

Crossing the Streams of Price and Promotion Under the Robinson-Patman Act

BY RICHARD M. STEUER

Dr. Egon Spengler: *There's something very important I forgot to tell you.*

Dr. Peter Venkman: *What?*

Spengler: *Don't cross the streams.*

Venkman: *Why?*

Spengler: *It would be bad.*

Venkman: *I'm fuzzy on the whole good/bad thing. What do you mean, "bad"?*

Spengler: *Try to imagine all life as you know it stopping instantaneously and every molecule in your body exploding at the speed of light.*

Dr. Ray Stantz: *Total protonic reversal.*

Venkman: *Right. That's bad. Okay. All right. Important safety tip. Thanks, Egon. (Ghostbusters).¹*

DESPITE ALL THE CRITICISM THAT has been heaped upon the Robinson-Patman Act² since its enactment, and all the efforts at repeal, it appears that the Act will remain in effect as long as Congress continues to believe that small dealers need special protection to gain traction and survive in competition against larger rivals. It also appears that compliance with the Act continues to absorb more of the time and attention of corporate counsel in most companies than any other aspect of the antitrust laws. Given these realities, it makes sense to devote greater attention to modernizing the interpretation and application of the Act rather than simply railing against the Act's existence.

A Quick Refresher

For the benefit of those readers whose Antitrust professors decided against teaching Robinson-Patman law, here is a brief overview: The Act prohibits discrimination in the prices charged, promotional allowances paid, or promotional services or "facilities" (e.g., materials) furnished in connection

with the sale of commodities of like grade and quality to customers that compete against one another at the same level of distribution for the same sales in the same geographic area, subject to certain defenses, including meeting a competitive offer, disposing of distress merchandise, or accounting for measurable cost savings.

There is no discrimination if the more favorable terms are available to all competing customers or to all competing new customers at the same time, even if those customers do not all choose to take advantage of them. Price discrimination does not violate the Act unless there is injury to competition but discrimination in promotional allowances, services, or facilities is a per se offense. The Act does not apply to sales to the government or nonprofit institutions, sales for export, or intra-state sales (although some states have their own discrimination laws). Finally, buyers can be held liable under the Act for inducing unlawful discrimination.

Offering Both Discounts and Promotional Assistance

In today's distribution environment, where incentives of one size rarely fit all, sellers find it increasingly difficult to offer only price reductions or only promotional assistance to their customers. Consequently, a nagging problem that has become especially ripe for modernization stems from the distinction drawn under the Act between price reductions and promotional assistance, the latter including both promotional allowances and promotional "services and facilities."³ There is a dearth of case law on the import of this distinction, but for as long as anyone can remember, the conventional wisdom has been that the value of price reductions and the value of promotional assistance may not be aggregated or otherwise commingled when determining whether there has been discrimination under the Act. *Don't cross the streams.*⁴

The result has been that manufacturers and other suppliers have been tied into knots, attempting to satisfy the rules against price discrimination in artificial and outmoded isolation from efforts to satisfy the rules against discrimination in promotional assistance.

Retailing and wholesaling are vastly different today than they were twenty-five years ago when this magazine began publishing, and they are unrecognizable in comparison to the retailing and wholesaling dynamics that existed when the

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Act was adopted during the Great Depression. Some dealers today have little or no use for promotional assistance and strongly prefer to receive the lowest possible everyday prices without any promotional assistance at all. Some of those dealers will not employ promotional assistance even if it is offered to them. Other dealers have targeted margins and will gladly utilize promotional assistance so long as they continue to earn those margins. Still other dealers routinely welcome promotional assistance to help with promotional activity that they would find necessary to drive demand in any event. Suppliers that sincerely want to treat all competing dealers equitably can face impossible situations when one discrete offer on price and a second discrete offer on promotional assistance do not fit the conflicting needs of all competing dealers, leaving some dealers better able to compete than others.

This puts suppliers in a quandary when confronting two questions they face over and over:

(1) *May a supplier charge competing dealers different prices and provide them different amounts of promotional assistance if the combined value of the discounts and promotional assistance provided to each dealer is of equal value?*

(2) *Is it permissible for a supplier to meet a competitive offer with a combination of discounts that are not in the same amount as the discounts the competitor has offered, and promotional assistance that is not in the same amount as the assistance the competitor has offered, so long as the combined value is no greater than the combined value of the competitor's offer?*

The conventional wisdom would provide negative answers to both questions, notwithstanding the fact that distribution today is so different from what it was when most of the case law on the Act was being made and notwithstanding the fact that offering an identical package to every competing dealer might actually favor some and disadvantage others. Perversely, the conventional wisdom would dictate that attempting to level the playing field among competing dealers by aggregating discounts with promotional assistance could violate the Act, even though the very purpose of the Act is to treat competing dealers equitably.

