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Practice Group:

Antitrust, Competition & Trade Regulation

Supreme Court Declines to Hear Seventh Circuit Case Holding That Bulk Packaging Does Not Constitute a Promotional Service Under the Robinson-Patman Act

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In March of last year, we covered oral argument before the Seventh Circuit in *Woodman's Food Market, Inc. v. Clorox Co.* No. 15-3001.[1] We commented that the three-judge panel hearing the case seemed skeptical of the plaintiff's argument that Clorox's sale of bulk-packaged products to some purchasers, but not others, constituted a promotional "service or facility" and was thus price discrimination under the Robinson-Patman Act. In August of 2016, the Seventh Circuit issued an order largely in line with our prediction,[2] and last week, the Supreme Court denied a writ of certiorari in the case without comment,[3] leaving the Seventh Circuit's decision intact.

THE LAWSUIT

Woodman's is a regional grocery store chain with approximately 15 stores throughout Wisconsin and Illinois. Prior to 2014, Woodman's purchased "large packs" of Clorox products directly from Clorox, including 40-ounce salad dressing bottles, 460-count packs of Glad storage bags, and 42-pound cat litter containers. However, in 2014 Clorox informed purchasers that going forward, it would sell "large packs" only to wholesale discount clubs, such as Costco, Sam's Club, and BJ's. Smaller purchasers like Woodman's would no longer be able to purchase "large packs" of Clorox products. Woodman's responded by bringing suit against Clorox in the Western District of Wisconsin, alleging that its decision to offer "large packs" for sale only to discount warehouses violated the Robinson-Patman Act ("RPA").

RPA Background

The RPA prohibits unlawful price discrimination between competing purchasers.[4] Subsection 13(a) targets traditional price discrimination, where competing purchasers are offered different prices to purchase the same goods. Subsections 13(d) and 13(e)[5] prohibit

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[1] *See* Christopher S. Finnerty, Michael R. Murphy & Edward J. Mikolinski, *7th Circuit Not Convinced That Bulk Packaging Constitutes a Promotional Service Under the Robinson-Patman Act*, http://www.klgates.com/7th-circuit-not-convinced-that-bulk-packaging-constitutes-a-promotional-service-under-the-robinson-patman-act-03-03-2016/ (last accessed Feb. 28, 2017).

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

[3] *Woodman's Food Market Inc. v. Clorox Co.* No. 16-914, 2017 WL 737846 (Feb. 27, 2017).

[4] 15 U.S.C. § 13.

[5] Subsection 13(d) prohibits payments for "services or facilities," while Subsection 13(e) prohibits the direct provision of "services or facilities." The two subsections are generally analyzed identically, and thus only Subsection 13(e), which was at issue in this case, will be discussed. *See* 833 F.3d at 746.

price discrimination through less obvious channels, such as the provision of promotional "services or facilities." These subsections were added to address a loophole left by Subsection 13(a), in which manufacturers would offer all purchasers the same price but then pay for (or reimburse) the advertising expenses of certain purchasers but not others, thereby providing a backdoor discount.[6] Because the use of promotional services to provide a discount to certain purchasers is relatively easy to conceal, a plaintiff alleging a violation of Subsection 13(e) need not demonstrate the competitive harm element, which is required for a claim under Subsection (a). In this way, it is relatively easier to establish a violation of Subsection 13(e) because the plaintiff need only show that a seller provided disparate promotional "services or facilities" to purchasers.

THE DISTRICT COURT DECISION

In its lawsuit, Woodman's alleged that Clorox had violated Subsection 13(e) of the RPA by offering to sell its "large packs" only to discount wholesalers. Woodman's theory was that the "large packs" constitute promotional services for purposes of Subsection 13(e), and thus the failure to offer them to all purchasers constitutes price discrimination.

The district court denied Clorox's motion to dismiss for failure to state a claim, citing two 50 year old decisions from the Federal Trade Commission ("FTC"). However, the court also allowed Clorox to file an interlocutory appeal to the Seventh Circuit, because the case involved controlling questions of law as to which there was substantial ground for difference of opinion.

