



2-1-1966

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Recommended Citation

Jerrold G. Van Cise, *Current Developments with Respect to Prima Facie Robinson--Patman Violations*, 41 Notre Dame L. Rev. 305 (1966).
Available at: <http://scholarship.law.nd.edu/ndlr/vol41/iss3/3>

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CURRENT DEVELOPMENTS WITH RESPECT TO PRIMA FACIE ROBINSON-PATMAN VIOLATIONS

*Jerrold G. Van Cise**

I. Introduction

When Professor Higgins initially met Eliza Doolittle in the delightful musical comedy *My Fair Lady*, he found her English to be poor and her manners to be worse. You will recall, however, that eventually he transformed Eliza into a lady of lovely speech and loving ways.

When the courts and the Federal Trade Commission first met the Robinson-Patman Act¹ in legal proceedings which at times verged upon comedy, they similarly found this legislation difficult to understand and even more difficult to live with. It is therefore a pleasure to report that a real life parallel to Eliza seems to be emerging currently. The administrators of the act appear recently to have made great progress in remaking the statute into commands of reasonable clarity and workable content.

Three developments in particular, involving what constitute a prima facie violation of the act, are illustrative of this encouraging change. These events relate to (1) like grade and quality, (2) injury to competition and (3) buyer liability.

II. Like Grade and Quality

By the enactment of the Robinson-Patman Act, American industry was instructed that "discrimination" in price in the sale of commodities of "like grade and quality"² was prohibited in certain circumstances. However, businessmen were not informed whether any, or only some, difference in price would constitute such a "discrimination" or whether any, or only some, difference in a commodity would cause it to be "unlike."

The courts and the FTC subsequently ruled that any difference in price

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1 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964).

2 Section 2(a) of the Robinson-Patman Act provides in pertinent part:

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .

49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964):

constituted a "discrimination,"³ but that only a substantial difference in a commodity caused it to be "unlike."⁴ Three recent Commission decisions with respect to distinctions in grade and quality have now clarified what differences will be deemed substantial.

In accordance with prior precedents,⁵ the Commission has declared that goods bearing a private brand were not so "unlike" identical goods carrying an advertised label that the former may be priced independently of the latter.⁶ The Commission emphasized that any price difference between unadvertised and advertised brands must be justified in accordance with the legal principles applicable to any other price discrimination under the act, *e.g.*, by differences in cost arising from differing methods or quantities of sale or delivery. When the Fifth Circuit differed with this reasonable interpretation, the FTC induced the Solicitor General to appeal the issue to the Supreme Court for a definitive ruling.⁷

On the other hand, where the grade of a product was sufficiently inferior in structure and composition to be appreciably less attractive in buyer appeal, the FTC has ruled in two industry settings that it was "unlike" the standard variety of this commodity and may lawfully be priced lower than the better quality or grade of the product.⁸ An unpublished study, undertaken by leading economists as part of the private compliance program of a major corporation, substantially concurs with these Commission conclusions.

These rulings make it clear to industry that, although the parties should be aware of the Robinson-Patman Act when they sell or buy at different prices, they nevertheless will be relatively safe from its prohibitions if any such differences in prices merely reflect and are ancillary to substantial differences in the content and utility of the commodities involved. Reasonable men could not ask for more practical guidelines.

III. Injury to Competition

American industry was further informed by the Robinson-Patman Act that any discrimination in price between like commodities is forbidden where its effect "may be" substantially to lessen, injure, destroy or prevent competition or tend to create a monopoly.⁹ Businessmen were left in doubt, however, as to what set of facts will give rise to the proscribed effect.

3 FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960), *reversing* 265 F.2d 677 (7th Cir. 1959).

4 Central Ice Cream Co. v. Goldenrod Ice Cream Co., 287 F.2d 265 (7th Cir.) *cert. denied*, 368 U.S. 829 (1961); General Shale Prods. Corp. v. Struck Constr. Co., 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943); County Theatre Co. v. Paramount Film Distrib. Corp., 146 F. Supp. 933 (E.D. Pa. 1956). *Cf.* Bruce's Juices, Inc. v. American Can Co., 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951).

5 Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916 (5th Cir. 1962); United States Rubber Co., 46 F.T.C. 998 (1950); United States Rubber Co., 28 F.T.C. 1489 (1939); Hansen Inoculator Co., 26 F.T.C. 303 (1938).

6 Borden Co., 3 TRADE REG. REP. ¶ 16191 (F.T.C. No. 28, 1962).

7 Borden Co. v. FTC, 339 F.2d 133 (5th Cir. 1964), *cert. granted*, 382 U.S. 807 (1965).

8 Quaker Oats Co., 3 TRADE REG. REP. ¶ 17134 (F.T.C. Nov. 18, 1964); Universal Rundle Corp., 3 TRADE REG. REP. ¶ 16948 (F.T.C. June 12, 1964).

9 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964).

The courts and the FTC have collaborated in bringing order out of this confused phraseology. In a recent series of rulings, they have explained that the act will apply only upon a showing of a substantial threat to competition between sellers or between buyers, and once again they have explained what they mean by substantial.¹⁰

The courts in early rulings emphasized that the effect of a discrimination "may be" substantially to restrain competition among sellers (*i.e.*, at the primary level) when a seller institutes a territorial price cut for the deliberate purpose of injuring local competitors.¹¹ Two new opinions of the Commission have now made clear that this effect may also occur when a seller — regardless of his purpose — maintains a territorial price discrimination over a substantial period of time at a level which not only undercuts the prices of local competitors but in addition goes below the point at which these local competitors can operate profitably.¹² Both courts and the Commission have stressed, however, that territorial price cutting is not per se unlawful,¹³ and that even systematic price cutting is not to be viewed — without more — as a threat to competition at the seller level.¹⁴

Again, the courts have ruled that the effect of a discrimination "may be" to restrain competition between buyers (*i.e.*, at the secondary level) when a seller grants a substantial price discrimination over an appreciable period of time to a favored buyer and this discrimination is shown to have some direct, causal relationship injurious to the profits or sales of competing buyers.¹⁵ Here also the courts, and now the Commission, have emphasized that a discrimination in price even between competing buyers is not considered to be per se unlawful without some showing of probable competitive injury,¹⁶ and that the probability of such an adverse effect will be most difficult to establish if the price discrimination is of short duration.¹⁷

These rulings reassure industry that even where the Robinson-Patman Act

10 *American Oil Co. v. FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Whitaker Cable Corp. v. FTC*, 239 F.2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957).

11 *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Maryland Baking Co. v. FTC*, 243 F.2d 716 (4th Cir. 1957); *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944); *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2d Cir.), *cert. denied*, 279 U.S. 858 (1929).

12 *Lloyd A. Fry Roofing Co.*, 3 TRADE REG. REP. ¶ 17303 (F.T.C. July 23, 1965); *Forster Mfg. Co.*, 3 TRADE REG. REP. ¶ 16243 (F.T.C. Jan. 3, 1963), *vacated and remanded*, 335 F.2d 47 (1st Cir. 1964), *opinion on remand*, 3 TRADE REG. REP. ¶ 17304 (F.T.C. July 23, 1965); *accord*, *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661 (6th Cir. 1965).

13 *Forster Mfg. Co.*, 3 TRADE REG. REP. ¶ 17304 (F.T.C. July 23, 1965) (Elman, Comm'r, concurring).

14 *Moore Business Forms, Inc.*, 3 TRADE REG. REP. ¶ 16889 (F.T.C. April 30, 1964); *Uarco, Inc.*, 3 TRADE REG. REP. ¶ 16807 (F.T.C. Feb. 24, 1964).

15 *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948); *accord*, *United Biscuit Co. of America v. FTC*, 350 F.2d 615 (7th Cir. 1965); *C. E. Niehoff & Co. v. FTC*, 241 F.2d 37 (7th Cir. 1957), *vacated and remanded*, 355 U.S. 411, *cert. denied*, 355 U.S. 941 (1958); *Moog Indus. v. FTC*, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958); *P. & D. Mfg. Co.*, 52 F.T.C. 1155 (1956), *aff'd*, 245 F.2d 281 (7th Cir.), *cert. denied*, 355 U.S. 884 (1957).

