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Anti-trust Laws -- Robinson-Patman Act -- Price Discrimination -- Proportionally Equal Terms

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NOTES AND COMMENTS

Anti-trust Laws—Robinson-Patman Act—Price Discrimination—Proportionally Equal Terms

In 1936, Congress enacted the Robinson-Patman Act[1] in an endeavor to plug the holes in the anti-trust dike concerning price discrimination.[2] Some observers seemed confident at the time the Act was passed that its "intent" was clear.[3] However, subsequent events have revealed many ambiguities. One writer has been prompted to remark that "There is a law suit in literally every word of it."[4]

The phrase "proportionally equal terms," in subsections (d) and (e),[5] has been characterized as a "legislative monstrosity"[6] because of its ambiguities. The source of the trouble is that these sections purport to prescribe a standard for determining what constitutes equality in the granting of services or facilities but no actual standard is given. The payments or services must be made to different purchasers on "proportionally equal terms." The Federal Trade Commission has been given wide latitude to determine what constitutes "proportionally equal terms." This "blank check" has left the Act without a definite standard and has

[1] 49 STAT. 1526 (1938), 15 U. S. C. § 13 (Supp. 1952).

[2] An excellent discussion of the legislative history of the Robinson-Patman Act may be found in: Evans, *Anti-Price Discrimination Act of 1936*, 23 VA. L. REV. 140 (1936); NOTES, 36 COL. L. REV. 1285 (1936); 50 HARV. L. REV. 106 (1936).

[3] Mr. Commissioner Ayres, Chairman of the Commission in 1937, said of the new legislation: "I do not contend that the Act is without imperfections, but I do believe that any business man who desires and conscientiously endeavors to keep within its provisions will have little trouble in doing so. Its purpose and intent are clear." NORWOOD, TRADE PRACTICE AND PROCEDURE LAW (1938).

[4] GORDON, CONFERENCE PROCEEDINGS ON THE ROBINSON-PATMAN ANTI-DISCRIMINATION ACT, p. 21 (1936). Some Senators were confused as to its purport. 80 CONG. REC. 6429 (1936). *But see* note 11, *infra*.

[5] 49 STAT. 1526 (1938), 15 U. S. C. § 13 (Supp. 1952):

Subsection (d): "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 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." Subsection (e): "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*." [Italics added.].

[6] Oppenheim, *Should the Robinson-Patman Act Be Amended?* CCH ROBINSON-PATMAN ACT SYMPOSIUM 141, 146 (1948). At the Conference Proceedings on the Robinson-Patman Act held in New York on July 8, 1936, Mr. Gordon stated: "The only definite thing about the phrase . . . is that it is indefinite."

led to attacks in the courts. But so far these provisions have withstood assault.[7] The purpose of this note is to inquire into the possible ratios which may come within the purview of "proportionally equal terms."

In the case of *Elizabeth Arden Sales Corporation v. Gus Blass,*[8] the appellant advanced, in theory, the ratio of "dollar volume of purchases made."[9] Had the figures of the appellant been correct[10] and the allowances offered to each of the companies graduated to shift throughout

[7] Subsection (e) was attacked on the ground of being unconstitutional in Elizabeth Arden, Inc., v. Federal Trade Commission, 156 F. 2d 132 (2d Cir. 1946), *cert. denied,* 331 U. S. 806. The Court of Appeals, in ruling against the petitioner, stated: "We reject the contention that the standard in section (e) is so indefinite that men of common intelligence cannot adequately grasp its meaning and therefore it is invalid as an improper delegation of legislative power and violative of due process."

[8] 150 F. 2d 988 (8th Cir. 1945), *cert. denied,* 326 U. S. 773. Here appellant, a Delaware corporation, was the distributing and sales company of Eliabzeth Arden, Inc., a manufacturer of cosmetics. Appellee owned and operated a department store in Little Rock, Ark., said store containing a cosmetic and toilet-goods department. In 1938 appellee, via an oral contract with appellant, began to carry the Elizabeth Arden line of products. It was agreed that appellant would pay one half of the salary of a "demonstrator" in appellee's store amounting to $10 per week, said "demonstrator" to push the sales of Elizabeth Arden products when it was possible to do so. At other times this "demonstrator" was to wait on the general trade. This arrangement remained in effect for two years at which time the appellant discontinued selling Elizabeth Arden cosmetics to the appellee and in lieu of the appellee, the appellant began selling to the M. M. Cohn Co., another department store in Little Rock, Ark., and a competitor of appellee. The Cohn Co. had been handling Elizabeth Arden cosmetics during the period that the appellee handled them and the appellee knew of this. However, the appellant failed to disclose to the appellee that he (appellant) had been paying *all* of the salary of the "demonstrator" for the M. M. Cohn Co., a total of $20 per week. Appellee seeks to recover three fold the difference between the amount of the allowances made and the value of the services furnished to Cohn and those to the appellee. The trial court had held in favor of the appellee for $10 per week for 101 weeks or an aggregate of $1,010.00.

