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Unfair Trade - Practices - Robinson-Patman Act - Payments for Advertising Under Sections 2 (d) and 2 (e)

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UNFAIR TRADE PRACTICES—ROBINSON-PATMAN ACT—PAYMENTS FOR ADVERTISING UNDER SECTIONS 2(d) AND 2(e)—Plaintiffs, wholesale and retail grocers, brought a class action for treble damages and injunctive relief[1] under sections 2(d) and 2(e) of the Robinson-Patman Act.[2] Defendant-suppliers of defendant-A & P Co. had paid for advertising in *Woman's Day,* a magazine published by a wholly-owned subsidiary of A & P, without making a corresponding allowance available to plaintiffs who had no similar publication. The district court found no violation of section 2(e) since the suppliers were not contributing to the furnishing of a discriminatory service within the meaning of that section.[3] Because the advertising was designed primarily to aid defendant-suppliers, with A & P gleaning only incidental benefits which also accrued to its competitors, there was also no granting of a payment upon proportionally unequal terms as prohibited by section 2(d).[4] Moreover, since plaintiffs did not themselves

1 As provided in 38 Stat. 731, 737 (1914), 15 U.S.C. (1952) §§15, 26.

2 Amendatory of the Clayton Act, 49 Stat. 1527 (1936), 15 U.S.C. (1952) §13.

3 Section 2(e) reads: "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

4 Section 2(d) reads: "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 of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

furnish similar services, they had no standing to complain of discrimination. On appeal, *held,* affirmed as to the section 2(e) ruling, reversed as to the section 2(d) ruling, one judge dissenting.[5] To avoid violation of section 2(d), defendant-suppliers needed to make payments available on proportionally equal terms to other customers competing with A & P. Plaintiffs' failure to publish a magazine did not relieve defendants from liability. *State Wholesale Grocers v. Great Atlantic & Pacific Tea Company,* (7th Cir. 1958) 258 F. (2d) 831.

The rapidly increasing power of the great chain stores and a resultant fear for the welfare of the independant merchant[6] gave rise to the Robinson-Patman Act which was aimed at curtailing unfair competition via price discrimination, both direct and indirect. The power of the chains was making itself felt in terms of discriminatory rebates, services, and allowances granted them by their suppliers. The particular stimulus for the inclusion of sections 2(d) and 2(e) was the prevalence of advertising allowances and promotional services which enabled these organizations to shift a portion of their selling costs to the suppliers and thereby gain a competitive advantage over their smaller rivals.[7] Section 2(d) proscribes the granting by suppliers of unequal or unproportionalized payments for services or facilities provided *by* customers competing with each other, while section 2(e) prohibits the discriminatory furnishing of services or facilities *to* such competing customers. The affirmance in the principal case of the finding of no violation of section 2(e) by defendant-suppliers appears correct. The mere purchasing of advertising space in the magazine would not reasonably seem to constitute the granting or furnishing of a "service" or "facility" to a purchaser within the purview of section 2(e).[8]

The interpretation of section 2(d), however, causes more difficulty. While numerous problems have arisen from the attempted application of this section, the phrase "proportionally equal terms" has proved the most perplexing.[9] Although the apparent purpose of these words was to prohibit

[5] The opinion does not disclose the basis of the dissent.

[6] See generally, S. Doc. 4, 74th Cong., 1st sess. (1934) FTC Final Report on the Chain Store Investigation; FELDMAN AND ZORN, ROBINSON-PATMAN ACT: ADVERTISING AND PROMOTIONAL ALLOWANCES 92 (1948); Rowe, "The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective," 57 COL. L. REV. 1059 (1957).

[7] H. Rep. 2287, 74th Cong., 2d sess., pp. 15, 16 (1936). See also S. Rep. 1502, 74th Cong., 2d sess. (1936); 80 CONG. REC. 7759, 8123, 9418, 9561 (1936); FELDMAN AND ZORN, ROBINSON-PATMAN ACT: ADVERTISING AND PROMOTIONAL ALLOWANCES 91 (1948).

[8] See Elizabeth Arden Sales Corp. v. Gus Blass Co., (8th Cir. 1945) 150 F. (2d) 988; American Can Co. v. Russellville Canning Co., (8th Cir. 1951) 191 F. (2d) 38; Chicago Seating Co. v. S. Karpen & Bros., (7th Cir. 1949) 177 F. (2d) 863; In the Matter of Luxor, Ltd., FTC Dkt. 3736 (1940). See also, FELDMAN AND ZORN, ROBINSON-PATMAN ACT: ADVERTISING AND PROMOTIONAL ALLOWANCES 89, 139 (1948); Fisher, "Sections 2(d) and (e) of the Robinson-Patman Act: Babel Revisited," 11 VAND. L. REV. 453 at 481 (1958).

