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Rowe: Price Discrimination Under the Robinson-Patman Act

Glen E. Weston

George Washington University

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RECENT BOOKS

PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT, By *Frederick M. Rowe*. Trade Regulation Series, *S. Chesterfield Oppenheim*, Editor. Boston: Little, Brown and Company. 1962. Pp. xxx, 675. \$22.50.

Twenty-six years after its enactment the Robinson-Patman Act remains as the most controversial of all the statutes labelled "antitrust laws." The classification of the statutory prohibition of price and service discrimination as "antitrust" legislation has long been seriously questioned and criticism of the act has mushroomed until it is exceedingly difficult today to find an ardent defender among academicians or other objective observers. Inept draftsmanship, erroneous basic precepts, class protectionism, and inconsistency with Sherman Act policies are among the many fundamental faults found with the legislation itself. Confusion in interpretation, vacillation in policies, lack of guiding strategy in enforcement (or misguided strategy), and failure to perceive the need for harmonizing its interpretation with Sherman Act policies stand out as some of the more cogent criticisms of the enforcement and administration of the act. After about 1,100 formal Federal Trade Commission complaints under the statute, approximately 10 Justice Department cases, over 120 reported private actions, many other unreported ones, and 17 Supreme Court opinions dealing with the statute, there are still so many areas of uncertainty and conflict that it is truly "a legal enigma whose mysteries are familiar to many but fathomed by few." (p. ix) Sharp controversy over its economic effects has been constant, but the complexity of the subject, the political magic in invoking emotive words like "discrimination" or "fairness" and the near-universal desire to protect that ambiguous something called "small business" assure not only continued entrenchment of the act but also liberality in enforcement funds. There is therefore little likelihood of substantial legislative change in the foreseeable future except perhaps in the direction of making it even more rigorous.

The plethora of precedent under the act has been expounded upon in a superabundance of law review commentary and economic analysis. Among the more outstanding of the published materials in the past have been the *Report of the Attorney General's National Committee To Study the Anti-trust Laws*, the provocative articles of Professor of Economics Morris Adelman, the recent study by the former chief economist of the Federal Trade Commission, Professor Corwin Edwards,¹ and the articles by Frederick M. Rowe of the District of Columbia bar. Any endeavor to synthesize and clarify the mass of cases and materials is indeed a formidable undertaking, but Mr. Rowe, former law clerk to Mr. Justice Clark and a member of a leading Washington and Chicago law firm, has completed such a project that he began ten years ago. The results of his prodigious efforts, now

¹ EDWARDS, THE PRICE DISCRIMINATION LAW (1959).

published in the Trade Regulation Series edited by the distinguished anti-trust scholar, Professor S. Chesterfield Oppenheim, constitutes an outstanding contribution to antitrust literature.

Mr. Rowe's work is remarkable for combining precise, detailed legal analysis of every Robinson-Patman precedent of even minor significance with the broad perspective needed to assess the economic impact of the statute. His meticulous examination of the overall structure of the act, the language of each subdivision, and its legislative history, is supplemented by searching analysis of the jurisdictional requirements and the elements of a prima facie case. For many of the book's readers the most significant feature is its unparalleled exegesis of defenses, including not only the familiar affirmative defenses of meeting competition in good faith and cost justification, but also lesser known approaches to defending an FTC complaint or a private treble damage suit, and even some which as yet remain disputed. With Mr. Rowe's openly-acknowledged perspective of one who has frequently represented respondents, it was naturally to be expected that the book would contain considerable guidance for defense counsel, might occasionally draw desired conclusions from rather obscure dicta, or be strongly critical of adverse precedent. It may also be anticipated that some FTC counsel or lawyers who represent treble damage claimants will sharply dispute some of Mr. Rowe's interpretations of judicial decisions and economic theories. Nevertheless, even the staunchest supporter of Robinson-Patman and the most zealous prosecutor will derive substantial benefit from Mr. Rowe's book despite its admitted lack of complete objectivity. To have insisted upon an author with that elusive quality of complete objectivity for this volume of the Trade Regulation Series would have required the greater sacrifice of Mr. Rowe's exceptional talents, sharpness of insight and pragmatic approach gained from years of vigorous combat in commission and court proceedings and from performing the frustrating task of formulating advice for the harassed corporate executive who must live with the vagaries of the statute. Although the mantle of advocate is not one that is easy to lay aside, Mr. Rowe has made a generally successful effort to segregate his value judgments from his description of the precedents or at least has usually made it quite clear when value judgments are drawn in interpreting decisions. Further, it is noteworthy that there is far more agreement than disagreement between the conclusions Mr. Rowe has drawn and those reached by such objective critics as Professor Edwards. The lack of theoretical objectivity is therefore not as serious an objection as many of Mr. Rowe's critics may be expected to maintain that it is.