It is time to challenge the conventional wisdom. The Supreme Court instructed in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*⁵ that the Robinson-Patman Act must be read consistently with the rest of the antitrust laws—to protect competition and not individual competitors. This means that if the combined values of bundles of discounts and promotional assistance offered to each of two competing dealers are equivalent, then the offers should not be held to violate the Act even if the individual values of the price and promotion components in each offer are not the same—even if the supplier *crosses the streams*. Under *Volvo*, and with support from a number of lower court authorities, there is ample basis for concluding that under a proper reading of the law, combining the value of discounts and pro-

motional assistance should be permissible under the Act, both in structuring offers and in meeting competitive offers.

It should be lawful to charge different prices and provide different promotional assistance, if the combined value of the discounts and promotional assistance to each retailer is of equal value.

The Act: (1) makes it unlawful for a seller “directly or indirectly” to “discriminate in price” among competing purchasers of goods where the effect may be substantially to injure competition, and (2) also makes it unlawful for a seller to discriminate among competing purchasers of goods by “the payment of anything of value” for promotional services or facilities, or by actually furnishing promotional services or facilities, and not providing such payments or furnishing such assistance to such purchasers on proportionally equal terms.

The Act is divided into discrete sections on discrimination “in price” (Section 2(a)), discrimination in paying for promotional activity (Section 2(d)), and discrimination in actually furnishing promotional services or facilities (Section 2(e)). Consistent with this, legal counsel to suppliers have long treated price discrimination and promotional discrimination as discrete legal questions. Suppliers overwhelmingly have avoided aggregating the value of discounts and promotional assistance in determining whether competing customers are being treated equitably.

This is not how dealers see things, however, especially in certain sectors. Dealers more often treat money as fungible, whether it is in the form of a discount, a rebate, or a credit, and whether earmarked for advertising and promotion or not.

Until *Volvo*, the case law appeared to be largely consistent with the sellers’ conventional wisdom. No case had squarely held whether or not the values of price discounts and promotional assistance may be combined in assessing whether there has been discrimination between competing customers,⁶ but on a number of occasions there were efforts to characterize payments as promotional allowances and not as indirect price discrimination in order to come within the per se rule of Section 2(d). Sometimes this resulted in virtually identical payments being categorized as price concessions in some instances and as promotional allowances in other instances, suggesting that all such payments belong in one bucket or the other.⁷ The authors of the influential 1955 *Report of the Attorney General’s Committee to Study the Antitrust Laws* criticized this development, admonishing that “[a]ntitrust enforcement should not be complicated by diverse legal consequences solely dependent on whether a discriminatory concession masquerades as a ‘brokerage’, ‘allowance’, or ‘service’ rather than a naked quotation in price.”⁸ The authors urged reconciling enforcement of the Robinson-Patman Act with “broader antitrust objectives.”⁹

Also, on several occasions, courts have treated sham promotional allowances for which no promotional activity was required as disguised discounts subject to the prohibition on

price discrimination, again possibly suggesting that funds belong only in one bucket or the other.¹⁰

Nevertheless, at least one court has suggested that promotional allowances can be considered indirect price discrimination *regardless* of whether they are a sham, suggesting that some payments properly belong in *either* bucket. (Remember, Section 2(a) applies to price discrimination accomplished “either directly or indirectly.”) This issue has arisen in the context of assessing claims against customers for inducing discrimination against a competing customer under Section 2(f) of the Act. Section 2(f) makes it unlawful “knowingly to induce or receive a discrimination in price which is prohibited” by the Act, but does not apply to inducing discriminatory promotional assistance. Nonetheless, in a case decided several years ago, a district court in New York held that non-sham but discriminatory promotional allowances or other promotional assistance can amount to indirect price discrimination under Section 2(a), and therefore inducing such discrimination can be actionable under Section 2(f).¹¹

If bona fide promotional allowances can constitute indirect price discrimination under Section 2(a) for purposes of applying Section 2(f), arguably they can constitute indirect price concessions for purposes of determining whether a seller is discriminating between competing customers. If promotional payments and discounts belong in the same bucket for purposes of 2(f), they arguably should belong in the same bucket for purposes of finding whether or not there is “discriminat[ion] in price” under Section 2(a), as well as whether or not promotional assistance was provided “on proportionally equal terms” under Sections 2(d) and 2(e).