[9] Note that the discussion regarding §2(d) applies equally to the identical language of §2(e), as both have been interpreted in the same way by the courts.

the favoring of certain customers through indirect means such as payments exceeding the worth of the service or facility provided, no legislative standard was provided by which compliance with the requirement was to be measured.[10] The cases clearly indicate that either the furnishing of a payment which cannot be proportionalized so as to be made available to all competing customers, or the refusal to proportionalize the terms upon which payment is granted, is a failure to comply with the statute.[11] In other words, a supplier cannot tailor a money grant so that only a few customers will be able to take advantage of it, even though it may be offered to all. Since the payment for advertising space in *Woman's Day* falls within this prohibition, the court concluded that failure of plaintiffs to publish a magazine did not relieve defendants from making some sort of allowance available to them.

The objection to the decision in the principal case is not that it fails to follow existing precedent but, on the contrary, that it perpetuates the interpretation of section 2(d) as a "per se" section; that is, violation of its terms is not excused by the fact that there has been no injury to competition even though such a defense is available in prosecutions under section 2(a) of the act.[12] The reasoning behind this interpretation is that the failure to make payments available on proportionally equal terms is in its nature discriminatory and, therefore, injurious to competition "per se." In addition, it has been suggested that the purpose of sections 2(d) and 2(e) was to prohibit accomplishing indirectly what cannot be done directly because of section 2(a).[13] The difficulty of proof as to the injurious effects of discrimination under sections 2(d) and 2(e) has led to the belief that to allow this defense would be ultimately to destroy the effectiveness of section 2(a). As has

[10] H. Rep. 2287, 74th Cong., 2d sess. (1936); S. Rep. 1502, 74th Cong., 2d sess. (1936); 80 CONG. REC. 3231, 9561 (1936); FELDMAN AND ZORN, ROBINSON-PATMAN ACT: ADVERTISING AND PROMOTIONAL ALLOWANCES 93 (1948); Fisher, "Sections 2(d) and (e) of the Robinson-Patman Act: Babel Revisited," 11 VAND. L. REV. 453 at 468 (1958); Smith, "The Patman Act in Practice," 35 MICH. L. REV. 705 at 726 (1937); FTC Dkt. 5226, 5243; comment, 46 YALE L. J. 447 at 465 (1937).

[11] Elizabeth Arden Sales Corp. v. Gus Blass Co., note 8 supra; American Can Co. v. Russellville Canning Co., note 8 supra. See also Russellville Canning Co. v. American Can Co., (W.D. Ark. 1949) 87 F. Supp. 484; 80 CONG. REC. 3231, 9416 (1936). But the terms offered need not be identical or tailored so that every purchaser can take advantage of every feature. See FTC Dkt. 5585-5587; AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 136 (1950).

[12] E.g., Elizabeth Arden, Inc. v. FTC, (2d Cir. 1946) 156 F. (2d) 132, cert. den. 331 U.S. 806 (1947); United Cigar-Whelan Stores Corp. v. H. Weinreich Co., (S.D. N.Y. 1952) 107 F. Supp. 89. See also AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 116 (1950); Greenberg, "Indirect Price Differences and the Robinson-Patman Act: Anomalies Compounded," 28 PA. B.A.Q. 265 (1957). Section 2(a) prohibits direct or indirect price discrimination between purchasers of like grade and quality which has an adverse effect on competition, and which cannot be justified on the basis of a cost saving.

[13] H. Rep. 2966, 84th Cong., 2d sess. (1956).

been pointed out in support of an amendment of these sections, however, the real aim of Congress was to eliminate unearned payments resulting in discrimination, not to disallow advantages gained pursuant to the rules of fair and open competition.[14] The undesirable result that the courts reach under the present interpretation is well illustrated by the principal case. Defendants received full value for their payments, obtained the primary benefits of the advertising, and paid on the same terms as advertisers who did not deal with A & P as a customer.[15] Yet the courts have determined that when a retail organization is paid a fair price for a service which only it is equipped to provide, and the supplier enters the transaction solely for his own legitimate business benefit, the transaction is nevertheless within the prohibition of section 2(d) because the retailer may also be benefited.[16] Surely this is a perversion of the purpose of the statute. In the interpretation of section 2(d), the courts have carried the operation of the act beyond its originally intended limits. The principal case, while in accord with the present state of the law, points up the need for a re-evaluation of the Robinson-Patman Act in this area.

Robert Segar

[14] Oppenheim, "Should the Robinson-Patman Act Be Amended?" N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 142 (1948). See also Rowe, "Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman," 60 YALE L. J. 929 at 959 (1951); LEVY, THE ROBINSON-PATMAN ACT—A YEAR'S RETROSPECT (1937).

[15] State Wholesale Grocers v. Great Atlantic & Pacific Tea Co., (N.D. Ill. 1957) 154 F. Supp. 471 at 497.

[16] There is a strong hint in the legislative history that the act was intended to cover this situation if the customer derives *equal* benefits to his own business. See H. Rep. 2287, 74th Cong., 2d sess., p. 15 (1936); S. Rep. 1502, 74th Cong., 2d sess., p. 7 (1936). This was admittedly not true in the principal case.