In this issue, James McGrath and Carol Head bring us up to speed on class certification of Robinson-Patman Act claims in light of the Third Circuit’s recent reversal of Danvers. Scott Westrich explores standing under the RPA in a case involving wheat exports to Iraq under the United Nations Oil for Food Program, and David Scharfstein takes a look at the strict approach that courts have taken to the RPA’s “purchase” requirement in the wake of the Volvo decision. Finally, we examine a recent decision involving discretionary promotional allowances under Minnesota state law. Enjoy!

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REST EASY: THE THIRD CIRCUIT DECERTIFIES A ROBINSON-PATMAN ACT CLASS

by James C. McGrath and Carol E. Head

In our previous article (see The Price Point, Spring 2008), we compared two recent district court decisions in which the plaintiff sought class certification for claims under the Robinson-Patman Act.1 One court—Mad Rhino, Inc. v. Best Buy Co.2—declined to certify a class. The other—in Danvers Motor Co. v. Ford Motor Co.3—certified a class. We noted that Danvers, if upheld, could serve as a wake up call to practitioners in this area where class certification is a rarity. To make a long story a short pre-bedtime read, there is no cause for alarm. Concluding that individualized issues of competitive injury predominated over any common issue, the Third Circuit has reversed the district court decision in Danvers and entered an order directing that the class be decertified.4

Danvers: An Impending Wake-Up Call from the District Court?

Danvers concerned a group of motor vehicles dealers that alleged, among other claims, that Ford had violated the Robinson-Patman Act through its Blue Oval Program (“Program”) by creating a tiered pricing scheme that allegedly favored Program certified dealers over non-certified dealers. The putative class included each of the over 4,000 current and former Ford dealers—all “franchisees of the Ford Division of Ford Motor Company in the United States during the existence of the Ford’s [Program].”5

Danvers was notable, even if just for a brief moment, because it was the rare case that actually certified a class under the Act. Most courts to consider the issue, including the court in Mad Rhino, have held that class

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1 James C. McGrath and Carol E. Head, Class Certification Under the Robinson-Patman Act: Is this Sleepy Corner of Antitrust Law in for a Wake-Up Call?, ABA Section of Antitrust Law, The Price Point Newsletter, at 6 (Spring 2008).
treatment of Robinson-Patman Act claims was not appropriate because competitive injury—lost profits and lost business—must be determined on an individualized basis. The district court in Danvers disagreed. It focused on whether the cause of the harm, i.e., the Program, was typical of the proposed class instead of whether the harm caused was typical of the proposed class.

In reaching its conclusion, the district court relied on *dicta* from the United States Supreme Court’s recent decision in *Volvo Trucks North America Inc. v. Reeder-Simco GMC, Inc.*, that “a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time” coupled with Third Circuit precedent presuming that a class should be certified unless there is some strong reason not to certify. Applying this authority, the district court declined to analyze the merits of whether plaintiffs could establish that competitive injury had in fact occurred. Ford appealed.

**The Third Circuit Reverses a Momentary Apparition**

Reversing the district court, the Third Circuit described in great detail the various differences among even the named plaintiffs and their allegations that they had been harmed by the Program, noting that the claims “reflect diverse and conflicting interests within the proposed class of Ford Dealers.” The Court explained that a “common course of conduct” was not enough to warrant class certification because the action involved “many non-common”, “individualized issues” based on the treatment of various class members under the program, the different markets, and even the dealer’s particular state franchise laws. Indeed, the Court noted that the varying effects on plaintiffs were so great that some plaintiffs apparently even benefited from the alleged price discrimination. In sum, the Court concluded that these individualized issues overtook any common issues, and the class should not have been certified.

In a footnote, the Court of Appeals addressed the district court’s reliance on the language of *Reeder-Simco* suggesting that plaintiffs may be entitled to an inference of competitive injury to satisfy Rule 23(b)’s predominance requirement. The Third Circuit explained that “[e]ven allowing the inference, common issues do not predominate. Plaintiffs’ allegations themselves, as detailed in the complaint, present numerous individualized issues that will have to be resolved, including whether and which particular dealers benefited under the [Program].” This footnote suggests, as does the detailed factual description contained in the decision, that the district court should not have been so hesitant to delve into what it perceived to be an analysis of the merits of plaintiffs’ claims. Without actually reaching the merits, the Third Circuit concluded that to decide the merits, “[t]he multitude of individualized issues presented in plaintiffs’ claims would entail complicated mini-litigations within the class action itself.”

