UNLAWFUL PRICE DISCRIMINATION: AN OBSCURE ANTITRUST OFFENSE

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A General Overview.

In this article I take up the obscure, problematic doctrine of illegal price discrimination, which was codified by the Robinson-Patman Act during the Great Depression, and which the modern, conservative Supreme Court has severely limited. Under certain circumstances, price discrimination remains an antitrust offense, and a litigant that prevails on a price discrimination claim can obtain treble damages, injunctive relief, and its attorney's fees, while the defendant, even if it prevails, cannot recover its attorney's fees.

What Is Price Discrimination? Price discrimination is a commonplace practice that is presumptively lawful, save under special circumstances discussed below. It occurs when *a seller of products regularly offers lower prices to its preferred customers and higher prices to the others when selling them the same or similar products at around the same time*. See *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97, 103 (10th Cir., 1973) ("The term 'price discrimination' means no more than price differentiation, or the charging of different prices to different customers for goods of like grade and quality.") (citing *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 80 S. Ct. 1267 (1960)).

Virtually every seller of products engages in some sort of price discrimination. It is commonplace for sellers to give discounts to customers who pay their bills early and to offer their lowest prices to customers who make large or recurring purchases. Do these sellers run the risk of violating federal antitrust law merely because they offer discounts and low prices to good customers? Of course not.

Price Discrimination Is Presumptively Lawful. Presumptively, a seller is entitled to set prices as he chooses when dealing with his different customers. Most sellers would resent any effort to restrict their discretion to set and vary their prices for different sales. In market economies such as our own, firms decide for themselves what to charge for their products and to whom they wish to make sales. It is contrary to the fundamental principles of market economics to regulate what sellers charge for their products or impose a rule that they cannot vary their prices for the same goods when selling them to different customers.

Thus the general rule is that a seller can practice price discrimination, except when doing so poses a substantial risk of injury to competition. A seller can therefore charge you $5 for a widget that he will sell to me only for $10, unless this price discrimination is likely to cause a substantial diminution of competition in any market affected by the sales.

Unlawful Price Discrimination, Defined. Stated as a rule, price discrimination becomes unlawful under the antitrust laws only when it threatens to undermine competitive processes in an affected market and otherwise meets the specific criteria of the price discrimination statutes (*viz.*,

the simultaneous, ongoing sale of the same or similar products to commercial customers at different prices in transactions that implicate interstate commerce). Let's see how this principle might work in practice.

Hypothetical Example of Unlawful Price Discrimination. Suppose a large national supplier of raw widgets, whom we will call the Price-Discriminating Supplier, sells its raw widgets to manufacturing companies that in turn process them into finished widgets, which they then sell to distributors and in some cases directly to large retailers. One of the manufacturers is the largest producer of widgets in North America. We will call this company the Favored Customer because the Price-Discriminating Supplier always gives it its best prices, which are significantly lower than the prices it charges all of its other customers for the exact same raw widgets. Another of the manufacturers is an aggrieved company that has lost many sales because it must pay so much more for its raw widgets, which are a necessary input for which there is no available substitute at a lower cost. The Price-Discriminating Supplier thus gives better prices for a necessary input (raw widgets) to the Favored Company, which in turn can produce its own goods (finished widgets) at lower cost and sell them at lower prices than can the Disfavored Company or other direct competitors. This circumstance eventually leads to a predictable result: The Favored Company increasingly dominates sales of finished widgets in virtually all regional markets across the county, while its direct competitors are run out of these markets or out of business altogether. One excluded direct competitor is the Disfavored Company. Moreover, the Favored Company makes direct sales to retailers at prices that cannot be matched by distributors that do not purchase their finished widgets from the Favored Company but must instead purchase them at higher cost from direct competitors of the Favored Company, such as the Disfavored Company. Many of these distributors find themselves run out of the markets in which they formally conducted a thriving business – the markets for wholesale deliveries of finished widgets to retailers for final point-of-sale delivery to end users.

On these facts, the Disfavored Company, other disfavored manufacturers of finished widgets, and affected wholesalers can all sue the Price-Discriminating Supplier for unlawful price discrimination under federal and California antitrust law, since the supplier has practiced price discrimination (charged differing prices to different customers for the same or similar products sold at around the same time) in a manner that has undermined competition in downstream markets (various markets across the country for the sale of finished widgets in different sales channels). The Price-Discriminating Supplier will have various affirmative defenses, which might succeed, but the Disfavored Company and the others will have arguable, potentially successful claims for unlawful price discrimination in violation of federal and state antitrust laws. In addition, the Disfavored Company and the other harmed businesses can sue the Favored Company for *inducing unlawful price discrimination*, if it has used coercion or inducements to prevail on the Price-Discriminating Supplier to offer it discriminatory prices that it knows will allow it to undersell and thereby undermine competition in its markets. This is the stuff of unlawful price discrimination.

Injury to Competition: A Prerequisite to Proving Unlawful Price Discrimination. It is no longer sufficient for a claimant merely to allege that it has lost sales to a favored customer because of a supplier's price discrimination (some cases from an earlier era state that this was the standard,

but a modern antitrust claimant would likely find itself embarked on a misadventure if its evidence were to establish only these points). In the modern era, a claimant must show more than mere lost sales occasioned by price discrimination. It must show that the challenged price discrimination, if allowed to continue, will likely result in a substantial lessening of competition in product markets affected by it.

The dispositive point is "injury to competition." Price discrimination rises to the level of an antitrust offense *only when it threatens competitive conditions in at least one affected market*. That is, the practice of price discrimination implicates the antitrust laws only when it is done in a manner that poses *a "reasonable probability" of significant harm to competitive processes either in the seller's own market or in downstream markets.* See *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46-47, 68 S.Ct. 822, 828 (1948) ("After a careful consideration of this provision of the Robinson-Patman Act, we have said that the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect.") (internal quotation in original).

The Three Kinds of Unlawful Price Discrimination. There are three different kinds of harm to competition that can arise because of price discrimination, and the first kind, which is called primary-line injury, is so difficult to prove under the modern standards that it likely should be excluded from the list. But since it remains a recognized category, I will include it in my list but also explain how it has been rendered toothless by the modern rule on predatory pricing. Subject to this caveat, I now list the three recognized kinds of harm caused by price discrimination:

(1) *Primary-line harm*, which occurs when the seller uses low prices to undermine its own direct competitors by underselling them until they are ruined.

(2) *Secondary-line harm*, which occurs when the seller's low prices to the favored customer allow this customer to undersell and thereby ruin its own direct competitors.

(3) *Tertiary-line harm*, which occurs in downstream markets when the seller's low prices to the favored customer allow the favored customer or its own customers to undersell and thereby ruin the disfavored customers' customers. For example, both secondary and tertiary harm occur when the favored customer makes wholesale and retail sales and uses the seller's preferred prices in order to undersell and thereby ruin rival wholesalers in the wholesale markets (secondary-line harm) and also to undersell and thereby ruin retailers that buy their products from the disfavored wholesalers (tertiary-line harm).

Primary-Line Harm Cannot Be Proved as a Practical Matter. Primary-line cases arise when the price-discriminating seller is a dominant firm that can *sell its products for an extended period at prices lower than the costs of its direct rivals*, thereby imposing intolerable pressure on the direct rivals, who in consequence either stop competing or agree to join a price-fixing cartel organized by the price-discriminating seller.

This offense is also known as predatory pricing, and under modern federal law it is exceedingly difficult if not impossible to prove because the claimant must prove all of the following points: (1) The price-discriminator is selling its products at prices lower than the costs of its direct competitors; (2) the price discriminator, by offering the lower prices to selected customers, will likely force its competitors to abandon sales of the product in question because they cannot compete on price against the price-discriminator; (3) after its rivals leave the market, the price-discriminator can raise its prices to supra-competitive rates with impunity because no rival will be able to re-enter the affected markets to offer the same or similar products at lower prices in response to the price-discriminator's supra-competitive prices (or, alternatively, the price discriminator will oblige its rivals to enlist in a price-fixing or market-allocation cartel after subduing them by its predatory pricing). Proving these points is not a practical endeavor, at least in any case that I have ever examined, so that primary-line harm as a practical matter can no longer be proven, at least in most cases.

A simple hypothetical example makes this point all too clearly. Suppose that Samsung started to sell its smartphones at a penny per phone to all customers all over the world. The rival makers of smartphones would find that they could not compete any longer against Samsung. While some customers might continue to buy smartphones from other makers at dramatically higher prices, most would begin to purchase their smartphones only from Samsung. All of Samsung's rivals, even mighty Apple, would eventually be run out of the smartphone markets. Yet even this spectacular development would not suffice to establish unlawful price discrimination or predatory pricing under the modern federal doctrines. Rather, Apple and the other excluded competitors must also show that Samsung, after running its rivals out of business, planned to charge unreasonably high prices for its smartphones (i.e., prices that it could not charge in competitive markets), and that no future rival could challenge these prices by entering the smartphone markets in order to offer lower, competitive prices for smartphones in response to Samsung's price-gauging. Alternatively, Apple and the others might be able to prevail by proving that Samsung planned to browbeat them into submission with its price of a penny per phone until they agreed to participate in a price-fixing or market-allocation cartel orchestrated by Samsung.

Needless to say, the above standard is just about impossible to meet – a point that the antitrust courts likely understood when they established it. The standard, which is the modern doctrine on predatory pricing, was first used in predatory pricing cases brought under Section 2 of the Sherman Act and later adopted for primary-line injury cases brought under the Robinson-Patman Act. Notably, California antitrust law has rejected this doctrine and still allows claims for predatory pricing when the predatory firm sells its goods below cost in order to eliminate rivals. **cites.**

While a claimant still can prevail on this kind of claim under California law, a federal claim along these lines under the Robinson-Patman Act (or under Section 2 of the Sherman Act) is likely doomed from the start. Don Quixote stood a better chance of vanquishing the windmills of Spain than does a firm of proving a predatory pricing or primary-line harm under the modern doctrine. It might thus be said that *there are three kinds of harm to competition recognized in price discrimination cases, and one of them exists in theory only!*

Secondary and Tertiary Harm Can Be Proved. In contrast, secondary-line and tertiary-line harm to competition can give rise to actionable claims for unlawful price discrimination. This harm occurs when a seller practices price discrimination in a manner that impairs or undermines competitive processes in its customers' markets or in markets even further downstream, such as a market in which the seller's preferred customer competes for sales against customers of the seller's disfavored customers. This offense can still be shown upon presentation of sufficient proofs.

