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DISTRIBUTION OF SENTENCING POWER BETWEEN LEGISLATURE AND JUDICIARY

speculative activity. Congress has empowered judges in Chapter X reorganizations to limit claims purchased by certain insiders in the course of such proceedings to their actual cost.[34] Similarly, the SEC has denied participation to securities purchased by management officials during a public utility reorganization.[35] And courts have traditionally penalized trustees, the analogues of corporate directors,[36] by denying them profits from transactions between themselves and the estate.[37] Application of a different rule to insider trading during insolvency ignores the role of the judiciary in preventing as well as penalizing management infidelity to the investing public.

THE SWINGING DOOR—OR HOW TO OBEY ONE ANTITRUST LAW BY VIOLATING ANOTHER*

THE Robinson-Patman Act[1] was enacted to protect small wholesalers and retailers[2] from their larger competitors who were using immense purchasing

(2d. Cir. 1949). The court, however, failed to realize that the main purpose of the limitation rule is to deter speculative activity rather than to make whole the former creditors.

To the extent that former creditors can be located, they might be given an equitable interest in the reorganization proceedings. When these creditors are unascertainable, however, and unclaimed profits are distributed among creditors participating in the reorganization, courts must guard against insiders subverting the limitation rule by deliberately purchasing bonds during insolvency in order to increase their dividend on bonds purchased during solvency. Moreover, in case insiders succeed in buying up an entire class of securities, courts must be prepared to subordinate their claims to other classes of security holders or to general creditors.

34. Bankruptcy Act § 212, 52 STAT. 895 (1938), 11 U.S.C. § 612 (1946). See note 3 *supra.*

35. Sustained under the order-making power conferred by the Public Utility Holding Company Act. SEC v. Chenery Corp., 332 U.S. 194 (1947). Previous to this decision, a divided Supreme Court had held that judicially established common law standards did not bar corporate fiduciaries from trading during utility company reorganizations. SEC v. Chenery Corp., 318 U.S. 80 (1942). But see Mr. Justice Black, dissenting, SEC v. Chenery Corp., 318 U.S. 80, 95 (1942).

36. *See* Pepper v. Litton, 308 U.S. 295, 306 (1939). See generally Dodd, *For Whom Are Corporate Managers Trustees?* 45 HARV. L. REV. 1145 (1932); Berle, *For Whom Corporate Managers* Are *Trustees: A Note,* 45 HARV. L. REV. 1365 (1932); BERLE & MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 247–76 (1934).

37. Magruder v. Drury, 235 U.S. 106 (1914). RESTATEMENT, TRUSTS § 170 (1935).

* Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949).

1. 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1946). The relevant portion of section 2(a) of the Act reads: "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition. . . ."

2. The United States Wholesale Grocers' Association was the prime mover behind the Robinson-Patman Bill. Indeed, the first draft was written by counsel for this organization. See ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 51 (1937); Note, *The Robinson-Patman Bill,* 24 GEO. L.J. 951-5 (1936).

power as a means of exacting price concessions from producers.[3] Sponsors of the Act hoped to restore the competitive balance which these concessions upset. They felt that efficiency rather than mere size should be the criterion of survival, and that the two were not necessarily synonymous.[4] But lawyers and economists were quick to warn that the Robinson-Patman Act, carried to its logical conclusion, would clash with the broad purposes of the Sherman Antitrust Act.[5] While the Sherman Act basically is geared toward achieving a competitive price structure,[6] the Robinson-Patman Act encourages substantial price rigidity.[7] Though the Sherman Act has belabored the monopoly producer,[8] the Robinson-Patman Act shields him from the bargaining pressures of the large buyer.[9] The recent *Standard Oil Co. v. FTC*[10] decision sharply portrays the disharmony.

The defendant, Standard Oil of Indiana, was a major petroleum supplier in the Detroit area. Standard made the bulk of its deliveries directly to retail service stations, who were charged the "tank-wagon" price. Some independent "wholesale"[11] distributors, however, were given a one and one-half cent per gallon discount from the "tank-wagon" price. Taking advantage

3. FTC, FINAL REPORT ON THE CHAIN-STORE INVESTIGATION 53–65 (1934); Phillips, *The Robinson-Patman Anti-Price Discrimination Law and the Chain Store*, 15 HARV. BUS. REV. 62–7 (1936).

4. For an examination of the economic philosophy and ambitions of one of the bill's sponsors, see Stockbridge, *What Does Mr. Patman Mean?*, Today, Nov. 7, 1936, p. 6.

5. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1946). For an excellent discussion of the inherent dichotomy of purpose between the Sherman and Robinson-Patman Acts, see Burns, *The Anti-Trust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301–20 (1937).

