

*Current Trends in Antitrust Law Under the Robinson-Patman Act:
Mom & Pop Shops vs. The Big Corporations*

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History of Antitrust Law

The American judicial system was first introduced to the concept of antitrust law when the Sherman Antitrust Act was passed in 1890. The Sherman Act was brought to life during a period of American history when our country was suffering from a series of depressions, while businesses were struggling to survive during the post Civil War era. Many large companies were organized for the sole purpose of monopolizing the market and restraining free competition in an effort to increase capital gains. The legislative history of the Sherman Act points to Congress's intent to make such tactics illegal where the result is an unreasonable restraint on trade.

The Sherman Act has two important provisions. Section 1 prohibits business combinations in restraint of trade and Section 2 prohibits monopolization. The Supreme Court has interpreted Section 1 as applicable only to agreements that restrain trade unreasonably. Monopolies themselves are not necessarily illegal under Section 2. However, if a company attempts to obtain a monopoly through unreasonable methods, then it will be deemed to have violated the law unless a legitimate business defense is asserted.

A claim brought under the Sherman Act may be instituted by private individuals, state attorneys general or United States attorneys. Successful Sherman Act suits can result in an award of treble damages and reasonable costs, including attorney's fees. Criminal prosecution under the Act can result in a fine up to \$10,000,000 for corporations, or \$350,000 for individuals and/or imprisonment for up to three years.

There is also an alternative provision allowing for a fine up to twice the amount of the gross pecuniary gain resulting from a violation of the Act.

In 1914, two new federal laws were put in place in response to criticism that the Sherman Act was too broad. The first piece of legislation was the Clayton Act. This Act was introduced in an effort to extend antitrust laws to include price discrimination, either directly or indirectly, among purchasers of like commodities in interstate and foreign commerce where price differentials were not based upon differences in grade, quality, quantity or cost of transportation, nor made in good faith to meet competition. 15 U.S.C. §12. It is important to note the controversy surrounding Section 4 of the Clayton Act. In 1977, the Supreme Court decision in *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), began what has become one of the most debated issues in antitrust law. The Court held that indirect purchasers are not permitted to sue for damages suffered as a result of price fixing in violation of antitrust law. Subsequently, some states have enacted “Illinois Brick repealer” legislation which allows actions by indirect purchasers that is not preempted by contrary federal law.

The second law introduced in 1914 was the Federal Trade Commission Act. This Act provided that “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce” were illegal. A violation of any provision of the Truth in Lending Act is also deemed a violation of the FTC Act. Additionally, the FTC Act established the Federal Trade Commission as a regulatory agency that would enforce and decipher the law. 15 U.S.C. §41. Section 5 of the FTC

Act empowers the Federal Trade Commission to arrest trade restraints even where such anti-competitive practices may not amount to violations of specific antitrust laws.

After its enactment, the Clayton Act was perceived as deficient because it included an unconditional exemption of discrimination in price when based on differences in the quantity of goods sold. There were also concerns that the scope of the Clayton Act only covered competition among sellers, thus leaving buyers without recourse for discrimination. To cure this deficiency, the Robinson-Patman Act (RPA) was enacted to amend Section 2 of the Clayton Act. The Robinson-Patman Act makes it unlawful for any person engaged in commerce to “discriminate in price between different purchasers of commodities of like grade and quality...where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce...” 15 U.S.C. §13(a).

Two years after the RPA was passed, the Non-Profit Institutions Act was enacted to amend RPA. This amendment provides an exemption for non-profit institutions such as libraries, universities, churches and hospitals. To be effective, the exemption must be applied to purchases by the non-profit institution of goods that are for its *own* use. Resales by covered institutions are only covered under the exemption if the goods in question are sold to another exempt institution. Although few cases have examined the scope of this exemption, courts have held that the statute itself should be narrowly construed and that purchases by state and local government agencies are not exempt

under the Non-Profit Institutions Act. See *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*, 460 U.S. 1105, 103 S.Ct. 1808, 76 L.Ed.2d 371 (1983).

