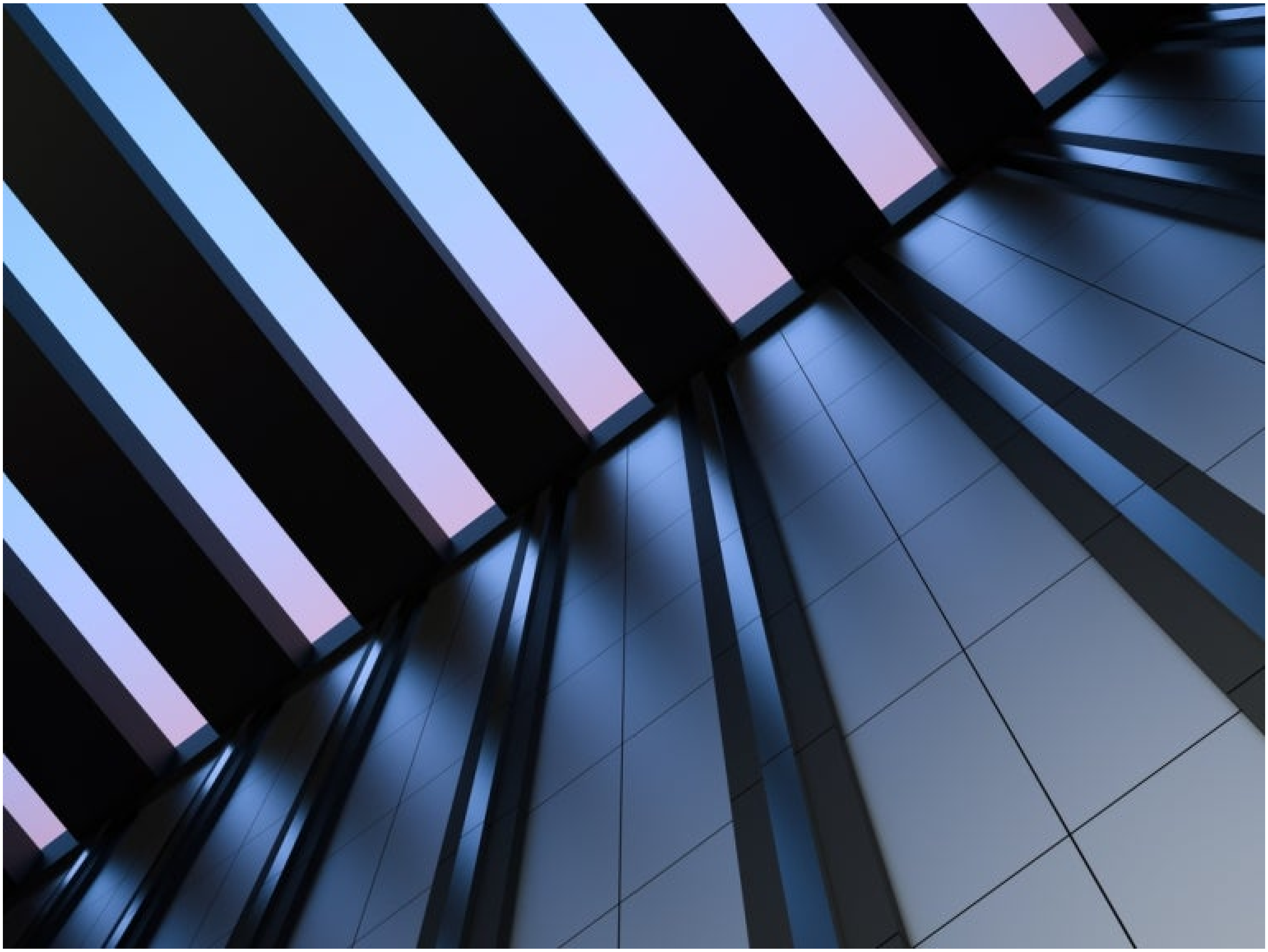

After a long hibernation, the Robinson-Patman Act (RPA)—which generally prohibits sellers from charging different prices or providing different allowances to "competing" buyers—is poised to make a comeback in agency enforcement proceedings.

