Washington and Lee Law Review

Volume 24 | Issue 2 Article 9

Fall 9-1-1967

"Commodities" Under the Robinson-Patman Act

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

Part of the Antitrust and Trade Regulation Commons

Recommended Citation

"Commodities" Under the Robinson-Patman Act, 24 Wash. & Lee L. Rev. 309 (1967).
Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol24/iss2/9

This Comment is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

"COMMODITIES" UNDER THE ROBINSON-PATMAN ACT

The Robinson-Patman Price Discrimination Act,[1] amending the Clayton Act,[2] provides: "It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality. . . ."[3] The Robinson-Patman Act has been the subject of much criticism and confusion[4] with the terminology of the Act being a particular source of trouble.[5] The definition of the term "commodities" within what is commonly referred to as section 2a of the Act[6] has recently become a subject of concern in Robinson-Patman Act litigation. The courts have restricted the term "commodities" to tangible personal property,[7] while excluding price discrimination involving service contracts and privileges[8] from the operation of the Act.

In *Tri-State Broadcasting Co. v. UPI*[9] the Court of Appeals for the Fifth Circuit held that the sale of the privilege of using UPI's news report service does not constitute a commodity under section 2a of the Robinson-Patman Act. Tri-State is a Georgia radio broadcasting company that claimed UPI discriminated by charging it a substantially higher price for UPI's news report service than other stations in the area. The court dismissed the suit on the ground that the news information service is not a "commodity" within the contemplation of the Robinson-Patman Act.[10] Even though Tri-State re-

---

[1]49 Stat. 1526 (1936), 15 U.S.C. § 13(a-f) (1964); 49 Stat. 1528 (1936), 15 U.S.C. §§ 13a, 13b, 21a (1964).

[2]38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1964).

[3]49 Stat. 1926 (1936), 15 U.S.C. § 13(a) (1964).

[4]See Symposium: *The Robinson-Patman Act—Retrospect and Prospect*, 17 A.B.A. SECT. OF ANTI-TRUST LAW 295 (1960). McLauglin, *The Courts and The Robinson-Pitman Act; Possibilities of Strict Construction*, 4 LAW & CONTEMP. PROB. 410 (1937); Morton & Cotton, *Robinson-Patman Act—Anti-Trust or Anti-Consumer?* 37 MINN. L. REV. 227 (1953); Rowe, *The Evolution of the Robinson-Patman Act: A Twenty Year Perspective*, 57 COLUM. L. REV. 1059 (1957).

[5]Automatic Canteen Co. v. FTC, 346 U.S. 61, 78 (1953).

[6]Courts and legal writers often refer to the Robinson-Patman Act as it was drafted, thus the designation section 2a but upon being enacted into the United States Code this section became 15 U.S.C. § 13(a) (1964).

[7]Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc., 219 F. Supp. 400 (W.D. Pa. 1963).

[8]See Fleetway, Inc. v. Public Serv. Interstate Transp. Co., 72 F.2d 761, 763 (3d Cir. 1934); Columbia Broadcasting Sys. v. Amana Refrigeration, Inc., 295 F.2d 375 (7th Cir. 1961).

[9]369 F.2d 268 (5th Cir. 1966).

[10]*Id.* at 269.

ceived written news reports, the court held that the dominant purpose of the transaction was the transfer of an intangible privilege to broadcast news information even though tangible objects were incidentally involved.[11]

A similar result was reached in *CBS v. Amana Refrigeration Co.*[12] where the court rejected Amana's contention that in the sale of network television time, CBS discriminated by granting a lower price to other sponsors, including competitors. The court rejected Amana's argument[13] and held that the sale of television time was the sale of a *privilege* of being identified with the program as a sponsor and advertising during the alloted time, and not the sale of a commodity.[14] An informal ruling of the FTC supports the view that sales of advertising or broadcasting time are not sales of commodities within the terms of the Act.[15]

In addition to the exclusion of sales of privileges, a second category, *services*, is excluded from Robinson-Patman Act coverage. *General Shale Products Corp. v. Struck Construction Co.*[16] held that there was no sale of a commodity under a contract between the defendant construction company and a municipal housing corporation which had awarded the company a job. The bid submitted to the commission included the use of a certain type of brick. The construction company agreed to reduce the bid if the commission would use another type of brick. The company negotiated with the seller of the brick to buy it at a reduced rate. The construction company in turn included it in the new bid at an even lower rate absorbing the loss themselves. This in effect resulted in the sale of the brick to the housing commission at a lower rate than to other purchasers. Plaintiff, a rival brick seller, brought suit claiming that the defendant construction company sold the brick at a price lower than that at which it was purchased, thus destroying competition in the brick market. The

---

[11]*Id.* at 270. The court cites General Shale Prods. Corp. v. Struck Constr. Co., 132 F.2d 425 (6th Cir. 1942), *cert. denied,* 318 U.S. 780 (1943).

[12]295 F.2d 375 (7th Cir. 1961).

[13]Amana argued that the transaction was a sale of television time. CBS v. Amana Refrigeration Co., 295 F.2d 375, 377-78 (7th Cir. 1961).

[14]*Id.* at 378.

[15]See Rowe, Price Discrimination Under the Robinson-Patman Act, 59 (1962). Also see Scott Pub. Co. v. Columbia Basin Pub. Co., 180 F. Supp. 754, 770 (W.D. Wash. 1959).

[16]132 F.2d 425 (6th Cir. 1942), *cert. denied,* 318 U.S. 780 (1943). The House Judiciary Committee was unsuccessful in attempting to amend the act to include services rendered by independent contractors. H.R. Res. 8277, 85th Cong., 1st Sess., 103 Cong. Rec. 9898 (1957). See also 103 Cong. Rec. 9900-9901 (1957).

court, however, held that there was no sale of a commodity because this was a service contract, including work or labor in addition to the brick. The contract was not divisible as to price so the dominant purpose controlled, labor being a service not a tangible commodity.

Before the Robinson-Patman Act, *Fleetway, Inc. v. Public Service Interstate Transportation Co.*[17] held that under section 2a of the Clayton Act, now amended by the Robinson-Patman Act, transportation by bus was not a commodity and thus not subject to the provisions of the Act. The defendant operated a bus line in New Jersey. When the plaintiff came into the business the defendant lowered his prices on the routes on which he was in competition with the plaintiff. The price of riding the bus remained the same on the other routes. The court held that transportation was a service, not a commodity, commodities usually being construed to relate to merchandise.

A possible third area of exclusion is exemplified by *Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town and Country Shopping Center, Inc.*[18] which defined a sale of "commodities" under the Robinson-Patman Act as a transfer of chattels or the sale of personal property, and did not include real estate.[19] *Gaylord Shops* involved the owner and operator of a shopping center, Pittsburgh Miracle Mile, which allegedly discriminated against Gaylord Shops by favoring J. C. Penney Co. with special provisions in the latter's lease.[20]

The rationale of the courts in these section two Robinson-Patman Act cases seems to be that the object of sale must not be a privilege, a service, or an interest in real property, to be considered a commodity.[21] This judicial interpretation of the term "commodities" is in accord with congressional understanding of the term. Legislative history[22] and later studies by Congress concerning the Clayton Act and the amending Robinson-Patman Act indicate that only tangible articles of commerce are covered. In addition the House Anti-Trust Subcom-

---

[17] 72 F.2d 761, 763 (3d Cir. 1934).

[18] 219 F. Supp. 400 (W.D. Pa. 1963).

[19] *Id.* at 403.

[20] Plaintiffs did not allege any specific violation of the Robinson-Patman Act but defendant and the court felt that only §§ 2a and 2e could be relevant. The court then held that real estate is not a commodity under the terms of the Act.

[21] See Rowe, *Price Discrimination Under the Robinson-Patman Act*, 59-62 (1962).

[22] The court in *Tri-State* refers to this point, the relevant citations are: 79 CONG. REC. 9078-79 (1935); Patman, THE ROBINSON-PATMAN ACT 75 (1938). Representative Patman indicated that the word is frequently used in the commercial sense to describe any movable or tangible thing that is produced or used as the subject of commercial transactions. Patman, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT. 33 (1963).

mittee on Television Broadcasting reported that the Robinson-Patman Act covers only tangible commodities and not services.[23] Perhaps another indication that intangibles were not intended to be included is the fact that Congressional hearings have been scheduled to consider whether to include intangibles under this Act.[24]

Section 3 of the Clayton Act contains terminology similar to that in section 2a of Robinson-Patman. Section 3 forbids, in any lease, sale, or contract to sell "goods, wares, merchandise, machinery, supplies, or other commodities...." the use of an agreement not to use goods of competitors of seller.[25] The Clayton Act was intended to supplement other anti-trust legislation, especially the Sherman Act of 1890,[26] and to attack in their incipiency all agreements tending to lessen competition or create a monopoly.[27] The Supreme Court has not defined the terminology used in the Clayton Act to enumerate the objects which violate section 3. However, the lower federal courts have considered the problem and have reached conflicting results.

Analysis of the decision in *United States v. Investors Diversified Services, Inc.*[28] indicates that the interpretation of goods, wares or other commodities under section 3 should be restricted to tangible commodities. The court specifically states that a commodity is confined to:

> articles of the same kind, class, and character as those specifically enumerated. The terms 'goods, wares, merchandise, machinery, supplies,' were undoubtedly used in their ordinary sense by the framers of the Act.... 'Commodities' therefore must be given its usual and natural meaning. That meaning does not include money which . . . is a medium of exchange.[29]

However, *Carter Carburetor Corp. v. Federal Trade Comm'n*[30] held that carburetors were tangible products and were included under section 3 in spite of the fact that a service contract was of prime importance in the tying arrangement. The court decided that the service contract did not control. Other federal courts have also been more liberal in their interpretation and have held that such things as a

---

[23]The court in *Tri-State* also notes the point. 369 F.2d at 270 n.2. Report on the Antitrust Subcommittee on the Television Broadcasting Industry of the House Committee on the Judiciary, 85 Cong., 1st Sess., 66-67 (1957).

[24]Again the court in *Tri-State* takes note of this fact. 369 F.2d at 271 n.3. The Gallagher Report No. 26 (June 30, 1965).

[25]Clayton Act, 338 Stat. 731 (1914), 15 U.S.C. § 14 (1964).

[26]Sherman Anti-Trust Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1, 2 (1964).

[27]Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355-56 (1922).

[28]102 F. Supp. 645 (D. Minn. 1951).

[29]*Id.* at 648.

[30]112 F.2d 722, 730-31 (8th Cir. 1940).

license (right or privilege) to manufacture certain patented products[31] are within the provisions of section 3.

The fact that many violations of section 3 of the Clayton Act may be prosecuted under section 1 of the Sherman Act[32] may be the reason why the courts feel it is neither necessary nor logical to make the same distinction concerning commodities as is made under section 2 of the Robinson-Patman Act.

The result in *Tri-State Broadcasting Co. v. UPI*[33] firmly establishes the view that "commodities" under the Robinson-Patman Act includes only tangible articles of commerce, excluding privileges, services, and interests in real property. One possible reason for the interpretation is that any extension of the term beyond tangible personal property would conflict with the built-in defense of the Act, such as the like grade and quality test.

Unlike the section 2 cases, the cases under section 3 of the Clayton Act do not so rigidly adhere to the distinction between tangibles and intangibles nor do they use the idea of the dominant nature of the transaction as controlling in order to exclude some contracts from coverage.[34] Perhaps the reason lies in the fact that the courts see a purpose behind the Clayton Act which is in line with general antitrust policy. This same purpose is not discernible in the Robinson-Patman Act and in many instances the courts tend to restrict the Act to the purpose for which it was passed, to prevent monopoly by large chain stores. In fact, since Robinson-Patman encourages a certain price rigidity, the courts restrict its scope, perhaps feeling that it goes

---

[31]RCA v. Lord, 28 F.2d 257, 260 (3d Cir.) *cert. denied,* 278 U.S. 648 (1928). Possibly the transaction may not have been violative of section 3 if the tying arrangement had not involved the purchase of tangible products, radio parts.

[32]See United States v. Loew's Incorporated, 371 U.S. 38 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). The Supreme Court has also given the FTC broad power to strike down any exclusive dealing arrangement which it deems improper. FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966); FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1953) (dictum). With the broad powers given to the lower courts and the FTC, only the Justice Department is required to adhere, in its prosecutions, to the strict terminology of section 3. It is not likely that the Justice Department will be held to this strict standard and it is safe to conclude that section 3 is a broad segment of the Act and in line with general antitrust policy.

[33]369 F.2d 268 (5th Cir. 1966).

[34]*Compare* General Shale Prods. Corp. v. Struck Constr. Co., 132 F.2d 425 (6th Cir. 1942), *cert. denied,* 318 U.S. 780 (1943). (The court held that the dominant nature of contract was service, thus the transaction was excluded from coverage under Robinson-Patman even though tangible incidentals were involved); *with* Carter Carburetor Corp. v. FTC, 112 F.2d 722, 730-31 (8th Cir. 1940) (The court held that even though the service contract was of prime importance it did not control and that carburetors ware tangible products included under section 3).