Marketing Channel Differentiation Strategies and the Robinson-Patman Act

By Anthony Dukes[*]

Brandon Norton[**]

Laura O'Laughlin[***]

Kristof Zetenyi[****]

Abstract

Recent years have seen renewed enforcement and private litigation under the Robinson-Patman Act ("RPA"), particularly in secondary-line cases, which allege price discrimination among downstream resellers. Firms, however, regularly employ marketing channel differentiation strategies by structuring prices and service offerings across distinct distribution channels such as retail, e-commerce, and wholesale. This article examines how such strategies have been raised as a possible defense in recent secondary-line RPA disputes and how courts have evaluated such strategies in connection with the competitive injury requirement. Drawing on marketing theory, Supreme Court precedent, and a review of secondary-line RPA cases from 2011 to 2021, we discuss how defendants have increasingly pointed to differences in marketing channels, reseller functions, and customer bases to argue that allegedly favored and disfavored purchasers do not compete for the same end customers and that courts have, in some instances, been receptive to these arguments. We conclude by exploring how channel differentiation may factor into competitive injury analysis in future RPA cases.

Introduction:

Marketing Channel Differentiation Strategies and the Return of Robinson-Patman

Enacted in 1936, the Robinson-Patman Act ("RPA"), with some exceptions, prohibits price discrimination by banning suppliers from charging different prices for the same commodity.[1] While in the past the Act was aggressively enforced, RPA cases have declined in recent decades, with private plaintiffs bringing only a handful of cases every year.[2] Just in the last few years, however, there has been a resurgence of secondary-line RPA cases, in which the litigation is brought by a reseller that accuses an upstream supplier of setting different prices to competing downstream resellers in the same market.[3]

---

[*] Anthony Dukes is the Robert E. Brooker Chair in Marketing and Professor of Marketing at the USC Marshall School of Business.

[**] Brandon Norton is a manager;

[***] Laura O'Laughlin is a principal; and

[****] Kristof Zetenyi is a vice president at Analysis Group Inc.

[1] Robinson-Patman Act of 1936, *codified at* 15 U.S.C. § 13(a).

[2] Ryan Luchs, Tansev Geylani, Anthony Dukes, and Kannan Srinivasan, *The End of the Robinson-Patman Act? Evidence from Legal Case Data*, 56(12) MANAGEMENT SCIENCE 2123–2133 (2010). *See also* D. Daniel Sokol, *Analyzing Robinson-Patman*, 83(6) THE GEORGE WASHINGTON LAW REVIEW 2064–2100 (2014). *See also* Anthony Dukes, Aishwarya Joshi, and D. Daniel Sokol, *Assessing the Antitrust Liability of Vertical Restraints*, Working Paper, pp. 23 and 37 (2024).

[3] This contrasts with primary-line cases that involve litigation between two suppliers in which one supplier is accused

Paralleling this renewed activity under the RPA is another trend, in which sellers have increasingly deployed marketing channel differentiation strategies: pricing and service approaches tied to the distinct channels through which products reach end customers, such as traditional brick-and-mortar retailers, e-commerce platforms, and wholesale distributors. These corresponding strategies reflect classic marketing frameworks, in which place and price interact with how firms structure distribution and customer service as part of the broader "marketing mix" of product, price, place, and promotion. Under traditional marketing theory, a firm may intentionally charge different prices or provide different service bundles across channels to align with differing customer preferences, transaction costs, and competitive conditions.[4]

The relevance of the connection between channel and differing customers is clear: A recurring defense in secondary-line RPA cases is that downstream resellers that operate in distinct marketing channels serve different classes of customers with differing expectations, transaction costs, and purchase behavior.[5] If resellers do not compete for the same end customers, then the pricing differences at issue in RPA matters may not threaten competition, even if sellers offer different net prices. Such a defense turns on the assessment of whether customers in different channels experience the same competitive dynamic or whether channel segmentation justifies different pricing structures without injuring competition.

In this article, we assess the potential relevance of the marketing channel differentiation strategy to secondary-line RPA cases. We begin by examining the legal background of liability under the RPA—in particular, the competitive injury requirement. We also note the recent increase in cases brought by the Federal Trade Commission ("FTC"). We then review established marketing theory and channel differentiation strategies, pointing out that, in many instances, allegedly favored and disfavored purchasers do not compete for the same end customers. We subsequently analyze the record of RPA cases and the role of channel differentiation in those cases, showing that marketing channel differentiation is relevant to assessing whether and to what extent a defendant's pricing practices caused harm to competition. We conclude by considering aspects of this strategy that may be relevant for future cases.

I. Establishing Liability and Injury in RPA Cases

Liability in secondary-line RPA cases generally requires that a plaintiff establish four elements: (a) sales in interstate commerce; (b) commodities of like grade and quality; (c) different prices charged to competing purchasers; and (d) injury to competition.[6] The fourth element is often the battleground. In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.* (2006), the Supreme Court emphasized that secondary-line liability is not triggered by price differences alone; the plaintiff bears the burden of showing that the discrimination harmed competition in a market in which the favored and disfavored purchasers actually compete, and must do so using concrete evidence such as lost sales or lost business attributable to the discrimination.[7] At the same time,

---

of providing a cheaper price to resellers in markets where the two suppliers compete and a more expensive price to resellers in markets where the two suppliers do not compete.

[4] *See* PHILIP KOTLER AND KEVIN KELLER, MARKETING MANAGEMENT, 15th ed. Pearson Education (2016), pp. 408–409, 506.

[5] *U.S. Wholesale Outlet & Distrib., Inc. v. Innovation Ventures, LLC*, 89 F.4th 1126 (9th Cir. 2023). *See also Woodman's Food Mkt., Inc. v. The Clorox Co*., 833 F.3d 743 (7th Cir. 2016).

[6] Section 2(a) of the Robinson-Patman Act of 1936, *codified at* 15 U.S.C. § 13(a) (2023).

[7] *Volvo Trucks North America, Inc. v. Reeder Simco GMC, Inc.*, 546 U.S. 164 (2006).