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THE SIXTH AND SEVENTH CIRCUITS PROVIDE PRACTICAL ROBINSON-PATMAN GUIDANCE TO BUSINESSES

The Robinson-Patman Act has given rise to some truly awful court decisions that have created a seller-buyer environment of sometimes unforgiving price rigidity, as well as complex and difficult-to-comply-with principles about when and to whom sellers must offer price discounts and nonprice promotions. For example:

- Unlike any other antitrust statute, the Robinson-Patman Act can be violated merely upon proof of a "reasonable possibility" that competition between two buyers might be impaired (the *Morton Salt* standard).
- The old *Fred Meyer* case requires sellers to offer promotions to entities that do not buy from the sellers and with whom the sellers may not even want to have a relationship.
- The meeting competition defense (which allows a seller to lower its price to a buyer in a good faith effort to meet a competing seller's price) loses all vitality in the hands of courts that hamstring a seller by requiring proof that the seller was meeting a competing seller's precise price to a specific buyer, and by then forcing the seller to repeat this process over and over in the case of different buyers in a market where many buyers existed and where the competing seller generally made available lower prices to those buyers.

The result of these and other Robinson-Patman principles is a regime that frustrates businesses and finds virtually no support among lawyers, economists, academics, or even government enforcers, who frequently call for its repeal. This month, in fact, the Antitrust Modernization Commission issued its report to Congress after a three-year evaluation of the U.S. antitrust laws, and one of its recommendations was to repeal the Robinson-Patman Act. Even the very structure of this uniquely American statute—which, as a practical matter, requires sellers to justify their decisions to offer discounts to some, but not all, buyers—has historically been at odds with the Sherman Act's policy of favoring efficiency, interbrand competition, and manufacturers' independent pricing decisions when no predation is in sight.

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A year ago, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S. Ct. 860 (2006), the Supreme Court seemed to have taken a small step toward converging the Robinson-Patman Act and the Sherman Act, one of several steps the Court has taken from time to time. The issue in *Volvo* was not a hard one—should the Robinson-Patman Act bar a seller from offering different discounts to buyers that were not competing against each other, but were instead competing against different buyers on different bids? Most businesspeople would find it hard to believe that this seemingly easy issue made its way to the Supreme Court. It did, however, and the Court sensibly rejected the claim, reaffirming that interbrand competition "is the primary concern of antitrust law" and that the Robinson-Patman Act must be construed "consistently with broader policies of the antitrust laws." 126 S. Ct. at 872–73 (citations omitted). But even this encouraging statement was tempered by the Supreme Court's reaffirmation of the old *Morton Salt* inference of competitive injury and the accompanying statement that the "hallmark" of competitive injury is the diversion of sales or profits from one buyer to another. *Id.* at 870.

A chief criticism of the Robinson-Patman Act is its perceived antagonism to sellers that want to find ways to encourage and reward their best and hardest-working customers (which are sometimes, but not always, their largest). Although, as indicated above, the Robinson-Patman Act has many faults, we do not think this particular criticism is a fair one since, despite its bias in favor of pricing uniformity, the Robinson-Patman Act still provides room for the design of creative marketing programs that provide incentives to buyers as long as those incentives are not tied to structural impediments, such as a buyer's size, that make it impossible—because of things the buyers cannot change—for all buyers to take advantage of the incentives. Put another way, the Robinson-Patman Act shouldn't prohibit sellers from offering discounts or other benefits to buyers willing to take steps to align the buyers' interests with the interests of sellers that are competing in the marketplace, as long as the offer is made available to all. And this ought to be true even if the seller is seeking to upset the status quo by asking buyers to make changes, even difficult changes, in the way the buyers run their businesses to benefit the seller. To that extent, the Robinson-Patman Act fosters interbrand competition and can be reconciled with the Supreme Court's desire in *Volvo* to construe the statute consistently with the other antitrust laws.