Typically, the claim arises when seller offers market-beating prices to a dominant customer that has demanded that the seller do so. The dominant customer thus obtains the seller's best prices for a key product, while the dominant customer's rivals obtain the same product only at higher prices, so that they largely are unable to compete against the dominant customer for sales of the key product or other products for which the key product is a necessary input.

To prevail on the claim, the disfavored customers must show that (1) they require the seller's products in order to provide their own products or services; (2) there is no substitute source of products at sufficiently low prices to allow them to avoid the harm caused by the price discrimination; and (3) they therefore cannot compete on price against the favored customer or its customers, and this circumstance in turn has resulted in a substantial lessening of competition.

Thus secondary or tertiary harm arises when the following circumstances are shown to exist: (1) at around the same time and on a continuing basis, a seller has sold the same or similar goods to its favored customer at lower prices and to others at higher prices; and (2) in consequence, the favored customer now enjoys an insuperable advantage over disfavored customers or over the customers of the disfavored customers; and (3) in consequence, there is a "reasonable probability" of a substantial loss of competition in the affected secondary or tertiary market because a substantial percentage of the disfavored customers can no longer successfully compete for sales in these markets.

Affirmative Defenses to a Claim for Price Discrimination. Lastly, even when a claimant has made one of the above showings, a seller accused of price discrimination can absolve itself by showing that it offered the preferred prices for a compelling commercial purpose, or that it offered the low prices to the favored customer in order to match prices offered by rival sellers, or that the preferred customer purchased very large quantities of the seller's products, so that the seller attained *economies of scale* on these sales and could reasonably charge lower prices per unit because its costs per unit were lower.

Even so, a favored customer that wrongly induces price discrimination might remain responsible for inducing several sellers to give it preferred prices, even if each seller were excused on the ground that it merely matched the prices offered by the others.

The above points constitute the necessary essentials of price discrimination. If this article has already proven more dry and less interesting than you first expected, you can safely disregard the remainder. But if you wish to have a deeper understanding of these points, I offer the following discussion below.

Unlawful Price Discrimination Under Federal Law.

Under federal law, the offense of unlawful "price discrimination" is governed by the Robinson-Patman Act, which is codified at 15 U.S.C. §§13 *et seq*.

Stated with precision, the federal rule against price discrimination is set forth in the Robinson-Patman Act at 15 U.S.C. §13(a) and is as follows. (1) A supplier cannot charge different prices, (2) for the same or similar goods, (3) that it sells at around the same time, (4) when making these sales in interstate commerce in the United States to different commercial purchasers, but (5) only if the practice will likely impair or undermine competitive conditions in the seller's own market or in an affected downstream market. See 15 U.S.C. §13(a); *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 212 (3rd Cir., 2007). See also *Energex Lighting Industries, Inc. v. North American Philips Lighting Corp.*, 656 F.Supp. 914, 919-20 (S.D.N.Y., 1987) ("Three elements are necessary to state a claim for an actionable violation of the Robinson-Patman Act. Plaintiff must complain that (1) the alleged price discrimination meets the 'in commerce' requirement, i.e., that 'either or any' of the purchases involved are in commerce; (2) there has been discrimination in price between different purchasers of products of like grade and quality; and (3) the effect of the discrimination 'may be substantially to lessen competition or tend to create a monopoly.'") (quoting *Hoyt Heater Co. of Northern California v. American Appliance Mfg. Co.*, 502 F.Supp. 1383, 1386–87 (N.D. Cal. 1980)).

Even then, a seller can avoid liability for unlawful price discrimination by showing that it has offered the lower prices to a favored customer for a pro-competitive purpose that on balance justifies the harm caused to competitive processes in affected markets; or that it has offered the lower prices in order to match comparable prices offered by a rival seller; or that it has done so because the favored customer buys such large quantities of its products that it enjoys economies of scale on these sales. See 15 U.S.C. §§13(a), 13(b). See also *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 113 S. Ct. 2578, 2586 (U.S.N.C. 1993) ("By its terms, the Robinson–Patman Act condemns price discrimination only to the extent that it threatens to injure competition. The availability of statutory defenses permitting price discrimination when it is based on differences in costs, changing conditions affecting the market for or the marketability of the goods concerned, or conduct undertaken in good faith to meet an equally low price of a competitor, confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, the Robinson–Patman Act should be construed consistently with broader policies of the antitrust laws.") (internal quotations and citations omitted).

To cut to the chase, either the seller means to run its rivals out of business by its prohibitively lower prices, after which it will establish a monopoly or force its rivals to join a price-fixing cartel (a scenario that is prohibitively difficult to prove); or the seller has made discriminatory sales at lower prices to its largest customer, which is typically a dominant firm, giving it an insuperable advantage over its own rivals in downstream product markets, and the price-differential cannot be justified by economies of scale or other pro-competitive responses to market conditions (e.g., a national chain of office-supply products might prevail on its suppliers to offer market-beating prices for their supplies, then use these prices in order to offer its products at

prices that its competitors cannot match, thereby establishing an insuperable advantage on prices that it can use to exclude competitors or force them to agree to terms of trade that harm consumers). This is the stuff of actionable price discrimination. In the modern era it is usually a difficult claim to plead and prove.

