

COMMENT

BUYER LIABILITY FOR INDUCING OR RECEIVING DISCRIMINATORY PRICES, TERMS, AND PROMOTIONAL ALLOWANCES: CAVEAT EMPTOR IN THE 1970's*

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A prime concern of purchasing managers and others responsible for procuring supplies and merchandise for business enterprises is, or should be, the possibility of incurring liability under federal law for inducing or receiving discriminatory and presumably more favorable prices, terms or conditions of sale, or promotional allowances than are available to the competition. The main source of this liability is section 2(f) of the price discrimination statute commonly referred to as the Robinson-Patman Act.¹ The purpose of this Comment is to review the basic elements of buyer liability under section 2(f) and to recount some recent developments that should be of concern to those engaged in purchasing. Advice will be offered that hopefully will help those involved in such activities avoid financial liability to aggrieved competitors or even suppliers and, equally important if not more so, restrictive Federal Trade Commission cease and desist orders.

The Federal Trade Commission is the federal agency principally responsible for government enforcement of the Robinson-Patman Act²—or, as it is more properly designated, section 2 of

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¹15 U.S.C. § 13(f) (1970) [hereinafter referred to as the Act].

²*Id.* § 21. Certain specified federal administrative agencies are authorized to enforce compliance with the substantive provisions of the Clayton Act by enterprises within their respective jurisdictions. Section 15 of the Clayton Antitrust Act, *id.* § 25, charges the United States Department of Justice with the duty of instituting equity proceedings to prevent and restrain violations of the antitrust laws, including the Robinson-Patman Act. See United States

the Clayton Antitrust Act as amended by the Robinson-Patman Act.³ Although the prime source of buyer liability for inducing or receiving favorable treatment is section 2(f) of the Robinson-Patman Act, this section is not exclusive. Purchasers can also incur liability under section 2(c) of the Act⁴ and section 5 of the Federal Trade Commission Act.⁵ While section 5 is undoubtedly best known as the statutory basis for FTC attacks on deceptive

v. Borden Co., 347 U.S. 514, 518 (1954). Criminal enforcement of the anti-trust laws, including section 3 of the Robinson-Patman Act, is the exclusive province of the Department of Justice. 15 U.S.C. §§ 4, 24 (1970); 18 U.S.C. § 4 (1970). See *United States v. Wise*, 370 U.S. 405 (1962); 16I J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATIONS, §§ 70.01, 80.02, 80.05 [1] (1972) [hereinafter cited as J. VON KALINOWSKI]. For discussion of how the FTC and the Department of Justice resolve the conflicts inherent in this concurrent jurisdiction, see ABA, ANTITRUST DEVELOPMENTS 1955-1968, at 271-74 (1968) [hereinafter cited as ABA, ANTITRUST DEVELOPMENTS]; D. BAUM, THE ROBINSON-PATMAN ACT, SUMMARY AND COMMENT 111-13 (1964); 1 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 83-86 (1973); A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 373-95 (2d ed. 1970); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 374-77 (1955) [hereinafter cited as 1955 REPORT].

³15 U.S.C. §§ 12-27 (1970).

⁴*Id.* § 13(c).

⁵*Id.* § 45(a). [The Federal Trade Commission hereinafter will be referred to as the FTC or the Commission.] This is not an exhaustive litany of federal statutes which can be the basis of buyer liability. The seldom invoked criminal provisions of section 3 of the Robinson-Patman Act, *id.* § 13a, which parallel and largely duplicate the civil sanctions of section 2, on their face appear to apply to buyers as well as to sellers. However, the actual application of section 3 to buyers has not been thoroughly tested in the courts, and Frederick M. Rowe, a foremost Robinson-Patman Act scholar, posits that section 3 is limited to sellers. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 459-60 (1962). Rowe's hypothesis is at least tangentially supported by the enforcement history of section 3. The Justice Department has been reluctant to invoke the sanction against buyers, perhaps because of some serious doubts as to the constitutionality of the provision. For example, in the proceedings reported in *United States v. Bowman Dairy Co.*, 1948-1949 Trade Cas. ¶ 62,403 (N.D. Ill. 1949), only the dairy product sellers and not the chain store buyers were indicted under section 3. The Justice Department did indict the purchasing dairy as well as the selling cooperative under section 3 in *United States v. Maryland & Virginia Milk Producers Ass'n*, 151 F. Supp. 438 (D.D.C. 1957), but the indictment was voluntarily dismissed prior to trial. In *United States v. H.P. Hood & Sons*, 1963 Trade Cas. ¶ 70,728 (D. Mass. 1963), the buyer and the seller were charged with violating sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-11 (1970), but only the seller was charged with violating section 3 of the Robinson-Patman Act. Both defendants were acquitted on March 19, 1965. ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 156 n.5.

and misleading advertising,⁶ its proscription against "unfair methods of competition" has been utilized by the FTC to fill a serious gap in the regulatory scheme established by the Robinson-Patman Act. This gap and the FTC's use of section 5 to fill it will be considered more fully in the ensuing discussion.⁷

The *Report of the Attorney General's National Committee to Study the Antitrust Laws*, *supra*, note 2, characterized section 3 of the Robinson-Patman Act as "dangerous surplusage" and, in urging repeal, observed that "doubts besetting section 3's constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law. It does not serve the public interest of antitrust policy." *Id.* at 201 (footnote omitted). The constitutionality issue was resolved in part in *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 33 (1963), in which the third of the three substantive clauses of section 3 (unreasonably low prices) was held "constitutional as applied."

Section 3 rarely has been invoked since 1958, when the Supreme Court, in *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958), held that it was not an "antitrust law" within the meaning of section 1 of the Clayton Antitrust Act, 15 U.S.C. § 12 (1970). A finding that section 3 was an "antitrust law" would have permitted private victims to secure treble damage redress. A treble damage action will lie, however, when conduct proscribed by section 3 also violates section 2. *Englander Motors, Inc. v. Ford Motor Co.*, 186 F. Supp. 82, 84 (N.D. Ohio 1960), *aff'd*, 293 F.2d 802 (6th Cir. 1961). For general discussion of section 3 of the Robinson-Patman Act, see ABA ANTI-TRUST DEVELOPMENTS, *supra* note 2, at 155-56; D. BAUM, *supra* note 2, at 74-76; 1 M. HANDLER, *supra* note 2, at 304-08; E. KINTNER, A ROBINSON-PATMAN PRIMER 266-80 (1970); 1955 REPORT, *supra* note 2, at 198-201; F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 452-75 (1962); *id.* at 112-17 (Supp. 1964); 16D J. VON KALINOWSKI ch. 37.

There is no question but that discriminatory pricing and related practices, including abuse of power by large and aggressive buyers, can result in civil liability under the Sherman Act. *See, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Buyers inducing or coercing secret price discriminations have been successfully prosecuted on criminal charges brought under the Sherman Act. *See, e.g., United States v. New York Great A. & P. Tea Co.*, 67 F. Supp. 626, 676 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949). A buyer inducing or receiving price or related commercial discriminations might also violate the myriad of state law applicable to price discriminations. For a general survey of state law in this area, see, 1 TRADE REG. REP. ¶¶ 3510-96 (1974); F. ROWE, *supra*, § 3.6.

⁶The cases and literature on deceptive advertising are legion. However, a brief bibliography of the FTC's efforts against such practices must include: E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES (1971); E. KINTNER, AN ANTITRUST PRIMER 115-23, 142-49, 164-203 (2d ed. 1973); S. OPPENHEIM, UNFAIR TRADE PRACTICES 352-404 (2d ed. 1965); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964).

