CPI Columns
US & Canada

March 2023

Robinson-Patman Redux: A Visit to Falls City

By Richard M. Steuer | Fordham Law School

Edited by Justin Stewart-Teitelbaum & Angela Landry

Robinson-Patman Redux: A Visit to Falls City

By Richard M. Steuer[1]

The Robinson-Patman Act is attracting growing attention as a tonic for small businesses. Created during the Great Depression, the Act has been derided in recent years as assertedly elevating the interests of small competitors over those of consumers. Now, new voices are rallying to revive enforcement of the Act, contending that low pricing to consumers is not the only goal of antitrust and that favoring large customers is hurting the country.

But there is a big obstacle facing enforcement — the meeting competition defense stops most Robinson-Patman claims in their tracks. Any Robinson-Patman case claiming discrimination in favor of large customers must find a way past the Supreme Court's venture to Falls City (a.k.a. Louisville), Kentucky, where, in *Falls City Industries, Inc. v. Vanco Beverages, Inc.*,[2] the meeting competition defense awaits.

Over the years, the Supreme Court has devoted no small degree of attention to the Robinson-Patman Act, most recently examining the Act's relationship to the other antitrust laws and its applicability to functional discounts, promotional support, predatory pricing, and the computation of damages.

In fact, across all the federal courts and the Federal Trade Commission, no area of antitrust law has generated more cases than Robinson-Patman litigation, addressing an endless number of esoteric issues such as which two products or packages are of "like grade and quality," which resellers are genuine competitors of one another, and how to measure the "cost" of selling goods or the value of services.

Each of these issues has proven determinative in specific cases but they all pale in significance next to the trump card that, as a practical matter, disposes of most Robinson-Patman inquires — the meeting competition defense.

So, as interesting as the bulk of the Supreme Court's Robinson-Patman jurisprudence may (or may not) be, none of its opinions has had the everyday impact of *Falls City.*

For this reason, no assessment of the prospects for a Robinson-Patman Act revival can be complete without appreciating the limitations that the meeting competition defense, as defined in *Falls City,* places on the Act's reach.

The meeting competition defense is found in the text of the Robinson-Patman Act itself. Section 2(b) of the Act, 15 U.S.C. § 13(b), permits charging a lower price or providing better promotional assistance "in good faith to meet an equally low price of a competitor, or the services or facilities offered by a competitor."

In *Falls City,* a unanimous Supreme Court provided a roadmap for applying the defense in a variety of common situations. Unless today's Supreme Court is prepared to rewrite this guidance, *Falls City* carries the potential to cabin the ability of enforcers to deliver on all of the expectations currently being raised.

To place today's dialogue in context, impetus for the Robinson-Patman Act traces back to concerns that supermarket chains such as A&P were being offered lower prices by manufacturers in the 1930's than mom-and-pop grocers were being offered by the same manufacturers for the same goods. Today, major retail chains still frequently attract better offers than smaller, local retailers. The meeting competition defense allows a seller to lower its price to a specific customer in order to meet an offer from a competing seller, in an effort to keep or gain that customer. A seller is not required to meet a competing offer, of course, but may choose to. And, not surprisingly, the customers that attract the best offers from competing sellers usually are the biggest and best accounts. It follows that when sellers see the need selectively to provide more favorable prices or allowances, they usually provide them to the biggest and best customers. In other words, when sellers find it necessary to meet

[1] Adjunct Professor, Fordham Law School; rsteuer@fordham.edu.

[2] 460 U.S. 428 (1983).

competitive offers, this most commonly is done in order to keep or win the most coveted customers, with the result being that those customers are offered the best deals.

One can argue the wisdom of including a meeting competition defense in the law. Skeptics characterize it as the exception that swallows the rule while supporters characterize it as necessary for sellers' self-defense. But love it or hate it, the meeting competition defense is a component of the Act itself (as it was in the Clayton Act before it) and there might have been no Robinson-Patman Act without it.[3]

What makes *Falls City* so important to today's conversation is the guidance it provides for applying the meeting competition defense. In a unanimous opinion written by Justice Blackman, the Court elaborated in some detail on the flexibility the defense affords to sellers. This comes close to an instruction manual for applying Section 2(b), which, the Court noted, "exonerates a seller from Robinson-Patman Act liability."[4]

To begin with, if each of a seller's customers is receiving a different offer from a competitor or from more than one competitor, that seller may meet competition at each customer differently. *Falls City* teaches, "The very purpose of the [meeting competition] defense is to permit a seller to treat different competitive situations differently."[5]

If a particular customer is attracting a variety of offers from multiple competitors, a seller ordinarily may choose which, if any, offer to meet. As the Court said, "Congress intended to leave it a 'question of fact . . . whether the way in which the competition was met lies within the latitude allowed.'"[6]

If several customers are being offered a price or allowance by a competitor, a seller may choose to meet those offers at all, some, or none of those customers. 460 U.S. at 445 (a seller may "raise his prices to some customers . . . while meeting competitors' prices . . . to other customers"). As the Court explained, "A seller is permitted 'to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers.'"[7] The Court added, "Section 2(b) does not require a seller, meeting in good faith a competitor's lower price to certain customers, to forgo the profits that otherwise would be available in sales to its remaining customers. The very purpose of the defense is to permit a seller to treat different competitive situations differently."[8]

Furthermore, Section 2(b) "does not distinguish between one who meets a competitor's lower price to retain an old customer and one who meets a competitor's lower price in an attempt to gain new customers."[9]

And if a customer is being offered a price or allowance by a competitor, a seller may choose to meet that offer in full or only part-way. The Court specified that to establish the meeting competition defense, a "seller must show that . . . it was reasonable to believe that the quoted price *or a lower one* was available to the favored purchaser or purchasers from the seller's competitors."[10]

Finally, the Court held that a seller may meet competition on an areawide basis if it has a good faith belief that the competitive offer it is meeting is available to all customers in the area. The Court stated, "Congress intended to allow reasonable pricing responses on an area-specific basis where competitive circumstances warrant them."[11] As the Court saw it, "A single

[3] See Frederick M. Rowe, Price Discrimination Under the Robinson-Patman Act, 212-13 (1962); Wright Patman, Complete Guide to the Robinson-Patman Act, 89-100 (1963).

[4] 460 U.S. 438.

[5] 460 U.S. at 445. See also *Standard Oil Co. v. FTC,* 340 U.S. 231, 250 (1951).

[6] 460 U.S. at 449, (quoting 80 Cong. Rec. 9418 (1936) (remarks of Rep. Utterback)).

[7] *Id.* at 445, quoting *Standard Oil Co. v. FTC,* 340 U.S., at 250.

[8] 460 U.S. at 445.

[9] *Id.* at 446.

[10] *Id.* at 438, (emphasis added)).

[11] *Id.* at 448.

low price surely may be extended to numerous purchasers if the seller has a reasonable basis for believing that the competitor's lower price is available to them."[12] The Court observed, "A seller may have good reason to believe that a competitor or competitors are charging lower prices throughout a particular region."[13] What is required is a "showing that a reasonable and prudent businessman would believe that the lower price he charged was generally available from his competitors throughout the territory and throughout the period in which he made the lower price available."[14]

What a seller may not do is knowingly *beat* a competitive offer. The standard is one of "good faith." A seller, in "good faith," may meet, but not beat, an equally attractive or more attractive offer from a competitor for products of "like grade and quality." *Great Atl. & Pac. Tea Co. v. FTC.*[15] The Court in *Falls City* elaborated, quoting *Continental Baking Co.,*:[16] "'At the heart of Section 2(b) is the concept of "good faith." This is a flexible and pragmatic, not a technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.'"[17]

As the Court added, "In most situations, a showing of facts giving rise to a reasonable belief that equally low prices were available to the favored purchaser from a competitor will be sufficient to establish that the seller's lower price was offered in good faith to meet that price."[18]

But not always. For instance, if the competitive offer a customer asks a seller to match seems too good to be true, it is especially important for the seller to obtain proof from the customer that the offer really exists.

The Court explicitly contrasted *FTC v. A.E. Staley Mfg. Co.*,[19] a case upon which the court below relied, where the meeting competition defense inaptly had been raised against what amounted to a horizontal price fixing conspiracy claim. The Court in *Falls City* observed that in a situation like that, "despite the availability from other sellers of a low price, it may be apparent that the defendant's low offer was not a good-faith response."[20]

But bad faith rarely has been proved in litigation. As the Court said, "In most situations" a "reasonable belief" that lower prices are available from a competitor "will be sufficient" to establish good faith and "exonerates a seller from Robinson-Patman Act liability."[21]

Taken together, then, the *Falls City* roadmap disposes of many, if not most, of the scenarios in which a seller chooses to offer favorable prices to the most coveted customers. There are other defenses to Robinson-Patman claims, of course, including the availability defense, the cost justification defense, and the changing conditions defense, but none has had the same impact as the meeting competition defense. It is no mystery why there have been so few successful Robinson-Patman cases since *Falls City.* If there is to be a consequential revival of Robinson-Patman enforcement now, that initiative will need to find a route past Falls City.

[12] *Id.* at 448.
[13] *Id.* at 449.
[14] *Id.* at 451.
[15] 440 U.S. 69, 82-83 (1979).
[16] 63 F.T.C. 2071, 2163 (1963).
[17] 460 U.S. 428, 441.
[18] 460 U.S. at 439.
[19] 324 U.S. 746 (1945).
[20] 460 U.S. at 439.
[21] *Id.* at 438, 439.