In June 2022, the Federal Trade Commission (FTC) announced it intended to use the RPA to combat allegedly improper rebates and fees from drug manufacturers to pharmacy benefit managers. From there, the drumbeat of an agency RPA revival has steadily grown louder.[1] Against this backdrop, two courts have taken what appears to be a broader approach to determining what constitutes a "competing" buyer for RPA purposes. Under these opinions, the fact that customers were in different channels was not enough to deem them noncompetitors. As a result, the existence of operational differences between downstream customers may not suffice to justify a seller treating them differently under the RPA.

Ultimately, however, these two cases—*U.S. Wholesale Outlet & Distrib., Inc. v. Innovation Ventures, LLC*, 89 F.4th 1126 (9th Cir. 2023) and *L.A. Int'l Corp. v. Prestige Brands Holdings, Inc.*, 2024 WL 2272384 (C.D. Cal. May 20, 2024)—should not be seen as a sea change in RPA jurisprudence, but as a broadening view of the underlying common law to make the point that *who* downstream customers sell to (as opposed to what those downstream customers look like) is the key in determining whether those customers compete.

What Is the Robinson-Patman Act?

In 1977, the U.S. Department of Justice (DOJ) issued a report stating it would cease to enforce the act, and the FTC has not brought an RPA case since 2000. The Supreme Court of the United States has not opined at length on the RPA for almost two decades.

The RPA is a New Deal-era statute prohibiting sellers of commodity products from charging different prices to competing purchasers of those commodities.[2] A violation occurs where a firm sells the same goods at roughly the same time at two different prices to two different competing customers, with the price difference creating a competitive injury.[3] Discriminating in promotional allowances—such as marketing support—can also constitute a violation.[4] Buyers can also be liable along with the seller if the buyer knowingly induces and receives discriminatory pricing or promotional allowances.[5]

Innovation Ventures

In *Innovation Ventures,* seven California wholesalers that purchased the energy drink "5-hour Energy" for resale to convenience and grocery stores alleged that the manufacturer of the drink offered them less favorable pricing, discounts, and reimbursements than it offered club stores.[6] After the defendants prevailed at trial, the plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit. The court identified the "key issue" as "whether [the club stores] and the Wholesalers (both customers of [defendant]) are 'customers competing' with each other as to resales [] for [the] purposes of section 2(d)." *Id.* at 1142. As part of a three-part test to determine whether two customers compete, the court asked whether the club stores and the wholesalers were both operating "on a particular functional level such as wholesaling or retailing." *Id.* at 1143. The court would not take businesses at their word here, noting that it "ask[s] whether customers are actually functioning as wholesalers or retailers with respect to resales of a particular product to buyers, *regardless of how they describe themselves or their activities* ," and "potential operational differences are not relevant to determining whether two customers compete for resales to the same group of buyers."[7] The question seems to be whether the purported competitors seek to sell to the same people.

The dissent argued that "[the club stores] and the Wholesalers may not be in actual competition because it is not clear they sold to the same buyers" as "buyers did not treat [the club stores] and the Wholesalers as substitute supply sources." *Id.* at 1146-47. The majority booted that argument because "the question whether one business lost buyers to another does not shed light on whether the businesses are in competition, but only on whether there has been an injury to competition." *Id.*

Prestige Brands

In *Prestige Brands,* nine wholesalers alleged that defendant suppliers gave discounts, promotions, and rebates for eye drops to some membership club stores, which were not also offered to the wholesaler plaintiffs. The favorable terms came in the form of quarterly rebate payments, provided in exchange for advertising and promotion services.[8] After a jury ruled in favor of the plaintiffs, the defendants moved for a new trial, insisting that the wholesaler plaintiffs and the favored purchasers were not in competition as the latter operated as membership-based clubs, whereas the plaintiffs did not. Thus, the defendants asserted, the buyers competed for different customers in different sales channels, and the RPA was inapplicable. *Id.* at *8-9.

The U.S. District Court for the Central District of California disagreed, holding that "potential operational differences" and "whether one business lost buyers to another" are "irrelevant" for the competition analysis under Section 2(d) of the RPA.[9] The court emphasized that "the differences between Plaintiffs and the Favored Purchasers that Defendants highlight are exactly the 'operational differences' that the Ninth Circuit ignore[s]." [10] When the situation involves "two customers in the same geographic area [] competing for resales to the same buyer or group of buyers," the customers are generally competitors.[11] Again, rather than focusing on the manner in which the businesses operate, the question instead seems to be whether the purported competitors are trying to sell to the same people.

Takeaways: Moving Toward a Broader Enforcement Approach?

This Ninth Circuit view could mark a pendulum swing toward taking a broader enforcement approach to the RPA, dusting off old caselaw to make the point that who potential competitors sell to is key. For instance, *Innovation Ventures* relied in part upon *Simplicity Pattern Co.*, a 1959 Supreme Court case where "variety stores" that offered lower-priced dress patterns and specialized fabric stores were held to be in competition. The fact that the variety stores had bare-bones furnishings, while the specialized stores "provide tables and chairs where the customers may peruse the catalogues in comfort and at their leisure," did not matter—ultimately, they were selling "identical product [patterns] to substantially the same segment of the public."[12] It also cited *Feesers*, a 2007 case from the U.S. Court of Appeals for the Third Circuit, to make the same point. Although one purchaser of egg and potato products was a "full line distributor of food and food related products" and the other was a "food service management company that [also] provides facility management and operation services," the court noted "[t]he threshold question is whether a reasonable factfinder could conclude [the two customers] directly compete for resales [of the food supplier's] products among the same group of [buyers]."[13]

In the past, companies have reasoned that discrimination between channels is acceptable, but discrimination between buyers within a channel is unacceptable. Club stores and grocery retail stores, for example, with their myriad operational differences, could be seen as a solid example of separate channels.

This logic may no longer be sufficient to avoid RPA scrutiny. Operational differences seem to be mere noise in competition analysis, at least where the Ninth Circuit is concerned. Suppliers may want to avoid relying solely on operational differences between their buyers to assert that a lack of competition exempts them from liability under the RPA. Instead, suppliers should carefully examine whether the companies they are supplying are competing for the same buyer.

It appears that the Supreme Court is not willing to weigh in on the broadening of the RPA, at least for now, denying a petition for a writ of *certiorari* in the *Innovation Ventures* case.[14] As a result, the opinion will remain the prevailing law in the Ninth Circuit.

Companies should be on the lookout for future FTC guidance and maintain strict RPA compliance programs as agency interest ramps up. For further guidance, see our series of takeaways and best practices to avoid RPA headaches.

Endnotes

[1] *See, e.g.*, Matthew Perlman, *FTC's Bedoya Looking for Market Power in Pricing Cases*, Law360 (April 11, 2024).

[2] 15 U.S.C. § 13(a).

[3] *See, e.g., Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990).

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

[5] 15 U.S.C. § 13(f).

[6] *Innovation Ventures,* 89 F.4th at 1133.

[7] *Id.* (emphasis added).

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

[9] *Id.* (citing *Innovation Ventures,* 89 F.4th at 1142-44, 1147).

[10] *Id.* (citing *Innovation Ventures,* 89 F.4th at 1146-47).

[11] *Id.* (quoting *Innovation Ventures,* 89 F.4th at 1143-44, 1147).

[12] *Innovation Ventures,* 89 F.4th at1143 (quoting *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 59-60, 62 (1959).

[13] *Id.* (quoting *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206. 214 n.9 (3d Cir. 2007)).

[14] *Innovation Ventures, LLC, et al. v. U.S. Wholesale Outlet, et al.*, No. 23-1099, 2024 WL 4426552 (U.S. Oct. 7, 2024).

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