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# Trade Regulation—Robinson-Patman Act—Substantial Lessening of Competition Not Proven by Short-Term Discounts.—American Oil Co. v. FTC

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which he has recommended, but rather only that the adviser must disclose his trading on his own account that is in any sense inconsistent with the recommendation he has given his clients.[30]

An adviser will be unable to circumvent the holding of the principal case by having his wife or other member of his immediate family trade in the stocks recommended, if such trading is not consistent with the advice offered. In the case of *In Re Midland United Co.*,[31] where the wife of an attorney, who had confidential information concerning securities, was trading in these stocks, the court said it was justified in

> extending the principles applicable to the conduct of the fiduciary to the fiduciary's wife. The settled rule in equity is that where a fiduciary is barred from compensation the prohibition extends to his wife.[32]

However, if the fiduciary, in our case an investment adviser, has no knowledge of his wife's dealings in the securities, there is authority that such transactions will not constitute fraud.[33] The *Torr* case stated that disclosure to the client is required if the adviser is being paid by an issuer or other interested party to favorably report a stock. An eventual result of *Torr* and *Capital Gains* would be to require an adviser to disclose any substantial interest he might have in a corporation whose stock the adviser recommends.

The Court, in this first contested case concerning fraud under the Investment Advisers Act, while not prohibiting all trading on personal accounts in recommended stock, has required disclosure where there is any possibility of a conflict, and in so doing has followed the course which other courts have taken in similar cases under the related securities acts. The result reached in this case is desirable in light of the possible opportunities for abuse by investment advisers and the lack of flexible means and remedies to protect the buying public.

DWIGHT W. MILLER

**Trade Regulation—Robinson-Patman Act—Substantial Lessening of Competition Not Proven by Short-Term Discounts.—*American Oil Co. v. FTC.***[1]—This was a petition from an FTC cease and desist order wherein the petitioner was charged with price discriminations in violation of Section 2(a) of the Robinson-Patman Act.[2] American Oil Co. employed as part

[30] Supra note 1, at 196.
[31] 159 F.2d 340 (3d Cir. 1947).
[32] Id. at 347.
[33] In re Philadelphia & Reading Coal & Iron Co., 61 F. Supp. 120 (E.D. Pa. 1945).

[1] 325 F.2d 101 (7th Cir. 1963).
[2] 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958). Section 2(a) of the act, as amended, provides in pertinent part:

> 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 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 competi-

of its marketing techniques a Competitive Price Allowance (CPA) which enabled it to grant discounts in the wholesale price to individual dealers whenever necessary.[3] The complaint focused upon a local (Georgia) price war during which American granted a lower "CPA" to its Smyrna-area dealers than it did to its Marietta-area dealers, both groups later found to be in competition with each other. This price discrimination, ranging from 3.5 cents to 11.5 cents per gallon in favor of Smyrna dealers over Marietta dealers, lasted for a seventeen day period. On October 28, 1958, the price war ended and American's "CPA" in the area again became uniform. Following a hearing on a complaint, the FTC found American's price discriminations constituted a violation of section 2(a) and the Commission issued a cease and desist order against American. On petition to the U.S. Court of Appeals, the 7th Circuit HELD: Order Set Aside. The record in the case did not contain substantial evidence to warrant the conclusion that American's temporary price reductions, although discriminatory, precipitated any reasonable probability of substantial injury to competition. In reaching their conclusion, the court stated that they did not mean to imply that a showing of intended permanency of price discrimination is necessary to establish a section 2(a) violation; but that there must be something more than an essentially temporary impact on certain competitors. Probative analysis must reveal a causal relation between the price discrimination and an actual or reasonably probable injury to *competition* in the context of the factual situation involved.

It appears well established that the courts construe section 2(a) in a literal sense as being aimed at price discrimination which may have an adverse effect on competition, and not that which may have an adverse effect on an individual competitor.[4] The controversy as to whether section 2(a) is concerned with injury to competition or injury to competitors sprang from the broad dicta of Mr. Justice Black in the landmark *Morton Salt* decision where the scope of the statute was expanded to include the *possibility* of harm.[5] However, the FTC has disclaimed the *Morton Salt* dicta, and it has, as in the instant case, adhered to the position that the statutory test is injury to competition,[6] at least so far as "secondary line" competition is concerned.[7] This interpretation of section 2(a) by the FTC has drawn substantial support from a long line of recent decisions which indicate that the courts as well have steered clear of the dicta in *Morton Salt*, and interpret the act as aimed at the preservation of competition and its concern with the

tion with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

[3] As the "CPA" increased, the price paid for the gasoline by the dealers proportionately decreased, and consequently as the dealers maintained a gross margin of profit of five cents per gallon their resale price was directly measured by the amount of the "CPA" extended.