Because of the diversity of plaintiffs in *Danvers*, it was, in the end, a clear-cut case for the Third Circuit. Even assuming a more cohesive group of plaintiffs, the Third Circuit made clear that *Reeder-Simco*’s competitive injury inference should not excuse a court from engaging in a substantive inquiry as to whether common issues predominate, i.e., whether particular plaintiffs and putative class members suffered competitive injury in a sufficiently similar manner to warrant class certification. To make such a ruling, a

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6 The court in *Mad Rhino* explained that “the single most critical problem with the putative Federal Class is that Plaintiffs cannot establish the ‘competitive injury’ element of the Robinson-Patman claims on a class-wide basis,” in part, because of the need for individualized determinations of harm based on, *inter alia*, variations among customers and locations. 2008 U.S. Dist. Lexis 8619 at *25-26.


9 F.3d at __, 2008 WL 4181728, at *7.

10 Id. at __, n.3, at *7 n.3.

11 Id. at __, at *8.
court necessarily must analyze individualized issues of the harm caused by the alleged competitive injury. These are, of course, exactly the same individualized issues that make claims under the Act, as the court in *Mad Rhino* explained, “unsuitable for class treatment.”

In sum, that the source of the alleged competitive injury is the same for all class members, and even that competitive injury is presumed, is not enough to warrant certification of a Robinson-Patman Act class. The key question for class purposes—as it effectively has been for years and the court in *Mad Rhino* noted—is how the class members were allegedly competitively injured, if that requires a determination of individualized issues, or whether common issues do, in fact, predominate.

**U.S. District Court Dismiss RPA Section 2(c) Claim for Lack of Antitrust Injury**

by Scott Westrich

In a recent decision regarding claims by a putative class of domestic wheat farmers against an Australian firm and its U.S. subsidiary, who exported Australian-grown wheat to Iraq, the United States District Court for the Southern District of New York dismissed the farmers’ claim that the defendants’ alleged bribery and money laundering conspiracy violated Section 2(c) of the Robinson-Patman Act (RPA) based on the farmers’ inability to establish antitrust standing. See *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236 (S.D.N.Y. 2008).

A group of wheat farmers in the United States brought this putative class action alleging that AWB Limited and its U.S. subsidiary AWB (U.S.A.) Limited (collectively, AWB), who exported Australian wheat to Iraq under the United Nations Oil for Food Program (OFFP), participated in a bribery and money laundering scheme to monopolize the market for wheat sold in Iraq. AWB allegedly entered into a conspiracy to pay kickbacks to the Iraqi government through various intermediaries by funneling and laundering monies through AWB’s bank account in the United States. Plaintiffs filed suit seeking treble damages under the antitrust laws and RICO on behalf of a putative class including growers and sellers of hard red winter wheat in the United States from 1999 to 2003. Plaintiffs did not allege that they themselves sold or attempted to sell wheat to Iraq. Rather, plaintiffs claimed that they were harmed because AWB’s conduct foreclosed U.S.-grown wheat from the Iraqi market and, as a result of the global nature of wheat pricing, this foreclosure caused prices in the United States to fall. *Id.* at 242. The defendants moved to dismiss plaintiffs’ claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

The court first addressed subject matter jurisdiction. The court concluded that plaintiffs’ Sherman Act claims were barred by the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, under which conduct involving non-import foreign commerce is outside the scope of the Sherman Act unless the conduct has a “direct, substantial, and reasonably foreseeable effect” on “American domestic, import, or (certain) export commerce.” *Id.* at 244. Although the FTAIA does not apply to claims under the Clayton Act or the RPA, the court also dismissed plaintiffs’ Clayton Act Section 3 claim for lack of subject matter jurisdiction on the ground that Section 3 expressly covers only the sale of goods “for use, consumption, or resale within the United States.” *Id.* at 246 (quoting 15 U.S.C. § 14). That basic predicate was missing in this case.

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12 See A/72667984.2

1 For similar reasons, the court also dismissed plaintiffs’ RICO claim for lack of subject matter jurisdiction. *Id.* at 253.
Turning to subject matter jurisdiction for plaintiffs’ RPA claim, the court explained that “the explicit reach of [the Robinson-Patman Act] extends only to persons and activities that are themselves ‘in commerce,’ the term ‘commerce’ being defined in § 1 of the Clayton Act . . . as ‘trade or commerce among the several States and with foreign nations.’” Id. at 247-48 (quoting Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194 (1974) (internal citations omitted)). In this case, the plaintiffs alleged that AWB funneled and laundered U.S. dollars through its bank account in the United States. The court concluded that, “even though AWB did not ship any wheat into or from the United States, its use of a bank located within the United States clearly occurred ‘within the flow of’ its commercial transactions with Iraq.” Id. at 248. The court therefore denied AWB’s jurisdictional challenge to the RPA claim.

