

Section Three of the Robinson-Patman Act Held Not an Anti-Trust Law

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seller to reduce his prices to the exact level of his low priced competitor, quality of product would be the chief factor of competition to the benefit of the general public. This is compatible with the policy embodied in our anti-trust laws of maintaining flexible prices within the economy.

CONCLUSION

There is a definite need for an amendment to the defense contained within Section 2(b) of the Robinson-Patman Act. The defense should be made available to a seller who uses price discrimination to obtain a new customer as well as to a seller who uses such price discrimination to retain existing customers. This writer suggests the test should be whether the seller asserting the defense has shown his good faith in that he acted as a reasonably prudent businessman in securing the new buyer and was not motivated by a desire to drive competition out of the market. Section 2(b) should also be amended to allow a seller to meet the equally low price of a competitor without regard to the maintenance of customary price differentials.

ERWIN JAMES KEUP

Section Three of the Robinson-Patman Act Held Not An Anti-Trust Law — Plaintiff alleged that it was injured by defendant's sales at unreasonably low prices, and that defendant's conduct violated Section Three of the Robinson-Patman Act. Plaintiff sued for treble damages and injunctive relief under Section Four and Section Sixteen of the Clayton Act, claiming that the defendant had violated an anti-trust law. The United States Supreme Court, in a five to four decision, *Held*: that Section Three of the Robinson-Patman Act was not an anti-trust law, and the plaintiff, therefore, could not maintain under Sections Four and Sixteen of the Clayton Act a private civil action for treble damages and injunctive relief. *Nashville Milk Co. v. Carnation Co.*, 78 Sup. Ct. 352 (1958).

The above problem has been before the courts for the past twenty years. Some decisions have agreed with the majority in the present case and other decisions have sided with the dissenting opinion holding that Section Three of the Robinson-Patman Act is an anti-trust law. Considering the importance of this issue and the amount of authority on either side, it is surprising that the Supreme Court did not pass on this sooner.

Section Four of the Clayton Act¹ permits one who is injured by reason of anything forbidden in the anti-trust laws to bring a suit for treble damages, and Section Sixteen² of the Clayton Act allows the claimant to obtain injunctive relief against threatened loss or damage

¹ 15 U.S.C. §15 (1914).

² 15 U.S.C. §26 (1914).

by a violation of the anti-trust laws. It is plain, therefore, that these private civil remedies are not available unless an anti-trust law is violated.

The majority of the court ruled that the Robinson-Patman Act was not an anti-trust law in its entirety, but that Section One of the Robinson-Patman Act was an anti-trust law, as Section One specifically states that "Section Two of the Clayton Act is amended to read as follows . . ."³ The court reasoned that the lack of specific language referring to the Clayton Act in Section Three of the Robinson-Patman Act precluded that Section from affecting the Clayton Act and thus it was not an anti-trust law.

Section Three of the Robinson-Patman Act⁴ prohibits three kinds of practices: (1) general price discrimination, (2) geographical price discrimination, and (3) selling goods at unreasonable prices for the purpose of destroying competition or eliminating a competitor. The first two abuses, general price discrimination and geographical price discrimination, are also condemned by Section Two of the Clayton Act which makes a violation of them subject to the private civil remedies provided for by Sections Four and Sixteen of the Clayton Act. The third abuse prohibited by Section Three of the Robinson-Patman Act is selling at unreasonably low prices to foreclose competitors and there is no mention of this practice in the Clayton Act. The court deemed this a significant factor in ruling that Section Three of the Robinson-Patman Act was not an anti-trust law. The end result is that price discrimination is criminally punishable under Section Three of the Robinson-Patman Act and a violator is subject to civil liability to an individual under Section Two of the Clayton Act. One who sells at unreasonably low prices is subject only to the criminal penalties imposed under Section Three of the Robinson-Patman Act.

The dissenting opinion failed to recognize a difference between the three abuses prohibited by Section Three. If the discriminatory practices condemned by Section Three were also violative of Section

³ 49 STAT. 1528 (1936).

⁴ 15 U.S.C. §13a (1936). "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality and quantity; to sell, or contract to sell, goods in any part of the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both."

Two of the Clayton Act so that civil relief was permitted then "selling at unreasonably low prices" should be placed in the same category as it is also an unfair trade practice.

Until this decision the majority of lower courts sustained the contention that Section Three of the Robinson-Patman Act was an anti-trust law and allowed civil relief.⁵ Most of these courts failed to distinguish between the effects of the various provisions of the Robinson-Patman Act and held that the Robinson-Patman Act was an anti-trust law in its entirety. They considered "selling at unreasonably low prices for the purpose of destroying competition" just as great an evil as price discrimination, and provided the same remedy to an individual injured by a violation of anything mentioned in the Robinson-Patman Act. This line of reasoning is best expressed in the *Balian Ice Cream case*⁶ where the court stated that the three main statutes dealing with monopolies and combinations are the Sherman Anti-trust Act, Clayton Act, and the Robinson-Patman Act, and they are all closely related. Each Act was enacted to curb conduct that the previous acts failed to prohibit. All three of the Acts aim to suppress combinations to restrain competition and attempts to monopolize, and maintain the freedom of commerce between the states. The treble damage provision was not only to compensate an individual for loss as a result of one of the prohibited acts, but it also induces potential violators not to act contra to the anti-trust laws, as the financial consequences are great.

The Supreme Court notes that the Justice Department has never prosecuted an individual for a violation of Section Three. If private civil remedies are not available to individuals, the policy of the Justice Department will undoubtedly change, and violators of Section Three will now be faced with criminal prosecution.

PAUL V. LUCKE

Constitutional Law — Interpretation of the Smith Act — Fourteen defendants were charged with conspiring: 1) to advocate and teach the duty and necessity of overthrowing the government of the

⁵ The following held that private remedies were available for a violation of Section Three of the Robinson-Patman Act: *Dean Oil Co. v. American Oil Co.*, 147 F. Supp. 414 (1956); *Atlanta Brick Co. v. O' Neal*, 44 F. Supp. 39 (1942); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408 (1950); *Hershel California Fruit Products Co. Inc. v. Hunt Foods Inc.*, 119 F. Supp. 603 (1954); *Balian Ice Cream Co. Inc. v. Arden Farms Co.*, 94 F. Supp. 796 (1950); *Meyers v. Shell Oil Co.*, 96 F. Supp. 670 (1951); *Kentucky-Tennessee Light and Power Co. v. Nashville Coal Co.*, 37 F. Supp. 728 (1941); *A. J. Goodman and Son Inc. v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (1949); *Vance v. Safeway Stores Inc.*, 239 F. 2d 144 (1957).

The following cases held that Section Three of the Robinson-Patman Act was not an anti-trust law and prevented private relief: *National Used Car Market Report Inc. v. National Auto Dealers Association*, 108 F. Supp. 692, (1951) *aff'd* 200 F. 2d 359 (1952); *Nashville Milk Co. v. Carnation Co.*, 238 F. 2d 86 ().

⁶ *Balian Ice Cream Co. Inc. v. Arden Farms Co.*, 94 F. Supp. 796 (1950).