



Discriminatory Pricing and the Robinson-Patman Act: Brief Background and Analysis

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Summary

The Robinson-Patman (R-P) Act, 15 U.S.C. § § 13, 13a, 13b, 21a, makes it unlawful, with certain exceptions, to knowingly sell goods “in commerce,” for use or sale within the United States, at differing prices to contemporaneous buyers of those goods. The “in commerce” language of Robinson-Patman has been held to mean that the interstate commerce requirement is satisfied only when at least one of the two (or more) sales is made “in the stream of commerce”—*i.e.*, across state lines.

Enacted during the Depression at the behest of small grocers who feared the buying power of large and growing chain grocers, Robinson-Patman is the exception to the notion that the antitrust laws protect *competition, not competitors* in that it generally prohibits precisely the kind of price differentiation which would normally be thought to result from vigorous competition.

Allegations of Robinson-Patman violations may be defended by asserting and proving either that the differing prices reflect only the cost of the seller's manufacture or delivery (the “cost justification” defense); or, that the seller is attempting either (1) to meet the competition of another seller, or (2) enable his buyer to meet the competition of a competitor of the buyer (“meeting competition” defense). In addition, there is also a broad exception to the prohibition against price discrimination when one of the sales is made to any of certain entities listed in the Nonprofit Institutions Act, 15 U.S.C. § 13c, and the goods are purchased for the institution’s “own use”; nonprofits may not, however, take advantage of their privileged Robinson-Patman status to purchase commodities at favorable prices in order to compete commercially with entities not so entitled. Further, lower courts have found that health maintenance organizations (HMOs) qualify as organizations entitled to take advantage of the Nonprofit Institutions Act, on the theory that they perform services that traditionally have been considered as “charitable”; the Supreme Court has not had occasion to rule on the status of HMOs.

Disfavored purchasers who prove a Robinson-Patman violation are not, however, automatically entitled to damages on that account. The Supreme Court has held that since, technically, Robinson-Patman prohibits any price differential whose effect “*may* be substantially to lessen competition, (emphasis added),” not all proven R-P violations actually damage those who prove them: “[t]o recover treble damages ... a plaintiff must ... make some showing of actual injury attributable to something the antitrust laws were designed to prevent”—*i.e.*, a causal connection between the violation and the injury allegedly suffered.

Although there have been some attempts at amending or repealing Robinson-Patman, none has been successful. The Antitrust Division of the Department of Justice has always believed the statute to be inflationary; that it artificially deprives consumers of the advantages of the lower prices that are the aim of the antitrust laws; and that, *inter alia*, it “reduces pricing flexibility [and] discourages the development of efficient distribution systems.” Small businesses, and others, have contended, on the other hand, that their survival depends on the prevention of unjustified price differentials.

Whether the current economic climate will revive efforts to modify the statute, which has not been enforced by the Department of Justice since its enactment, and has been enforced sporadically by the Federal Trade Commission, is not known.

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The Act and Some Issues It Raises

The Robinson-Patman Act (R-P)(15 U.S.C. §§13, 13a, 13b, 21a) was enacted in 1936 with the specific purpose of creating and maintaining a market atmosphere in which small business could compete effectively, at least in the purchase of commodities, with its larger rivals. The immediate impetus for that Depression-era legislation was concern for smaller grocery store operators who complained that their businesses were suffering as the direct result of the activities of the chain grocery stores generally and the Great Atlantic & Pacific Tea Company (A&P) particularly. In pertinent part, the statute states that

it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or sale within the United States ..., and *where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them.*¹

As is noted in a 1986 article, “[f]or the first time within the umbrella of the federal antitrust laws, the Congress declared that it was enacting legislation to remedy injury to competitors rather than a generalized injury to competition itself.”²

Very simply, the act prohibits sellers in interstate commerce³ from charging different purchasers different prices for goods of “like grade and quality.”⁴ It applies only to the sale of *goods* (*i.e.*, it does not apply to the sale of services)⁵ and only *where each sale is of goods purchased for resale*

¹ 15 U.S.C. § 13(a) (emphasis added).

² Clark R. Silcox & A. Everette MacIntyre, *The Robinson-Patman Act and competitive fairness: balancing the economic and social dimensions of antitrust*, XXXI ANTITRUST BULLETIN 611 (Fall 1986).

