

## Antitrust Alert

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### Sixth Circuit Uses Some Old Supreme Court Cases To Give Robinson-Patman Act New Life

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In *Williams v. Duke Energy International, Inc.*, No. 10-3604 (6th Cir. June 4, 2012), the Sixth Circuit rejected a Rule 12(b)(6) challenge to a Robinson-Patman claim against Duke Energy for discriminatory pricing of retail electricity. The Robinson-Patman claim was based upon substantial side rebates Duke Energy gave to certain large customers, including GM, which were not given to Ohio retail customers such as the plaintiffs. The Sixth Circuit rejected Duke Energy's various substantive attacks on the Robinson-Patman claim raised in its Fed. R. Civ. P. 12(b)(6) motion to dismiss.

The Sixth Circuit opinion is somewhat surprising given the largely negative treatment of the 76-year-old price discrimination law by federal courts in recent years. This 12(b)(6) holding is also in contrast to a recent trend of federal court rulings finding that plaintiffs had not adequately pled a viable Robinson-Patman claim under the Supreme Court's *Twombly-Iqbal* line of cases regarding federal court 12(b)(6) pleading standards. Given the Supreme Court's continued interest in the Robinson-Patman Act—sometimes called the “black sheep” of antitrust—this recent Sixth Circuit case may well be headed to the Supreme Court.

In reaching its holding, the Court applied the following reasoning:

*First*, the Court rejected a challenge to its jurisdiction over the Robinson-Patman claim under the filed rate doctrine. Relying upon the Sixth Circuit's 2004 decision in *MCI Telecomms. Corp. v. Ohio Bell Tel. Co.*, 376 F.3d 539 (6th Cir. 2004), and the First Circuit decision in *Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408 (1st Cir. 2000), the Court determined that the plaintiffs were not challenging the filed rates—but rather Duke Energy's side agreements for rebates that were not approved or filed with the Public Utilities Commission of Ohio.

*Second*, the Court held that electricity is a “commodity” under the Robinson-Patman Act. Such a finding was crucial because the Act is only applicable to commodities, not services. The Court pointed out that in a 1993 decision, the Sixth Circuit indicated support for this proposition. The Court rejected the precedent of a 1979 Delaware District Court decision holding that electricity was not a commodity—especially in light of rulings by other courts that electricity is a commodity, because it is produced, sold, stored in small quantities, transmitted, and distributed in discrete quantities.

*Third*, the Court rejected the argument that the Act does not apply because the plaintiffs and the favored purchasers did not specifically compete for resale of electricity. Relying upon the seminal 1948 Supreme Court decision in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), the Court held that plaintiffs adequately alleged competitive injury when the competitive opportunities of certain merchants were injured because they had to pay substantially more for their goods than their competitors for other goods and services.

*Fourth*, the Court rejected the argument that plaintiffs failed to adequately allege competitive injury—citing the Supreme Court's 1945 decision in *Corn Prods. Refining Co. v. FTC*, 324 U.S. 726 (1945)—stating that the Act does not require that the discrimination must, in fact, have harmed competition, but only that there is a reasonable possibility that competition has been harmed.

*Fifth*, the Court rejected the argument that plaintiffs did not allege the identity of the favored purchase or the effect of the cost of electricity on sales or profit margins. Because the favoritism occurred through side agreements and no discovery had taken place, plaintiffs had pled enough to proceed with the Robinson-Patman claim.

Like Mark Twain's famous adage, reports of the death of the Robinson-Patman Act remain premature. While surviving a motion to dismiss does not preordain a merits verdict (even if the Supreme Court does not weigh in), at a minimum, this appellate opinion strongly suggests that businesses need to continue to include Robinson-Patman Act issues in their business risk assessments of pricing strategies.

If you would like to discuss the impact of the Robinson-Patman Act on your business, please contact one of the authors listed above or another attorney in our Antitrust Practice.

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