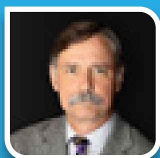
ROBINSON-PATMAN: HOW DID WE GET HERE? COULD WE GO BACK?

BY STEVEN CERNAK & LUIS BLANQUEZ[1]



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A TRIP TO PINE RIDGE: AN OLD ANTITRUST LAW AND ITS FORGOTTEN PROMISE FOR RURAL AMERICA
By Max M. Miller & Bryce Tuttle

REFORMING THE ROBINSON-PATMAN ACT
By John B. Kirkwood

THE ROBINSON-PATMAN ACT: EVERYONE OLD IS NEW AGAIN
By Patrick A. Bradford

ROBINSON-PATMAN ASCENDANT?
By David Munkittrick & Colin Kass

RESUMED FTC ENFORCEMENT AGAINST PRICE DISCRIMINATION, AND RAMIFICATIONS OF A CONSCIOUS UNCOUPLING OF PRICE DISCRIMINATION FROM ROBINSON-PATMAN
By Lawrence Silverman

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Government enforcement and private litigation of the Robinson-Patman has been minimal during the past decades. However now the FTC — among many others — seems to want to revive its application. In this article we illustrate the evolution of courts' views on Robinson-Patman cases, and how any attempt would need to account for decades worth of court opinions that have questioned its policy and narrowed its interpretation. Courts have interpreted all antitrust laws, including Robison-Patman, as focused on protecting competition and consumers. As a result, courts have ridiculed Robinson-Patman's policy and narrowed its interpretation for years. Any attempt to revive Robinson-Patman to its former glory will need to deal with that precedent.

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The Robinson-Patman ("RP") Act's price and promotional discrimination prohibitions are still on the books, but government enforcement and private litigation has been minimal for decades. Yet, some commentators — even some FTC Commissioners — would like to revive RP. Any such attempt must account for decades worth of court opinions that have questioned its policy and narrowed its interpretation.[2]

Below, we illustrate this evolution of courts' views on RP through quotes from both old and recent opinions. Because a generation (or more) of antitrust lawyers have grown up professionally thinking they would never need to understand the elements of and policy behind RP, we also summarize some of these cases to illustrate how different they are from other more recent antitrust actions.

I. ROBINSON-PATMAN ORIGINS

In 1936, the RP Act amended the earlier Clayton Act and attacked some of the perceived advantages enjoyed by certain big buyers, like the A&P grocery store chain, and tried "to keep open the door of opportunity for the small-business man."[3] Generally, it prohibits certain discriminatory price discounts and provision of or reimbursement for certain promotional services. The statutory language is lengthy and convoluted, especially compared to the Sherman Act, and a plaintiff must satisfy several elements, and often fend off several potential defenses, to successfully make a claim.

In one of its earliest RP cases, the Court's majority in 1948's *Morton Salt* made it easier for a disadvantaged buyer by allowing a rebuttable presumption of the requisite injury to competition merely from a showing of sustained higher prices to the disadvantaged buyer.[4] The Court's views on RP's general purposes and how the law should handle quantity discounts were clear:

> Furthermore, in enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end it undertook to strengthen this very phase of the old Clayton Act. The committee reports on the Robinson-Patman Act emphasized a belief that § 2 of the Clayton Act had "been too restrictive, in requiring a showing of general injury to competitive conditions . . . ." The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination."

Still, even at this early date, the *Morton Salt* dissent recognized that interpreting RP to protect certain competitors might come at the cost of harming consumers:

> The Robinson-Patman Act itself, insofar as it relates to quantity discounts, seems to me, on its face and in light of its history, to strive for two results, both of which should be kept in mind when interpreting it.
>
> On the one hand, it recognizes that the quantity discount may be utilized arbitrarily and without justification in savings effected by quantity sales, to give a discriminatory advantage to large buyers over small ones. This evil it would prohibit. On the other hand, it recognizes that a business practice so old and general is not without some basis in reason, that much that we call our standard of living is due to the wide availability of low-priced goods, made possible by mass production and quantity distribution, and hence that whatever economies result from quantity transactions may, and indeed should, be passed down the line to the consumer.