³ “[T]he ‘in commerce’ language of Robinson-Patman mandates that “at least one of the two transactions [involved in the alleged discrimination] cross a state line.” *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974), quoting from *Hiram Walker, Inc. v. A&S Tropical, Inc.* 407 F.2d 4, 9 (5th Cir. 1969), cert. denied, 396 U.S. 901 (1969). The plaintiff in *Copp* had argued that because the product involved in the challenged price (paving tar) could be used for interstate roads, despite the fact that the subject sales were entirely intrastate, the jurisdictional “commerce” requisite for a Robinson-Patman challenge had been met. The Court easily distinguished between the broader commerce requirement of § 1 of the Sherman Act (15 U.S.C. § 1), which is satisfied by conduct which merely *affects* commerce, and the more specific and rigid commerce requirement of the Robinson-Patman Act, which is satisfied “only [by] persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer.” 419 U.S. at 195.

⁴ There has been a great deal of litigation concerning the definition of “like grade and quality,” with the conclusion that, at the least, the phrase does not necessarily dictate that brand-name and private-label goods are not comparable. In *F.T.C. v. Borden Co.*, 383 U.S. 637 (1966), for example, the Court indicated that the proper test for determining whether commodities are of “like grade and quality” is a “physical comparison” of the goods as opposed to consumer or marketplace acceptance of them. 383 U.S. at 639-41. See also, *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383 (8th Cir. 1974), cert. denied, 419 U.S. 836 (1974).

⁵ *TV Signal Co. of Aberdeen v. American Telephone & Telegraph Co.*, 462 F.2d 1256, 1259 (8th Cir.1972); *Windsor Auctions, Inc. v. eBay, Inc.*, 2008 WL 2622791,*4 (N.D. Cal. 2008); *Ventimiglia v. AT & T Yellow Pages*, 543 F.Supp.2d 1038 (E.D. Mo. 2008). The Department of Justice pointed to R-P’s nonapplication to “the offering of services—a growing sector in which small business is especially significant,” as further reinforcement of its conclusion that “the Robinson-Patman is not a key factor in preserving efficient small business.” *Report on the Robinson-Patman Act, 1977 (Report)*, United States Department of Justice at 260.

*within the United States (i.e., it does not prohibit price differentials between goods sold for resale within the United States and those sold for export.)*⁶

Since its enactment in 1936, the Robinson-Patman Act has been less than enthusiastically viewed by the Department of Justice, which believes that the act is not beneficial to consumers.⁷ In its 1977 Report on the Robinson-Patman Act, the Antitrust Division noted that

It should not be surprising ... that Robinson-Patman can be shown to have many adverse effects on the economy. To be sure, there are some who do not recognize these effects or who argue that they are outweighed by benefits to specific sectors of the economy, notably small business; to competition by preventing increased concentration in a line of commerce; and to public values in general by establishing as a legal norm the concept of ‘fair dealing’ in pricing. But any discussion of the benefits of Robinson-Patman can be made only with a clear understanding of the burdens that the statute places on American economic activity.⁸

Government enforcement of the act, therefore, has always been entrusted to the Federal Trade Commission (FTC), which over the years has acted inconsistently with respect to R-P actions. The bulk of R-P cases have generally been brought by disfavored buyers.⁹

⁶ *Fimex Corp. v. Barmatic Products Co.*, 429 F.Supp. 978 (E.D.N.Y. 1977), *aff'd without published opinion*, 573 F.2d 1289 (2d Cir. 1977); *C.E.D. Mobilephone Communications, Inc. v. Harris Corp.* (“Th[e] plain statutory language exempts exports from the prohibition against price discrimination,” 1985 WL 193,*2 (S.D.N.Y. 1985)); *but see*, *Raul Intern. Corp. v. Sealed Power Corp.*, which uses the words “next immediate resale” to explain its reasoning that the exemption is generally applied too broadly—that the statutory language creating the exemption applies only to sales by U.S. entities either *directly* to entities outside the country or to exporters: that *indirect* sales—those made in domestic commerce, albeit on the way to either a sale in export commerce or to a U.S. exporter—do not qualify for the exemption (586 F.Supp. 349, 354 (D.C.N.J. 1984).

⁷ According to the Department, “Under existing liaison agreements between the Department of Justice and the Federal Trade Commission, the FTC has taken primary responsibility for civil enforcement of the Act [despite the fact that, theoretically at least, it is equally enforceable by both agencies], leaving the Department of Justice with responsibility for criminal prosecutions under Section 3 [which provides for a \$5,000 fine and/or imprisonment for not more than one year]. That section, never intended as a substantive addition to the Act [and not codified], has rarely been invoked.” *Report* (note 5) at 3. In fact, most price-discrimination activity involves only private litigants.

