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CURRENT DEVELOPMENTS UNDER THE ROBINSON-PATMAN ACT

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Text of remarks presented by Mr. Sheehy to the Round Table on Trade Regulation at the 1959 annual meeting of the Association of American Law Schools, held at St. Louis, Missouri, December 29, 1959.

I appreciate this opportunity to discuss with you a few of the developments in recent Robinson-Patman Act cases which I consider significant. My comments, of course, are expressions of my personal views and I am not speaking for, or necessarily expressing the views of, the Federal Trade Commission.

The matter of area price discrimination is one which is receiving increasing attention and one on which there is relatively little case law. This despite the fact it unquestionably was one of the major targets of Congress at the time of the passage of both the original Clayton Act[1] and the Robinson-Patman Amendment.[2] This practice of lowering prices in one geographic area while maintaining or enhancing them elsewhere enables large companies with interstate treasuries to subsidize local price cutting without material impairment of their over-all profits.

Federal Trade Commission v. Anheuser-Busch, Inc.[3] is a case of more than usual interest in this field. It is now pending in the Supreme Court, certiorari having been granted in November 1959.[4] Anheuser-Busch lowered the price of its Budweiser Beer in St. Louis and the surrounding St. Louis County area while maintaining its prices in all other sales areas throughout the United States. Its prices were not identical in all areas, but in each it maintained a differential for its "premium" product over the price being charged there for regional or local beers. In the St. Louis territory, however, it adopted a price reduction program which eventually wiped out the differential and placed the premium Budweiser on exactly the same price level as the local beers. The record shows that during the period of the price reduction there was an over-all increase in beer sales in the affected

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1. § 323, 38 Stat. 730 (1914), 15 U.S.C. § 12 (1958).
2. § 592, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).
3. 265 F.2d 677 (7th Cir. 1959).
4. Anheuser-Busch, Inc. v. FTC, 265 F.2d 677 (7th Cir.), cert. granted, 361 U.S. 880 (1959).

market of less than ten percent, but that Anheuser-Busch increased its sales by more than two hundred percent. Of its three principal local competitors, one suffered a slight loss while the other two suffered crippling sales losses. Since this was a section 2(a)[5] case, respondent had available all of the statutory defenses, including the good faith meeting of a competitor's equally low price,[6] which defense was vigorously asserted.

The hearing examiner, however, having found the existence of adverse competitive effect, concluded that "the good faith requirement of section 2(b) of the Clayton Act is not met where the price discrimination, with the required resultant competitive effect, is for aggressive rather than defensive purposes."[7]

The Commission adopted, with some modification, the order of the hearing examiner.[8] The court of appeals, however, found that the Commission had failed to establish a price discrimination in violation of section 2(a).[9] This decision of the court seems to be based on the fact that the seller's customers in the St. Louis market who received the lower price were not in competition with its customers in other markets who paid the higher price. It ignores both the statutory language and prior judicial construction of the section. Clearly the law is aimed at injury in either the primary or secondary lines of competition. The decision of the court of appeals limits the area of measurement to the secondary line.

The matter is now pending in the Supreme Court on one simple question which, as stated in the petition for certiorari, is:

> Whether price cutting in a particular locality by a nationwide seller who maintains higher prices in other localities, with con-

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5. Robinson-Patman Act § 2(a) 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, . . . 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 . . . .

6. Robinson-Patman Act § 2(b) states:

> That nothing herein contained shall prevent a seller rebutting the prima facie case . . . by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . . .

7. Initial decision by Hearing Examiner Frank Hier, October 25, 1956. Trade Reg. Rep. ¶ 26,257 (1956).
8. Trade Reg. Rep. ¶ 26,705 (1957).
9. Anheuser-Busch, Inc. v. FTC, 265 F.2d 677, 681-82 (7th Cir. 1959).

sequent injury to competition in the locality in which the lower price is charged, constitutes a discrimination in price forbidden by section 2(a) of the amended Clayton Act?

