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Size Alone Does Not Constitute a Promotional Service: Seventh Circuit Looks to Legislative Intent of the Robinson-Patman Act in Reversing Lower Court's Decision

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In February 2015, the district court in western Wisconsin denied a motion to dismiss, brought by The Clorox Company, against claims raised by Woodman's Food Market alleging violations of Sections 2 (d) and (e) of the Robinson-Patman Act. Woodman's had alleged that Clorox's large package sizes for certain products constituted a "promotional service" and that Clorox's refusal to sell to Woodman's those large package sizes was discriminatory and thus constituted a *per se* violation of the Robinson-Patman Act. In denying Clorox's motion to dismiss, the district court pointed to guidelines produced by the FTC, as well as two old FTC decisions, noting that neither of those decisions had ever been revoked.[12] On appeal, the Seventh Circuit reversed the district's court decision and, in so doing, affirmed that the "primary concern" of antitrust law, including the Robinson-Patman Act, is to promote inter-brand competition.[13]

As the district court observed in denying Clorox's motion to dismiss, the question of whether package size constituted a promotional service under Sections 2 (d) and (e) of the Robinson-Patman Act had never been squarely addressed.[14] Lacking precedent, the district court looked to the so-called Fred Meyer Guides, which were published by the FTC to "provide assistance to businesses seeking to comply with [s]ections 2 (d) and (e) of the Robinson-Patman Act" specifically since the idea of a promotional "service" had "not been exactly defined by the statute or in decisions."[15] The district court noted that the Guides "expressly" listed "special packaging, or package sizes" as falling under Sections 2 (d) and (e).[16] In addition, the district court affirmed the relevance ("directly on point") of two "old-but-never-revoked administrative decisions" rendered by the FTC that it found supported Woodman's claims that Clorox's packaging size "is connected to the resale of those products."[17]

Subsequent to the district court's decision, the FTC filed an *amicus* brief in support of Clorox disavowing the district court's reliance on those two decision with the concern that an "overbroad interpretation" of Sections 2 (d) and (e) "could contradict other settled antitrust policies" and ultimately "reduce consumer welfare."[18] In reaching its conclusion that the two administrative decisions relied upon by the district court "should no longer be followed," the FTC provided its own interpretation of Sections 2 (d) and (e) as well as the rationale for those sections' existence.[19]

As explained by the FTC, prior to the passage of the Robinson-Patman Act, a proscription against price discrimination was already embedded in Section 2 of the Clayton Act.[20] However, an FTC study conducted in the 1930s regarding the emergence of chain stores "found that frequently price advantages were passed on to the chains in the form of brokerage or commissions to the intermediaries, through special allowances for advertising or display, and through various indirect forms of concession not allowed to independent retailers."[21] These benefits, since they were not viewed as "direct" price concessions, apparently did not fall afoul of the Clayton Act and allowed "several large chain buyers [to] effectively avoid [Section 2] by taking advantage of gaps in its coverage."[22] In a speech from 1936, contemporaneous with the passage of the Robinson-Patman Act, the then-chairman of the

[12] *Woodman's Food Market, Inc. v. Clorox Co.*, 2015 WL 420296 (W.D. Wisconsin 2015).
[13] *Woodman's Food Market, Inc. v. Clorox Co.*, 2016 WL 4254935 (7th Cir. 2016).
[14] *Woodman's*, 2015 WL 420296 at *4.
[15] 16 C.F.R. at §§ 240.1 and 240.7.
[16] *Woodman's*, 2015 WL 420296 at *4.
[17] *Id*. at *4-6.
[18] *Woodman's Food Market, Inc. v. Clorox Co.*, Brief of Amicus Curiae the Federal Trade Commission in Support of Defendants-Appellants and Reversal, filed November 2, 2015 ("FTC Brief"), at v. and 1.
[19] *See Id.* at 1-3.
[20] *Id*. at 8.
[21] Address by Honorable Charles H. March, Chairman of Federal Trade Commission, Before Annual Convention of National Association of Retail Druggists, at Pittsburgh, Pennsylvania, Thursday, September 24, 1936 ("March Speech").
[22] *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 69-69, (1959).

FTC expressly pointed to the "facts" of the chain-store study as influencing Congress's actions.[23] This perspective that the passage of the Robinson-Patman Act generally, and Sections 2(d) and (e) specifically, was in response to indirect, or not readily observable, price discrimination was later affirmed by the Supreme Court.[24]

Grounded on the basis that Sections 2 (d) and (e) are intended to weed out indirect price discrimination, the FTC's *amicus* brief reached the conclusion, ultimately adopted by the Seventh Circuit, that the Robinson-Patman Act does not categorically "prevent manufacturers from selling certain product lines to only a subset of its customers, or from providing those customers with a more desirable product mix than other customers" since such a "result would contradict the established antitrust principle that, absent monopoly, a seller may choose the parties with which it will deal."[25] The FTC further clarified that, in its opinion, for Section 2(e) appropriately to be invoked a plaintiff would need "to demonstrate that a seller provided a promotional *service* distinct from the product itself."[26] Were this not the case, and given the *per se* illegality of violating Sections 2 (d) and (e), a more expansive interpretation of those sections would amount to a "categorical ban" on manufacturers ever offering different "types, styles, and sizes of a given product" since manufacturers would not be able to defend their conduct as pro-competitive or welfare-enhancing.[27] Thus, the FTC found that "Woodman's does not allege the type of hidden, promotional discrimination that Section 2(e) was meant to combat."[28]