THE SEVENTH CIRCUIT'S DECISION

On appeal, the Seventh Circuit reversed. Central to the Seventh Circuit's decision was the legislative intent and mutual exclusivity of Subsections 13(a) and 13(e). The Court highlighted that Subsections 13(e) was included in the RPA to "target only a narrow band of conduct that Congress identified as a problem: the provision of advertising-related perks to purchasers as a way around subsection 13(a)'s prohibition on price discrimination."[7] The Seventh Circuit also cited previous case-law that held Subsection 13(e) excluded claims that could fall within 13(a), explaining if that were not the case, a plaintiff alleging price discrimination could always avoid having to show the competitive harm element required for a Subsection 13(a) claim by simply bringing his claim under Subsection 13(e) instead.[8] Because Clorox's sale of the "large packs" to only discount wholesalers was a classic quantity discount, the Seventh Circuit explained, it could be properly analyzed only under Subsection 13(a), not 13(e).

In addition, the Seventh Circuit rejected Woodman's argument that it was the convenience of the "large packs" to consumers (rather than the straightforward quantity discount) that made them a promotional "service or facility" under Subsection 13(e). Here, the Seventh Circuit noted that "every other circuit to consider the issue has held that the terms 'services or facilities' in subsection 13(e) refer only to those services or facilities *connected with*

[6] *See FTC v. Fred Meyer, Inc*. 390 U.S. 341, 350-51 (1968).
[7] *Clorox*, 833 F.3d at 747-48.
[8] *Id.* at 747.

promoting the product, rather than sweeping in any attribute of the product that makes it more desirable to consumers."[9] The FTC had also changed its view and now believed that package size alone could not constitute a promotional service or facility.[10] This interpretation was logical, the court reasoned, because if a "large pack" could be a promotional "service or facility" merely because its size made it more attractive to consumers, "then nearly all product attributes would be 'services or facilities' covered by subsection 13(e)."[11] Thus, the Seventh Circuit held that Clorox's "large packs" were not promotional "services or facilities" for purposes of Subsection 13(e), and its failure to offer them to sale to all purchasers did not violate that provision.

CONSEQUENCES OF THE DENIAL OF CERTIORARI

As with any denial of certiorari, the Supreme Court's decision not to hear *Clorox* indicates a lack of interest in reversing the Seventh Circuit's decision at this point. This means that without more, a manufacturer's decision to offer to sell bulk-packaged products to certain purchasers, but not others, will not constitute a violation of Subsection 13(e). It should be noted, however, that *Clorox* applies narrowly, to a situation where there is nothing special about the large quantity packaging. In its decision, the Seventh Circuit warned, "[t]his is not to say that it would be impossible under different facts to imagine package size or design as part of a 'service or facility' when combined with other promotional content."[12] The court gave the examples of "football shaped packages offered just before the Super Bowl, or Halloween-branded 'fun size' individually wrapped candies near Halloween."[13] Thus, even after *Clorox*, manufacturers must remain sensitive to whether large quantity packaging is arguably combined with promotional content that might bring it within the ambit of a promotional "service or facility" under Subsection 13(e).

Manufacturers should be encouraged by the Seventh Circuit's decision in *Clorox,* which reaffirms that plaintiffs cannot circumvent the competitive harm element by bringing what is properly a Subsection 13(a) claim as a Subsection 13(e) claim instead. Still, it is important to remember that the focus of *Clorox* is only on a potential price discrimination claim arising under Subsection 13(e). Manufacturers will continue to face liability for price discrimination under Subsection 13(a) where only certain purchasers are offered bulk packaging and the plaintiff can allege harm to competition.

[9] *Id*. at 748 (emphasis added).
[10] *Id.* at 749.
[11] *Id.*
[12] *Id.* at 750.
[13] *Id.*

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