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Fimex Corp. v. Barmatic Products Co.: Robinson-Patman Act - Application to Goods Purchased for Resale Abroad

David Salem

B. Restrictive Business Practices and Competition

ANTITRUST — ROBINSON-PATMAN ACT — U.S. COURTS WILL NOT APPLY § 2(a) OF THE ROBINSON-PATMAN ACT TO GOODS PURCHASED IN THE U.S. FOR RESALE ABROAD

Fimex Corp. v. Barmatic Products Co., 429 F. Supp. 978 (E.D. N.Y.), *aff'd mem.*, 573 F.2d 1289 (2d Cir. 1977).

On November 4, 1976, Fimex Corp. filed a complaint against Barmatic Products Co. alleging that Barmatic practiced price discrimination in violation of Section 2(a) of the Robinson-Patman Act (hereinafter referred to as the Act).[1] The defendant manufactures auto parts which it sells to middlemen such as the plaintiff for resale in the United States and abroad. Over a period of years the plaintiff had purchased many auto parts from several manufacturers which it in turn resold both in the United States and abroad. The unrefuted testimony of the defendant indicated that all the parts which it had sold to the plaintiff had been resold abroad. Upon motion by the defendant, summary judgment was granted on the basis that a transaction wherein the goods are sold for resale abroad does not come within the purview of the Act. In so doing this court became the first judicial body to make a clear statement concerning the role which this section of the Act is to play in the arena of international trade.

Section 2(a) of the Act prohibits among other things, price discrimination between purchasers of like commodities "where such commodities are sold for use, consumption, or resale within the U.S."[2] The first question the court faced was the problem of rendering a proper interpretation of that specific phrase.[3]

It was plaintiff's contention that the phrase should be construed to cover the sale of goods to purchasers within the United States for use, consumption or resale. The fact that the purchaser in the United States then exports these goods was claimed to be totally irrelevant and to have no effect on the rights of the United States purchaser under Section 2(a)

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1. Robinson-Patman Act, 15 U.S.C. § 13-13(b), 21(a) (1976).
2. 15 U.S.C. § 13(a).
3. The court admitted that this was not to be an easy task and quoted the U.S. Supreme Court decision in Automatic Canteen Co. v. F.T.C., 346 U.S. 61 (1953) wherein the Court noted that "precision of expression is not an outstanding characteristic of the Act." *Id.* at 65.

of the Act. The plaintiff's interpretation rests on what could be termed a "location" theory, which postulates that the key consideration in potential price discrimination cases is the location of the two sales (and, of course, the two purchasers) which are alleged to involve discriminatory prices.

The court rejected plaintiff's contention and adopted the contrary theory which could be termed a "destination" theory. According to that theory in alleged instances of price discrimination the key is determining where the goods are going and not where the parties are located. To support its analysis the court relied heavily on the writings of Congressman Patman which were published after the enactment of the law.[4] The court also based its decision on a rather dissimilar case which arose in the U.S. District Court for the Eastern District of Pennsylvania.[5] In that case a foreign manufacturer charged one price for American purchasers and another for Japanese purchasers. The court found that no action could be brought against that manufacturer because there was no discriminatory pricing between different American consumers and no goods which were sold to Japanese purchasers were sold "for use, consumption or resale in the U.S."[6]

Having determined that a "destination" rule is the proper rule under the Act, the court attempted to fashion a test for deciding the factual question of when goods were "sold for . . . resale within the United States."[7] The court admitted that this issue could be viewed from three entirely different perspectives. This arises from the fact that in any given transaction there exists the seller's beliefs and expectations, the buyer's beliefs and expectations and the actual conclusion of the transaction. The court, therefore, stated that there were three possible tests which could be used. These were: (a) the seller's intent; (b) the buyer's intent; and (c) the place where the goods were actually resold.[8]

On the particular facts of this case all three tests yield the same result. The buyer intended to sell the goods abroad, the seller believed the goods were going to be resold abroad and the goods were in fact resold abroad. Therefore, the small discussion which the court allocated to the relative merits of the three tests is *obiter dicta* in that no differentiation between the three was necessary to reach the conclusion which the court

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4. 429 F. Supp. 979 *quoting from* L. PATMAN, THE ROBINSON-PATMAN ACT 208 (1938).

5. Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 402 F. Supp. 244 (E.D. Pa.), *petition denied,* 521 F.2d 1399 (3d Cir. 1975).

6. 402 F. Supp. at 248.

7. 429 F. Supp. at 980.

8. *Id.*

reached. Given the likelihood, however, (recognized by this court) that similar cases will arise in the future, it is important to briefly examine the court's analysis, not only of the three tests, but also of the proper interpretation to be given the Act itself.