⁸ *Report* at 8 (*see* note 5) (emphasis in original).

⁹ The 1970 Report, *Small Business and the Robinson-Patman Act*, prepared by the Special Subcommittee on Small Business and the Robinson-Patman Act of the House Select Committee on Small Business (91st Cong., 2nd sess.), collects and summarizes several studies (*e.g.*, *White House Task Force on Antitrust Policy* (Neal Report, 1968); *President’s Task Force Report on Productivity and Competition* (Stigler Report, 1969); *Report of the ABA [American Bar Association] Commission to Study the Federal Trade Commission*, 1969) that found, *inter alia*, that R-P was itself anticompetitive or that the Federal Trade Commission enforcement of R-P was either “overzealous” or wrong-headed. The Subcommittee itself decried what it characterized as the FTC’s “[h]aphazard or selective enforcement, based on a Russian roulette concept,” of Robinson-Patman (at 42). Subsequent studies have also noted that R-P is not actively enforced by either agency. For example, the *ABA Section of Antitrust Law Task Force Report on the Federal Antitrust Agencies* noted in 2000 that “only two cases have been brought under the Act since the 1980s” *quoted at* 80 ATRR 79 (2/2/01).

Other Defenses to Robinson-Patman Challenges

Meeting Competition

In addition to the commodities-not-of-“like grade and quality” and sales-for-export justifications for price differentials, an additional, affirmative defense permitted to refute the Robinson-Patman illegality of differential pricing is the so-called “meeting competition” defense, which has at least two levels: a defendant may assert (and must prove) that the lower price charged to a favored buyer was selected in order to permit the seller to meet that of a competing seller (primary line competition); or he may assert (and must prove) that the challenged price was necessary in order to enable his buyer to meet the competition of one of the buyer’s competitors (secondary line competition).¹⁰ A seller may not, however, knowingly “beat” the prices of a competitor.¹¹ A Robinson-Patman defendant may also successfully defend his challenged pricing activity if he can show that his price differentials were “cost justified”—*i.e.*, that the price differential made only due allowance for the costs incurred in producing or delivering the goods.¹²

¹⁰ “A good-faith *belief*, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the [“meeting competition”] defense. While casual reliance on uncorroborated reports of buyers or sales representatives without further investigation may not ... be sufficient to make the requisite showing of good faith, nothing in the language of [the statute] ... indicates that direct discussions of price between competitors is required.” *United States v. United States Gypsum Company*, 438 U.S. 422, 453 (1978) (emphasis added). According to the *Gypsum* Court, an exchange of price information is unlawful as a violation of the Sherman Act prohibition against agreements or conspiracies in “restraints of trade” (15 U.S.C. § 1); it is an agreement having an effect on price or output (*i.e.*, price fixing), and is not saved by an assertion that it was necessitated in order to assure compliance with the Robinson-Patman mandate that price breaks generally may be granted to favored buyers only as necessary to meet the competition of another seller.

¹¹ The Supreme Court has long held that the Robinson-Patman Act permits a seller to meet competition (*FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-760 (1945): “The test for determining when a seller has a valid meeting-competition defense is whether a seller can ‘show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.’”). It is a Robinson-Patman violation, however, to knowingly lower prices sufficiently to beat those of a competitor. Further, the Court held, in *Great Atlantic & Pacific Tea Co. v. F.T.C.*, 440 U.S. 69 (1979) (the so-called “lying buyer” case), that, if a seller is not guilty of a Robinson-Patman violation (because, *e.g.*, his lower price is cost-justified, or he actually believed that he was doing no more than meeting competition), neither is the buyer receiving the lower, but not unlawful price guilty of violating 15 U.S.C. §13(f), which prohibits the knowing inducement or “a discrimination in price which is prohibited [in 15 U.S.C. §13].”