Just five years later in *Automatic Canteen*, the Court picked up that concern of the Morton Salt dissent about RP's potential conflicts with other antitrust laws as it disagreed with the FTC and narrowed the times when an advantaged buyer would be liable under Section 2(f) of RP:

> Although due consideration is to be accorded to administrative construction where alternative interpretation is fairly open, it is our duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress.[5]

2 https://www.ftc.gov/news-events/news/speeches/returning-fairness-prepared-remarks-commissioner-alvaro-m-bedoya-midwest-forum-fair-markets.

3 *Ibid.*

4 https://supreme.justia.com/cases/federal/us/334/37/.

5 https://www.law.cornell.edu/supremecourt/text/346/61.

Perhaps the height of the Court's focus on competitors, not consumers, under RP came in 1967's *Utah Pie*. [6] Plaintiff was a local maker of frozen pies. Defendants were three larger but non-local competitors. Plaintiff sold more than 60% of the pies in the market before it and defendants began lowering price and expanding volume. Defendants sold pies at prices lower in this market than in other markets, perhaps some below total costs. A few years later, plaintiff still had more than 40 percent of the much larger output and prices were much lower to consumers. The Court reversed the appellate court and found that the jury could find injury to competition, saying:

> [RP] does not forbid price competition which will probably injure or lessen competition by eliminating competitors, discouraging entry into the market or enhancing the market shares of the dominant sellers. But Congress has established some ground rules for the game.
>
> In this context, the Court of Appeals placed heavy emphasis on the fact that Utah Pie constantly increased its sales volume and continued to make a profit. But we disagree with its apparent view that there is no reasonably possible injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit.
>
> The frozen pie market in Salt Lake City was highly competitive. At times Utah Pie was a leader in moving the general level of prices down, and at other times each of the respondents also bore responsibility for the downward pressure on the price structure. We believe that the Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact.

Again, the dissent focused more on the effects on consumers resulting from the price war and any price discrimination:

> In 1958, Utah Pie had a quasi-monopolistic 66.5% of the market. In 1961 -- after the alleged predations of the respondents -- Utah Pie still had a commanding 45.3%, Pet had 29.4%, and the remainder of the market was divided almost equally between Continental, Carnation, and other, small local bakers. Unless we disregard the lessons so laboriously learned in scores of Sherman and Clayton Act cases, the 1961 situation has to be considered more competitive than that of 1958. Thus, if we assume that the price discrimination proven against the respondents had any effect on competition, that effect must have been beneficent.
>
> That the Court has fallen into the error of reading the Robinson-Patman Act as protecting competitors, instead of competition, can be seen from its unsuccessful attempt to distinguish cases relied upon by the respondents. Those cases are said to be inapposite because they involved "no general decline in price structure," and no "lasting impact upon prices." But lower prices are the hallmark of intensified competition.

II. ROBINSON-PATMAN TODAY

In the ensuing years, the Court narrowed its interpretation of RP and found new defenses for defendants. For instance, in 1990's *Hasbrouck*, the Court's majority followed a recommendation from an earlier expert study of the antitrust laws plus amicus briefs from the Antitrust Division and FTC and found a "functional discount" defense for suppliers selling to both wholesalers and retailers.[7] In general, the Court found that a "reasonable" discount to compensate a wholesaler-buyer who performed some functions that retailer-buyers did not could be found not to lessen competition. In the Court's words:

> A supplier need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and the supplier's direct customers.

While the Court found that the defendant's evidence did not support the functional discount in this case, it provided a roadmap for subsequent defendants to follow. In 1998, the Second Circuit found an appropriate functional discount in *American Booksellers*. There, the plaintiff alleged that defendants had violated RP by offering more advantageous promotional allowances and price discounts to certain large national chains and buying clubs. The court, however, found that discounts given by book publishers to vertically integrated bookstore chains were permissible functional discounts. The court expanded the defense by rejecting the argument that functional discounts could be given only to third-party

6 https://casetext.com/case/utah-pie-co-v-continental-baking.

7 https://supreme.justia.com/cases/federal/us/496/543/.

wholesalers unaffiliated with purchasing retailers.

Other lower courts have easily overcome the *Morton Salt* presumption and found no injury to competition even in the face of evidence of persistent higher prices to the plaintiff. In *Living Essentials LLC*, the defendant maker of 5-Hour Energy drinks convinced the Ninth Circuit that it did not violate RP by offering instant rebates and otherwise selling its product to Costco, a large retailer, at prices below what it had charged other wholesalers, finding that Costco and the plaintiff wholesalers were not direct competitors.

In 2015, the Second Circuit in *Cash & Henderson* upheld a summary judgment in favor of defendant pharmaceutical manufacturers accused of price discrimination stating that "[a]lthough Section 2(d) does not require plaintiffs to establish competitive injury, it does require them to establish antitrust injury." Here, plaintiff retail pharmacies alleged that the lower drug pricing offered to staff-model HMOs and pharmacy benefit managers was unlawful price discrimination under RP. But only 1-3 percent of potential lost customers were identified as customers who later filled prescriptions with a favored purchaser. The court concluded that this de minimis loss of customers was insufficient to establish a competitive injury. The court held that although *Morton Salt* allows a discrimination claim based on a substantial discount to a competitor over a significant period of time,

> [I]f the loss attributable to impaired competition is de minimis, then the challenged practice cannot be said to have had a 'substantial' affect [sic] on competition.

The Court's transformation to treating RP consistently with other antitrust statutes and focusing on injury to competition and consumer welfare was complete by 2006's *Volvo* case. There, the Court's majority found the plaintiff's "mix and match" evidence of price discrimination and injury to competition was insufficient to support a jury verdict, even though the likely effective result was no RP application for custom-built products. The majority went out of its way to explicitly state how RP should be interpreted (cleaned up):

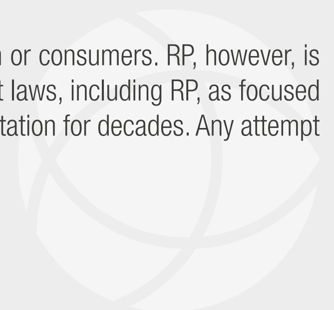
> Interbrand competition, our opinions affirm, is the "primary concern of antitrust law." The Robinson-Patman Act signals no large departure from that main concern. Even if the Act's text could be construed in the manner urged by [Plaintiff] and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition. In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. By declining to extend [RP's] governance to such cases, we continue to construe the Act "consistently with broader policies of the antitrust laws."

While the dissent thought the lower court opinions were supported by RP's text, it too could not resist some criticisms of the law:

> As the Court recognizes, the Robinson-Patman Act was primarily intended to protect small retailers from the vigorous competition afforded by chain stores and other large volume purchasers. Whether that statutory mission represented sound economic policy is not merely the subject of serious debate but may well merit Judge Bork's characterization as "wholly mistaken economic theory." I do not suggest that disagreement with the policy of the Act has played a conscious role in my colleagues' unprecedented decision today. I cannot avoid, however, identifying the irony in a decision refusing to adhere to the text of the Act in a case in which the jury credited evidence that discriminatory prices were employed as means of escaping contractual commitments and eliminating specifically targeted firms from a competitive market. The exceptional quality of this case provides strong reason to enforce the Act's prohibition against discrimination even if Judge Bork's evaluation (with which I happen to agree) is completely accurate.

III. CONCLUSION

Clearly, Robinson-Patman was passed to protect competitors — namely, small retailers — and not competition or consumers. RP, however, is an amendment of the Clayton Act, one of the antitrust laws. And for decades, courts have interpreted all antitrust laws, including RP, as focused on protecting competition and consumers. As a result, courts have ridiculed RP's policy and narrowed its interpretation for decades. Any attempt to revive RP to its former glory will need to deal with that precedent.



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