

IN MY OPINION (I am not a lawyer.... and this is not legal advice. but I thought you'd want to know)

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In our discussion about Analyzing sellers cost's and the Total Cost of acquisition(TCA) in order to negotiate better pricing and a more complete contract, we should remember some of the tenets of the Robinson-Patman anti-trust act (Act). Basically the Act, makes pricing discrimination it illegal. Sellers can be cited under the Act when they limit competition by unfair pricing practices. Buyers may also be cited when the buyer induces unfair prices.

One exception would be, that the lower price is due to specific changes in the cost of the product or the sale. That is, if the buyer and seller agree on a lower price because the deal includes a commensurate cost savings to the seller – then the new price could be justified. This opens to the door to a valuable negotiation strategy for buyers.

That is, a buyer could say to the seller, "I want to find a way to reduce the total transaction cost (production and/or acquisition), so that we can reduce the price." Thus your sale to me is justifiably different than the sale you make to others. The negotiation principle; "Change the terms of the agreement to find additional opportunities" also works well to break a negotiation deadlock.

Here are some excerpts about the Robinson-Patman Act:

A speech by Donald S. Clark, Secretary, Federal Trade Commission

<http://www.ftc.gov/speeches/other/patman.shtm>

That leads us to a discussion of the specific provisions of the Robinson-Patman Act. I should first note that the Act requires allegedly discriminatory transactions to satisfy certain jurisdictional prerequisites before its substantive prohibitions apply. Earl Kintner, at one time the Chairman of the Commission, summarized these jurisdictional requirements in the following fashion:

In order to bring the substantive portions of the Act into play, there must be

1. two or more consummated sales,
2. reasonably close in point of time,
3. of commodities,
4. of like grade and quality,
5. with a difference in price,
6. by the same seller,
7. to two or more different purchasers,
8. for use, consumption, or resale within the United States or any territory thereof,
9. which may result in competitive injury. Furthermore,
10. the "commerce" requirement must be satisfied.¹¹

As I mentioned earlier, the Act contains a number of exceptions to the prohibitions embodied in section 2(a). First, section 2(a) itself contains a cost justification defense. It permits price differentials that "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which the commodities are "sold or delivered." **Thus, a seller may charge different prices to different purchasers where "justified by savings in the seller's costs of manufacture, delivery or sale."**³⁵ If properly interpreted, this exception can ensure that the Act prohibits only price differences that are discriminatory in an economic sense. ³⁶ It is not easy to establish this defense in the usual case, however; as the Supreme Court noted in *Texaco v. Hasbrouck*, a defendant typically must establish through "rigorous accounting" that the price differential at issue precisely equals the additional costs it incurs in selling to the plaintiff.³⁷ Second, section 2(a) **permits price differences due to "changing conditions affecting the market for or marketability of the goods concerned," such as the deterioration of perishable goods, the obsolescence of seasonal goods, distress sales under court process, or "going out of business" sales.**

Third, section 2(a) permits price differences that represent a good faith effort to meet the competition of one or more other firms. As you might expect, it has not been easy to define the precise contours of this defense. However, the essential principle is that **firms should be able to lower their prices, in order to match the prices of their rivals, without violating section 2(a).** The Supreme Court has said that the standard is whether the

seller can show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would, in fact, meet the equally low price of a competitor. 38

Section 2(f) of the Act applies these same principles to the conduct of buyers, by making it unlawful for a buyer "knowingly to induce or receive a discrimination in price" prohibited by other parts of the Act. As a threshold matter, liability does not attach unless the buyer knew or should have known that the discrimination it induced or received was an illegal discrimination. 44 Moreover, buyer liability under Section 2(f) is completely derivative of seller liability under Section 2(a). The injury to competition requirements of Section 2(a) therefore apply to Section 2(f) as well, so that secondary line competitive injury may be rebuttably inferred from "substantial price discrimination between competing purchasers over time." 45 However, a buyer cannot be found liable under Section 2(f) unless a price discrimination that violates Section 2(a) can be established, and the meeting competition, cost justification, and changed conditions defenses cannot be sustained

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<http://www.law.cornell.edu/uscode/text/15/13>

(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 or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of 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: