

Rare Robinson-Patman Ruling Exhibits Key Antitrust Risk

By **Teisha Johnson, Daniel Graulich and Heidi Smucker** (June 14, 2024, 3:33 PM EDT)

On May 20, the U.S. District Court for the Central District of California affirmed a seven-figure jury verdict and **granted** a permanent injunction in a rare Robinson-Patman Act decision.

The RPA is an antitrust statute that prohibits certain kinds of price discrimination in goods purchased for resale.[1]

The case, LA International Corp. v. Prestige Brands Holdings, was pursued by a group of local wholesaler plaintiffs that claimed a defendant eye drop manufacturer and its subsidiaries sold the plaintiffs eye drops on less favorable terms than the defendant's club store wholesale customer.

The decision highlights the antitrust risks faced by suppliers that manage customers across different sales channels and participate in discount programs set up by their customers.

The RPA

The RPA is a federal antitrust statute that prohibits price discrimination between customers that are similarly situated resellers and contemporaneously purchase commodity products that are of "like grade and quality." [2]

In addition to targeting differences in wholesale prices, the RPA reaches discrimination in the provision of promotional allowances or services to customers who compete in the resale of a seller's products.

Why the Case Matters

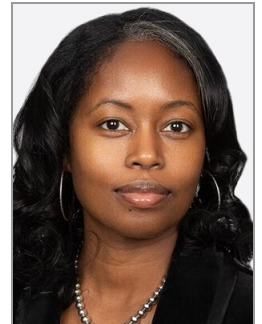
The case represents the first plaintiff-side victory under the RPA since a 2002 jury verdict that was subsequently overturned by U.S. Supreme Court in the 2006 Volvo Trucks North America Inc. v. Reeder-Simco GMC Inc. decision. [3]

The recent decision comes against the backdrop of increased warnings from leadership at the Federal Trade Commission about the need to revitalize RPA enforcement and the initiation of at least two investigations into potential RPA violations.

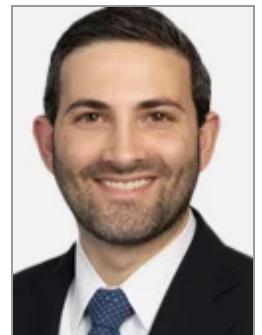
This case is likely to be cited by future plaintiffs and enforcement officials that are calling for renewed scrutiny of pricing and discounting practices employed by product manufacturers and their key customers.

About the Case

The plaintiffs were a group of 10 small to midsize wholesale distribution companies that purchased consumer products in bulk and resold these products on a wholesale basis to retailers or smaller wholesalers who did not have direct-purchaser status with suppliers.



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The defendant — a holding company and its wholly owned subsidiary — supplies Clear Eyes, which are branded over-the-counter eye drops that can be purchased for resale.

The plaintiffs filed suit on Aug. 8, 2018, alleging the defendant violated the RPA, along with two California consumer protection statutes, by providing quarterly promotional allowances exclusively to locations operated by Costco Wholesale Corp. and Walmart Inc.'s Sam's Club.

Two months later, on Oct. 18, the defendant filed a motion to dismiss, which was denied by the court in November.

Following several years of subsequent discovery, evidentiary and pretrial proceedings, a trial was finally set for Dec. 5, 2023. The trial concluded on Dec. 15, 2023, and the jury returned a verdict for the plaintiffs that same day.

The court granted a permanent injunction against the defendant on May 20, prohibiting the defendant from continuing to offer promotional allowances to its club store customer on more favorable terms than those offered to the plaintiffs.

The court also held it made no error in instructing the jury on any of the plaintiffs' claims and denied the motion for a new trial.

Following the trial, plaintiffs secured a seven-figure jury verdict — \$680,000 awarded by jury, which was then trebled under the antitrust laws, to \$2.04 million — and a permanent injunction that requires defendant to offer its eye drops on the same price terms and allow the plaintiffs to participate in any discount programs on proportionally equal terms.

The case, which resulted in over six years of litigation in federal district court, also underscores the significant time, cost, and resource burdens associated with defending against price discrimination claims in federal litigation.

The Court's Decision

In its opinion, the court determined that the defendant failed to demonstrate that their subsequent promotional offerings mooted the need for injunctive relief. The court stated that:

The mere fact that [the defendant and its subsidiaries] have ceased their illegal conduct for now is insufficient to carry their burden, especially in light of the jury's finding of liability and the fact that the new promotional offer was only offered months after trial and once Plaintiffs moved for injunctive relief.

Additionally, the court was not persuaded by the defendant's argument that their conduct could not violate the RPA because it was Costco that established the promotional allowance program, which the defendant merely participated in, and that it was irrelevant whether or not the plaintiffs ever offered a similar program.

In particular, the court highlighted that it "is not aware of any cases that required Plaintiffs to affirmatively offer a similar program as their competitors, nor do[es] Defendant provide any such authority."

In examining the request for injunctive relief, the court based its decision on evidence presented at trial that showed the defendant paid Costco stores a 3.95% allowance and failed to offer similar payments to the plaintiffs.

The court further concluded that all four equitable factors weighed in favor of injunctive relief:

- The plaintiffs suffered an irreparable injury;
- The monetary damages could not adequately compensate for that injury;
- The balance of hardships between the parties warranted the injunction; and
- The public interest would not be harmed by the injunction.

However, the court declined to require that the defendant allocated certain quantities of eye drops, as the plaintiffs requested.

Key Takeaways

The most notable takeaways from the case include the following.

First, illegal price discrimination can occur even when a seller participates in a discount program that was established by one of its customers — as opposed to the manufacturer itself.

The defendant argued there was no price discrimination because they were participants in a discount program that Costco — the favored buyer — established, and merely paid the promotional allowances as was required by that program.

Furthermore, the defendant claimed that the plaintiffs never solicited similar allowances from the defendant.

The court found these facts to be irrelevant, explaining that the RPA prohibits discounts where a seller fails to affirmatively undertake efforts that would provide allowances on proportionally equal terms.

Second, a plaintiff can be viewed as competing in the same sales channel as a favored buyer even if a plaintiff and the favored buyer do not serve the same exact end customers.

To prevail under the RPA, a plaintiff is required to show it competes with a favored buyer — e.g., Costco. Here, the defendant argued that the plaintiffs failed to prove they compete with Costco because the plaintiffs and Costco do not serve the same end consumers — particularly since Costco requires end customers to have club membership.

The court disagreed with the defendant and held it was enough to show the plaintiffs:

- Had outlets that were in geographical proximity to Costco locations;
- Purchased goods of the same grade and quality as Costco, within approximately the same time period; and
- Operated on the same functional level of the supply chain as Costco.

Third, unique brokering and wholesale functions performed by a favored buyer may also not be sufficient to defeat the RPA claim.

To prevail under the RPA, a plaintiff is required to show it is similarly situated to favored buyer — e.g., Costco.

Here, the defendant claimed that the plaintiffs were not similarly situated to Costco because the defendant specifically selected Costco to facilitate unique brokering and wholesaling functions that the plaintiffs could not perform.

The court held this factor was not determinative and instead found that the plaintiffs and Costco were similarly situated purchasers by virtue of the fact that their purchases from the defendant took place in what the court characterized as a "typical chain store paradigm."

The so-called functional discount defense raises questions of fact that are for a jury to decide.

A functional discount is one that a seller gives to a buyer, based on the buyer performing certain functions — typically wholesale, brokering, packaging, and distribution services.

If a favored buyer's lower prices are the result of functional discounts, a seller can use this as a

complete defense against RPA liability. Based on the jury's findings of fact, defendant did not successfully prove, through documentation, testimony, or otherwise, that their allowances to Costco were the result of functional discounts.

RPA Compliance Considerations and Conclusions

This case provides a rare example of RPA claims that culminated in a victory for plaintiffs. As such, it provides insights into how future litigants may attempt to expand the RPA's scope and interpretation, and companies should expect plaintiffs and enforcers to cite this case's holdings in calling for more aggressive enforcement.

Moving forward, companies should be mindful of the challenges that can arise in setting up differential pricing programs across their sales channels — particularly given the costly and time-consuming nature of RPA litigation.

There are several best practices that companies can employ to mitigate this risk, including carefully evaluating what pricing differentials exist, documenting the basis for any differential, and setting up formal internal protocols for purposes of distinguishing between sales made through different sales channels.

Additionally, when interacting with downstream customers on the issue of discounts and promotional support, suppliers and manufacturers must consider the potential impacts on its remaining sellers and whether such terms are being made available on proportionally equal terms within a given sales channel.

Further, companies should evaluate whether their participation in a given purchaser's discount program provides the purchaser with benefits or other incentives that other resellers cannot access.

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[1] 15 U.S.C. § 13, et seq.

[2] RPA does not apply to the sale of services.

[3] **Volvo Trucks North America Inc. v. Reeder-Simco GMC Inc.**, 546 US 164 (2006). The Plaintiff in this case brought its suit in 2000.