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Note

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NOTE — SECTION 2(A) OF THE ROBINSON-PATMAN ACT

I. Introduction

The symposium papers contributed by Mr. Van Cise and Mr. Mayer thoroughly cover the provisions of section 2(a), the judicial construction of the provisions of the section, the requirements for a violation, and the seller's defenses to a charged violation. The purpose of this note is to discuss several questions raised during the question and answer period by those in attendance at the symposium. Because these questions were not discussed in the papers, and since time did not allow complete answers at the symposium itself, it was suggested by several members of the symposium panel that these problems be discussed in a student note.

Generally, the two questions which will be considered in this note are (1) when does a purchaser have standing to sue for a violation of section 2(a)? For example, may a competitor of a purchaser from a discriminating seller bring an action against the seller if the competitor buys from someone other than the discriminating seller? And (2), in a sealed bid sale, when does Robinson-Patman liability attach: at the time the bid is made, at the time the bid is accepted, or after the bid is accepted and the transfer of goods takes place?

II. Standing to Sue

Not everyone who is injured by a price discrimination proscribed by the Robinson-Patman Act has a right to sue. The language of section 2(a) has been interpreted as placing certain conditions upon any individual's right to recover damages for such an injury. While other provisions of the antitrust laws would seem to give any aggrieved party the right to recover for damages inflicted "by reason of anything forbidden in the antitrust laws," the courts have limited the application of these broadly stated sections with regard to Robinson-Patman violations.

1 Section 2(a) provides:

(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 of 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.


2 Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agency, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

In discussing the standing problem this note will consider first the purchaser's right to sue the discriminating seller under section 2(a). Accordingly, the position of the purchaser at both the secondary and tertiary levels of competition, as well as the "indirect purchaser" doctrine, will be discussed. Then the discussion will turn to the right of a competing seller to bring an action against a discriminating seller under section 2(a), i.e., the right of a person on the primary level of competition.

A. Secondary-Line Injury

If a seller discriminates between two or more purchasers in the sale of goods of like grade and quality, but the person injured is not one of the purchasers from the discriminating seller but a competitor of the purchasers, which competitor buys from a different seller, does the purchaser thus injured have a remedy under section 2(a) of the Robinson-Patman Act? This hypothetical poses a secondary-line injury problem. The rule that an individual must be an actual purchaser from the person charged with the discrimination as well as in competition with the favored buyers before he has the right to seek the protection of the Robinson-Patman Act is firmly established.

B. Tertiary-Line Injury

When there is injury to competition with a customer of a customer who purchases at a discriminatory low price, the injury is said to occur at the tertiary level. For example, in Klein v. Lionel Corp., a retailer purchased toy electric trains and accessories from jobbers or middlemen who were customers of the supplier and manufacturer, Lionel. Lionel sold to some retailers directly at a discount which was larger than that given to retailer Klein through the middlemen. Klein contended that it was in competition with these retailers and was entitled to equal price treatment. Klein's complaint in other words, was that competition at the tertiary level was being adversely affected by the seller's discriminations. The Third Circuit held that, because Klein was not a direct purchaser from Lionel, it had no standing to sue. In the court's opinion, the words "or with customers of either of them" of section 2(a) did not include "customers of purchasers."

The case of Baim & Blank, Inc. v. Philco Corp. presents another illustration of the rule that the injured purchaser must be a customer of the discrimi-
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inating seller. There Davega, a large retail appliance chain, was able to purchase appliances at a cheaper price directly from Philco, the manufacturer, while plaintiff, an independent dealer, had to pay a higher price for its purchases from Philco Distributors, Inc., a wholly-owned subsidiary of Philco. Plaintiff did not dispute that an individual has no right of action under section 2(a) unless he is an actual purchaser from the seller charged with the discrimination.\textsuperscript{11} However, plaintiff attempted to utilize the "indirect purchaser" doctrine (discussed in more detail below), arguing that the policies and activities of the subsidiary were directly controlled by Philco itself and thus that Philco was in reality the seller. Influenced by the fact that the prices and practices of Philco Distributors were established by that organization and not by the manufacturer, the court dismissed the complaint on the grounds that the alleged discrimination did not grow out of sales made by the same seller.\textsuperscript{12}

C. Indirect Purchaser Doctrine

Where a seller so dominates the activities and policies (especially pricing policies) of his subsidiary distributors that the latter have very little or no autonomy in the selection of customers or the quotation of prices, the seller and distributor will sometimes be treated as one legal entity, and an injured purchaser may bring an action directly against the seller even though he purchases from a distributor. This policy of the Federal Trade Commission, as it has been formulated in a series of cases dating back to 1937,\textsuperscript{13} is known as the "indirect purchaser" doctrine. Obviously, the doctrine is a modification of the rule that the injured buyer must have purchased directly from the discriminating seller.