The elements of the offense can be listed as follows: There must be (1) *commercial price discrimination,* – i.e., a commercial supplier must charge differing prices for the same or similar goods when selling them at around the same time to its favored and disfavored commercial customers; (2) the practice must entail *a reasonable probability or likelihood of harm to competition* in at least one affected market; (3) the practice must affect *interstate commerce*; and, lastly, (4) the supplier must *lack a pro-competitive justification for the practice*, such as cost savings attained by economies of scale when filling large orders from the favored customer or matching prices that another supplier has offered to a favored customer. To state the matter in shorthand, price discrimination becomes an offense under federal law when the following four criteria are met: There is *price discrimination* in *sales to commercial buyers* that affect *interstate commerce*; it gives rise to *a reasonable probability of harm to competition*; and the supplier *lacks a sufficient justification* for its price discrimination.

Unlawful Inducement of Price Discrimination

Under specific circumstances, it is unlawful to *induce* unlawful price discrimination. The rule against inducing price discrimination is set forth in the Robinson-Patman Act at 15 U.S.C. §13(f). According to the Supreme Court, this rule does not prevent a buyer from negotiating the most favorable possible prices for its supplies, *unless it obtains these prices precisely in order to prevent its competitors from competing against it in one or more affected markets.* Thus a commercial customer commits an antitrust offense if it induces its supplier to give discriminatory prices that the customer expects will disrupt competitive processes in secondary or tertiary markets, nor can the customer knowingly accept such prices from its supplier. See 15 U.S.C. §13(f). See also *Automatic Canteen Co. of Am. v. Fed. Trade Comm'n*, 346 U.S. 61, 71, 73 S. Ct. 1017, 1023 (1953) ("[The statutory ban on inducing unlawful price discrimination] does not reach all cases of buyer receipt of a prohibited discrimination in prices. It limits itself to cases of knowing receipt of such prices.")

This rule is aimed at dominant buyers that would otherwise prevail on their suppliers to give them market-beating prices on a wide range of products, leaving their competitors unable to compete with them in an ever larger number of markets. But the rule also illustrates the difficulty of enforcing the price discrimination statutes in furtherance of the stated aim of antitrust law, which is to promote competition on the merits and prevent anti-competitive cartels and monopolies from suffocating or sabotaging competition.

After all, a business that seeks market-beating prices would seem to be engaged in the very kind of pro-competitive activity that the antitrust laws are supposed to protect and champion. But the anti-competitive danger arises when a small number of dominant buyers in each market prevail on their suppliers to give them price advantages that are ruinous to any would-be

rival, so that over time the dominant buyer in each market can exclude most or all of its rivals.

To ensure that the price discrimination statutes are not used to punish businesses whose only offense is that they have successfully negotiated better prices for their supplies, the rule against inducing price discrimination applies *only when the buyer, typically a dominant firm, has prevailed on a supplier to give it prices that it knows will likely undermine competitive processes in the buyer's markets*. See 15 U.S.C. §13(f). See also *Automatic Canteen Co. of Am. v. Fed. Trade Comm'n*, 346 U.S. 61, 71, 73 S. Ct. 1017, 1023 (1953).

Even so, this rule has troubling implications, as it could be used to discourage firms from using commercial acumen to obtain low prices for necessary products. The rule against inducement should therefore be invoked only when the price discrimination is blatant, cannot be justified by a pro-competitive rationale, and clearly undermines competition on the merits by allowing the dominant buyer to undersell its rivals until they are ruined.

The Principal Purpose of the Price-Discrimination Laws: Curbing Abuses by Dominant Buyers

Although it is problematic (see above), the rule against inducing price discrimination is intended to further a key if not the principal aim of the law on price discrimination, which is *to protect smaller competitors from the excessive market power of a dominant purchaser*. Otherwise, the dominant purchaser could use its purchasing power to oblige suppliers to give it better prices that it could then use to undersell and thereby ruin its direct competitors. The disfavored customers would find themselves unable to compete on price against the favored customer, and over time they would go out of business or accept anti-competitive terms of trade proposed by the dominant customer. See *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 349, 88 S.Ct. 904, 908 (1968) ("[T]he Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.") (internal quotation omitted); and *F.T.C. v. Henry Broch & Company*, 363 U.S. 166, 168-69, 80 S.Ct. 1158, 1160 (1960) ("The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power."); *Innomed Labs, LLC v. Alza Corp.*, 2002 WL 31521084, *3 (S.D.N.Y., 2002) ("[The Robinson-Patman Act] was intended, in part, to protect small competitors from discriminatory pricing in favor of larger purchasers, who would have the power to impose higher prices with their stronger brand names.") (citing *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 11, 96 S.Ct. 1305 (1976)); and *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1170 (7th Cir., 1978) ("Section 2(c) [of the Robinson-Patman Act] was enacted in order to prevent discriminatory rebates granted large sellers under the guise of 'brokerage fees' never actually earned."); and *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175, 126 S.Ct. 860, 869 (2006) (By enacting the Robinson-Patman Act, "Congress sought to target the perceived harm to competition occasioned by powerful buyers....").