6. "[Trade and commerce] are 'monopolized' within the meaning of the federal statute [Sherman Act], when . . . a few persons acting together *can control the prices* of a commodity moving in interstate commerce." American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946). (Italics added.)

7. Learned & Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations*, 15 HARV. BUS. REV. 137, 139 (1936). "And since it [Robinson-Patman Act] *stops competition* at the [production] level where it is most effective in American business, the only level where aggressive buying makes inroads on fixed prices, it amounts to a repeal of the antitrust policy in a very important part of American business." (Italics added.) See also Gordon, *The Robinson-Patman Anti-Discrimination Act* in BUSINESS AND THE ROBINSON-PATMAN LAW 40 (Werne ed. 1938).

8. *E.g.*, American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

9. See EDWARDS, MAINTAINING COMPETITION 169 (1949).

10. 173 F.2d 210 (7th Cir. 1949), *modifying* 41 F.T.C. 263 (1945).

11. In reality, one of the four "wholesale" dealers, Ned's Auto Supply Company, was exclusively a retailer, operating four to six service stations. Two of the remaining three dealers operated several retail stations in addition to their wholesale business. The fourth, Stikeman Oil Company, Inc., was a legitimate wholesaler. Brief for Respondent, pp. 18, 19. However, each of the four favored distributors had large storage facilities and made his own deliveries. Brief for Petitioner, pp. 7, 8. But in framing its order

of this discount, wholesalers resold below the "tank-wagon" price to retail outlets competing with others buying directly from Standard.

The Seventh Circuit, upholding the Federal Trade Commission, found that Standard's discount to wholesalers violated section 2 of the Robinson-Patman Act. Retailers buying directly from Standard, the court held, were injured in their competition with retailers buying through the independent wholesalers. The court found that the discrimination was not justified by cost savings.[12] Furthermore, Standard's defense that the discount was "an effort in good faith to meet competition of other producers" was ruled unavailable where competition between retailers might be injured.[13] The cease and desist order, as modified by the court, forbids Standard to grant wholesale distributors any discounts, where it knows or ought to know the wholesaler resells to retailers at below the "tank-wagon" price.[14]

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the court, like Standard Oil, took no account of the functional differences of the jobbers involved.

12. 173 F.2d 210, 213 (7th Cir. 1949). The Robinson-Patman Act does not contain an absolute prohibition against price differentials. Section 2(a), note 1 *supra*, continues: "Provided . . . nothing . . . 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."

This proviso has customarily been interpreted as permitting *functional* discounts to wholesalers. Functional discounts are often justifiable on a cost basis, since wholesalers perform storage, transportation, and advertising services which the seller would otherwise assume. See, *e.g.*, Bird & Son, Inc., 25 F.T.C. 548, 553 (1937) (evidence established cost justification of functional discounts). For a discussion of FTC treatment of functional discounts under the Robinson-Patman Act, see Crowley, *Equal Price Treatment Under the Robinson-Patman Act*, 95 U. OF PA. L. REV. 306, 328 (1947); Shniderman, *The Tyranny of Labels*, 60 HARV. L. REV. 571 (1947).

13. 173 F.2d 210, 217 (1949). This is the principal holding of the case.

Section 2(b) of the Robinson-Patman Act reads in part: "Nothing . . . shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. . . ."

After the passage of the Act, this was considered a "doubtful defense" by one of the bill's sponsors. See PATMAN, THE ROBINSON-PATMAN ACT 182 (1938). However, the Court's language in International Salt Co. v. United States, 332 U.S. 392, 399 (1947) and FTC v. Staley Mfg. Co., 324 U.S. 746, 760 (1945) seemed to indicate that a producer charged with price discrimination could rely upon the "good faith" proviso as a complete defense. *Accord:* Shefford Cheese Co., 25 F.T.C. 1209 (1937) (complaint charging discrimination dismissed on ground that discounts "were made to meet those of competitors.")

For a discussion and criticism of the court's holding, see Berger & Goldstein, *Meeting Competition Under the Robinson-Patman Act*, 44 ILL. L. REV. 315 (1949); 62 HARV. L. REV. 1249 (1949). See Note, 49 COL. L. REV. 863 (1949) for an approval of the court's position.

