

Price Discrimination

In 1936, the U.S. Congress, at the time concerned about the rise of large grocery chains and their concentrated buying power, passed the Robinson-Patman Act to protect mom and pop stores and other small businesses from the perceived purchasing and selling power of national and regional chain stores. This act amended the Clayton Act of 1914 and is said by some commentators to be perhaps the most technical and complex of anti-trust laws. It is, however, still the law of the land and businesses that sell goods need to be aware of it in order to avoid potentially serious consequences.

The law says that it is unlawful to “discriminate in price between different purchasers of commodities...where the effect of such discrimination may be substantially to lessen competition.” Thus, the seller of goods (the law does not apply to services) may not make two different sales to two different buyers of the same goods of like grade and quality if the sale is made in a short time interval and at different prices. The measure of prices is based on the net price after taking into account discounts, rebates, allowances, delivery terms and the like. Such things as credit terms can be different based upon the credit worthiness of different buyers.

Note that discrimination in price violates the law only if it may “substantially injure competition.” The injury to competition may be “primary line injury” or “secondary line injury.” Primary line injury occurs if a seller makes sales at below cost in order to injure its competitors, expecting to recover losses in the future. This is also referred to as predatory pricing and may violate other laws. Secondary line injury occurs where the buyers that are receiving different prices are in competition with each other and the buyer receiving the higher price can establish the likelihood of injury (which may not occur in the case of insignificant or temporary price differences).

There are defenses to claims of price discrimination consisting of the defense of meeting a price offered by a competitor/seller of the same goods and selling based on a cost justification (typically selling goods in larger quantities). A seller is entitled to meet but not beat the competitor’s price and any cost justification needs to be substantiated by verifiable data that demonstrate actual differences in cost. Two other defenses that are seldom used are changing conditions such as deterioration of perishable products, obsolescence of seasonal goods and close-outs of discontinued goods and a court created defense that is called “practical availability” where a buyer has a lower price available to it but fails to take advantage of it.

Anti-trust laws are complicated and price discrimination can be particularly vexing and difficult to understand and apply. Obviously, an article of this length can merely serve to alert business people of the fact that these prohibitions exist and warn of the dangers of failing to be aware of those prohibitions. Robinson-Patman can be enforced by the U.S. Department of Justice but is more often enforced by the Federal Trade Commission. Typically, however, civil actions are brought by private litigants that assert they have been injured. A successful plaintiff can recover three times actual damages plus its attorneys’ fees. Consult with counsel whenever questions concerning possible price discrimination arise.

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