Finally, the court turned to the question of antitrust standing for the RPA claim. The court applied the various standing factors set forth in Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1982), to determine whether plaintiffs could meet the antitrust standing requirements. First, the court reasoned that the “multitude of factors” affecting wheat prices in the United States meant that plaintiffs could not show that AWB’s conduct in Iraq was a proximate cause of their injury, a required element of standing under Associated General Contractors. See 544 F. Supp. 2d at 250. Second, the plaintiffs, all domestic wheat farmers, were not efficient enforcers of the antitrust laws because there was an identifiable class of other persons whose self-interest would lead them to sue for a violation, i.e., “domestic wheat exporters who actually attempted to sell wheat to Iraq through the OFFP but were precluded from doing so as a result of AWB’s conduct.” Id. Plaintiffs’ injury, if any, was derivative of any harm suffered by the wheat exporters. In fact, the court concluded that plaintiffs’ claimed injury was “significantly more indirect” than the injury alleged by the plaintiffs in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Id. n.15. Third, plaintiffs’ claimed injury was inherently speculative, because it would require the fact-finder to trace complex economic causes and effects in the international wheat market. “Needless to say, such a damages inquiry would involve ‘massive evidence and complicated theories’ of causation that strongly weigh against a finding of antitrust standing.” Id. at 251 (citation omitted). For these reasons, the court dismissed plaintiffs’ § 2(c) claim for lack of antitrust standing. The court also noted that it would have dismissed plaintiffs’ Sherman and Clayton Act claims on the same ground if it had not already dismissed them for lack of subject matter jurisdiction. Id. at 251 n.17.

For another recent case in which the court also dismissed the plaintiff’s RPA Section 2(c) claim for lack of antitrust injury, see Cottman Transmission Systems, LLC v. Kershner, 536 F. Supp. 2d 543 (E.D. Pa. 2008) (discussed in Spring 2008 Newsletter).

Courts Strictly Define “Purchase” to Require Actual Sale Under RPA

by David Scharfstein

In Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.,1 the Supreme Court felt it “need not decide” whether an unsuccessful bidder for a specialized sale qualifies as a “purchaser” under the Robinson-Patman Act. Two recent decisions, however, have squarely addressed the issue of whether a plaintiff must actually consummate a purchase in order to be deemed a “purchaser” under the RPA.

The Third Circuit addressed a very similar fact pattern in Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.2 Toledo was in the business of selling custom-made Mack trucks. Toledo would submit a potential customer’s desired truck specifications to Mack, and Mack would respond with a price at which it would sell that truck to Toledo. This price included a transaction specific “sales assistance” discount, which would greatly affect Toledo’s “bid” price to the customer and thereby whether Toledo made the sale.

Toledo presented evidence that it received less average sales assistance than other Mack dealers located in similar geographic areas, but did not present evidence

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that Mack had discriminated against Toledo in head-to-head competition for the same customer. Toledo also presented credible evidence that the difference in sales assistance stemmed from Toledo’s refusal to cooperate with a once-official and now-unspoken agreement between Mack and Mack dealers that dealers should not compete in each others’ “Areas of Responsibility.”

The Court, however, dispensed with Toledo’s RPA claim on the ground that the statute requires two or more “purchasers.” In this case, only one actual sale was consummated for each specialized truck Mack manufactured.

Although the amount of sales assistance Mack offers to each dealer may well determine whether a customer chooses to accept a bid from one Mack dealer or another, Mack does not actually sell a truck to the dealer until the customer actually selects a dealer’s bid. Because no sale takes place until a customer accepts a dealer’s bid, the amount of sales assistance Mack is willing to provide to a particular dealer is part of an offer by Mack to sell, not a sale.

‘[I]n order for there to be discrimination between purchasers violative of [the RPA] there must be actual sales at two different prices to two different actual buyers . . .’

In a footnote following this reasoning, the Court notes that although it may be “elevat[ing] form over substance,” it is bound by precedent and “think[s] it no injustice to narrowly interpret the oft-questioned RPA.”

In *The Diamond Center, Inc., v. Leslie’s Jewelry Mfg. Corp.*, the Western District of Wisconsin took a similarly narrow tack to the RPA’s “purchaser” requirement. Diamond Center, Inc. (“Diamond Center”), a jewelry retailer located in Wisconsin, sued Leslie’s Jewelry Manufacturing Corporation (“Leslie’s”), a gold jewelry manufacturer under section 2(a) of the RPA after Leslie’s attempted to change the terms of its “Lifetime Guarantee” and “Stock Balance” programs. Leslie’s “Lifetime Guarantee” ensured that Leslie’s would repair or replace any damaged Leslie’s jewelry purchased from Diamond Center, and the “Stock Balance” program permitted Diamond Center to exchange any unsold Leslie’s inventory for new Leslie’s products. In September 2007, Leslie’s president and owner wrote a letter to Diamond Center, essentially revoking Diamond Center’s use of the stock balance program and stating that Leslie’s would no longer honor its Lifetime Guarantee with respect to jewelry purchased at Diamond Center. Leslie’s did not attempt to change the terms of either program with any other retailer.