Unlawful Price Discrimination, Stated in Full.

Here is a full statement of the doctrine from a recent decision rendered by a United States Court of Appeal:

> [I]n order to prove a violation of section 2(a) of the Robinson–Patman Act, a plaintiff must show (1) that sales were made to two different purchasers in interstate commerce; (2) that the product sold was of the same grade and quality; (3) that defendant discriminated in price as between the two purchasers; and (4) that the discrimination had a prohibited effect on competition.

Feesers, Inc. v. Michael Foods, Inc., 498 F.3d 206, 212 (3rd Cir., 2007). See also *Energex Lighting Industries, Inc. v. North American Philips Lighting Corp.*, 656 F.Supp. 914, 919-20 (S.D.N.Y., 1987) ("Three elements are necessary to state a claim for an actionable violation of the Robinson-Patman Act. Plaintiff must complain that (1) the alleged price discrimination meets the 'in commerce' requirement, i.e., that 'either or any' of the purchases involved are in commerce; (2) there has been discrimination in price between different purchasers of products of like grade and quality; and (3) the effect of the discrimination 'may be substantially to lessen competition or tend to create a monopoly.'") (quoting *Hoyt Heater Co. of Northern California v. American Appliance Mfg. Co.*, 502 F.Supp. 1383, 1386–87 (N.D. Cal., 1980)).

The Requirement of Sales to Commercial Purchasers In Competition With One Another

In the typical case, which is for so-called "secondary line competitive injury," price discrimination becomes an offense only when the supplier makes its sales at around the same time to commercial purchasers that are in direct competition with one another, or, alternatively, in "tertiary line cases," when one of the commercial purchasers or its customers are in direct competition with the customers of the other (e.g., a manufacturer sells the same widgets at different prices to two different widget distributors, and the favored distributor also re-sells widgets at retail in direct competition with the retail customers of the disfavored distributor). See *Bel Air Markets v. Foremost Dairies, Inc.*, 55 F.R.D. 538, 540-41 (N.D. Cal., 1972) ("One essential element of a price discrimination case is that there exist competition between the favored customer and the disfavored customer."). See generally *Volvo Trucks*, supra, 546 U.S. at 176-177, 126 S.Ct. at 870 ("Our decisions describe three categories of competitive injury that may give rise to a Robinson–Patman Act claim: primary line, secondary line, and tertiary line. Primary-line cases entail conduct – most conspicuously, predatory pricing – that injures competition at the level of the discriminating seller and its direct competitors. Secondary-line cases ... involve price discrimination that injures competition among the discriminating seller's customers.... Tertiary-line cases involve injury to competition at the level of the purchaser's customers."); and *Conoco Inc. v. Inman Oil Co., Inc.*, 774 F.2d 895, 902-03 (8th Cir., 1985) ("The [Robinson-Patman Act] is concerned with the protection of competition on three levels: (1) competition with the seller who granted the discriminatory prices (primary line); (2) competition with the seller's purchaser who received the favorable lower price (secondary line); and (3) competition with a customer of the favored purchaser (tertiary line)."). See, e.g., *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 556, 110 S.Ct. 2535, 2543 (1990) (price-discrimination case in which

defendant supplier provided better prices to distributor that re-sold at retail than it did to retail customers).

The Requirement of Contemporaneous Sales

Moreover, the sales at differing prices must be made at approximately the same time. See *Rutledge v. Elec. Hose & Rubber Co.*, 327 F.Supp. 1267, 1275 (D.C., Cal. 1971) ("[P]roof of a violation of [the Robinson-Patman Act] must consist of groups of two or more contemporaneous sales which, when compared, permit the drawing of an inference of price discrimination. The sales should be contemporaneous to eliminate the possibility that their differences are caused by market fluctuations ordinarily happening during an extended time interval between sales.").

The Prices at Issue are the Actual, Net Prices that the Customers Pay After Receiving Discounts, Rebates or Other Offsets

Significantly, the prices to the favored customer are calculated according to *the net price actually paid,* which expressly means (1) the list price, less (2) any applicable discount, rebate or other offset, however characterized. See 15 U.S.C. §13a. See also *Checker Motors Corp. v. Chrysler Corp.*, 283 F.Supp. 876, 887 (D.C.N.Y., 1968) ("[A] rebate may be violative of the Robinson-Patman Act...."); *Diehl & Sons, Inc. v. International Harvester Co.*, 445 F.Supp. 282, 286 (D.C.N.Y., 1978) ("The generally accepted rule is that 'price' for purposes of [the Robinson-Patman Act] means the amount actually paid by the purchaser, that is, the quoted invoice price less any discounts, offsets or allowances afforded the purchaser and not otherwise reflected in the invoice price."); and *Kapiolani Motors, Limited v. General Motors Corp.*, 337 F.Supp. 102, 104 (D.C. Haw., 1972) ("In calculating the price a buyer actually pays, the courts deduct from the base price or invoice price the amount or value of any discounts or offsets knowingly granted to a buyer.... Discounts and offsets which have been held violative of [the Robinson-Patman Act] usually involve (1) quantity discounts, (2) cash discounts based on time or mode of payment or 'off the top', or (3) rebates, all knowingly given by the supplier. All such obviously affect the 'price' and were clearly in the mind of Congress when they enacted the Robinson-Patman Act.")