[4] FTC v. Sun Oil Co., 371 U.S. 505 (1963); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835 (7th Cir. 1961).

[5] FTC v. Morton Salt Co., 334 U.S. 37, 49 (1948).

[6] Purex Corp., 51 F.T.C. 100, 112 (1954).

[7] Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1959).

individual is but incidental.[8] These conclusions are summarized by the Seventh Circuit in the landmark *Anheuser-Busch* decision in 1961:

> The Act is really referring to the effect upon competition and not merely upon competitors . . . . In this respect § 2(a) must be read in conformity with the public policy of preserving competition, but it is not concerned with mere shifts of business between competitors. It is concerned with substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses. The competition which is sought to be protected by this section is a contest between sellers for the buyer's contest for trade.[9]

The courts have felt that directing the purpose of the Act toward the protection of competition is fundamental to a reconciliation of the Robinson-Patman Act with over-all antitrust policies.[10] However, while this distinction must be kept in mind, it should not be forgotten that although the literal purpose of the Act was to prohibit price discriminations which may be injurious to competitive enterprise, the unique feature of the Act was its design to afford protection to *individual* competitors in "secondary line" competition against such price differentials in order to preserve competition generally, and to protect small business in particular.[11] "Secondary line" is the term given to the competition between the seller's buyers and their customers as opposed to "primary line" competition between the seller and other sellers. While the statutory test reprehends adverse effects on competition, a seller's discriminatory pricing may by its nature simultaneously injure a competitor and competition.[12] It is with this basic Robinson-Patman philosophy in mind that the holding of the instant case must be evaluated.

By the prevailing view price discrimination per se does not constitute a violation of section 2(a)[13] and hence proof of that without more is insufficient.[14] The Commission has always construed the Act as placing the

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[8] FTC v. Nat'l Lead Co., 352 U.S. 419 (1957); Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959); Standard Motor Prod., Inc. v. FTC, 265 F.2d 674 (2d Cir. 1959); E. Edelmann & Co. v. FTC, 239 F.2d 152 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958).

[9] Anheuser-Busch, Inc. v. FTC, supra note 4, at 840.

[10] Automatic Canteen Corp. v. FTC, 346 U.S. 61, 74 (1954); Standard Oil Co. v. FTC, 340 U.S. 231, 248-49 (1951); Ben Hur Coal Co. v. Wells, 242 F.2d 481 (10th Cir.), cert. denied, 354 U.S. 910 (1957). See also, Rowe, Price Discrimination Under The Robinson-Patman Act, 130 (1962).

[11] FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 544 (1960); H.R. Rep. No. 2287, 74th Cong., 2d Sess. (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. (1936); Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act, 8-11 (1959).

[12] Moore v. Mead's Fine Bread Co., 348 U.S. 115, 119-20 (1954); E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944).

[13] FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945); Anheuser-Busch, Inc. v. FTC, supra note 4.

[14] A prima facie case of violation of section 2(a) requires proof of the following matters:

> The first part of Section 2(a) sets out the elements necessary to establish a violation of the law. They are: (1) discrimination in price between different purchasers of commodities of like grade and quality; (2) certain jurisdictional

onus upon it ("plaintiff") for proving that the effect of a price discrimination will be to substantially lessen or injure competition.[15] This interpretation has also been followed by the courts,[16] notwithstanding the aberational view set down by the 2nd Circuit in the controversial *Moss* decision.[17]

The pivotal portion of section 2(a) in the instant case is "substantially to lessen competition," and it was on this ground that the FTC according to the 7th Circuit failed to sustain its burden of proof. It is generally conceded that the Act requires substantial and not trivial or sporadic interference with competition to establish a violation of section 2(a).[18] As to what constitutes a substantial lessening of competition will naturally depend on the particular facts of each case.[19] However, various guideposts have been erected by the courts in ascertaining this often times elusive standard. The traditional position was laid down by the Supreme Court in 1922 when they held that the Act was aimed at price discriminations which would *probably* lessen competition.[20] However, the area appeared to cloud when the Court in *Morton Salt* held that evidence sufficient to support a finding of reasonable *possibility* of injury to competition is enough to satisfy the Act.[21] The substitution of this test for the formerly accepted reasonable probability test was severely criticized by the dissent to that decision.[22] Notwithstanding *Morton Salt*, the FTC has not relied on the possibility test as a doctrinal proposition.[23] Although there may be an occasional loose reference to possibility rather than probability, the terms are used interchangeably, but have not been applied by the courts in a doctrinal sense either.[24] One thing is quite clear however, in a proceeding under section 2(a), proof of actual injury to competition is neither necessary nor required, for it is sufficient if the effect of the discriminatory prices "may be" to injure competition.[25] It is highly questionable as to how the court in *American* was able to reach the general conclusion that competition may not be lessened as

facts; and (3) competitive injury. Proof of all three is necessary to make out a prima facie case.