14. Paragraph 6 of the modified cease and desist order prohibits Standard Oil from granting discounts "where such jobber or wholesaler, to the knowledge of the respondent or under such circumstances as are reasonably calculated to impute knowledge to the respondent, resells such gasoline or intends to resell the same to any of its

The court suggests alternate courses that Standard might pursue in compliance with the order. First, Standard may continue the price differential, but refuse to sell to wholesalers who resell below the "tank-wagon" price. In this, the court is inviting Standard to engage in resale price maintenance, even though such action violates section 1 of the Sherman Act.[15] The right of a producer to refuse sales is not unqualified—especially when refusal to sell is part of an overall resale price maintenance program.[16] Moreover, the inquisitive policing that would be needed to implement such a policy is in itself highly unpopular with courts.[17] Aside from its legal consequences, re-

said retail-customers at less than respondent's posted tank-wagon price. . . ." 173 F.2d 210, 217 (2d Cir. 1949). Under the original order filed by the Federal Trade Commission, Standard Oil faced liability whenever the "tank-wagon" price was cut by benefited wholesalers. 41 F.T.C. 263, 285 (1945). The scienter requirement was added by the Seventh Circuit.

15. Section 1 of the Sherman Act punishes every contract, combination or conspiracy in restraint of trade. Resale price maintenance agreements were long prohibited under this language. *E.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). The Miller-Tydings Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1946), blessed resale price maintenance agreements wherever permitted by state law. Today, 45 states have enacted legislation approving this restraint. But the Supreme Court has narrowly construed Miller-Tydings. See United States v. Frankfort Distilleries, 324 U.S. 293 (1945). Thus the act should offer Standard scant comfort, for resale price maintenance agreements are still prohibited between "persons, firms, or corporations in competition with each other." In the Detroit area, Standard and its wholesalers are in competition, inasmuch as both sell to retail service stations. Any price maintenance agreements between them would be a horizontal agreement expressly prohibited.

Nor can Standard Oil plead that compliance with this order excuses violation of the Sherman Act. 38 STAT. 719 (1914), 15 U.S.C. § 45(e) (1946) explicitly provides: "No order of the commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts."

Perhaps the most surprising aspect of this is its apparent inconsistency with the Federal Trade Commission's usual stand against resale price maintenance. In a 1945 report, the Commission was sharply critical of the Miller-Tydings Act: "The Commission believes that the consumer is not only entitled to competition between rival products but to competition between dealers handling the same branded products." FTC, REPORT ON RESALE PRICE MAINTENANCE, (1945). And see note 16, *infra*.

16. *E.g.*, Sidney Morris & Co. v. National Ass'n of Stationers, 40 F.2d 620 (7th Cir. 1930). Courts have frowned upon refusal to sell wherever resale price maintenance was the underlying purpose. For an analysis of this problem see Comment, 58 YALE L.J. 1121, 1128, 1132-4 (1949).

The Federal Trade Commission has pending an action against General Motors Corp., CCH TRADE REG. REP. ¶ 6385.23 (FTC 1939), in which, among other offenses, the defendant is charged with threatening cancellation or price increase unless buyers maintained resale prices.

17. *E.g.*, United States v. Univis Lens Co., 316 U.S. 241 (1942) (licensees required to assist seller to secure evidence against those buyers reselling below established price); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922) (numbering packages in order to facilitate detection of price-cutting); Q.R.S. Music Co. v. FTC, 12 F.2d 730 (7th Cir. 1926) (procuring agents and retailers to report price-cutters).

sale price maintenance in the sale of gasoline would increase the already energetic role major refiners play in determining the retail price the consumer must pay.[18]

Alternately, the court suggests Standard undertake a one-price policy to all buyers.[19] Yet a uniform price, set at the "tank-wagon" price, will probably eliminate the independent wholesaler as a distributor of Standard products.[20] Perhaps he can remain an active gadfly by switching to the independent refiner with no retail outlets.[21] But in many industries there is no such option, and elimination of the mass distributor and independent wholesaler—like resale price maintenance—would considerably strengthen the producers' control over price.

In modifying the original order, the Court was concerned lest Standard Oil be forced to police its wholesalers. 173 F.2d 210, 217 (7th Cir. 1949). See note 14 *supra*. But query: does the modification satisfy the court's objection to the original order? Standard Oil still faces liability if a wholesaler undercuts the "tank-wagon" price whenever *knowledge* of such action may reasonably be *imputed* to the producer. In the closely-knit Detroit market, courts could justifiably impute knowledge to Standard Oil of any wholesaler breach. It is doubtful, to say the least, that Standard Oil will risk lackadaisical policing under the modified order.

18. For a discussion of price leadership in the petroleum industry, see ROSTOW, A NATIONAL POLICY FOR THE OIL INDUSTRY 53, 75-6 (1948); COOK, CONTROL OF THE PETROLEUM INDUSTRY BY MAJOR OIL COMPANIES 41 (TNEC Monograph 39, 1941). A study of the petroleum industry by the Federal Trade Commission reached the following conclusion: "Price leadership in the form of posted prices both for the purchase of crude petroleum and for wholesale and retail sales of gasoline is characteristic of the industry." FTC, DISTRIBUTION METHODS AND COSTS, pt. IV, 84 (1944).

