Discriminatory Pricing and the Robinson-Patman Act: Brief Overview, Including Some Exceptions

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Summary

The Robinson-Patman Act (hereinafter, R-P), 15 U.S.C. § § 13, 13a, 13b, 21a, makes it unlawful, with certain exceptions, to knowingly sell goods "in commerce," for use or sale within the United States, at differing prices to contemporaneous buyers of those goods. Enacted during the Depression at the behest of small grocers who feared the buying power of large and growing chain grocers, it is the exception to the notion that the antitrust laws protect *competition, not competitors* in that it generally prohibits precisely the kind of price differentiation which would normally be thought to result from vigorous competition . Allegations of R-P violations may be defended by asserting and proving either that the differing prices reflect only the cost of the seller's manufacture or delivery (the "cost justification" defense); or, that the seller is attempting either (1) to meet the competition of another seller, or (2) enable his buyer to meet the competition of a competitor of the buyer ("meeting competition" defense). In addition, there is also a broad exception to the prohibition against price discrimination when one of the sales is made to any of certain entities listed in the Nonprofit Institutions Act, 15 U.S.C. § 13c, and the goods are purchased for the institution's "own use"; nonprofits may not, however, take advantage of their privileged Robinson-Patman status to purchase commodities at favorable prices in order to compete commercially with entities not so entitled. Further, lower courts have found that health maintenance organizations (HMOs) qualify as organizations entitled to take advantage of the Nonprofit Institutions Act, on the theory that they perform services that traditionally have been considered as "charitable," although the Supreme Court has not had occasion to rule on the status of HMOs.

The "in commerce" language of Robinson-Patman has been held to mean that the interstate commerce requirement is satisfied only when at least one of the two (or more) sales is made "in the stream of commerce"—*i.e.*, across state lines.

This report will be updated as warranted.

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The Robinson-Patman Act (15 U.S.C. §§13, 13a, 13b, 21a) was enacted in 1936 with the specific purpose of creating and maintaining a market atmosphere in which small business could compete effectively, at least in the purchase of commodities, with its larger rivals. The immediate impetus for that Depression-era legislation was the concern for smaller grocery store operators who complained that their businesses were suffering as the direct result of the activities of the chain grocery stores generally and the Great Atlantic & Pacific Tea Company (A&P) particularly. In pertinent part, the statute states that

> 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 sale within 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 the customers of either of them.[1]

Very simply, the Act prohibits sellers in interstate commerce[2] from charging different purchasers different prices for goods of "like grade and quality."[3] The Act applies only to the sale of *goods* (*i.e.*, it does not apply to the sale of services) and only *where each sale is of goods purchased for resale within the United States* (*i.e.*, it does not prohibit price differentials between goods sold for resale within the United States and those sold for export.)[4]

Defenses

Among the affirmative defenses permitted to refute the Robinson-Patman illegality of differential pricing is the so-called "meeting competition" defense, which has at least two levels: a defendant may assert (and must prove) that the lower price charged to a favored buyer was selected in order to permit the seller to meet that of a competing seller (primary line competition); or he may assert (and must prove) that the challenged price was necessary in order to enable his buyer to meet the competition of one of the buyer's competitors (secondary line competition).[5] A seller may not,

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[1] 15 U.S.C. §13(a).

[2] Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974), quoting from Hiram Walker, Inc. v. A&S Tropical, Inc. 407 F.2d 4, 9 (5th Cir. 1969), *cert. denied*, 396 U.S. 901 (1969): "the 'in commerce' language of Robinson-Patman mandates that "at least one of the two transactions [involved in the alleged discrimination] cross a state line."

[3] There has been a great deal of litigation concerning the definition of "like grade and quality," with the conclusion that, at the least, the phrase does not necessarily dictate that brand-name and private-label goods are not comparable. In F.T.C. v. Borden Co., 383 U.S. 637 (1966), for example, the Court indicated that the proper test for determining whether commodities are of "like grade and quality" is a "physical comparison" of the goods as opposed to consumer or marketplace acceptance of them. 383 U.S. at 639-41. See also, Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383 (8th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974).