In reaching its own conclusion regarding Woodman's claims, the Seventh Circuit largely echoed the logic of the FTC:

> The history of the Act and the reasoning of our sister circuits and the Commission demonstrate that only promotional "services or facilities" fall within subsection 13(e) [or Section 2(e)]. And the logic of the Act as a whole convince us that package size alone is not a promotional "service or facility." As we have already noted, Congress's purpose in enacting subsection 13(e) was to close off the possibility of circumventing subsection 13(a) by concealing price discrimination as advertising benefits.[29]

The Seventh Circuit further observed that "every other circuit to consider the issue" held that for a promotional service to fall under Section 2(e) it must be "connected with promoting the product, rather than sweeping in *any* attribute of the product that makes it more desirable to consumers."[30] Hence, the Seventh Circuit's statement that it had "no inclination to be the first" court to render a decision that "would wipe out the seller's discretion to choose which products to sell to whom."[31] The Seventh Circuit held that "[s]ize alone is not enough to constitute a promotional service […and that…] the convenience of the larger size is not a promotional service or facility."[32]

In fact, packaging is a well-recognized "marketing tool" and provides a basis for competition among manufacturers along with the other so-called "P's" of marketing such as price, product, place and promotion.[33] A variety of studies have examined ways in which package size, in particular, can influence consumers' choices. For example, for a product that is thought to have a short shelf-life, such as a food or a pharmaceutical item, a consumer who expects to use relatively little of that product might have a strong preference for

[23] March Speech.
[24] *See e.g.*, *Simplicity*, 360 U.S. at 69 and *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349-352 (1968). *See also* FTC Brief at 8-9.
[25] FTC Brief at 12-13 and 19.
[26] *Id*. at 20 (emphasis in original). Of course, the FTC's views on the Robinson-Patman Act are not dispositive. As the Seventh Circuit acknowledged, the "FTC's interpretations of the Act 'do not have the force of law.'" *See Woodman's*, 2016 WL 4254935 at *4. Nonetheless, in referencing the FTC's *amicus* brief, the court observed that the FTC's "reasoned opinions deserve our respectful consideration."
[27] *See* FTC Brief at 14 and 19.
[28] *Id*. at 21. Although the FTC has apparently "considered deleting 'special packaging or package sizes' from the Guide's list of examples of promotional services," in what it characterized as a "close" decision it "ultimately kept the example to address the scenario in which '*special packaging*' has 'appeal to [resale] customers.'" *Id*. at 22-23 (emphasis in original). However, as clarification and as follow-up to the 2014 version of the Fred Meyer Guides, the FTC states that for a Section 2(e) violation to have occurred "the special packaging or package size must convey a promotional message to consumers, rather than merely satisfy market demand for lower unit prices or desirable product attributes like larger quantities. *Id*. at 22.
[29] *Woodman's*, 2016 WL 4254935 at *3-4.
[30] *Id*. at *4-5 (emphasis added).
[31] *Id*. at *5.
[32] *Id*.
[33] *See*, *e.g.,* Philip Kotler, *Marketing Management*, Eleventh Edition, Prentice Hall: Upper Saddle River, NJ, 2003 at p. 236.

the smallest possible package size. Conversely, a heavy user of that product might very well opt for a significantly larger package size in return for a lower price.[34] Thus, by making available to retailers a wide range of different package sizes, a particular brand may be more effectively positioned to compete against its rivals. A ruling adverse to Clorox's decision to only selectively make available certain package sizes may have stifled such competition.

Underlying both the FTC's and the Seventh Circuit's conclusions then is an adherence to the principle that "antitrust laws protect competition, not competitors" and that "interbrand competition … is the 'primary concern of antitrust law.'"[35] These affirmations, specifically with respect to the Robinson-Patman Act, are significant, given the Seventh Circuit's observation that the Act's "fit with antitrust policy is awkward, as it was principally designed to protect small businesses."[36] Indeed, one commentator on antitrust policy has noted that in the Act's attempt to "protect small businesses from larger, more efficient businesses [a] necessary result is higher consumer prices."[37] This commentator further concluded that the Robinson-Patman Act is, in fact, "quite hostile towards economic competition."[38] However, by affirming that the Robinson-Patman Act does not preclude manufacturers from offering differentiated package sizes to different retailers, the Seventh Circuit's decision should ensure that firms can continue to compete on the basis of packaging.

About the Author

Jeffrey Klenk is an economist at Berkeley Research Group where his practice focuses on antitrust and intellectual property issues.

[34] *See* Oded Koenigsberg, Rajeev Kohli and Ricardo Montoya, "Package Size Decisions," *Management Science*, vol. 56, no. 3, March 2010, p. 485-494.
[35] *Id*. at 3 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990)) and at 2 (quoting *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180 (2006)).
[36] *Id*. at 2.
[37] Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, West Publishing Co.: St. Paul, MN, 1994 at § 14.6a.
[38] *Id*.