPA. *Prestige Brands* began in 2018 when nine wholesalers alleged that defendants Prestige Consumer Healthcare, Inc. and Medtech Products provided better discounts, promotions, and rebates to some membership club stores which were not also offered to the plaintiffs.[12] The favorable terms came in the form of quarterly rebate payments, which were provided in exchange for various advertising and promotion services.[13] After a six-day trial, a jury found that defendants' various discounts and rebates to the club stores were not sufficiently justified by the advertising and promotional services that those stores provided.[14]

Following the verdict, defendants moved for a new trial on several grounds. First, they argued that the jury instructions failed to convey that a functional discount is a complete defense to RPA liability. This defense applies when "a purchaser performs a service for a supplier" in exchange for the discount.[15] Here, defendants asserted that their discriminatory pricing was justified as a functional discount in exchange for the marketing services that certain customers performed for Clear Eyes.[16] Rejecting this defense, the court held that the jury instructions adequately conveyed that the functional discount defense is a complete defense and upheld the jury's finding that the Clear Eyes discounts were not given in exchange for a service.

Second, defendants asserted that the wholesaler-plaintiffs and the favored purchasers were not in competition because they were not "after the same dollar" since they competed for different customers in different sales channels.[17] Specifically, defendants argued that they offered their own discount programs and operated as membership-based clubs, whereas the plaintiffs did not.[18] The court disagreed, taking a broader view of the competitive space in finding that any difference between the plaintiff-wholesalers and the favored-wholesalers were merely immaterial "operational differences."[19] The court followed the U.S. Court of Appeals for the Ninth Circuit decision in *Innovation Ventures*, which held that a club store and wholesalers were in "actual competition with each other in the distribution of 5-hour Energy" drinks to convenience and grocery stores.[20] However, other courts could reach a different result where a club store sells primarily to consumers rather than to retailers. The ruling here underscores that some judges and juries may take a broader view of which companies compete in the same channel than previously believed.

Finally, the court rejected defendants' argument that the downstream customers, not defendants, requested the discount program.[21] The court confirmed that the RPA does not insulate a defendant from liability even if the buyer initiates the discount program.[22] This is an important reminder that liability attaches to both upstream and downstream trading partners under the RPA, regardless of who requested (or even demanded) the pricing.

Looking Ahead With a Clear Perspective: Takeaways and Best Practices

- Companies should keep track of whether discounts, rebates, or promotional allowances were functionally available on proportionally equal terms to all customers or resellers. The rationale for these discounts

should be contemporaneously documented to enable a jury or judge to see how any discounts are directly connected to savings or costs. Merely assuming that higher volumes mean lower costs or higher savings may not be enough. And do not expect courts or enforcers to take executives at their word years after the fact. Ordinary course business documents are the strongest evidence.
- Even companies that sell to consumers in different ways can still be "in competition" under the RPA. Here, wholesalers and club stores were deemed competitors despite differences in how they buy and sell. Companies should consider expanding their RPA compliance and instituting guardrails to cover situations beyond their traditional competitive set.
- The larger the price discrimination, the more eyebrows it may raise. Here, the plaintiff-wholesalers paid 17.5%–38% more for Clear Eyes than the two large wholesale membership clubs. Although any price difference can trigger a claim, greater differences may warrant a consultation with competition counsel at an early stage of the pricing process.
- Companies cannot escape liability even when the customer requests (or even demands) the discount. Whenever a purchaser proposes a volume discount, be sure that discount is either tied closely to savings or costs, or that the discount is offered to other purchasers on the same functional terms, as well.

Endnotes

[1] *L.A. Int'l Corp. v. Prestige Brands Holdings, Inc.*, 2024 WL 2272384, at *1 (C.D. Cal. May 20, 2024).

[2] *Id.* at *2.

[3] *Id.* at *15.

[4] Press Release, "Warren, Scanlon, Lawmakers Urge FTC to Revive Enforcement of Robinson-Patman Act to Promote Competition, Lower Food Prices," (Mar. 29, 2024).

[5] Prepared Remarks of Commissioner Alvaro M. Bedoya, Federal Trade Commission, "Returning to Fairness" (September 22, 2022).

[6] FTC, Open Commission Meeting, March 21, 2024, at 1:04:37-1:05:16.

[7] 15 U.S.C. § 13(a).

[8] *See Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990); *see also* Federal Trade Commission, Price Discrimination: Robinson-Patman Violations.

[9] *See Woodman's Food Market, Inc. v. Clorox Co.*, 833 F.3d 743 (7th Cir. 2016).

[10] Federal Trade Commission, Price Discrimination: Robinson-Patman Violations (stating that the Robinson-Patman Act "applies to commodities, but not to services").

[11] *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 77 –78 (1979) (discussing various defenses available to sellers).

[12] *L.A. Int'l Corp. v. Prestige Brands Holdings, Inc.*, No. 18-6809-MWF (MRWx), ECF No. 373, at 3 (C.D. Cal. May 20, 2024) ("Findings of Fact").

[13] *Prestige Brands*, 2024 WL 2272384, at *11.

[14] *Id.* at *2.

[15] *U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures*, LLC, 89 F.4th 1126, 1139 (9th Cir. 2023).

[16] *Prestige Brands*, 2024 WL 2272384, at *6.

[17] *Id*. at *8.

[18] *Id.*

[19] *Id.*

[20] *U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC*, 74 F.4th 960, 977 (9th Cir. 2023).

[21] *Prestige Brands*, 2024 WL 2272384, at *11.

[22] *Id.*

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