RECENT ROBINSON-PATMAN ACT DEVELOPMENTS AFFECTING AUTOMOTIVE WHOLESALERS

Statement by Earl W. Kintner of Arent, Fox, Kintner, Plotkin & Kahn, Washington, D. C., before the Second National Assembly of the National Congress of Automotive Wholesalers, Dinkler-Plaza Hotel, Atlanta, Georgia, November 23, 1963

When I spoke to you last year, I warned you of many problems that confront all businessmen because of the provisions of the Robinson-Patman Act. In the year that has elapsed, these problems have become, if anything, even more complex. I hope that in the few moments I have with you, I can bring you up to date on some of the newer developments in this constantly changing field.

I.

As you will recall, I discussed with you last year some Robinson-Patman Act problems which are of continuing significance to automotive wholesalers. A very brief recapitulation will enable us to assess more quickly the importance of the decisions of the last year.

The early buying group cases involved what could more aptly be termed "buying offices." They involved simply the efforts of jobbers to cumulate purchasing power in order to exact price discounts. While orders were cumulated for all members, manufacturers continued to drop-ship to each individual member. Not surprisingly, the Federal Trade Commission and the courts had little difficulty in finding that manufacturers acceding to the demands of these buying groups had unlawfully discriminated in price between the jobber members of the buying groups and other competitor jobbers. E.g., Standard Motor Products, Inc. v. FTC, 265 F.2d 674 (2d Cir.), cert. denied, 361 U.S. 826 (1959). Correlatively, members of these buying groups were held to have unlawfully induced this price discrimination in violation of Section 2(f) of the Robinson-Patman Act. E.g., Mid-South Distributors v. FTC, 287 F.2d 512 (5th Cir.), cert. denied, 368 U.S. 838 (1961).

After these early cases, more sophisticated buying groups arose which can best be characterized in terms of their assumption of distributive functions. Usually, these new buying groups actually operated warehouses containing substantial inventories and broke bulk and filled orders from those warehouses. No longer were the buying groups sham buying offices; they had now begun to perform warehouse distributor functions of demonstrable economic value to suppliers.

The crucial difference of functional performance peculiar to these new buying groups was first recognized in Alhambra Motor Parts v. FTC, 309 F.2d 213 (9th Cir. 1962). Without again reviewing the facts, which I outlined in some detail last year, the court held in that case that the legality of discounts to buying groups performing economically valuable functions would depend on the answer to two questions:

> (1) Was the buying group an entity separate and distinct from its jobber members which could be regarded as a purchaser from manufacturers and suppliers and a reseller to jobber members?
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> (2) Even if it was not an entity separate and distinct from its members, did the members, through the medium of the buying group, perform a valuable economic function which would allow manufacturers to cost justify the price differentials received by the members?

The court assumed for purposes of discussion that the Commission's hearing examiner had correctly determined that the buying group was not separate and distinct from its members. Nonetheless, the court ruled, the Commission should have determined whether the cost justification defense was available. The case was remanded to the Commission for that purpose.

In Ark-La-Tex Warehouse Distributors, Inc., Docket No. 7592 (June 14, 1963), the Commission appeared to accept the Alhambra decision. Henceforth, the determinants of legality in buying group cases will be independence and cost justification. That the broad position once taken by the Commission no longer survives does not mean, however, that the Commission does not continue to view buying groups with active skepticism. If no functions are performed by the buying group, the Commission can be expected to react with blinding speed. The recent complaint against Monroe Auto Equipment Co., Docket No. 8543 (November 5, 1962) and the even more recent cease and desist order entered against Tung-Sol Elec., Inc., Docket No. 8514 (September 20, 1963) well illustrate the Commission's unimpaired virility in this area.

Another interesting buying group case decided recently is Central Retailer Owned Grocers, Inc. v. FTC, 319 F.2d 410 (7th Cir. 1963). In that case, a buying group for a number of retail grocery stores received discounts from canners that were roughly equal to the amount paid brokers by these canners to effect sales of their products to others. The Commission ruled that Central had violated Section 2(c) of the Robinson-Patman Act because the discounts granted Central were in lieu of brokerage. The court reversed, holding that the Commission had improperly inferred a violation of Section 2(c) from the equivalence of the discount to brokerage paid on other transactions. The court felt the record plainly established that the discounts given Central were granted not in lieu of brokerage but rather because of the economically valuable functions performed by Central as a buyer. Thus, Central gave yearly contracts to suppliers which enabled them to better allocate their resources. In addition, Central ordered in larger quantities when it purchased for its own account. These factors led the court to conclude that a discount in lieu of brokerage was not involved.

II.

Perhaps the most significant Robinson-Patman Act decision by the Federal Trade Commission last year was Fred Meyer, Inc., Docket No. 7492 (April 14, 1963). In that case, Fred Meyer, a chain of fourteen grocery stores, was charged with inducing suppliers to grant discriminatory promotional allowances in violation of Section 2(d) of the Robinson-Patman Act. In order for a supplier to violate Section 2(d), there must be a discrimination in the grant of promotional allowances between competing customers. Fred Meyer contended that this prerequisite had not been established.

