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## Sawyer: Business Aspects of Pricing Under the Robinson-Patman Act (Trade Regulation Series)

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## RECENT BOOKS

BUSINESS ASPECTS OF PRICING UNDER THE ROBINSON-PATMAN ACT (TRADE REGULATION SERIES). By *Albert E. Sawyer*. Boston: Little, Brown, 1963. Pp. xvi, 514. \$22.50.

Mr. Sawyer's book is a valuable and needed addition to the relatively few comprehensive treatises dealing with the complex pricing problems arising under section 2(a) of the Clayton Act as amended by the Robinson-Patman Act. The well-achieved purpose of the book is to classify and consider the problems of defense and justification of price differentials falling within the coverage of the act, in relation to the particular type of price discrimination involved and the level or levels of competition affected thereby, in the light of the recorded proceedings before the Federal Trade Commission and the courts. The businessman, or the lawyer for his client, is thus enabled readily to identify the distinctive types of factual situations with which section 2(a) of the act is concerned, and to turn directly to the case law and decisions dealing with situations similar to the situation at hand.

Professor Packer has stated in a recent monograph<sup>1</sup> that "it seems plain that a grasp of economic analysis is a necessary (although not a sufficient) piece of equipment for useful work in the antitrust field. The best work in recent years has come from people who have such a grasp and who apply economic theory in a very explicit way to the study of antitrust problems." Mr. Sawyer's training in economics and his long experience in the field of distribution cost accounting have been well utilized in the orderly and logical presentation of the subject matter of this book.

The book is concerned principally with the pricing problems arising from the limitations on price differentials imposed by section 2(a) of the act. As stated at the outset, "The subject matter of this volume is limited to matters associated with 'price discrimination,' particularly the accounting and business aspects of differentials in price."<sup>2</sup> The "meeting competition" defense under section 2(b) is considered in connection with particular types of discrimination or factual situations where the availability of this defense is indicated. Likewise, the discussion of the cost justification proviso of section 2(a) includes consideration of the nature and extent of the proof of lack of cost justification required of the Commission or plaintiff in a case brought under section 2(f). The provisions of section 2(c) concerning unlawful payments of commissions or brokerage, and discrimination between competing customers in the payment for or furnishing of services and facilities (sections 2(d) and 2(e)), are not within the scope of the book.

Chapter 1 contains a preliminary discussion of the function of price lists and the meaning of "price" as used in sections 2(a), (b) and (f). There

<sup>1</sup> PACKER, THE STATE OF RESEARCH IN ANTITRUST LAW 112 (Walter E. Meyer Research Institute of Law 1963).

<sup>2</sup> P. 3.

follows a useful checklist of the statutory elements of a prima facie case of violation of section 2(a), and a similar checklist of the elements of proof necessary to support the defense of cost justification. The chapter concludes with a broad classification or grouping of the varied business situations which have been the subject of case adjudication in this field, into categories depending on the marketing structure of the seller and the level or levels of competition affected, or which may be affected, by the price differentials employed. Chapter 2 groups and discusses the more important interpretative cases (both FTC adjudications and court decisions) which have dealt with each of these categories.

Chapter 3 is devoted to a reclassification and further discussion of the adjudicated cases, principally those reviewed in chapter 2, according to the various types of price discrimination employed. Mr. Sawyer divides price differentials into eight distinct types and points out that each of these pricing methods requires different consideration from the standpoint of probable competitive injury and susceptibility to cost justification. Here the different pricing problems inherent in the use of quantity discounts, cumulative volume discounts, territorial differentials, free goods, etc., are treated separately.

Chapters 2 and 3 are supplemented by an important tabulation (Appendix A) of all reported proceedings before the Federal Trade Commission, upon complaints charging violation of section 2(a), reaching initial decision or final order from the passage of the Robinson-Patman Act in 1936 to November 30, 1961. The first of two summary tables shows the number and disposition of these cases (including appeals) grouped according to the level or levels of competition alleged to have been affected, following the classification of chapter 2. The second table shows the number and disposition of cases according to the type of discrimination involved. The tabulation itself, covering ninety-six pages, follows the type of discrimination classification and, under each such type, lists all Commission proceedings during this period chronologically with columns showing the product, position of respondent (producer or distributor), types of purchasers and levels of competition affected, a brief description of the pricing methods employed, defenses offered, whether contested, disposition by the Commission, and comments on the significance of certain decisions.

Appendix B is a chronological tabulation of all complaints issued by the Federal Trade Commission under section 2(a) during the same period, with citation to the FTC or CCH reports, Commission disposition, and cross references to Appendix A.

These appendices are valuable and time-saving reference tools for anyone who must advise on the validity or risk of differential pricing, and are alone a sufficient reason why this book should be a part of the kit of every practitioner before the Federal Trade Commission.

Turning to the cost justification proviso of section 2(a), the author in chapter 4 outlines the separate but parallel functions of the lawyer and

the accountant in developing this affirmative defense. This chapter undertakes to convey an understanding of the methods of approach to the development of a valid cost justification, and the nature of the cost accounting problems involved, without attempting to provide a formula for lawyers or a manual for accountants. The distinction between cost accounting and financial accounting is explained by emphasizing the necessity for separate cost accounting procedures where cost justification of differentials is to be attempted. The discussion here is helpful in pointing out to the lawyer that the accountant's presentation of evidence of cost justification in a Robinson-Patman case will consist essentially of estimates based on factual studies and appraisals, rather than the recorded facts of themselves. Thus, "the probative value of the particular cost accounting procedure rests heavily upon the subjective qualities of the individuals who execute or direct the particular piece of work under review."<sup>8</sup> The chapter proceeds with a collection and discussion of the Commission and court decisions dealing with each of the terms and phrases of the cost justification proviso, with illuminating excerpts from the testimony and opinions in the leading cases.

Chapter 5 begins with a lucid explanation of the business rationale and legislative background of the various geographic pricing methods commonly employed by sellers in distributing their products to customers located at varying distances from the seller's plant and able to buy from competing sellers located at different points. Two conflicting concepts of the term "price" as used in section 2(a) are stated and discussed in their relation to the measure and validity of geographic differentials: the "buyer's cost" theory, and the "seller's net-back" or "mill-net" theory. "Buyer's cost" is defined as "what the buyer pays, net to himself," including transportation costs.

It does not appear that the buyer's cost of goods purchased, including delivery to destination, has heretofore been advanced as a measure of the price paid, or so accepted in any decided case, without regard to whether transportation costs are included by the seller in the amount charged for the goods. It is the seller's price and the seller's costs with which the statute is concerned. Transportation costs of the buyer after transfer of title have been regarded at most as material in determining injury to competition. As the author points out, if *S* sells f.o.b. mill at one dollar a unit to a buyer located six cents distant freightwise, the buyer pays a price of one dollar and (back-hauling aside) incurs six cents transportation cost to destination. If *S* sells the same goods to the same buyer delivered at destination for one dollar and six cents, then the price paid, as distinguished from *S*'s mill net, is one dollar and six cents. The buyer's delivered cost is the same and the seller's mill net is the same in each instance, but the price paid differs. The author, however, appears to treat these two pricing methods as equivalent, in the context of geographic pricing and freight equalization, under *both* of the conflicting concepts of price discrimination. Actually,

<sup>8</sup> P. 123.

when freight equalization is imposed upon f.o.b. pricing, the problems arising are quite different from those encountered in destination delivered pricing, and these differences are accentuated when "back-hauling" or pick-up allowances are granted.

Where a seller sells f.o.b. mill and equalizes freight with the competitive factory point nearest the customer, the freight allowed is usually deducted on the invoice, reducing the f.o.b. price to below the competitor's price to that customer and below the seller's price to nearest competing customers. Whether selling *below* a competitor's price in order to equalize a customer's delivered cost of buying from a competitor can be justified under the meeting competition proviso is an open question. Problems of diversion of shipment also arise. When the goods are sold delivered by the seller at destination these problems are avoided, if the delivered price is regarded as the true price, but they persist under the mill net theory. These two concepts of the discriminatory aspects of freight equalized *delivered* prices are clearly portrayed by diagram and chart in this chapter.

With reference to available defenses the author states that the meeting competition proviso "would seem to apply" to the types of geographic price differentials discussed, but that spelling out the application of this defense in each situation arising is beyond the limits of the discussion. In the section devoted to discussion of the granting of pick-up allowances to customers taking delivery in their own trucks, however, it is difficult to follow the author's suggestion that price differentials resulting from such allowances can be cost justified in the examples given, or that the meeting competition proviso may be successfully invoked in defense of a price reduction equal to a pick-up allowance granted by a more distant seller.

In chapter 6 the author discusses some problems of Robinson-Patman compliance which (as of the date of the test) remained unsettled by case-by-case adjudication. These include a possible alternative method of justification of price differentials, allowance of return on investment as an element of cost, and certain applications of the meeting competition defense under section 2(b). The section 2(b) questions have largely been resolved by subsequent appellate court decisions, but the other problems remain open.

The orderly presentation of the subject matter in this book, and the careful selection and presentation of the leading cases dealing with each of the problems discussed, provide a useful and ready source of reference for anyone concerned with the legality of price differentials under the Robinson-Patman Act.

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