Recently, the Sixth and Seventh Circuits ratified the use of marketing programs that provided discount incentives to buyers willing to support a seller's products, even though the programs necessarily meant that different buyers would be paying different prices depending on the extent to which the buyers chose to participate in the seller's programs. *See R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores,* No. 99 C 1174, 2004 U.S. Dist. LEXIS 23063 (N.D. Ill. Nov. 15, 2004), *aff'd*, 462 F.3d 690 (7th Cir. 2006), *cert. denied,* 127 S. Ct. 1330 (2007), and *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.,* No. 2:03-CV-30, 2005 U.S. Dist. LEXIS 31961 (E.D. Tenn. Nov. 29, 2005), *aff'd,* 477 F.3d 854 (6th Cir. 2007). The notion that a seller ought to be able to reward buyers that support the seller hardly seems controversial, yet very few Robinson-Patman decisions existed on either side of the issue, and for that reason alone the cases are noteworthy.

These sensible decisions find their roots in the same practical view of the Robinson-Patman Act that at times can be found in the Supreme Court's *Volvo* decision. Although only one of them (*Smith*) cited *Volvo*, both decisions endorsed a flexible approach in the evaluation of marketing programs designed to permit sellers to compete against their interbrand rivals. It is rare to see two pro-competitive (and, we believe, pro-consumer) interpretations of the Robinson-Patman Act coming so close together, and we hope that *Cigarettes Cheaper* and *Smith* will prove to be steps toward an effort to bring the statute closer to the policies that underlie the remainder of the antitrust laws.

THE *CIGARETTES CHEAPER* CASE

R.J. Reynolds Tobacco Company ("RJR") sued Cigarettes Cheaper, a retail tobacco chain, for trademark violations based on the retailer's sale of gray-market cigarettes. Cigarettes Cheaper filed a counterclaim under Section 1 of the Sherman Act, claiming that RJR conspired with other retailers to provide discounts to those retailers, but not Cigarettes Cheaper, a competing retailer. Cigarettes Cheaper also claimed that RJR engaged in price discrimination in violation of the Robinson-Patman Act.

Specifically, Cigarettes Cheaper argued that RJR violated the Robinson-Patman Act when it offered retailers (including Cigarettes Cheaper) merchandising contracts that

conditioned RJR discounts and promotions on the provision of certain shelf space, product positioning, signage, and display in the retailers' stores. Cigarettes Cheaper had rejected RJR's contract, choosing instead to enter into a merchandising contract with Philip Morris ("PM"), the leading cigarette manufacturer and RJR's rival, which provided discounts and promotions on PM's brands in return for providing merchandising space, signage, positioning, and display to PM's brands. By entering into PM's highest-level contract, Cigarettes Cheaper elected not to provide the level of merchandising support required to participate in RJR's program. Cigarettes Cheaper further contended that internal RJR documents demonstrated a competitive animus toward Cigarettes Cheaper because Cigarettes Cheaper aligned itself with the PM program. Cigarettes Cheaper argued that RJR retaliated against Cigarettes Cheaper by trying to drive it out of business by working with competing retailers to offer low prices on RJR brands.

RJR argued, in turn, that its marketing program offered discounts to retailers that were willing to support RJR's brands; that RJR's program had been offered, and was therefore available, to Cigarettes Cheaper, which had rejected RJR's program in favor of PM's program; and that RJR had the right to offer discounts on the condition that retailers pass the discounts along to consumers. Prior to trial, RJR obtained summary judgment on the Section 1 claim despite the existence of documents that, as the Seventh Circuit later would say, "discusse[d] ways to 'shut down' and 'kill' Cigarettes Cheaper! 'on the beach.'" 462 F.3d at 696. The Robinson-Patman claim went to trial in late 2004, and RJR obtained a complete defense verdict after a five-week jury trial. (RJR won its trademark case in a separate jury trial.)

