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Trade Regulation—Robinson-Patman Act—Manufacturer's Pricing of Autos at Close of Model Year.—*Valley Plymouth v. Studebaker-Packard Corp.*[1]—This is an action for treble damages brought by an automobile dealer against a manufacturer and another competing dealer for asserted price discrimination in violation of Section 2(a) of the Robinson-Patman Act.[2] The manufacturer, Studebaker, sold 66 of its 1960 model cars to plaintiff, Valley Plymouth, from January 7 to July 11, 1960. Due to unexpectedly poor sales between March and July of that year, Studebaker was faced with an unusually large inventory of 1960 model cars for the months of October through December, the very period when the 1961 models were being introduced. Despite announced monthly reductions in price to all its dealers, the manufacturer was not able to reduce this inventory. On December 31, 1960, a special sales agreement for 418 cars was reached between the defendant-manufacturer and defendant-dealer, Ranchero. The prices were not only considerably lower than those paid by the plaintiff at any time during that year, but also were lower than any price ever offered to it. The plaintiff contended that this lower price to a competing dealer was discriminatory as against him. HELD: The plaintiff could not claim injury within purview of the statute even though the automobile might be considered to be of "like grade and quality." These were not analogous transactions made under comparable conditions at the same time. Furthermore, the circumstances of this case, namely, a normal change in automobile model, made in good faith, came within the "changing condition" exception of Section 2(a).

The questions before the court were whether by these transactions the manufacturer did "discriminate in price between different purchasers of commodities of like grade and quality . . ." within the meaning of Section 2(a) of the Robinson-Patman Act,[3] and whether such alleged discriminations in price were "in response to changing conditions affecting the market for or marketability of the goods concerned . . ." and thereby within the exception of the Fourth Proviso of Section 2(a) of the Robinson-Patman Act.[4]

In determining whether the defendants were guilty of price discrimination, the court felt it necessary to consider the sales to Valley Plymouth during the first seven months of 1960 and the sale to Ranchero on December 31, 1960. It treated the plaintiff's claim as relying upon the actual differences in price between that paid by it to Studebaker and the amount agreed upon between the two defendants nearly six months later, although it was expressed that the plaintiff's allegations were not based upon Studebaker's dealer-wide reductions in price of its 1960 models following the introduction of the newer models.

For the provisions of the Act to be applicable, a plaintiff must be able to establish that the discrimination in price arose over goods of "like grade and quality." This is a crucial requirement to meet, as it is obvious that if the commodities to be sold are not "like", the price at which they are sold need not be the same. Congress left the precise meaning of "commodities

[1] 219 F. Supp. 608 (S.D. Cal. 1963).
[2] 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).
[3] Ibid.
[4] Ibid.

of like grade and quality" open to the courts, and the result has been a relatively few decisions, which are confusing and conflicting in their conclusions.[5] The Attorney General's Report has taken the view that "the 'like grade and quality' concept . . . was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute."[6] This view has been specifically supported in at least one decision,[7] and the theory has obviously been followed in another.[8]

While the meeting of the "like grade and quality" requirement is essential to a § 2(a) case, a surface satisfaction of this clause does not end the statutory test for the fulfillment of this prima facie element.[9] So it was evidenced by the court in this case when it stated that "although the cars involved may be considered of like grade and quality . . . there was not a failure . . . to give fair and equal treatment to plaintiff . . . ."[10] Therefore, other circumstances of this case, particularly the time interval between transactions during which period the 1961 models were introduced and the resulting depreciation in value of the older styles, were the bases of the court's determination that there was no violation of the Act's prohibitions. Due to the automatic lessening in value of the older models upon introduction of the newer ones and the decrease in consumer demand for the out-dated cars, it is felt that the court realistically and justifiably decided the plaintiff could not claim any discrimination under the statute arising out of differences in price paid by it and the defendant-dealer.[11] These factors of time and demand no doubt affected the relative value and pricing of the cars at the different purchase dates. Thus, even though the commodities involved could be classified as "like", it would have been imprudent for the court to treat these two business dealings as "consummated contemporaneous sales transactions" demanding like treatment by Studebaker.

Once the court decided that the plaintiff claimed no violation within the scope of section 2(a) of the statute, it need not have concerned itself

[5] Boss Mfg. Co. v. Payne Glove Co., 71 F.2d 768 (8th Cir. 1934) (actual physical composition of commodities examined); Bruce's Juices v. American Can Co., 87 F. Supp. 985 (S.D. Fla. 1949), aff'd, 187 F.2d 919 (5th Cir. 1951) (comparing items as to their functional interchangeability); United States Rubber Co., 46 F.T.C. 998, 1006-09 (1950), and United States Rubber Co., 28 F.T.C. 1489, 1500 (1939) (dismissing problems of brand advertisement differentials).

