Duquesne Law Review

Volume 4 | Number 4 Article 8

1965

Trade Regulations - Price Discrimination

Andrew M. Schifino

TRADE REGULATIONS—Price Discrimination—Consumer acceptance does not sufficiently differentiate physically identical goods for the purpose of determining the jurisdictional requirement of "like grade and quality" under section 2(a) of the Clayton Act.

Federal Trade Comm'n. v. Borden Co., 86 Sup. Ct. 1092 (1966).

The path of unconstrained evasion[1] of section 2(a) of the Clayton Act as amended by the Robinson-Patman Act[2] has been closed by the United States Supreme Court.[3] In a significant and far-reaching decision the Court held that brands and labels do not differentiate products for the purpose of determining grade or quality under section 2(a) of the Act.[4] By settling a heretofore unsettled question, this decision not only touched upon one of the "legal frontiers" of the Robinson-Patman Act, but indeed, it preserved the very Act itself from the legal graveyard.

Respondent, the Borden Company, manufactures and sells evaporated milk under the Borden brand name, a nationally advertised brand. Borden also markets evaporated milk under various private labels owned by its customers. All of the milk is manufactured and packed in substantially the same manner, except that different labels are affixed to the cans. The Borden brand and the private label milk are chemically identical.[5] However, the Borden Company has consistently sold the private label milk at prices lower than that charged for the Borden brand.[6] In view of this discriminatory pricing practice, the Federal Trade Commission[7] brought an action against Borden alleging price discrimination in violation of

---

1. This path was opened by the United States Court of Appeals for the Fifth Circuit. See, Borden Company v. Federal Trade Comm'n, 339 F.2d 133 (5th Cir. 1964).

2. 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1936).

3. Federal Trade Comm'n v. Borden Co., 86 Sup. Ct. 1092 (1966).

4. Section 2(a) provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of *like grade and quality*, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1936). [Emphasis supplied.]

5. The record disclosed this fact to be undisputed.

6. It was found that the private label milk was sold F.O.B. at a price determined by a cost-plus formula. The price varied from plant to plant and from month to month depending upon the time and place of shipment. It was also established that the private label price was always lower than the Borden brand price, which was sold at a uniform charge throughout the country.

7. Hereinafter referred to as "Commission."

section 2(a).[8] On appeal[9] to the United States Court of Appeals for the Fifth Circuit, it was held, contrary to a long-standing Commission interpretation,[10] that the jurisdictional requirement of "like grade and quality" had not been established in the case. The court adopted the position that although the two products[11] were chemically the same, commercially they were quite different. One was a premium product, the other a non-premium product, and they should be priced accordingly. The court concluded that:

> In determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional.[12]

Thus, the court of appeals sanctioned a practice which the Robinson-Patman amendment to the Clayton Act intended to restrain.

The Supreme Court rejected this shallow construction of section 2(a). The Court embraced the Commission's interpretation that labels do not differentiate products for the purpose of determining grade or quality and stating that this represents a more reasonable construction of the statute than that offered by the circuit court. This view is correct, even though one label may have more customer appeal and command a higher price in the marketplace. Furthermore, when the attitude of Congress concerning this question is gleaned from the legislative history, it supports the Commission's interpretation of the Act rather than that of the court of appeals. The Court pointed out during the 1936 hearings on the Robinson-Patman amendment, it was proposed that section 2(a) be amended to apply only to sales of commodities of "like grade, quality and brand."[13] The proposal was intended to put the practice of a man-

8. A price discrimination within the meaning of section 2(a) is merely a price difference. Federal Trade Comm'n v. Anheuser-Busch, Inc., 363 U.S. 536 (1960).

9. The Hearing Examiner found a price discrimination within the meaning of the statute. However, he found no injury to competition and held the difference in price was cost-justified in any event.

The Commission reversed the Hearing Examiner. Potential injury to competition within the meaning of the Act was found, and the cost-justification defense was rejected. A cease and desist order was issued by the Commission.

The cost-justification defense was not pursued on appeal by Borden. Borden Co. v. Federal Trade Comm'n, *supra* note 1.

10. The Commission's view has always been that labels do not differentiate products for the purpose of determining grade or quality under section 2(a). See, Goodyear Tire & Rubber Co., 22 F.T.C. 232 (1936); United States Rubber Co., 28 F.T.C. 1489 (1939); Page Dairy Co., 50 F.T.C. 395 (1953); Whitaker Cable Corp., 51 F.T.C. 958 (1955).