And now a few questions growing out of this case:

1. *Does the Commission's decision require a national distributor to maintain a single price throughout the entire country?*

No. The Commission recognized that Anheuser-Busch had different prices in various geographic areas, but its attack was limited to those price differences which it had reason to believe affected competition adversely. And, of course, varying prices in different areas are perfectly lawful when they simply reflect cost differences.

2. *Is evidence of predatory intent essential in an area price discrimination case?*

No. But from my experience I am of the opinion that it will be present in practically every instance and we, of course, shall put in the available evidence on this point. It is of special importance in establishing that the lower price was not made in "good faith" to meet the equally low price of a competitor.

Let us turn now to section 2(d)[10] dealing with the failure to proportionalize the payment for services or facilties furnished by a reseller. In the Federal Trade Commission proceedings against P. Lorillard Company and General Foods Corporation,[11] the facts as stipulated showed that major broadcasting companies, in promoting the sale of radio and television time, entered into separate contracts with certain grocery chains. The broadcasting companies agreed to furnish broadcasting time to the chains, and the chains agreed to conduct week-long promotional displays on products sold in their stores, such products to be selected by the broadcasting companies. These contracts were initiated by the broadcasting companies, and were made *without any prior commitment or agreement* involving anyone other than the grocery chains and the broadcasting companies. Following negotiation of this series of contracts, the broadcasting companies solicited P. Lorillard Company and General Foods Corporation to purchase radio or television time from them for the

10. Robinson-Patman Act § 2(d) states:

That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of any thing of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in 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 or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

11. P. Lorillard Co. v. FTC, 267 F.2d 439 (3d Cir. 1959).

advertising of the products of Lorillard and General Foods. As an added inducement for such purchase, the broadcasting companies offered in-store promotions of Lorillard and General Food products in certain chain stores under contract with the broadcasting companies. Lorillard and General Foods entered into contracts with the broadcasting companies which contained no mention of the in-store promotions or of the broadcasting time which would be furnished to the chains, and provided for the purchase of radio or television time at the regular card rate which they would have had to pay whether or not they received any in-store promotion. In soliciting purchasers of radio and television time, the broadcasting companies furnished them with brochures and circulars pointing up the benefits of the in-store promotions which were available to them if they would buy minimum quantities of broadcasting time at the regular card rate.

The hearing examiner found that the payments by Lorillard and General Foods to the broadcasting companies were for the benefit of the participating chain store customers in consideration for in-store promotional facilities furnished by them. Furthermore, since these or similar benefits were not made available on proportionally equal terms to Lorillard's and General Foods' other customers who competed with the favored customers in the distribution of respondents' products, there was a violation of section 2(d).[12]

On review in the court of appeals, Lorillard and General Foods each denied that it had paid anything to or contracted with the broadcasting companies "for the benefit of" a customer within the meaning of section 2(d) of the Clayton Act. Each further denied having paid for or supported the furnishing of broadcasting time to the chains, and, lastly, denied having adopted, or having become a party to, the broadcasting companies' sales promotions. The court stated that the real question involved was whether Lorillard or General Foods had made payments to someone which actually were of benefit to their customers and not whether they had bound themselves to do so by a legally enforceable contract.[13] In its opinion of June 1959, the Third Circuit made it clear that

> "The purpose of the section here involved was to eliminate all discriminations under the guise of payments for advertising or promotional services, and Congress employed language that would cover any evasive methods. . . ."[14]

It rejected the petitioners' argument that the facts must be considered in the light of technical rules of contract law, and agreed with the

12. Robinson-Patman Act § 2(d), note 10 supra.

13. 267 F.2d at 443-45.

14. Id. at 443

Commission that the enforcement agency may view the contracts as a whole. Certiorari was denied by the Supreme Court.[15]

And now a few questions suggested by these cases.