[6] The Att'y Gen's Nat. Committee to Study the Anti-Trust Laws 157 (1955).

[7] Moog Indus. v. FTC, 238 F.2d 43 (8th Cir. 1956).

[8] Atlanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958).

[9] Rowe, Price Discrimination Under the Robinson-Patman Act 45 (1962).

> [I]f any one of the jurisdictional elements does not appear, the substantive prohibitions of the statute cannot come into play.

The jurisdictional determination turns on these basic statutory requirements: a discrimination must arise from (A) consummated contemporaneous sales transactions (B) by the same seller to different purchasers, (C) involve "commodities" of (D) "like grade and quality," and (E) occur "in commerce."

[10] Supra note 1, at 610.

[11] In support of their position the court quoted from the Atty. Gen's Rep. "The prohibitions of the statute presuppose discriminatory treatment of customers in analogous transactions involving similar goods under comparable market conditions at approximately the same time." Supra note 6, at 178.

with Studebaker's contention of the "changing condition" proviso, as this proviso is a matter of affirmative defense to a party charged with price discrimination. The proviso represents an exception to what would otherwise be an unlawful discrimination arising out of a seller's price variations in analogous and concurrent transactions.[12] The two usual statutory defenses are the cost justification proviso[13] and the meeting competition proviso.[14] It has been expressed that it is doubtful whether the "changing markets" proviso will ever have any substance or applicability,[15] and it has been referred to as "an unchartered legal frontier."[16] Perhaps, it was a desire to pave a judicial path that led the court to include a discussion of the issue.

As to the purpose of the "changing condition" proviso the view has been taken that:

> Congress tried to assure that a seller's pricing might without risk of illegality respond readily to quickly unfolding market events, even though this prejudiced some rival buyers who purchased almost simultaneously in equivalent commercial circumstances but at a higher price which preceded the "change."[17]

The rationale of this proviso is only valid when the price variation is in response to "a competitive situation not of the seller's own making."[18] Hence, it has been said, only when

> the "changing condition" affecting the market for the seller's products is an objective external market change genuinely motivating the price variation, the proviso could come into play to exonerate the price.[19]

Faced with a case of first impression in defining a "changing condition affecting the market" based on "obsolescence of seasonal goods" the court made a very practical interpretation of both words, "obsolescence" and "seasonal." The application of the facts of this case to the meanings provided by the court should not cause serious objection.

A more arguable drawback to the court's declaration might appear by its disregard of the clause's fore-mentioned presupposition that the situation not be of the "seller's own making." A rejection of this requirement would make it possible for each seller to create and control the very "changed condition" necessary to legalize its price discrimination. While not benefiting this plaintiff, such an objection to the application of the proviso continues to be relevant to any treatment of it. The court did concern itself with this

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[12] See supra note 6, at 178, and supra note 9, at 322.

[13] Supra note 2.

[14] Ibid.

[15] Barton, Defenses in Price Discrimination, 17 A.B.A. Antitrust Section 390 (1960).

[16] Rowe, supra note 9, at 322.

[17] Supra note 6, at 178.

[18] American Motor Specialties Co. v. FTC, 278 F.2d 225, 226 (2d Cir.), cert. denied, 364 U.S. 884 (1960). Cf., supra note 1, at 613 which rejects the application of this argument.

[19] Rowe, supra note 9, at 329.

problem[20] and relied heavily on the particular facts presented and the apparent good faith of the sellers to negate the possibility of such a self-created "changing condition."

Another problem, alluded to earlier, is this court's treatment of the case as if the plaintiff's allegations were based only upon the differences in price paid by it and defendant-dealer. A reading of the case indicates that the plaintiff was actually claiming a price discrimination due to the price paid by the defendant-dealer and that such a similar special arrangement was not offered to it as a competing dealer. This issue becomes conspicuous by the complete disregard of it in the discussion of the case. Perhaps the court felt the act itself precluded explicitly setting aside this contention.[21] There are also many cases which give support to the well-established position that no actionable price discrimination can arise unless there is a discrimination "between different purchasers." This simply means that two transactions must be completed in order to violate this statute.[22]

The inapplicability of the Robinson-Patman Act to "refusals to deal" has been confirmed by a leading interpretation of the Act by the Federal Trade Commission.[23] However, in the circumstances of this case, Studebaker had chosen plaintiff as a customer by accepting it as a dealer and was still very much agreeing to deal with it by continuing offers of additional reductions in price. It must be further noted that this was occurring at the time when the special agreement was made with the defendant-dealer. Therefore, this was not simply a case of a seller's "refusal to deal" as used above; neither was it a denial to select a customer as is allowed by the statute.