⁷*See* text accompanying notes 34-41 *infra*. The FTC has also utilized section 5 to "bolster" and "supplement" the Sherman Act, which is not specifically enforced by the Commission, and sections 3 and 7 of the Clayton

The location of the Robinson-Patman Act in the spectrum of federal statutes regulating competition is significant. As an amendment to the Clayton Act, section 2 is deemed an "antitrust law" within the meaning of section 1 of the Act⁸ and the prohibitions against price and other related forms of commercial discrimination can be enforced by the private treble damage suits familiar to all.⁹ Although not many private suits which significantly involved the buyer liability provisions of the Robinson-Patman Act have been brought—up to now, less than a dozen mostly unsuccess-

Act, 15 U.S.C. §§ 14, 18 (1970), which is. *See, e.g.*, *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394 (1953); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1940); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 14 (7th Cir. 1971); *Beatrice Foods Co.*, 67 F.T.C. 473 (1965). In *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972), the Supreme Court gave an affirmative answer to the two-fold question whether section 5 empowers the FTC to "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws," and to "proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition." For consideration of section 5 as an "antitrust law," see ABA, *ANTITRUST DEVELOPMENTS*, *supra* note 2, at 252-59, and authorities cited in M. HANDLER, *TRADE REGULATION* 1310-11 (4th ed. 1968); S. OPPENHEIM & G. WESTON, *FEDERAL ANTITRUST LAWS* 621-40 (3d ed. 1968). Using section 5 to fill regulatory gaps in other antitrust laws has not gone uncriticized. *See, e.g.*, 1 M. HANDLER, *supra* note 2, at 67-68, 420-31, 665-77; 2 *id.* at 1030-43; Alexander, *Section 5 of the Federal Trade Commission Act, a Deus ex Machina in the Tragic Interpretation of the Robinson-Patman Act*, 12 SYRACUSE L. REV. 317 (1961); Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act With the Sherman and Clayton Acts*, 59 MICH. L. REV. 821, 851 (1961).

⁸15 U.S.C. § 12 (1970).

⁹Such suits are authorized by section 4 of the Clayton Act. *Id.* § 15. Injunctive relief is also available to private plaintiffs for Robinson-Patman Act violations. *Id.* § 26. For discussion of the procedures, problems and intricacies of private enforcement of the antitrust laws, see ABA, *ANTITRUST DEVELOPMENTS*, *supra* note 2, at 274-310; C. AUSTIN, *PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT* 171-74 (2d rev. ed. 1959); A. NEALE, *supra* note 2, at 395-400; 1955 REPORT, *supra* note 2, at 378-85; F. ROWE, *supra* note 5, at 524-33; 16L J. VON KALINOWSKI chs. 99-103. For conflicting views as to the proper measure of damages in Robinson-Patman Act cases, compare *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); and *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), with *Enterprise Indus., Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1956). *See generally* 2 M. HANDLER, *supra* note 2, at 896-902; Comment, *Damages Under the Robinson-Patman Act*, 31 MD. L. REV. 60 (1970).

ful or at best partially successful have appeared in the law reports¹⁰—this sanction is not a dead letter and purchasers can ignore it only at their peril.¹¹ As the FTC steps up enforcement of the Robinson-Patman Act against what former FTC Chairman Miles W. Kirkpatrick and others have characterized as “power buyer abuses,”¹² it is quite likely that more private actions will be brought. Rather than proceeding against the sellers who have been the usual targets of FTC prosecutions, the Commission is now likely to file complaints against buyers who are dominant in unbalanced power situations.¹³ Chairman Kirkpatrick’s legacy to the

¹⁰Texas Gulf Sulphur Co. v. J.R. Simplot Co., 418 F.2d 793 (9th Cir. 1969); Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969); Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916 (5th Cir. 1962); State Wholesale Grocers v. Great A. & P. Tea Co., 154 F. Supp. 471 (N.D. Ill. 1957), *rev'd*, 258 F.2d 831 (7th Cir. 1958); Kapiolani Motors, Ltd. v. General Motors Corp., 337 F. Supp. 102 (D. Hawaii 1972); Metropolitan Dry Cleaning Mach. Co. v. Washex Mach. Corp., 1969 Trade Cas. ¶ 72,686 (E.D.N.Y. 1968); Big Value Stamp Co. v. Sperry & Hutchinson Co., 1967 Trade Cas. ¶ 71,978 (S.D. Ohio 1967); Rosenfeld Co. v. Lion Mfg. Corp., 1961 Trade Cas. ¶ 69,937 (N.D. Ill. 1961); Robinson v. Stanley Home Prods., Inc., 178 F. Supp. 230 (D. Mass.), *aff'd on other grounds*, 272 F.2d 601 (1st Cir. 1959); Robinson v. Stanley Home Prods., Inc., 174 F. Supp. 414 (D.N.J. 1959); Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230 (D.N.J. 1956). The “partially successful” reference is to cases, such as *Krug*, in which the adequacy of the section 2(f) complaint was tested by a motion to dismiss rather than by a consideration of plaintiff’s evidence in support of the allegations.

¹¹This caveat assumes purchases of commodities in interstate commerce, as the Act encompasses only such transactions. The jurisdictional elements of a Robinson-Patman violation will be expanded upon below. See text accompanying notes 108-12 *infra*. See generally Comment, *The Interstate Commerce Requirement of Section 2(a) of the Robinson-Patman Act*, 44 U. COLO. L. REV. 607 (1973); Note, *Commerce Requirement of the Robinson-Patman Act*, 22 HASTINGS L. REV. 1245 (1971).

¹²Address by Miles W. Kirkpatrick, Antitrust Law Section of the New York State Bar Association, January 28, 1971. See also Address by Basil J. Mezines, Executive Director, FTC, Automobile Warehouse Distributor Association, March 6, 1973; Address by Lawrence G. Meyer, Director, Office of Policy Planning and Evaluation, FTC, Annual Meeting of the State Bar of Texas, July 1, 1971.

¹³An interesting variation of the power buyer theme was tried—and rejected in *Mark Plastic Prods., Inc. v. Exxon Corp.*, 1973-2 Trade Cas. ¶ 74,784 (E.D. Mich. 1973), in which plaintiff urged, in support of its motion to dismiss a section 2(f) counterclaim, that the provision only applied “to a dominant buyer using his dominant economic power to force a seller to sell at discriminatory prices.” *Id.* at 95,492. For general observations on power buying, see Applebaum, *Fundamentals of Buyer’s Violation Under Robinson-Patman Act*, 39 ANTITRUST L.J. 869 (1970); Scher, *New Directions in Buyer’s Liability Under the Robinson-Patman Act*, 39 ANTITRUST L.J. 884 (1970).

business community is, for better or for worse, an activist FTC. It is still too early to predict whether the Commission will change directions under its new chairman, Lewis A. Engman, but it seems doubtful that it will retreat to the semicomatous state that gave rise to the well-deserved sobriquet: "The Old Lady of Pennsylvania Avenue."¹⁴

Stepped up Robinson-Patman Act enforcement by the FTC is likely to result in an increase in private treble damage actions, given congressional emphasis on the so-called "private attorney general." To complement the enforcement functions of the FTC and the Department of Justice, Congress specifically provided in section 5(a) of the Clayton Act¹⁵ that a final "judgment" or "decree" obtained in a government antitrust prosecution, including an FTC order under the Robinson-Patman Act,¹⁶ could be used as prima facie evidence of a defendant's "transgressions" in a treble damage suit brought by a private plaintiff. This does not mean that the plaintiff automatically prevails, but it does ease his task, inasmuch as the Government has already done most of the work.¹⁷ Further,

¹⁴The FTC has had more than its share of criticism—some balanced, some biased. Inefficiency and a lack of goals and directions seem to be the common themes of the analyses. See, e.g., E. COX, R. FELLMETH & J. SCHULZ, NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969); REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969) (chaired by Mr. Kirkpatrick); Symposium, *The Fiftieth Anniversary of the Federal Trade Commission*, 64 COLUM. L. REV. 385 (1964). For a position questioning the need for the FTC, see Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969). For varied analysis of FTC developments since 1969, see Symposium, *The FTC: Revitalized or Repackaged*, 41 ANTITRUST L.J. 453 (1972).

It should be noted that since this speech was delivered, Lewis A. Engman has demonstrated an interest in a vital and active FTC, although his objectives differ from those of his predecessor. See, e.g., the emphasis on the line-of-business report program of the FTC, 5 TRADE REG. REP. ¶ 50,204 (1974), and Mr. Engman's speech on antitrust and the energy crisis to the Antitrust Section of the State Bar of Michigan on February 15, 1974, reprinted at 5 TRADE REG. REP. ¶ 50,200 (1974).

¹⁵U.S.C. § 16(a) (1970). See *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951).

¹⁶*Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 299 F. Supp. 1043 (D. Me. 1967), *aff'd*, 421 F.2d 61 (1st Cir. 1970); *Purex Corp. v. Proctor & Gamble Co.*, 308 F. Supp. 584 (C.D. Cal. 1970). However, there is some authority that an order in a section 5 proceeding is not entitled to prima facie effect. *In re Coordinated Pretrial Proceedings in Antitrust Actions*, 333 F. Supp. 317 (S.D.N.Y. 1971). Cf. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958).