1. *When the payment for the benefit of a customer is in a form which advertises only the private brand products and good will of the customer and does not advertise in any way the products of the seller, does section 2(d) apply?*

Yes. In this case the benefit which flowed to the chain store from the payment at the standard card rate by the advertiser to the broadcasting company was realized by having the chain's name, or its private brands, advertised on "free" time by the broadcasting company. The chain did not receive an advertising allowance or advertising broadcast time for the product of the respondent. The only thing the respondent received in connection with its own product was the in-store promotion.

2. *Is it a defense to a section 2(d) charge to prove that the respondent had good intentions and good motives in offering an allowance and furnishing a benefit?*

Not only in the brief of the respondents but also in the amici curiae briefs of the broadcasting companies, one of the principal arguments was that the arrangements between the respondents and the chain stores were so indirect that they had no legal connection, and that in any event the advertisers had no intention or motive to violate the law. The court made it clear that motives were immaterial.

3. *When a payment inures to the benefit of a customer on a disproportionate basis, is the supplier's lack of knowledge concerning details as to the scheme material?*

The court in the *Lorillard* and *General Foods* cases stated that section 2(d) "is only concerned with the consequences which flow from an act. If those consequences eventuate, the act from which they result is forbidden." In other words, the respondents' knowledge of the details of the scheme was not material, and it was not necessary for the Commission to find that the respondents knew, or should have known, when they entered into the plan with the broadcasting companies that the respondents in adopting such plan would be supplying the consideration which would constitute compensation for the benefits to be received by a few favored customers to the prejudice of their competitors. The court pointed out, however, that the Commission *did* make such a finding.

15. P. Lorillard Co. v. FTC, 267 F.2d 439 (3d Cir.), cert. denied, 361 U.S. 923 (1959).

Moving now to section 2(e),[16] we shall consider the *Simplicity Pattern*[17] case in which the complaint was drawn in two counts. One contained a section 5 Federal Trade Commission Act charge, and the other a section 2(e) Clayton Act charge. In support of the section 5 charge, it was alleged that respondent gave its large customers a variety of advantages not given to their smaller customers. Among these were more favorable credit, return privileges on unsold merchandise and prepayment of transportation charges. It was alleged that the granting of special benefits to the large customers furthered the control respondent had over their business and prevented competitors from obtaining that business without unfairly discriminating among their own large and small customers. In the second count, charging violation of section 2(e) of the Clayton Act, it was alleged that respondent charged smaller customers for catalogues, pattern cabinets and other equipment which were furnished to its large customers without charge.

The hearing examiner dismissed the complaint as to count one for failure of proof of competitive injury, and on appeal this was sustained by the Commission. In dismissing the charge, however, the Commission made it clear that it was not placing its stamp of approval on the practices, but was basing its decision solely on the ground that the record before it did not sustain the allegation.

With regard to count two, the hearing examiner found that the charges in the complaint had been sustained. In his opinion he pointed out that while count one failed for lack of proof of injury, this was not a defect under count two since section 2(e) appeared to be a per se statute, requiring no proof of injury. Upon appeal from this phase of the examiner's decision, respondent's principal contentions were, first, that the cost justification defense of section 2(a) should also be applicable to section 2(e) and, second, that there was an absence of competition between the large stores that handled patterns for profit and the small stores which carried them as an accommodation to promote the sales of fabrics and accessories.

The Commission rejected both of respondent's contentions although it conceded there was some merit in the second. In rejecting the cost

16. Robinson-Patman Act § 2(e) states:

That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

17. Simplicity Pattern Co. v. FTC, 258 F.2d 673 (D.C. Cir. 1958), cert. granted, 360 U.S. 55 (1959).

justification contention, it cited with approval the holding of the court of appeals in *Elizabeth Arden, Inc. v. Federal Trade Commission*[18] that Congress had determined that practices falling within the standard of section 2(e) were unlawful, and consequently there was no reason for reading into it the limitations of section 2(a) or any other similar limitations.[19]

Since the Commission sustained the hearing examiner's dismissal of count one, the court had before it for review only the matter of section 2(e) and the extent to which section 2(b) might be applicable to it for defense purposes. A divided court held that respondent was entitled within the meaning of section 2(b), to show its cost justification.[20] On certiorari the Supreme Court held unanimously[21] that when discriminations in services or facilities occur between two classes of competing customers, neither the absence of competitive injury nor the presence of cost justification defeats the enforcement of section 2(e). The Court rejected the contention that because the variety stores sold for profit and the fabric stores for accommodation, they were not in fact in competition with each other. It concluded that the presence or absence of competition may not be predicated upon such motives. Let us examine a few questions that may be raised by this decision.

1. *What defense is available under section 2(e) when the showing has been made of a failure to proportionalize services or facilities furnished to competing purchasers?*

Where a respondent is unable to show that the services or facilities were in fact accorded to all competing purchasers on proportionally equal terms, the proviso of section 2(b) permits rebutting the case by showing that they were furnished in good faith to meet the services or facilities furnished by a competitor.

2. *Isn't it a rather narrow construction to say that the proviso of section 2(b) furnishes a defense for section 2(e), but that the main body of that section does not provide any other substantive defense of "justification"?*

No. This, it seems, was basic to the error of the court of appeals which failed to recognize that the first part of section 2(b) was strictly procedural and, as the Supreme Court stated, "was clearly not intended to have any independent substantive weight of its

18. 156 F.2d 132 (2d Cir. 1946).

19. Id. at 135.

20. Simplicity Pattern Co. v. FTC, 258 F.2d 673 (D.C. Cir. 1958), cert. granted, 360 U.S. 55 (1959).

21. 360 U.S. at 62-71.

own."[22] The section, as originally reported to the Congress, dealt only with *price* discriminations. Services and facilities were added on the floor during debate, and it was explained that the purpose was to allow the meeting not only of *price* competition of other competitors, but also their competition in services and facilities furnished.

Thus, the only "justification" for discriminatory furnishing of services or facilities is the good faith meeting of competition. As stated by the Supreme Court:

> . . . The key word 'justification' can be read no more broadly than to allow rebuttal of the respective offenses in one of the ways expressly made available by Congress.[23]

And although a section 2(a) offense of *price* discrimination may be "justified" in various ways, Congress expressly limited the section 2(e) "justification" to meeting competitive offers of services or facilities.

3. *Isn't it inconsistent to require proof of adverse competitive effects in connection with discriminations in price under section 2(a) but to have no similar requirement regarding discriminations in the furnishing of services or facilities?*

No. As the Court points out in *Simplicity,* Congress provided several grounds which might be utilized in rebutting a prima facie case under section 2(a) which it did not make available under section 2(e). The Court disclaimed any intention to review the economic wisdom of Congress, but commented that there was a rational basis for the difference with regard to both competitive injury and cost justification.[24] It expressed the view that Congress may have intended to confine discriminatory practices to the granting of price differentials, where they could be more readily detected and where comparisons with alleged cost savings could be made more easily. The congressional debates lend some support to this reasoning since several references were made to the secret character of the discriminations intended in the main to be reached by subsections (c), (d) and (e) of section 2.

Summary and brevity with respect to recent developments in complex areas of the Robinson-Patman Act are at best risky, but cautiously applied, can be helpful in emphasizing the points which appear to be of particular significance. These cases, and those which were already on the books, mark a course which can be followed without serious difficulty if practices are avoided which push toward the ultimate limits of lawful conduct. Practices which involve price dif-

22. Id. at 71.
23. Id. at 66.
24. Id. at 67.

ferences designed to disrupt competitive conditions in selected areas and which result in varying treatment of competitive customers represent, I believe, calculated risks of violation.

The Robinson-Patman Act is intended to prevent price discriminations and related practices which are unfair to competitors and which adversely affect the ability of customers to compete in the market place. The standard of conduct which it requires is fairness to competitors and equality of treatment among customers, subject to the right to deal in good faith with competitive circumstances which may be encountered, and to promote competition by reflecting certain advantages which may accrue through efficiency of operations. Adherence to such a standard, I believe, will go far toward preserving the vigor of competition.