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## Rowe: Price Discrimination Under the Robinson-Patman Act

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## BOOK REVIEWS

"Price Discrimination Under the Robinson-Patman Act." By Frederick M. Rowe:<sup>1</sup> Little, Brown & Co., Boston, 1962, The Trade Regulation Series, pp. xxx, 675. \$22.50.

By a margin of one year, the publication of this volume missed the twenty-fifth birthday of the Robinson-Patman Act (1961). However, it would not have constituted an appropriate silver anniversary present for either the original promoters or the subsequent enforcers of the legislation, for the author combines a valuable legal text with searching and almost unvaryingly critical commentary on the objectives and techniques of Mr. Patman (and his allies of twenty-five years ago) and the Federal Trade Commission.

That the bar has long needed a work of the instant sort requires no extended demonstration in view of the fact that it is the *only* treatment of the Robinson-Patman Act, of comparable scope and depth, which has become available since the enactment of the legislation. The numerous law review articles treating separate phases of the field to one side, the subject has heretofore been dealt with as a whole only in a pamphlet work of under 200 pages.<sup>2</sup>

The present text is one of a so-called "trade regulation series" which in the words of its editor seeks to "present the law with the greatest possible clarification as a guide for the general practitioner who has little experience in this field . . . and for the specialist who desires a ready reference tool." (p. viii.) The problems posed by these not entirely compatible dual objectives, accentuated as they are by this most confusing of all laws in a field noted for its generality and uncertainty, have been successfully surmounted by Mr. Rowe. Of all the texts in this series to date,<sup>3</sup> his promises to be the most universally valuable.

The scheme of presentation of the material follows more or less directly the order of the statute itself. After an opening chapter on the general legislative history, the author briefly outlines some of the economic and marketing realities in and to which the oft-times ambiguous provisions of the act must be applied by the courts and the FTC. Analysis of the first section of the act (the section 2(a) price discrimination provision) commences with a study of the jurisdictional requirements (*i.e.*, the necessity for the challenged transaction to involve a sale of "commodities," of "like grade and quality" "in interstate commerce"). Succeeding chapters consider the factors entering into a determination of what constitutes a "price" discrimination and deal with the necessity for proof of an injury to compe-

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<sup>1</sup> Member of the District of Columbia Bar and of the firm of Kirkland, Ellis, Hodson, Chaffetz & Masters.

<sup>2</sup> Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act, Committee on Continuing Legal Education (ALI) (1952, rev. eds. 1953, 1959).

<sup>3</sup> Lamb & Kittelle, Trade Association Law and Practice (1956); Fugate, Foreign Commerce and the Antitrust Laws (1958); Hale, Market Power: Size and Shape Under the Sherman Act (1958); Fulda, Competition in the Regulated Industries, Transportation (1961).

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tion, either on the seller level (the so-called "primary line" injury) or on the buyer level (the "secondary line"). The "meeting competition" and "cost justification" defenses are then analyzed. The illegal brokerage (section 2(c)), the advertising payments and services sections (sections 2(d) and (e)), the buyer liability provision (section 2(f)) and the provision for criminal responsibility (section 3) are treated in detail and in that order.

In view of the express objective of the trade regulation series to serve the general practitioner who has little experience in the field, a cautionary observation may be in order. The section-by-section treatment of the act means that, unlike a text on landlord and tenant, for example, resort to a particular chapter or section of the book will not necessarily produce a helpful or complete answer. Thus, a problem involving different prices by a seller to customers might well involve, among other things, questions of whether the sales were in commerce (Chapter 4), whether there was injury to competition on the seller or buyer level (Chapters 5-8), the availability of a meeting competition defense (Chapter 9) or even whether a person who is a customer of the buyer or competitor of the seller has standing to bring a treble damage action (Chapter 16).