In the first application of the "indirect purchaser" principle, the Commission stated:

A retailer who purchases respondent's goods from jobbers and wholesalers is considered by the Commission to be a "purchaser" within the meaning of the Robinson-Patman Act as well as retailers buying direct. This is because of the fact that respondent recognizes the retailers buying through jobbers as customers by personally soliciting them and by making effective its price policies and schedules as applied to them. A retailer is none the less a purchaser because he buys indirectly if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys.\textsuperscript{14}

The Whitaker Cable Corp.\textsuperscript{15} decision of the Commission illustrates the kinds of considerations which enter into a finding of "control" of the distributor by the manufacturer. There respondent manufacturer supplied the distributor with catalogs, price sheets, and advertising materials. Any contracts made by the distributor were conditional upon written acceptance by respondent's dis-

\textsuperscript{11} Id. at 543.
\textsuperscript{12} Id. at 543-44.
\textsuperscript{13} E.g., General Foods Corp., 52 F.T.C. 798, 813 (1956); Whitaker Cable Corp., 51 F.T.C. 958, 973 (1955), aff'd, 239 F.2d 253 (7th Cir. 1956); Champion Spark Plug Co., 50 F.T.C. 30, 44-45 (1953); Luxor, Ltd., 31 F.T.C. 658, 662-63 (1940); Kraft-Phenix Cheese Corp., 25 F.T.C. 537, 546 (1937).
\textsuperscript{14} Kraft-Phenix Cheese Corp., supra note 13, at 546.
\textsuperscript{15} 51 F.T.C. 958 (1955), aff'd, 239 F.2d 253 (7th Cir. 1956).
strict manager and Whitaker Cable itself. The Commission found that "the degree of control exercised by respondent over sales to the wholesale distributor accounts was such that the sales were in all essential respects sales by respondent..."16

However, the Third Circuit refused to apply the "indirect purchaser" doctrine in Klein v. Lionel Corp., stating that whatever may be the necessity of applying the theory in a case where a party seeks a cease and desist order, the court did not feel compelled to apply the doctrine in a case where a party was seeking treble damages.18 Since there is no logical reason why the doctrine should be applied in one case and not in the other, it can only be concluded that the "indirect purchaser" doctrine has not yet won full acceptance in the courts. Nevertheless, in a fairly recent case, the United States District Court for the Southern District of New York seemed to give explicit recognition to the doctrine by its statement that, "an indirect purchaser may come within Section 2 when the manufacturer deals directly with him in promoting the sale of his product and exercises control over the terms upon which he buys."19

D. Primary or First-Line Injury

Where the injury is to competition with the seller who discriminates in the sale of goods of like grade and quality, only a competitor of the discriminating seller is entitled to bring an action under the Robinson-Patman Act. This type of injury is usually referred to as primary or first-line injury.20 One of the purposes of the act is to "extend protection to competitors of the discriminating seller..."21 and the statute is violated if there is the requisite injury to primary-line competition, even though there is no effect upon secondary and tertiary-line purchasers.22

The well-known case of FTC v. Anheuser-Busch, Inc., presents a perfect example of injury to primary-line competition. Anheuser-Busch reduced its price on Budweiser, a premium beer, to meet the price for nonpremium beer of its three major competitors in the St. Louis area, while maintaining higher prices in all of its other markets. The Commission found substantial injury to defendant's competitors in the St. Louis area during the period of the price discrimination, and held that defendant had violated section 2(a). On review, the Court of Appeals for the Seventh Circuit reversed the Commission's decision and concluded that since all of the competing purchasers in the St. Louis market area paid Anheuser-Busch the same price there was no price discrimination within the language of section 2(a) even though the price cuts were predatory and obviously directed against the very seller-competitors who suffered the injuries.25