Plainly, this would represent movement analytically because there is no clear holding today that the values of discounts and promotional assistance may be combined to determine whether there has been discrimination. However, the courts should be ready to take this next step. As noted above, in *Volvo* the Supreme Court, citing its prior decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*,¹² held that the Robinson-Patman Act should be construed “consistently with broader policies of the antitrust laws.”¹³ In *Brooke Group*, the Court had quoted its opinion in *Atlantic Richfield Co. v. USA Petroleum Co.*¹⁴ for the principle that low prices “benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved.”¹⁵ The Court emphasized in *Volvo* that the primary concern of the antitrust laws is the promotion of competition among different brands, and that it “would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of [interbrand] *competition*.”¹⁶

If a seller were permitted to combine discounts and promotional assistance in order to tailor its offers to customer needs and thereby lower cost to all competing customers without engaging in discrimination, the goals of intensifying

[T]here is a sound argument that, under the law as it exists today, providing competing customers with bundles of discounts and promotional assistance of equivalent value should not amount to discrimination in violation of either Sections 2(a), 2(d), or 2(e) of the Act, regardless of whether the ratio of discounts to promotional assistance is the same for each customer.

interbrand competition and lowering prices to consumers would be satisfied. If it is procompetitive to make promotional services and allowances available to competing customers on proportionally equal terms, and to swap allowances for services in order to ensure that equivalent assistance is functionally available, as recognized in the Fred Meyer Guides issued by the Federal Trade Commission,¹⁷ it should be procompetitive to make *all* assistance available to competing customers on proportionally equal terms where some customers are not in a position to make as much use of promotional assistance as others.

The language of the statute itself leaves room for this interpretation. Section 2(a) applies to discriminating in price either “directly or indirectly,” which arguably includes the value of promotional allowances and other promotional assistance. As dealers themselves recognize, money is money. Furthermore, Section 2(a) requires a showing that the effect of the discrimination may be substantially to lessen competition. Providing various bundles of discounts, promotional allowances, and other promotional assistance that all have equivalent value arguably cannot be anticompetitive because it puts all competing retailers on a level playing field.

Similarly, although Sections 2(d) and 2(e) do not require a showing of competitive injury in order to establish a violation, they explicitly permit promotional assistance that is provided on “proportionally equal” terms to all competing purchasers. Arguably, if promotional assistance is combined with discounts in bundles that all have equivalent total value, then such bundles are being provided on terms that are, in fact, “proportionally equal.” Nothing in the language of Sections 2(d) or 2(e) militates otherwise. The Fred Meyer Guides provide “[a]ny method that treats competing customers on proportionally equal terms may be used” and any “methods that result in proportionally equal allowances and services being offered to all competing customers are acceptable.”¹⁸ The Guides include a number of examples of proportionally equal promotional alternatives, and admonish that the seller should take precautions to ensure that a cus-

tomers spends a promotional allowance “solely for the purpose for which it was given,”¹⁹ but the Guides never squarely rule out the possibility of price discounts constituting all or part of a proportionally equal offer.

Furthermore, although Sections 2(d) and 2(e) do not require a showing of competitive injury, a plaintiff may not recover damages under Section 4 of the Clayton Act (the section that provides for private damage actions) unless it can prove “antitrust injury,” which itself must flow from injury to competition. Again, providing bundles of discounts, promotional allowances, and other promotional assistance that all have equivalent value arguably cannot injure competition if they are designed to ensure that dealers compete on an equal footing.

The bottom line is that although most manufacturers and other suppliers continue to compartmentalize price discounts and promotional assistance for purposes of assessing exposure to claims of discrimination, there is a sound argument that, under the law as it exists today, providing competing customers with bundles of discounts and promotional assistance of equivalent value should not amount to discrimination in violation of either Sections 2(a), 2(d), or 2(e) of the Act, regardless of whether the ratio of discounts to promotional assistance is the same for each customer.

More than that, as a matter of policy, this is what the law should be. When the changing circumstances of distribution rewrite the meaning of “discriminate,” the application of the law needs to change to reflect those new circumstances.

It should be lawful to meet a competitive offer with a combination of discounts and/or promotional assistance that is not in the same proportion as the competitor’s offer, so long as the combined value is the same as the value of the competitor’s offer.

A similar issue arises when a seller confronts a competitor’s offer—which may consist of a lower price and/or greater promotional allowances or other promotional assistance—and wants to meet that offer with discounts and promotional assistance of comparable value, but not necessarily divided in the same way.

Section 2(b) of the Act provides that nothing in the Act shall prevent a seller from rebutting a prima facie case of discrimination “by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.”