Although other remedies may be available,[24] it would appear that for the plaintiff to come within the literal language of this Act it must have made an actual and current purchase at a price higher than that paid by the defendant-dealer. It is not denied that Valley Plymouth did not meet this element, but it is suggested that this requirement should not be applied in the special circumstances of this case. To require the plaintiff to enter a sales

[20] This should be evident from the court's statement that "obviously there was no intention of manufacturing the cars, which turned out to be excess, for off-season sale and it appears to the court that their manufacturer was in good faith . . . ." Supra note 1, at 613.

[21] Supra note 2. Section 2(a) of the Robinson-Patman Act provides that "nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions. . . ."

[22] Chicago Sugar Co. v. American Sugar Ref. Co., 176 F.2d 1 (7th Cir. 1949); Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939); Naifeh v. Ronson Art Metal Works, 117 F. Supp. 690 (W.D. Okla. 1953), aff'd, 218 F.2d 202 (10th Cir. 1954).

[23] Bird & Son, Inc., 25 F.T.C. 548, 553 (1937).

> [S]o the act does not purport to interfere with the right of a seller to select his customers. He may discriminate in the choice of his customers. Not until there is a discrimination in price among those chosen does Section 2(a) of the act have any application.

[24] Supra note 6, at 133.

> [T]he validity of any refusal to deal may depend on the Sherman Act's prohibitions on contracts, monopolization and combinations in restraint of trade; the Clayton Act's control on price discriminations and exclusive arrangements; as well as the general ban on "unfair methods of competition" in Section 5 of the Federal Trade Commission Act.

agreement with Studebaker at an unprofitable price, when on the surface it appears that neither a business benefit nor a possible price discrimination in violation of the Robinson-Patman Act can thereby result, seems entirely unreasonable. Thus, when dealer-wide offers continued and where there was an implication of a secret dealing between the defendants, such facts provide an instance where the requirement of actual purchase should be waived.[25] Rather, it is suggested that the plaintiff need only establish that it would have become a purchaser at the special lower price offered to its competitor.

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Uniform Commercial Code—Products Liability—Requirement of Privity in the Breach of Warranties.—*Wilson v. American Chain & Cable Co.*[1]—Action to recover damages for personal injuries sustained by the plaintiff when thrown from a rotary lawn mower into the path of its revolving blade, as the machine came to a sudden stop when striking an incline. The machine was manufactured by the defendant and had been purchased from a local dealer by the plaintiff's father. Separate theories of liability were pleaded and bottomed on the alleged negligence of and breach of warranty by the manufacturer. It was not specified whether the warranties allegedly breached were express or implied. The defendant moved to dismiss the action as to breach of warranty on the ground that there was no privity of contract between the defendant and the injured party. The plaintiff moved to strike, asserting that in Pennsylvania a lack of privity is not a defense to a suit by a subpurchaser or members of his family against a manufacturer on breach of warranty principles. HELD: The defense of lack of privity could not, under Pennsylvania law, be stricken, where there was no showing as to whether the warranty was implied or express, and where no showing had been made as to whether the manufacturer had intended either an express or implied warranty to flow through the conduit of a contractual chain to a subpurchaser and his family.

The Uniform Commercial Code states that a *seller*[2] impliedly war-

[25] It has been held that it was not necessary for a customer to make a purchase at the discriminatory higher price: "in order to attain the status of a competing purchaser under the Act, as its failure to do so was directly attributable to defendant's own discriminatory practice." American Can Co. v. Bruce's Juices Inc., 187 F.2d 919 (5th Cir. 1951).

[1] 216 F. Supp. 32 (E.D. Pa. 1963).

[2] Section 2-103 of the UCC defines "seller" as "a person who sells or contracts to sell goods." However, it would appear that this definition is broad enough to encompass suits against the manufacturer, even though he is not the immediate seller. Professor Del Duca in his article Extension of Warranty Protection Under Section 2-318, appearing in the B.C. U.C.C. CO-ORD (1963) 415, suggests: "In sustaining the son's cause of action against the manufacturer, the court *could* have ruled that since the purchaser-father had warranty protection against the manufacturer this warranty protection also extended to the beneficiary-son by virtue of Section 2-318." (Emphasis supplied.) The case under analysis was Allen v. Savage Arms Corp., 52 Luz. L. Reg. R. 159 (Pa. 1962). Thus one is confronted with a manufacturer, a wholesaler and a