

Table of Contents

CHAPTER 1. OVERVIEW OF THE ROBINSON-PATMAN ACT

§ 1:1	Background
§ 1:2	Section 2(a): price discrimination
§ 1:3	—Discrimination in price
§ 1:4	—Two consummated sales
§ 1:5	—The “same seller” requirement
§ 1:6	—Same Seller/two different purchasers
§ 1:7	—The commerce requirement
§ 1:8	—Contemporaneous sales
§ 1:9	—The commodities requirement
§ 1:10	—Like grade and quality
§ 1:11	—Injury to competition
§ 1:12	— —Primary-line injury
§ 1:13	— —Secondary-line injury
§ 1:14	— —Tertiary-level competition
§ 1:15	Defenses to price discrimination
§ 1:16	—The cost-justification defense
§ 1:17	—The meeting-competition defense
§ 1:18	—The “changing conditions” defense
§ 1:19	—“Functional availability” and volume incentive discounts
§ 1:20	Section 2(c): commercial bribery
§ 1:21	—Standing
§ 1:22	—Services rendered and “goods, wares, or merchandise”
§ 1:23	—Acceptance of illegal payment alone sufficient
§ 1:24	Section 2(d) and (e): advertising and promotional allowances
§ 1:25	—Section 2(d)
§ 1:26	—Section 2(e)
§ 1:27	—Basic rules and requirements
§ 1:28	— —Standing
§ 1:29	— —A per se offense
§ 1:30	— —Requirements
§ 1:31	Section 2(f): buyer liability—Introduction
§ 1:32	—Plaintiff’s burden of proof
§ 1:33	—Derivative liability
§ 1:34	—The “lying buyer” situation
§ 1:35	Functional discounts and dual distribution

THE ROBINSON-PATMAN ACT

- § 1:36 Standing to sue under § 4 of the Clayton Act
- § 1:37 —No standing for reduction in employee's sales
- § 1:38 —Employee termination for refusal to discriminate
- § 1:39 Exemptions from the Act
- § 1:40 Other laws that may apply
- § 1:41 —The Federal Trade Commission Act
- § 1:42 —Sherman Act
- § 1:43 —Common-law claims
- § 1:44 —State consumer protection laws
- § 1:45 —State antitrust laws
- § 1:46 —State regulatory laws
- § 1:47 Arbitration of Robinson-Patman claims
- § 1:48 Class action litigation involving Robinson-Patman claims
- § 1:49 Criminal violation of the Robinson-Patman Act
- Appendix 1-A. Text of the Robinson-Patman Act, Clayton Act, § 2, 15 U.S.C. § 13
- Appendix 1-B. Text of the Robinson-Patman Act, § 3, 15 U.S.C. § 13a

CHAPTER 2. PRICE DISCRIMINATION

- § 2:1 Introduction
- § 2:2 Basic elements of price discrimination
- § 2:3 —Discrimination in price
- § 2:4 —Two consummated sales
- § 2:5 — —Sale must be “consummated”
- § 2:6 — —What is a “sale”?
- § 2:7 — —Sales must be comparable
- § 2:8 — —“Sale” in a distribution context
- § 2:9 —The “same seller” requirement
- § 2:10 —Two different purchasers
- § 2:11 —The commerce requirement
- § 2:12 —Contemporaneous sales
- § 2:13 —The commodities requirement
- § 2:14 —Like grade and quality
- § 2:15 —Injury to competition
- § 2:16 — —Primary-line injury
- § 2:17 — — —Injury through predatory pricing
- § 2:18 — — —The threshold requirement of actual competition
- § 2:19 — —Secondary-line injury
- § 2:20 — — —The threshold requirement of actual competition among similarly-situated customers
- § 2:21 — — —The *Morton Salt* inference