As in the analysis described above, if bona fide promotional assistance can amount to an indirect discount, and if, by a parity of reasoning, discounts can amount to indirect promotional assistance, it should arguably be a defense to a claim of discrimination that a seller met a competitive offer by providing a bundle of discounts and promotional assistance of equivalent value to the price and/or promotional assistance offered by the competitor.

Moreover, the latest instruction from the Supreme Court

indicates that so long as a competitive offer is consistent with the overarching objectives of the antitrust laws—to promote interbrand competition and lower prices to consumers—there should be no violation of the Act. Sometimes it is impossible for a seller to match a competitor’s offer exactly and offering a combination of discounts and promotional assistance of comparable value serves the principle reconfirmed in *Volvo*: low prices benefit consumers regardless of how they are set and do not threaten competition.

Furthermore, the language of Section 2(b) itself, like the language of 2(a), 2(d), and 2(e), leaves room for interpretation. The section provides a defense when the seller can show that its “lower price or the furnishing of services or facilities” was made in good faith to meet “an equally low price of a competitor, or the services or facilities furnished by a competitor.” This is not a masterpiece of draftsmanship, as is widely recognized.

First, it neglects to include paying for promotional assistance rather than furnishing it (which is the distinction between Section 2(d) and Section 2(e)), something a court had to rectify in *Exquisite Form Brassiere v. FTC*.²⁰ This apparent omission may have stemmed from confusion in the original drafting as to whether the reference in Section 2(d) to “payment of anything of value” in return for promotional activity already included discounts and any other reduction in price. If “payment” and “lower price” were interchangeable, there would have been no need specifically to mention payment for promotional activity in the meeting competition provision of Section 2(b). This interpretation is helpful in reaching the conclusion that Congress never intended to compartmentalize discounts and promotional assistance too tightly when such compartmentalization elevates form over substance and condemns offers that actually are designed to avert discrimination.

Second, the language of the meeting competition defense, allowing the “low price of a competitor, or the services or facilities furnished by a competitor” to be met by the seller with an equally “lower price or the furnishing of services or facilities,” does not specifically require offering a price for a price, or promotional assistance for promotional assistance. If that were the intent, it could have been specified with far greater clarity.

The bottom line is that if it makes business sense to meet a competitor’s offer with an offer of equivalent value but containing a different mix of discounts and promotional assistance, then there is a sound argument to be made that under current law—and consistent with the “broader policies of the antitrust laws,” which apply “regardless of the type of antitrust claim involved”—the meeting competition defense should apply under the Act. Of course, it still would be necessary to “meet but not beat” the competitive offer, and to keep careful records of the offers being met, but the defense should not be precluded just because the mix of discounts and promotional assistance is not a perfect match to the competitive offer so long as it is of equal value.

Conclusion

The law is not entirely clear on the effect of aggregating the values of discounts and promotional assistance for purposes of either assessing whether the treatment of customers is discriminatory or determining whether an offer meets a competitive offer. However, if such combinations are genuinely tailored to suit the needs of the customers, if the intent is to treat customers fairly, if there is no injury to competition among customers or among competing manufacturers, and if there is no injury to or damages incurred by the customers themselves, both the case law and the language of the statute allow room for interpretation permitting such combinations. As always, dealers that go out of business for other reasons still may allege that price and promotional discrimination contributed to their failure, but if the total value of the discounts and promotional assistance available to them was comparable to that provided to competing retailers, and suited to their business, their claims would need to overcome all of the points described above.

In short, a serious gap remains between the conventional wisdom and today's business realities with respect to combining discounts and promotional assistance under the Robinson-Patman Act, and it is time to adopt a new con-

vention and some up-to-date wisdom. The alternative—administering discounts and promotional assistance independently of one another—is making it difficult for sellers to compete effectively in today's environment, to the detriment of retailers and consumers alike.

Dr. Egon Spengler: *I have a radical idea. The door swings both ways, we could reverse the polarity flow through the gate.*

Dr. Peter Venkman: *How?*

Spengler: *[hesitates] We'll cross the streams.*

Venkman: *'Scuse me Egon? You said crossing the streams was bad!*

Dr. Ray Stantz: *Cross the streams . . .*

Venkman: *You're gonna endanger us, you're gonna endanger our client—the nice lady, who paid us in advance, before she became a dog . . .*

Spengler: *Not necessarily. There's definitely a very slim chance we'll survive.*

[pause while they consider this]

Venkman: [slaps Ray] *I love this plan! I'm excited it could work! LET'S DO IT!* ■

¹ GHOSTBUSTERS (Columbia Pictures Industries, Inc. 1984).