The 2006 Seventh Circuit opinion (3–0, with Judge Easterbrook writing the decision) largely dealt with three decisions by the trial court: (1) its grant of summary judgment in RJR's favor on the Section 1 claim, (2) its exclusion of Cigarettes Cheaper's claimed "ill intent" evidence from the trial of the Robinson-Patman claim, and (3) its jury instruction under the Robinson-Patman Act's meeting competition defense. Overall, the Seventh Circuit validated RJR's retail marketing program, holding that it did not violate either the Sherman Act or the Robinson-Patman Act. The court acknowledged that RJR's program was available to Cigarettes Cheaper and rejected Cigarettes Cheaper's attack on RJR's marketing program, holding that RJR "had every right, under antitrust law, to condition discounts on agreement by its customers to reduce the prices they charged to consumers." 462 F.3d at 697. With respect to the meeting competition defense, which traditionally requires a seller to respond to individual, buyer-by-buyer competitive situations, the Seventh Circuit sensibly concluded that RJR could respond to PM's generally available offer in the marketplace by offering its own generally available program, and that it did not have to defend its lower prices on a retailer-by-retailer, price-by-price basis, given the way the marketplace in which RJR and PM competed actually operated: no seller in that business visited retailers on a daily basis, offering individual discounts, and it would have made no sense to require a responding seller (RJR, in this case) to gauge each competing discount in each retailer and then offer its own specific response to that retailer. Such a hypertechnical argument, if it had been adopted, would have competitively hamstrung sellers that competed in marketplaces where competition occurred across marketing programs and not through individual, day-by-day discounts. On February 20, 2007, the United States Supreme Court denied Cigarettes Cheaper's petition for *certiorari*.

Three aspects of the Seventh Circuit's opinion are key.

First, although the case involved a challenge to RJR's incentive discount program, the Court had no difficulty whatsoever with the structure of the seller's program—in particular, the seller's decision to condition a discount on performance. To the contrary, the Court acknowledged not only that RJR could condition the receipt of discounts and other incentives on its customers' compliance with certain conditions, but that RJR could indeed restrict the provision of discounts to those customers that chose to comply with RJR's conditions.

Second, the Seventh Circuit held that the district court did not err in granting RJR's motion to exclude evidence of RJR's claimed "ill intent," which the retailer had wanted to present as part of its Robinson-Patman case at trial for the obvious purpose of inflaming the jury, but which had no relevance to whether RJR engaged in price discrimination. As the Court explained, "a bad intent is not part of the plaintiff's *prima facie* case under §13(a), and a 'good' intent (apart from its bearing on the statutory justifications) does not excuse price discrimination;" thus, such evidence "could have played little role beyond confusing jurors." 462 F.3d at 698. The Court

rejected what it described as Cigarettes Cheaper's "tidbits" (*id.* at 696) and later commented that "[t]he district judge sensibly prevented an excursion through Reynolds's files, which would have hijacked this trial." *Id.* at 701. Indeed, the Court expressly and rationally recognized that

> [a] large firm such as Reynolds, with thousands of employees, generates mountains of internal paper. Some of the employees are bound to take almost any view about almost every subject. Yet only the CEO and Board of Directors speak for Reynolds; that one or more subordinates reached one or another conclusion does not demonstrate that "RJR thought" anything in particular. . . .

Id.

Third, the Seventh Circuit rejected Cigarettes Cheaper's claims that the district court erred when it instructed the jury that RJR could satisfy the meeting competition defense by showing that it met a competitor's generally available marketing program with its own marketing program. In doing so, the Seventh Circuit confirmed the long standing Robinson-Patman Act principle that the meeting competition defense need not be established on a customer-by-customer basis, but that it should be sensibly applied in the context of actual market conditions. Here, Judge Easterbrook recognized, RJR did not just "argue 'this market is rivalrous' and stop," but showed that it made its discounts "generally available to retailers because Philip Morris made its discounts generally available." *Id*. at 699. The Seventh Circuit refused to interpret the statute in a way that would have stifled intense interfirm price competition. Specifically, the court not only sensibly allowed competitive conditions in the marketplace to dictate *how* the meeting competition defense should be implemented in the specific context in which it was being applied, but applied a realistic approach to evidentiary burdens in determining *what* had to be proven to meet the elements of the defense.