TABLE OF CONTENTS

§ 2:22	— — — Injury to competition: competition in general or specific competitors?
§ 2:23	— — — Rebutting the inference
§ 2:24	— — Tertiary-level competition
§ 2:25	— — Damages and standing under § 4 of the Clayton Act
§ 2:26	Defenses to § 2(a) violations
§ 2:27	— The cost-justification defense
§ 2:28	— The meeting-competition defense
§ 2:29	— The “changing conditions” defense
§ 2:30	— The “functional availability” defense
§ 2:31	Volume discounts and volume incentive discounts
§ 2:32	Conclusion

CHAPTER 3. BROKERAGE AND COMMERCIAL BRIBERY

§ 3:1	Introduction
§ 3:2	The <i>Broch</i> decision
§ 3:3	What constitutes “brokerage” or “discounts in lieu of brokerage”?
§ 3:4	Commercial bribery under state law—State statutes
§ 3:5	— Elements of commercial bribery under state statutes
§ 3:6	— Intent
§ 3:7	— Actual payment is not necessary
§ 3:8	— In relation to the principal’s or employer’s interest
§ 3:9	— Without knowledge or consent of the principal or employer
§ 3:10	— Public policy concerns
§ 3:11	— Recipient need not have authority to take the requested action
§ 3:12	— Anything of value
§ 3:13	Commercial bribery under the Robinson-Patman Act—Generally
§ 3:14	— Payments need not inure to the benefit of the company
§ 3:15	— Price discrimination is not required
§ 3:16	— Variation: bribery must involve buyer and seller
§ 3:17	— Foreign bribery cases under the Robinson-Patman Act
§ 3:18	— The “services rendered” exception
§ 3:19	— The requirement of “goods, wares, or merchandise”
§ 3:20	— The requirement of standing
§ 3:21	— Connection between injury and antitrust violation
§ 3:22	— Injury to competition
§ 3:23	— Indirect injuries are not covered

- § 3:24 — —Variation: No competitive injury required
- § 3:25 —Other exceptions
- § 3:26 The Foreign Corrupt Practices Act
- § 3:27 —The bribery section
- § 3:28 —Penalties
- § 3:29 —Jurisdiction
- § 3:30 —Enforcement
- § 3:31 Federal antikickback and fraud statutes
- § 3:32 —Antikickback statutes
- § 3:33 —False Claims Amendments Act
- § 3:34 —Program Fraud Civil Remedies Act of 1986

CHAPTER 4. ADVERTISING ALLOWANCES AND PROMOTIONAL SERVICES UNDER THE ROBINSON-PATMAN ACT

- § 4:1 Introduction
- § 4:2 The basic rules—Per se offenses
- § 4:3 —The scope of § 2(d) and (e)
- § 4:4 — —Promotional and advertising activities
- § 4:5 — —“In connection with the resale by the buyer”
- § 4:6 — —Additional restrictions
- § 4:7 Establishing elements of a discriminatory advertising allowances claim—Standing to assert the claim
- § 4:8 —Competing customers
- § 4:9 — —Customers of wholesalers versus direct-buying retailers
- § 4:10 — —Geographic and functional competition
- § 4:11 —The “resale” requirement
- § 4:12 —Functional availability on proportionally equal terms
- § 4:13 —Functional availability
- § 4:14 —Proportionally equal terms
- § 4:15 —The “promotional service or facility” requirement
- § 4:16 —Interaction with other Robinson-Patman claims
- § 4:17 Conclusion

Appendix 4-A. 16 C.F.R. Part 240

CHAPTER 5. BUYER LIABILITY

- § 5:1 Introduction
- § 5:2 Derivative liability and buyer’s knowing receipt of discriminatory price
- § 5:3 The meeting-competition defense
- § 5:4 The “lying buyer”
- § 5:5 Miscellaneous § 2(f) issues

TABLE OF CONTENTS

- § 5:6 —Seller's suit against buyer under § 2(f)
- § 5:7 —Indirect purchasers
- § 5:8 —Sales agents
- § 5:9 Joint purchasing
- § 5:10 —Requirement of genuine wholesaler functions to legitimize buying groups
- § 5:11 —Proof of buyer's knowledge of illegal price
- § 5:12 —The exemption of § 4 of the Robinson-Patman Act

CHAPTER 6. PRIMARY-LINE INJURY

- § 6:1 Introduction
- § 6:2 Primary-line injury generally
- § 6:3 Predatory pricing
- § 6:4 —Subjective intent insufficient
- § 6:5 —Detailed market analysis
- § 6:6 —Documentary evidence
- § 6:7 —The two-part test of *Brooke Group*
- § 6:8 — —Predatory pricing under the Sherman Act
- § 6:9 — —Predatory pricing under the Robinson-Patman Act
- § 6:10 — — —The *Brooke Group* litigation
- § 6:11 — — —Subsequent case law
- § 6:12 Appropriate measures of cost
- § 6:13 —Average variable cost
- § 6:14 —Average total cost
- § 6:15 —Below-cost pricing coupled with predatory intent
- § 6:16 The dual distribution context

CHAPTER 7. SECONDARY-LINE INJURY

- § 7:1 Introduction
- § 7:2 Injury to competition in secondary-line cases
- § 7:3 —Establishing a *prima facie* case
- § 7:4 —The *Morton Salt* inference
- § 7:5 —The *Falls City* test
- § 7:6 —Proof that the disfavored purchaser is in actual competition with the favored purchaser
- § 7:7 —Injury to competitor or injury to competition?
- § 7:8 — —Injury to competitor sufficient
- § 7:9 — —Injury to competitor insufficient
- § 7:10 Rebutting the *Morton Salt* inference
- § 7:11 —Breaking the causal connection
- § 7:12 —Distinguishing between rebuttal of *Morton Salt* and establishing antitrust injury needed to collect damages
- § 7:13 —Evidence of competitive market

§ 7:14 Conclusion

CHAPTER 8. THE SAME SELLER REQUIREMENT

- § 8:1 Introduction
- § 8:2 Sales by the parent corporation to its wholly owned subsidiary—The per se rule
- § 8:3 —The “degree of control” test
- § 8:4 Same seller doctrine
- § 8:5 Indirect purchaser doctrine
- § 8:6 Must sale be made directly to plaintiff?

CHAPTER 9. THE INTERSTATE COMMERCE REQUIREMENT

- § 9:1 Introduction and overview
- § 9:2 Illustrative cases—*Gulf Oil Corp. v. Copp Paving Co., Inc.*
- § 9:3 —*S&M Materials Co. v. Southern Stone Co.*
- § 9:4 —*Hampton v. Graff Vending Co.*
- § 9:5 —*Great Atlantic & Pacific Tea Co., Inc. v. F.T.C.*
- § 9:6 —*Rio Vista Oil, Ltd. v. Southland Corp.*
- § 9:7 —*Indiana Grocery Co., Inc. v. Super Valu Stores, Inc.*
- § 9:8 —*Zoslaw v. MCA Distributing Corp.*
- § 9:9 —*McCallum v. City of Athens, Ga.*
- § 9:10 —*Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*
- § 9:11 —*Precision Printing Co., Inc. v. Unisource Worldwide, Inc.*
- § 9:12 —*Pulitzer Publishing Co. v. Godfrey*
- § 9:13 Conclusion

CHAPTER 10. THE COMMODITIES REQUIREMENT AND MIXED TRANSACTIONS

- § 10:1 Introduction
- § 10:2 Mixed transactions
- § 10:3 —One transaction required
- § 10:4 —Goods must not be incidental to the service
- § 10:5 —Issue subject to summary judgment
- § 10:6 Illustrative examples of the commodity versus service analysis
- § 10:7 —Commodity must be part of violation of the law
- § 10:8 —Enforcement agency interpretation may differ

TABLE OF CONTENTS

§ 10:9 Conclusion

**CHAPTER 11. ANTITRUST INJURY UNDER
§ 4 OF THE CLAYTON ACT**

- § 11:1 Introduction
- § 11:2 Proof of actual injury—The *J. Truett Payne* case
- § 11:3 —Evidence of antitrust injury
- § 11:4 — —The existence of antitrust injury
- § 11:5 — —Antitrust injury related to competition-reducing effect of alleged violation
- § 11:6 —Price discrimination need not be sole cause of antitrust injury
- § 11:7 Proving the amount of damages

**CHAPTER 12. STANDING UNDER § 4 OF
THE CLAYTON ACT**

- § 12:1 Introduction
- § 12:2 Early antitrust injury/standing tests
- § 12:3 Supreme Court guidance
- § 12:4 The lower courts on standing
- § 12:5 —Standing generally
- § 12:6 —The standing of trade associations
- § 12:7 —The lower court split on the antitrust standing of terminated employees
- § 12:8 — —Cases that approve standing
- § 12:9 — —Cases that deny standing
- § 12:10 Lack of standing based upon derivative injury
- § 12:11 Conclusion

**CHAPTER 13. COST-JUSTIFICATION
DEFENSE**

- § 13:1 Introduction
- § 13:2 Distinguishing the defense from functional discounts
- § 13:3 Volume discounts
- § 13:4 Technical requirements
- § 13:5 Rules of discovery: privilege
- § 13:6 Litigation
- § 13:7 Illustrative cases
- § 13:8 —Cases where the cost-justification defense failed
- § 13:9 —Cases where the cost-justification defense succeeded
- § 13:10 —Cases where summary judgment was denied because some evidence of a cost-justification defense existed

CHAPTER 14. THE MEETING-COMPETITION DEFENSE

- § 14:1 The statutory language
- § 14:2 The scope of the defense—Defense applies to § 2(a), (d), and (e)
- § 14:3 —Absolute nature of the defense
- § 14:4 Requirements
- § 14:5 —Good faith
- § 14:6 — —The fact-specific approach
- § 14:7 — —Guidelines approach
- § 14:8 —Verification—Verification in general
- § 14:9 — —Direct interseller verification
- § 14:10 — —Establishing the meeting-competition defense with records
- § 14:11 —A legal price
- § 14:12 —Meeting, not beating, price
- § 14:13 —Tailored response
- § 14:14 Miscellaneous issues—Seller's competition
- § 14:15 —Defensive/aggressive action
- § 14:16 —Burden of proof on buyer liability claim

CHAPTER 15. THE CHANGING-CONDITIONS DEFENSE

- § 15:1 Introduction
- § 15:2 Enumerated conditions
- § 15:3 —Perishability
- § 15:4 —Obsolescence of seasonal goods
- § 15:5 Unenumerated conditions
- § 15:6 Conclusion

CHAPTER 16. FUNCTIONAL DISCOUNTS

- § 16:1 Introduction
- § 16:2 The *Texaco* case
- § 16:3 The *Boise Cascade* case
- § 16:4 —The inference of injury under *Morton Salt*
- § 16:5 —Relationship to Robinson-Patman
- § 16:6 —The concurrences
- § 16:7 The *White Industries* case
- § 16:8 Other cases
- § 16:9 Commentary

CHAPTER 17. THE FUNCTIONAL-AVAILABILITY DEFENSE

- § 17:1 Introduction

TABLE OF CONTENTS

- § 17:2 Judicially-created defense
- § 17:3 Scope of the defense—Defense negates required element(s) of price discrimination
- § 17:4 —Defense negates competitive injury requirement of secondary-line claim
- § 17:5 Requirements of the defense
- § 17:6 —Availability must be known
- § 17:7 —Lower price must be “functionally” available
- § 17:8 Recent Auto Dealership Cases

CHAPTER 18. ROBINSON-PATMAN ACT EXEMPTIONS

- § 18:1 Introduction
- § 18:2 Sales to federal and state governments
- § 18:3 Sales to nonprofit institutions
- § 18:4 FTC advisory opinions

Table of Laws and Rules

Table of Cases

Index