[4] Fimex Corp. v. Barmatic Products Co., 429 F.Supp. 978 (E.D.N.Y. 1977), *aff'd without published opinion*, 573 F.2d 1289 (2d Cir. 1977).

[5] The Supreme Court has rejected the assertion that an exchange of price information carried out allegedly in order to comply with the R-P mandate that price breaks generally may be granted to favored buyers only as necessary to meet the competition of another seller could not be considered as a price-fixing violation of the Sherman Act (15 U.S.C. § 1 prohibits agreements "in restraint of trade," which phrase has been consistently interpreted to encompass price-fixing—*i.e.*, agreements or conspiracies having an effect on price or output): "A good-faith *belief*, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the ["meeting competition"] defense. While casual reliance on uncorroborated reports of buyers or sales representatives (continued...)

however, knowingly "beat" the prices of a competitor.[6] A Robinson-Patman defendant may also successfully defend his challenged pricing activity if he can show that his price differentials were "cost justified"—*i.e.*, that the price differential made only due allowance for the costs incurred in producing or delivering the goods.[7]

In addition, the 1938 Nonprofit Institutions Act (15 U.S.C. §13c), which expressly permitted price breaks on "purchases of their supplies *for their own use* by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit" (emphasis added), created a broad exemption from the general price-discrimination prohibition:

The underlying intent in granting such an exemption was indisputably to permit institutions which are not in business for a profit to operate as inexpensively as possible.[8]

Robinson-Patman in the Courts: The Non-Profit Exemption

Two Supreme Court opinions, announced in the mid-1970s and early 1980s, provided significant interpretations of the scope of the nonprofit exemption from the Robinson-Patman prohibition. Both involved challenges to the practice of a pharmaceutical supplier who was selling its products

(...continued)

without further investigation may not ... be sufficient to make the requisite showing of good faith, nothing in the language of [the statute] ... indicates that direct discussions of price between competitors is required." United States v. United States Gypsum Company, 438 U.S. 422, 453 (1978) (emphasis added).

[6] The Supreme Court has held that although it is permissible to meet competition, it is a Robinson-Patman violation to knowingly lower prices sufficiently to beat those of a competitor. Conversely, the Court held that, if a seller is not guilty of a Robinson-Patman violation (because, *e.g.*, his lower price is cost-justified, or he actually believed that he was doing no more than meeting competition), the buyer receiving the lower, but not unlawful price is not guilty of violating 15 U.S.C. §13(f), which prohibits the knowing inducement or "a discrimination in price which is prohibited [in 15 U.S.C. §13]." Great Atlantic & Pacific Tea Co. v. F.T.C., 440 U.S. 69 (1979), the so-called "lying buyer" case.

[7] 15 U.S.C. §13(a): "... *Provided*, 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: ...." *See, e.g.*, Texaco v. Hasbrouck, 496 U.S. 543 (1990): The Hasbrouck Court cites several commentators who rather unanimously note that the "exactitude" of the proof required by the cost-justification defense—the need to show that the price reduction(s) did not exceed the seller's actual cost savings—is generally not possible in actual market situations. A proxy for that defense, however, may be the "functional discount": "A supplier need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount [discount for services rendered by, *e.g.*, a wholesaler] did not cause any substantial lessening of competition between a wholesaler's customers and the supplier's direct customers. [But no one] would ... countenance a functional discount completely untethered to either the supplier's savings or the wholesaler's costs." At 561, 562 (fn 18 and surrounding text). Previously, the Court, having ruled that the phrase "like grade and quality"refers to *physical* versus *perceived* identity, noted obliquely that advertising expenses incurred to convince consumers of the superior nature of a branded product, might actually be counted in the cost-justification calculation: "Borden's extra expenses in connection with its own milk are more relevant to the cost justification issue than to the question we have before us." F.T.C. v. Borden Co., *supra*, note 3, at 644 (n. 5).

[8] Logan Lanes, Inc. v. Brunswick Corp., 378 F. 2d 212, 216 (9th Cir. 1967), *cert. denied*, 389 U.S. 898 (1967). Cited with approval by the United States Court of Appeals for the Seventh Circuit in Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., Inc., 632 F.2d 680, 692-93 (7th Cir. 1980), *aff'g.*, 479 F.Supp. 281 (E.D. Ill. 1979). The Seventh Circuit also noted in its discussion at that point that "if a particular purchase is exempt from liability ... both the seller and the purchaser in the transaction are exempt."

to certain hospitals at prices lower than those charged to retail pharmacists in the areas surrounding the hospitals in question.

Abbott Laboratories v. *Portland Retail Druggists Association, Inc.*, 425 U.S. 1 (1976), discussed the "for their own use" phrase in the Nonprofit Institutions Act; the provision was interpreted strictly. The Court relied largely on the "for their own use" language to hold that purchases made by a nonprofit hospital are not all necessarily exempt from price discrimination prohibitions, only those made in order to able to meet the needs of the hospital (*e.g.*, dispensing to inpatients, outpatients treated in the hospital, emergency room use) and those of staff physicians, medical and nursing students, and their dependents: "The Congress surely did not intend to give the hospital a blank check"[9] Although the Court included within permissible uses by the hospital, "genuine take home prescription[s], intended, for a limited and reasonable time, as a continuation of, or supplement to, the treatment that was administered at the hospital to the patient who needed, and now continues to need, that treatment," it specifically excluded from the Robinson-Patman exemption embodied in the Nonprofit Institutions Act "the refill for the hospital's former patient."[10] Further, the Court refused to sanction purchases by the hospital-based physician for use in "that portion of his private practice unconnected with the hospital."[11]

While the primary concern addressed by the Court in *Portland* was the sale of pharmaceuticals to nonprofit hospitals for all uses, including patient care and resale, four years later, in *Jefferson County Pharmaceutical Ass'n., Inc.* v. *Abbott Laboratories*, 460 U.S. 150 (1983), the Court set out the limits of the exception to Robinson-Patman for government purchases; *Jefferson County* presented an issue "limited to state [read "nonprofit hospital"] purchases for the purposes of competing against private enterprise—with the advantage of discriminatory prices—in the retail market."[12] *Jefferson County* stressed that Robinson-Patman's prohibitions against unjustified discriminatory price differentials in the sale of commodities of "like grade and quality" dictated that government [nonprofit hospital] purchases for use in retail competition with private enterprise, as opposed to those for "traditional governmental [hospital] functions," are fully subject to the strictures of the Act. The Court held that purchases of pharmaceuticals by the University of Alabama Hospital for uses other than in the treatment of its patients, as, for example, in retail sales, may not be made at prices which would give the University Hospital an unfair price advantage over its competitors in the retail sale of pharmaceuticals.

Health maintenance organizations were found to be "eligible institutions" under the Nonprofit Institutions Act in *De Modena* v. *Kaiser Foundation Health Plan, Inc.*, 743 F.2d 1388 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985). After acknowledging that the Act "does not explicitly list HPs [health plans]," and that no case law at that time specifically included HPs as "charitable" institutions, the appeals court relied on "precedent defining the term charitable for purposes of the tax code and the law of charitable trusts" to reach its conclusion: "[T]he emergence of social welfare, insurance, and municipal hospitals [has] drastically reduced the number of poor requiring free or below cost medical services . . . .

> This reduction eliminated the rationale upon which the traditional, limited definition of charitable was predicated, resulting in a move towards a less restrictive interpretation of the

[9] 425 U.S. at 13.

[10] *Id.* at 15.

[11] *Id.* at 17.

[12] 460 U.S. at 154.

> term in recent years. Now all non-profit organizations which promote health are considered charitable under the law of charitable trusts. Further, a number of courts have specifically held that health maintenance organizations, such as HPs, are charitable institutions for tax purposes. . . . Given this increasingly liberal interpretation of the term, we conclude that the [defendant] HPs are charitable institutions within the meaning of the Nonprofit Institutions Act.[13]

Further, the court relied on the expression of the "for their own use" criterion propounded by the Supreme Court in *Abbott Laboratories* v. *Portland Retail Druggists*[14] to decide that the "basic institutional function" of a health plan—providing a "complete panoply" of health-care services, including continuing and preventative services, to its members—requires that "drugs purchased by an HMO . . . for resale to its members [be considered as] purchased for the HMO's `own use' within the meaning of the Nonprofit Institutions Act."[15]

Since its enactment, the Robinson-Patman Act has been less than enthusiastically viewed by the Department of Justice, which has believed since 1936 that the Act is not beneficial to consumers. Accordingly, government enforcement of the Act has always been entrusted to the Federal Trade Commission (FTC).[16] In its 1977 REPORT ON THE ROBINSON-PATMAN ACT, the Antitrust Division noted that

> It should not be surprising ... that Robinson-Patman can be shown to have many adverse effects on the economy. To be sure, there are some who do not recognize these effects or who argue that they are outweighed by benefits to specific sectors of the economy, notably small business; to competition by preventing increased concentration in a line of commerce; and to public values in general by establishing as a *legal* norm the concept of `fair dealing' in pricing. But any discussion of the benefits of Robinson-Patman can be made only with a clear understanding of the burdens that the statute places on American economic activity.[17]

In the mid 1970s, the 94th Congress, through an Ad Hoc Subcommittee of the House Small Business Committee, held hearings on and considered proposals to amend or repeal the

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[13] 743 F.2d at 1392 (notes omitted).

[14] "`[T]heir own use' is what reasonably may be regarded as use by the hospital in the sense that such use promotes the hospital's intended institutional operation in the care of persons who are its patients." 425 U.S. at 14 (emphasis in original).

[15] 743 F.2d at 1393. In a note, the court explained the difference between the Nonprofit Institution Act's treatment of prescription refills by hospitals (prohibited) and drug sales to members by HMOs (permitted): refilling prescriptions goes beyond "the basic institutional function of a fee-for-service hospital [which] is to provide temporary medical care for its patients . . . ." *Id*., n. 7 (emphasis added). The United States Court of Appeals for the Tenth Circuit expanded on that reasoning when, in U.S. v. Stewart, 872 F.2d 957 (1989), it refused to let a criminal defendant in a mail-fraud case argue that he had not defrauded or legally injured certain manufacturers because one of his problem sales was made to a hospital buying group that included a member entitled to receive discounted prices: "... it is clear that the large-scale sale of pharmaceuticals at a profit to wholesalers in the private market is not for the "own use" of a hospital buying group." At 961.

[16] According to the Department, "Under existing liaison agreements between the Department of Justice and the Federal Trade Commission, the FTC has taken primary responsibility for civil enforcement of the Act [despite the fact that, theoretically at least, it is equally enforceable by both agencies], leaving the Department of Justice with responsibility for criminal prosecutions under Section 3 [which provides for a $5,000 fine and/or imprisonment for not more than one year]. That section, never intended as a substantive addition to the Act [and not codified], has rarely been invoked." United States Department of Justice, Report on the Robinson-Patman Act, 1977 (hereinafter referred to as Report) at 3. In fact, most price-discrimination activity involves only private litigants.

[17] Report at 8 (emphasis in original).

Robinson-Patman Act.[18] Although the Subcommittee received several draft bills from the Department of Justice to either substantially amend, or to repeal the Act, no legislation was introduced at that time; nor are we aware of any introduced at any time thereafter.

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[18] Recent Efforts to Amend or Repeal the Robinson-Patman Act, Hearings Before the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the House Committee on Small Business, 94th Cong., 1st and 2d sess. (1975, 1976). The hearings resulted in H.R. Rep. 94-1738, 94th Cong., 2d Sess. (1976).