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Casenotes

Buyers' Liability Under Sections 2(d) and 2(e) of The Robinson-Patman Act

*Max Factor & Co. and Shulton, Inc.*¹

In 1958 and 1959 respondent cosmetic manufacturers made payments to J. Weingarten, Inc., a large Texas supermarket chain, under an agreement to defray some of Weingarten's advertising expenses for certain special promotional events. The Federal Trade Commission examiner found these payments were a violation of section 2(d)² of the Robinson-Patman Act,³ which prohibits payments for promotional services by suppliers (wholesalers and manufacturers) to customers who resell the items, unless such payments are made available to all competing customers of the supplier on "proportionally equal terms." The full Commission dismissed for policy reasons, holding that in this type of violation of section 2(d), it may be better to proceed against the buyer who extracted the illegal payments under section 5⁴ of the Federal Trade Commission Act,⁵ authorizing the Commission to issue cease and desist orders against persons engaging in "unfair methods of competition," than to proceed against the seller under the Robinson-Patman Act itself.

The Robinson-Patman Act was intended to "curb and prohibit all devices by which large buyers gain discriminatory preferences over smaller ones by virtue of their greater purchasing power."⁶ With this in mind, a brief examination of the various sections of the Act is in order. The first section, 2(a),⁷ prohibits discriminations in price by suppliers in sales to competing customers. Section 2(b)⁸ provides that once the fact of discrimination has been proved, a *prima facie*

1. Dockets 7717 and 7721, 3 Trade Reg. Rep. ¶ 16,992 (Aug. 3, 1964).

2. 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 . . . as compensation or in consideration for any services or facilities furnished . . . in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale . . . unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

52 Stat. 446, 15 U.S.C. § 13(d) (1936).

3. 15 U.S.C. § 13 (1936).

4. 15 U.S.C. § 45(a)(1) (1938).

5. 38 Stat. 717, as amended, 15 U.S.C. §§ 41-51 (1938).

6. F.T.C. v. Henry Broch & Co., 363 U.S. 166, 168 (1960).

7. It shall be unlawful for any person engaged in 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 competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a) (1936).

8. 15 U.S.C. § 13(b) (1936).

case is established.⁹ Section 2(b) also sets out a statutory defense¹⁰ which shall be considered in more detail later. Section 2(c)¹¹ concerns itself with discrimination of brokerage commissions. Section 2(d) prohibits discriminatory promotional allowances. Section 2(e)¹² prohibits the granting of promotional services in a discriminatory manner. For many years the FTC has "obtained internal consistency by reading the two sections [2(d) and 2(e)] . . . as if they were one."¹³ They shall, then, be treated in this light. Section 2(f)¹⁴ provides for proceedings against buyers who "knowingly . . . induce or receive" a prohibited price discrimination.

Problems arise due to the failure of the statute specifically to provide that buyers who induce violations of sections 2(d) and 2(e) are themselves in violation of the statute. Section 2(f) only provides that buyers who induce suppliers to grant price discriminations, *i.e.*, induce violations of section 2(a), are guilty of violating the law. Despite this lack, however, the Commission did at an earlier time proceed against buyers who induced violations of sections 2(d) and 2(e) on the theory that the discriminatory promotional or service allowances granted were, in effect, discriminatory price allowances in violation of section 2(f).¹⁵ Between 1953 and 1959, the Commission instituted very few proceedings against buyers who induced violations of the Robinson-Patman Act. This was true of buyers inducing 2(a) violations as well as those inducing 2(d) and 2(e) violations. Then, in 1959, the Commission once again returned to the problem of the inducing buyer. The first actions were instituted against buyers violating section 2(f) by inducing violations of section 2(a).¹⁶

Emboldened by its success in these cases, the Commission devised a new technique for dealing with inducers of violations of sections

9. "Upon proof being made . . . that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made . . . shall be upon the person charged. . . ." It has been held that "a price discrimination within the meaning of that provision is merely a price difference." *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). No comparably brief definition of "discrimination in . . . services or facilities" has yet been advanced.

10. "Provided, however, that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that . . . [the discrimination] . . . was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

11. 15 U.S.C. § 13(c) (1936).

12. 15 U.S.C. § 13(e) (1936). "It shall be unlawful for any person to discriminate . . . by contracting to furnish or furnishing . . . any services or facilities . . . upon terms not accorded to all purchasers on proportionally equal terms."

13. Gooder, *The Robinson-Patman Act: Sections 2(c), (d) and (e)*, Conf. on the Anti-Trust Laws and the Attorney General's Committee Report 223 (1955).

14. 15 U.S.C. § 13(f) (1936). "It shall be unlawful for any person engaged in commerce . . . knowingly to induce or receive a discrimination in price which is prohibited by this section."

15. *National Tea Co.*, 46 F.T.C. 829 (1950), 47 F.T.C. 1314 (1951); *Atlantic City Wholesale Drug Co.*, 38 F.T.C. 631 (1944); *Miami Wholesale Drug Corp.*, 28 F.T.C. 485 (1939). Between 1936, when the Robinson-Patman Act was enacted, and 1952, 245 actions were commenced against sellers who violated sections 2(d) and 2(e), and 5 actions were commenced against buyers for inducing violations of these sections. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT, Appendix A (1963).

16. *Mid-South Distributors v. F.T.C.* 287 F.2d 512 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961); *American Motor Specialties Co. v. F.T.C.*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).

2(d) and 2(e). This new technique was the issuance of cease and desist orders under section 5 of the Federal Trade Commission Act on the ground that inducing discriminatory promotional allowances constituted an "unfair method of competition" prohibited by the Federal Trade Commission Act. When faced with the argument that nothing in either statute specifically provided for this procedure, the Commission replied: "Section 5 was framed in language as general as possible, for the purpose of permitting development of the law on a case-by-case basis in response to new anti-competitive practices as they arose."¹⁷

The Commission also argued that "[t]he Supreme Court has held that conduct which 'runs counter to the public policy declared in the Sherman and Clayton Acts' violates Section 5 of the Federal Trade Commission Act,"¹⁸ and since the Robinson-Patman Act is an amendment to the Clayton Act, "conduct which runs counter to" its purposes is subject to action under the Federal Trade Commission Act. The Commission has been successful in all cases in which this reasoning has been challenged in the courts.¹⁹ This technique may soon be the Commission's main weapon in dealing with violations of sections 2(d) and 2(e), if the principal case means what it says.

In order to understand the impact of the present decision, it is necessary to look more closely at the facts, which "present a factual pattern that has recurred frequently in the Commission's administration of Section 2(d)."²⁰ As set forth by the Commission in an earlier order made during the proceedings against Weingarten,²¹ the buyer, Weingarten, would,

prior to each planned promotion . . . send solicitory letters to a selected group of its suppliers whose products were deemed appropriate for the sale. The letter extends an offer of an "opportunity to participate" and refers to an attachment which lists the costs of "participation." If a supplier agrees to the solicitation, its goods are advertised and specially promoted . . . to the extent of the payment made by the supplier.²²

This solicitation, sent to all the suppliers of a particular type of product, forces the suppliers to navigate between the Scylla of the buyer's wrath and the Charybdis of the FTC. If they refuse to agree, their competitors who do agree receive the enormous advantages of extra advertising and "pushing" by the buyer's employees. If they

17. Brief for Respondent, p. 30, *Grand Union Co. v. F.T.C.*, 300 F.2d 92 (2d Cir. 1962).

18. *Shulton, Inc.*, 3 Trade Reg. Rep. ¶ 16,992, p. 22,066 (Aug. 3, 1964), citing *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457, 463 (1941).

19. *R. H. Macy & Co. v. F.T.C.*, 326 F.2d 445 (2d Cir. 1964); *Grand Union Co. v. F.T.C.*, 300 F.2d 92 (2d Cir. 1962); *American News Co. v. F.T.C.*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); *Giant Food Co. v. F.T.C.*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963).

20. *Shulton, Inc.*, 3 Trade Reg. Rep. ¶ 16,992, p. 22,065 (Aug. 3, 1964).

21. *J. Weingarten, Inc.*, Dkt. 7714, 3 Trade Reg. Rep. ¶ 16,349 (Mar. 25, 1963).

22. *Id.* at 21,182.

agree, they will be forced to violate section 2(d) if they cannot afford to make proportionate allowances to smaller customers. It was with this fact situation in mind that the Commission handed down its orders in this case, implying that in the future it will be the soliciting buyers and not the helpless sellers who will be held accountable.

The reasoning behind the new policy of proceeding against the buyers is that it is "best calculated to achieve the ends contemplated by Congress",²³ *i.e.*, the elimination of this type of discriminatory allowance. As the Commission said, "The entry of cease and desist orders against these particular respondents . . . would not be an equitable and fully effective method of eliminating the discriminatory practices."²⁴ They would be ineffective because the defendants were only two of the many suppliers who were induced to discriminate; and inequitable, as proceedings were not brought against *all* the suppliers who were induced to discriminate. By proceeding against the buyers instead of the sellers, the Commission feels it will lower the total number of violations committed, for one buyer can induce violations by many sellers. If the buyers are sufficiently afraid of the Commission's reaction, they will not induce discriminations.

What, then, does the Commission have to prove in order to establish a *prima facie* case against a buyer in a proceeding under section 5 of the Federal Trade Commission Act? In its earlier remand order in the proceedings against Weingarten, the Commission said that the following four things must be proved:

1. The solicitation and receipt by the respondent in commerce of payments for promotional services in connection with the resale of a supplier's product.
2. That at approximately the time of the solicitation and receipt, other customers of the supplier were competing with the recipient in the distribution of the grantor-supplier's goods of like grade and quality.
3. The payments received by respondents were not affirmatively offered by the supplier to such competing customers on proportionately equal terms.
4. That respondent possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the granting suppliers were making such payments available to its competitors on proportionately equal terms.²⁵

23. Shulton, Inc., 3 Trade Reg. Rep. ¶ 16,992, at 22,066 (Aug. 3, 1964).

24. *Ibid.*

25. J. Weingarten, Inc., 3 Trade Reg. Rep. ¶ 16,349, at 21,183 (Mar. 25, 1963). Note that no proof of injury to the public or to competition is required. In *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55 (1959), it was held that this was not an element of a section 2(d) violation; *i.e.*, the activities banned by section 2(d) were held illegal *per se*. Also, in *Grand Union Co. v. F.T.C.*, 300 F.2d 92 (2d Cir. 1962), it was held that such injury need not be made part of the record in a proceeding under section 5 of the Federal Trade Commission Act for a violation of section 2(d) of the Robinson-Patman Act. This illustrates the Commission's approach to the problem, demonstrating that these proceedings under section 5 of the Federal Trade Commission Act differ only in form from those under the Robinson-Patman Act itself.

In sum, the Commission must prove that the seller in granting the allowances violated section 2(d) or 2(e) of the Robinson-Patman Act, and that the buyer should reasonably have known that he was inducing the seller to commit a violation. Logically, then, the buyer should be able to defeat such a proceeding on the ground that he received no payments or services; that he had no disfavored competitors who handled the seller's product; or that proportionate payments or services were provided to the buyer's competitors. The availability of these defenses has not yet been before the courts in a case involving a section 5 proceeding, but when one considers how similar the matters at issue are to the issues in a Robinson-Patman Act proceeding, one is probably safe in assuming that they are available.²⁶

An important problem is whether the statutory defense set forth in section 2(b)²⁷ of the Robinson-Patman Act is available in these section 5 proceedings. This defense provides that a seller who lowers prices in a "good faith" attempt to meet the equally low prices of a competitor is not in violation of the Act. In *Standard Oil Co. v. F.T.C.*,²⁸ the Supreme Court held that the section 2(b) defense was an absolute defense to proceedings under section 2(a). Subsequently, in *Exquisite Form Brassiere Co. v. F.T.C.*,²⁹ the Court of Appeals for the District of Columbia held that the 2(b) defense was available in proceedings under section 2(d). This issue has not been passed upon by any other circuit, but the same court followed its own decision in an earlier part of the litigation in the principal case.³⁰

All the problems discussed above arise because, as the Supreme Court has said, "[P]recision of expression is not an outstanding characteristic of the Robinson-Patman Act."³¹ Armed with the new weapon of proceedings under section 5 of the Federal Trade Commission Act, the Commission is once more entering the fray on behalf of the "small merchants." Whether it shall succeed in eliminating discriminatory practices remains to be seen.

26. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 416 (1962).

27. *Supra*, note 10.

28. 340 U.S. 231 (1951).

29. 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962). See Note, 48 VA. L. REV. 574 (1962).

30. *Shulton, Inc. v. F.T.C.*, 305 F.2d 36 (D.C. Cir. 1962).

31. *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 65 (1953).