16 *Borden Co. v. FTC*, 339 F.2d 953 (7th Cir. 1964); *Admiral Corp.*, 3 TRADE REG. REP. ¶ 17230 (F.T.C. April 7, 1965); *W. F. Schrafft & Sons*, 3 TRADE REG. REP. ¶ 16882 (F.T.C. April 22, 1964).

17 *American Oil Co. v. FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Humble Oil & Refining Co.*, 3 TRADE REG. REP. ¶ 17259 (F.T.C. June 8, 1965); *Sperry Rand Corp.*, 3 TRADE REG. REP. ¶ 16791 (F.T.C. Feb. 17, 1964).

applies to a discrimination in price between like commodities, it does not require any rigid, public utility type of pricing. The confused, individualistic phraseology of the act thereby has in large part been reconciled with the competitive philosophy of our other antitrust laws, and it should now be possible for businessmen to comply more readily with the former legislation without almost inevitably appearing to violate the latter.

IV. Buyer Liability

American industry was also informed by the Robinson-Patman Act that liability for a proscribed price discrimination will vary depending upon whether the seller or buyer is being charged with the alleged unlawful conduct. Sellers who discriminate in price in the forbidden manner are declared to be guilty of a prima facie violation,¹⁸ but this is not true of buyers. Buyers must also be shown to have "knowingly" induced or received the prohibited discrimination to be prima facie in violation of the statute.¹⁹ This condition precedent to buyer liability was also left for future clarification by the courts and the Commission.

The early decisions held that it was not sufficient to show merely that a buyer "knowingly" received a price which was different from that made available to others.²⁰ But the courts and the FTC have since ruled that a buyer who induces a prohibited discrimination by conduct indicating either his awareness of, or indifference to its illegality is "knowingly" obtaining an unlawful discrimination. They have declared that vendees may not set up corporate buying offices controlled by them and by this subterfuge obtain any functional discounts resulting in lower net prices to them than to their competitors.²¹ Moreover, the Commission has declared that a buyer who deliberately seeks preferential treatment²² or misleads a seller into giving the buyer a lower price in order to meet a nonexistent low competitive quotation²³ is "knowingly" inducing an unlawful discrimination. The Commission has finally awakened to the fact that compliance with this legislation will be possible only when proceedings are brought against buyers as well as sellers so that both are required to respect the act's prohibitions.²⁴

18 Section 2(b) of the act provides:

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination. . . .

49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1964).

19 Section 2(f) of the act provides: "(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." 49 Stat. 1526 (1936), 15 U.S.C. § 13(f) (1964).

20 *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61 (1953).

21 *National Parts Warehouse v. FTC*, 346 F.2d 311 (7th Cir. 1965), *affirming* *National Parts Warehouse*, 3 TRADE REG. REP. ¶ 16700 (F.T.C. Dec. 16, 1963); *American Motor Specialties Co. v. FTC*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960); *Mid-South Distribs. v. FTC*, 287 F.2d 512 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961); *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230 (D.N.J. 1956).

22 *Fréd Meyer, Inc.*, 3 TRADE REG. REP. ¶ 16368 (F.T.C. March 29, 1963).

23 *Forster Mfg. Co.*, 3 TRADE REG. REP. ¶ 17304, at 22454 (F.T.C. July 23, 1965).

24 *Max Factor & Co.*, 3 TRADE REG. REP. ¶ 16992 (F.T.C. July 22, 1964).

This last development may, in the long run, be the most significant of all. Few sellers expose themselves to Robinson-Patman Act liability except at the urging of power-conscious buyers. If it is made known to industry that it is not more blessed to receive than to give an unlawful discrimination, the problems of Robinson-Patman Act enforcement may be greatly simplified.

V. Conclusion

This article should not be construed to indicate that all is well with the Robinson-Patman Act. Certainly the rulings to date with respect to cost justification under the act leave much to be desired. The thrust of these observations is that during recent years the act has increasingly become both reasonably clear and more clearly reasonable.

Perhaps the author is merely stating that in the course of his day-to-day work with the act, he has become, like Professor Higgins, "accustomed to her face." After reviewing the bills now before Congress for amending this statute, he is convinced that one could do far worse than accept and comply with the act as presently interpreted than to proceed down any congressional road paved with the current well-intentioned legislative proposals. Better the statutory ills we have, than become seriously ill from further legislative medication.