16 Id. at 973.
17 237 F.2d 13, 15-16 (3d Cir. 1956).
18 Ibid. For an excellent discussion of the "indirect purchaser" doctrine see Rowe, op. cit. supra note 4, at 57-59.
20 Austin, op. cit. supra note 3, at 45.
22 Id. at 542-43.
24 Id. at 540-41.
25 Anheuser-Busch, Inc. v. FTC, 265 F.2d 677 (7th Cir. 1959).
In reversing the Court of Appeals, the Supreme Court stated that the lower court's view was incompatible with the purposes of section 2(a), and that a primary purpose of that section was to protect competitors of discriminating sellers as well as purchasers who had been discriminated against. The Court also stated that so long as the requisite injury to primary-line competition was present, any injury to secondary or tertiary-line competition was irrelevant. Accordingly, Anheuser-Busch was adjudged to be in violation of section 2(a) of the act.

E. Conclusion

Thus, the Robinson-Patman Act places very real limitations upon the right of an individual to bring an action for a violation of its provisions. The broad statement of 15 U.S.C. § 15 is not to be taken literally in Robinson-Patman proceedings. General injury to competition is not sufficient to maintain an action under the act. The injury must be to, and the action brought by: (1) a purchaser from the discriminating seller in the case of primary and secondary-line injury; or (2) to a competitor of the seller in the case of a primary-line injury.

III. Sealed Bid Sales Under Section 2(a) of the Robinson-Patman Act

A great deal of the purchasing done today is carried on by means of competitive sealed bidding. By asking for sealed bids, the buyer can be assured that the sellers who wish to acquire his account will do their best to give him the lowest possible price. Often, the competitive nature of the bidding itself and the desire of the sellers to get a large account will lead them to undercut their prices for the same articles on the regular negotiated market when submitting the bid. As Mr. Van Cise remarked at the symposium, in such situations, both the seller and the buyer must be wary of any cutthroat tactics. The seller should be sure that his price quotations can be cost justified when they are lower than his regular prices lest he be subjected to liability under section 2(a), and the buyer should also be quite certain that the seller can cost justify, lest he find himself trying to explain his own position in a 2(f) proceeding.

Two questions arise with regard to sealed bids: (1) does a bid which cannot be cost justified subject the bidder to Robinson-Patman Act liability at the time the bid is made, at the time the bid is accepted, or after the bid is accepted and the sale is completed?; and (2) since much government buying is done through bids, does the Robinson-Patman Act apply to sales to federal, state, or municipal governments?

27 Id. at 542-43.
28 Section 2(f) of the Robinson-Patman 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, 15 U.S.C. § 13(f) (1964).
29 Remarks of Mr. Van Cise, Transcript of Symposium Proceedings, Sept. 24-25, 1965, on file in the office of the Notre Dame Lawyer.
A. Is Bidding at a Discriminatory Low Price in Itself a Violation of Section 2(a)?

In order for a violation of section 2(a) of the Robinson-Patman Act to occur, there must be two actual sales, to two actual purchasers, each sale at a different price.\(^{30}\) The statute does not apply to mere offers to sell at discriminatory prices.\(^{31}\) As stated in Shaw's Inc. v. Wilson-Jones Co.,\(^{32}\)

\[\text{At least two purchases must have taken place. The term purchaser means simply one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser or one who wishes to purchase.} . . . \(^{33}\]\n
A bid is merely an offer to enter into a contract which may be withdrawn before acceptance.\(^{34}\) An advertisement requesting sealed bids is a request for offers, not an offer itself, and "this is true even though it may be common practice to accept the best bid made."\(^{35}\) Thus, it would seem that a bid which quotes a discriminatory low price is merely an offer to sell at that price and no violation of the act occurs until the bid is accepted and the sale is made.

However, in a few cases the courts have found a violation of the act even though no sale has in fact occurred. In American Can Co. v. Bruce's Juices, Inc.,\(^{36}\) defendant sold goods at a discount and on advantageous freight terms to plaintiff's competitors, but refused to sell to plaintiff, an old customer, on the same terms. Although a seller has the widely recognized right to refuse to deal with anyone,\(^{37}\) the defendant in this case did not refuse to deal with plaintiff outright; it continued to offer plaintiff goods of like grade and quality at the higher price knowing its actions to be discriminatory. The court held that defendant had violated section 2(a) of the Robinson-Patman Act even though plaintiff in fact had purchased no goods from defendant at the discriminatory price. Actual purchase was unnecessary, the court remarked, because plaintiff's failure to purchase any goods "was directly attributable to defendant's own discriminatory practice."\(^{38}\) From this decision it could be inferred that a bid at a discriminatory low price, although normally an offer, could give rise to a cause of action by the injured party.

If negotiations for a sale proceed to the point where the parties have actually made a valid enforceable contract, the courts will treat the parties as if an actual sale had taken place even though there was in fact no transfer of the title or possession of the goods. This would be especially true in states which have adopted the Uniform Commercial Code which does not make passage of title

\(^{30}\) Austin, op. cit supra note 3, at 36-38; Baum, THE ROBINSON-PATMAN ACT 9 (1964); Rowe, op. cit. supra note 4, at 53-59.  
\(^{31}\) See, e.g., South End Oil Co. v. Texaco, Inc., 237 F. Supp. 650, 652 (N.D.Ill. 1965); Austin, op. cit. supra note 3, at 36.  
\(^{32}\) 105 F.2d 331 (3d Cir. 1939).  
\(^{33}\) Id. at 333.  
\(^{34}\) 1 Corbin, CONTRACTS § 24 (1963).  
\(^{35}\) Ibid.  
\(^{36}\) 187 F.2d 919 (5th Cir.), modified, 190 F.2d 73 (5th Cir.), cert. denied, 342 U.S. 875 (1951).  
\(^{38}\) American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919, 924 (5th Cir.), modified, 190 F.2d 73 (5th Cir.), cert. denied, 342 U.S. 875 (1951).
or possession of the goods essential for their delivery under the contract, and which, moreover, does not follow the orthodox "offer and acceptance" criteria with regard to sales contracts. The case of Aluminum Co. of America v. Tandet exemplifies a situation in which the formation of a binding contract can be found to create a sale for purposes of the act. There Tandet entered into a written contract to purchase $2,500,000 worth of aluminum products over a five-year period at Alcoa's prices at the time of shipment, and submitted a purchase order for the goods. In an action for breach of that contract brought by Alcoa, Tandet asserted a defense and counterclaim by alleging that Alcoa was guilty of a violation of section 2(a) since the prices quoted to Tandet were ten percent higher than the actual market prices of the products. Alcoa submitted that Tandet could not assert a violation of the act since it had in fact purchased no goods from it and was not therefore a purchaser within meaning of the statute. Alcoa contended that the act could be violated only if there had been "an actual, completed discriminatory sale," and that Tandet was a mere offeree. The court found that Tandet was a purchaser within the meaning of the statute since there had been a purchase of specific goods "with price, conditions and terms agreed on," instead of a mere offer of sale awaiting acceptance. The court reasoned as follows:

Prior to the execution of a formal writing, businessmen bargain in the realm of credit proposals, quotation of prices, offers and counter-offers, and their words and actions have little legal effect. Once, however, the terms and conditions of an agreement are settled and the contract document drafted and signed, particular rights, obligations, benefits and liabilities accrue which the courts recognize as binding and enforceable. In the instant case, Alcoa and Tandet were parties to a contract for the sale of specified goods. They were no longer in the categories of an "offorer" or an "offeree"; they became the "seller" and the "buyer." The transaction on paper was complete; legal relations became operative. The incidence of delivery and payment would affect only the type and kind of remedies an aggrieved party would have in the event of a breach of contract by the other party, but in no other way was their legal status as a seller and a buyer diluted. Submission of the purchase order by Tandet was not an attempt to enter into a contract but must be regarded as an act done pursuant to an existing contract.

However, cases such as Tandet are rare. It is clear that in most instances there must be an actual and completed sale to two different purchasers by the same seller before the provisions of the Robinson-Patman Act will protect the injured party. Thus it follows that a discriminatory low bid, being a mere offer, does not violate section 2(a).

B. Government Sales

A great deal of the sealed bid selling carried on today is transacted with

41 Id. at 113.
42 Id. at 114.
43 Ibid.
municipal, state, or federal governmental bodies. The Robinson-Patman Act contains an "implicit exclusion" of sales to the federal government by private firms.\(^4\) The exclusion is recognized in the legislative history of the act as well as in judicial interpretations of its provisions. In 1935, in a memorandum submitted to the House Judiciary Committee, Mr. H. B. Teegarden, draftsman of the Robinson-Patman Act, stated that the act was not meant to apply to government sales.\(^4\) In 1936, the year of the passage of the act, the Attorney General of the United States stated that "statutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government."\(^4\) He concluded that the Robinson-Patman Act was not applicable to government sales in the absence of any express intention by the Congress that it should be.

It is a long-recognized principle of the common law that the sovereign is not bound by the acts of the legislature unless the acts are made expressly applicable to it.\(^4\) In 1955, for example, the Clayton Act was amended to permit the United States to sue for actual damages incurred by reason of antitrust violations\(^4\) after several unsuccessful attempts by the government to sue for treble damages under 15 U.S.C. § 15.\(^4\) Courts had consistently held that the United States was not a "person" within the meaning of the latter section.\(^4\) It is extremely doubtful therefore, that a persuasive argument could be made that the federal government was meant to be included in the terms "person" and "purchaser" as they are used in section 2(a) of the Robinson-Patman Act.

Another reason for holding that the act does not apply to sales of goods of like grade and quality to the federal government is that there is in reality no injury to competition from such sales.\(^2\) The Government is in competition with no one, and therefore, there can be no adverse secondary or tertiary-line effects.\(^2\) There can be no unlawful effects on primary-line competition either. The Robinson-Patman Act gives protection to the competitors of discriminating sellers because the latter are unlawfully injuring the business of their competitors who are following the dictates of the act. Therefore, the act attempts to eliminate the unlawful discriminatory practices of one seller by protecting the law—

\(^{44}\) Rowe, op. cit. supra note 4, at 83.

\(^{45}\) Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 250 (1935); see Rowe, op. cit. supra note 4, at 84.

\(^{46}\) 38 Ops. ATT'Y GEN. 539, 540 (1936). See Rowe, op. cit. supra note 4, at 84.


> Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit.

\(^{49}\) See text of this provision cited note 2, supra.

\(^{50}\) See, e.g., United States v. Cooper Corp., 312 U.S. 600 (1941). But see Georgia v. Evans, 316 U.S. 159 (1942) (state is "person" within the meaning of section 7 of Sherman Act and entitled to sue for treble damages).

\(^{51}\) See Rowe, op. cit. supra note 4, at 84 n.166.

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abiding seller from this unlawful competition. However, if both sellers realize that they need not follow the restrictions of the act in their sales to government bodies, whether by sealed bid or otherwise, they can compete equally and neither is hampered. This is competition in its purest form, and the losing bidder or seller cannot complain of competitive injury.

The Attorneys General of several states have disagreed as to whether the Robinson-Patman Act should apply to state or municipal governments. However, “the preponderance of reasoned opinion [what little there is] treats state or municipal bodies on a par with the Federal Government’s exemption.” As stated by one court:

The Act does not apply to sales to the government, state or municipalities. The statute provides that such a discrimination is unlawful “where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce.” This means, according to the discussion of the bill at the time of its consideration and enactment, that the parties must be in competition with each other. Neither the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article. There is nothing in the Act which attempts to establish the price at which an article can be sold to a purchaser; it merely provides that a seller can not discriminate by selling it to one purchaser for less than he sells it to another purchaser who is in competition. Accordingly, a sale at a reduced price is not illegal unless it is made for the purpose of discriminating between competitive buyers.

C. Conclusion

The overwhelming weight of opinion is that the Robinson-Patman Act does not apply to sales to federal, state, or municipal governmental units, for two reasons: first, there is no record of congressional intent that it should apply, and secondly, there can be no adverse effects upon competition as required by section 2(a) of the Robinson-Patman Act since a government is in competition with no one. Moreover, there can be no competitive injury on the primary level since all sellers have equal opportunities to submit prices to a government free from the restrictions of the act.

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53 See Rowe, op. cit. supra note 4, at 84-85.
54 Id. at 84.