Boston College Law Review

Volume 7 | Issue 4 Article 16

7-1-1966

Antitrust Law—Robinson-Patman Act—Section 2(c)—Commercial Bribery - Rangen, Inc. v. Sterling Nelson & Sons

Steven D. Ostrowsky

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Recommended Citation

Steven D. Ostrowsky, *Antitrust Law—Robinson-Patman Act—Section 2(c)—Commercial Bribery - Rangen, Inc. v. Sterling Nelson & Sons*, 7 B.C.L. Rev. 1006 (1966), http://lawdigitalcommons.bc.edu/bclr/vol7/iss4/16

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CASE NOTES

Antitrust Law—Robinson-Patman Act—Section 2(c)—Commercial Bribery.—*Rangen, Inc. v. Sterling Nelson & Sons.*[1]—Rangen bribed Grimes, the superintendent and nutritional expert of the Idaho fish hatcheries, to use his best efforts to see that Rangen received Idaho's contracts for fish foods. As a result, Grimes influenced the responsible state purchasing officials to favor Rangen, and Nelson, a competitor of Rangen, was excluded from the market. Nelson brought a private antitrust suit against Rangen, claiming that the bribe was a violation of Section 2(c) of the Robinson-Patman Act.[2] The district court found for the plaintiff[3] and the defendant appealed on the ground, *inter alia*, that section 2(c) is not applicable to commercial bribery unassociated with price discrimination. HELD: "[S]ection 2(c) is not directed solely against price discriminations through rebates described as brokerage. . . . [T]hat subsection also encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent, representative, or other intermediary in a transaction involving the sale or purchase of goods, wares or merchandise."[4]

At first glance the Robinson-Patman Act appears to be aimed at price discrimination only. The act was an amendment to Section 2 of the Clayton Act.[5] Its purpose was to prevent practices devised by businessmen to circumvent the Clayton Act, which only "condemned in principle the practice of price discrimination in private competitive business. . . ."[6] The first section of the Robinson-Patman Act deals with out-and-out price discrimination in an expanded version of the wording used in the Clayton Act.[7] In light of the legislative history,[8] it is clear that the other sections were aimed at various forms of price discrimination and that section 2(c) was specifically intended to prohibit price discrimination in the forms of rebates and dummy brokerages. Moreover, the legislative history of the act is replete with references to price discrimination devices, such as brokerage paid "where true brokerage services have not been rendered,"[9] and with references to the dangerous effects of price discrimination upon competition.[10]

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[1] 351 F.2d 851 (9th Cir. 1965), cert. denied, 86 Sup. Ct. 1067 (1966).

[2] 49 Stat. 1527 (1936), 15 U.S.C. § 13(c) (1964):

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.

[3] Sterling Nelson & Sons v. Rangen, Inc., 235 F. Supp. 393 (D. Idaho 1964).

[4] Supra note 1, at 858.

[5] 38 Stat. 730 (1914).

[6] 80 Cong. Rec. 6621 (1936) (remarks of Representative Miller).

[7] 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964).

[8] See, e.g., 80 Cong. Rec. 6281-82 (1936) (remarks of Senator Logan).

[9] 80 Cong. Rec. 6623 (1936) (remarks of Representative Miller).

[10] 80 Cong. Rec. 6622 (1936) (remarks of Representative Miller).

Despite the one-sidedness of the wording and the legislative background of the Robinson-Patman Act, the court in *Rangen* reached the conclusion that commercial bribery, unassociated with price discrimination, is a violation of section 2(c). In reaching this conclusion, the court relied on three premises. First, the wording of that section contains nothing "which requires that [the] subsection . . . be limited to instances of price discrimination."[11] Second, nothing in the legislative history excludes commercial bribery from its application; in fact, there are specific references to bribes which tend to undermine the fiduciary relationship between employer and employee.[12] Third, several cases[13] support the proposition that section 2(c) does not require price discrimination as an element of a violation. In addition, the court relied upon *Fitch v. Kentucky-Tenn. Light & Power Co.*,[14] which reached the specific conclusion that commercial bribery is a violation of section 2(c).

Although this rationale is correct, as far as it goes, it is unconvincing. The fact that the wording of the statute does not require that it be "limited to instances of price discrimination" is hardly adequate authority for the proposition that commercial bribery is included within the statute's prohibition. It merely shows that commercial bribery was not specifically excluded. Also, the references in the legislative history to commercial bribery are few, and too weak and secondary to be authority for the present case's holding: the references in the history are overwhelmingly directed toward price discrimination.

The case precedent upon which the court depended for the proposition that section 2(c) does not require price discrimination consists entirely of cases which involved some form of price discrimination—dummy brokerage or out-and-out rebates.[15] Thus, these cases, too, present no affirmative ground for a decision that commercial bribery which does not effect price discrimination violates the section.

