Are You a Competitive Wannabe? If So, the Robinson-Patman Act Probably Is Not Going to Help You

Theodore L. Banks, Schoeman Updike Kaufman & Scharf

What happens when a customer complains that a seller's prices are too high for it to be able to compete? In a purely market-driven setting, a seller will examine pricing to see if it is missing an opportunity to increase profitable sales. But in the legal setting, the seller and the customer may start to consider if the Robinson-Patman Act has been violated.

This concern may arise where a customer, perhaps in the role of consumer or a seller to consumers, wants to act as a distributor. Or the customer wants to act as a distributor in a territory or to a class of customers that does not fit the manufacturer's business plan. Although there is no question that a manufacturer can refuse to deal or impose reasonable vertical restraints on its customers, distributors and "wannabe" distributors continue to complain that they are the victims of discrimination, even when the sales in question seem to be between customers who serve entirely different markets.

Feesers, Inc. v. Michael Foods, Inc.,[1] was brought by a distributor challenging lower prices given to another customer, Sodexo. Feesers purchased food items from Michael Foods, and resold them to customers who operated foodservice facilities, such as cafeterias. Sodexo purchased items directly from Michael Foods for use in cafeterias that it operated under contract. When the case was originally brought, the district court thought that Feesers and Sodexo were not competitors. One company was a distributor, and the other provided cafeteria management services. If companies are not in competition, then a difference in prices charged to them shouldn't matter; there is no injury to competition. The district court took this view, and dismissed the case.

Feesers appealed and argued that it was possible that, as companies were deciding whether to operate their own cafeterias or hire a company like Sodexo to run them, the cost of food products might influence that decision. The appellate court liked this argument, or at least thought it was plausible, and ruled that there should be a trial to determine whether competitive injury had been established. If Feesers could show that it competed with Sodexo and there was price discrimination over time, there would then be an inference of competitive injury,[2] which Michael Foods would need

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to rebut with proof that the price difference did not cause Feesers to lose sales or profits.

Notwithstanding the prior dismissal of the case by the trial court, the results after a three-week bench trial went in the opposite direction. This time the court did not think that the fact that Feesers and Sodexo were in entirely different businesses was significant. According to the court, price discriminators should not be allowed to "avoid the sanctions of the Act by the simple expedient of adding an additional link in the supply chain."[3] The plaintiff's expert characterized the amount of discrimination as "stunning," which seemed to entitle Feesers to an inference of competitive injury.

The price difference should not have mattered, of course, since Feesers and Sodexo actually were not in competition. If Sodexo had re-sold food products in competition with Feesers rather than consuming them in cafeteria operations, that would be a different story. But that was not the basis of the case. For any given customer who might be considering whether to operate its own cafeteria or hire Sodexo to do it for them, the price difference of the items sold by Michael Foods would have been such a small part of the overall cost of operating a cafeteria that it is hard to *see* how it could have made a difference, let alone be detectible. The defendant argued that there was no connection between the lower prices it received and reduced sales or profits experienced by the plaintiff. The court rejected Sodexo's assertion that the food products from Michael Foods were a small part of any customer's purchases. The court thought that the Sodexo document showing a strategy to emphasize low prices to grow its business indicated that Sodexo was competing for the same business as Feesers.

In the subsequent injunction hearings, Feesers argued that while products from Michael Foods were but a small portion of sales to any one customer, they were important components of market baskets demanded by customers to determine product availability of potential suppliers. Even assuming that the argument was true, it should not have been given any weight under the Robinson-Patman Act. If courts allow this approach, any item, no matter how minor, could be singled out and accorded special significance, notwithstanding the lack of any actual competitive impact.[4]

But then it was all reversed,[5] as the appellate court realized that Sodexo never was in competition with Feesers. The court termed its analysis the "competing purchaser" approach, but I prefer to call it the "temporal" analysis, since it looks at when purchases occurred. If competing bids are submitted by favored and disfavored purchasers before goods are purchased from the seller, the disfavored purchaser cannot show that it and the favored purchaser were competing purchasers at the time of the bid.[6] This approach does help construe the law more consistently with other antitrust laws that focus on the impact of practices on competition and not just on one competitor.[7] The ability to meet competition (as in a competitive bidding situation) is one way in which the Robinson-Patman Act is reconciled with the more general purposes of the antitrust laws.[8] If only one party can win a contract, and purchases do not occur until after the contract is awarded, competing bidders are not competing purchasers.[9]

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The court observed that its *Toledo Mack* decision, with facts somewhat similar to those in the Supreme Court's *Volvo Trucks* decision, turned on the recognition that competition for customers occurred before the purchase of a truck by the winning dealer, thus limiting the relevant market of sellers to the customer to one entity at the time the truck was sold to the dealer.[10] So even if the disfavored and favored purchasers were competing bidders for a contract, since only one company could win the contract, they were not competing purchasers.

Applying the "temporal" analysis, the court determined that Feesers and Sodexo were not competing purchasers. Competition for institutional foodservice business occurred prior to any product sale by Michael Foods, when a customer was considering whether it wanted to operate its food facility or use a management company. Once the decision was made, the relevant market was limited to one end user, and the competing suppliers were either foodservice management companies or distributors. But even if Feesers and Sodexo were deemed to be in competition, the competing purchaser requirement would still not be satisfied because Michael Foods would not make a sale until the institution decided which distributor or management company to use, and started purchasing products through that company. Because the plaintiff was not a competing purchaser, there was no competitive injury, and the District Court was instructed to enter judgment as a matter of law for the defendants.

While it would seem intuitively obvious that a distributor is not competing with a facility operator, the language of the case law construing the Act is somewhat difficult. Some cases speak about parties being in competition if they have "actual or potential ability to deprive each other of significant levels of business"[11] or consider whether they are "in economic reality acting on the same distribution level."[12] The inquiry is a factual one, and advocates may be able to marshal evidence that parties are in "substantial"[13] competition, since any purchasing decision may deprive an unsuccessful seller of "significant levels of business." The Third Circuit's "temporal" approach, applied to examine when and if competing purchases are made, may be helpful to exclude certain situations. But it is not a complete answer, since in many cases, companies may be engaged in active sales activity and purchasing goods at the same time, but not be in actual competition since their *outputs* are different.

So, if trying to determine if customers are competing for Robinson-Patman purposes, the "temporal" analysis is just the first step. If actual purchases happen at the same time, then there needs to be a second step: the traditional analysis of whether the customers operate on the same functional level.[14] In cases where customers have debated whether they qualify for functional discounts, the courts have noted that the nature of the customer is to be determined based on how the customer *sells* the goods, not how it buys them.[15] Where customers operate on different functional levels – selling products to a different channel, or after transformation of the product into a different object — they do not need to be charged the same price.[16] Even if the "temporal" analysis had not been applied, Michael Foods should not have had any exposure for its sales at different prices to Feesers and Sodexo. Feesers was reselling goods, essentially unchanged. Sodexo was providing a foodservice management service,[17] taking multiple inputs (food products, labor, equipment, and supplies) and delivering a finished product (cafeteria operation) that was significantly transformed from the inputs.

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The appellate court decision in *Feesers* reached the correct result, based on the bidding practice in the industry. But in the absence of a bidding situation that might provide the basis for a temporal defense, buyers and sellers need to pause and review the nature of their markets as they consider the prices they charge, and the prices they pay. Sellers with different kinds of customers that may actually be competing should not summarily conclude that the customers are not in competition and charge whatever prices they wish. The seller must make certain that prices to competing customers comply with the Robinson-Patman Act, or use vertical restraints to make sure that competing customers don't "bump" in to each other as they go after the same customer.

Even in a situation where bids are the basis for sales, distributors may respond to bid requests based on inventory; the customers may be in competition at the time of the bid since the purchases have already occurred. Additionally, the *Feesers* court noted that its holding was not limited to the bid markets under discussion in the case, and was not intended to require purchases before a bid in every situation.[18] Additionally, if special prices are granted to respond to specific bids, there may be "leakage" as customers use low-priced goods intended to satisfy the requirements of one bid to compete for other business. Sellers who do not provide accurate pricing information to purchasers about to make a bid may not be breaking the Robinson-Patman Act, but there could be liability under state contact or unfair competition law.

Buyers should be alert that they are being treated fairly, and seek assurances if they feel they are being disfavored – or look for another supplier. Sometimes sellers may have a very disorganized distribution system and may have no idea which of its customers are in competition. Or, a seller of industrial components may think that it can price whatever way it wants, since its components may undergo some level of transformation before being resold. Where price differences adversely impact the disfavored competing distributor, a manufacturer is well-advised to make sure that it has a basis for a price difference, such as meeting competition. But a buyer cannot just declare it is in competition with another customer of a common supplier; there must be a solid basis, such as a consistent pattern of lost customers who are purchasing and reselling the *same thing* from a competitor. In most cases where it appears that the customer needs are different, the concept of "switching costs" should come into play. Can a customer really choose between two different types of providers (e.g., foodservice operator and distributor) without making a significant investment? If the switch is easy, then maybe the suppliers are in competition; if the switch involves a lot more than just picking up the phone (or sending an email) to a different supplier, then, at the least, a lot more examination is necessary.

The first time *Feesers* came to the Third Circuit, the lower court was instructed to find competition if Sodexo and Feesers "are each directly after the same dollar."[19] This is an incomplete formulation, since, in the broadest sense, as long as dollars are finite, every seller is going after the same dollar. The concerns of the Robinson-Patman Act should be limited to competing purchasers who are going after the same dollar with essentially the *same product*.

Theodore L. Banks is counsel to the firm of Schoeman Updike Kaufman & Scharf in Chicago, where his practice concentrates on antitrust and corporate matters, and President of Compliance & Competition Consultants, LLC. Previously, he served as

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Chief Counsel for Global Compliance at Kraft Foods. He is the author of Distribution Law: Antitrust Principles & Practice, published by Wolters Kluwer Law & Business.

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[1] 2006 BL 57008 (M.D. Pa. May 4, 2006), *rev'd*, 498 F.3d 206 (3d Cir. 2007), *on remand*, 2007 BL 128960 (M.D. Pa. Oct. 19, 2007); 632 F. Supp. 2d, 414 (M.D. Pa. Apr. 27, 2009), *rev'd*, 591 F.3d 191 (3rd Cir. 2010).

[2] *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

[3] *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642, 647 (1969); *accord Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 567 n.26 (1990).

[4] The argument that an item was needed as a "door opener" was rejected in *Westman Commission Co. v. Hobart Corp.*, 796 F.2d 1216 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988)(distribution termination case).

[5] 591 F.3d 191(3rd Cir. Jan. 7, 2010).

[6] *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

[7] *Volvo Trucks*, 546 U.S. at 180.

[8] *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 82 n. 16 (1979).

[9] *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir.2008).

[10] The same approach was applied in *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1068 n. 20 (5th Cir.1975), *cert. denied*, 424 U.S. 968 (1976) (only one purchaser if only one winning bidder).

[11] *Thurman Industries v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989); *Universal-Rundle Corp. v. FTC*, 382 F.2d 285, 287 (7th Cir. 1967).

[12] *Stelwagon Manufacturing Co. v. Tarmac Roofing System, Inc.*, 63 F.3d 1267, 1272 (3d Cir.1995).

[13] *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 533 (6th Cir.), *cert. denied*, 543 U.S. 821 (2004). 2004)(vending machines in competition with convenience stores); *Godfrey v. Pulitzer Publishing Co.*, 276 F.3d 405, 412 (8th Cir. 2002)(one instance of lost business insufficient to show competition)

[14] *Abbott Labs. v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 12 (1976).

[15] *Mueller Co. v. FTC*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964).

[16] *Richard Short Oil Co., Inc. v. Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986)(competition not injured when lower prices given to retailers and not to wholesalers); *Energex Lighting Industrial, Inc. v. North American Philips Lighting Corp.*, 656 F. Supp. 914 (S.D.N.Y. 1987)(more favorable terms to distributors compared to manufacturers); *Leff Radio Parts, Inc. v. Mattel, Inc.*, 706 F. Supp. 387 (W.D. Pa. 1986)(more favorable return privileges granted to retailers).

[17] The Robinson-Patman Act was never intended to cover (and does not cover) providers of services.

[18] 591 F.3d at 206 n.18.

[19] 498 F.3d at 214. This was a 2-1 opinion, and the dissent would have found that the parties were not in competition because they sold different products — Feesers sold unprepared food and Sodexo sold meals. 498 F.3d at 218, 220. The majority thought that it was significant that some customers were not charged a net price for the meals, but received a detailed accounting of the cost of food, supplies, labor and a management fee. 498 F.3d at 215. But the dissent was correct. Regardless of how the costs were expressed, the purchaser was not picking and choosing which items to purchase – it was purchasing the bundle. Feesers could not have provided the bundle.

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