The grocery suppliers involved in the case made sales to two classes of customers: they sold directly to the retailer, Fred Meyer; and they sold to wholesalers who resold to retailers competing with Fred Meyer. Fred Meyer asserted both that the wholesalers were not competitors covered by Section 2(d) since they made no sales at retail and that the competing retailers purchasing from these wholesalers were not "customers" of the supplier within the meaning of that section. Accordingly, it was argued that the grocery suppliers could discriminate at will between these two classes of customers without violating Section 2(d).

The Commission rejected both portions of Fred Meyer's premise that Section 2(d) protected "only those who buy directly from the seller in question ('customers'), and who 'compete' with the favored buyer by

III.

The decision in Borden Co., Docket No. 7129 (November 28, 1962), is extremely important to those dealing in private label goods. Borden was charged with illegally discriminating in price in violation of Section 2(a) of the Robinson-Patman Act by selling at differing prices evaporated milk canned under the Borden label and such milk packed under a buyer's private label. Borden contended that the two commodities were not of "like grade and quality" so as to be the subject of illegal price discriminations. This position was summarily rejected by the Commission on the theory that identical commodities did not cease being of like grade and quality when differing labels were placed on them. The Commission also rejected Borden's argument that in any event the price differentials caused no adverse competitive effects and were cost justified. Competitive injury was found from the substantial diversion of trade away from Borden's competitors. And cost justification was unavailable because of the imprecision of the cost statistics. See also United States v. Borden Co., 370 U.S. 460 (1962).

A recent decision of a Federal Trade Commission hearing examiner indicates that the requirement that commodities be of "like grade and quality" still is meaningful in a private label context. The examiner dismissed the complaint in Sears, Roebuck and Co., Docket No. 8069 (November 9, 1963), on the ground that the counsel supporting the complaint had not proved that products sold under the manufacturer's own brand name and products sold by the manufacturer to Sears for resale under its own private label were of like grade and quality. The examiner went on to find that the two products were "substantially different in dimensions, style, design, functional features, amounts of raw materials, and manufacturing molds."

These two decisions indicate the rules determining the legality of price differentials between branded and private label products. While a mere difference in label will not justify a price discrimination, a different label plus differences in the quality or construction of the two products will allow a manufacturer to charge varying prices. Future cases, however, may well see the defense of cost justification raised to a charge of unlawful price discrimination between branded and private label goods. If a manufacturer can establish that any price difference makes only due allowance for differences in the cost of manufacture, sale, or delivery of private label goods, then any price differential would be legal.

IV.

The past year has been marked by continuing Congressional interest in legislation relating to distribution policies and practices. Many of these Congressional activities are of real interest to you insofar as they may relate to automotive parts distribution channels.

Companion bills have been introduced in the House and Senate (H.R. 3562 and S. 1107) which would prohibit vertically integrated companies from engaging in discriminatory practices against independent distributors. Also, proposed legislation (H.R. 3559 and S. 1108) would require certain companies engaged in dual distribution to disclose separate annual operating data for each of their related establishments which compete with independent distributors. And, renewed interest in mandatory functional discount legislation has been expressed in Congressional circles.

In connection with this "dual distribution" legislation, the Distribution Subcommittee of the House Small Business Committee has conducted extensive hearings this year. The testimony presented during the course of these hearings is most interesting. The Committee was given a very comprehensive insight into distribution problems which confront our private enterprise competitive system. Wholesalers and retailers testified in industries rnaging from steel to cigarettes, and from pharmaceuticals to clothes. In reviewing this testimony, I found it most enlightening to see how distribution problems tend to be common to so many different industries.

The grocery, and phonograph record fields have "group buying" problems, functional discount problems, and private brand problems similar to those found in the automotive parts aftermarket.

In connection with these hearings, I should like to point to some examples of contemporary distribution dilemmas, as it were, which in themselves may not be in violation of our present antitrust laws. Consider the case where a manufacturer has integrated forward, say to the wholesaler level, or an intermediate wholesaler integrates forward to a retailer level. Suppose this company also sells to an independent who competes with this affiliated wholesaler or retailer.

Invariably, the independent has complained of unfair business practices. When particular merchandise or goods are in short supply, the supplier tends to "play favorites" and ensure that its affiliated customer has an adequate inventory, to the prejudice of the independent.

Also, many independents in this competitive position have complained of local price cutting by the affiliated customer of his supplier, with an overall corporate profit being made by higher prices elsewhere.

Still another complaint was addressed to a manufacturer or supplier who adheres to a one-price policy to any purchaser, regardless of the purchaser's functional role. Where a retailer, for example, is free to purchase merchandise from the manufacturer at the same price as a wholesaler, the wholesaler feels a price squeeze. This is because only the large volume retailers can usually engage in such direct purchasing, and these customers are lost to the wholesalers. The wholesaler is relegated to selling to smaller retailers who are placed at a competitive disadvantage because they must pay higher prices.

It is not at all certain that any significant legislation will develop from these recently concluded hearings. The Robinson-Patman Act is notoriously difficult to amend and new legislation might only further confuse an already complex statute. Nonetheless, automotive wholesalers should be aware of the possibility of changed legislation and be prepared to take advantage of it once it is passed.

V.

As is usually the case, there is much more that I could tell you concerning new developments in the trade regulation field. Time limitations have confined me to a review of the more spectacular cases. Automotive wholesalers, however, should continue to pay close attention to new rulings as they are handed down. Hopefully, in that way all of us will be able to avoid trouble with the governmental agencies regulating competition. It is my wish that at the Third National Assembly next year that hope will have become a reality.