Will the Coronavirus Spark a Resurgence of Price Discrimination Claims?

April 8, 2020

The Selective Extension of Payment Terms May Expose Sellers to Abnormally High Risk under the Robinson-Patman Act

As the economic consequences of social distancing ripple through the economy, businesses throughout the supply chain face tough choices. The ability of retailers and other businesses to stay afloat and pay their bills is at serious risk. And that risk cascades throughout the economy. When customers stop paying their bills, firms stop paying their suppliers, and so on. No one knows how pervasive or long-lasting the effects will be, but two things are almost certain. Many customers will ask for extended payment terms, and some customers will go out of business. These not-necessarily-connected facts mean suppliers will face a resurging risk of price discrimination claims under the Robinson-Patman Act.

When making pricing decisions in the midst of a crisis, price gouging laws – state laws prohibiting extreme increases in price during an emergency – are often forefront in the mind. But that is a short-term problem, and only those who act egregiously are likely to find themselves in the sights of State AGs. When the pandemic passes, so too will that problem. The bigger exposure lies in the aftermath. Firms making decisions now about to whom to extend credit may be choosing which businesses will survive and which will fail. The Robinson-Patman Act constrains that choice.

The Robinson-Patman Act is the federal antitrust law that prohibits selling the same product at different prices to similarly situated business customers. It is a Depression-Era law passed to protect mom-and-pop stores from being put out of business by larger national chains that could command volume discounts from suppliers. "Congress considered it to be ***an evil***," as the Supreme Court explained, "that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability." *See FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

Through the 1960s, the law was a bastion to small businesses everywhere, creating significant antitrust risk for manufacturers and large retailers. Over the last few decades, however, the law fell out favor, as courts and commentators alike disparaged the law for creating unnecessary barriers to discounting. As Judge Easterbrook noted, "[t]he control of price discrimination poses substantial risks to competition, which often works through 'discriminatory' chiseling down of prices." *Ball Mem. Hosp. Inc. v. Mutual Hosp. Ins., Inc.,* 784 F.2d 1325 (7th Cir. 1986). Robert Bork also famously described the law as "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory." *The Antitrust Paradox: A Policy at War with Itself* at 382 (1993). For this reason, it became increasingly difficult to square the text of the Act with the general purpose of the antitrust laws – to protect consumers. What does it matter, critics argued, if customers needed to go to a big national chain to get lower prices, rather than a small hole-in-the-wall retailer?

But the law has populist undertones, and efforts to repeal it have uniformly failed. So the federal courts stepped in. Short of repeal, there is no surer way to diminish the impact of a law than to make it unprofitable to bring a claim. So courts started erecting numerous hurdles that plaintiffs must now overcome to bring a successful Robinson-Patman Act claim. Most importantly, the Supreme Court rejected simple damages measures based on the differences between the prices offered to favored and disfavored customers. *See, e.g.*, *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 564-65 & n.4 (1981). In practice, this made it all but impossible to prove damages using common evidence across classes of customers, effectively killing the class action device in price discrimination cases. And because lost sales were often too small to make the claim worth the candle, price discrimination cases essentially disappeared from courts' dockets, save for the occasional strike suit.

That may change. Whether based in fact or fiction, a bankrupt customer has every incentive to allege that its supplier's discriminatory refusal to extend credit hastened its demise, entitling it to the future profits it would have earned as a going concern, all trebled.

The ultimate viability of such claims is far from assured, of course. While some courts have long recognized that credit is an element of price, it is not entirely clear that payment-term discrimination is the same as price discrimination. As one court has put it:

> Because credit, by its very nature, involves delicate assessments concerning financial strength, business experience, and many other factors, a court should be cautious in allowing disparate credit terms to provide the basis for a price discrimination claim. This caution should not, however, induce blindness to a particularly egregious use of credit that could operate effectively to produce wide variance in price.

Whirlpool Corp. v. U.M.C.O. Int'l Corp., 748 F. Supp. 1557, 1566 (S.D. Fla. 1990). It is also not clear that losses from a business's demise constitute harm to competition, or "antitrust injury" – the type of injury the antitrust laws were designed to prevent. Nor is causation as simple as proving a rejection of credit from a single supplier and the plaintiffs' posting of a going out-of-business sign.

But cases brought by bankrupt customers present a higher risk than cases brought by ongoing businesses, because the amounts at stake are larger and may be sufficient to entice a contingency lawyer to take the case.

For ongoing businesses, damages in price discrimination cases are generally measured by the profits lost on sales that were diverted from the disfavored retailer to the favored one. That is, a mom-and-pop plaintiff would need to show how many customers chose not to buy from it and instead traveled to a big-box store to purchase the same item (assuming the big-box store received more favorable credit or payment terms). Imagine trying to prove meaningful damages by showing hordes of customers flying out the doors of a local grocery store because a box of salt costs 5 cents more than at the nearest chain store. That is an almost impossible task, and explains why there are so few Robinson-Patman Act cases.

But a bankrupt plaintiff may seek to measure damages by comparing its pre-crisis profits to the zero profits it earned after it went out of business. And even if the plaintiff adjusts for the short-term reduction in foot-traffic while shelter-in-place or social distancing orders were in effect, damages are still likely to be large because, having closed its doors forever, the plaintiff will claim lost profits from now until the end of time. It is not clear whether courts will countenance a bankrupt customer’s efforts to measure damages by the difference between its pre-coronavirus P&Ls and the zero profits they earned thereafter. But, if history is any guide, many courts may be unwilling to toss such cases on an early dispositive motion. Courts unwilling to dismiss these cases at the outset expose defendants to real risk, and give plaintiffs significant leverage to demand large settlements. And if any plaintiff is successful in wresting a large judgement or settlement, rest assured that other similar bankrupt customers will follow.

So what can businesses do to protect themselves? For starters, companies should develop fair and consistent standards for determining whether and when to extend credit or payment terms. Companies can also develop payment programs that are “functionally available” to all customers, such as requiring any customer seeking extensions to agree to specific repayment terms or to agree to purchase additional products in the future. Similarly, since a bankrupt business will need to prove causation, requiring customers to establish both their ability to pay if credit is extended, and an inability to remain in business if credit is not extended would limit the ability to bring a claim for plaintiffs that could not make such a showing. Another potential way to limit the pool of potential plaintiffs would be to extend credit to one class of customers, but not other types, if the classes of customers do not compete. For example, if a supplier sells its products to airlines and auto makers, it could decide to extend credit to the former but not the latter. Since auto makers and airlines do not compete, price discrimination between these channels of trade does not harm competition and is not prohibited.

Finally, businesses need to be mindful of how they communicate their decisions to grant, or decline, credit extensions. For better or worse, those communications will become fodder for potential plaintiffs. Attempts, for example, to use the Robinson-Patman Act as a shield (“sorry, the law doesn’t let me give you an extension”) could be used as sword by a plaintiff if the supplier later caves in to a big customer (“see, you admitted what you did was illegal.”).

Credit decisions are complicated, and all the more so now. Decisions made today will impact businesses – both suppliers and customers – in the immediate weeks and months ahead, and for years to come. Those left without a business may view their only asset as a contingent claim against suppliers who discriminatorily refused to extend a lifeline. Keeping this in mind, and crafting Covid-19 credit and payment terms policies that comport with the Robinson-Patman Act will help avoid funding a bankrupt plaintiff's lottery ticket.

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