General Foods Corp., 50 F.T.C. 885, 890 (1954).

[15] Ibid.

[16] Supra note 13.

[17] Samuel H. Moss Inc. v. FTC, 148 F.2d 378 (2d Cir.), cert. denied, 326 U.S. 734 (1945), modified, 155 F.2d 1016 (2d Cir. 1946). The *Moss* doctrine is that once the Commission proves there was a price discrimination, the burden shifts to the alleged violator, to prove that the discrimination did not have the statutory effect on competition.

[18] Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786, 790 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952).

[19] E. Edelmann & Co. v. FTC, supra note 8, at 154; Nat'l Lead Co. v. FTC, 227 F.2d 825 (7th Cir. 1955), rev'd on other grounds, 352 U.S. 419 (1957).

[20] Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356 (1922).

[21] Supra note 5.

[22] Id. at 53.

[23] General Food Corp., supra note 14, at 887.

[24] Anheuser-Busch, Inc. v. FTC, supra note 4, at 841; Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co., supra note 8, at 957; Standard Motor Prod., Inc. v. FTC, supra note 8, at 676; Moog Indus., Inc. v. FTC, 238 F.2d 43, 51 (8th Cir. 1956), aff'd, 355 U.S. 411 (1958); Nat'l Lead Co. v. FTC, supra note 19, at 835. Supra note 18, at 792.

[25] Supra note 5; Corn Prod. Ref. Co. v. FTC, 324 U.S. 726 (1945).

to the future because of the temporary effects in the past. The court focused exclusively on past effects which are inconclusive to a "probability" test, and ignored the continuing CPA system.

Since the Act is not aimed at outlawing price discrimination per se it is essential that a causal nexus between the price discrimination and the injury to competition be shown in order to establish a section 2(a) violation.[26] In the past, in "secondary line" competition cases, it has been held that proof of a substantial difference in prices to competing buyers was sufficient to support the conclusion that competition with the favored customers may be substantially injured by the discrimination.[27] The contention that such a holding would be to the effect of adjudging price discriminations to be illegal per se has been rejected.[28]

The *Sun Oil* case restated the FTC's interpretation of the "substantially lessening competition" requirements in "secondary line" competition when it held:

> It seems self-evident that where a producer is selling a homogeneous product, such as salt, automotive parts, or gasolines, where competition is extremely keen among retailers, and where margins of profit or markup are small, a lower price to one or some of such competing retailers not only "may" but must have the effect of substantially lessening competition.[29]

Yet the court in the instant case specifically rejects the contention that proof of a substantial price differential between favored and unfavored purchasers in a keenly competitive area, is sufficient to support the conclusion that such a practice "may be" to substantially lessen competition. The court in the instant decision attempts to distinguish *Sun Oil* on the basis that injury to competition was not there disputed on appeal and therefore not in issue before the Supreme Court. The court is for some reason undisturbed as to why the issue was undisputed on a fact situation weaker than the one in the instant case. Nevertheless, *Sun* also stated in reference to price discriminations in favor of one dealer over the other:

> We are not free on the basis of our own economic predelections to make the choice between harm to McLean, on the one hand, and to the other Sun operators, on the other, or to balance the comparative degree of individual injury in each instance; that choice is foreclosed by the determination in the statute itself in favor of *equality* of treatment. (Emphasis supplied.)[30]

Apparently the court in the instant case believes that such a proof re-

[26] Supra note 18.

[27] Standard Oil Co. v. FTC, supra note 10, at 243-46; supra note 5; Corn Prod. Ref. Co. v. FTC, supra note 25; Sun Oil Co., 55 F.T.C. 955 (1959), rev'd on other grounds, 294 F.2d 465 (5th Cir. 1961), rev'd on other grounds, 371 U.S. 505 (1963).

[28] E. Edelmann & Co. v. FTC, supra note 8, at 154; Whitaker Cable Corp. v. FTC, 239 F.2d 253, 254-55 (7th Cir.), cert. denied, 353 U.S. 938 (1956); Moog Indus., Inc. v. FTC, supra note 24, at 49.

[29] Sun Oil Co., 55 F.T.C. 955, 962 (1959).

