

Antitrust Modernization Commission Summary of Robinson-Patman Act Hearings

July 28, 2005

The Antitrust Modernization Commission (“AMC” or “Commission”) held hearings on Thursday, July 28, 2005. The panel presented the Commission with a variety of views on the Robinson-Patman Act (“R-P Act” or “the Act”). The hearings focused on the necessity and appropriateness of the Act in the context of modern antitrust law.

The session revealed a range of positions with respect to what type of recommendation the Commission should make to Congress in its report on antitrust modernization. The proponents of maintaining the R-P Act explained that price discrimination laws benefit consumer welfare through protecting diversity in product offerings and the general shopping experience, while at the same time leveling the playing field for small buyers to compete with power buyers. The opponent of the Act called for its repeal on the grounds that the Act contradicts the goal of antitrust law, which is to promote efficient competition. A third position on the panel articulated the need for reforms through the judicial process and not through Congress. There was one distinct point of common ground among the panelists – all agreed that the criminal provision should be repealed.

The following discussion attempts to summarize each panelist’s written testimony and views expressed at the hearing. In addition to a summary of positions, this document highlights the significant questions raised by the AMC and the panelists’ responses.

I. Summary of Written Testimony From Panel

A. J. H. Campbell. President and CEO of Associated Grocers, Inc. on behalf of the National Grocers Association

The theme of Mr. Campbell’s statement was that the R-P Act should be preserved in order to maintain a level playing field and marketplace diversity. Price differences are almost always offered to those firms that already hold market power, and not to those firms that are attempting to enter the market. The recent lack of enforcement of the R-P Act has enabled large chain stores to use their buying power to make discriminatory demands on suppliers and receive preferences in pricing, packaging, payment terms, and conditions of product availability. The effect of repeal or reduced enforcement of the R-P Act would be an increase in buyer power, decrease in competition, and diminished diversity in the shopping experience.

The National Association of Grocers (“NAG”) is simply looking to receive the same terms offered to large power buyers, and to stop discrimination that is not justified by buyer efficiency. Additionally, NAG recommends that the R-P Act be extended to cover discrimination in services offered to competitors – the

best example being the different per transaction costs for debit card transactions offered to Wal*Mart versus the rate offered smaller retailers.

- B. Herbert Hovenkamp. Professor of Law and History at the University of Iowa and author of numerous books and articles, including the *Antitrust Law* treatise

Professor Hovenkamp takes the position that the R-P Act, as it is currently enforced, offers no benefit to competition that could not be realized through claims brought under Section 1, and occasionally Section 2, of the Sherman Act. Therefore, the R-P Act should be repealed. Professor Hovenkamp details the harms of the R-P Act, including promotion of inefficient distribution schemes, the difficulty of proving a “cost justification” defense, price rigidity and facilitation of collusion by eliminating individual price cuts that otherwise undermine cartel behavior, and increased incentives for a manufacturer to switch from dealing with independent dealers to owning retail outlets. All of these issues undermine the fundamental purpose behind the antitrust laws — the promotion of competition in the interest of the consumer.

Professor Hovenkamp acknowledges the one competitive danger that the R-P Act theoretically protects against – power buyers’ ability to force suppliers to make choices contrary to their own independent self-interest. Hovenkamp notes that this concern, although discussed heavily in the legislative history of the statute, has not been reflected in recent government enforcement.

Last, Professor Hovenkamp addressed the criminal provision of the R-P Act, calling it “defunct” and urging its repeal.

- C. Harvey L. Saferstein. An attorney from the law firm Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., whose practice focuses on defending companies from claims of violations of the Robinson-Patman Act and counseling sellers on compliance with the law

Mr. Saferstein argues that, in spite of the failings of the R-P Act, it should not be repealed, for fear that states will enact price discrimination laws with the same zeal that they have adopted indirect purchaser statutes. A wave of state laws would be inefficient and create a tremendous burden of compliance for sellers and buyers. Rather, Mr. Saferstein urges the Commission to allow for continued judicial reform to correct the failings of the R-P Act. At the same time, Mr. Saferstein urges the Commission to recommend that the criminal provision of the Act be abolished.

- D. Bruce Spiva. Attorney from the law firm Tycko, Zavareei & Spiva, LLP, spoke on behalf of the American Booksellers Association (“ABA”)

Mr. Spiva advocated in favor of maintaining the R-P Act in order to promote an even playing field and greater diversity for consumers. In the context of booksellers, the R-P Act promotes diversity in the selection and display of books because independent stores seek out unique titles and authors and make selections according to their particular communities, whereas chain stores do all their buying from a central office and are given special incentives to promote best sellers. In spite of the claim by chain stores that they offer lower prices overall, books in both independent bookstores and chain stores frequently carry the same price. Independent stores provide an additional benefit in that they maintain stores in markets not large enough for a chain store.

In 1988, the Federal Trade Commission brought suit against six of the largest publishers, under the R-P Act, but eventually dismissed the complaint. Due to the lack of government enforcement of the R-P Act, the ABA filed suit against several top publishers alleging discount pricing to large chains, payments by publishers for certain book placement, and discounts to mass merchandise stores like Costco and Wal*Mart. Each of the publishers settled with the ABA.

II. Highlights from Panel Questions and Answers

A. Is the Robinson-Patman Act necessary, or can the issues it addresses be dealt with under Sections 1 and 2 of the Sherman Act?

- Hovenkamp – Real restraints on price and output require an agreement and therefore fall under the Sherman Act. The R-P Act is the only antitrust law that does not require a showing of injury to competition, and when a law does not concern itself with injury to competition, it should not fall under the antitrust laws.
- Spiva – Injury to competition in the context of the R-P Act may not have the same meaning as it does under the Sherman Act, but there is injury to diversity and the quality of the consumer experience.
- Campbell – The R-P Act protects against more than differences in pricing, it protects against the practice of denying a product, promotions, and special packaging to certain buyers. If properly enforced, it would protect against power buyers that control the market. And it would protect against a manufacturer discriminating in its sales based upon the “class of trade” of its buyers.
- Saferstein – The R-P Act captures many things not otherwise captured under the Sherman Act, because under the R-P Act there is no requirement for competitive harm. Therefore, the

Sherman Act would be inadequate to regulate everything that currently falls under the R-P Act.

B. What are the costs of the R-P Act?

- Saferstein – Resources are spent on training salespeople to understand the Act’s requirements of uniform pricing; businesses have employed certain practices specifically in order to comply with the Act; and substantial amounts of money and resources are spent on legal fees in order to defend against R-P Act claims.

C. What are worthwhile defenses to the R-P Act?

- Spiva – Both the meeting competition and cost justification defenses are effective and burdensome for the plaintiffs to clear.
- Saferstein – The meeting competition defense is very effective, but the cost justification defense is not as effective, because it is less flexible.

D. Should section 2(a) be expanded to cover services, or should it continue to be limited to commodities?

- Saferstein – Section 2(a) should be limited to commodities because it is too complicated to determine when services are of “like grade and quality.”
- Campbell – Expanding the Act to cover services (*e.g.*, debit card service charges) is wholly in line with the purpose of the R-P Act.

E. Has the presence of large chain bookstores and grocery stores resulted in higher prices?

- Spiva - The prices of books, as set by publishers, have increased. Large chains no longer offer the discounts that they, at one time, offered consumers.
- Campbell – Grocery prices are lower overall, but where there is less competition in a particular market, the prices are higher.

F. Should not every antitrust violation require a showing of competitive injury as an element?

- Saferstein – If R-P Act plaintiffs were required to prove full blown competitive injury, chances are that they would not be able to do so.

G. Would not it be appropriate for the AMC to recommend some clarification of the R-P Act?

- Campbell – Under the R-P Act, there should be a clarification that the purpose is to restore equality of opportunity for access to products, packaging, price, and promotions.
- Hovenkamp – If there is no repeal, then a clarification that injury to competition is an essential element would be appropriate.
- Saferstein – Clarify and make more explicit the requirements of the Act. The trade-off is that businesses may find it easier to comply with a more objective standard. Merger reviews should consider the effect of a merger on creating a power buyer.

H. Would the R-P Act be necessary in the absence of power buyers?

- Spiva – Typically, price discrimination is less likely in the absence of power buyers. There may be price differences, but there will not be inefficient price discrimination.

I. Should we preserve the criminal provision of the R-P Act?

- None of the panelists took the position that they wished to preserve the criminal provision of the R-P Act.

J. Are some of the services in question more like commodities than professional services?

- Saferstein – Often services are considered in the context of promotions. Based on Mr. Campbell’s statement regarding debit card rates, it would seem that some types of services could be included and defined under a “like grade and quality” standard.

K. Looking at consumer choice and diversity as elements of consumer welfare, how do we apply a limit to consumer choice/welfare in order to apply the R-P Act?

- Spiva – The consumer welfare is the overall goal of the antitrust laws, and the Act seeks to promote choice, therefore the Act is in line with antitrust policy.
- Campbell – Equal access to products, packaging, and payment terms are basic elements to which the R-P Act should apply.

L. What would be the impact of repeal?

- Hovenkamp – Repeal of the R-P Act would result in cost savings – there would be no more compliance seminars, there would be more discounts, and a wider range of differential terms and arrangements between buyers and sellers.

- Campbell – Repeal would result in fewer retail outlets and less diversity in the shopping experience and product offerings.
- Spiva – Repeal would result in the reacceleration of independent booksellers going out of business, lack of consumer choice, and greater barriers to entry for new authors.