11. These products included the Borden brand milk and the private brand milk.

12. Borden Co. v. Federal Trade Comm'n, *supra* note 1, at 137.

13. *Hearings on H.R. 4995 Before the House Committee on the Judiciary*, 74th Cong., 2d Sess. 421 (1936).

ufacturer selling his nationally advertised brand product at a different price from his private label beyond the reach of the statute. The recommended amendment met with vigorous objection and was rejected by the Committee.[14]

The purpose and policy of the Robinson-Patman Act is furthered by the Commission's construction of the Statute, whereas the court of appeals' interpretation frustrates the aim and in fact destroys the primary difference between section 2(a) and "old" section 2 of the Clayton Act. Under the unamended section 2, a seller could legally extend discriminatory prices to the "volume" buyer without justification or excuse.[15] The so-called "volume discount" or "volume price" could be based merely upon the quantity purchased. It was not required that the price differential be reasonably related to a cost differential.[16] Consequently, the mass buying power of the chain stores provided them with a competitive advantage in the marketplace. The effects of this situation were felt by all small independent wholesalers and retailers. The Robinson-Patman amendment was enacted to cure this competitive malady. Thus, in this sense, the Act is remedial in nature and as such should be strictly construed to effectuate its purpose. If, for example, by permitting a mere change in the label of a physically identical product to sufficiently differentiate the grade and quality of the commodity for purposes of section 2(a), the situation which prevailed under the unamended section 2 would be regenerated. The seller could once again grant to the large buyer a "volume" price by merely attaching a different label to the product. The main thrust of section 2(a), however, is to curtail *unjustified* price differences. A seller may discriminate in the price of two or more brands of a physically identical product if he can justify the price difference under one of the defenses provided in the Act.[17] Thus, in this case, Borden could sell its private brand milk at a price lower than that charged for the Borden brand if a reasonable cost difference in marketing could be shown. The Court, clearly consistent with the purpose, policy and intent of the Robinson-Patman Act, noted:

> We doubt that Congress intended to foreclose . . . inquiries in situations where a single seller markets the identical product under several different brands, whether his own, his customers or both. Such transactions are too laden with potential discrimination and *adverse competitive effect* to be excluded from the reach of section 2(a) by permitting a difference in grade to be

14. *Ibid.*

15. Goodyear Tire & Rubber Co. v. Federal Trade Comm'n, 101 F.2d 620 (6th Cir. 1939).

16. *Ibid.*

17. 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) and (b) (1936).

> established by the label alone or by the label and its consumer appeal.[18] [Emphasis added.]

The adverse competitive effect referred to here is that which Robinson-Patman intended to alleviate.[19]

The Commission's construction adopted by the Court was criticized in a dissenting opinion by Mr. Justice Stewart.[20] The dissent, in advocating the position of the court of appeals, argued that the Commission's determination of "like grade and quality" under section 2(a) is inconsistent with the position it has assumed under section 2(b). That is, in cases where the discriminating seller has offered the defense that he is meeting competition in good faith it has been accepted.[21] In such cases the Commission has declared consumer preference to be a necessary consideration under section 2(b) in determining whether the seller is meeting or undercutting competition.[22] Thus, the "good faith meeting of competition defense" is disallowed where the product enjoys a "premium" reputation among consumers.

Essentially, the dissent's argument is reduced to the following: If demonstrable consumer preference for a product is recognized to prevent a defendant seller from successfully asserting the section 2(b) defense, then it is inconsistent for the Commission and the courts to deny this recognition when determining the applicability of section 2(a). Superficially, this argument seems appealing and logical. However, a meaningful examination of the purpose of the Act shows the specious nature of the dissent's argument. The purpose of the Act is to provide a framework within which equal opportunity for all businessmen prevails. This aim is effectuated by section 2(a) which proscribes direct and indirect price discrimination between different purchasers under similar con-

---

18. Federal Trade Comm'n v. Borden Co., *supra* note 3, at 1097.

19. The practice of unjustified price discrimination in the pre-Robinson-Patman years stimulated a trend toward fewer buyers and fewer sellers. This is a trend toward oligopoly and monopoly. 80 CONG. REC. part 4, 74th Cong., 2d Sess. 4683 (1936).

20. Mr. Justice Harlan joined with Justice Stewart in the dissent. Federal Trade Comm'n v. Borden Co., *supra* note 3, at 1099.

21. Section 2(b) provides in part:

> Upon proof being made . . . , that there has been discrimination in price . . . , the burden of rebutting the prima facie case . . . by showing justification shall be upon the person charged with a violation . . . and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. . . .

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

22. See, Standard Oil Co., 49 F.T.C. 923 (1952); Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948).

ditions.[23] The Act does not condemn every price differential, but rather those which cannot be justified under one of the "provisos" of the statute.[24] The "provisos" make available certain specific affirmative defenses, one of which is section 2(b).[25] The defenses can be, and indeed must be carefully limited so as not to nullify the purpose of the Act.

The recognition of "consumer preference" in considering the section 2(b) defense is a necessary limitation which gives effect to the intent of the statute. If such "preference" was not recognized, a convenient escape hatch would be open to large manufacturers allowing them to circumvent and indeed undermine the Act. The opportunity for classic territorial price discrimination would be available to the manufacturing giants. They could literally devastate the small local manufacturer by reducing the price of their "premium" product to exactly match that of the local product and thereby capture a significant share of the market on the strength of sheer economic power rather than competitive skills.[26] In

23. 49 Stat. 1526, 15 U.S.C. § 13(a) (1936).

24. 49 Stat. 1526, 15 U.S.C. § 13(a) and (b) (1936).

25. 49 Stat. 1526, 15 U.S.C. § 13(b) (1936).

26. For example, consider the following hypothetical situation: Colossal Mfg. Co. markets the "Colossal" brand zweck, a nationally advertised brand which enjoys consumer acceptance as a premium zweck. Several small local manufacturers also produce and market a zweck in various areas throughout the country. These zwecks are not regarded as a premium product, thus are sold for a price which is attractively lower than that charged for the "Colossal" zweck. Colossal decides it wants a larger share of the market in area X. The price of the premium "Colossal" zweck is lowered to exactly match that of the local manufacturers throughout area X. The highly probable consequence of this action would be the rapid decline of local brand zweck sales with an equally rapid increase in Colossal sales. If "consumer acceptance" was disregarded under section 2(b), then in any action brought against Colossal under section 2(a), Colossal could successfully defend by asserting the section 2(b) defense. This could be repeated in area Y, area Z, etc. The effect of this would be a motion toward fewer zweck sellers—the destruction of primary-line zweck competition. Clearly, this is contrary to the intent of the Robinson-Patman Act.

For a case which demonstrates the effects of such a price reduction on a premium product, see, Anheuser-Busch, Inc., 54 F.T.C. 277 (1957); Anheuser-Busch, Inc. v. Federal Trade Comm'n, 289 F.2d 835 (7th Cir. 1961).

The Commission found the phenomenal increase in "premium" Budweiser beer sales (during an eight-month period, Anheuser-Busch's market share leaped from 16.55% to 39.3%) was directly due to a price reduction which lowered the price of "Bud" to exactly match that of the local beers in the St. Louis market area. Hearing Examiner Frank Hier commented, "I have rarely seen such a dramatic exhibition of economic power and price sensitivity in so short a time." Anheuser-Busch, Inc., *supra* at 286.

On appeal, the circuit court found the incredible market shifts to be a consequence of factors other than the price-cut. In arriving at this conclusion, the court considered not only the period of the price reduction, but also an eleven-month period that followed; during which the price of Budweiser and the relative market shares were restored to former levels.

However, upon careful analysis of the relevant "eight-month price reduction period," it seems patently clear that the pronounced market shifts were due to the lower price of Budweiser, which exactly matched that of local competitors. See, Murray & Fixler, *Area Price Discrimination: A Workable Concept of Injury to Competitors*, 23 U. PITT. L. REV. 893 (1962).

addition, section 2(a) is directed to the protection of primary-line, secondary-line and tertiary-line competition[27] while section 2(b) is confined in scope to primary-line competition—actual competitors of the discriminating seller.[28]

It is clear that the majority opinion discharged the Court's responsibility to effect the legislative intent. Thus, the Robinson-Patman funeral procession signalled in the Fifth Circuit was halted and new life restored to the Act. The Commission's construction adopted by the Supreme Court in this case is the only one warranted by the purpose of the Act. The basic underlying policy of all anti-trust legislation is the preservation of competition. The Court's decision here is consistent with that policy.

Andrew M. Schifino

SALES—Uniform Commercial Code—The Pennsylvania Supreme Court completely ignored the Uniform Commercial Code in a case where the Code was applicable.

C.I.T. Corp. v. Jonnet, 419 Pa. 435, 214 A.2d 620 (1965).

In 1961, the Commercial Appliance Company sold equipment to Miracle Lanes, Inc. under a conditional sales contract.[1] The Commercial Appliance Company then assigned its rights under the contract to the C.I.T. Corporation, which had financed the transaction.

In 1964, Miracle Lanes, Inc. assigned the lease for a cocktail lounge, where the equipment was located, to Penn Hills Center, Inc. The plaintiff, C.I.T. Corporation, through its authorized agent, was informed of and consented to the assignment with full knowledge that the payments would thereafter be made by the assignee, Penn Hills Center, Inc. When the installment payments ceased, the C.I.T. Corporation brought an action in assumpsit against the defendants, Miracle Lanes and Mr. Jonnet. The defendants alleged that through the circumstances surrounding the assignment they were released from further liability on the original contract.

The lower court granted a judgment on the pleadings in favor of the plaintiff. The defendants appealed, contending that the evidence of a subsequent parol agreement was sufficient to raise the issue of modification of the original contract.

27. 49 Stat. 1526, 15 U.S.C. § 13(a) (1936).

28. See, Federal Trade Comm'n v. Sun Oil Co., 371 U.S. 505 (1963).

1. Elmer J. Jonnet, Jr. guaranteed in writing, as a surety, Miracle Lanes' obligations under the contract.