The Requirement of "Like Commodities"

In addition, the goods sold must be the same or similar, but this requirement is met if the purchasers of the goods use them as inputs or resell them in order to fulfill the same function. See *Lubbock Glass & Mirror Co. v. Pittsburgh Plate Glass Co.*, 313 F.Supp. 1184, 1187 (D.C.Tex., 1970) ("These requirements of 'like grade and quality' [in the Robinson-Patman Act] mean that commodities must have similar characteristics before a charge of price discrimination under the Act can be maintained. Actual and genuine differences between products generally remove differential pricing of the two from the reach of the Robinson-Patman Act."); and *McWhirter v. Monroe Calculating Mach. Co.*, 76 F.Supp. 456, 461 (D.C. Mo., 1948) (where two different kinds of calculators perform the same function and are competitively priced with one another, they are deemed 'like commodities' for the purposes of the Robinson-Patman Act).

The Requirement of "Injury to Competition"

Crucially, price discrimination occurs only where the practice gives rise to a "substantial possibility" or "reasonable probability" of 'injury to competition" – which must occur in the seller's market ("primary-line harm"), or in a secondary or tertiary market, as explained above. See *Conoco*, supra, 774 F.2d at 902-03.

Significantly, "injury to competition" under the Robinson-Patman Act is easier to prove than is "harm to competition" under Sections 1 and 2 of the Sherman Act. For purposes of showing unlawful price discrimination, "injury to competition" is established upon a showing of the following matters: (1) The supplier has been charging the disfavored commercial customers comparatively higher prices than those it has been charging its favored commercial customer for the same or similar goods sold at around the same time; (2) the sales were made in interstate commerce in the United States, and the favored and disfavored customers are commercial purchasers that directly compete against one another or against the customers of one or the other; (3) the defendant seller has engaged in the challenged price discrimination over an extended period, and (4) the consequence is that the disfavored customers have lost sales and profits to the favored customer, and the sales in question constitute a significant part of overall sales in the market in question. Indeed, proving the first three of these three points gives rise to a rebuttable inference of the last point. See, e.g., *Volvo Trucks*, supra, 546 U.S. at 177, 126 S.Ct. at 870 ("A hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time.") (citing *FTC v. Sun Oil Co.*, 371 U.S. 505, 518–519, 83 S.Ct. 358 (1963); *Morton Salt Co.*, supra, 334 U.S. at 49–51, 68 S.Ct. 822 (1948); and *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435, 103 S.Ct. 1282 (1983) ("[I]njury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time. In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits.")

Even so, modern antitrust jurisprudence disfavors a claim of price discrimination that depends solely on a showing that the favored customer received better prices over time. For practical purposes, it is now necessary to demonstrate by empirical evidence that *the effect of the price discrimination has been to allow the favored customer to gain sales at the expense of its competitors, a substantial percentage of whom have therefore ceased to compete for future sales in the affected market*. I address this point more fully immediately below.

Narrow Application in Modern Jurisprudence.

In recent times, the courts have impliedly imposed a more demanding standard for proving "injury to competition" that is sufficient to establish a claim for price discrimination. That is, the Courts have not expressly established a new, more exacting standard, but in their dicta have suggested that a claim for price discrimination cannot succeed unless the plaintiff makes a sufficient showing of a substantial lessening of competition because of the challenged price

discrimination. The plaintiff's own loss of sales to the favored customer will suffice only if the plaintiff was formerly a major competitor whose effectual exclusion from an affected market has the effect of substantially lessening overall competition in the market. See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 113 S. Ct. 2578, 2586 (U.S.N.C. 1993) ("By its terms, the Robinson–Patman Act condemns price discrimination only to the extent that it threatens to injure competition. The availability of statutory defenses permitting price discrimination when it is based on differences in costs, changing conditions affecting the market for or the marketability of the goods concerned, or conduct undertaken in good faith to meet an equally low price of a competitor, confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, the Robinson–Patman Act should be construed consistently with broader policies of the antitrust laws.") (internal quotations and citations omitted); *Volvo Trucks*, supra, 546 U.S. at 176-81, 126 S.Ct. at 870-73 ("Robinson–Patman does not ban all price differences charged to different purchasers of commodities of like grade and quality; rather, the Act proscribes price discrimination only to the extent that it threatens to injure competition.... Interbrand competition, our opinions affirm, is the primary concern of antitrust law. The Robinson–Patman Act signals no large departure from that main concern....[W]e would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition....").

Statutory Affirmative Defenses

Even if a plaintiff or the FTC can establish a prima facie case of price discrimination, a supplier can defeat the charges by showing either of the following: (1) Its lower prices are justified by economies of scale for filling large orders; or (2) it has offered lower prices in order to meet the prices offered by a direct competitor. See 15 U.S.C. §13(b). See also *Texaco*, supra, 496 U.S. at 556, 110 S.Ct. at 2542 ("[The Robinson-Patman Act] does contain two affirmative defenses that provide protection for two categories of discounts – those that are justified by savings in the seller's cost of manufacture, delivery, or sale, and those that represent a good-faith response to the equally low prices of a competitor.")