At the outset it should be noted that this article will not attempt a lengthy discussion of the proper interpretation to be given the phrase "sold for . . . resale within the United States." As mentioned earlier, two radically different theories, the location and the destination, currently exist in this area.[9] A major flaw in this decision is the court's failure to discuss several U.S. Supreme Court decisions which imply that the Act's purpose is to promote competition and protect smaller purchasers for the sake of competition, and that therefore, it is the location of the competitors and not the destination of the goods which should control.[10]

Assuming, *arguendo,* that the court was correct in its interpretation, it is still necessary to review the three possible tests for answering the factual question of what determines whether goods are sold for resale within the United States.

The purpose of the Act should ultimately determine which of the three tests is appropriate. The fact that treble damages are provided clearly indicates that the Act is intended to discourage price discrimination rather than to merely compensate the victims of such a practice. Therefore the proper test should be the one which provides the maximum deterrent effect.

The test which provides the maximum protection is the one labeled "buyer's intent." Under that test if the buyer planned to resell the goods in the United States at the time he purchased them then the transaction would be protected by the Act. Utilization of this test would satisfy two important objectives. First, it would insure that every purchaser who would like to resell goods in the United States, be charged a price which allows him to compete with every other similarly situated purchaser. Indeed one of the contentions of Fimex, the purchaser in this case, was that it could never obtain a contract to resell goods in the United States because it was forced to pay Barmatic discriminatorily high prices. The second goal which use of this test would help to achieve is somewhat

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9. Surprisingly, few authors even discuss this question. Of seven works surveyed only two mention the issue. One favors a destination interpretation. *See* H. SHNIDERMAN, PRICE DISCRIMINATION IN PERSPECTIVE 8 (1977). The other indicates that only sales to foreign purchasers are exempt. *See* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 81-82 (1962). Obviously, more discussion is needed here.

10. F.T.C. v. Simplicity Patterns Co., 360 U.S. 55, 62, 69 (1959); F.T.C. v. Anheuser Busch, Inc., 363 U.S. 536, 541 (1960).

evidentiary in nature, but is nevertheless extremely critical to fulfillment of the Act's intention. To prevail in a Robinson-Patman action a buyer would only be required to show that he was charged unjustified discriminatory prices for goods — a like kind and quality of which are sold in interstate commerce — and that he had planned to resell them in the United States. Neither of the other two tests provide an equal degree of protection for buyers. The "objective test" would require that the goods in question actually be resold in the United States. Consequently in situations where a buyer is prevented from reselling goods within the United States solely because he is charged discriminatorily high prices, he would fail in his Robinson-Patman action even though the Act was clearly intended to cover such a situation. Similarly if the "seller's intent" test were used a buyer would lose his case if he were unable to prove that the seller knew that the goods were to be resold in the United States even if the goods were in fact resold there. Again, such a result is not intended by the Act.

Despite the fact that use of the "buyer's intent" test would go the furthest in promoting the objectives of the Act, the court in *Fimex* stated that such a test should not be read into the act because it was "unfair."[11] The court reached this conclusion by reasoning that use of this test would create a trap for the unwary seller.[12] This apprehension is largely unwarranted. Use of this test would merely force the seller to ascertain the buyer's intent prior to completing the transaction. Such a requirement is not excessively demanding and actually fits within the overall operation of the Act. Moreover, use of this test would still require that complainant buyers prove by a preponderance of the evidence that they did in fact intend to resell the goods within the United States.

The circumstances in *Fimex v. Barmatic* did not warrant a lengthy analysis of the three possible tests which could be used to determine when goods are sold "for use, consumption or resale within the United States." The case is important, however, in that it illuminates the issues which exist in this area. The separate but related issue of whether a location or destination theory is appropriate also merits substantial, future discussion.

For the purposes of this short article it is sufficient to point out that the destination theory, opted for in this case, could lead to results which were clearly unintended by the Act. This can be illustrated in the following way. Under the destination theory an American wholesaler

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11. 429 F. Supp. at 981.
12. *Id.*

would not be protected by the Act when he purchases goods from an American producer for resale abroad, but at the same time a foreign wholesaler or other purchaser would be protected by the Act when he purchases goods from an American producer for resale in the United States. Utilization of the location theory would lead to the opposite, and in the opinion of this writer, appropriate result.[13]

Both issues — the proper theory and the proper test to be applied given a particular theory — are important to American businesses. It is hoped that future decisions will thoroughly discuss these issues in light of the intentions and purposes of the Act.

David Salem

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13. An analysis of this issue requires a determination of who the intended beneficiaries of the Act are, consumers or competitors and whether the Act was designed to promote competition or provide for similar prices for similar goods. Such a determination would necessarily involve a discussion of the Sherman Antitrust Act.