Unfair Trade Practices - Robinson-Patman Act - Exclusion of Seller's Broker From Coverage Under Section 2

James A. Park S.Ed.
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Antitrust and Trade Regulation Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol57/iss6/14

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
UNFAIR TRADE PRACTICES—ROBINSON-PATMAN ACT—EXCLUSION OF SELLER'S BROKER FROM COVERAGE UNDER SECTION 2(c)—Petitioners, a brokerage partnership acting as a seller's agent, sold a commodity to a buyer at five cents below the seller's normal price. The seller agreed to this reduction only because the petitioners agreed to reduce their commission on the sale from 5% to 3%. Thus 2.75 cents of the reduction was absorbed by the brokers and 2.25 cents was absorbed by the seller. Respondent Federal Trade Commission ordered petitioners to cease and desist from selling at such a reduction on the ground that the reduction in the regular rate of commission constituted an indirect payment by the brokers of part of their commission to the buyer, and as such was unlawful under section 2(c) of the Clayton Act as amended by the Robinson-Patman Act.1 On review, held, order set aside. Neither the language of section 2(c) nor its legislative history indicates that a seller's broker is covered by that section. Henry Broch and Company v. Federal Trade Commission, (7th Cir. 1958) 261 F. (2d) 725.

Section 2(c) of the Robinson-Patman Act prohibits the payment or receipt, in connection with the sale or purchase of goods, of anything of value to the other party or to an agent of the other party (or such agent's statutory equivalent) except for services rendered in connection with the purchase or sale.2 Although section 2(c) has not been interpreted by the

---

2 Section 2(c) reads: "... 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,
Supreme Court, it has received wide and definitive discussion in the various courts of appeals. A buyer's agent cannot receive brokerage commissions from the seller whether such agent keeps the commissions or passes them on to the buyer, and whether or not such agent renders services to the seller. Likewise, a buyer cannot receive a brokerage payment or discount in lieu thereof from the seller. The fact that the discount reflects a saving in costs resulting from differing methods in which such commodities are sold is no defense since section 2(a), which allows such defense, is independent of section 2(c). Furthermore, neither a buyer nor a buyer's agent can avail himself of the "services rendered" exception of 2(c). The principal case fits into the pattern of previous decisions dealing with the brokerage provision in that none of them proscribed the actions of the "true independent seller's broker." Nevertheless, the breadth of the court's pronouncement that sellers' brokers are not intended to be covered by the provision seems unwarranted. In so holding, the court relies on statements made in congressional hearings and debates, but overlooks the best evi-

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." For an extensive annotation and discussion of the cases under this section, see 149 A.L.R. 650 (1944) as well as the treatises and articles cited in note 11 infra.

3 E.g., one "acting in fact for or in behalf, or . . . subject to the direct or indirect control (of the buyer). . . ."


5 Oliver Brothers v. FTC, (4th Cir. 1939) 102 F. (2d) 763; Quality Bakers of America v. FTC, (1st Cir. 1940) 114 F. (2d) 393.

6 Biddle Purchasing Co. v. FTC, (2d Cir. 1938) 96 F. (2d) 687, cert. den. 305 U.S. 634 (1938); Oliver Brothers v. FTC, note 5 supra.

7 Southgate Brokerage Co. v. FTC, (4th Cir. 1945) 150 F. (2d) 607, cert. den. 326 U.S. 774 (1945).


9 Section 2(a) provides: "That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such commodities are to such purchaser sold or delivered. . . ."

10 See, e.g., Great Atlantic & Pacific Tea Co. v. FTC, note 8 supra.

11 See, e.g., Southgate Brokerage Co. v. FTC, note 7 supra. To the effect that the courts have read the "services rendered" exception out of the statute, see Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act, rev. ed. (1953); Austern, "Section 2(c)," in N.Y. State Bar Assn., Robinson-Patman Act Symposium 37 (1946); Chadwell, "An Analysis of Section 2(c)," Chicago Bar Association Symposium on the Robinson-Patman Act (1947); Oppenheim, "Administration of the Brokerage Provision of the Robinson-Patman Act," 8 Geo. Wash. L. Rev. 511 (1940); Report of the Attorney General's National Committee To Study the Antitrust Laws 188 (1955).

dence of legislative intent, the congressional committee reports. While the court's holding seems to assume a great deal of surplusage in the statutory declaration, it should be recognized that Congress probably had a dual intent in enacting section 2(c): first, to condemn as illegal per se discriminatory prices cloaked as brokerage allowances; and, second, to preserve the wholesome business of the "true independent broker." In the principal case a conflict arises between these two purposes, for the court allows the seller to reduce its price to the buyer by obtaining a reduction in the allowance due its broker. Thus a volume purchaser was able to obtain a preferential discount and part of that discount was undeniably in lieu of brokerage. In *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, the court held that a seller's saving in cost resulting from the non-use of brokers could not be passed on to a buyer. The instant holding would seem to sanction the granting of preferential discounts to volume buyers through the medium of the protected independent broker. It is difficult to see why a seller should be allowed to pass on to the buyer a saving in cost attributable to a partial reduction in brokerage when the same seller could not sell direct to the buyer at a cost reflecting a total savings in brokerage. This of course assumes the major problem presented by this case: whether the protection afforded the independent broker extends to the other parties to the transaction. It would seem that the same arguments relied upon in the principal case to exempt the broker from section 2(c) coverage could be extended to the case of the buyer and seller in any transaction utilizing an independent seller's broker. In this event, the commission would be compelled to resort to a proceeding against the seller under section 2(a) or the buyer under section 2(f). This would not give the commission the advantage of the per se violation approach under

13 H. Rep. 2287, 74th Cong., 2d sess. (1936); S. Rep. 1502, 74th Cong., 2d sess. (1936); H. Rep. 2951 (Report of Conference Committee), 74th Cong., 2d sess. (1936). These reports indicate that although the moving purpose of Congress was the prohibition of price concessions coerced by large buyers, particularly chain stores, the section was intended to prohibit an "allowance by the buyer direct to the seller, or by the seller direct to the buyer; and . . . by either to an agent or intermediary . . . of the other." Conference Report at p. 7.

14 See note 13 supra.

15 See H. Rep. 2287, 74th Cong., 2d sess., p. 15 (1936): "The relation of broker to his client is a fiduciary one . . . [T]o protect those who deal in the streams of commerce against breaches of faith in its relation of trust, is to foster confidence in its processes and promote its wholesomeness and volume."

16 A competitor of petitioners in the principal case had refused to cut his brokerage on the belief that such practice would violate the Robinson-Patman Act. See principal case at 727.

17 Note 8 supra.

18 See also Southgate Brokerage Co. v. FTC, note 7 supra.

19 See legislative history cited by the court in the principal case at 728, n. 4. Likewise, no case has been found wherein any of the three parties to a transaction involving an independent seller's broker has been prosecuted under §2(c).
section 2(c), but would require it to sustain the burden of proving either price discrimination and injury to competition under section 2(a), or the knowing inducement or receipt of an illegal price discrimination under section 2(f). In viewing the brokerage provision as but one strand in the fabric of national antitrust law and policy, it would appear that the best answer to the problems posed by this case would be to hold that sellers have an inherent right to pass *true* cost savings on to buyers and eventually to the consumer.

*James A. Park, S.Ed.*

---

20 Regarding the relative uncertainty of this approach, see Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953).