¹² 15 U.S.C. §13(a): “... *Provided*, That nothing herein contained shall prevent differentials which make only due allowances for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:” *See, e.g.*, *Texaco v. Hasbrouck*, 496 U.S. 543 (1990); the *Hasbrouck* Court cited several commentators who rather unanimously noted that the “exactitude” of the proof required by the cost-justification defense—the need to show that the price reduction(s) did not exceed the seller’s actual cost savings—is generally not possible in actual market situations. A proxy for that defense, however, may be the “functional discount”: “A supplier need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount [discount for services rendered by, *e.g.*, a wholesaler] did not cause any substantial lessening of competition between a wholesaler’s customers and the supplier’s direct customers. [But no one] would ... countenance a functional discount completely untethered to either the supplier’s savings or the wholesaler’s costs.” At 561, 562 (fn 18 and surrounding text). Moreover, although the Court had ruled previously that the phrase “like grade and quality” refers to *physical* versus *perceived* identity (*see* note 4, *supra*), it had also noted, obliquely, in the same case, that the cost-justification calculation *might* include advertising expenses incurred to convince consumers of the superior nature of a branded product: “Borden’s extra expenses in connection with its own milk are more relevant to the cost justification issue than to the [like grade and quality] question we have before us.” *F.T.C. v. Borden Co.*, *supra*, note 4, at 644, n. 5.

The Non-Profit Exemption

There is yet another defense to an allegation of unlawful price differentials under the Robinson-Patman Act. The 1938 Nonprofit Institutions Act (15 U.S.C. §13c), which expressly permits price breaks on “purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit” (emphasis added), created a broad exemption from the general price-discrimination prohibition. As the Court of Appeals for the Ninth Circuit stated in 1967:

The underlying intent in granting such an exemption was indisputably to permit institutions which are not in business for a profit to operate as inexpensively as possible.¹³

Two Supreme Court opinions, announced in the mid-1970s and early 1980s, provided significant interpretations of the scope of the nonprofit exemption from the Robinson-Patman prohibition. Both involved challenges to the practice of a pharmaceutical supplier who was selling its products to certain hospitals at prices lower than those charged to retail pharmacists in the areas surrounding the hospitals in question.

Abbott Laboratories v. Portland Retail Druggists Association, Inc., 425 U.S. 1 (1976), discussed the “for their own use” phrase in the Nonprofit Institutions Act, and interpreted the provision strictly. The Court relied largely on the “for their own use” language to hold that not all purchases made by a nonprofit hospital are necessarily exempt from price discrimination prohibitions. The exemption is applicable only to those purchases made in order to enable the hospital to meet the *needs of the hospital* (e.g., dispensing to inpatients, outpatients treated in the hospital, emergency room use) and those of staff physicians, medical and nursing students, and their dependents: “The Congress surely did not intend to give the hospital a blank check.”¹⁴ Although the Court included within permissible uses by the hospital, “genuine take home prescription[s], intended, for a limited and reasonable time, as a continuation of, or supplement to, the treatment that was administered at the hospital to the patient who needed, and now continues to need, that treatment,” it specifically excluded from the Robinson-Patman exemption embodied in the Nonprofit Institutions Act “the refill for the hospital’s former patient.”¹⁵ Further, the Court refused to sanction purchases by the hospital-based physician for use in “that portion of his private practice unconnected with the hospital.”¹⁶

While the primary concern addressed by the Court in *Portland* was the sale of pharmaceuticals to nonprofit hospitals for all uses, including patient care and resale, four years later, in *Jefferson County Pharmaceutical Ass'n., Inc. v. Abbott Laboratories*, 460 U.S. 150 (1983), the Court set out the limits of the exception to Robinson-Patman for government purchases: *Jefferson County* presented an issue “limited to state [read “nonprofit hospital”] purchases for the purposes of competing against private enterprise—with the advantage of discriminatory prices—in the retail

¹³ *Logan Lanes, Inc. v. Brunswick Corp.*, 378 F. 2d 212, 216 (9th Cir. 1967), *cert. denied*, 389 U.S. 898 (1967). *Cited with approval* by the United States Court of Appeals for the Seventh Circuit in *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., Inc.*, 632 F.2d 680, 692-93 (7th Cir. 1980), *aff'g.*, 479 F.Supp. 281 (E.D. Ill. 1979). The Seventh Circuit also noted in its discussion at that point that, as is the case with a seller who unknowingly sells at a discount to a “lying buyer,” “if a particular purchase is exempt from liability [by virtue of the exemption in the Nonprofit Institutions Act] ... both the seller and the purchaser in the transaction are exempt.”

¹⁴ 425 U.S. at 13.

¹⁵ *Id.* at 15.

¹⁶ *Id.* at 17.

market.”¹⁷ *Jefferson County* stressed that Robinson-Patman's prohibitions against unjustified discriminatory price differentials in the sale of commodities of “like grade and quality” dictated that government [nonprofit hospital] purchases for use in retail competition with private enterprise, as opposed to those for “traditional governmental [hospital] functions,” are fully subject to the strictures of the act. The Court held that purchases of pharmaceuticals by the University of Alabama Hospital for uses other than in the treatment of its patients, as, for example, in retail sales, may not be made at prices which would give the University Hospital an unfair price advantage over its competitors in the retail sale of pharmaceuticals.