The particular merit of the work derives, in addition to the thoroughness of its treatment of the issues and collection of the relevant case law, from the statutory history-and-purpose-centered approach to each provision of the act. Rejecting any attempt at merely summarizing the purport of the existing decisions, as productive of a misleading impression of a nonexistent certainty, the author commences the discussion of each section of the act with a detailed review of the legislative history of the particular provision. When, as is frequently true, the subsequent exposition reveals still undefined areas of the law, the reader is better equipped to form his own judgment on the intelligible and defensible possible interpretations.

This completeness of the references to the statutory history<sup>4</sup> produces one of the most valuable incidental benefits of the text, particularly to the antitrust specialist: in dealing with statutory history hereafter reference to and citation of this text should eliminate the need for resort to the Congressional materials which often are not readily available.

It is noteworthy that the presentation of this complete legislative background in one place demonstrates, as its partial quotation in the cases has never done, how much the source and purpose of this legislation was anti-competitive in import. Although helping the "little businessman" against the "big chains" may have inspired its sponsors, it is clear that they sought in the Robinson-Patman Act (unlike the Sherman and Clayton Acts) to accomplish such a result in a number of respects by restricting rather than fostering the competitive process.

So far as the author's handling of the case law (both court and FTC decisions) is concerned, the work seems to be extremely complete and accurate, thereby fulfilling the objective of providing the antitrust practi-

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<sup>4</sup> The volume contains, in addition to a general summary of legislative history (Chapter 1), a detailed analysis of the history of each section (in the relevant chapters) and an appendix which sets out some seven bills which culminated in the Robinson-Patman Act, two relevant Senate Judiciary Committee reports and the Conference Committee report.

tioner with a ready reference tool.<sup>5</sup> The provision for a pocket part promises that the utility of the volume in this respect will be maintained in the future.

By virtue of the uniqueness and competence of his book, which has been noted above, the author's views on the as yet unresolved areas of the law are bound to have significant weight in future decisions of the courts, if not of the Commission. The viewpoint of the author (an attorney representing respondents<sup>6</sup> and one believing that the act, in its original conception and subsequent application, has more often than not been anti-competitive in effect (Chapter 17)) is neither concealed nor a bar to reasoned appraisals.

With respect to certain interesting questions, which either have been or currently are the subject of judicial consideration, the author endorses the decisions of the courts of appeal reversing Commission opinions holding (1) that the meeting competition defense, although available under section 2(e) (furnishing of promotional services) provision, is not available under the conceptually identical section 2(d) (p. 554 n.80); (2) that the defense is unavailable in cases involving the "obtaining" of new customers as distinct from "retaining" old customers (p. 419) and (3) that the benefits of section 2(b) cannot be claimed by a gasoline distributor with respect to reductions to his retailer made to enable the latter to meet lower prices accorded by a competitive distributor to the latter's retailer (pp. 240, 247).<sup>7</sup>

In other areas the author has some interesting suggestions. He defends the granting of discounts to co-operative buying organizations representing a number of independent small retailers, at least where the co-operative furnishes genuine wholesaling services such as warehousing or delivery. Viewing the Commission's denial of any group buying advantages in such cases as tending to decrease rather than increase competition by depriving their members of the advantages of size which the large chain organization can secure without running afoul of the act,<sup>8</sup> he calls for a sympathetic judicial refurbishing of section 4 of the act originally intended as an exemption for such organizations.

On the troublesome problem of a manufacturer's lower price for private brand goods produced for a large retail organization as compared with the

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<sup>5</sup> So far as those cases with which the reviewer is personally familiar, he can furnish witness that they are all cited and attributed exactly to the propositions for which they stand, a report which cannot always be made by a reviewer.

<sup>6</sup> E.g., p. 322, discussing the defense of the proviso permitting sales at differential prices when due to changing conditions affecting product markets or marketability: ". . . [T]he full potentiality of this proviso . . . as a defense to price discrimination charges. . . ."