Injunctive Relief, Treble Damages, and Criminal Penalties

Although disfavored and narrowly enforced, the price-discrimination statutes remain standing law and are enforced as follows:

FTC Proceedings. The FTC can conduct administrative proceedings, which entail lengthy investigations, hearings, and, if warranted, injunctive relief and civil penalties. See *Sperry & Hutchinson*, supra, 405 U.S. at 235-236, 92 S.Ct. at 901.

Private Injunctive Relief. A private plaintiff can seek an injunction and attorney's fees under 15 U.S.C. §26 that forbids the defendants to continue practicing the challenged price discrimination. See also *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 119 (3rd Cir. 1980) ("A plaintiff seeking either injunctive or damage relief under the Robinson-Patman Act must demonstrate that the defendant has discriminated in price against the plaintiff and in favor of at least one of the plaintiff's competitors. It also must prove that the discrimination may

substantially lessen competition.") (internal quotation omitted).

Treble Damages. In addition, a private plaintiff can bring suit under 15 U.S.C. §15 to seek treble damages and attorney's fees for the challenged price discrimination. See *Innomed Labs*, supra, 368 F.3d at 163-64 ("In order to establish that a violation of the Robinson-Patman Act warrants an award of treble damages, the plaintiff must establish that it has suffered actual economic injury as a result of the defendant's conduct.")

In such a case, the measure of a plaintiff's damages are the lost profits that it can attribute to the price discrimination. See *id*. ("A plaintiff may establish economic injury by showing that its ability to compete has been harmed by the price discrimination; for instance, if the plaintiff distributor must charge higher prices than the favored distributors in order to cover its higher costs, and loses sales and profits as a result, then the plaintiff has suffered antitrust injury.")

These damages, if awarded, must then be trebled under 15 U.S.C. §15. See *Volvo Trucks*, supra, 546 U.S. at 176, 126 S.Ct. at 870 ("Pursuant to §4 of the Clayton Act [15 U.S.C. §15], a private plaintiff may recover threefold for actual injury sustained as a result of a violation of the Robinson–Patman Act.") (citing 15 U.S.C. §15(a); and *J. Truett Payne*, supra, 451 U.S. at 562, 101 S.Ct. 1923.

Attorney's Fees. If the plaintiff prevails on a claim for injunctive relief or treble damages, it is entitled as a matter of law to recover its attorney's fees (under 15 U.S.C. §15 on a claim for treble damages, and under 15 U.S.C. §26 on a claim for injunctive relief). Significantly, the defendant, even if successful, cannot recover its own attorney's fees, save where the plaintiff's case was sanctionably frivolous. See *Syufy Enterprises v. Am. Multicinema, Inc.*, 602 F. Supp. 1466, 1472 (N.D. Cal. 1983) (an antitrust defendant can recover its attorney's fees after prevailing in an antitrust case, but only if the plaintiff's claims "clearly were [] so lacking in merit as to constitute an abuse of the processes of the court.")

Criminal Prosecution. In rare cases, the Antitrust Division of the United States Department of Justice theoretically can prosecute criminal claims for unlawful price discrimination. See 15 U.S.C. §13a (imposes criminal penalties for price discrimination). In practice, the offense is rarely or virtually never prosecuted as a criminal offense, nor should you hold your breath until the Department of Justice announces its next indictment for felony price discrimination.

I was able to find one case in which the defendant was convicted of both felony price discrimination and felony price-fixing. Price-fixing is criminally prosecuted on a routine basis, and in this case it appears that the prosecutor added on the charge for price discrimination, and the defendant was convicted of both offenses. But even this one instance of a felony conviction for price discrimination was vacated by the United States Supreme Court on procedural grounds concerning the prosecution's discovery and disclosure obligations). See *Nat'l Dairy Products Corp. v. United States*, 350 F.2d 321, 323 (8th Cir. 1965) vacated, 384 U.S. 883, 86 S. Ct. 1913, 16 L. Ed. 2d 995 (1966).

I otherwise am unaware of any case in which the Department of Justice initiated criminal proceedings to suppress price-discrimination, which at best lingers on in the modern era as a disfavored, highly technical, and problematic civil claim that is best asserted by a private company whose only other option is go out of business, or which has already done so and now seeks some relief.

California's Law Against Price Discrimination

California has its own statutes that govern price discrimination. These statutes are set forth in California's Unfair Practices Act and are codified at California Business & Professions Code §§1740-45. These statutes are similar, but not identical to the Robinson-Patman Act, and the California courts have enforced them by adopting some but not all of the above-summarized federal standards. Compare 15 U.S.C. §§13, 13a and 13b with California Business & Professions Code §§1740 et seq. See generally *ABC International Traders, Inc. v. Matsushita Electric Corp.*, 14 Cal.4th 1247, 1256-64 (1997) (extended discussion of the history, purpose and reach of California's Unfair Practices Act); and *Harris v. Capitol Records Distributing Corp.*, 64 Cal.2d 454, 459, 413 P.2d 139, 142-43 (1966) (discussion of the differences between the Robinson-Patman Act and California's prohibition of certain kinds of price discrimination under the Unfair Practices Act).

Most notably, the offense of predatory pricing under California law remains a tenable claim, while the modern federal doctrine is so restrictive as to render the practice an offense in theory only, as explained above. Under California, it suffices to show that the defendant lowered its prices below its own costs with the intent of driving competitors out of business. It need not be shown that any percentage of overall competition was thereby eliminated, nor that the defendant can and will impose supra-competitive pricing with impunity after eliminating its rivals. Predatory pricing therefore remains a potent claim under California law. See *Bay Guardian Co. v. New Times Media LLC*, 187 Cal. App. 4th 438, 457-58 (2010) ("The history of the amalgamation of statutes that comprise the [California Unfair Practices Act or "UPA"] teaches that a primary concern in the enactment of the UPA was the protection of smaller, independent retailers, especially grocers, against unfair competitive practices of the large chain stores. As a contemporary commentator explained, the prohibitions added in 1933 on secret rebates and unearned discounts (now section 17045) and below-cost sales (now section 17043) are designed to protect the retailer whose more powerful neighbor is attempting to drive him out of business. The defendant's ability to recoup losses is unnecessary to the dual objectives of preventing unfair trade practices and protecting comparatively smaller enterprises from predatory pricing schemes of larger competitors. Thus, California and federal cases have recognized that the UPA in many respects does not mirror federal predatory pricing law. Defendant's reliance on federal law fails to acknowledge the significant differences between the language of the Sherman Act, the federal antitrust statute prohibiting predatory below-cost pricing, and its state counterpart, section 17043 of the UPA. It has been observed that the UPA, in contrast to the federal antitrust statutes, is precisely drawn to eliminate defined commercial practices such as predatory pricing. Therefore, changing judicial perspectives on antitrust enforcement have far less influence on the development of California predatory pricing law than on the development of the federal counterparts.") (internal quotations and citations omitted).

In addition, California's Unfair Practices Act expressly prohibits a seller's payment of "secret" rebates to its buyer if doing so causes the buyer's competitor to suffer losses and otherwise tends to "destroy competition" in the buyers' market or in further downstream markets. Here is the exact statutory prohibition, quoted in full:

> The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.

California Business & Professions Code §17045.

Lastly, the California courts in recent years have adopted a comparatively lenient, expansive definition of "harm to competition," deeming it to occur even when the challenged practices do not lead to an increase in market prices or reduction in output, yet nevertheless are calculated to suppress competitors and lessen or eliminate consumer choice. See *Lloyd Design Corp. v. Mercedes Benz of North America, Inc.*, 66 Cal.App.4th 716, 721 (1998) (the antitrust laws broadly condemn business practices, such as unlawful tying arrangements, that serve no purpose other than the "suppression of competition" since such practices "deny competitors free access to the market" and "[a]t the same time buyers are forced to forego their free choice between competing products.").[1]

California's law on price discrimination therefore provides an independent ground for challenging predatory pricing schemes and secret rebates. Moreover, the California courts have adopted a lenient standard for finding that challenged practices cause "harm to competition" for purposes of establishing unlawful price discrimination under California law.

Conclusion

Your business might usefully seek relief for price discrimination only if (1) it has been harmed by obvious price discrimination that cannot be justified by a pro-competitive explanation, and (2) the effect of the price discrimination is that the favored customer is underselling and thereby undermining a substantial part of competition in at least one of its markets. It is a very

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[1] Confusingly, there are three terms of art to describe the prohibited effect on competitive processes in a given market. "Harm to competition" in cases brought under Sections 1 or 2 of the federal Sherman Act (which arguably requires a showing of higher prices, reduced output, or inferior service occasioned by the challenged conduct); "injury to competition" for price discrimination under the federal law (which requires the likelihood of a substantial diminution of competition in an affected market because of the challenged price discrimination) and "harm to competition" to prove unlawful price discrimination under California law (which arguably requires only a showing that consumers now have fewer significant choices in an affected market).

difficult claim to prove. It is the sort of claim that likely is best asserted alongside other, related antitrust offenses. A defendant has many protections against liability for price discrimination, but should confer with antitrust counsel about its pricing policies from time to time. A plaintiff should bring a claim only if its business or a major line of its business is under mortal threat from clear, indefensible price discrimination.

Under California law, however, it remains possible to seek relief for predatory pricing and secret rebates that harm competition, and it is easier to prove the requisite "harm to competition" caused by price discrimination than it is to prove "injury to competition" in a federal case for the same conduct.

I hope that this article is useful to those who are interested in this topic. For your immediate reference, you will find below the key statutory provisions of the Robinson-Patman Act.

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Appendix

The Controlling Federal Statutes (The Robinson-Patman Act)

The Robinson-Patman Act of 1936 sets forth a series of antitrust statutes that are codified at 15 U.S.C. §§13 *et seq*. Here are the key excerpts, quoted verbatim:

15 U.S.C. §13(a): Price; selection of customers

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States ... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance 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.... And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in

bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

15 U.S.C. §13(b): Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section.... Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor....

15 U.S.C. §13(f): Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

15 U.S.C. §13a: Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to ... any transaction of sale ... which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate [or] allowance is granted to the purchaser over and above any discount, rebate [or] allowance available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity....