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Repository Citation

John F. Savage, *Not All Price Discriminations are Unlawful Under the Robinson-Patman Act*, 42 Marq. L. Rev. 193 (1958).
Available at: <http://scholarship.law.marquette.edu/mulr/vol42/iss2/3>

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NOT ALL PRICE DISCRIMINATIONS ARE UNLAWFUL UNDER THE ROBINSON-PATMAN ACT

JOHN F. SAVAGE*

It is not our purpose to describe those situations in which the federal anti-trust laws permit the seller or buyer to "justify" sales or purchases for discriminatory prices. Nor is it the purpose to illustrate those situations where the anti-trust laws are inapplicable because of the absence of interstate commerce. The objective of this article is to show that the Clayton and Robinson-Patman Acts¹ do not condemn all sales that involve price discrimination even though they are made in interstate commerce.

The Robinson-Patman Act admittedly lacks clarity in many respects. McAllister² notes that an early commentator remarked there's "a lawsuit in every word of it." Austern³ wrote, "Heaven knows it's [the Robinson-Patman Act] a lawyer's dream as it stands. It is ambiguous. It has conflicting legislation. It has tremendous economic impact on the business world."

Important provisions were supplied by the courts because they were "inadvertently" omitted by Congress.⁴ And, on at least one occasion in a dissenting opinion, Justice Jackson, in referring to key language used by the Supreme Court in an earlier case, referred to its use as an "inadvertent" choice of language.⁵ Nonetheless, the majority apparently followed the language so used.

It is, however, one thing to supply language "inadvertently" omitted by Congress and quite another to overlook language expressly used by Congress. In the early days of the Robinson-Patman Act, courts and the F.T.C. apparently gave little recognition to the following express language of the pertinent provisions of the Act:

"(a) It shall be unlawful for any person in commerce, in the course of such commerce . . . to discriminate in price be-

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¹ 15 U.S.C.A. §13. In *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1957) and *Safeway Stores, Inc. v. Vance*, 355 U.S. 389 (1957), the Supreme Court held that section 3 of the Robinson-Patman Act (15 U.S.C.A. §13(a)) was not an anti-trust law of the United States that afforded a party injured in his business a right of action for treble damages under 15 U.S.C.A. §15.

² McAllister, *Price Control Law by the United States*, 4 LAW AND CONTEMPORARY PROBLEMS 273, 280 (1937); CLEWETT, *MARKETING CHANNELS* (Richard D. Irwin, Inc. 1954).

³ Austern, *Required Competition Injury and Permitted Meeting of Competition*, C.C.H. PAMPHLET—ROBINSON-PATMAN ACT SYMPOSIUM (1947).

⁴ *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (9th Cir. 1945); *Elizabeth Arden, Inc. v. F.T.C.*, 156 F.2d 132 (2nd Cir. 1946); *Sun Cosmetics Shoppe v. Elizabeth Arden Sales Corp.*, 81 F. Supp. 547 (E.D.N.Y. 1948).

⁵ See Justice Jackson's dissent in *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948).

tween different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . 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 . . .⁶ [Emphasis ours.]

It is with this language (emphasized) that we will concern ourselves.

It is to be noted that Congress clearly intended that it was not necessary for the prosecution to establish actual injury to competition. It is sufficient that competition *may* be injured.⁷ But, according to the express wording, the potential injury must be *substantial*.

The FTC in prosecuting, and the United States Supreme Court and the Second Circuit Court of Appeals in deciding the *Moss*,⁸ *Corn Products*⁹ and *Morton Salt*¹⁰ cases, indicated either their misunderstanding or lack of feeling for the express statutory language. There were also other less-important but similar actions too numerous to cite here.

In 1945 the Second Circuit Court of Appeals, in the *Moss Case*¹¹ held that anyone who had established two prices for a given commodity had assumed the burden of proof to *justify*¹² his action.

In the same year the Supreme Court, in the *Corn Products Case*,¹³ reasoned that it was unnecessary in an FTC proceeding to establish actual injury to competition, but only "the reasonable probability" of injury to competition. The court, through "inadvertence" or otherwise,¹⁴ used the phrase "reasonably possible" rather than "reasonably probable" in concluding its opinion.

In the *Morton Salt Case*,¹⁵ the Supreme Court ostensibly settled on the "reasonably possible" test. At the same time, the court said that the phrase "reasonably possible" must also be "read in the light" of the "reasonably probable" language found in the *Corn Products Case*.¹⁶ What did the court mean? Possible and probable are two different adjectives.

⁶ Robinson-Patman Act §2, 15 U.S.C.A. §13(a).

⁷ See cases cited at notes 10, 13, 24 and 25 *infra*.

⁸ Samuel H. Moss, Inc. v. F.T.C., 148 F. 2d 378 (2nd Cir. 1945).

⁹ Corn Products Refining Co. v. F.T.C., 324 U.S. 746 (1945).

¹⁰ F.T.C. v. Morton Salt Co., 334 U.S. 37 (1948).

¹¹ *Supra* note 8.

¹² Section 2 of the Robinson-Patman Act (15 U.S.C.A. §13) permits a defendant to justify discriminatory prices in specific instances. These would include price differentials that make due allowance for difference in the cost of manufacture, sale or delivery; price changes from time to time in response to changing market conditions or the marketability of the goods; and good faith meeting of competitor's prices. It would seem that these practices are legal (if justified) even though they may substantially affect competition. See page 200 below.

¹³ Corn Products Refining Co. v. F.T.C., 324 U.S. 746 (1945).

¹⁴ See note 5 *supra*.

¹⁵ *Supra* note 10.

¹⁶ *Supra* note 13.

Justice Jackson, in his dissent in the *Morton Salt Case*,¹⁷ and Mr. W. David Robbins¹⁸ have expressed the thought that this decision came quite close to outlawing all price differentials, whether they are predatory in character or may tend to work for the common good.

Many attorneys and economists felt that to outlaw or nearly to outlaw all price variances was unreasonable and, rather than to effectuate the purpose of the statute, had an undesirable effect on the public welfare. These decisions served as a protection for competitors rather than as a protection of competition. While no one can deny that many reductions in price prove a hardship on a competitor, yet many may be very healthy for the economy generally. Sporadic and unsystematic discrimination should not be regarded in the same light as precisely ordered, systematic discriminations whose purpose is to destroy competition.

In the report of the Attorney General's National Committee to Study the Anti-Trust Laws,¹⁹ it was stated, "The essence of competition is a contest for trade among business rivals in which some must gain while others lose, to the ultimate good of the consuming public."

Since 1953 the courts and the FTC have given express recognition to the proposition that the prosecution has the burden of proving that the alleged price discrimination may have the effect of substantially injuring competition or tending to create a monopoly.

In the *Maico Case*²⁰ involving exclusive dealing contracts where proof of substantial and potential injury to competition was also required, the Commission discussed at length on whom the burden of proof rested and what evidence was relevant to such a determination in that case.

In his recommendation to the Commission, the examiner in *Maico* "presumed" there must have been a lessening of competition because the respondent (defendant) was the fourth, fifth, or sixth largest in the hearing aid field; it had exclusive dealing contracts since 1945; and, in 1950 (at the time of the hearing), it had 123 retail dealers under exclusive contracts. Furthermore, its sales showed substantial increases: in 1945, \$600,000; in 1947-48, \$1,912,000; in 1948-49, \$1,891,000; and in 1949-50, \$1,927,000.

While "presuming" that these facts showed the respondent's contracts may lessen competition, the examiner rejected evidence which showed that during the course of time these contracts had been in use: (1) there had been an increase in the number of the respondent's competitors in the hearing aid field; (2) the volume of hearing aid

¹⁷ *Supra* note 10.

¹⁸ Robbins, *Is Competitive Pricing Legal?*, HARV. BUS. REV. (1957).

¹⁹ REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS OF THE U.S. 164 (Govt. Print. Off. 1955).

²⁰ The Maico Company, Inc., F.T.C. Docket 5822 (1953).

business done by respondent's competitors had increased; (3) respondent's share of the hearing aid market had decreased; (4) its dealers constituted a small percentage of the hearing aid dealers in this country; and (5) other matters relating to the effect of the exclusive dealing contracts on competition.

The Commission required the taking of evidence on points one through five.

The Commission said:

"These factors, in our opinion, all have a real bearing on whether there may be, or already has been, a substantial lessening of competition due to respondent's exclusive dealing contracts"

and accordingly referred the matter back for further evidence before making a ruling.

It is to be observed that the *Maico Case* involved a proceeding before the Federal Trade Commission which started before an Examiner. It was the Examiner who made the "presumptions." It could (or should) be expected that in civil actions for damages the courts would require the plaintiff to establish the possible or probable effect of the discrimination on competition as well as the actual injury to the plaintiff. In such private actions, it is not only elementary that a plaintiff must in fact be injured in his business or in his property to recover damages, it is expressly required by the statute establishing the right of private actions for treble damages.²¹

It is not surprising that Congress required that proof of possible or probable injury to competition be submitted in prosecutions for violation of the Acts. The sole purpose of the anti-trust laws is to assure the continuance of competition and to prevent the establishment of monopolies.

It is, however, surprising to find in the early history of the Acts that our higher courts apparently overlooked the element of effect on competition. The trend, however, appears that more and more recognition is given to this element.

The *Maico Case* (in 1953) evidenced the turning point. The Commission there recognized that proof of possible or probable injury to competition is an element of the offense and the burden of proof is on the prosecution. The burden is not one of justification for the defendant to establish:²²

"The burden of proof to establish injury to competition is on counsel supporting the complaint . . . (Proof of the discrimination is not sufficient) . . . there must be evidence to support a finding and there must be a finding based on that

²¹ 15 U.S.C.A. §15.

²² *Supra* note 20.

evidence to show wherein competition is substantially lessened and a monopoly threatened."

It is to be noted that it is proof of probable injury to *competition* that is required in either an FTC proceeding or in a private action. It is not sufficient to prove mere injury to a *competitor*.

The Commission recognized that its conclusions were not entirely in harmony with past actions of the FTC nor of the courts but it pointed to the severe criticisms to which the earlier rulings and decisions had been subjected by authorities on the subject.

The Commission also concluded that it is not sufficient to prove probable injury to competition by conclusions of witnesses and that where a witness makes the statement that his business has been injured by the discriminatory pricing policy of the respondent, the fact that his business has actually grown in size is relevant and contradicts the conclusion.

Evidence that the other businesses were or are being damaged by causes other than the respondent's pricing policy is also relevant — such as shortages of material, lack of quality, lack of consumer acceptance, rationing, and the fact (if true) that others traditionally charged more for their product than the respondent.

In 1953, preceding the *Maico Case* which we have just discussed, the Commission had before it three cases involving the pricing of spark plugs on sales to automobile manufacturers by *Champion Spark Plug Co.*,²³ the *A-C Spark Plug Division of General Motors*,²⁴ and the *Electro-Auto Lite Co.*,²⁵ and it dismissed the complaint (in part) as *the prosecution had failed to establish* an "undue mortality rate" or "undue loss of business" by the competitors of these companies.

It is also interesting to note that the Commission felt that direct sales of spark plugs by these manufacturers to automobile manufacturers for use in new automobiles were not to be classed with sales of spark plugs to the same automobile companies for resale to their dealers for use by the latter as replacement parts. In the latter situation, the automobile dealers are competing with other dealers who buy directly from spark plug manufacturers.

The Commission also indicated that, to establish a violation, there should be a showing that the competitive spark plugs which are available are acceptable, quality-wise, by the automobile manufacturers.

In 1954 the Commission, in the *General Foods Case*,²⁶ again said that *it is the burden of the "counsel supporting the complaint . . . to establish the necessary injury . . . Difference in price without competitive injury is not illegal."* [Emphasis supplied.]

²³ F.T.C. Docket 3977 (1953).

²⁴ F.T.C. Docket 5620 (1953).

²⁵ F.T.C. Docket 5624 (1953).

²⁶ F.T.C. Docket 5675 (1954).

In the *Purex Case*,²⁷ also in 1954, the Commission said:

"The fact that a competitor has been injured in a local price-cutting case may tend to show that competition with the grantor has been affected but it does not follow in every case that because a competitor has been injured, competition has been affected."

In the *Yale and Town Mfg. Co. Case*,²⁸ the Commission dismissed a complaint charging unlawful price discrimination. The discrimination involved discounts under which certain purchasers obtained products of Yale and Town at lower net acquisition costs than others. Counsel for Yale and Town produced evidence that in the majority of cases the controlling factors inducing sales of these products were performance, engineering specifications, and related attributes, including adaptability to the customer's individual requirements. The hearing examiner found:

"This record affirmatively shows that in this industry in the years in question there has been ease of entry, opportunity for survival, growth, and profit, excellent consumer choice of alternative products, efficiency in production and an active race for improvement of product, redesigning and the introduction of new types with supplier preference by purchasers fluidly responsive thereto, technological advances, and a fluidity and flexibility of market and of competition therein. The evidence is unanimous that competition in the industry in respondent's line of commerce is active, keen, healthy and increasing."

In addition, counsel showed that some of Yale and Town's competitors which had not adopted volume discount programs had increased their business as well as improved the competitive positions.

The changed attitude of the FTC has also been reflected in the language used by the courts.

The *Corn Products Case* and the *Morton Salt Case* were reviewed in *E. Edelmann & Co. v. Federal Trade Commission*²⁹ and, after a discussion of the "reasonably probable" vs. "reasonably possible" tests, it was stated by the 7th Circuit Court of Appeals in 1956:

". . . Although it has been held that there is no automatic *de minimis* exception in section 2(a) which requires the Commission to insert a maximum permissible discrimination in its order . . . it is implicit in the Act that discriminations which are negligible and which at best have a remote effect on competition are not within its prohibitions. . . ."

In *Whitaker Cable Corporation v. Federal Trade Commission*,³⁰ the same court also declared:

²⁷ F.T.C. Docket 6008 (1954).

²⁸ F.T.C. Docket 6232 (1956).

²⁹ *E. Edelmann & Co. v. F.T.C.*, 239 F. 2d 152 (7th Cir. 1956).

³⁰ *Whitaker-Cable Corp. v. F.T.C.*, 239 F. 2d 253 (7th Cir. 1956).

"Congress has not outlawed price differentials per se, unjustified though they may be. The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial."

In *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*,³¹ the 7th Circuit Court of Appeals said:

"And we construe the Act to Require substantial, not trivial or sporadic interference with competition, to establish a violation of its mandate. . . ."

In this case, the court also held the Federal Trade Commission should not have disregarded these facts: (1) Prices of the defendant's competitors were generally lower than the defendant's and there was no evidence of undercutting by the defendant; (2) The keenest kind of price competition among similar manufacturers; (3) The business of the defendant's competitors had increased and three new concerns had enjoyed a steady increase in business; (4) The defendant's share of the available market was reduced from 73% in 1937-38 to 60% in 1941; (5) In 1941 the defendant lost 53% of the control business of 31 customers who previously had standardized on the defendant's controls; and (6) In 1941, 126 of the defendant's oil burner manufacturer customers also purchased competitive controls.

In *Moog Industries, Inc. v. Federal Trade Commission*³² the 8th Circuit Court of Appeals, speaking through Justice Whittaker, now of the United States Supreme Court, said:

"The proper test of injury to competition has been phrased in various ways. In the *Corn Products* case, at page 738, the Court stated, following the *Standard Fashion* case, 'The use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition.' Later, in the *Corn Products* case, at page 742, the Court declared, 'As we have said, 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. . . .' The latter passage was repeated in the *Morton Salt* case, at page 46, although with the qualification that it 'is to be read also in the light of' the statement on page 738 of the *Corn Products* case [334 U.S. at 46n]."

In the *Whittaker-Cable Corp. Case*,³³ the Court criticized the Federal Trade Commission's statement that the seller's standing among its competitors is not a material factor in *connection* with injury to competition. The Court said:

³¹ *Minneapolis-Honeywell Regulator Co. v. F.T.C.*, 191 F. 2d 786 (7th Cir. 1951).

³² *Moss Industries, Inc. v. F.T.C.*, 238 F. 2d 43 (8th Cir. 1956).

³³ *Whittaker-Cable Corp. v. F.T.C.*, 239 F. 2d 253 (7th Cir. 1956).

"Petitioner's relative position in the industry standing alone is, of course, of no particular significance, but in so far as it reflects relative size, this is a material factor which the Commission should consider . . . [and after stating that if the discrimination does not, cannot and will not have the defined effect of injury to or substantial lessening of competition, the Act has not been violated], we do not mean to suggest that the Act may be violated a little without fear of its sanctions but rather that insignificant 'violations' are not, in fact or in law, violations as defined by the Act. If the amount of the discrimination is inconsequential or if the size of the discriminator is such that it strains credulity to find the requisite adverse effect on competition, the Commission is powerless. . . ."

An excellent article on the trend of the Courts and the FTC is found in a recent edition of the Harvard Business Review, written by Mr. W. David Robbins.³⁴

It is not a play-on-words to discuss whether it is the burden of the prosecution to prove that a particular price discrimination may substantially affect competition or that it is the burden of the defense to "justify" the price discrimination.

In the first case, all price discriminations would be condemned. Yet, clearly there is no evil unless competition is endangered. The latter is the basis for the law itself. In the *Moss Case*³⁵ the Court did not distinguish between (a) price discriminations that may substantially affect competition and (b) price discriminations that (i) make only due allowance for the difference in the cost of manufacture, sale, or delivery, (ii) are in response to changing conditions affecting the market for or marketability of a commodity, and (iii) are made in good faith to meet the lower price of a competitor. The latter three situations may be legally *justified* by proof that the conditions exist even though there is also proof—even overwhelming proof—that competition not only *may* be but actually is substantially injured. The first situation (i.e., that described in (a)) is an element of the offense itself. It is the purpose of the statute. Clearly Congress did not intend to intervene in every price variance, as not all price variances are contrary to the public welfare, nor do they all injure competition. Indeed, many preserve competition.

There would seem to be no question but that proof of possible or probable injury to competition must be submitted by the prosecution in an action or proceeding under section 2 of the Robinson-Patman Act.³⁶ Without such proof, the action or proceeding must be dismissed. Further, the proof must be that the potential injury to competition is substantial. It seems also likely that the Supreme Court, as now con-

³⁴ Robbins, *Is Competitive Pricing Legal?*, HARV. BUS. REV. (1957).

³⁵ Samuel H. Moss, Inc. v. F.T.C., 148 F. 2d 378 (2nd Cir. 1945).

³⁶ 15 U.S.C.A. §13(a).

stituted, would require proof of "reasonably probable" rather than mere "reasonably possible" injury to competition.

It is quite obvious then that not all trade practices involving sales at variable prices are condemned.

Where, however, a businessman decides to sell a commodity at variable prices to several purchasers, he should arm himself with facts that would rebut evidence that competition "may" be "substantially" affected by the variable pricing practice.

Some of the matters to which inquiry may be directed are: The extent to which the brand (which is sold at variable prices) dominates the market; the prominence and availability of other brands; the comparability of the available brands; the reputation and warranties of the manufacturers thereof; the predictable actual effect on competition; the seller's sale volume before and after the discrimination, the volume of sales of competitive brands before and after the discrimination, other factors that may have affected the volume of such sales; the profitability of the seller's business (and competitors' businesses) before and after the discrimination, other factors affecting such profits; the relative size of the seller's establishment as compared with the establishments of competitors; the actual competition prevailing among purchasers paying the variable prices, or their customers; factors that may make such competition impossible or improbable such as territory restriction, license restrictions, local restrictions; whether or not competition has remained healthy, whether or not there is the danger that the price variance is a start toward creeping practices that will end in "bullying the market;" whether or not the number of purchasing wholesalers or retailers decreased or whether or not that probability exists; whether the purpose of the pricing practice is to gain immediate sales or to make it impossible for competition to continue; how many competitors are likely to be injured; what class of competitors are to be injured — manufacturers, wholesalers or retailers; in which class is the seller? the plaintiff?

If, from the answers to these questions, the picture that unfolds itself indicates the probability that competition generally will be substantially affected, a violation is present.

If, on the other hand, the picture that unfolds indicates only little possibility of real injury to competition, there is no violation.

The burden is on the prosecution to present the evidence of probable substantial injury to competition — not just to a competitor.