THE *SMITH* CASE

Twenty wholesalers sued RJR for alleged violations of the Robinson-Patman Act in relation to a program that offered lower prices to wholesalers willing to devote a certain percentage of their business to the promotion and sale of RJR savings brands. According to the wholesalers, the lower prices were not "functionally available" to them because their retail customers primarily sold to lower-income consumers who "demanded" cigarettes priced at a lower level than any brand available from RJR. Arguing that their role was to fill orders, not influence purchasing decisions, the wholesalers claimed that it was "impossible" for them to meet the percentage of their savings brand sales required to qualify for RJR's lower prices. (This impossibility theory was an effort to take advantage of the well-known principle that sellers cannot offer volume discounts that favor large buyers over small ones, whose size prevents them from taking advantage of the discounts.)

The district court, after two years of discovery, granted RJR's motion for summary judgment in 2005. In affirming the district court's decision, the Sixth Circuit in 2007 found that RJR offered its market share discounts "to all wholesalers using a non-discriminatory formula" (477 F.3d at 880), that "[t]he capacity of plaintiffs to qualify for the [wholesale program's] best discount was a matter of marketing strategy and brand prioritization, a choice inherent and unavoidable in multi-brand incentive programs," and that RJR's prices were therefore functionally available. *Id*. The Court also rejected "plaintiffs' invitation to re-engineer" RJR's program "to make it more reasonable for some participants." *Id*. at 879. In short, the Sixth Circuit agreed with RJR's position that the Robinson-Patman Act did not bar RJR from using share-based incentive targets to influence its customers' marketing behavior in favor of RJR's brands.

The Sixth Circuit (just like the Seventh Circuit six months earlier) made several important points in applying a flexible, fact-based interpretation of the Robinson-Patman Act.

First, the Court made clear that it is permissible under the Robinson-Patman Act for a seller to try to influence, or even entirely change, buyer behavior if the seller's efforts are in furtherance of the primary concern of the antitrust laws—*i.e.*, the promotion of interbrand competition.

Second, the court held that the Robinson-Patman Act does not protect a customer from having to make difficult choices: as long as that same choice is available to, and made known to, all competing customers, the statute is not violated. In the

words of the Sixth Circuit, "the Robinson-Patman Act neither ensures success nor excuses purchasers from making difficult decisions about which competing brands to carry, market or promote." *Id*. at 872; *see also id*. at 865–66. The wholesalers had claimed that the "choice" presented by RJR's wholesale program was effectively no choice at all "because most retailers prefer to buy their stock from a single distributor, [and] if plaintiffs curtail the sale of fourth-tier cigarettes, their customers will take their entire business elsewhere." *Id*. at 875. The Sixth Circuit, however, found "no evidence that anything other than plaintiffs' marketing decisions impacted their ability to obtain the . . . best prices [from RJR]. . . . Plaintiffs could alter their sales mix at any time so as to qualify for the varying discount levels." *Id*. at 879. The Sixth Circuit thus concluded that RJR's lower prices were "functionally available" to plaintiffs, meaning that no price discrimination existed in the first place.

Third, rejecting inferences and shortcuts, the Sixth Circuit required the plaintiffs in *Smith* actually to prove the allegations set forth in their complaint and not just rely on the sort of inferences and presumptions for which the Robinson-Patman Act is notorious. For this reason alone, the Sixth Circuit's decision was a welcome—and much-needed—breath of fresh air.

Each of these decisions demonstrates and endorses a flexible, common-sense application of the Robinson-Patman Act to a supplier's discount incentive programs. Following *Volvo*, both courts sensibly applied the Robinson-Patman Act in ways that recognized actual competitive conditions in the industry at issue and refused to stretch the Robinson-Patman Act to impose liability on a supplier when such liability would not promote competition—and, indeed, when using the Robinson-Patman Act to condemn the seller's programs actually would have been fundamentally inconsistent with broader antitrust principles. Instead, the courts properly applied the meeting competition defense and the functional availability doctrine in practical ways that acknowledged the core purpose of the antitrust laws—the promotion and protection of interbrand competition.