Another major criticism that is likely to be made of Mr. Rowe's book is that it may not provide the clear-cut guiding rules needed by the corporate official who must make the day-to-day pricing decisions for his company. However, the author specifically denies any such objective. In-

stead he expresses the desire "to facilitate an analytical and policy-oriented approach by the practitioner, rather than to supply pat but illusory answers or to profess legal certainty where none exists." (p. xii) The book admirably achieves this objective by providing the raw material and incisive analysis from which corporate counsel may derive their own company guides based upon the prerequisite intimate knowledge of the particular industry and a realistic assessment of the risks involved in the areas of uncertainty and conflict. This is a more useful and lasting service than the formulation of delusive hornbook rules that are apt to be quickly outmoded as new decisions are announced and either perilous to follow or so conservative as to hamper a corporation's ability to engage in vigorous competition. Moreover, the FTC itself has dared to venture only once (and peripherally) into this never-never land of Robinson-Patman compliance guides with its 2(d) and 2(e) guides. A short time after this initial experiment, a majority of the Commission had so many qualms about adopting guides for compliance with the paramount prohibitions of the act in sections 2(a) and 2(c) that the Commission's able former chairman felt compelled to wait until after leaving the Commission to publish his own personal "suggestions for compliance."²

In addition to the expansive legal and economic analysis of every important aspect of Robinson-Patman, Mr. Rowe's book has a concise but valuable chapter on enforcement that covers FTC procedure from investigation through penalty suits for violating cease and desist orders, as well as private enforcement suits. The description and comment upon the recent changes in FTC organization and procedure cover all of the major "New Frontier" developments except the new procedures for "trade regulation rules" and "advisory opinion" that were not announced by the FTC until after the book's publication and which became effective on June 1, 1962.³ Under these new rules the Commission will undertake to adopt more specific rules which will presumably be "interpretative" although the incumbent chairman has apparently expressed elsewhere the rather startling opinion that the Commission was empowered to promulgate "substantive" rules by the 1914 FTC Act.⁴ What rules may be contemplated, if any, under Robinson-Patman have not yet been revealed. The new "advisory

² See Appendix to Statement by Earl W. Kintner to students and faculty of the Executive Development Program in Food Marketing Management, Michigan State University, March 31, 1961.

³ FTC Rules of Practice, Procedures and Organization (June 1962), §§ 1.61-.93, reprinted in 3 TRADE REG. REP. ¶¶ 9801.61-.93.

⁴ See "The Federal Trade Commission in 1961," an Address by Chairman Paul Rand Dixon to the Section of Antitrust Law of the New York State Bar Association, January 25, 1962, which will presumably be reprinted in the annual CCH Antitrust Law Symposium. However, in a later speech before the American Association of Advertising Agencies at White Sulphur Springs, W. Va. on April 28, 1962, Chairman Dixon stated

opinions" rule will supposedly enable any concern to request advice as to whether a proposed course of conduct will violate any law administered by the Commission, including the Robinson-Patman Act. Such advice is subject to revocation and does not preclude later action by the FTC. The information submitted by the requesting concern may be used in a subsequent proceeding after the concern has been given notice and an opportunity to discontinue the course of action involved. Unfortunately the Commission apparently does not plan to publish its advisory opinions but will probably disseminate them to its staff for their guidance.⁵ Commissioner Elman's views opposing the adoption of the rules expressed doubts about the legality of the advisory opinion procedure and called it "administratively unrealistic and impracticable, holding out to businessmen a promise to the ear that would probably be broken to the hope."⁶ It remains to be seen what significance this procedure will assume in Robinson-Patman compliance programs. It is to be hoped that Mr. Rowe will later supplement his excellent book with assessments of the significance of these new procedures after they have had adequate test.

