

TESTIMONY OF HARVEY I. SAFERSTEIN*

**“NOW THAT IT IS ALMOST 70 YEARS OLD,
WHAT DO WE DO WITH THE ROBINSON-PATMAN ACT?”**

BEFORE THE ANTITRUST MODERNIZATION COMMISSION

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INTRODUCTION

Thank you for the opportunity to appear before you. My name is Harvey I. Saferstein and I practice law in Los Angeles, California, with the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. I have been in private practice in California for some 30 years now – having served as President of the California State Bar between 1992 and 1993. I have also been with the Federal Trade Commission twice in my career – once as an assistant to FTC Commissioner Philip Elman soon after graduating from law school, and once as the Regional Director of the FTC’s Los Angeles Regional Office.

I speak today on my own behalf as a practitioner who has written and lectured about the Robinson-Patman Act for many years.

My practice tends to be one that defends companies from claims of violations of the Robinson-Patman Act, and advises various sellers on how to comply with the law. However, in my public presentations and writings, I have tried to examine the law from a neutral point of view. My views and experience with the Act come from my practice – and not from any independent investigation of the practical ramifications of the Act. For many years, I have written and published a summary of Robinson-Patman decisions for both the Practising Law Institute’s Annual Antitrust Institute and the Annual Advanced Antitrust Seminar. This past year, I participated in a significant revision of the ABA Antitrust Section’s publication, the Robinson-Patman Primer – a book aimed at helping non-attorneys and business persons better understand and comply with the Act. I also participated in the work of the Robinson-Patman Ad Hoc Working Group, formed to

assist the Antitrust Modernization Task Force of the ABA Antitrust Section in developing comments to submit to this Commission regarding the Act.

I have the following general summary positions on the Act:

1. Like most antitrust laws, the Robinson-Patman Act has compliance costs. And like most antitrust laws, the Robinson-Patman Act has influenced pricing decisions by sellers and buyers.

2. While there is no substantial empirical evidence, there seems to be ample anecdotal evidence that the Act tends to reduce pricing flexibility and increase price rigidity – to the detriment of competitive vigor. That is, the Act can often be at odds with the aims of other antitrust laws.

3. While there is no substantial empirical evidence, there seems to be ample anecdotal evidence that higher purchase prices make it much harder for the small or independent retailer – the so-called “mom and pop” retailers – to survive *vis a vis* the “chain stores” or mass merchandisers. That is, insofar as the Act was intended to provide a level playing field for the small or independent retailers, that purpose remains viable today.

4. While more could be done, the courts, particularly the United States Supreme Court, have been able to harmonize much of the Act with other antitrust laws – to insure that the Sherman Act’s goals of vigorous competition remain supreme.

5. State discriminatory pricing laws have not been utilized extensively by aggrieved buyers and competitors. However, the repeal of the Robinson-Patman Act could lead to a revival and/or proliferation of such state laws. And such a patch-work of state laws could be much more problematic for compliance than the current situation.

6. Given the above, I do not believe repeal of the law is either necessary or desirable. The Act's limited goals of providing a more level playing field for small retailers in the pricing of goods is one that can be accomplished with the continued supervision of the Federal Courts to ensure that vigorous price competition is also furthered.

7. The modern legislative process is not a desirable forum for reform of the Act. Rather, continued judicial "reform" through interpretation is desirable. The intricacies of the Act, and the strong political opinions on both sides of the Act, make it a volatile area for legislative action that could have a variety of unintended adverse consequences.

8. There are a variety of "reforms" that the Federal Trade Commission or the Federal Courts could adopt to make the Robinson-Patman Act less burdensome as well as more effective in accomplishing its purposes. However, care must be taken if we expect private plaintiffs to continue to shoulder the burden of enforcing the Act.

TOPICS AND QUESTIONS FOR PUBLIC COMMENT

In the invitation, the Commission has asked that we address a series of topics and questions. I will do so in order.

- 1. What are the benefits and costs of the Robinson-Patman Act as currently enforced? Does the Robinson-Patman Act promote or reduce competition and consumer welfare? If so, how? What other benefits does it afford or costs does it impose, if any?**

I believe that the Act has serious costs – particularly compliance costs (given the complexity and uncertainty of the Act). I teach the Robinson-Patman portion of the

Practising Law Institute’s two major antitrust programs. This portion of the program is typically attended by a high number of in-house counsel trying to determine compliance issues with the Act. Because the Act is not taught in most law schools’ antitrust courses, and because it is considered an esoteric topic, the interest in our course is high. It is also apparent from the feedback during this course that major corporations are spending significant sums of money on Robinson-Patman compliance – especially in terms of documenting and keeping track of “competitive offers” to take advantage of the widely-used meeting competition defense. Complying with the complex requirements for a promotional allowance or service program under the Fred Meyer Guidelines is also a significant burden.¹

The Act also has serious costs in terms of encouraging price rigidity, whereas price flexibility is more in keeping with the kind of competitive vigor encouraged by the antitrust laws in general.