[30] Sun Oil Co. v. FTC, 371 U.S. 505, 519 (1963).

quirement is essential to reconcile the Robinson-Patman Act with over-all antitrust policies.[31] This is evidenced by the fact that the court places great reliance on the classical language of the *Anheuser-Busch* decision, to the effect that the Act is really referring to the effect upon competition and not upon competitors.[32] However, it is submitted that *Anheuser-Busch* was dealing with "primary line" competition, and that while Robinson-Patman prohibits price discrimination which may substantially injure competition *in any line* of commerce, important differences in practical orientation have emerged. Price variations, challenged for their impact in seller-line cases, are condemned only after a more forceful demonstration of enimical competitive impact than might satisfy a charge of injurious effect on the customer level.[33] Furthermore, the Supreme Court in *Anheuser-Busch* was careful to point out that they were dealing with "primary line" competition and that they did not also mean to depart from their holding in *Morton Salt* as to adequacy of proof in "secondary line" competition cases.[34] Yet the court in the instant case in disregard of this clear warning, as a practical matter, has imposed the same requirement of proof laid down in *Anheuser-Busch* with respect to primary line cases, to "secondary line" cases. As a result, rather than reconciling Robinson-Patman with over-all antitrust policies, the court in the instant case has perverted the basic philosophy of the Act—to reach and prohibit discriminatory pricing in "secondary line" competition which the Clayton Act did not provide for.[35] Rather than strengthen the Act, the court has weakened it in a manner clearly repugnant to the reasons behind the passage of the Robinson-Patman as an amendment to the Clayton Act.[36]

It is further questioned, as has been stated above, whether the standard laid down by the court in the instant case is really feasible as a practical matter to carry out the fundamental purposes of section 2(a). The well established test of reasonable probability of injury to competition, without reference to a time factor as was done in the instant case, is consistent with the design of the statute "to reach such discriminations in their incipiency before the harm to competition is effected."[37] In light of *American Oil*, how long must the Commission stand by and watch a substantial price differential between competing purchasers of a common supplier, before they can act? The standard applied in *American Oil*, presents a new problem of where to draw the line as to what is temporary and what is not. Such a holding as in the instant case could open the door to a wholesale method of circum-

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31 Supra note 10.

32 Supra note 4.

33 Rowe, supra note 10, at 124 (substantially quoted).

34 FTC v. Anheuser-Busch, Inc., supra note 11, at 552, n.21.

35 See supra note 2. The words in section 2(a): "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. . . ." are words added by the Robinson-Patman Act to section 2 of the Clayton Act for the purposes of the protection they afford to individual customers of the seller, and were entirely new to our antitrust legislation.

36 Supra note 11.

37 Corn Prod. Ref. Co. v. FTC, supra note 25, at 738.

venting the spirit and harmony of Robinson-Patman, by allowing the practice of temporary price discrimination, the overall effect of which will cause that *potential* danger of substantially lessening competition which the Act seeks to prohibit. While it is true that the court in the scope of its appellate review may upset the Commission's findings if they are not supported by substantial evidence on the record as a whole,[38] the courts should scrupulously avoid hamstringing the Commission in carrying out the basic purposes of the Act, by imposing a greater degree of proof than has been necessary in the past, as was done in the instant decision. Who is to know better than the Commission which is staffed by experts in the area of economics and business practices, what constitutes a substantial lessening of competition. "The precise impact of a particular practice on trade is for the Commission, not the courts to determine."[39] It would be an understatement to say that the decision in the instant case was a setback to the FTC and we can only watch and wait to determine whether the standard laid down in the instant case will be followed, or rejected by other circuits in subsequent decisions concerning section 2(a) of the Robinson-Patman Act, so far as "secondary line" competition is concerned.

CHARLES K. BERGIN, JR.

**Labor Law—Section 301—Employee's Standing to Enforce Contract Rights Against His Union—*Humphrey v. Moore.*[1]**—Respondent Moore brought a class action in a Kentucky state court, on behalf of himself and his fellow employees, against his union and his company (Dealers). He prayed for an injunction to restrain the implementation of a joint grievance committee's decision to dovetail the seniority lists of his company with those of another company (E & L) which was moving from the area. The two companies had arranged to transfer certain rights to each other, and the question arose whether Dealers was absorbing E & L's business within the meaning of Dealers' collective bargaining contract,[2] which fact would permit dovetailing. When the issue first arose, the president of the local union, which represented the employees of both companies, informed Dealers' employees that their jobs were not in jeopardy since there would be no absorption. But, when the union became more advised as to the nature of the

[38] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[39] FTC v. Motion Picture Adv. Co., 344 U.S. 392 (1953). The Supreme Court is apparently more favorably disposed to the expertise of the FTC. "We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty." FTC v. Cement Institute, 333 U.S. 683 (1948).

[1] 375 U.S. 335 (1964), rehearing denied, 32 U.S.L. Week 3297 (U.S. Feb 25, 1964). Includes companion suit General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Moore.

[2] Article 4, Section 5 of the contract was as follows:

> In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure.