Michigan Law Review

Volume 55 | Issue 6

1957

Regulation of Business-Civil Actions Under Section 3 of the Robinson-Patman Act

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COMMENTS

REGULATION OF BUSINESS—CIVIL ACTIONS UNDER SECTION 3 OF THE ROBINSON-PATMAN ACT—In *Nashville Milk Co. v. Carnation*

Co.[1] plaintiff sought to recover treble damages and asked injunctive relief, claiming defendant had sold filled milk at unreasonably low prices for the purpose of destroying competition by plaintiff in its sale of a like product in violation of section 3 of the Robinson-Patman Act.[2] In affirming an order dismissing the complaint, the Court of Appeals for the Seventh Circuit held that a private action may not be maintained for a violation of section 3 of the Robinson-Patman Act. That very same week, the Court of Appeals for the Tenth Circuit reached a contrary conclusion in *Vance v. Safeway Stores.*[3] In that case the trustee in bankruptcy of an operator of a retail grocery brought an action against the defendant supermarket for treble damages and equitable relief for allegedly violating section 3 of the Robinson-Patman Act in selling certain items at unreasonably low prices with knowledge and intent to destroy competitors. In reversing the district court, the Tenth Circuit held that section 3 is an amendment to the Clayton Act[4] for which a private action for treble damages[5] and injunctive relief[6] is available.

This conflict in the courts of appeals is a culmination of the confusion that has surrounded section 3 since it was first drafted.[7] Referred to as a "grotesque manifestation of the scissors and paste pot method of drafting a potentially drastic criminal statute,"[8] it was originally drafted as the Borah-Van Nuys[9] bill and intended to be an alternative to the longer and more explicit Robinson-Patman legislation.[10] As a compromise, the Borah-Van Nuys bill was "pasted" onto the Robinson-Patman Act as section 3.[11] It was generally believed that section 3 was a separate penal statute, not technically

1 (7th Cir. 1956) 238 F. (2d) 86. See also Mackey v. Sears, Roebuck & Co., (7th Cir. 1956) 237 F. (2d) 869, filed simultaneously.

2 49 Stat. 1528 (1936), 15 U.S.C. (1952) §13a.

3 (10th Cir. 1956) 239 F. (2d) 144. See also Dean Oil Co. v. American Oil Co., (D. C. N.J. 1956) 1957 Trade Cases ¶68,593; Ben Hur Coal Co. v. Wells, (10th Cir. 1957) 1957 Trade Cases ¶68,635.

4 38 Stat. 730 (1914), 15 U.S.C. (1952) §12.

5 38 Stat. 731 (1914), 15 U.S.C. (1952) §15.

6 38 Stat. 737 (1914), 15 U.S.C. (1952) §26.

7 On the origin and impact of the Robinson-Patman Act generally, see citations in Rowe, "Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act," 66 YALE L. J. 1 at 2, n. 5 (1956).

8 Oppenheim, "Should the Robinson-Patman Act Be Amended?" CCH ROBINSON PATMAN ACT SYMPOSIUM 141, 153 (1948).

9 S. 4171, 74th Cong., 2d sess. (1936). See 80 CONG. REC. 6346 to 6348 (1936).

10 80 CONG. REC. 6331, 6332 (1936); H. R. Rep. No. 2951, 74th Cong., 2d sess. (1936). For legislative history see ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS (1937); WERNE, BUSINESS AND THE ROBINSON-PATMAN LAW, A SYMPOSIUM 99 to 132 (1938). "A Symposium on the Robinson-Patman Act," 49 N.W. UNIV. L. REV. 196 at 285 (1954).

11 80 CONG. REC. 6346 (1936). Senator Patman opposed this amendment to his bill. 80 CONG. REC. 8227, 8228 (1936).

part of the "antitrust laws" as defined in the Clayton Act,[12] for which no private suit for treble damages could be maintained.[13] Therefore, enforcement of the Robinson-Patman Act was believed to be (1) by cease and desist orders of the Federal Trade Commission; (2) by the Department of Justice through civil proceedings for injunctions under section 1, and by criminal proceedings under section 3, and (3) by private parties for injunctions or treble damages under section 1, *but not under section 3*. The Department of Justice has been reluctant to enforce this "potentially drastic criminal statute," and no prosecution has produced a conviction under section 3.[14] By contrast, the civil suits under this section have become quite numerous.[15]

I. *Development of the Conflict*

A federal district court of Texas was the first to disallow treble damages under section 3, although the court did allow a single damage action.[16] In 1947, though the point was not directly argued in the case, Supreme Court dicta seemed to indicate approval of a treble damage action under section 3 in *Bruce's Juices v. American Can Company*.[17] After this decision the number of cases allowing civil section 3 actions increased.[18]

The earlier cases were not clear on the point. The private right to sue under section 3 was not clearly in issue, since it was used in combination with other antitrust laws as a basis for suit. In 1950,

12 38 Stat. 730 (1914), 15 U.S.C. (1952) §12.

13 See material cited in Nashville Milk Co. v. Carnation Co., (7th Cir. 1956) 238 F. (2d) 86 at 90; Vance v. Safeway Stores, (D.C. N.M. 1956) 137 F. Supp. 841 at 847.

14 United States v. American Petroleum Institute, Civ. No. 8524, (D.C. D.C. 1949) and United States v. Borden Co., No. 48, Cr. 362, (N.D. Ill. 1949) 89 F. Supp. 112, both voluntarily dismissed by the United States; United States v. Bowman Dairy Co., (N.D. Ill. 1949) 89 F. Supp. 112, revd. on other grounds (7th Cir. 1950) 185 F. (2d) 159, revd. and remanded 341 U.S. 214 (1951), dismissed on a procedural point; United States v. Maryland & Virginia Milk Producers, Inc., (D.C. D.C. 1956) 145 F. Supp. 374, dismissal of indictment by the United States, 1956 CCH Trade Cases ¶66,263.

15 On private enforcement, see Loevinger, "Enforcement of the Robinson-Patman Act by Private Parties," address before the Section on Antitrust Law of the New York State Bar Association, January 24, 1957 (unpublished); Clark, "The Treble Damage Bonanza: New Doctrines of Damages in Antitrust Suits," 52 MICH. L. REV. 363 (1954); Doyle, "Treble Damages and Counsel Fees," A.B.A. SECTION OF ANTITRUST LAW PROCEEDINGS 142 (1954); 61 YALE L. J. 1010 (1952).

16 Atlanta Brick Co. v. O'Neal, (E.D. Tex. 1942) 44 F. Supp. 39 at 43.

17 330 U.S. 743 at 750 (1947). See also dicta in Moore v. Mead's Fine Bread Co., 348 U.S. 115 at 117 (1954).

18 A. J. Goodman & Son v. United Lacquer Mfg. Corp., (D.C. Mass. 1949) 81 F. Supp. 890; Atlantic Co. v. Citizens Ice & Coal Storage Co., (5th Cir. 1949) 178 F. (2d) 453; Gordon, Wolf, Cowen Co. v. Independent Halvah & Candies, Inc., (S.D. N.Y. 1949) 9 F.R.D. 700; Spencer v. Sun Oil Co., (D.C. Conn. 1950) 94 F. Supp. 408; Moore v. Mead Service Co., (10th Cir. 1950) 184 F. (2d) 338.

however, the question was squarely presented in *Balien Ice Cream Co. v. Arden Farms Co.*,[19] and the district court held that a civil treble damage suit was proper. Doubt was cast on this holding by dicta in *National Used Car Market Report, Inc. v. National Automobile Dealers Association*,[20] in which the Court of Appeals for the District of Columbia indicated that it was inclined to the view that no civil action for treble damages or injunctive relief could be maintained under section 3. Weight was added to this position by the *Report of the Attorney General's National Committee to Study the Antitrust Laws,* which felt that ". . . acceptance of Section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support neither in the legislative intent nor overall antitrust policy."[21] The district court in the *Vance* case, impressed with the logic of the *Attorney General's Report,* held that the *Balien Ice Cream* case was decided wrongly, and that a private treble damage action could not be maintained under section 3.[22] The present cases move the conflict into the circuit courts of appeals—the Seventh Circuit followed the reasoning of the district court in the *Vance* case, and the Tenth Circuit overruled the district court's holding in *Vance,* and followed the reasoning of *Balien Ice Cream.*

II. *Conflict in the Court of Appeals*

Agreeing that the United States Code is only prima facie evidence of the laws,[23] both courts looked to the act itself to determine whether section 3 is an "antitrust law" as defined by the Clayton Act, entitling a private party to maintain a civil action for treble damages. Both courts sought legislative intent and applied rules of statutory construction to arrive at diametrically opposed conclusions. Each court started with the common thesis that if section 3 is an amendment to the Clayton Act (as section 1 is admitted to be), it is an antitrust law for which the Clayton Act allows treble

19 (S.D. Cal. 1950) 94 F. Supp. 796 at 802. See also F. & A. Ice Cream Co. v. Arden Farms, (S.D. Cal. 1951) 98 F. Supp. 180; Hershel California Fruit Products Co. v. Hunt Foods, Inc., (N.D. Cal. 1954) 119 F. Supp. 603; Myers v. Shell Oil Co., (S.D. Cal. 1951) 96 F. Supp. 670.

20 (D.C. D.C. 1951) 108 F. Supp. 692, affd. (D.C. Cir. 1952) 200 F. (2d) 359. See also note 46 infra.

21 P. 201.

22 Vance v. Safeway Stores, (D.C. N. M. 1956) 137 F. Supp. 841 at 847.

23 Vance v. Safeway Stores, (10th Cir. 1956) 239 F. (2d) 144 at 145; Nashville Milk Co. v. Carnation Co., (7th Cir. 1956) 238 F. (2d) 86 at 89.

damages[24] and suits for private injunctions,[25] since the Clayton Act is therein stated to be such an antitrust law,[26] and an amendment takes on the status of the statute which it amends.

The court of appeals in *Carnation* felt that the legislative history pointed to an intent that section 3 was not an amendment to the Clayton Act[27] and that this view was substantiated in the statutory construction of the Robinson-Patman Act. The court pointed out that, whereas the first section of the Robinson-Patman Act begins with the statement ". . . Section 2 of [the Clayton Act] is amended to read as follows. . . ,"[28] no such statement appears at the beginning of sections 2, 3 or 4 of the act. Therefore, reasoned the court, these sections "do not purport to amend as Section 1 specifically did."[29] Following this enacting clause, the entire section 1 is enclosed in quotation marks, whereas the remaining sections are not. This was again evidence to the Seventh Circuit that only section 1 was meant to amend the Clayton Act.[30]

The Tenth Circuit in the *Vance* case cited legislative history in support of its theory of congressional intent,[31] and was completely unimpressed with the argument concerning statutory construction made in the district court, which was followed by the Seventh Circuit in the *Nashville Milk* case. The title and enacting clause expressly declares that the act is an amendment to the Clayton Act, and since there is only one enacting clause, the court felt that everything following is meant to be an amendment to the Clayton Act, disagreeing with the significance the Seventh Circuit attributed to the placing of the quotation marks.[32]

Additional arguments favoring the Tenth Circuit's conclusions might be made. Although indicative, titles of statutes and legislative history are not conclusive, and only an examination of each statute, as to its objects, purposes and subject matter, can reveal their true relation.[33] The purpose of the antitrust laws is to "suppress combinations to restrain competition and attempts to mo-

24 38 Stat. 731 (1914), 15 U.S.C. (1952) §15.
25 38 Stat. 737 (1914), 15 U.S.C. (1952) §26.
26 38 Stat. 730 (1914), 15 U.S.C. (1952) §12.
27 Nashville Milk Co. v. Carnation Co., (7th Cir. 1956) 238 F. (2d) 86 at 89, 90.
28 49 Stat. 1526 (1936), 15 U.S.C. (1952) §13.
29 Nashville Milk Co. v. Carnation Co., (7th Cir. 1956) 238 F. (2d) 86 at 89.
30 Ibid.
31 Vance v. Safeway Stores, (10th Cir. 1956) 239 F. (2d) 144 at 146.
32 Ibid.
33 Balian Ice Cream Co. v. Arden Farms Co., (S.D. Cal. 1950) 94 F. Supp. 796 at 799.

nopolize by individuals and corporations."[34] Therefore, it can be argued, the entire Robinson-Patman Act is an amendment to the Clayton Act since their objects or purposes and situations to which the laws apply are similar.[35] A further argument might be that since the definition of "antitrust laws" in the Clayton Act is in terms of "including," Congress did not intend to "exclude" from that definition statutes with antitrust purposes other than those specifically named which might be enacted in the future.[36]

III. *Possible Resolution of the Conflict by the Supreme Court*

The outcome of this contradiction at the circuit courts of appeals level remains to be resolved by action of the Supreme Court.[37] If the Court should follow the Seventh Circuit's reasoning, section 3 will probably return to a "limbo of unenforced criminal laws."[38] If the Court should follow the Tenth Circuit's view, however, as its own dicta indicate that it might,[39] a further question will be raised—that of the constitutionality of section 3.

A. *Constitutionality of Section Three*

Although dealing with the same subject matter, the Borah-Van Nuys bill differs from section 1 of the Robinson-Patman Act[40] in several significant particulars, some of which cast doubt on its constitutionality. Section 3 forbids any person, on pain of fine or imprisonment, (1) "to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that any discount, rebate,

34 Parker v. Brown, 317 U.S. 341 at 351 (1943); Balian Ice Cream Co. v. Arden Farms Co., (S.D. Cal. 1950) 94 F. Supp. 796 at 801.

35 Vance v. Safeway Stores, (10th Cir. 1956) 239 F. (2d) 144 at 146; Spencer v. Sun Oil Co., (D.C. Conn. 1950) 94 F. Supp. 408 at 410; Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, (3d Cir. 1939) 106 F. (2d) 667 at 676 to 678; Balian Ice Cream Co. v. Arden Farms Co., (S.D. Cal. 1950) 94 F. Supp 796 at 801.

See also Oliver Bros., Inc. v. Federal Trade Commission, (4th Cir. 1939) 102 F. (2d) 763 at 767; Southgate Brokerage Co. v. Federal Trade Commission, (4th Cir. 1945) 150 F. (2d) 607 at 609.

36 If this reasoning is sound, it would appear to apply equally to §5 of the Federal Trade Commission Act, 15 U.S.C. (1952) §45, which declares unfair trade practices in interstate commerce to be unlawful but makes no mention as to a private right to sue for treble damages or injunctive relief, but it has been held that no such action for treble damages may be maintained for a violation of that section. Atlanta Brick Co. v. O'Neal, (E.D. Tex. 1942) 44 F. Supp. 39.

37 Certiorari has been granted. Nashville Milk Co. v. Carnation Co. (No. 699), and Safeway Stores, Inc. v. Vance (No. 707), 25 U.S. LAW WEEK 3253 (1957).

38 VAN CISE & DUNN, HOW TO COMPLY WITH THE ANTITRUST LAWS 12 (1954).

39 Note 17 supra.

40 49 Stat. 1526 (1936), 15 U.S.C. (1952) §13.

allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity;" (2) "to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted [elsewhere] for the purpose of destroying competition, or eliminating a competitor;" or (3) "to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Clause 1. In contrast to section 1, clause 1 of section 3 apparently allows unlimited quantity discounts. This clause does not prohibit different prices or quantity discounts, rebates, or allowances, so long as the same allowances are granted competing purchasers of like quantity of the same grade or quality. For a section 1 offense there must be two sales involving price discrimination, whereas the language of section 3 appears to indicate that a single contract to make a sale can be a violation, although it has been held otherwise.[41] Clause 1 further differs from section 1 in that only discriminations affecting the competitors of the buyer are unlawful.

Doubt as to the constitutionality of clause 1 results from the omission of a requirement that such discrimination must have an adverse effect on competition,[42] requiring only that discrimination be "to his knowledge against competitors of the purchaser." This might be the most potent clause in section 3 since it prohibits discrimination in the most sweeping terms without providing for any of the exceptions and safeguards of section 1, except discounts based on grade, quality or quantity.[43] While it may be conceded that Congress can regulate prices in private industry,[44] such a drastic provision might be open to the charge that the law violates due process in that it is "unreasonable, arbitrary or capricious," and that the "means selected . . . [has no] real and substantial relation to the object sought to be attained."[45]

41 Klein v. Lionel Corp., 1956 CCH Trade Cas. ¶68,485 (3d Cir. 1956). The court read §2(a) and §3 together, concluding that "competitors" means "competing purchasers from the same seller." But, it is submitted a different result would follow from the wording of §3 that such discount, etc., merely need be "*available* at the time of such transaction. . . ." See A. J. Goodman & Son v. United Lacquer Mfg. Corp., (D.C. Mass. 1949) 81 F. Supp. 890.

42 Cf. Federal Trade Commission v. General Foods Corp., (F.T.C. 1954) 3 CCH TRADE REG. REP., 10th ed., ¶25,069, discussed in 55 COL. L. REV. 106 (1955).

43 WERNE, BUSINESS AND THE ROBINSON-PATMAN LAW, A SYMPOSIUM 60 (1938).

44 Olsen v. Nebraska, 313 U.S. 236 (1941). See note 71 infra.

45 Nebbia v. New York, 291 U.S. 502 at 525 (1934).

The constitutional question might be avoided, however, by reading into clause 1 the general purposes and limitations of section 1 through a liberal judicial construction of "knowledge."[46] Thus, if the Court construes this clause to require competitive injury, it would probably be upheld, since a similar provision of the original section 2 of the Clayton Act has been generally assumed to be constitutional.[47] Read literally, clause 1 makes no express provision for the meeting of competition or other defenses explicitly provided under section 1. Some legislative history[48] indicates that Congress intended such defenses to apply to section 3, and it is logical that if they applied under the civil section, they should, a fortiori, apply under the criminal section. The Court might also maintain that the word "discriminates" means not mere difference in price, but a difference where the circumstances create a duty to treat all parties alike.[49] The Supreme Court has read in an analogous "rule of reason" in interpreting the phrase "in restraint of trade" in section 1 of the Sherman Act.[50] This could result in giving section 3 discriminations the same meaning and scope as those prohibited in section 1.

Clause 2. Clause 2 is aimed at territorial price cutting with intent to destroy competition or eliminate a competitor, such as that in *Porto Rican American Tobacco Co. v. American Tobacco Co.*[51] This clause adds nothing new to the law. Such predatory price slashing has always been a civil violation of the Clayton Act, and when it constitutes an attempt to monopolize, it would also be a crime under section 2 of the Sherman Act[52] and an unfair method of competition under section 5 of the Federal Trade Commission Act.[53]

46 Hershel California Fruit Products v. Hunt Foods, Inc., (N.D. Cal. 1954) 119 F. Supp. 603.

47 George Van Camp & Sons v. American Can Co., 278 U.S. 245 (1929).

48 80 CONG. REC. 9903 (1936).

49 Cf. 80 CONG. REC. 9416 (1936), in which a frequently quoted definition of "discrimination" as used in the Robinson-Patman Act is given by Congressman Utterback, manager of the Conference Bill, stating, "In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other." But see AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT, rev. ed., 18 (1953).

50 Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 at 60 (1911). See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, 5 to 12, and cf. 201 (1955).

51 (2d Cir. 1929) 30 F. (2d) 234. See also Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

52 26 Stat. 209 (1890), 15 U.S.C. (1952) §2.

53 38 Stat. 719 (1914), 15 U.S.C. (1952) §45.

Clause 3. Clause 3 requires for a violation, (1) a sale or contract to sell at "unreasonably low prices" (2) "for the purpose of destroying competition or eliminating a competitor." This third clause evokes the greatest doubts as to its constitutionality. No discrimination is required, and no standard for determining "unreasonably low prices" is supplied. Because this is a penal statute, the due process clause of the Fifth Amendment to the United States Constitution requires that it be so definite and certain that it clearly apprises of the condemned conduct.[54] Failing this, it may be invalid for vagueness as a civil statute as well.[55] What then are "unreasonably low" prices? Does this mean below cost to the seller? Below cost to the injured competitor? Below the average price charged by the industry? What account should be taken of differences in volume, margins, seasonal fluctuations, overcapacity and oversupply? Should a businessman be required to disclose his profits upon every charge of selling at an "unreasonably low" price? The very problem of determining costs and profits of isolated transactions is often impossible.[56] Because of this indefiniteness some courts have seriously questioned the constitutionality of this clause.[57] Doubt was also expressed in the *Report of the Attorney General's National Committee To Study the Antitrust Laws.*[58]

A similar provision in the Lever Act[59] was declared unconstitu-

54 F. & A. Ice Cream Co. v. Arden Farms, (S.D. Cal. 1951) 98 F. Supp. 180 at 184; Conally v. General Construction Co., 269 U.S. 385 at 391 (1926); International Harvester Co. of America v. Kentucky, 234 U.S. 216 at 222 to 224 (1914); Jordan v. De George, 341 U.S. 223 at 230 to 246 (1951); Winters v. New York, 333 U.S. 507 at 517, 518 (1948).

55 A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 at 239, 240 (1925); Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 231 N.Y. 51 at 54, 131 N.E. 566 (1921).

56 Myers v. Shell Oil Co., (S.D. Cal. 1951) 96 F. Supp. 670. But see F. & A. Ice Cream Co. v. Arden Farms, (S.D. Cal. 1951) 98 F. Supp. 180 at 189, discussed in 100 UNIV. PA. L. REV. 1058 at 1061 (1952). Courts have relied on numerous factors to determine "reasonableness." See Hershel California Fruit Products v. Hunt Foods, Inc., (N.D. Cal. 1954) 119 F. Supp. 603 (seasonal factors, good faith, cost, perishability); Gordon, Wolf, Cowen Co. v. Independant Halvah and Candies, Inc., (S.D. N.Y. 1949) 9 F.R.D. 700 (cost and profit data); F. & A. Ice Cream Co. v. Arden Farms, (S.D. Cal. 1951) 98 F. Supp. 180 (costs, market conditions, level of profits); Balian Ice Cream Co. v. Arden Farms Co., (S.D. Cal. 1950) 94 F. Supp. 796 (meeting competition); Ben Hur Coal Co. v. Wells, (10th Cir. 1957) 1957 CCH Trade Cas. ¶68,635 (market conditions). Cf. state statutes prohibiting sales below cost. See Lovell, "Sales Below Cost Prohibitions: Private Price Fixing under State Law," 57 YALE L.J. 391 (1948), and materials cited in OPPENHEIM, UNFAIR TRADE PRACTICES, CASES, COMMENTS AND MATERIALS, 947, n. 1 (1950).

57 Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co., (8th Cir. 1942) 131 F. (2d) 419 at 422; United States v. Bowman Dairy Co., (N.D. Ill. 1949) 89 F. Supp. 112. Cf. Hershel California Fruit Products Co. v. Hunt Foods, Inc., (N.D. Cal. 1953) 111 F. Supp. 732.

58 P. 201.

59 41 Stat. 297 (1919), 21 U.S.C. (1952) §2.

tional as being too uncertain.[60] The Supreme Court there held that a criminal law is lacking in due process when so vague that men of ordinary intelligence must guess as to its meaning or application. "Unreasonably low" might be sustained if the Court should view the phrase as having a technical or special meaning, or if there is a sufficient common law background of precedents to act as a guide in construction.[61] The test laid down in *F. & A. Ice Cream Co. v. Arden Farms*[62] is that of the "reasonably prudent man." But it is submitted that such a standard should not apply here, since society has not dictated standards of what a "reasonable" price should be.[63] Judge Yankwich in *F. & A. Ice Cream* grounded validity of this clause in the argument that sufficient definiteness is supplied by the additional requirement that such "unreasonably low prices" must be coupled with the "purpose of destroying competition or eliminating a competitor."[64]

An additional problem is posed in determining "purpose." Is the seller to be held to an objective test measured by the necessary and foreseeable consequences of his actions? It has been so held.[65] In *F. & A. Ice Cream,* the court indicated that the same factors which might be considered in determining "reasonableness" of prices would form the basis of deciding the fact question of whether the "unreasonably low" price was fixed for the "purpose" of destroying competition or a competitor.[66] Such an interpretation would tend to eliminate any distinction between the two requirements, resulting, through application of the objective approach, in a finding of scienter wherever the price should be found "unreas-

[60] United States v. Cohen Grocery Co., 255 U.S. 81 (1921). See also Cline v. Frink Dairy Co., 274 U.S. 445 (1927).

[61] Nash v. United States, 229 U.S. 373 (1913). "The vagueness of the Sherman Law was saved by imparting to it the gloss of history." Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392 at 405 (1953). But see note 63 infra.

[62] (S.D. Cal. 1951) 98 F. Supp. 180, noted in 100 UNIV. PA. L. REV. 1058 (1952). See also Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co., (8th Cir. 1942) 131 F. (2d) 419; Hipps v. Bowman Dairy Co., (N.D. Ill. 1951) 1950-51 CCH Trade Cas. ¶62,859.

[63] See note 60 supra. See also: Weeds, Inc. v. United States, 255 U.S. 109 (1921); International Harvester Co. of America v. Kentucky, 234 U.S. 216 (1914). "Doubts besetting Section 3's constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 201 (1955). Cf. note 61 supra.

[64] (S.D. Cal. 1951) 98 F. Supp. 180 at 187. See also: Hygrade Provision Co. v. Sherman, 266 U.S. 497 at 501 (1925); Omaechevarria v. Idaho, 246 U.S. 343 at 348 (1918); Nash v. United States, 229 U.S. 373 at 377 (1913).

[65] United States v. Patten, 226 U.S. 525 at 541, 543 (1913); F. & A. Ice Cream Co. v. Arden Farms, (S.D. Cal. 1951) 98 F. Supp. 180 at 189, 190.

[66] F. & A. Ice Cream Co. v. Arden Farms, (S.D. Cal. 1951) 98 F. Supp. 180 at 189, 190.

onably low." If the separate requirement of "purpose," is thus read out, the sole criterion left is the definiteness and certainty of the phrase "unreasonably low" prices.

Certainly this result is not desirable. Since the necessary result of every sale is to injure a competitor, in a criminal statute there should be required a finding of subjective intent to destroy competition or eliminate a competitor. Such an intent should include "malice" in the criminal sense. It should be shown that the defendant's intent was to drive out a competitor, and not merely to get business.[67] If the requirement of scienter could be thus separated from the determination of "reasonableness," the additional requirement of purpose to destroy competition would tend to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."[68]

Because Congress has practically unlimited power to exclude from interstate commerce,[69] it has a similarly broad power of regulation.[70] Here, therefore, "the norms by which it is determined whether due process has been violated are entirely different."[71] But the norms of due process should not be stretched to the point of imposing criminal liability for an offense of which the defendant was unaware. In absence of requiring such actual "malice" the clause must be judged on the certainty and definiteness of its standard of reasonableness. None of the cases cited in *F. & A. Ice Cream* as indicating the validity of a standard of reasonableness is in point.[72]

While it may be true that "the test of reasonableness or unreasonableness or similar tests which can be judged by reference to a common standard of conduct satisfy the requirement of definiteness,"[73] it is submitted that in the great diversity of business practices there is no such objective "common standard of conduct." Punishment of a child by a teacher,[74] "featherbedding,"[75] claiming income tax deductions,[76] driving an automobile,[77] making con-

67 See WERNE, BUSINESS AND THE ROBINSON-PATMAN LAW, A SYMPOSIUM 62 (1930).

68 Screws v. United States, 325 U.S. 91 at 102 (1945).

69 National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 at 36, 37 (1937); United States v. South-Eastern Underwriters Assn., 322 U.S. 533 at 558-559 (1944).

70 Mulford v. Smith, 307 U.S. 38 at 48 (1939); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 at 423, 424 (1946); Cleveland v. United States, 329 U.S. 14 at 19 (1946).

71 F. & A. Ice Cream Co. v. Arden Farms, (S.D. Cal. 1951) 98 F. Supp. 180 at 183.

72 Id. at 185, 190.

73 Ibid.

74 People v. Curtiss, 116 Cal. App. 771, 300 P. 801 (1931).

75 United States v. Petrillo, 332 U.S. 1 (1947).

76 United States v. Ragen, 314 U.S. 513 (1942).

77 Miller v. State of Oregon, 273 U.S. 657 (1927).

tracts tending to fix prices,[78] and obstructing navigation[79] are all situations in which an actor can justifiably be held to a "standard of reasonableness." In each of these the actor can rightly be put on guard to act "reasonably" or suffer the consequences. Efforts to get business by lower prices, however, is an accepted method of competition. To subject a businessman to criminal liabilities for an error of judgment in setting his prices "unreasonably low" is not only unjust, but also inconsistent with the basic purpose of our antitrust laws—the promotion of competition.

Conclusion

The fate of this ineptly drawn statute remains for the Supreme Court to determine. It is always difficult to discover what was in the collective mind of Congress, but reference to legislative history at least casts serious doubt on whether section 3 was meant to allow civil treble damage actions. The wording of the statute adds to this doubt. Moreover, the very validity of section 3 has been seriously questioned. Its pervasive prohibitions against all "discriminations" in price against competing buyers without requiring an adverse effect on competition and with no justifications or defenses other than that the goods must be of like grade, quality, or quantity, and its vague and indefinite prohibition against selling at "unreasonably low" prices whether or not discriminatory, cast grave doubts on its constitutionality. However, the Supreme Court, through liberal judicial construction, might read section 1 defenses into clause 1 and uphold clause 3 of section 3 under the broad commerce power of Congress as requiring a reasonably prudent man test, coupled with a requirement of scienter.

This is a criminal statute, and treble damages are punitive—ordinarily provided only to punish willful and conscious violations of the law.[80] It is submitted that to apply such penalties to section 3 of the Robinson-Patman Act—which appears to frustrate comprehension by lawyers and judges, and more so by laymen— is unjust

78 Waters-Pierce Oil Co. v. State of Texas, 212 U.S. 86 (1909).

79 Union Bridge Co. v. United States, 204 U.S. 364 (1907).

80 There is a conflict of opinion among writers as to whether treble damages should be allowed in any civil suit where the violation was not willful. For arguments against treble damages where violation is not willful see Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 at 1209 (1952); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 379 (1955); Chadwell, "Antitrust Administration and Enforcement," (Symposium on the Attorney General's Report) 53 MICH. L. REV. 1133 at 1150 (1955); Segal and Mullinix, "Administration and Enforcement," (Symposium on the REPORT) 104 UNIV. PA. L. REV. 285 at 306 (1955); Cummings, "A General Survey and Critique," (Symposium on the

and lacks due process. Supreme Court dicta and the weight of lower court authority, however, tend to indicate that section 3 will not likely be invalidated on this basis. If this be true, the only real solution to this dilemma would be for Congress to clarify the law by a restatement more in conformity with accepted business practice and basic antitrust policies.

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REPORT), 50 N.W. UNIV. L. REV. 305 at 308 (1955). For arguments in favor of civil treble damage actions regardless of willfulness see McConnel, "The Treble Damage Issue: A Strong Dissent," (Symposium on the REPORT), 50 N.W. UNIV. L. REV. 305 at 342 (1955); DIRLAM AND KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 271, n. 17 (1954); Wham, "Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement," 40 A.B.A.J. 1061 (1954); Schwartz, "The Schwartz Dissent," 1 ANTITRUST BULLETIN 37 at 55 (1955), and REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 380 (1955).