[9] Appellant seeks to substantiate his case by stating, in the language of the court that ". . . taking the total amount of products purchased by Cohn Co. over the entire period involved, in the sum of $18,593.40, and the total amount purchased by the appellee, in the sum of $11,250.35, then deducting the amount of goods, in the sum of $2,463.04, which Cohn Co. took off appellee's hands, . . . and finally comparing the net figure of $8,787.51 for appellee with the figure of $18,593.40 for Cohn Co.," there is a ratio of proportionality set up as the dollar volume purchased by each of the two companies. Converting his dollar volume purchased into percentages, appellant contends that since Cohn Co. did more than 67% of the business and appellee received much more than a proportionate share of the salary, i.e. 50% instead of 33%, appellant is in the clear and the appellee is in no position to contend that he has been slighted or a violation of the law has occurred.

[10] However, the court found a number of fallacies in the appellant's argument, including some discrepancies in appellant's figures. They stated: ". . . In the next place appellant's retrospective effort to adopt appellee's entire purchasing period as the base for testing the question of proportional treatment in relation to the amount of goods bought is purely artificial, for the evidence does not show that its policy of furnishing clerk's services or paying clerk's salaries ever was related to such a base. In passing, it may also be noted that, if appellant had undertaken to make a comparison of purchases by a calender year, appellee's purchases for the period that it handled appellant's products in 1938 would have shown $5,117.78 as against $3,834,83 for Cohn Co., and if a fiscal year had been taken commencing with the date that appellee began handling appellant's products it would have shown purchases of $7,086.86 by appellee during that specific period as against $7,575.82 by Cohn Co."

the business relationship so as to mirror their true value, the Commission probably would have upheld appellant's contention.[11] However, in reality, the appellant's facts indicate that the ratio which he in fact advanced was one of his own discretion and favor. This was rejected as being merely an arbitrary arrangement. The court stated: "That which was discriminatory under the statute when done, cannot subsequently, in order to enable the seller to escape damages the discrimination, be artificially tailored into proportionally equal terms by fitting it to some imaginary basis or standard that has never in fact existed."[12] Even though the court does not go into all the ramifications of "proportionally equal terms," it does infer that the proportionality must have a sound basis of existence, not a mere arbitrary arrangement, and such basis must have its birth not later than co-existent with the furnishing of the service or facility.

[11] The Court approved the Commission's cease and desist order which stated: "The statute affords the seller a free election in the first instance as to what services or facilities, if any, he will provide to purchasers of his products; but having elected to furnish a particular service or facility to a particular purchaser or puchasers, he thereby assumes the obligation of according similar services to all competing purchasers to the extent required by the statute. The furnishing of a service or facility which cannot be proportionalized for the benefit of competing purchasers, or, in the alternative, the failure or refusal to proportionalize the terms upon which services or facilities are granted, so as to make it reasonably possible for competing purchasers to avail themselves of such services or facilities if they desire to do so, constitutes a failure to accord such services or facilities upon proportionally equal terms."

Both the Committees of the Senate and the House of Representatives, explaining the meaning of "proportionally equal terms," concurred: "Where a competitor can furnish them (i.e., services or facilities) in less quantity but of the same relative value, he seems entitled, and this clause is designed to accord him, the right to a similar allowance commensurate with those facilities. To illustrate: Where, as was revealed in the hearings . . . , a manufacturer grants to a particular chain distributor as advertising allowance of a stated amount per month per store in which the former's goods are sold, a competing customer with a smaller number of stores, but equally able to furnish the same service per store, and under conditions of the same value to the seller, would be entitled to a similar allowance on that basis." SEN. REP. No. 1502, 74th Cong., 2d Sess. (1936); H. R. REP. No. 2287, 74th Cong., 2d Sess. (1936).

Furthermore, Senator Logan, who was in charge of the bill on the floor of the Senate, stated: "But if the seller grants an advertising allowance to one customer there is no reason why he should not grant, under identical circumstances, the same allowance to another customer based upon the quantity of the purchases. If one man buys $100,000 in goods and should be allowed $1,000 for advertising purposes, and another buys $10,000 in goods, he ought to be allowed $100 for advertising. That is not prohibited by the bill. So long as the same advertising allowances are made proportionately on the amount of purchases there is no prohibition in the bill against them." 80th CONG. REC. 3231 (1936). Congressman Utterback, who was in charge of the bill on the floor of the House stated: "But proportional to what? Proportional naturally to those customers' purchases and to their ability and equipment to render or furnish the service or facilities to be paid for." 80th CONG. REC. 9558 (1936). This would seem to be an indorsement of both the instant ratio," Dollar Volume Purchased" and also "Quantity Purchased Ratio," which will be discussed later.

[12] 150 F. 2d 988, 994 (8th Cir. 1945), *cert. denied*, 326 U. S. 773 (1945).

However, the "dollar volume purchased ratio"[13] is not, as a matter of law, the only basis upon which allowances or facilities may be tendered.

Another possible ratio may be found in quantities purchased. A recent survey by the American Law Institute stated: ". . . merchandising payments and services may be considered granted on proportionally equal terms when the payments are made or the services furnished in proportion to the respective quantities of goods purchased by different purchasers."[14] Thus, if *A* sold *B* 100 car loads of potatoes and gave *B* $100 to use for advertising for the sale of the potatoes, *C*, a competitor of *B*, who bought 50 car loads of potatoes, would be entitled to $50 for use in advertising the potatoes.[15]

Still another method of equalizing payments or services in a logically valid ratio is by making such payments or services in proportion to specified services furnished by the buyers without relation to the volume of goods purchased, either dollar volume or volume purchased.[16] For

[13] Laton, "Demonstrators on Proportionally Equal Terms," CCH Robinson-Patman Act Symposium, 38, 44 (1948).

Elizabeth Arden Sales Corporation v. Gus Blass, 150 F. 2d 988 (8th Cir. 1945), *cert. denied*, 326 U. S. 773; *accord*, Elizabeth Arden, Inc., v. Federal Trade Commission, 156 F. 2d 132 (2d Cir. 1946), *cert. denied*, 331 U. S. 806. In the last case cited, petitioner sought to have the court review an order by the Federal Trade Commission holding a violation of 2(e) of the Robinson-Patman Price Discrimination Act. The facts were that petitioner sold a "prestige" line of cosmetics in the several states to stores judged by petitioner to have facilities and appropriate services to merchandise the cosmetics in such a way which would appeal to customers having exclusiveness and fashion as buying motives. To their more important stores, which constituted less than 10% of the total number of stores, petitioners furnished "demonstrator" service, paying all or part of the salary to such "demonstrators." To the remaining 90% of their customers, who bought some 60% of petitioner's total sales, no "demonstrator" service was given. The terms which kept the 90% from being accorded this service were their inability to " 'cooperate' satisfactorily with petitioners by reciprocally furnishing to them . . . services and facilities to promote the resale of Arden cosmetics, such as carrying a representative stock, making available counter-displays, advertising once or twice a month . . . etc." The evidence tended to show that where the "demonstrators" were furnished, the sales of the Arden line of cosmetics increased, "sometimes as much as tripled." Upon this evidence, the Commission found that petitioners had violated the Act, since the subsection "required a seller who elected to furnish any service or facility to any purchaser to proportion both service or facility and terms so as not to exclude any competitive purchaser." In upholding the Commission, the court refused to read the limitation of an injurious effect upon competition of subsection (a) into subsection (e). Thus, subsection (e) is construed to be a per se violation, as is subsection (d), the only defense being a flat denial of the charge. In the instant case, petitioner tried unsuccessfully to use subjective considerations such as prestige value of the displays, etc. as a basis for proportioning the "demonstrators." The court rejected this as being much too arbitrary.

[14] AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT, 132 (1950).

[15] Although there have been no court decisions holding the "Quantity Purchased Ratio" to be a valid standard, this would seem to follow from Congressman Utterback's statement, note 11, *supra*. It is contended that not only should $50 be available for *C*'s use in advertising *A*'s potatoes but also an alternative, that is a $50 equivalent in value. See notes 20 and 23, *infra*.