<sup>7</sup> The related difficult problem presented by the distributors' efforts to limit the area of the price-cutting with a resultant possible effect on dealers in the immediately adjacent area is not commented on. See *American Oil Co.*, 3 Trade Reg. Rep. ¶ 15,961 (Dkt. 8183 June 27, 1962). The problem is one which must be resolved on a case by case basis in which, however, it is submitted that the guiding principle should be that the courts will not substitute their judgment for what they find to be a bona fide reasonable business judgment on the selection of the retailers to whom the lower price assistance is given. Cf. *U.S. v. Trenton Potteries*, 273 U.S. 392 (1927); *Orbo Theatre v. Loew's Inc.*, 156 F. Supp. 770, 778, aff'd per curiam, 261 F.2d 380 (D.C. Cir. 1958).

<sup>8</sup> See Commissioner Elman dissenting in *Central Retailer-Owned Grocers, Inc.*, 3 Trade Reg. Rep. ¶ 15,896 (Dkt. 7121 May 14, 1962).

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manufacturer's similar advertised and branded item (usually sold to the smaller retailers), the writer makes one of his most original contributions; a "commercial fungibility" standard is proposed, under which the two items would be held to be of "like grade and quality" (and therefore present, all other things being equal, an actionable discrimination) if the "business community" would consider them to be substantially interchangeable at the same price (p. 253).<sup>9</sup>

Again, with regard to the crucial inquiry in a section 2(a) price discrimination case, whether the differential had any significant impact on the vitality of competition (either on the seller or buyer level), the text analyzes a series of factors which could, in appropriate cases, be resorted to to demonstrate the lack of any such injury (p. 253).<sup>10</sup>

The discussion (Chapter 10) of the cost justification defense is particularly complete. The legislative and case history, the summary of the various areas where possible cost savings can be derived, and the accounting techniques and problems involved in demonstrating a cost justification defense, are fully spelled out. However, the writer reaches an essentially negative conclusion as to the practical utility of the defense, not only for the reason customarily assigned (*i.e.*, Commission hostility)<sup>11</sup> but because of (1) the unlikelihood, in the realities of modern marketing, that the quotation of the particular challenged price was actually inspired by any considerations of cost savings and (2) the inability of the accounting profession to furnish objective and persuasive answers to the question, involved in most cost justification situations, of allocating joint costs.

For this reviewer, one of the most interesting insights was noted in connection with the discussion (Chapter 14) of the buyer liability provision (section 2(f)) of the act. In a series of recent decisions, the Federal Trade Commission, asserting that section 2(f) does not reach buyer inducement of discriminatory advertising and promotional allowances, has, nevertheless, held such buyer action unlawful under Section 5 of the Federal Trade Commission Act<sup>12</sup> (15 U.S.C. section 45(a)) as "unfair methods of competition." (p. 432 et seq.) Although the particular cases involved rather naked applications of large buyer power, for which little defense could be made, the Commission's use of section 5 to attack such transactions, on

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<sup>9</sup> The possible difficulty with this test is that it would legalize a situation where the seller furnishes the large buyer a private brand at a price well below any advertising values attributable to the branded item. The author recognizes this problem but feels it would have to be accepted in the interests of a greater degree of competitive flexibility (p. 76 n.136).

<sup>10</sup> P. 186 et seq., listing as to secondary line injury: (1) intervening economic factors dispelling the causal effect of the supplier's price differential on the customer level; (2) offsetting costs neutralizing a customer's nominal price advantage; (3) competitive inertia by customer as the real cause of injury; (4) availability of lower price from other sources. As to similar factors precluding injury on the primary lines, see p. 163, et seq. The text does not observe, as it might, the unlikelihood of any, much less all, of these factors receiving any recognition whatsoever under the current tenor of FTC decisions.

<sup>11</sup> See Report of the Attorney General's National Committee to Study the Antitrust Laws 172 (1955).

<sup>12</sup> 38 Stat. 719 (1925), 15 U.S.C. § 45(a) (1958).

the sweeping rationale that the latter provision is available to bar anything violative of the "spirit" (even though not the language) of the other antitrust laws, has been criticized as a potentially dangerous expansion of that section, the consequences of which can neither be foreseen nor adequately limited by the courts.<sup>13</sup> Mr. Rowe points out that this whole unwelcome extension of section 5 coverage was unnecessary because the legislative history and earlier decisions of the Commission indicate that section 2(f) was intended to reach all forms of price discrimination under the Robinson-Patman Act, including disproportionate promotional allowances. It seems reasonable to conclude that had the Second Circuit been aware that the Commission had available to it the more appropriate section 2(f) provision through which to invalidate the buyer exactions involved in the *Grand Union* cases, it would not have approved the Commission's utilization of section 5 for that purpose.

The final chapter of the book is devoted to an evaluation of the history of enforcement of the act by the FTC, the agency chiefly responsible for its administration. A devastating statistical analysis shows that in the twenty-five years of enforcement, fifty-six per cent of the Commission complaints (and sixty-three per cent of the orders secured) have been under the least significant provisions of the act, such as section 2(c) (brokerage) and section 2(d) (advertising allowances). (p. 535 et seq.) (Section 2(c), both in its conception and Commission enforcement, receives the author's severest castigation as class legislation of an obvious sort having the design and effect of insulating one part of the business community (principally, food brokers) from possible competition from more efficient and flexible means of distribution.)

The statistics reveal that the large buyers, against which the Robinson-Patman Act was most explicitly directed have been spared virtually any cause for concern: only 3.6 per cent of all complaints in the period have been directed against buyers. Perhaps most striking of all is the revelation of the ironical fact that, although the act was originally designed to help the "little businessman," the bulk of the enforcement activity and orders secured have been directed against the relatively small concern. (p. 542.) Accentuating this lopsided enforcement record has been the tendency of the Commission, in a given case, when confronted with two possible interpretations of a provision of the act, to choose the one most restrictive of competition. (p. 543.)<sup>14</sup>

Although calling for a correction of this past history by a change of focus of Commission enforcement activity, Mr. Rowe, nevertheless, offers no concrete program for adoption by the Commission. His only suggestion (that large buyer cases receive greater emphasis in the future), while generally sound, offers no sure answer to the Commission's problem of rationalizing the act with the other antitrust laws.<sup>15</sup> Undue restriction of buyer activity may well thwart that "sturdy bargaining between buyer and seller" which

<sup>13</sup> Oppenheim, *Harmonization of Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 17 A.B.A. Antitrust Section 231 et seq. (1960).

<sup>14</sup> Cf. Hally, *The Meeting Competition Defense in Robinson-Patman: FTC v. The Courts*, 3 B.C. Ind. & Com. L. Rev. 201 (1962).

<sup>15</sup> *FTC v. Motion Pictures Advertising Co.*, 344 U.S. 392, 406 (1952).

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the Commission has been enjoined to leave play for.<sup>16</sup> To forestall any such result, the economic and marketing situation presented in a given case must be carefully analyzed and there must be insistence among other things, on according a liberal scope to the meeting competition defense and adequate proof of the requisite injury to competition (not merely individual competitors).

Possibly the only answer that can be given is for the Commission and, to a greater extent, the courts, to act, during the next quarter-century, with a greater consciousness of the fact that indiscriminating application of the provisions of this act may restrain more competition than it fosters.

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<sup>16</sup> *Automatic Canteen Co. v. FTC*, 344 U.S. 809 (1952). [And see Commission itself to the same effect.] *Accord*, *Union Carbide Corp.*, 3 Trade Reg. Rep. ¶ 15,503 (Dkt. 6826 Sept. 25, 1961) (Clayton Act § 7); *Snap-On Tools Corp.*, 3 Id. ¶ 15,546 (Dkt. 7116 Nov. 1, 1961) (F.T.C. Act § 5).