Other notable features of the treatise include a "do-it-yourself" appendix of legislative history containing the original bills and committee reports that will benefit those unwilling to accept Mr. Rowe's inferences as to legislative purpose, and the provocative final chapter entitled "Robinson-Patman in Perspective." The latter evaluates the FTC's administration of the act and the statute's "Balance of Achievement," and forecasts the "Outlook for the Future." The FTC comes in for especially severe criticism. "Conceived as a body of experts, and basking in judicial accolades to its specialized touch, the Commission mocked the encomium with legalistic quibbles, paradoxical enforcement, and boilerplate orders to cease and desist." (p. 548) Mr. Rowe also charges that the FTC "has signally failed to coordinate Robinson-Patman with antitrust, or even to indicate an awareness of the Act's troublesome antitrust dilemmas,"⁷ (p.548) and accuses

that the new rules do not contemplate promulgation of "substantive rules." See excerpts at 5 TRADE REG. REP. ¶ 50,147.

⁵ See Analysis of FTC Advisory Opinions, BNA Antitrust and Trade Reg. Rep. No. 48, June 12, 1962, p. B-1.

⁶ See FTC Press Release, May 15, 1962.

⁷ Compare the following quotes from an address by Chairman Dixon before the Grocery Manufacturers of America, Inc., at White Sulphur Springs, W. Va. on June 19, 1961: "Of all the criticisms made of the Robinson-Patman Act the one which is most astonishing to me is the contention that it is inconsistent with the Sherman Act. . . . The Robinson-Patman Act in its prohibitions therefore requires and promotes harder and more nearly perfect competition than the Sherman Act; and, in my opinion, some of those who contend to the contrary may well be apologists for monopolistic power and practices who cloak their position by calling it 'workable competition,' a euphonism for an economy that can satisfy the Sherman Act only after very generous applications of the so-called rule of reason, a euphonism for the process of finding that Congress doesn't mean what it says."

the Commission of seeming to be "mesmerized by litigation statistics." "Its preoccupation with scalps rather than policy considerations showed up in the dogmatic drive toward per se illegality in pricing proceedings, and most of all, the slew of easy cases against small-bore respondents under Sections 2(c) and 2(d)." (pp.548-49) Another comment with respect to 2(c) is that "the skewed statistical record portrays a Parkinson's Law of FTC enforcement: that Robinson-Patman proceedings proliferate with the ease of making a case."(p. 539) Mr. Rowe probably overstates his case here and in some other places in the book; the Commission's task is more difficult than some readers may be led to assume, and it is subjected to many conflicting pressures. Its performance is not as dismal as he sometimes portrays, although it can hardly be characterized as sparkling. However, these few samples of his views may also serve to demonstrate that his gifted, pungent pen makes this book on a normally abstruse subject as interesting to read as it is informative.

In summary, this book may not be as objective as some might like to see but it is far superior to any previous publication on the Robinson-Patman Act and should quickly become the dominant authority on price and service discrimination problems. Any lawyer who may be called upon to render advice on pricing problems or promotional activities of a seller would be derelict in his duty to his client if he fails to consult this classic. In the jaded jargon of Clayton Act litigation, there is clearly both a "reasonable possibility" and a "reasonable probability" that the effects of Mr. Rowe's "discriminating" efforts will be to "tend to create a monopoly" for him in the Robinson-Patman treatise "line of commerce."

*Glen E. Weston,
Professor of Law,
George Washington University*