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## CONSUMER PREFERENCE FOR BRAND NAMES UNDER THE ROBINSON-PATMAN ACT

Borden Company sold evaporated milk under its own brand name at a substantially higher price than it sold chemically identical milk under private brand names.<sup>1</sup> The Federal Trade Commission found price discrimination in violation of the Robinson-Patman Act<sup>2</sup> and issued a cease and desist order prohibiting further price differentials between the two products. The Fifth Circuit Court of Appeals granted Borden's petition to set aside the order, and *held*: Premium brand products commanding consumer preference and chemically identical products sold under private brands are not of "like grade and quality" within the meaning of the Robinson-Patman Act. *Borden Co. v. FTC*, 339 F.2d 133 (5th Cir. 1964), *cert. granted*, 34 U.S.L. WEEK 3117 (U.S. Oct. 12, 1965) (No. 1127, 1964 Term; renumbered No. 106, 1965 Term).<sup>3</sup>

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, makes it unlawful "to discriminate in price between purchasers of commodities of like grade and quality . . . where the effect . . . may be substantially to lessen competition or tend to create a monopoly . . .,"<sup>4</sup> indicating that "like grade and quality" is one of four jurisdictional prerequisites to the application of the act.<sup>5</sup> Each of the prerequisites must be satisfied by the complaining party before the Federal Trade Commission (FTC) can hear the case. Failure to meet these prerequisites is ground for collateral attack upon the Commission's decision for want of jurisdiction. Legislative history of the Robinson-Patman Act reveals that a difference in brand names was not intended to affect the "grade and quality" of a product.<sup>6</sup> Consequently, in *Goodyear Tire & Rubber Co.*,<sup>7</sup> a landmark decision

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<sup>1</sup> "It is a common practice for large chain stores, mail order houses, cooperatives, and dealer associations buying for their membership, to create their own brands and have those brands, and not the manufacturer's brands, placed on goods purchased for resale. Such brands are known as 'private brands.'" AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 39 (2d rev. ed. 1959).

<sup>2</sup> Section 1, 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (Supp. V, 1964).

<sup>3</sup> The *Borden* decision is discussed in 65 COLUM. L. REV. 720 (1965).

<sup>4</sup> Section 1, 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (Supp. V, 1964).

<sup>5</sup> "The act cannot apply unless there are (1) sales (2) of commodities (3) of 'like grade and quality' (4) in commerce. These four jurisdictional elements must always be proved by the party plaintiff in any proceeding—whether the Federal Trade Commission or a private suitor." ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 36 (1962).

<sup>6</sup> 80 CONG. REC. 8234-35 (1936).

<sup>7</sup> 22 F.T.C. 232 (1936), *rev'd on other grounds*, 101 F.2d 620 (6th Cir. 1939), *cert. denied*, 308 U.S. 557 (1939).

considering brand names in the determination of "like grade and quality," the FTC prohibited price differentials among identical tires sold under different brand names.

The court in the principal case reasoned that recognition of brand names was in accord with the broad antitrust policy of avoiding price rigidity. Although a difference in labels is alone insufficient to change the grade of the product, the court found that proof that retailers will purchase a brand name product at a higher price than identical private brand products is adequate indication of a change in the grade of the product on the competitive market. The court reasoned that adequate precedent for the decision could be derived from an earlier FTC decision allowing a private brand competitor to lower his prices below those of a brand name product in order to meet the latter's competition.<sup>8</sup>

The decision in the principal case gives new meaning to the price discrimination section of the Robinson-Patman Act. In recognizing that consumer preference for a premium brand product is a valid basis<sup>9</sup> for determining "like grade and quality," the court followed the declared policy of the Robinson-Patman Act of avoiding price sterilization.<sup>10</sup> In keeping with this policy, the court stated:

Were we to ignore the fact that a brand name product may be able to command a higher price than an unknown brand because of its public acceptance, then we would be encouraging just such a price uniformity and rigidity . . .<sup>11</sup>

The decision in the principal case was not totally unexpected when

<sup>8</sup> *Calloway Mills Co.*, 3 Trade Reg. Rep. No. 16800 (F.T.C. Feb. 10, 1964).

<sup>9</sup> What precedent existed was found in decisions concerning the "meeting competition" defense of § 2(b). The significance of these decisions was stated in *Calloway Mills*: "Both the courts and the Commission have consistently denied the shelter of the (meeting competition) defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than usually received by sellers of competitive goods. For example, the defense will not lie when the price of Lucky Strikes is dropped to the level of a poorer 'grade of cigarettes,' *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234, 237 (2d Cir. 1929), *cert. denied*, 279 U.S. 858 (1929); when the price of Budweiser beer is dropped to match the price of non-premium beers, *Anheuser-Busch, Inc.*, 54 F.T.C. 277, *set aside for other reasons*, 265 F.2d 677 (7th Cir. 1959), *rev'd for other reasons*, 265 F.2d 677 (7th Cir. 1959), *rev'd*, 363 U.S. 336 (1960) *again set aside for other reasons*, 289 F.2d 835 (7th Cir. 1961); and when the price of a 'premium' automatic control is set above the price of less acceptable controls, *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, *rev'd on other grounds*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952)." 3 Trade Reg. Rep. No. 16800, at p. 21755. To the same effect see *Standard Oil Co.*, 49 F.T.C. 923 (1953), *rev'd on other grounds*, 233 F.2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 376 (1958); *Gerber Prods. Co. v. Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916 (S.D.N.Y. 1958).

<sup>10</sup> The FTC set out these principles in *Automatic Canteen Co. v. FTC*, 46 F.T.C. 861, *aff'd*, 194 F.2d 433 (7th Cir. 1952), *rev'd*, 346 U.S. 61, 74 (1953).

<sup>11</sup> 339 F.2d at 136.

one considers the results reached in previous section 2(a) proceedings. In several informal rulings during 1936-1937, the FTC gave apparent consideration to brand names when accompanied by physical differences between products.<sup>12</sup> However, ruling on "like grade and quality" in *Hanson Innoculator*<sup>13</sup> in 1938, the FTC reasserted the *Goodyear* rule by prohibiting price differentials of physically identical products varying only in label inscription. This "physical composition" test became the standard under the Clayton Act for determining "like grade and quality."<sup>14</sup> Products having essentially the same physical characteristics were considered to be of "like grade and quality" regardless of their brand name.<sup>15</sup> But when manufacturers sought to avoid prosecution by making insignificant physical changes in substantially similar products,<sup>16</sup> a "functional interchangeability" test was conceived.<sup>17</sup> Under this test, products varying slightly in physical composition were considered to be of "like grade and quality" if they served an essentially similar purpose and had no basic functional differences. In 1958, the Second Circuit, in *Atlanta Trading Corp. v. FTC*,<sup>18</sup> applied a third test predicated upon whether differences between the products were real or artificial. Under all three tests, however, consumer preference for brand names per se was not a consideration in determining grade and quality.<sup>19</sup>

The court in the principal case expressly confined its holding to situations involving brand names which are "clearly of commercial significance."<sup>20</sup> It rejected previous administrative decisions which

<sup>12</sup> 81 CONG. REC. APP. 2336-41 (1937). See Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 9 (1956); Note, 17 N.Y.U. INTRA. L. REV. 133 (1962).

<sup>13</sup> 26 F.T.C. 303, 309 (1938). The only material difference in the labels was that one bore the manufacturer's name and the other the brand name of the private customer.

<sup>14</sup> See, e.g., *Page Dairy Co.*, 50 F.T.C. 395 (1953); *United States Rubber Co.*, 46 F.T.C. 998, 1006-09 (1950); *United States Rubber Co.*, 28 F.T.C. 1489, 1500 (1939), where brand and label distinctions were considered legally insignificant in the "like grade and quality" determination.

<sup>15</sup> See discussion in Cassady & Grether, *The Proper Interpretation of "Like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act*, 30 So. CAL. L. REV. 241, 251 (1957).

<sup>16</sup> See, e.g., *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953).

<sup>17</sup> See discussion in Note, 17 N.Y.U. INTRA. L. REV., *supra* note 12, at 136-37.

<sup>18</sup> 258 F.2d 365, 371 (2d Cir. 1958).

<sup>19</sup> See AUSTIN, *op. cit. supra* note 1, at 38; and PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 23 (1963). The FTC relied upon a report by the Attorney General's National Committee which stated: "The majority of this committee, however, recommends that the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test. . . ." ATT'Y GEN. NAT'L COMM. TO STUDY THE ANTI-TRUST REP. 188 (1955).

<sup>20</sup> 339 F.2d at 138.

had not recognized brand names under the act,<sup>21</sup> on the ground that the brands in those cases were not shown to command higher prices. Referring to one case<sup>22</sup> which had held that different labels did not affect the grade and quality of products represented as being identical, the court said:

The brand names were not shown to have any effect on the ultimate price the products could command. Here the *Borden* brand label was clearly of commercial significance. At all levels of distribution it imparted a premium market value to the Borden products which the private label did not enjoy.<sup>23</sup>

The limitation on the scope of the jurisdictional requirement of "like grade and quality," resulting from the decision in the principal case, will afford greater opportunity to avoid the act entirely. On the other hand, proof of one of the defenses under the act (*e.g.*, differential in cost of production) would have allowed the FTC to hear the case, and would only have mitigated the effect of an eventual decision. Consequently, the *jurisdictional* basis for the decision in the principal case should lead to a decrease in the amount of litigation reaching the courts.

In the principal case the court stated in dictum:

In determining whether products are of like grade and quality, consideration should be given to *all commercially significant distinctions* which affect market value, whether they be physical or promotional.<sup>24</sup>

The court was aware that other judicially unrecognized factors in addition to brand names may induce a buyer to select one product over another. Although the court does not spell out these additional factors, such distinctions as merchandise coupons,<sup>25</sup> contest prizes, merchandise packed inside the product, and large scale advertising may be promotional differences which the court would recognize as proof that two products are of unlike grade and quality. However, these suggested differences will be subject to the limitation set forth in the principal case—that the difference for which recognition is sought be clearly shown to be the cause of a demonstrated consumer preference for the higher-priced product.

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<sup>21</sup> *Page Dairy Co.*, 50 F.T.C. 395 (1953); *United States Rubber Co.*, 46 F.T.C. 998 (1950); *United States Rubber Co.*, 28 F.T.C. 1489 (1939); *Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), *rev'd on other grounds*, 101 F.2d 620 (6th Cir. 1939).

<sup>22</sup> *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962).  
<sup>23</sup> 339 F.2d at 139.

<sup>24</sup> *Id.* at 137.

<sup>25</sup> For the influence coupons have in the competitive market, see Gannon, *Assault on Coupons*, Wall Street Journal, March 2, 1965, p. 14, col. 4.