Health maintenance organizations were found to be “eligible institutions” under the Nonprofit Institutions Act in *De Modena v. Kaiser Foundation Health Plan, Inc.*, 743 F.2d 1388 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985). After acknowledging that the act “does not explicitly list HPs [health plans],” and that no case law at that time specifically included HPs as “charitable” institutions, the appeals court relied on “precedent defining the term charitable for purposes of the tax code and the law of charitable trusts” to reach its conclusion: “[T]he emergence of social welfare, insurance, and municipal hospitals [has] drastically reduced the number of poor requiring free or below cost medical services”:

This reduction eliminated the rationale upon which the traditional, limited definition of charitable was predicated, resulting in a move towards a less restrictive interpretation of the term in recent years. Now all non-profit organizations which promote health are considered charitable under the law of charitable trusts. Further, a number of courts have specifically held that health maintenance organizations, such as HPs, are charitable institutions for tax purposes. ... Given this increasingly liberal interpretation of the term, we conclude that the [defendant] HPs are charitable institutions within the meaning of the Nonprofit Institutions Act.¹⁸

Further, the court relied on the expression of the “for their own use” criterion propounded by the Supreme Court in *Abbott Laboratories v. Portland Retail Druggists*¹⁹ to decide that the “basic institutional function” of a health plan—providing a “complete panoply” of health-care services, including continuing and preventative services, to its members—requires that “drugs purchased by an HMO ... for resale to its members [be considered as] purchased for the HMO’s ‘own use’ within the meaning of the Nonprofit Institutions Act.”²⁰

De Modena was endorsed in 1995 by the United States District Court for Northern Illinois:

¹⁷ 460 U.S. at 154.

¹⁸ 743 F.2d at 1392 (notes omitted).

¹⁹ “[T]heir ‘own use’ is what reasonably may be regarded as use by the hospital in the sense that such use promotes the hospital’s intended institutional operation in the care of persons who are its patients.” 425 U.S. at 14 (emphasis in original).

²⁰ 743 F.2d at 1393. In a note, the court expanded its reasoning on the difference between the Nonprofit Institution Act’s treatment of prescription refills by hospitals (prohibited) and drug sales to members by HMOs (permitted): refilling prescriptions goes beyond “the basic institutional function of a *fee-for-service hospital* [which] is to provide *temporary* medical care for its patients” *Id.*, n. 7 (emphasis added). The United States Court of Appeals for the Tenth Circuit further expanded on that reasoning when, in *U.S. v. Stewart*, 872 F.2d 957 (1989), it refused to let a criminal defendant in a mail-fraud case argue that he had not defrauded or legally injured certain manufacturers because one of his problem sales was made to a hospital buying group that included a member entitled to receive discounted prices: “... it is clear that the large-scale sale of pharmaceuticals at a profit to wholesalers in the private market is not for the ‘own use’ of a hospital buying group.” At 961.

In *De Modena* the Ninth Circuit resolved to ‘follow the true mandate of *Abbott* ... by determin[ing] the basic institutional function of [the HMO in issue] and then decid[ing] which sales are in keeping with this function.’ *De Modena*, 743 F.2d at 1393. The court began its analysis by recognizing that the intended institutional operation of an HMO is to ‘provide a complete panoply of health care to [its] members.’ *Id.* The court further observed that, unlike the ‘temporary and usually remedial’ care that fee-for-service hospitals provide to their patients, HMOs ‘provide continuing and often preventative health care for their members.’ *Id.* Thus, concluded the *De Modena* court, ‘any sale of drugs by an HMO to one of its members falls within the basic function of the HMO’ and, therefore, constitutes ‘own use’ within the meaning of the Nonprofit Institutions Act. *Id.*²¹

To our knowledge, the inclusion of HMOs in the list of entities entitled to take advantage of the “for their own use” language of the Nonprofit Institutions Act has not been judicially repudiated,²² although the Supreme Court has not yet provided an opinion on the subject.