Finally, the *Fitch* case, which reached the same conclusion as *Rangen*, offers no better rationale. It relied upon the same basic premises as *Rangen* except that there was no allusion to the legislative history at all. *Fitch* further reasoned that commercial bribery is an unfair trade practice[16] but then proceeded in broad generalities without ever stating why, if commercial bribery is an antitrust wrong, section 2(c) is the cure.[17] Neither *Rangen* nor *Fitch*, therefore, state any direct or positive reason why the Robinson-Patman Act is the applicable law.

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[11] Supra note 1, at 856.

[12] 80 Cong. Rec. 8112 (1936) (remarks of Representative Patman).

[13] FTC v. Washington Fish & Oyster Co., 271 F.2d 39 (9th Cir. 1959) (dummy brokerage); Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir. 1945) (brokerage paid to a broker on purchases for its own account); Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939) (reduced prices); Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir. 1938) (dummy brokerage).

[14] 136 F.2d 12 (6th Cir. 1959).

[15] See cases cited note 13 supra.

[16] Fitch v. Kentucky-Tenn. Light & Power Co., supra note 14, at 16.

[17] See Federal Trade Commission Act § 5, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(1) (1964).

What the court in *Rangen* should have done was to stress the basic antitrust policies behind the Robinson-Patman Act, ascertain the precise anticompetitive effects of price discrimination and commercial bribery, compare these effects for their similarities and differences, and determine whether the differences, if any, necessitated the conclusion that commercial bribery does not fall within section 2(c).

In price discrimination, one of several competing buyers receives goods at reduced cost so that he may sell at a price below that of his competitors. It should be noted that the unfair advantage over competitors originates in one market and operates in another. In the case of commercial bribery, one seller is able to exclude his competitors from a market by bribing a fiduciary of the buyer to influence his principal to give the seller an exclusive market. The result is the same as in price discrimination—competing sellers are unable to compete effectively. But in commercial bribery, the unfair advantage originates in the same market in which it operates. The question with which the court would then have been faced is whether it is relevant where the unfair advantage originates; and to this question the court could have easily and soundly answered "no," emphasizing that the tendency toward a lessening of competition is the same, regardless of where the unfair advantage originates.

STEVEN D. OSTROWSKY

Bankruptcy Act—Strong Arm Clause—Invalidity of Unfiled Federal Tax Lien Against Trustee.—*United States v. Speers.*[1]—On June 3, 1960, respondent-trustee's bankrupt was assessed for unpaid federal taxes. Demand for payment was made but not met, giving rise to a lien under Section 6321 of the Internal Revenue Code of 1954, but no notice was filed as provided in section 6323. On June 20, the bankrupt filed his voluntary petition in bankruptcy. Respondent contended that the federal tax lien is invalid as to him, since Section 70(c) of the Bankruptcy Act[2]—the so-called Strong Arm Clause—gives him the rights of a judgment creditor and Section 6323 of the Internal Revenue Code invalidates an unfiled lien as against a judgment creditor. He prevailed before the referee, the district court, and on appeal to the Sixth Circuit.[3] Certiorari was granted because of a conflict with decisions in the Second, Third, and Ninth Circuits.[4] HELD: Affirmed.

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1 382 U.S. 266 (1965).

2 66 Stat. 430 (1952), 11 U.S.C. § 110(c) (1964).

3 In re Kurtz Roofing Co., 335 F.2d 311 (6th Cir. 1964).

4 Simonson v. Granquist, 287 F.2d 489 (9th Cir. 1961), rev'd on other grounds, 369 U.S. 38 (1962); In re Fidelity Tube Corp., 278 F.2d 776 (3d Cir.), cert. denied sub nom. Borough of East Newark v. United States, 364 U.S. 828 (1960); Brust v. Sturr, 237 F.2d 135 (2d Cir. 1956); United States v. England, 226 F.2d 205 (9th Cir. 1955). Accord, In re Estrada's Market, 222 F. Supp. 253 (S.D. Cal. 1963); In re National Insul-Fluf, Inc., Bankr. L. Rep. ¶ 58559 (S.D. Cal. 1956); In re Green, 124 F. Supp. 481 (N.D. Ala. 1954); In re Ann Arbor Brewing Co., 110 F. Supp. 111 (E.D. Mich. 1951); In re Taylorcraft Aviation Corp., 168 F.2d 808 (6th Cir. 1948) (dictum). Contra, In re Sport Coal Co., 125 F. Supp. 517 (S.D.W.Va. 1954), rev'd on other grounds sub nom. United States v. Eiland,