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NOTES ON THE ROBINSON-PATMAN ACT

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ROBINSON-PATMAN ANTI-PRICE DISCRIMINATION ACT

A cursory reading by either lawyer or layman of the Robinson-Patman Anti-Price Discrimination Act would tend to make him throw up his hands in despair. A more refined analysis of the act, supplemented by a perusal of several commentaries thereon, would have a result not much different. Nevertheless, the law is upon the statute books and though some constitutional objections have been raised with respect to it, the consensus of opinion appears to be that the act stands within constitutional limitations.

Section 1 of the act is in part simply an amendment of the Clayton Act. The amendatory section re-enacts the substance of the old act, but also makes two very important additions thereto.

First—The new act restricts differentials in price made on account of differences in quantity. Under the old act there was no limitation on the price differential which a seller could allow to a quantity customer. Now, however, the vendor must be able to justify any price differential allowed by him to a quantity purchaser by demonstrating that the quantity order resulted in an equivalent savings in the cost of manufacture, sale or delivery.

The keyword is "costs." A court unfriendly to the purpose of the act could largely vitiate it by a particular construction of that word. If, however, due regard is given to the legislative background of the act, the word "costs" must be construed to include overhead so as to prohibit the former practice of giving to a large consumer a price based merely on the actual increased cash outlay occasioned by a quantity order, leaving all of the fixed costs to be borne by other customers.

However, not even this right to give a price differential to a quantity purchaser, where such differential can be satis-

factorily accounted for by a showing of savings in the cost of manufacture, sale or delivery, is unlimited. Where quantity purchasers are so few as to render differentials on account thereof, unjustly discriminatory or promotive of monopoly, the Federal Trade Commission is empowered, after hearings, to establish quantity limits beyond which a price differential cannot be given. This power is justified by analogy to the Interstate Commerce Commission ruling which makes a carload the maximum rate unit. That is, a shipper of one carload is entitled to the same rate as a shipper who uses a whole train.

Second—The second addition is equally important. The old law did not, in the words of Mr. Justice Holmes, apply to "the small dishonesties of trade" affecting only the individuals immediately concerned. It prohibited price discrimination only where the effect of such discrimination might be "substantially to lessen competition" or "tend to create a monopoly."

The Robinson-Patman Act adds a third prohibitve effect, to-wit: Where it might "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." In other words, the new act attempts to prohibit those very small dishonesties of trade referred to by the late justice. It interdicts discriminations which might adversely affect:

(a) Competitors of the seller,
(b) Competitors of the buyer,
(c) Competitors of either buyer or seller.

Congressman Utterback illustrated the purpose of the clause as follows:

"The difference may be illustrated where a non-resident concern opens a new branch beside a local concern, and with the use of discriminatory prices destroys and replaces the local concern as the competitor in the local field. Competition in the local field generally has not been lessened, since one competitor has been replaced by another; but competition with the grantor of the discrimination has been destroyed. The present bill is, therefore, less rigorous in its provisions as to the effect required to be shown in order to bring a given discrimination within its prohibitions."

The definition of "commerce" as contained in Section 1

of the Clayton Act was not amended. Under the Clayton Act only discriminations between purchasers, when both were engaged in interstate or foreign commerce, was prohibited. But the Robinson-Patman Act, by extending the prohibition against discrimination to cases "where either or any of the purchases involved in such discrimination are in commerce" has made it possible to predicate a violation of the law upon a comparison of two sales, one made in interstate commerce and the other in intrastate commerce.

Nor does it appear that the discrimination must be against the sale made in interstate commerce. A discrimination either way is obnoxious to the law. It does not seem that such an attempt exceeds constitutional limitation. The Shreveport case, 234 U. S. 342, is authority for the proposition that intrastate rates cannot be placed so low as to constitute a burden on interstate rates. Though this case dealt with freight rates the analogy to commerce in general seems pertinent. On the other hand, there can be no doubt that the power of the Federal government over interstate commerce is sufficiently plenary to enable it to prevent its being carried on in such a way as to injure intrastate commerce. The senate committee report on this aspect of the bill contained the following language:

"Section 2 (a) attaches to competitive relations between a given seller and his several customers, and this clause is designed to extend its scope to discriminations between interstate and intrastate customers, as well as between those purely interstate. Discriminations in excess of sound economic differences involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them. When granted by a given seller to his customers in other states, and denied to those within the state, they involve the use of that interstate commerce to the burden and injury of the latter. When granted to those within the state and denied to those beyond, they involve conversely a directly resulting burden upon interstate commerce with the latter. Both are within the proper and well-recognized power of congress to suppress."

Section 2 of the act deals with pending rights of action and Federal Trade Commission proceedings under the old act and need not be discussed here.

Section 3 is the penalty section of the act. A literal interpretation of its sweeping provisions would prescribe and subject to a $5,000.00 fine and/or one year's imprisonment, the

doing of several acts which are expressly permitted to be done under the provisos of Section 1. It is to be presumed that the courts will construe this section as being in pari materia with Section 1, and will interpret it as attaching criminal penalties to acts which would otherwise be subject to only civil liabilities. Reassurance that such was its intended effect is found in the house managers' report to the house, where it is said:

"Subsection (h) of the senate amendment, which was not contained in the house bill, was accepted by the house conferees, and, except for the paragraph relating to cooperatives, separately treated in section 4 below, appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys bill (S. 4171). While they overlap in some respects, they are in no way inconsistent with the provisions of the Clayton Act amendment provided for in Section 1. Section 3 authorizes nothing which that amendment prohibits, and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of the amendment provided in section 1, section 3 sets up special prohibitions as to the particular offenses therein described and attaches to them also the criminal penalties therein provided."

But an ominous qualification is found in the report to the house made by Representative Hubert Utterback, of Iowa, at the time of the adoption of the Conference Report:

"It does not affect the scope or operation of the prohibitions or limitations laid down by the Clayton Act amendment provided for in Section 1. It authorizes nothing therein prohibited. It detracts nothing from them. Most of the acts which it does prohibit lie also within the prohibitions of that amendment. In that sphere this section merely attaches to them its criminal penalties in addition to the civil liabilities and remedies already provided by the Clayton Act."

This section was introduced as an amendment to the original Robinson-Patman bill by Senator Borah, who explained its purpose in the following language:

"Mr. President, the amendment is designed to cover certain specific matters which we think ought to be inhibited as a matter of law, certain things which we think ought to be prohibited without the intervention of the discretionary power of the Federal Trade Commission or other bureau. The matters which we propose to prohibit (are those) of allowing discount or rebate or allowance for advertising service charge to one purchaser without making it available to each and every other purchaser. That, it seems to us, should be prohibited as a matter of law, and that there need not be any discretion laid anywhere with reference to the execution of that kind of law. That is the distinction really between the bill which is now pending and the proposed amendment." Congressional Record, Vol. 80, No. 88, April 29, 1936, p. 6594.

As a practical matter it would seem imperative, until otherwise informed by the courts, to construe Section 3 as simply attaching penalties to what Section 1 forbids.

Returning now to the substantive law as set out in Section 1, it is fair to generalize and to say that the standard therein prescribed is one of uniformity of price to all. Deviations are allowable only as expressly permitted or necessarily inferable. How extensive will be the field of exceptions no person can predict. A comprehensive code of fair competition covering all of trade and industry cannot be drafted in a few hundred words. A multitude of situations will necessarily arise where the courts will be compelled to exercise a judicial discretion tantamount to legislation. For example, the act does not expressly sanction differentials in price based on differences in the functions of the respective vendees. Unless such differentials are allowed, the well-established practice of selling to jobbers at a lower price than to retailers, regardless of quantity, is prohibited. In this section of the country it is almost impossible for a manufacturer to confine his sales to any one class of buyers. In areas where there are no jobbers he must sell directly to the retailer, or the consumer. If such is the fact, and if the law be so construed, he must either raise his price to the dealer or lower it to the retailer. The latter course would seriously impair his own profits. The former might well drive an economically valuable middleman out of the picture. It is evident that to discontinue such differentials would have a tremendously disruptive effect on trade. It is therefore almost certain that the courts will construe the word "discrimination" as being inapplicable to such price differentials.

An equally well-established practice is for a manufacturer to put under different brand names products of almost identical grade and quality for which he charges different prices. The proviso in the old act "that nothing herein contained shall prevent discrimination in price between the purchasers of commodities on account of differences in the grade, quality or quantity of the commodity sold, or that makes only due allowance for the difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition" seemed

to sanction such a practice. But in the new act the modifying phrase "due allowance" is moved up so that it now reads "*provided* that nothing herein contained shall prevent differentials which make only due allowance 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.

Such a practice therefore seems to fall entirely afoul of the language of the act, yet it does not seem within its purpose, provided both brands are available to all buyers on non-discriminatory terms.

A third practice, the validity of which is now shrouded in doubt, is the so-called "basing point" practice, e.g., the steel practice of quoting all rail prices on a basis of "Pittsburgh plus."

Another query arises with respect to prices charged to non-competing dealers in different localities. Most commentators on the act appear to assume that, except as justified by different costs, prices must be the same to all vendees, no matter where they are operating. Here and there in the debates, however, an intimation is given that the act is not quite so severe in its effect. Thus, in the house discussion on May 27, 1936, Representative Boileau made the following statement as to the effect of the act, in which statement both Representative Patman and Representative John E. Miller of the Judiciary Committee acquiesced:

"A manufacturer or other seller may give advertising allowances to stimulate trade in one community, but because he gives such advertising allowances in one community he is not required to give an identical, a similar, or a proportional advertising allowance to a customer in another community who is not in competition with the persons in the community in which the advertising allowances are granted. . . . the farm cooperatives can go into one community and grant advertising allowances and they will not be required to give such advertising allowances to customers in other communities. It is true that if they go into Podunk and give an advertising allowance to one concern in that community they will have to give a similar allowance to any other concern in that community, but not on the west side of New York."

The next day Mr. Miller confirmed the following interpretation advanced by Mr. Boileau:

"My understanding of that language is that sellers may not discriminate, but they may, nevertheless, charge different prices in different

communities to persons who are not competitors. In other words . . . a seller many sell a commodity in one community at one price and sell it in another community at a different price, because those two purchasers, even though they are purchasers for resale, are not competitors, and therefore there is no discrimination in price."

Recognizing that strict uniformity under all circumstances and conditions is impossible Congress specifically provided for deviations therefrom:

(a) As previously noted differentials are permitted which "make only due allowance for differences in the cost of manufacture, sale or delivery, resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered." Extended discussion of this proviso at this time would be fruitless. Pending an authoritative construction by the courts the following excerpt from the Report of the House Committee on the Judiciary may prove helpful.

"This proviso is of great importance, for while it leaves trade and industry free from any restriction or impediment to the adoption and use of more economic processes of manufacture, methods of sale, and modes of delivery, wheresoever they may be employed in streams of production or distribution; it also limits the use of quantity price differentials to the sphere of actual cost differences. Otherwise, such differentials would become instruments of favor and privilege and weapons of competitive oppression.

"In the above exception the phrase 'which make only due allowance,' is carried over from the present act, but as coupled with the remainder of the clause, is here extended to limit quantity differentials to differences in the cost of manufacture, sale, and delivery as provided in said subsection (2). It marks the zone within which differentials may be granted.

"The bill neither requires nor compels the granting of discriminations or differentials of any sort, . . . It leaves any who wish to do so entirely free to sell to all at the same price regardless of differences in cost, or to grant any differentials not in excess of such differences. It does not require the differential, if granted, to be the arithmetical equivalent of the difference. It is sufficient that it does not exceed it.

"The following clause from subparagraph (2) should be noted:

"* * * resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *."

"This limits the differences in cost which may justify price differentials strictly to those actual differences traceable to the particular buyer for and against whom the discrimination is granted, to the different methods of serving them, and to the different quantities in which they buy.

"But such differentials whether they arise in operating or overhead cost must, as is plainly stated in the phrase quoted above, be those resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

"This, in its plain meaning, permits differences in overhead where they can actually be shown as between the customers or classes of customers concerned, but it precludes differentials based on the imputation of overhead to particular customers, or the exemption of others from it, where such overhead represents facilities or activities inseparable from the seller's business as a whole and not attributable to the business of particular customers or of the particular customers concerned in the discrimination. It leaves open as a question of fact in each case whether the differences in cost urged in justification of a price differential—whether of operating or of overhead costs—is of one kind or the other. That is, whether or not it answers the above requirements as to differences resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered."

Congressman Utterback's explanation made just prior to the adoption of the bill is also enlightening:

"It is through this clause that the bill assures to the mass distributor, as to everyone else, full protection in the use and rewards of efficient methods in production and distribution in return for depriving him of the right to crush his efficient smaller competitors with the power and resources of mere size. There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and the economies of superior efficiency achieved, nor from which those economies, when demonstrated, may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase and delivery make them possible. They apply as between purchasers of materials for use in manufacture, as well as between those who purchase purely as retail and wholesale distributors. As between purchasers in equal quantities, for example, where one takes multiple store-door delivery, and the other single warehouse delivery, with consequent savings in trucking or other delivery costs to the seller, that saving may be expressed in a price differential. Or where one places a single order calling for periodic deliveries over an extended period of time, whereas the other smaller successive orders requiring more frequent and therefore more costly salesman solicitation, such a difference in cost may be expressed in a price differential. Or where one customer, devoid of storage facilities, requires spot deliveries during the rush of the season, for which the manufacturer must produce in advance and store himself in order to make the fullest utilization of his plant capacity; while another customer orders for delivery in off seasons, handling the storage himself and saving the manufacturer that cost, such a saving may be expressed in a price differential.

"Or where one customer orders from hand to mouth during the rush of the season, compelling the employment of more expensive over-

time labor in order to fill his orders; while another orders far in advance, permitting the manufacturer to use cheaper off-season labor with the elimination of overtime, or perhaps to buy his raw materials at cheaper off-season prices, such savings as between the two customers may likewise be expressed in price differentials. So also where a manufacturer or merchant sells to some customer through traveling salesman solicitation, to others across the counter, and to others by mail order from catalog, price differentials may be made to reflect the differing costs of such varying methods of sale. These examples are illustrative of the way in which the bill permits the translation of differences in cost into price differentials as between the customers concerned, no matter where those differences arise.

"But the bill does not permit price differentials merely because the quantities purchased are different, or merely because the methods of selling or delivery are different, or merely because the seasons of the year in which they enable production are different. There must be a difference in cost shown as between the customers involved in the discrimination, and that difference must be one 'resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.' A customer granted the benefit of a discrimination may receive it only on the basis of the difference between his methods or quantities of purchase and delivery and those of other customers not receiving the differential.

"Such a difference cannot be claimed on the basis of a difference in cost in the seller's entire business with and without the purchases of the customer in question. If his purchases so increase the seller's volume as to make possible a reduction in unit cost upon his entire business, other customers are entitled to share also in the benefit of that reduction. The differential granted a particular customer must be traceable to some difference between him and other particular customers, either in the quantities purchased by them or in the methods by which they are purchased or their delivery taken.

"Where the methods of delivery are the same, but the distance is different, price differences in such cases may of course be made to reflect those differences. In such case the price is really paid both for the commodity itself and for its delivery, and the differing freight rates or commercial trucking rates applicable to the different delivery distances involved, are of course differences in cost which may be reflected in differences in such delivery prices."

(b) Price changes are permitted which are made "In response to changing conditions affecting the market for, or the marketability of, the goods concerned such as, but not limited to, actual or imminent deterioration of perishable goods, obsolescence of seasonable goods, distress sales under court process or sales in good faith in discontinuance of business in the goods concerned."

Under this proviso would probably be permitted temporary changes in price made for a variety of substantial reasons, so long as such changes are made applicable to all customers and are not used as a mere cloak to hide a discrimination. Discounts to move goods and sustain production during dull business and discounts to raise ready cash have been suggested as possible additional instances of application.

(c) Differentials are permitted where "made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor." However, to show that a discount was made for the foregoing reasons does not constitute a complete defense to an alleged violation of the law. Such showing operates merely as evidence to rebut the prima facie case made by merely establishing the discrimination. It cannot be used as a loophole to avoid the entire effect of the act. A national manufacturer may properly show that he reduced his prices in a particular locality to meet local competition and thus rebut the prima facie case made by the discrimination; but he cannot justify a price-cut to the Walgreen chain by showing that another manufacturer makes a similar cut. Two wrongs cannot make a right. This proviso is of tremendous importance to all parties affected by the act, but until its scope has been clarified by the courts it must be employed with caution.

(d) Selection of customers "in bona fide transactions and not in restraint of trade" is still permissible. But, as said by Judge Utterback:

> "This permits, however, the selection of customers and not the selection of what shall be sold to them. It is intended to protect the buyer against customers who are troublesome in their methods or insecure in their credit. It does not permit the buyer, once he has accepted a customer, to refuse discriminatorily to sell to him particular distinctions of quality, grade, or brand which the seller has set aside for exclusive sale at more favorable prices to selected customers in evasion of the purposes of this bill. Nor does it permit absolute refusal to sell to particular customers, where the facts are such as to show that it is done for the purpose of injuring or destroying them and that the elimination of their competition effects a restraint of trade."

Under the old act certain practices had grown up which, if permitted to continue, would largely nullify the effect of the amendatory act. So, in addition to the general prohibition

against discriminations in price for commodities of like grade in quality, the following specific prohibitions were added:

"(Sec. 1.3. Brokerage).—(c) 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, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is 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."

The effect of this section was summarized by Paul F. Myers, counsel for The National Food Brokers Association, as follows:

"First, it permits the seller to pay to his broker or agent compensation for services actually rendered in behalf of the seller.

"Second, it permits the buyer to pay to his broker or agent compensation for services actually rendered in behalf of the buyer.

"Third, it prohibits the payment or allowance by the seller of any brokerage or sales compensation, or any allowance or discount in lieu thereof, directly to the buyer.

"Fourth, it prohibits the payment or allowance of brokerage or sales compensation, or any allowance or discount in lieu thereof, directly from the buyer to the seller.

"Fifth, it prohibits the payment or allowance of brokerage or sales compensation, or any allowance or discount in lieu thereof, by the seller to an agent or intermediary acting in fact for or in behalf of or subject to the direct or indirect control of the buyer.

"Sixth, it prohibits the payment or allowance of brokerage or other sales compensation, or any allowance or discount in lieu thereof, by a buyer to an agent or intermediary acting in fact for or in behalf of or subject to the direct or indirect control of the seller."

Advertsiing allowances and the like are governed by the following sections:

"(Sec. 1.4. Payment of buyer for services or facilities).—(d) That it shall be 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 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.

"(Sec. 1.5. Furnishing of services or facilities by seller).—(e)

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."

These two sections were explained in the Report of the Senate Committee on the Judiciary in the following language:

"Still another favored medium for the granting of oppressive discrimination is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances in purported payment of advertising and other sales promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so.

"Section 2 (c) of the bill addresses this evil by prohibiting the granting of such allowances unless made available to all other customers of the seller concerned on proportionately equal terms, or unless in the rendition of such services the customer's own business is kept out of the picture. The first of these conditions is designed to rob this practice generally of its discriminatory character, and the second to leave open a legitimate field for the use of customer services as mere employees or agents in local advertising, in lieu of salaried representatives sent it from without, or of other local personnel strangers to the seller's acquaintance. The frequency with which limited advertising appropriations admit of their expenditure only in selected communities makes it important both to the seller and to the local community to preserve this freedom so long as it is properly protected against discriminatory use.

"The phrase 'proportionally equal terms,' used in clause 1 of section (c), is designed to prevent the limitation of such allowances to single customers on the ground that they alone can furnish the services or facilities in the quantity specified. Where a competitor can furnish them in less quantity, but of the same relative value, he seems entitled, and this clause is designed to accord him, the right to a similar allowance commensurate with those facilities. To illustrate: Where, as was revealed in the hearings earlier referred to in this report, a manufacturer grants to a particular chain distributor an advertising allowance of a stated amount per month per store in which the former's goods are sold, a competing customer with a smaller number of stores, but equally able to furnish the same service per store, and under conditions of the same value to the seller, would be entitled to a similar allowance on that basis."

To deter buyers from importuning sellers to violate the act, the following section was inserted:

"(Sec. 1.6. Wilful inducement or reception of discrimination in price).—(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

CONCLUSION

Any specific recommendations are difficult. Clients should be informed of the general purpose and intent of the law, should be advised to review their trade practices in the light of such purpose and intent, and if doubts arise to consult counsel. In the absence of glaring violations the government will undoubtedly seek a construction of the law by a series of test cases against the larger concerns, and will leave the "little fellow" alone until a judicial construction of the act has been obtained. In making recommendations to clients, however, attorneys should not lose sight of the fact that violations of Section 1 of the act are subject to all of the penalties provided for in the Clayton Act, including the payment of three-fold damages to any person injured in his business or property by reason of the violation thereof.

TO THE LAWYERS OF DENVER:

As you are aware, the DENVER BAR ASSOCIATION voted to conduct a bar primary for the selection of candidates for District Judge. The primary was conducted, and the following were chosen as the bar candidates:

OTTO BOCK	STANLEY H. JOHNSON
HENLEY A. CALVERT	FRANK McDONOUGH, SR.
FRANK L. HAYS	CHARLES C. SACKMANN

ROBERT W. STEELE

All of these candidates were successful in the September primary election of their respective parties and their names will appear, with others, on the ballot in November.

The aim of the Bar Association is to remove judicial office from partisan politics. This is a non-partisan recommendation. You are asked to impress the importance of a non-partisan judiciary upon all with whom you come in contact. Pamphlets concerning the Bar candidates are being printed and will be sent to each member. You are asked to distribute them as far as possible.

ERNEST B. FOWLER, *President.*