In 1950, the Clayton Act was amended a second time. The Celler-Kefauver Anti-Merger Act extended coverage under Section 7 of the Clayton Act to include corporate asset acquisitions and stock acquisitions. 15 U.S.C. §18. Originally, the Clayton Act only provided liability for mergers that included stock purchases of rival companies where the purchases substantially lessened competition. Companies avoided this prohibition by completing mergers through asset acquisition. Congress extended coverage under the Act to include asset and stock acquisitions so those transactions could be evaluated under the broad standards of the Clayton Act as opposed to the stricter Sherman Act standard. The Clayton Act now covers vertical mergers, mergers between firms in a buyer-seller relationship and horizontal mergers between competitors.

In 1976, Congress enacted Section 7A of the Clayton Act as part of the Hart-Scott-Rodino Antitrust Improvements Act. This addition to antitrust law provided for pre-merger notification requirements to both the Federal Trade Commission and the Department of Justice where the acquiring party would hold an aggregate of the acquired party's assets exceeding \$200 million dollars. After filing the proper notification forms, parties to a merger must wait 30 days before continuing the transaction. Failure to comply with the pre-merger notification requirement imposes a civil penalty of up to \$10,000 for each day the Hart-Scott-Rodino Act is violated. To have an anti-competitive

effect, a merger generally must significantly concentrate the market and make it difficult for effective new competition to enter the market after the merger.

Purpose and Scope of the Robinson-Patman Act

The Robinson-Patman Act was originally labeled the “chain store bill.” After World War I, there was significant growth of multi-location merchants, or “chain stores.” These purchasers became a direct threat to small businesses that had limited purchasing power. To combat this threat, the National Association of Retail Grocers urged Congress to investigate the competitive practices of “chain stores.” The Robinson-Patman Act eventually grew out of those investigations, as legislators sought to protect small independent businesses from injury caused by discriminatory pricing. *See e.g., Great A & P Tea Co.*, 440 U.S. 69, 99 S.Ct. 925, 59 L.Ed.2d 153 (1979). It is evident that Congress was concerned that such discriminatory practices would harm consumers by increasing prices, lowering quality and reducing the availability of goods. Essentially, the basic function of the RPA is to protect competitors, not competition.

Section 2(a) of the Robinson-Patman Act

The RPA has several provisions that can be used to safeguard purchasers. Section 2(a) of the Act contains a basic prohibition regarding price discrimination among purchasers of commodities. The elements required to establish a prima facie case under Section 2(a) include: (1) two or more consummated sales; (2) the sales must relate to commodities; (3) the goods must be of like grade and quality; (4) the sales must be reasonably contemporaneous; (5) there must be a discrimination in price; (6) by the same

seller to two or more purchasers; (7) the sale must affect interstate commerce; and (8) the price discrimination must have an adverse effect or injury to competition. It is important to note that intent is not a necessary element to establish a valid claim under the RPA. Sellers of goods must be aware of potential violations of antitrust law, and attorneys should be prepared to advise their clients of the proper steps to avoid liability.

To establish that there are two consummated sales involved which are discriminatory, there must be two actual purchases. Although an offer of sale is not a consummated purchase, a signed contract is sufficient to establish completion of the sale. The sale in question must also relate to commodities covered under the RPA. These are general tangible goods and not intangibles such as services. To determine if the goods in question are of “like grade and quality, “ courts use a variety of tests to examine each case individually. The majority of RPA claims that stem from controversy over like grade and quality most often involve two or more products of the same seller. The physical and chemical identity of the product is scrutinized and a simple difference in labeling or packaging is not sufficient to avoid the effect of the Act. *See, e.g., F.T.C. v. Borden Co.*, 383 U.S. 637, 86 S.Ct. 1092, 16 L.Ed.2d 153 (1966). However, physical appearance coupled with substitutability and identity of performance are factors to be considered.

As part of a prima facie case of price discrimination under RPA, a plaintiff must also show that the sales in question were reasonably contemporaneous. Although this element is not specifically required by the Act, most courts require that the element be

met. Generally, courts do not look to the date of delivery of the product to determine reasonableness but rather the date on which the sale was consummated. The discrimination in price requirement, as the Supreme Court has determined, means nothing more than a difference in price. *See Texaco v. Hasbrouck*, 496, U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990).

The “same settler” doctrine raises many questions regarding a corporation and its subsidiaries, which under antitrust laws are considered one entity and cannot be guilty of conspiracy when interacting with one another. Likewise, the requirement that there be two different purchasers raises issue when subsidiaries are involved. Under the scope of the doctrine, indirect purchasers may also bring claims when the intermediary is considered the “alter ego” of the primary seller. To meet the element of interstate commerce, sales must do more than merely affect such commerce. The seller must be engaged in interstate commerce, the price discrimination must occur in the course of such commerce and one of the purchases must occur in such commerce. Of all elements involved in a claim for price discrimination, the showing of an adverse effect on competition is the most complex. Commonly known as the “injury to competition” requirement, there are two types of injury generally alleged under Section 2(a), “primary line” and “secondary line.” Primary line injury occurs when there is harm to the seller’s competition by engaging in predatory pricing. Secondary line injury occurs when there is a harm to the buyer’s competition. Typically in a primary-line case, prices will be set lower in one geographic market and higher in another. *See, e.g., Brooke Group Ltd. v.*

Brown & Williamson Tobacco Group, 509 U.S. 209, 113 S.Ct. 2528, 125 L.Ed.2d 168 (1993); *Texaco v. Hasbrouck*, 496 U.S. 543. A third type of injury, tertiary-line, describes injury to customers of the injured buyers. Cases are rarely brought alleging tertiary-line injury due to the complex burden of proof involved. Regardless of the type of injury alleged, a plaintiff must offer proof of being in "functional or geographic competition with the alleged competitor." *DeLong Equip. Co. v. Washington Mills Electro. Minerals Corp.*, 990 F.2d 1186, 1202 (11th Cir. 1993).

As the Supreme Court has established, "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Corn Products Co. v. F.T.C.*, 324 U.S. 726, 742, 65 S.Ct. 961, 89 L.Ed. 1320 (1945). *See also Falls City Industries, Inc. v. Vanco Beverages*, 460 U.S. 428, 103 S.Ct. 1282, 75 L.Ed. 2d 174 (1983). In *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), the Supreme Court held that an injury to competition might be inferred from evidence that some purchasers had to pay their supplier "substantially more for their goods than other competitors had to pay." *Id.* at 46-47.

Defenses to RPA Section 2(a)

Under RPA, price discrimination is allowed when: (1) justified by cost savings; (2) the need to meet a competitor's equally low price; or (3) changing market conditions. A fourth defense to an RPA allegation is available if the defendant can show that the lower price at issue was functionally and practically offered to all competing customers,

whether utilized or not. *See Borden Co. v. F.T.C.*, 381 F.2d 175 (5th Cir. 1967). The "cost justification" defense requires that the defendant bear a heavy evidentiary burden, which often causes substantial problems for the defendant. Section 2(a) provides that: "Nothing herein contained shall prevent differentials which make only due allowances 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." 15 U.S.C. 13(a).

Because it is often hard for a defendant seller to provide the appropriate records to prove that "cost savings" justified a discriminatory price, the "meeting-competition" defense is most commonly used. Section 2(b) of the RPA contains statutory language that grants a defendant the ability to assert the "meeting competition" defense. The defense is absolute provided the defendant can show that the lower price was made in good faith in order to meet an equally low price of a competitor. The good faith requirement is measured by using the standard of an ordinarily prudent businessperson in the same situation. In this circumstance, the seller must only show that it was trying to meet, not necessarily beat, the price of the competition using a reasonable method. *See e.g., McGuire Oil Co., et al. v. Mapso, Inc.*, 612 So.2d. 417 (Ala. 1992). The "changing conditions" defense is used in limited situations where the marketability of the goods concerned may be affected, such as out-of-date obsolescence of seasonal goods, out-of-date perishable products, or "going out of business" sales.

There has long been debate over whether or not the concept of "functional discounts" can be used as a defense to the RPA. Though the Act does not specifically mention functional discounts, the defense was judicially recognized in *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990). A functional discount occurs when a seller charges a lower price to a buyer who performs a particular function in the redistribution of commodities that positively affects the seller. There are two categories of functional discounts. The first occurs where different prices are charged to a wholesaler and a retailer. These types of discounts are not in violation of the RPA since wholesalers and retailers do not directly compete with one another. The second type of discount is a performance discount where a customer receives a discount for services it performs. Generally, this type of discount will not be passed on and therefore injury to competition is unlikely.

Functional availability is another possible defense statutorily created under Sections (d) and (e) of the RPA. The defense of functional availability was judicially extended to apply to Section (a) as well. *See e.g. DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir. 1989). Functional availability occurs when a defendant has made an equivalent price "functionally," "practically" and "realistically" available to all purchasers. *Id.* at 1517.

Section 2(c) of the Robinson-Patman Act

Section 2(c) provides that, "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept,

anything of value as a commission, brokerage, or other compensation, or any allowance, or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise. . . to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or on behalf, or subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." 15 U.S.C. 13(c). Essentially, this section of the RPA creates a claim for buyers who have been damaged by commercial bribery and the practice of "dummy" brokerages. Bribes are also considered an unfair tactic under Section 5 of the Federal Trade Commission Act.

In *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981), the United States Supreme Court remanded an Alabama antitrust case involving an automobile dealer who alleged that he was driven out of business due to defendant's illegal price discrimination. The central issue was whether a plaintiff who proves price discrimination in violation of RPA Section 2(a) is entitled to automatic damages in the amount of the price discrimination, absent proof of injury. The Supreme Court held that the plaintiff must demonstrate an actual injury to competition to recover treble damages under RPA. This holding also applies to a Section (c) claim of commercial bribery by raising the question of whether a showing that the plaintiff paid an inflated price for goods due to bribery is sufficient to show proof of injury to business. Although case law indicates that courts are split on this issue, it is safe to assume that a plaintiff bringing a claim under this section must also prove direct antitrust injury.

Sections 2(d) and 2(e) of the Robinson-Patman Act

Section 2(d) of the RPA prohibits a seller from making promotional allowances to favored "customers" and section 2(e) prohibits such allowances to "purchasers." Section (d) provides that it is unlawful "for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of commerce as compensation or consideration...for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products..." 15 U.S.C. §13(d). Section (e) states that it is unlawful "for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale..." 15 U.S.C. §13(e). Certain conditions must be met in order to establish a valid claim under either of these sections: (1) allowances must be in connection with "processing, handling, sale or offering for sale" of products that relate to resale; (2) both the favored and disfavored customers must compete in the same geographic market; and (3) the promotional allowances or payments at issue must be available on proportionally equal terms. 15 U.S.C. §§13(d) – (e).

The Federal Trade Commission has taken the initiative to ensure that businesses are given guidance on the proper steps to take in order to be in compliance with these sections of the RPA. This "manual" is commonly referred to as the *Fred Meyer Guide* because it was initially created after a Supreme Court opinion suggested that the FTC should assist sellers in their pursuit for conformity to the law. *See F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968).

Defenses to RPA Sections (d) and (e)

Both sections (d) and (e) provide a statutory defense that allows otherwise illegal discriminatory payment for services if such services are made available on proportional terms to all purchasers. Functional availability can only be established as a defense if "a supplier must not merely be willing, if asked, to make an equivalent deal with other customers, but must take affirmative action to inform them of the availability of the promotional program." *Alterman Foods, Inc. v. F.T.C.*, 497 F.2d 993, 1001 (5th Cir. 1974). Basically, a customer must be aware that a deal is available so that it can be taken advantage of or disregarded. In *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (1990), the Eleventh Circuit recognized that a defendant seller must show that purchasers were given an equal opportunity to participate not only in incentive programs but any advertising and promotional programs also offered by the seller. Cost justification is not a defense to Section (d) and Section (e) claims. *See F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959).

Section 2(f) of the Robinson-Patman Act

Section 2(f) makes it unlawful for a buyer "knowingly to induce or receive a discrimination" which is prohibited by any other parts of the Act. To prove a prima facie violation of this section, the following elements must be established: (1) the defendant must be a person engaged in commerce; (2) who knowingly induces or receives; (3) a discriminatory price; and (4) in violation of Section 2(a). In *Automatic Canteen Co. of America v. F.T.C.*, 346 U.S. 61, 73 S.Ct. 1017, 97 L.Ed. 1454 (1953), the Supreme Court

held that a plaintiff must prove a buyer knew or should have known a cost justification defense was unavailable to the seller. Various courts have established tests that can be used to prove a buyer was put on notice that cost justification was unavailable as a defense. A buyer's knowledge of a particular industry and the buyer's knowledge that considerations other than cost were used to set prices are two factors that may be used to show such unavailability. *See, e.g., Kroger Co. v. F.T.C.*, 438 F.2d 1372 (6th Cir. 1971). On the other hand, it has been held that it is unnecessary for a plaintiff to show that the buyer knew or should have known that the meeting competition defense was unavailable to the seller. *Automatic Canteen, supra.*

Defenses to RPA Section (f)

Perhaps the most obvious bar to proving a Section 2(f) violation is the burden of proof involved to show that the purchaser knew or should have known that the price was discriminatory. In *Automatic Canteen*, the Court also held that a buyer "is not liable under 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." *Id.* at 74. In some situations, courts have allowed the "trade experience" of the buyer to show that he or she should have known the price was discriminatory. *Id.* at 79-80. Other courts have also allowed guilty knowledge of price discrimination to be inferred through a buyer's actions. *See, e.g. Fred Meyer, Inc. v. F.T.C.*, 359 F.2d 351 (9th Cir. 1966). Basically this means that a buyer in this situation is not an "unsuspecting recipient of prohibited discrimination." *Id.* at 364. The most important factor a defendant buyer

should look to is whether a valid claim against the seller has been established under Section 2(a). A Section 2(f) claim is completely dependent on the seller liability, without it the buyer cannot be liable. *See, e.g. Great Atlantic & Pacific Tea Co. v. F.T.C., supra* at 76-77.

Enforcement and Penalties under RPA

Although enforcement by the Antitrust Division of the Department of Justice is provided for through the antitrust statutes, private parties are almost always the named plaintiffs in claims of price discrimination. The Department of Justice is granted authority under the RPA to enforce both the criminal and civil provisions of the RPA. Criminal penalties are found in Section 3 of the Act. However, criminal enforcement is so rare that research yielded evidence of only one guilty verdict for criminal activity under antitrust law.

If successful, a plaintiff bringing a claim under the RPA can be awarded treble damages, injunctive relief and reasonable attorney's fees. As previously discussed in the context of Section (c) claims, in *J. Truett Payne*, the Supreme Court distinguished the theory that automatic damages are recoverable under the RPA. While a different price is sufficient to establish a threshold case of price discrimination, the Court held that actual injury must be shown to recover damages. To prove an injury, a plaintiff must show a lost sale to the favored retailer and a showing of the amount profits on each lost sale. *J. Truett Payne*, 451 U.S. 557.

Class actions under the RPA are becoming more accepted but continue to be difficult to certify. Courts have held that such claims are simply unmanageable in that plaintiffs have to show individual injury as well as functional competition between the class and the favored customer. *See Close v. American Honda Motor Co., Inc.*, 1994 WL 761957 (D.N.H. 1994).

Conclusion

Price discrimination cases appear to be on the rise across the country. As the "Sam's" and "Wal-Marts" of the world continue to gain an increasing share of the marketplace, "mom and pop" shops may have legal avenues available to them to halt unfair competition. The Robinson-Patman Act is one available remedy. Accordingly, it is important that litigants become more familiar with claims and defenses under the RPA as set out in this article.