[16] Feldman & Zorn, "Advertising and Promotional Allowances," Bureau of National Affairs (1948).

example, *A* agrees to pay *B* at the rate of $10 per week per square foot of window space for a maximum of 10 square feet for the exclusive display of *A's* product for a period not to exceed four weeks. Therefore, *B* receives $100 per week or $400 for the four week period. Now, suppose *C*, a competitor of *B*, has only five square feet of window space. If *C* agrees to display *A*'s goods for two weeks, under this ratio *C* will be entitled to $50 per week or $100 for the two weeks. But, even so, *C* is still receiving the payments from *A* at the same rate of $10 per square foot for four weeks, i.e., the same rate as that of *B*.

A similar situation would arise under the instant ratio if *S*, Seller, agreed to pay *B*, Buyer, for specified local advertising of *S*'s product a sum not to exceed $100 per week which is to be 50% of the Buyer's cost of such advertising for a maximum of four weeks. If *X*, a competitor of *B* and a purchaser from *S*, had the same agreement with *S* and wished to advertise for only two weeks and to buy local advertising at a total cost of $100 per week, *S* under this agreement would pay $50 for each of the two weeks. Thus, *S* is paying the 50% of the local advertising of each buyer, both *B* and *X*, in proportion to the reciprocal advertising service expense incurred by the buyers.

Conceding the above ratios to be proportional, there is still a strict requirement which must be complied with. The reciprocal services or facilities required of the purchasers for participation in the plan must be within the ability of the smallest competing purchasers to furnish. As the Commission stated in its findings in the *Elizabeth Arden* case:[17] "The furnishing of a service or facility which cannot be proportionalized for the benefit of competing purchasers or, in the alternative, the failure or refusal to proportionalize the terms upon which services or facilities are granted, so as to make it reasonably possible for competing purchasers to avail themselves of such services or facilities if they desire to do so, constitutes a failure to accord such services or facilities upon proportionally equal terms. The phrase 'upon terms not accorded to all purchasers on proportionally equal terms' contemplates the proportionalization of the terms, and this necessarily includes the proportionalization of the service or facility as well."

It is nowhere stated in subsection (d)[18] that the payments made to competing customers for services in return must be for services of the same type. Nor does subsection (e)[19] provide that services furnished to all purchasers must be of the same type. Thus, it has been stated: "The way is left open to offer alternative terms to smaller purchasers to suit their abilities, or alternative services to suit their needs."[20] This

[17] 39 F. T. C. 288, 302 (1944).

[18] See note 5, *supra*.

[19] See note 5, *supra*.

[20] "For example, a manufacturer who has arranged with certain large purchasers to pay all or a part of the cost of their newspaper and radio advertising, might meet the 'proportionally equal terms,' requirement by offering payments to smaller purchasers for providing window displays, distributing handbills, etc. If the co-

would seem to be only conjecture, however, since the courts have not read into the provision such a liberal interpretation. Even so, it would seem logical as well as practical since, if a company agreed to paint delivery trucks with the name of their product inscribed thereon for use by a distributor, without such a liberal interpretation, the company would be supposed to furnish identical services to other distributors who made no use of trucks whatsoever.

However, the Federal Trade Commission, dividing 3-2, has attempted to alleviate the situation in the Cosmetic Industry.[21] In 1951 the Commission issued certain rules for the Cosmetic Industry. One in particular was aimed at solving the problem of offering demonstrator services by the manufacturers of cosmetics to all retail members of the industry on terms of equality.[22] The majority of the Commission realized that too liberal an interpretation of the proportioning of demonstrator services would lead to obvious absurdities.[23] The dissent contended that the statute furnished no basis for any provision concerning alternative types of promotional services. It seems clear that expediency and practical necessity have emerged the victor over mere form and, therefore, the rule as now promulgated is that where the demonstrator service is not suitable to the facilities of one particular customer-[24]purchaser,[25] an

operative merchandising services which the seller requires of large customers are of a type which small customers cannot furnish, the terms offered should provide for proportional benefits to the latter conditioned on the furnishing of alternative services within their ability to render." AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 136 (1950).

[21] F. T. C. Trade Practice Rules for the Cosmetic and Toilet Preparation Industry, 16 Fed. Reg. 11,993 (1951), 3 CCH TRADE REG. REP. (9th ed.) ¶ 20,282 (1951).

[22] These rules, called "Group I" rules, set out those things which the Federal Trade Commission consider to be illegal within the industry as distinguished from "Group II" rules which merely set out those practices that are undesirable within the industry. Thus, " 'Group I' Trade Practice Rules merely express the understanding of the F. T. C. as to what conduct is illegal under the statutes within its jurisdiction, in an endeavor to secure voluntary compliance and avoid individual cease-and-desist proceedings." 65 HARV. L. REV. 1261, 1262 (1952).

It is to be noted that these Trade Practice Rules must be viewed principally as the weather forecast of "administrative wind" that the F. T. C. intends to follow and not a reliable statement of existing law. That this latter statement is true is evident from the fact that these rules do not grant immunity from prosecution but they do help the industry form policies.

[23] "As an example of eventual absurdity, if a girl demonstrator were employed in a department store, it might be contended that the law would be violated unless proportionate services of the same girl would be provided for every small drug store within range of that competition. And then, to continue on this road toward absurdity, we might have to find some means of measuring the energy and enthusiasm of the girl when she worked for a department store, as compared with when she worked for a drug store. . . . Absurdities could be piled upon absurdities, if it were necessary to prove that any such interpretation of the law was not intended by the Congress." ANNUAL SURVEY OF AMERICAN LAW, 291 (1952).

[24] See note 7, *supra*. "It shall be unlawful . . . unless such payment or consideration is available on proportionally equal terms to all other *customers* . . ." § 13(d). (Italics added.)

[25] See note 7, *supra*. "It shall be unlawful . . . or offering for sale of such commodity so purchased upon terms not accorded to all *purchasers* on proportionally equal terms." § 13(e). (Italics added.)

"alternative type of promotional service or facility which is of equivalent measurable cost"[26] may be substituted in its place.

It could be argued with some merit that the same type of policy rules should apply to other industries inasmuch as their problems, in part, are not unlike those in the Cosmetic Industry.

Although the Commission and the courts have indirectly approved only one interpretation of the phrase "proportionally equal terms," this is by no means the only ratio that would be valid under the Act. The real hope of the phrase lies not in its ambiguous past nor its equally uncertain present but in future liberal constructions which the judicial and administrative bodies must, of necessity, place upon it.

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Criminal Law—Former Jeopardy—Discharge of Jury Held to Bar Subsequent Prosecution

Defendant was on trial for murder. At the end of the third day of the trial the jurors were taken to a local hotel for the night. During the night, the police, upon being called to investigate the conduct of the jurors, found three in an intoxicated condition. When court was convened the next day, in the absence of the jury and upon the testimony of the officers, the judge withdrew a juror and declared a mistrial. The defendant objected to the order of mistrial, and upon the court's overruling the objection, duly excepted. At a later trial the defendant was convicted of manslaughter, the court overruling a plea of former jeopardy, to which the defendant duly excepted. On appeal, the Supreme Court in a unanimous decision vacated the judgment, held the order of mistrial improper and sustained the defendant's plea of former jeopardy[1]

The principle that a person shall not be twice put in jeopardy for the same offense is deeply rooted in American jurisprudence.[2] It is well established that jeopardy attaches when a competent jury is sworn

[26] See note 23, *supra*.

[1] State v. Crocker, 239 N. C. 446, 80 S. E. 2d 243 (1954). The city police officers testified that they observed three jurors moving along the halls of the hotel in an intoxicated condition. The sheriff testified that he observed one of the jurors in an intoxicated condition either from alcoholic beverages or narcotic drugs, and had to threaten arrest before the juror would become quiet and re-enter his room.

[2] The Federal Constitution and all of the state constitutions, except the Constitutions of Connecticut, Maryland, Massachusetts, North Carolina, and Vermont, contain prohibitions against double jeopardy. The states that do not have a constitutional provision have the principle as a part of their common law. State v. Benham, 7 Conn. 414 (1829); Gilpin v. State, 142 Md. 464, 121 Atl. 354 (1923); Commonwealth v. McCan, 277 Mass. 199, 178 N. E. 633 (1931); State v. Clemmons, 207 N. C. 276, 176 S. E. 760 (1934); State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934). See A. I. L., *Administration of the Criminal Law*, Commentary to § 6 (Proposed final draft for 1935) for a complete listing of the Constitutional provisions.