Damages Under Robinson-Patman

If none of the affirmative defenses set out above justifies a challenged price differential, and the non-profit exemption is unavailable to the defendant, price discrimination in violation of the Robinson-Patman Act is proved. That the successful plaintiff is entitled to damages in the amount of the unlawful price differential is not, however, a foregone conclusion. In *J. Truett Payne Company, Inc. v. Chrysler Motors Corporation*,²³ the Supreme Court, deciding “the appropriate measure of damages in a suit brought under § 2(a) of the Clayton Act,”²⁴ rejected the contention that “once [a plaintiff] has proved a price discrimination in violation of § 2(a) it is entitled to a minimum to so-called ‘automatic damages’ in the amount of the price discrimination.”²⁵

To recover treble damages [the measure of antitrust damages under 15 U.S.C. § 15, which requires as a prerequisite to recovery that one have been ‘injured in his business or property’], then, a plaintiff must make some showing of *actual* injury attributable to something the antitrust laws were designed to prevent.²⁶

²¹ In re Brand Name Prescription Drugs Antitrust Litigation, 1995 WL 715848, *3 (N.D. Ill. 1995).

²² The Federal Trade Commission, in February 2008, took the position that an HMO which covered a self-insured employer’s employees, albeit on a fee-for-service basis, could avail itself of the “for their own use” language in the Nonprofit Institutions Act in order to purchase and sell discounted pharmaceuticals: “This letter responds to your request on behalf of Kaiser Foundation Health Plan, Inc. for an advisory opinion on whether, under the Nonprofit Institutions Act (‘NPIA’) exemption to the Robinson-Patman Act, Kaiser may lawfully purchase discounted pharmaceuticals for use in connection with a proposed program to provide health care services to persons covered under health benefits plans offered by self-insured employers (the ‘proposed program’). ... it is our opinion that the NPIA exemption would apply to pharmaceuticals purchased by Kaiser for use in connection with its proposed program. We therefore would not recommend that the Commission not challenge under the Robinson-Patman Act the purchase or sale of discounted drugs for use in that program, if implemented consistent with the discussion below.” Advisory Opinion, *Re: Kaiser Foundation Health Plan, Inc.*, Issued by the Federal Trade Commission, February 13, 2008, reported at 94 ANTITRUST & TRADE REGULATION REPORT 161 (February 15, 2008).

²³ 541 U.S. 557 (1981).

²⁴ *Id.* at 559. Section 2(a) of the Clayton Act is 15 U.S.C. § 13(a).

²⁵ *Id.* at 561.

²⁶ *Id.* at 562 (emphasis added), *citing and quoting from* Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969) in support of its conclusion.

Previously, the Court had noted that “[t]he automatic-damages theory has split the lower courts,” but found more persuasive the opinions that rejected it, noting that Robinson-Patman “is violated merely upon showing that ‘the effect of such discrimination *may* be substantially to lessen competition.’”²⁷

Conclusion

In the mid 1970s, the 94th Congress, through an Ad Hoc Subcommittee of the House Small Business Committee, held hearings on and considered proposals to amend or repeal the Robinson-Patman Act. At that time, representatives of small business, and others, contended that retention of Robinson-Patman was essential.²⁸ Although the Subcommittee received several draft bills from the Department of Justice to either substantially amend, or to repeal the act, no legislation was introduced at that time, and CRS is not aware of any introduced at any time thereafter.

The Antitrust Modernization Commission was authorized in P.L. 107-273, “21st Century Department of Justice Appropriations Authorization Act,” to “examine whether the need exists to modernize the antitrust laws and to identify and study related issues,” and issued its final Report in April 2007. In its chapter on “Government Exceptions to Free-Market Competition,” it devoted several pages to its study of the Robinson-Patman Act, noting that despite the aim of supporters of its passage to remedy the “concern of small businesses ... that they were losing share to larger supermarkets and chain stores and in some cases were being forced to leave the market,”

[i]n its operation ... the Act has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would.²⁹

The Commission recommended that “Congress should repeal the Robinson-Patman Act in its entirety.”³⁰

Whether the current economic climate will result in a further renewal of efforts to modify or repeal the statute, or whether Congress will determine that statutory intervention is appropriate, is not known at this time.

²⁷ *Id.* at 561 (citations omitted, emphasis added).

²⁸ As noted above, in 1977 the Department of Justice disagreed with that assessment: “the Robinson-Patman Act is not a key factor in preserving efficient small business.” It preceded that conclusion with the observation that R-P did not apply to “the offering of services—a growing sector in which small business is especially significant .” *Report* (see note 5) at 260.

²⁹ *Report and Recommendations*, Final Report of the Antitrust Modernization Commission (April 2007) at 311.

³⁰ *Id.* at 312 (Recommendation #55).

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