The Court noted the change in terms placed the Diamond Center at a significant disadvantage to other retailers that could sell Leslie’s jewelry with a Lifetime Guarantee and exchange old inventory for new items, but ultimately granted Leslie’s motion to dismiss the RPA claim because of the lack of multiple “purchasers.” It reasoned that although *Volvo* “does not explicitly require two sales, its language, as well as the language in [section 2(a) of the Robinson-Patman Act], implicitly requires two sales under the requirement that the discrimination in price be between two purchasers.” Here, the Court held that two purchases had not been made:

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3 Id. at 215.
4 Id. at 211-214.
5 Id. at 228.
6 Id.
8 Id. at 1013.
9 Id. at 1013, 1014-15.
10 Id. at 1014.
Plaintiff alleges that after receiving the altered terms regarding purchase of defendant’s gold products, it refused to purchase gold products from defendant because it could not afford to purchase the gold products at the new price. Although plaintiff’s allegations establish that plaintiff had been a purchaser under the old terms and prices, its allegations establish that it has not made any purchases at the new allegedly discriminatory prices, making plaintiff merely a prospective purchaser with respect to the new terms and prices. As a prospective purchaser, plaintiff cannot maintain a cause of action under Section 2(a) of the Robinson-Patman Act.\footnote{Id. at 1015.}

This reasoning begs the question of whether Diamond Center’s claim would have survived Leslie’s motion to dismiss if it had made a token purchase in accordance with the new terms.

The Supreme Court has not explicitly endorsed the two-sale requirement embraced in Toledo and Diamond Center, but these two cases reflect the recent trend of reading the term “purchasers” strictly and the Robinson-Patman Act narrowly.

**Discretionary Promotional Allowances Valid Under Minnesota Price Discrimination Laws**

by David Scharfstein

In Barnett Chrysler Plymouth v. Kia Motors America, Inc.,\footnote{Barnett Chrysler Plymouth v. Kia Motors Am., Inc., Civ. No.08-828 ADM/JSJ (D. Minn. Oct. 27, 2008).} the U.S. District Court of Minnesota dismissed Barnett’s claim that Kia Motors America’s (KMA’s) policy of offering discretionary promotional allowances to certain dealerships that advertise Kia vehicles violates The Minnesota Act Against Unfair Discrimination and Competition (MAAUDC) and The Minnesota Motor Vehicle Sale and Distribution Act (MMVSDA).

The MAAUDC prohibits price discrimination “for the purpose or with the effect of injuring a competitor or destroying competition.”\footnote{Minn. Stat. § 325D.03.} The Court acknowledged that the MAAUDC expressly prohibits some forms of discrimination such as “special rebates” and “collateral contracts,” but refused to extend the Act to prohibit discretionary advertising allowances.\footnote{Barnett Chrysler Plymouth, Civ. No.08-828 ADM/JSJ, at *4.} To do so would “break down the legal distinction recognized in other contexts between price discrimination and advertising provisions.”\footnote{Id. at *4.}

The MMVSDA prohibits automobile manufacturers from offering “any refunds or any other types of inducements to any new motor vehicle dealer for the purchase of new motor vehicles...”\footnote{Minn. Stat. § 80E.13(e).} The Court held that discretionary promotional allowances do not qualify as a prohibited “inducement” under the statute. An inducement requires a “direct link between the payment by the manufacturer and a sale to the dealer.”\footnote{Barnett Chrysler Plymouth, Civ. No.08-828 ADM/JSJ, at *6.} Such a relationship is not present in this case, where the promotional allowances are aimed at increasing sales between the dealership and consumers, not between the manufacturer the and dealership.

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\footnote{Id. at 1015.}
Recent List Serve Postings

by Scott P. Perlman

July 21, 2008

District Court Dismisses Auctioneers' RPA Claim Against eBay as Involving Services

In a July 1, 2008 opinion in Windsor Auctions, Inc., et al. v. eBay, Inc., No. C-07-06454 RMW, the U.S. District Court for the Northern District of California dismissed a jewelry auctioneer's claim against eBay, Inc. ("eBay") under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. Sec. 13(a) ("RPA"), on the grounds the claim was based on the provision of services rather than commodities, and therefore not actionable under the RPA ("Order"). The decision is informative with respect to application of the "dominant nature" test for whether a transaction involves a commodity or services for RPA purposes to the increasingly important on-line distribution sector.