The Sixth and Seventh Circuits' decisions also evidence several important takeaways that provide practical, implementable guidance to companies seeking to succeed in the intensely competitive marketplaces in which they do business.

First, there should be no one-size-fits-all method of meeting competition. Instead, courts ought to be willing to interpret the meeting competition defense "consistently with broader policies of antitrust law," *Volvo*, 126 S. Ct. at 872–73, by evaluating discount and other promotional programs in the specific context of the industries in which they are offered. Thus, if a discount program is generally available in a marketplace from competitor A, competitor B ought to be able to respond with its own generally available discount program in that marketplace without having to establish that it was meeting competitor A's precise offer on a particular day at every customer that availed itself of competitor B's program. The Seventh Circuit properly recognized that it is only by accounting for the manner in which an industry actually operates that a court can ensure the Robinson-Patman Act is not being used to stifle the very competition the antitrust laws are designed to encourage.

Second, the Robinson-Patman Act should not preclude a supplier from designing reasonable programs that condition the receipt of lower prices on the customer's agreement to favor that supplier's products over those of competitors. Incentive programs that reward customer loyalty have the effect of promoting interbrand competition, which is what the antitrust laws are all about. The plaintiffs in the *Smith* case, by contrast, had argued that a seller shouldn't be allowed to restrict the plaintiff-wholesalers' ability to freely purchase from other sellers—even though that's exactly what any incentive program does. Thus, the plaintiffs argued that the legality of the program should have depended on whether, from the *buyer's* perspective, the program was a reasonable one. The acceptance of such an approach would have restricted the ability of sellers to design incentive programs in an effort to enhance the sale of their products by allowing debate about the reasonableness of the targeted goals or the "unfair" effect of those goals on buyers' purchasing freedom. This is truly an argument for an anticompetitive outcome, but it's the sort of argument for which Robinson-Patman cases historically have been infamous. Here, it would have all but eliminated discount incentive programs because only the most courageous sellers would have been willing to take the litigation risk of developing programs that

buyers could have attacked simply by presenting evidence that it was hard for them to comply. The Sixth Circuit thankfully rejected such an anticompetitive outcome.

Third, the Robinson-Patman Act does not require that every competing customer benefit equally from a discount program. Nothing in the Robinson-Patman Act excuses buyers from making tough choices about which competing brands to carry, market, or promote. To the contrary, as the Sixth Circuit recognized, "a discount program may be functionally available even when the choice 'would have threatened [the plaintiff's] very existence,' . . . or when the choice would not be economically possible.' " *Smith*, 477 F.3d at 873 n.12 (citations omitted). The Act simply does not require a seller to conduct its business in ways that ensure the success of its customers. That a buyer may not like the conditions placed upon it by a seller, finding them difficult or unpalatable, does not mean that the concededly offered discounts were unavailable. Instead, as these cases make clear, the Robinson-Patman Act requires only that the program be made available to all competing customers and that all such customers have the choice to participate in the program. That choice need not be equally palatable to all, nor need it be an easy one. The buyers may believe that the choice is not one they should be required to make or that the choice is a bad one for them, but that is not the standard.

At bottom, the beauty—and benefit—of these rational appellate court decisions is that they provide comfort to a seller designing and implementing a share-based incentive program *even if* that program will require its customers to make a choice between promoting, or even carrying at all, the products of that seller and those of one or more of the seller's competitors. Such a program should be defensible under the Robinson-Patman Act as long as it is consistent with the interbrand competition the antitrust laws are designed to encourage.

The *Cigarettes Cheaper* and *Smith* cases thus represent significant steps in the convergence of Robinson-Patman and Sherman Act principles and in recognizing the importance of interbrand competition and market realities even in the Robinson-Patman area. Although the principles of these cases may seem like small steps in competition policy, in the world of Robinson-Patman jurisprudence, they represent giant leaps toward common sense. Most important, they are principles that companies can bank on and practically apply—at least in the Sixth and Seventh Circuits.

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