For years the petroleum industry has been one of the prime targets of the antitrust division. See, *e.g.*, Standard Oil Co. of California v. United States, 337 U.S. 293 (1949) (requirement contracts entered into by independent retailers with defendant producer declared invalid); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (invalidating buying program which stabilized retail prices); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940) (licensing agreements with refiners, which controlled resale price policy, held unlawful). In the light of this history, a decision encouraging resale price maintenance by a petroleum supplier becomes even stranger.

19. Bird & Son, Inc., 25 F.T.C. 548 (1937), approved a one-price policy to wholesalers and mail-order houses, despite objection by the jobbers that one-price treatment effectively discriminated against them.

20. This suggestion in effect substitutes one form of price discrimination for another. The wholesaler is now the victim. He must resell to retailers at the same price he himself pays, *i.e.*, perform distributing functions for free. Compare the similar discrimination enforced by the brokerage clause of the Robinson-Patman Act, 40 STAT. 1526 (1936), 15 U.S.C. § 13(c) (1946), discussed in Note, 58 YALE L.J. 969, 973 (1949).

Construing the order literally, functional discounts, which are often justifiable as a cost saving, seem equally disfavored. At least this is so if a wholesaler, receiving a "legitimate" discount, turns around and undersells the producer's direct price. But functional discounts don't seem incompatible with the purposes of the Robinson-Patman Act. See Van Cise, *Functional Prices*, in NEW YORK STATE BAR ASS'N, ROBINSON-PATMAN ACT SYMPOSIUM 89 (1947).

21. Independent refiners are a "troublesome" element in the market structure. However, their percentage of the total market is small and has remained relatively stable. Naturally, the majors are anxious to preserve the status quo. This has been

Theoretically, a one-price policy is not inconsistent with the objectives of the Sherman Act. This assumes, however, a measure of competition at the producer level. Actually oligopoly, or market domination by a few producers, is a widespread phenomenon.[22] If it were administratively and economically possible to atomize all oligopolies, there would be no need to rely on the large buyer to restore a measure of competition. But practically speaking, the government's policing facilities are limited.[23] Furthermore, fragmentation would reduce the efficiency of many industries.[24] Under these circumstances, the pressure of large buyers is a useful thing to have around. The resulting price discrimination is perhaps unfortunate for some competitors, but a forced one-price policy is likely to have unfortunate effects on competition in general, by bolstering rigid oligopoly pricing.[25]

In effect, oligopoly and resale price maintenance, both objectionable under the Sherman Act, are buttressed by this Robinson-Patman Act decision. Perhaps in ruling out the "meeting competition in good faith" proviso the Seventh Circuit has incorrectly interpreted the Robinson-Patman Act.[26] But if the court is affirmed on appeal,[27] Congress could do well to reconsider its antitrust vehicles, which seem to be chugging off in opposite directions.

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accomplished through buying programs designed to keep surplus gasoline off the market (see United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940)); the use of "off-brand" subsidiaries to meet the independent's lower retail price; and an overwhelming financial ability to successfully withstand any price war. Although scattered independents may benefit from a one-price policy, their overall strength should change little. For a discussion of the independents and their relation to the major petroleum producers, see ROSTOW, *op. cit. supra* note 18, 70–87.

22. See WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 5 (TNEC Monograph 21, 1940).

23. See Bergson, *Enforcing Antitrust*, Fortune, August, 1949, p. 117, for a discussion of the limitations facing the Antitrust Divisions of the Department of Justice.

24. See Blair, *Does Large-Scale Enterprise Result in Lower Costs?*, 38 AM. ECON. REV. 121 (1948 Supp.). Although this treatise foresees (and approves) a trend toward decentralization of industry, studies quoted indicate that some industries prosper with increasing size. *Id.* at 146. See also EDWARDS, *op. cit. supra* note 9, at 111.

25. See CHAMBERLAIN, THE THEORY OF MONOPOLISTIC COMPETITION 30–55 (1946); WILCOX, *op. cit. supra* note 22, at 121–32. Price concessions by one producer are almost invariably matched by his competitors, and in the end each producer will have no more than the share of the market he began with, although at a smaller profit. Hence the phenomenon of "follow-the-leader" pricing at the production level, at a price likely to return the greatest monopoly profits.

26. See note 13 *supra*.

27. The Supreme Court has granted certiorari. 18 U.S.L. WEEK 3149 (U.S. Nov. 7, 1949).