Plaintiffs Windsor Auctions, Inc. ("Windsor") and Jewelry Auctions Corporation sold jewelry. In 2005, Windsor contracted with Live Auctioneers LLC ("Live Auctioneers"), a technology and services company that had a partnership with eBay, to bring live jewelry auctions to eBay. Windsor also entered into a written agreement with eBay that entitled Windsor to conduct auctions on eBay. Windsor also entered into a written agreement with eBay that entitled Windsor to conduct auctions on eBay, including using an eBay tool called "Mr. Lister." Plaintiffs allege that in mid-2007 their sales over eBay were decreasing while sales on eBay of a competing auctioneer, George Molayem, were increasing. They further alleged that Molayem, who unlike plaintiffs was a direct client of eBay, was given access by eBay (in secret, initially) to a "Batch Uploading Tool" that gave him a competitive advantage by moving his listings to the front of eBay's core listings. On December 21, 2007, plaintiffs sued eBay claiming this preferential treatment violated the RPA. They also brought claims under California's Unfair Practices Act, Cal. Bus. & Prof. Code Sec. 17045, common law unfair competition, and for breach of the implied covenant of good faith and fair dealing. Order, 1-3.

The court turned first to the RPA claim. Section 2(a) prohibits discrimination in price of sales of "commodities of like grade and quality." eBay argued that plaintiffs failed to state a claim because the transaction at issue did not involve a commodity. The court noted that in May Dep't Store v. Graphic Process Co., 637 F.2d 1211, 1214 (9th Cir. 1980), the Ninth Circuit had ruled that Section 2(a) was intended to apply to sales of tangible goods, not services, and that courts had strictly construed the term "commodity." The court further noted that "[a] number of courts have considered whether particular services and technology are commodities under the Robinson-Patman Act. 'Consistent with decisions of the Seventh Circuit and other courts, web site maintenance, an electronics retail franchise, credit card processing services, and order processing services are not "commodities" for purposes of the Robinson-Patman Act.'" (citing Goodloe v. National Wholesale CO. Inc., 2004 WL 1631728 at *10 (N.D. Ill. 2004). Order, 5. Plaintiffs sought to avoid the force of these rulings by arguing that their transaction with eBay involved both goods and services because they received a manual from eBay for the Mr. Lister software. Plaintiffs urged the court to apply the "dominant nature" test adopted by the Ninth Circuit in May, which is used when a case involves both goods and services "to determine how to characterize the transaction for purposes of the Robinson-Patman Act," and to find eBay had discriminated between plaintiffs and Molayem in the sale of commodities. The court rejected this argument on two grounds. First, the court found that "provision of a manual for software does not convert the transaction from one for a software service to one for both tangible goods and services. Accordingly, there is no combination of goods and services to which the court would apply the dominant nature test." Id. at 6. The court continued "[e]ven assuming that the Mr. Lister software could be considered a good in spite of the lack of a tangible component, application of the 'dominant nature' test would result in the conclusion that the transaction between eBay and Windsor Auctions did not involve a commodity . . . ." Similarly, the court found that even if the technology and tools associated with eBay could be considered goods, "it is clear that the 'dominant nature' of the transaction between EBaY and Windsor was the provision of access to 'organize online and sell items through the eBay Services.'" Id. at 6-7. The court concluded the RPA did not apply to the challenged transaction and dismissed the RPA claim with prejudice.

The court next turned to the Unfair Practices Act, which prohibited "secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions." The court ruled that plaintiffs failed to satisfy the "like terms and conditions" requirement because they con-
tracted for eBay's services through Live Auctioneers, while the allegedly favored purchaser Molayem contracted with eBay directly. The court also dismissed plaintiffs' common law unfair competition law claim, finding plaintiffs had failed to specify the "duty" allegedly violated by eBay, "particularly in light of the dismissal of their Robinson-Patman Act and Unfair Practices Act claims." Order, 8. The court dismissed both of these claims without prejudice, however, giving plaintiffs the opportunity to replead. Finally, the court denied eBay's motion to dismiss plaintiffs' claim that it had violated the implied covenant of good faith and fair dealing, finding the "allegations that eBay provided to them a listing tool that is potentially not the same listing tool as provided to Molayem sufficiently alleges" such a claim relating to eBay's agreement to provide plaintiffs with an auction platform to sell jewelry. Id. at 8-9.

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