The Act also has some benefits in giving small, independent businesses (so-called “mom & pop” stores) a modicum of price parity with the chain stores and mass merchandisers. While there are pressures on small businesses today other than the costs of their goods, the benefit of non-discriminatory prices is probably quite real. Moreover,

¹ The questions posed by the Commission do not seem to focus on promotional allowances and services – *i.e.*, Sections 2(d) and (e) of the Act. This is an area with enormous compliance costs, and perhaps, much less value to the small retailer. Thus, reform could help greatly in this case. Irving Scher has pointed out elsewhere that this is a place where the FTC could provide effective leadership in light of the FTC’s role in promulgating the Fred Meyer Guidelines (Guides for Advertising Allowances and Other Merchandise Payments and Services, 16 CFR Part 240). *See* Irving Scher, “How the Federal Trade Commission Can Modernize Interpretations of the Robinson-Patman Act,” April 1, 2005, Paper Presented Before the ABA Antitrust Section’s 2005 Spring Antitrust Meeting, Robinson-Patman Panel.

the diversity, uniqueness, and competitive vigor that the small, independent retailer brings to the competitive environment are probably real.

a. Does the Robinson-Patman Act benefit or harm particular types of business?

The primary beneficiaries of the Act seem to be small retailers and small quantity buyers who depend upon the Act's non-discrimination provisions to obtain prices on goods necessary to compete with larger retail competitors.

The primary burdens of the Act seem to fall on major sellers of consumer items in mature industries. Robinson-Patman compliance, litigation, and awareness tend to be higher in more mature industries that have lived through some of the more vigorous, past enforcement of the Act – e.g., petroleum, tobacco, liquor, and automobiles.² Conversely, there seems to be less activity in newer industries, such as telecommunications, business equipment, software and computers, where distribution systems are more complex and still evolving, and a history of Robinson-Patman enforcement does not exist. These

² See, e.g., *Petroleum – Texaco v. Hasbrouck*, 496 U.S. 543 (1990); *Alcorn v. BP Prods. N. Am., Inc.*, 2004 U.S. Dist. LEXIS 15061 (D. Minn. Aug. 2, 2004); *Chawla v. Shell Oil Co.*, 75 F. Supp. 2d 626 (S.D. Tex. 1999); *Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088 (9th Cir. 1998); *Tolokan v. Mobil Oil Corp.*, 946 F.2d 882 (2d Cir. 1991); *Automobiles – J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981); *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004), *cert. granted*, 125 S. Ct. 1596 (2005); *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998); *Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557 (3d Cir. 1998); *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994); *Eastern Auto Distribs., Inc. v. Peugeot Motors of Am., Inc.*, 795 F.2d 329 (4th Cir. 1986); *Tobacco – Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Lewis v. Philip Morris, Inc.*, 355 F.3d 515 (6th Cir. 2004); *Amsterdam Tobacco, Inc. v. Philip Morris, Inc.*, 107 F. Supp. 2d 210 (S.D.N.Y. 2000); *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791 (4th Cir. 1989); *Liquor – Callahan v. A.E.V., Inc.*, 1994 U.S. Dist. LEXIS 19761 (W.D. Pa. Sept. 26, 1994); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987).

“newer” industries also tend to sell more complex products, often combined with services, that may not be “of like grade and quality.”³

b. How significant is the quantity and cost of private litigation under the Robinson-Patman Act?

Robinson-Patman litigation is, like most antitrust litigation, quite expensive. However, the amount of Robinson-Patman litigation is down significantly from the days when both the FTC and private litigants made Robinson-Patman litigation a staple of antitrust litigation. Nevertheless, my sense is that there has been an upswing in recent years – caused by the decline in the efficacy of Sherman Act private treble damage litigation for small retailers and the increase in a new generation of “plaintiff” antitrust lawyers willing to take on the complex and often-misunderstood Robinson-Patman Act.⁴

c. What impact, if any, does the Robinson-Patman Act have on business decision making or on the intensity of price competition?

In industries where Robinson-Patman compliance is more visible, it is my sense that it can lead to less flexible, innovative pricing by sellers. I cannot give any verifiable empirical evidence of such impact. The Act is not one that has generated recent empirical study.

³ See, e.g., *Accurate Control Sys. v. Neopost, Inc.*, 2002 U.S. Dist. LEXIS 11340 (N.D. Ill. June 25, 2002); *Cancall PCS, LLC v. Omnipoint Corp.*, 2000 U.S. Dist. LEXIS 2830 (S.D.N.Y. March 10, 2000); *World Wide Communications, Inc. v. Rozar*, 1997 U.S. Dist. LEXIS 20596 (S.D.N.Y. Dec. 30, 1997); *Laitram Mach., Inc. v. Carnitech A/S*, 884 F. Supp. 1074 (E.D. La. 1995); *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739 (6th Cir. 1993); *Southern Bus. Communications, Inc. v. Matsushita Elec. Corp. of Am.*, 806 F. Supp. 950 (N.D. Ga. 1992); *National Communications Ass’n v. AT&T*, 808 F. Supp. 1131 (S.D.N.Y. 1992); *Tel-Phonic Servs., Inc. v. TBS Int’l, Inc.*, 975 F.2d 1134 (5th Cir. 1992); *Tel-Instrument Elec. Corp. v. Teledyne Indus., Inc.*, 934 F.2d 320 (4th Cir. 1991) (unpublished disposition), text of opinion reported at 1991-1 Trade Cas. (CCH) ¶ 69, 459 (4th Cir. 1991).

⁴ See *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F. Supp. 2d 133 (S.D.N.Y. 2000) (Plaintiff’s counsel, Carl E. Person of New York, has written extensively on the Robinson-Patman Act. See, e.g., “Saving Main Streets and Its Retailers,” published in 2004. He also sponsors an extensive website about the Act at www.lawmall.com).

It is also my impression that buyers are not significantly constrained by Section 2(f) exposure from soliciting better prices. Section 2(f)'s interpretation has led to the belief by many that it is a “paper tiger.”⁵ While aggressive buyers may receive some resistance from sellers using the Act as an excuse to avoid price concessions, it is my sense that the buyers are seldom reluctant to ask for better pricing and give little credence to sellers' use of the Robinson-Patman Act as an excuse. I am also under the impression that aggressive buyers can often serve as proxies for their industry – that is, a chain store request for lower prices can often lead to lower prices for small retailers.

d. Are the interests protected by the Robinson-Patman Act adequately protected by other provisions of the antitrust laws, or does the Robinson-Patman Act afford protection that would otherwise be unavailable?

Insofar as the Robinson-Patman Act was intended to protect the small, independent retailer from the buying power of chain retailers, the other antitrust laws offer little shelter – particularly because of the narrowing interpretations of both Sherman Act Section 1 regarding vertical restraints and Sherman Act Section 2 regarding single firm conduct. Indeed, as I stated above, I believe that one of the reasons for the recent increase in Robinson-Patman litigation is the relative ineffectiveness of the Sherman Act for protection of the small retailer.

2. What purposes should the Robinson-Patman Act serve?

⁵ See, e.g., *United Magazine Co. v. Murdoch Magazines Distribution, Inc.*, 146 F. Supp. 2d 385 (S.D.N.Y. 2001); *General Supply Deck & Floor Underlayment Co. v. Maxxon Southwest, Inc.*, 2001 U.S. Dist. LEXIS 18938 (N.D. Tex. Nov. 19, 2001); *Allied Sales & Services Co. v. Global Indus. Technologies, Inc.*, 2000 U.S. Dist. LEXIS 7774 (S.D. Ala. May 1, 2000); *Nichols Motorcycle Supply, Inc. v. Dunlop Tire Corp.*, 913 F. Supp. 1088 (N.D. Ill. 1995), available at 1995 U.S. Dist. LEXIS 14045; *Orcon Corp. v. Special's Trading, Inc.*, 1994 U.S. Dist. LEXIS 6676 (N.D. Cal. May 13, 1994); *Maier-Schule GMC, Inc. v. General Motors Corp.*, 780 F. Supp. 984 (W.D. N.Y. 1991).

The Act was intended to, and still does, attempt to provide a modicum of parity for the small, independent retailer seeking a level playing field for prices on par with the large chain stores. That means that its primary purpose was, and still should be, in the area referred to in Robinson-Patman lexicon as “secondary line” price discrimination – i.e., price discrimination by sellers among competing buyers.

- a. Does the current approach to interpreting the Robinson-Patman Act reflect the increasing importance of economic analysis in modern antitrust analysis? Does the Act’s language or legislative history warrant a different approach?**

The federal courts, particularly the United States Supreme Court, have done an admirable job of bringing modern economic analysis to bear on the 69-year old Robinson-Patman Act.

- 3. Should the Robinson-Patman Act be repealed or modified, or its interpretation by the courts altered? Please identify specific change and explain why they should be adopted.**

I do not think that the Act should be repealed or legislatively modified (except to repeal the Section 3 criminal provision as anachronistic). The Act has its benefits; the Act’s burdens are acceptable; and Congressional action is likely to have unintended adverse consequences, including the possible proliferation or strengthening of state anti-discrimination laws.

In terms of encouraging the Courts and/or the Federal Trade Commission to interpret the Act differently, there are a variety of areas for action. The primary area for reform, in my opinion, is the narrow interpretation given to the “cost justification” defense. The defense should be more flexible and forgiving. I also agree with my

colleague, Irving Scher, that the FTC could provide some needed reforms in the area of promotional allowances and services – i.e., Sections 2(d) and (e) of the Act.⁶

As for various proposed interpretations of the Act, such as requiring proof of full-blown “competitive injury or harm” in all secondary-line injury case, they raise various concerns. The debate over what level of proof to require of secondary-line plaintiffs has been a spirited one emanating from the Supreme Court’s decision in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).⁷ Some believe that the proposals to require a Sherman Act competitive injury may render meritorious secondary line injury cases – much like primary lines injury cases⁸ – virtually impossible to bring and prove as a practical matter. That is, secondary-line plaintiffs need the procedural and substantive benefit of not having to prove full-blown antitrust competitive injury (something antitrust plaintiffs are required to prove in Sherman Act rule of reason cases and other antitrust cases). Others believe that without such a requirement, secondary-line cases are fundamentally inconsistent with the core principles of the antitrust laws – consumer welfare and

⁶ See Irving Scher, “How the Federal Trade Commission Can Modernize Interpretations of the Robinson-Patman Act,” April 1, 2005, Paper Presented Before the ABA Antitrust Section’s 2005 Spring Antitrust Meeting, Robinson-Patman Panel.

⁷ See, e.g., the opinion of Judge Norris in *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653 (9th Cir. 1997); the majority opinion by Judge Starr and the dissent of Judge Mikva in *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988); and the majority opinion of Judge Mansmann in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990). See the majority and dissenting opinions *In The Matter of McCormick & Company, Inc.*, FTC Docket No. C-3939 (FTC April 27, 2000).

⁸ Since the Supreme Court’s decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), which established new requirements for proving primary line injury, such cases have met with little success. See, e.g., *El Aguila Food Prods., Inc. v. Gruma Corp.*, 2005 U.S. App. LEXIS 8944 (5th Cir. May 17, 2005) (unpublished opinion); *Bailey v. Allgas, Inc.*, 284 F.3d 1237 (11th Cir. 2002); *Bridges v. MacLean-Stevens Studios, Inc.*, 201 F.3d 6 (1st Cir. 2000); *Taylor Publ’g Co. v. Jostens, Inc.*, 216 F.3d 465 (5th Cir. 2000); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 146 F.3d 1088 (9th Cir. 1998); *C.B. Trucking, Inc. v. Waste Management Inc.*, 137 F.3d 41 (1st Cir. 1998); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 130 F.3d 1101 (2d Cir. 1997); *Bathke v. Casey’s Gen. Stores, Inc.*, 64 F.3d 340 (8th Cir. 1995).

allocative efficiency.⁹ This debate requires a policy choice – Do we recognize that the Robinson-Patman Act has different goals than the general antitrust laws and, in recognition of that, relieve plaintiffs in certain instances from having to prove traditional Sherman Act “injury to competition”? Or do we require a competitive injury showing in order to bring the Act in line with the Sherman Act and other antitrust laws?

a. Should private plaintiffs asserting Robinson-Patman claims be required to prove “antitrust injury,” i.e., proof of injury reflecting the anticompetitive effect of the challenged conduct?

While this proposal makes sense as a matter of the structure of the Clayton Act, the practical effect may well be to import a “competitive effects” requirement into all Robinson-Patman secondary line cases. If the suggestion is to require a plaintiff to prove that it was injured by the disparity in prices, the proposal makes sense. Indeed, it is the basic law as set down by the Supreme Court in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), when it abolished “automatic damages” for price discrimination plaintiffs. But if the suggestion is that a plaintiff must always show an injury to competition (in the Sherman Act sense) and that the plaintiff was injured by that impairment of competition, I believe that the proposal is similar to the proposals to require a full blown competitive effects showing in all Robinson-Patman secondary line cases.

b. Should the inference of harm to competition often recognized in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) be modified, e.g., by requiring plaintiffs to make a showing of harm to competition similar to that required to establish a Sherman Act violation?

While a tempering of the *Morton Salt* inference may be warranted, requiring a full-blown Sherman Act “competitive harm” showing in all cases (with economists and

⁹ See, e.g., Hovenkamp, “Antitrust at the Millennium (Part I): The Robinson-Patman Act and Competition: Unfinished Business,” 68 ANTITRUST L.J. 125 (2000).

economic testimony) may well spell the end of secondary line case for most private plaintiffs. There may well be intermediate positions that the courts could develop to modify the *Morton Salt* inference of injury from significant price discrimination; however, this is a delicate and complex area.

c. Does limiting the substantive provisions of the Robinson-Patman Act to the sale of commodities, not services, make sense in today's economy?

I believe it still does. While our economy is now much more service-oriented, the difficulties of applying the Act to services would make the Act even more complicated and difficult to enforce.

d. What role should buyer market power play in applying the Robinson-Patman Act?

Some have suggested the use of a buyer market power screen for secondary-line injury cases. While there is a theoretical economic basis for this proposal, it has the potential to require every secondary-line plaintiff to make a full-blown Sherman Act “competitive effects” showing. Such a requirement is of concern because it could put an effective end to private secondary-line enforcement.

e. Should the criminal provision of the Robinson-Patman Act be repealed?

I believe it serves no useful purpose and can be repealed without great controversy.

f. Should enforcement of the Robinson-Patman Act be strengthened?

The Federal Courts and/or the Federal Trade Commission could strengthen the law with regard to buyer liability. The primary focus of the Act has been buyer-induced, unjustified price discriminations. Yet the burdens of compliance as well as the burdens of defending lawsuits fall primarily upon sellers – because the provisions of Section 2(f)

have been rendered too difficult to enforce under current interpretations. The Courts and the FTC should consider loosening the requirements that buyers have knowledge of the “illegality” of the price discrimination and that no defenses exist to the discrimination. Buyers, large and small, should not be discouraged from aggressive price negotiations; however, the current imbalance of burdens between buyers and sellers seems unfair.

One additional way to accomplish this goal might be to encourage the FTC to take the appropriate action under Section 5 of the FTC Act (as opposed to the Robinson-Patman Act) – thus minimizing any treble damage exposure.

g. Should the approach of *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), be extended to secondary line cases?

Many well-regarded authorities have suggested that *Brooke Group* be applied to all secondary line cases. Again, while there is theoretical merit in these suggestions, the practical effect could be to eliminate the only remaining enforcement mechanism for the Robinson-Patman Act – private treble damage plaintiffs.

4. To what extent do state antitrust laws prohibit price discrimination that is also prohibited by the Robinson-Patman Act? Would repeal or reform of the Robinson-Patman Act affect the likelihood that states would adopt their own prohibitions on price discrimination? How, if at all, would repeal or reform of the Robinson-Patman Act affect the amount of litigation under such state laws?

State laws parallel to the Robinson-Patman Act have seen little private or public enforcement. However, they remain a “sleeping giant” that could be awakened¹⁰ if the Robinson-Patman Act were repealed. Moreover, such a move could encourage states to adopt new, or more rigorous, state laws against discrimination. Under the current regime,

¹⁰ For example, in the recent Sherman Act Section 2 monopolization case brought by AMD against Intel in Delaware Federal Court, AMD alleged below-cost pricing. However, instead of alleging a Robinson-Patman primary-line or §2(c) claim, AMD brought a California state law claim for secret rebates. See Complaint in *AMD v. Intel Corp.*, Case No. 05-CV-00441 (D. Del. 2005).

the Robinson-Patman Act serves as an umbrella – with many courts using its developed law to interpret state law counterparts. Thus, the new economic-based interpretations of the Act have often been adopted by courts interpreting state law counterparts. Without the Robinson-Patman Act, such a restraining influence could be lost. Moreover, it would be very difficult to draft and/or pass federal legislation that would effectively pre-empt state laws in this area.

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