² 15 U.S.C. § 13.

³ Promotional allowances, or the payment for promotional activity, are covered by Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d), while the furnishing of promotional “services or facilities” is covered by Section 2(e), 15 U.S.C. § 13(e).

⁴ See, e.g., FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 103 (1962): “[A] variety of collateral contract terms can so affect a seller’s nominal prices as to create ‘indirect’ price discriminations. Illustrated by sales return privileges, booking arrangements, or delivery terms, these span the entire range of commercial accommodations or benefits extended by suppliers to customers—except insofar as they concern brokerage, promotional, or other ‘services’ or ‘facilities’ subject to the specific provision of Sections 2(c), 2(d), or 2(e).” (Emphasis added.) See also *id.* at 416–20. Indeed, the pressing issue years ago was whether promotional allowances could be substituted for promotional services or facilities to determine whether there was discrimination in meeting competition (because it was not clear that the meeting competition defense applied to promotional allowances), not whether promotional services and allowances could be interchangeable with price reductions. See *Exquisite Form Brassiere v. FTC*, 301 F.2d 499 (D.C. Cir. 1961).

⁵ 546 U.S. 164 (2006). The *Volvo* case concerned a manufacturer’s uneven provision of price supports to dealers endeavoring to meet competition from dealers of other brands. The Court made clear that the purpose of all of the antitrust laws, including the Robinson-Patman Act, is to protect interbrand competition, not individual dealers.

⁶ *Cf. Alan’s of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1423–24 (11th Cir. 1990) (The court observed that “[w]here two types of programs are segregated in law and nonequivalent in fact, comparing them to determine whether the promotional programs were available on ‘proportionally equal terms’ seems nonsensical,” but cited no authority for this proposition and went on to hold that even if the supplier’s extended financing terms and promotional programs “are legally comparable,” the benefits in the case under review had not been disbursed on proportionally equal terms.)

⁷ *Compare, e.g., Champion Spark Plug Co.*, 50 F.T.C. 30 (1953), and *General Motors Corp.*, 50 F.T.C. 54 (1953), *with, e.g., Lambert Pharacal Co.*, 31 F.T.C.

734 (1940), and *American Crayon Co.*, 32 F.T.C. 306 (1940).

⁸ REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 192 (1955) (citing examples).

⁹ *Id.* (citing *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953)). The Supreme Court later cited *Automatic Canteen* in *Volvo* for the very same principle. See *Volvo*, 546 U.S. at 181.

¹⁰ *E.g., Bargain Car Wash, Inc. v. Standard Oil Co.*, 466 F.2d 1163, 1170 (7th Cir. 1972); *American Booksellers Ass’n v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1068 (N.D. Cal. 2001). *Cf. New England Confectionery Co.*, 46 F.T.C. 1041 (1949) (discounts are not covered by § 2(e)).

¹¹ *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F. Supp. 2d 133, 138 (S.D.N.Y. 2000) (citing Irwin J. Schiffres, *Validity, Construction, and Application of §§ 2(d) and 2(e) of the Robinson-Patman Act*, 24 A.L.R. Fed. 9 (Supp. 1999) (“It has been suggested that the prohibition of price discrimination under § 2(a) is applicable in all cases in which § 2(d), and probably § 2(e), apply, because marketing allowances and services can be regarded as indirect discrimination in price”)); *cf. O’Connell v. Citrus Bowl, Inc.*, 99 F.R.D. 117, 120–21 (E.D.N.Y. 1983) (also quoted in *Intimate Bookshop* but indicating that it is the sham nature of advertising allowances that subjects them to treatment as discounts). See also William H. Fisher, *Sections 2(d) and (e) of the Robinson-Patman Act: Babel Revisited*, 11 VAND. L. REV. 453, 458 (1958).

¹² 509 U.S. 209, 220 (1993).

¹³ 546 U.S. at 181 (quoting *Brooke Group*, 509 U.S. at 220).

¹⁴ 495 U.S. 328, 340 (1990).

¹⁵ 509 U.S. at 220.

¹⁶ 546 U.S. at 181.

¹⁷ See 16 C.F.R. § 240.10, Example 2 (“[P]ayments by the seller to customers for their advertising or promotion of the seller’s product” may be substituted for “demonstrators” furnished to large retailers.)

¹⁸ 16 C.F.R. § 240.9.

¹⁹ *Id.* at § 240.12.

²⁰ 301 F.2d 499, 502–05 (D.C. Cir. 1961).