¹⁷Consent decrees entered before testimony is taken and decrees or judgments in government damage suits brought under section 4A of the Clayton

section 5(b) of the Clayton Act¹⁸ reduces time pressures on injured plaintiffs by tolling the running of the four-year statute of limitations during, and for one year following, a government prosecution.¹⁹ Competitors who did not receive the favored treatment or a losing bidder who might have secured business but for an illegal price discrimination occasioned by a competitor's illegal conduct should provide a substantial class of potential plaintiffs interested in bringing such private suits.²⁰

Although the importance of treble damage litigation in the scheme of Robinson-Patman Act enforcement cannot be over-emphasized—a judgment of three times the amount of damages suffered by an aggrieved plaintiff plus costs and attorneys' fees is a significant deterrent to violations—the buyer liability provisions of the Act will generally be enforced by the FTC in pro-

Act, 15 U.S.C. § 15(a) (1970), are specifically excluded from section 5(a). See generally ABA ANTITRUST DEVELOPMENTS, *supra* note 2, at 294-99; E. KINTNER, AN ANTITRUST PRIMER 152-53 (2d ed. 1973); Simon, *The Private Litigant and Prior Government Judgments or Decrees*, 7 ANTITRUST BULL. 27 (1962); Timberlake, *Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N.Y.U.L. REV. 991 (1961). Admittedly, the private plaintiff has not always been aided by section 5(a). See H. BLAKE & R. PITOFKY, CASES AND MATERIALS ON ANTITRUST LAW 1374-75 (1967).

¹⁸15 U.S.C. § 16(b) (1970).

¹⁹In fact, section 5(b) tolls the statute even when the judgment or decree could not be utilized as *prima facie* evidence under section 5(a) because of differences in issues or because the government failed in its prosecution. *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 316-21 (1965). Perhaps the two provisions should be characterized as "fraternal" rather than "identical" twins, expressing congressional intent to permit private plaintiffs to cull maximum benefits from prior government actions. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 66 (1st Cir. 1969). Prior to the adoption of the four year antitrust statute of limitations in 1955, 15 U.S.C. § 15(b) (1970), federal courts looked to the law of the forum state to determine the statute of limitations. See, e.g., *Chatanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906); *Schiffman Bros., Inc. v. Texas Co.*, 196 F.2d 695 (7th Cir. 1952). For general discussion of statute of limitations problems, see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 286-90; 2 M. HANDLER, *supra* note 2, at 964-76; E. KINTNER, AN ANTITRUST PRIMER 152-54 (2d ed. 1973); F. ROWE, *supra* note 5, at 524-26; 16L J. VON KALINOWSKI ch. 103.

²⁰The key to standing to bring a private antitrust action is injury to plaintiff's "business or property by reason of anything forbidden in the antitrust laws . . ." 15 U.S.C. § 15 (1970). See generally ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 279-84; E. KINTNER, AN ANTITRUST PRIMER 150-52 (2d ed. 1973); F. ROWE, *supra* note 5, at 524-28; *id.* at 164 (Supp. 1964); 16L J. VON KALINOWSKI ch. 101.

ceedings seeking cease and desist orders.²¹ At the present time the FTC is the only agency enforcing the restraints on business conduct imposed by section 5 of the FTC Act.²² However, there have been proposals in recent sessions of Congress to make section 5 violations actionable in private damage or injunction suits.²³ This could be accomplished in several ways. Section 5 itself could be amended to authorize private suits; a federal consumer protection act incorporating the substantive provisions of section 5 and providing for private enforcement could be adopted; or, unlikely but not impossible, section 1 of the Clayton Act²⁴ could be amended to include the FTC Act as an "antitrust law" enforceable by treble damage actions.²⁵ It is also conceivable that a federal court might

²¹15 U.S.C. § 21 (1970). See note 2 *supra*. The authority of the FTC to formulate remedial orders under the Robinson-Patman Act is quite extensive and the Commission is not limited to entering orders directed only to specific violations found to exist. *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 681-82 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965). The reason for the rule is simple. A restricted or limited order could be circumvented easily. However, the authority of the FTC is not unlimited and the cease and desist order must be warranted by the underlying record in the case. *FTC v. Henry Brock & Co.*, 368 U.S. 360, 366 (1962). See generally ABA, *ANTITRUST DEVELOPMENTS*, *supra* note 2, at 259-66; C. AUSTIN, *supra* note 9, at 167-71; D. BAUM, *supra* note 2, at 92-109; F. ROWE, *supra* note 5, at 504-14; Kintner, *Scope of Federal Trade Commission Orders in Price Discrimination Cases*, 14 *BUS. LAW.* 1053 (1959).

²²15 U.S.C. § 45(b).

²³See, e.g., H.R. 5986, 92d Cong., 1st Sess. (1971); H.R. 5368, 92d Cong., 1st Sess. (1971); H.R. 1078, 92d Cong., 1st Sess. (1971); H.R. 14931, 91st Cong., 1st Sess. (1969); H.R. 14585, 91st Cong., 1st Sess. (1969); S. 1823, 92d Cong., 1st Sess. (1971); S. 1378, 92d Cong., 1st Sess. (1971); S. 3201, 91st Cong., 1st Sess. (1969); S. 3092, 91st Cong., 1st Sess. (1969). See generally Eckhardt, *Consumer Class Actions*, 45 *NOTRE DAME LAW.* 663 (1970); Note, *An Act to Prohibit Unfair and Deceptive Trade Practices*, 7 *HARV. J. LEGIS.* 122, 147 (1969).

²⁴15 U.S.C. § 12 (1970). In *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958), the Supreme Court held that the definition of antitrust laws in section 1 is exclusive.

²⁵Designating the FTC Act as an antitrust law or authorizing private section 5 suits might well be desirable if the provision were limited to conduct cognizable under other antitrust laws but, as Judge Harold Leventhal of the District of Columbia Circuit Court of Appeals pointed out in *Holloway v. Bristol-Myers Corp.*, 1973-2 *Trade Cas.* ¶ 74,623 (D.C. Cir. 1973), in denying a private cause of action for allegedly deceptive nonprescription analgesic advertising, the flexibility inherent in FTC enforcement of section 5 in the sphere of advertising and the vagueness of the substantive provisions are incompatible with private enforcement. *Id.* at 94,757-59. Judge Leventhal's opinion is an excellent survey of the legislative history of section 5 as

hold that a violation of federal regulatory legislation such as the FTC Act automatically supports a tort damage suit. Decisions under federal securities laws and other federal statutes would furnish ample precedent for such a ruling,²⁶ but the courts so far have uniformly held that a section 5 violation does not give rise to a private cause of action.²⁷

There is a bit of irony in the FTC's recent shift of Robinson-Patman emphasis from sellers to buyers. The Act was passed by Congress in 1936²⁸ as an amendment to section 2 of the Clayton Act of 1914. The original provision had been directed at localized price cutting by monopolistic sellers intending to force their competitors out of business.²⁹ The earlier provision was not intended

adopted and the 1938 Wheeler-Lea Amendments, 52 Stat. 111 (1938). As pointed out in Van Cise, Scher & Weil, *The Use and Expansion of Section 5 of the Federal Trade Commission Act*, BUS. LAW., Mar. 1973, at 61, 72-73 (special issue), the FTC has not utilized section 5 to attack discriminatory arrangements entirely without the ambit of the Robinson-Patman Act. See *Grand Union Co. v. FTC*, 300 F.2d 92, 95-96 (2d Cir. 1962), and text accompanying notes 163-65 *infra*. However, it is too early to tell if the broad reading of section 5 in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), will have any impact here.

²⁶See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1963); *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499, 501 (2d Cir. 1956). Judge Gus J. Solomon, in his dissent in *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 281 (9th Cir. 1973), argued that section 5 did in fact create a private remedy for unfair or deceptive acts or practices. See generally Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271 (1971); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Note, *A Private Right of Action Under Section 5 of the Federal Trade Commission Act*, 22 HASTINGS L. REV. 1268 (1971).

²⁷*Moore v. New York Cotton Exchange*, 270 U.S. 593, 603 (1926); *Holloway v. Bristol-Myers Corp.*, 327 F. Supp. 17 (D.D.C. 1971), *aff'd*, 1973-2 Trade Cas. ¶ 74,623 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 318 F. Supp. 785 (N.D. Cal. 1970), *aff'd*, 483 F.2d 279 (9th Cir. 1973); *Frederick Chusid Co. v. Marshall Leeman & Co.*, 326 F. Supp. 1043, 1063 (S.D.N.Y. 1971); *LaSalle St. Press, Inc. v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004, 1006 (N.D. Ill. 1968); *Smith-Victor Corp. v. Sylvania Elec. Prods., Inc.*, 242 F. Supp. 302, 306 (N.D. Ill. 1965); *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 118 F. Supp. 251, 254 (D. Pa. 1953), *rev'd on other grounds*, 214 F.2d 649 (3d Cir. 1954); *Samson Crane Co. v. Union Nat'l Sales Inc.*, 87 F. Supp. 218, 221 (D. Mass. 1949); *National Fruit Prod. Co. v. Dwinell-Wright Co.*, 47 F. Supp. 499, 504 (D. Mass. 1942); *Atlantic Brick Co. v. O'Neal*, 44 F. Supp. 39, 41 (D. Tex. 1942).

²⁸49 Stat. 1526 (1936).

²⁹F. ROWE, *supra* note 5, § 1.2, at 6. For the background and legislative history of the Robinson-Patman Act, see D. BAUM, *supra* note 2, at 1-5; C. EDWARDS, *THE PRICE DISCRIMINATION LAW* 1-28 (1959); A. NEALE, *supra*

to combat price coercion on sellers by large volume customers such as the food chain stores. Consequently, it was totally inadequate when the nature of the problem changed between 1914, when the Clayton Act was adopted, and 1936.³⁰ The genesis of the Robinson-Patman Amendment was the power buyer abuses of the late 1920's and early 1930's. Buyer abuse was the problem, and Congress' primary answer was legislation making it illegal for sellers to grant discriminatory prices or more favorable promotional allowances to selected customers. This anomaly of ending buyer abuse by attacking sellers has been rationalized by some commentators who noted that Congress, in 1936, had serious doubts as to its constitutional power to prohibit a buyer from inducing or receiving favorable price discriminations.³¹ In any event, this anomaly is not inappropriate in a rather confusing and turgid piece of federal legislation. Courts have read words out of certain provisions of this statute and have read words into other provisions in which Congress, perhaps studiously, perhaps not, omitted them.³² All this has been done in the name of trying to achieve a consistent regulatory scheme. If, as Ralph Waldo Emerson opined in an essay on self-reliance, "a foolish consistency is the hobgoblin of little

note 2, at 225-29; F. ROWE, *supra* note 5, §§ 1.1-1.7, 14.1, & pp. 559-620; 16B J. VON KALINOWSKI chs. 21-22.

³⁰The original language of section 2, 38 Stat. 730 (1914), appeared to bar price discriminations prejudicial to competition on the customer level, but court decisions in the 1920's restricted it to seller or primary line competition. *E.g.*, National Biscuit Co. v. FTC, 299 F. 733 (2d Cir. 1924); Mennen Co. v. FTC, 288 F. 774 (2d Cir. 1923). Even the Supreme Court, in *George Van Camp & Sons v. American Can Co.*, 278 U.S. 245 (1929), repudiating the restrictive interpretation of section 2, did not revitalize it vis-à-vis chain stores because the provision unconditionally exempted price differentials made "on account of differences in the grade, quantity or quality of the commodity sold." This quantity discount exemption gave chain stores, in Rowe's words, "carte blanche for unlimited purchasing advantages which the FTC felt powerless to check with the legal safeguards of section 2 of the original Clayton Act." F. ROWE, *supra* note 5, § 1.2, at 7. See *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620 (6th Cir. 1939).

³¹*Cf.* *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1 (1927). See generally F. ROWE, *supra* note 5, § 14.1.

³²Compare the interpretation of the section 2(c) brokerage provision in *Webb-Crawford Co. v. FTC*, 109 F.2d 268 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940), with the interpretations of the section 2(b) meeting competition defense in *Exquisite Form Brassiere Co. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962), and the section 2(d) promotional allowance provision in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). *Cf.* *FTC v. Henry Brock & Co.*, 363 U.S. 166 (1960); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65-66 (1959); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 993 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945).

minds, adored by little statesmen and philosophers and divines,"³³ this country was blessed with an impressive Congress in 1936. Of course, the operating words of this observation are a "foolish consistency," and this author suspects that some consistency in the statutory language of the Robinson-Patman Act would not have been particularly foolish.

The emphasis on sellers in the bill which ultimately became the Act was such that the key buyer liability provision, section 2(f), was added as an afterthought during Senate debates.³⁴ Since the substance of section 2(f) came from another bill, it is likely that Congress simply did not realize that language³⁵ prohibiting buyers from inducing or receiving prices more favorable than those paid by competitors would not apply to buyer-induced discriminatory promotional allowances or services not amounting to indirect price discriminations. Although sellers could not lawfully grant such discriminatory allowances under other provisions of the Robinson-Patman Act, buyers, it seems, were not precluded unless their violations rose to the level of indirect price discriminations. This is the regulatory gap that has been filled by section 5 of the FTC Act.³⁶ However, some courts have read the Robinson-Patman Act rather expansively and it would not be surprising to see section 2(f) construed to cover discriminatory promotional allowances as well as discriminatory prices, since discriminatory promotional allowances are really just extreme indirect price discriminations.³⁷ This, in turn, would be a change of great significance

³³Emerson, *Essays—First Series: Self Reliance*, in BARTLETT'S FAMILIAR QUOTATIONS 606a (14th ed. 1968).

³⁴The provision originated in a bill introduced by Senator Copeland, S. 4024, 74th Cong., 2d Sess. (1936). See C. EDWARDS, *supra* note 29, at 45-46; F. ROWE, *supra* note 5, § 14.1, at 423-25.

³⁵Section 2(f) of the Robinson-Patman Act is set out at note 44 *infra*.

³⁶The Supreme Court, in *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 73 n.14 (1953), expressly left open the question of the applicability of section 2(f) to buyer-induced violations of section 2(d) and 2(e) of the Act. The Commission did not pursue the issue but rather turned to the general prohibitions of section 5. See, e.g., *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962); *Giant Food Inc. v. FTC*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963). See generally F. ROWE, *supra* note 5, § 14.5; 16D J. VON KALINOWSKI § 36.02[1]. For a discussion of specific section 5 cases, see text accompanying notes 163-65 *infra*. For criticism of the technique, see authorities cited note 7 *supra*.

³⁷See *Fred Meyer, Inc. v. FTC*, 359 F.2d 351, 362 (9th Cir. 1966); *cf. Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 990, 993 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); C. AUSTIN, *supra* note 9, at 126.

as far as private damage suits are concerned, unless FTC Act violations are made actionable in private litigation by Congress or the courts.³⁸ It would, however, have minimal impact on FTC enforcement since the Commission and the courts apply basically the same criteria when enforcing sections 5 and 2(f)³⁹ and the remedy, a cease and desist order, is the same.⁴⁰ Of course, FTC cease and desist orders cannot be taken lightly. The penalty for violating such an order is a civil penalty of up to \$5000 for each violation, with each day of a continuing violation deemed a separate offense.⁴¹

Many economists and scholars have urged drastic revision of the Robinson-Patman Act, if not repeal in toto.⁴² Generally,

This result would be a return to an earlier view of the scope of section 2(f). For FTC proceedings and private cases attacking beneficiaries of promotional or advertising allowances under section 2(f), see 16D J. VON KALINOWSKI § 36.02[1], at n.15. The rationale was rejected by the Commission in *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962), notwithstanding that, the Second Circuit, in affirming the use of section 5, noted that the omission of buyers from sections 2(d) and 2(e) was probably more inadvertent than studious. *Id.* at 96.

³⁸See text accompanying notes 23-27 *supra*.

³⁹See, e.g., *Grand Union Co. v. FTC*, 300 F.2d 92, 96, 100 (2d Cir. 1962); *Giant Food, Inc. v. FTC*, 307 F.2d 184, 187 (D.C. Cir. 1962). See generally F. ROWE, *supra* note 5, § 14.5; 16D J. VON KALINOWSKI § 36.02[1], at 36-23 to 36-34.

⁴⁰15 U.S.C. §§ 21(b) [Robinson-Patman Act], 45(b) [FTC Act] (1970).

⁴¹*Id.* §§ 21(1) [Robinson-Patman Act], 45(1) [FTC Act].

⁴²The literature is encyclopedic. See, e.g., C. EDWARDS, *supra* note 29, at 617-35, 646-56; M. HANDLER, *TRADE REGULATION* 1131-48 (4th ed. 1967); Austin, *Isn't Thirty Years Enough?*, 30 A.B.A. ANTITRUST SECTION 18 (1966); Backman, *An Economist Looks at the Robinson-Patman Act*, 17 A.B.A. ANTITRUST SECTION 343 (1960); Levi, *The Robinson-Patman Act—Is It In the Public Interest?*, 1 A.B.A. ANTITRUST SECTION 60 (1952); Rowe, *The Robinson-Patman Act—Thirty Years Thereafter*, 30 A.B.A. ANTITRUST SECTION 9 (1966). As Rowe pointed out in his remarks at the 1966 Spring Meeting of the American Bar Association Antitrust Section, *id.* at 10-11: "Today criticism of the Act's enforcement is mounting. The sleek indignation of *Fortune Magazine* [Editorial, *Antitrust: The Sacred Cow Needs A Vet*, FORTUNE, Nov. 1962, at 104-06] is matched by the hairy outrage of *The New Republic*, no less, at the FTC's Robinson-Patman 'attack' on small businessmen who form co-ops. [Ridgeway, *Out of Business—By FTC Order*, THE NEW REPUBLIC, Feb. 12, 1966 at 13]." The Act is not without defenders but even they tend to recognize the need for administrative changes. See, e.g., Loughlen, *The Little Statute that Ran Away*, 56 A.B.A.J. 681 (1970), Van Cise, *No, Thirty Years Are Not Enough*, 30 A.B.A. ANTITRUST SECTION 28 (1966).

they argue that the statute imposes restraints on price bargaining alien, or supposedly alien, to our competitive economy. In other words, it is anticompetitive in spirit. Nonetheless, it is unlikely that repeal or revision is in the offing, and thus it is necessary for practitioners and purchasers to become familiar with the basic provisions of the Act and the judicial gloss which has been placed on these provisions over the past thirty-eight years.⁴³

Basically, section 2(f) prohibits a buyer from knowingly inducing or receiving a price reduction or discount that would cause the seller to violate section 2(a) of the Act.⁴⁴ Thus, section 2(f) liability is almost exclusively derivative in nature. "Almost" is used advisedly since in *Kroger Co. v. FTC*,⁴⁵ the United States Court of Appeals for the Sixth Circuit affirmed and enforced an FTC order⁴⁶ holding that Kroger violated section 2(f) when it induced Beatrice Food Company, by *falsely* claiming receipt of lower bids from Beatrice's competitors, to sell fluid milk and cottage cheese at prices lower than prices charged other customers.⁴⁷ Beatrice, however, was absolved from section 2(a) liability because the prices it had quoted Kroger were offered in good faith to meet what it thought were the equally low prices of competitors.⁴⁸ Thus, Beatrice was successful in establishing the "good faith meeting competition" defense of section 2(b) of the Act.⁴⁹ There was no

⁴³Even the astute and prolific Robinson-Patman critic Professor Milton Handler, *see, e.g.*, 1 M. HANDLER, *supra* note 2, at 431-42, concedes this point while noting that the "good fight" to bring rhyme and reason to the statute must continue. *Id.* at 133.

⁴⁴15 U.S.C. § 13(f) (1970). Section 2(f) reads: "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.

⁴⁵438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). Retired Supreme Court Justice Tom Clark wrote the opinion. The case was noted in 40 U. CIN. L. REV. 632 (1971).

⁴⁶Beatrice Foods Co., 76 F.T.C. 719 (1969). A score card is needed for this proceeding since it produced four opinions. Commissioners Elman and Nicholson dissented from the holding against Kroger, and Chairman Dixon and Commissioner MacIntyre dissented from the dismissal of Beatrice. Thus, only Commissioner Jones agreed with both determinations and each of the other four Commissioners dissented to at least one of them.

⁴⁷438 F.2d at 1374, 1377.

⁴⁸*Id.* at 1373-74.

⁴⁹15 U.S.C. § 13(b) (1970). Section 2(b) provides in pertinent part:

Upon proof being made . . . that there has been discrimination in price or services or facilities furnished, the burden of rebutting the

question in the case that Beatrice had granted discriminatory prices unlawful under the Act but for the defense,⁵⁰ which is an absolute defense even if all the elements of a section 2(a) violation exist.⁵¹ The essential feature of *Kroger*, then, is that it answered in the negative the question whether a successful meeting competition defense by the seller automatically discharges the buyer who induced the unlawful price. In most cases, a buyer will not have violated section 2(f) if the seller can establish the meeting competition defense, since the buyer must have "knowingly" induced or received the discrimination.⁵² However, as established by *Kroger*, the effective "lying buyer" cannot find protection in the section 2(b) defense of the seller.

The United States Supreme Court refused to hear *Kroger's* appeal from the Sixth Circuit decision.⁵³ Although it is conceivable that one of the remaining ten United States Courts of Appeal could reach an opposite conclusion, the Sixth Circuit view of the so-called "lying buyer" should prevail, since it appears to be perfectly consistent with the leading Supreme Court decision on section 2(f) liability, *Automatic Canteen Co. of America v. FTC.*⁵⁴ This position is maintained even though *Kroger* argued, along with more than one Robinson-Patman Act scholar, that *Automatic Canteen* requires the acquittal of a buyer if the seller is vindicated

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 this 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, or the services or facilities furnished by a competitor.

⁵⁰At least at the secondary level. 76 F.T.C. at 817-21; 438 F.2d at 1379.

⁵¹*Standard Oil Co. v. FTC*, 340 U.S. 231, 251 (1951). With two small exceptions the competitor must be the seller's and not the buyer's. *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963). For the elements of and the problems with raising the meeting competition defense, see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 138-44; C. AUSTIN, *supra* note 9, ch. IV; D. BAUM, *supra* note 2, at 29-37; 1 M. HANDLER, *supra* note 2, at 522-28, 560-64; F. ROWE, *supra* note 5, ch. 9; 16C J. VON KALINOWSKI § 32.02.

⁵²*Cf.* 438 F.2d at 1374. Beatrice also raised the cost justification defense provided by section 2(a). The FTC did not consider this defense from Beatrice's position, but did consider the cost study in passing on the charges against *Kroger*. 76 F.T.C. at 812. See text accompanying notes 127-32 *infra* for a discussion of the cost justification defense.

⁵³404 U.S. 871 (1971).

⁵⁴346 U.S. 61 (1953).

in a companion section 2(a) proceeding.⁵⁵ Although the *Kroger* case is an important decision that must be noted by all buyers, claims that the decision outlaws hard bargaining among buyers and sellers should be rejected as mere hyperbole. The facts of the case clearly established that Kroger's Charleston Division purchasing manager was furnishing *false* price information to Beatrice, that is, that Kroger was lying rather than engaging in hard bargaining. Greed apparently played a role here since Beatrice's initial quote to Kroger on the dairy products was lower than any bid Kroger had received from potential dairy product suppliers and in fact was lower than several subsequent quotes from Beatrice's competitors. The initial Beatrice bid was, of course, higher than the ultimate bid accepted by Kroger.⁵⁶ If Kroger's conduct was to receive judicial approval it would, according to the court:

[P]ut a premium on the buyer's artifice and cunning in inducing discriminatory prices. . . . In order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer. To hold otherwise would violate the purposes of the Act, and frustrate the intent of the Congress.⁵⁷

The court was presented with the argument that such a decision would place buyers in peril whenever they engage in price bargaining. The language of the FTC decision was, to be sure, couched in terms of "hard bargaining,"⁵⁸ but the court correctly pointed

⁵⁵438 F.2d at 1374, *See, e.g.*, C. AUSTIN, *supra* note 9, at 161-62; D. BAUM, *supra* note 2, at 69; J. MCCORD, COMMENTARIES ON THE ROBINSON-PATMAN ACT 96 (1969); Rowe, *Pricing and the Robinson-Patman Act*, 41 ANTITRUST L.J. 98, 103-04 (1971).

⁵⁶76 F.T.C. at 776-89; 438 F.2d at 1375-77. Discounts on some items in Broughton Dairy's initial bid might have amounted to the 20% discount representation made to Beatrice, but not on all items and not on the important gallon jug of milk. 76 F.T.C. at 776-77.

⁵⁷438 F.2d at 1377.

⁵⁸*See, e.g.*, 76 F.T.C. at 794-96, 810, 818. As the Commission pointed out:

We think the summary of the negotiations . . . set out above in this opinion amply demonstrate that Kroger bargained too hard—not because it was able to wring an oppressive contract out of a weak seller, but because it did not have a sufficient regard for its Robinson-Patman obligations. If a buyer chooses to use its bargaining power to get favored treatment from its suppliers, it is permitted to do so under the law. Normally the seller must bear the responsibility for seeing that Robinson-Patman requirements are complied with. At

out that “[t]he controlling point here is not the ‘hard bargaining’ nor the ‘price levels’ but the *misrepresentation* of the Broughton bid, in order to induce a discriminatory price.”⁵⁹ The *Kroger* decision, then, is not a command against hard bargaining by large power buyers but rather a warning as to the risks that obtain when such buyers act dishonestly. The proper response to the *Kroger* decision is complete honesty. It does not seem too difficult, at least academically, to distinguish between hard bargaining and lying and misrepresentation, but purchasers who fail to see this distinction court disaster.

Actually the “solo tango,” to paraphrase a short squib in the issue of *Purchasing Week* reporting the Supreme Court’s denial of certiorari in *Kroger*,⁶⁰ may well be the rare case. Unless the seller is fortunate enough to deal with a buyer who can completely disguise the facts and simultaneously exert extreme pressure, it is unlikely that the seller will be able to establish the good faith element of the meeting competition defense. The “good faith” element of section 2(b) mandates the seller to act as a “prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.”⁶¹ At a minimum, the seller must make some effort to substantiate that the alleged competitor’s bid was in fact made, and taking the buyer’s word at face value will not suffice.⁶² Beatrice was able to substantiate the defense, perhaps because the proposals covered a diversity of products and services and as such were to some extent inherently incomparable.⁶³

some point, however, if the buyer continues to push, he must become liable if Robinson-Patman bounds are exceeded. And this is so even though the seller had lived up to his Robinson-Patman obligations by maintaining the good faith required for a Section 2(b) defense.

Id. at 818.

⁵⁹438 F.2d at 1378.

⁶⁰PURCHASING WEEK, Oct. 18, 1971, at 4.

⁶¹Continental Baking Co., 63 F.T.C. 2071, 2163 (1963). See also FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759-60 (1945); Forster Mfg. Co. v. FTC, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

⁶²See *Viviano Macaroni Co. v. FTC*, 411 F.2d 255, 259-60 (3d Cir. 1969), in which the court concluded that respondent had not shown the requisite good faith in failing to investigate or verify the veracity of a buyer who reported a competitive offer in an oral communication, and in failing to verify a competitive offer reported by an experienced salesman who had been with the company for eighteen years. See also *Wall Prods. Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971).

⁶³76 F.T.C. at 789-90, 811.

However, in most cases it would seem that reasonable diligence would lead to a discovery of the falsity of a claimed bid or offer.

It should be noted that a buyer withholding information from a seller runs a risk too. In a pending proceeding, *In re Great A & P Tea Co.*,⁶⁴ the FTC has charged the A & P Company with knowingly inducing discriminatory prices from Borden Company for private label dairy products sold in A & P Chicago Division stores. The FTC alleged in its complaint that, when Borden submitted the final bid to A & P, a Borden Company official told the A & P representative that the offer was being made "to meet competition in the form of an existing offer or offers then in A & P's possession."⁶⁵ According to the complaint, A & P accepted the Borden offer knowing full well, but without so notifying Borden, that the bid was substantially lower than the bid offered by the only other competitive bidder.⁶⁶ On its face, the complaint against A & P goes beyond the *Kroger* situation since it does not allege that A & P had made any affirmative statements to Borden about receiving a lower bid. In other words, A & P simply permitted Borden to operate under a misconception. A & P, of course, denied the allegations and contended that it could rely on Borden's representation that the lower prices were lawful, and that it should not be held to the knowledge that Borden was relying on the meeting competition defense.⁶⁷ Specifically, A & P claimed that "Borden did not disclose to A & P in any manner reasonably calculated to inform A & P that it was Borden's position that the only justification for the prices for private label milk and other dairy products sold by Borden to A & P was 'meeting competition.'"⁶⁸

The FTC complaint also charged A & P and Borden with "combining" to stabilize prices of dairy products in violation of section 5 of the FTC Act. This allegation was based on A & P's failure to pass the discounts on to its customers and Borden's failure to make available comparable discounts to other food stores in the Chicago market.⁶⁹ This aspect of the proceeding goes beyond the Robinson-Patman Act price discrimination issue and gets into

⁶⁴[1970-1973 Transfer Binder] TRADE REG. REP. ¶¶ 19,639, 19,826 (F.T.C. 1971) (No. 8866).

⁶⁵*Id.* ¶ 19,639, at 21,685.

⁶⁶*Id.*

⁶⁷See E. Kintner, L. Henneberger, & M. Fleischaker, "Power Buyers" and the Robinson-Patman Act, Feb. 8, 1974, at 9 n.4.

⁶⁸*Id.*

⁶⁹[1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,639, at 21,686.

the price fixing area proscribed by the Sherman Antitrust Act.⁷⁰ It is impossible to predict whether the A & P complaint theory that there is an affirmative duty on the buyer to clear up the seller's misconceptions will pass muster. It may be that A & P made some representations to Borden concerning competitive bids, and, if this were the case, then the *Kroger* decision will control. The most recent significant development in the proceeding was the denial of A & P's motion to dismiss on January 19, 1973.⁷¹

If the seller cannot successfully raise the meeting competition defense, then the specific issue of *Kroger* does not arise.⁷² If the defense does not prevail, the ultimate liability of the buyer under section 2(f) depends on the presence of a section 2(a) violation by the seller which was knowingly induced or received by the buyer.⁷³

⁷⁰15 U.S.C. § 1 (1970). The FTC does not have specific statutory authority to enforce the Sherman Act, but it is well settled that conduct prohibited by that Act constitutes "unfair methods of competition" cognizable under section 5 of the FTC Act. *FTC v. Cement Institute*, 333 U.S. 683, 690-91 (1948); *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971). See generally text accompanying & authorities cited note 7 *supra*; ABA, ANTI-TRUST DEVELOPMENTS, *supra* note 2, at 253-54.

⁷¹[1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,201 (F.T.C. 1973). There have been several procedural rulings in Docket 8866 subsequent to January 19, 1973. Borden filed suit in the Federal District Court for the Northern District of Illinois, Cause No. 73-C-1187, seeking a determination that the FTC was without authority to proceed under its complaint. Counts I and II of the Borden complaint were dismissed, respectively, on June 7, 1973, and October 19, 1973. The Seventh Circuit affirmed the dismissal of the complaint on May 1, 1974. *Borden, Inc. v. FTC*, 1974 Trade Cas. ¶ 75,036 (7th Cir. 1974). The court noted that the FTC had presented its case in chief and that Borden's defense was scheduled to begin on March 4, 1974.

⁷²Of course, meeting competition does not mean beating competition and a seller can neither undercut the price of a comparable product nor drop the price of a premium product to the level of the price of an inferior product offered by a competitor. *National Dairy Prods. Corp. v. FTC*, 395 F.2d 517 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968); *FTC v. Standard Brands, Inc.*, 189 F.2d 510 (2d Cir. 1951). To be sure, the requirement is not draconian. It has been interpreted liberally in light of competitive realities and the defense has obtained when the seller has technically "beat" his competitor's price. See, e.g., *Callaway Mills Co. v. FTC*, 362 F.2d 435 (5th Cir. 1966); *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956). In fact, the Commission recognized that Beatrice "at least technically 'beat' the competitors" in the *Kroger* case but still allowed the defense. 76 F.T.C. at 811-12. The key here was Beatrice's showing of "good faith."

⁷³Section 2(a) provides in pertinent part that:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to dis-

The elements of a section 2(a) violation by the seller are, in capsule form, that there must be two or more consummated sales⁷⁴ of commodities⁷⁵ of like grade and quality⁷⁶ made at discriminatory, meaning different prices⁷⁷ by the same seller⁷⁸ to two or more different

criminate 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

15 U.S.C. § 13(a) (1970).

⁷⁴See *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947); *Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 372-73 (2d Cir. 1958). Individual refusals to deal by a seller are not actionable as discriminations under a specific proviso of section 2(a), *Shaw's Inc. v. Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939), but concerted refusals to deal are actionable under the Sherman Act. See *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 358 U.S. 809 (1959).

⁷⁵"Commodities" includes tangible goods or products, not services. See, e.g., *Baum v. Investors Diversified Serv., Inc.*, 409 F.2d 872, 875 (7th Cir. 1969); *Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc.*, 219 F. Supp. 400 (W.D. Pa. 1963). For an extensive list of cases classifying various items as commodities, or as "noncommodities," see 16B J. VON KALINOWSKI § 24.05.

⁷⁶Conflicting views on the proper criteria for determining like grade and quality were resolved in favor of the objective "physical characteristics" test in *FTC v. Borden Co.*, 383 U.S. 673 (1966). See text accompanying & authorities cited notes 98-107 *infra*.

⁷⁷There were also conflicting views as to the exact scope and meaning of "discrimination" under the Robinson-Patman Act until the Supreme Court's decision in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), in which it was held that "a price discrimination within the meaning of [section 2(a)] is merely a price difference." *Id.* at 549. Thus, the Court rejected the authorities and commentators who contended that predatory intent or competitive injury were prerequisites to a statutory "price discrimination." The Court also decided against the economists who urge that economic discrimination occurs "when the profit contribution is not the same for all sales of a product; some sales are more profitable than others." Backman, *An Economist Looks at the Robinson-Patman Act*, 17 A.B.A. ANTITRUST SECTION 343, 344 (1960). In other words, there might not be economic price discrimination when prices differ, but there might be even though prices are the same. See generally 16C J. VON KALINOWSKI §§ 27.01-.02.

⁷⁸See, e.g., *Walker Oil Co. v. Hudson Oil Co.*, 414 F.2d 588, 590 (5th Cir. 1969); *National Lead Co. v. FTC*, 227 F.2d 825 (7th Cir. 1955); Mas-

purchasers⁷⁹ in reasonably close time proximity,⁸⁰ at least one of which sales crosses a state line,⁸¹ for use, consumption or resale within the United States or any territory thereof.⁸² It is important to note that transactions such as leases or consignments, as long as they are not disguised sales, are not covered by the Act.⁸³ The Act has been construed as not being applicable to sales to the

sachusetts Brewers Ass'n v. P. Ballantine & Sons, 129 F. Supp. 736 (D. Mass. 1955). See text accompanying note 88 *infra*.

⁷⁹Usually determining whether a person is a "purchaser" for Robinson-Patman Act purposes presents no problems, but there are circumstances in which purchasers from wholesalers or distributors will be deemed "indirect purchasers" from the manufacturer. Hiram Walker, Inc. v. A. & S. Tropical, Inc., 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937). The key to the application of the indirect purchaser doctrine is the manufacturer's control over the sales policies of the distributor even if they are ostensibly unrelated. The supplier who is responsible for the prices of the distributor will be held accountable for any resulting competitive injury. The "indirect purchaser" doctrine in essence complements the "single seller" doctrine applied to parent-subsidiary relationships and the same factors are considered in determining whether the requisite control exists. *Cf.* FTC v. Fred Meyers, Inc., 390 U.S. 341 (1968). See generally F. ROWE, *supra* note 5, § 4.5; 16B J. VON KALINOWSKI § 24.04[3]. See also text accompanying note 87 *infra*.

⁸⁰Atalanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958); Valley Plymouth v. Studebaker-Packard Corp., 219 F. Supp. 608, 610 (S.D. Cal. 1963); 1955 REPORT, *supra* note 2, at 178. Essentially, the requirement is satisfied if both the sales agreements and the delivery of the commodities involved occur reasonably simultaneously. "Closeness" is required—not exactly simultaneous sales. Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 921 (5th Cir. 1952). Otherwise, the Robinson-Patman Act would be effectively emasculated.

⁸¹See text accompanying notes 110-12 *infra*.

⁸²Section 1 of the Clayton Act, 15 U.S.C. § 12 (1970), defines "commerce" as including trade with foreign nations. Thus, the specific language of section 2(a) exempts export sales discriminations, but such sales may be subject to other provisions of the Act. See, e.g., Baysoy v. Jessop Steel Co., 90 F. Supp. 303 (W.D. Pa. 1950), in which an export sales agreement was held to violate the brokerage provision of section 2(c). Import sales are covered by the Act. See, e.g., Matter of Siemens & Halske A.G., 155 F. Supp. 897 (S.D.N.Y. 1957). See generally 16C J. VON KALINOWSKI §§ 26.01[1], 26.03.

⁸³See, e.g., Students Book Co. v. Washington Law Book Co., 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); Gaylord Shops, Inc. v. Pittsburg Miracle Mile Town & Country Shopping Center, Inc., 219 F. Supp. 400, 403, 404 (W.D. Pa. 1963). Of course, an "agency" or "consignment" label will not insulate a transaction that is in fact a sale. Western Fruit Growers Sales Co. v. FTC, 322 F.2d 67 (9th Cir. 1963). For an extensive analysis of the factors considered in resolving this issue, see 16B J. VON KALINOWSKI § 24.03[2].

federal government.⁸⁴ There are conflicting opinions regarding its application to sales to states and other governmental units, but generally such sales have been excluded from Robinson-Patman liability.⁸⁵ Section 4 of the Robinson-Patman Act grants limited exemptions to cooperative associations.⁸⁶ Non-profit institutions such as schools, libraries, and hospitals, purchasing supplies for their own use, were specifically exempted from the Act by legislation adopted in 1938.⁸⁷

The requirement that the sales must be made by the "same seller" often conjures up an easy way to avoid liability under the Act. It seems that one could create a selling subsidiary to deal with the vast majority of customers and could reserve to the parent favored customers who will receive preferential treatment. In theory, the Act allows sufficient freedom in pricing to accomplish this and, in fact, the stratagem has worked. However, it is not without risk, since to avoid liability the subsidiary must have a great deal of independence, perhaps more than exists in the real

⁸⁴General Shale Prods. Corp. v. Struck Constr. Co. 37 F. Supp. 598 (D. Ky. 1941), *aff'd*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943); Sperry Rand Corp. v. Nassau Research & Dev. Associates, 152 F. Supp. 91, 96 (E.D.N.Y. 1957); Opinion of United States Attorney General, 1932-1939 Trade Cas. ¶ 44,145 (1936). However, in Sterling Nelson & Sons v. Rangen, Inc., 351 F.2d 851, 859 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), the court indicated that the Act might apply if the Government is the victim, not the beneficiary, of the discrimination. See F. ROWE, *supra* note 5, § 4.11; 16B J. VON KALINOWSKI § 24.06[1].

⁸⁵Compare Sacks v. Brown-Forman Distillers Corp., 134 F. Supp. 9, 16 (S.D.N.Y. 1955), *aff'd per curiam*, 234 F.2d 959 (2d Cir.), *cert. denied*, 352 U.S. 925 (1956), and Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. ¶ 55,157 (1937), with Opinion of Attorney General of California, 1932-1939 Trade Cas. ¶ 55,156 (1937). See F. ROWE, *supra* note 5, § 4.12; 16B J. VON KALINOWSKI § 24.06[2].

⁸⁶15 U.S.C. § 13(b) (1970). See Quality Bakers of America v. FTC, 114 F.2d 393, 400 (1st Cir. 1940). For a discussion of the ramifications of this exemption, see 1955 REPORT, *supra* note 2, at 311; F. ROWE, *supra* note 5, §§ 14.2, 14.8; 16D J. VON KALINOWSKI § 36.03[3].

⁸⁷15 U.S.C. § 13(c) (1970). Because of the chronology, this provision has been construed as adding to existing exemptions. General Shale Prods. Corp. v. Struck Constr. Co., 37 F. Supp. 598 (D. Ky. 1941), *aff'd*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943). The provision has been broadly construed to include anything required to meet the needs of the institution. Logan Lanes, Inc. v. Brunswick Corp., 378 F.2d 212 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967). However, it has been held inapplicable if the institution is reselling for a profit. Students Book Co. v. Washington Law Book Co., 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956).

world of parent-subsidary relationships, in setting prices and terms of sales.⁸⁸

It should be emphasized that, even in cases in which the two major and the several minor defenses and exemptions do not obtain,⁸⁹ section 2(a) does not prohibit all price discriminations. The crux of the Act is that the price discrimination must have a prescribed adverse effect on competition and, to be unlawful, must satisfy at least one of the statutory tests. A discrimination violates section 2(a) if its effect "may be substantially . . . to lessen competition or tend to create a monopoly in any line of commerce,"⁹⁰ or to injure, destroy or prevent competition with any person who "grants" the discrimination,⁹¹ with any person who "knowingly

⁸⁸Neither share ownership, *Warren Petrol. Corp.*, 53 F.T.C. 268 (1956), nor common directors or officers, *National Lead Co. v. FTC*, 227 F.2d 825 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957); *Baim & Blank, Inc. v. Philco Corp.*, 148 F. Supp. 541 (E.D.N.Y. 1957), are sufficient, standing alone, to make the parent accountable for discriminatory sales. However, even these cases recognize that a parent corporation actively controlling or at least contributing to the subsidiary's pricing or distribution policy will justify disregarding the corporate fiction. It is certainly not inconceivable that the explanation of the results in these cases is that they were poorly prosecuted or superbly defended. The parent-seller runs another risk. If it successfully shows that it did not control its subsidiary, then it might be liable for direct discrimination between different purchasers or customers if the subsidiary gets price or allowance benefits not available to others. *Cf. Baim & Blank, Inc. v. Philco Corp.*, 148 F. Supp. 541, 542 (E.D.N.Y. 1957). For an analysis of the cases involving the "single seller" issue, see 16B J. VON KALINOWSKI § 24.04[2][a], particularly the helpful guidelines, *id.* § 24.04, at 24-45.

⁸⁹In addition to the section 2(a) cost justification defense, notes 127-32 *infra*, the section 2(b) meeting competition defense, notes 48-52 *supra*, and the governmental, cooperative association and nonprofit institution exemptions, notes 85-87 *supra*, the fourth and last proviso of section 2(a) justifies otherwise unlawful price discriminations made in response to changing conditions affecting the market for the goods concerned or the marketability of those goods. The proviso specifically refers to several possibilities, such as a deterioration of perishable goods and obsolescence of seasonal goods. *See generally* 16C J. VON KALINOWSKI § 32.04. Also the FTC and the courts have recognized, albeit somewhat vaguely, a *de minimis* rule. *See E. Edelman & Co. v. FTC*, 239 F.2d 152, 155 (7th Cir. 1956); *Alterman Foods, Inc.* [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,248 (F.T.C. 1973); *American Metal Prods. Co.*, 60 F.T.C. 1667 (1962). It should be noted that section 2(a) qualifies the cost justification defense by authorizing the FTC to set quantity limits on particular commodities even when cost justified. *See generally* 16C J. VON KALINOWSKI § 32.03[5].

⁹⁰15 U.S.C. § 13(a) (1970).

⁹¹*Id.* This is the so-called primary line or seller level injury.

receives the benefit of the discrimination,"⁹² or with "customers of either of them."⁹³ The "may" in section 2(a) clearly does not mean a "mere" or "remote possibility."⁹⁴ However, the interpretation of the word, depending on the forum and the circumstances, has ranged from "reasonable possibility"⁹⁵ to "reasonably probable."⁹⁶ Of course, without running afoul of the Act, different prices may legally be offered to customers who clearly occupy different places in the distribution chain, such as wholesalers, distributors, or direct buying retailers.⁹⁷

One of the basic requirements for section 2(a) liability is that the commodities must be of "like grade and quality."⁹⁸ This element is necessary to insure that the price discrimination

⁹²*Id.* This is the so-called secondary line or customer level injury.

⁹³*Id.* This is the so-called tertiary line or customer's buyer level injury.

⁹⁴*See, e.g.,* Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); Corn Prods. Ref. Co. v. FTC, 324 U.S. 726, 738 (1945); American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964). *See generally* 16C J. VON KALINOWSKI § 28.05.

⁹⁵The leading authority favoring this construction is FTC v. Morton Salt Co., 334 U.S. 37 (1948). The "test" was impliedly reaffirmed in a 1967 Supreme Court decision. Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). *See also* American Motors Corp. v. FTC, 384 F.2d 247, 251 (6th Cir. 1967), *cert. denied*, 390 U.S. 1012 (1968); Forster Mfg. Co. v. FTC, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

⁹⁶Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965). The FTC itself appears to have opted for the "reasonably probable" test—at least for the present. *See, e.g.,* General Foods Corp., 50 F.T.C. 885, 887 (1954).

⁹⁷*See, e.g.,* Guyott Co. v. Texaco, Inc., 261 F. Supp. 942, 950 (D. Conn. 1966); Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230 (D.N.J. 1956); Doubleday & Co., 52 F.T.C. 169 (1955). *See generally* ABA, ANTI-TRUST DEVELOPMENTS, *supra* note 2, at 157-62; F. ROWE, *supra* note 5, at 174-75; 16C J. VON KALINOWSKI § 30.02[2]. The reference is to secondary line cases. Conceivably a discount granted to customers at a particular level in the distribution chain might result in a primary line violation if the customer classification and discount amount were aimed at the seller's competitors. Furthermore, it should be noted that discounts granted to dual function distributors, *i.e.*, wholesalers who also retail, can be successfully challenged under section 2(a) if not cost justified. *See, e.g.,* Mueller Co. v. FTC, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); E. Edelman & Co., 51 F.T.C. 978 (1955), *aff'd*, 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958). Also challengeable under section 2(a) are arrangements in which direct buying customers farther down the chain get greater discounts than available to customers higher up. *See, e.g.,* Krug v. International Tel. & Tel. Corp., *supra*.

⁹⁸15 U.S.C. § 13(a) (1970).

law is confined to reasonably comparable business transactions.⁹⁹ The leading authority on the issue is the Supreme Court's 1966 decision in *FTC v. Borden Co.*,¹⁰⁰ which held that the test of like grade and quality is the physical identity or characteristics of the commodities involved. The Court upheld the FTC's determination that Borden's name brand condensed milk and its physically and chemically identical private label milk were of like grade and quality notwithstanding that the latter sold at a much lower price in the food stores. The Fifth Circuit Court of Appeals had set aside the FTC order on the ground that economic factors and consumer preferences had not been considered in passing on this jurisdiction element.¹⁰¹ The wisdom of ignoring brand names and trademark differences in considering the like grade and quality element has been questioned¹⁰² but, for better or for worse, the issue has been resolved. The *Borden* case does not make such differences totally irrelevant in Robinson-Patman cases; the Supreme Court recognized that they could be considered in the context of the more flexible "injury to competition" issue.¹⁰³ In fact, Borden ultimately prevailed on remand to the Fifth Circuit because the discrimination in price between the two condensed milks did not cause the requisite injury to competition.¹⁰⁴

The like grade and quality requirement does give the buyer some freedom in price bargaining if he has product specifications that differ significantly from those of the supplier's usual product.¹⁰⁵ It is particularly helpful if the differences have some

⁹⁹1955 REPORT, *supra* note 2, at 157.

¹⁰⁰383 U.S. 637 (1966). See generally 16C J. VON KALINOWSKI § 25.02.

¹⁰¹*Borden Co. v. FTC*, 339 F.2d 133, 136-37 (5th Cir.), *rev'g* 64 F.T.C. 534 (1964).

¹⁰²The commentators have produced prodigious writings on the points. So much so that in the *Borden* case the Supreme Court engaged in a battle of footnotes—the majority emphasizing the numbers, particularly those supporting the position of the majority of the Attorney General's Committee, 383 U.S. at 640 n.3, and the dissenters urging that most of the supportive writings were not really relevant or on point. *Id.* at 652 n.8. See also 16C J. VON KALINOWSKI § 25.01, at 25-3 n.2.

¹⁰³383 U.S. at 646.

¹⁰⁴381 F.2d 175 (5th Cir. 1967). For a recent case involving this issue, see *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97 (10th Cir. 1973).

¹⁰⁵The courts and the Commission recognize that physically dissimilar products are not of like grade and quality. See, e.g., *Lubbock Glass & Mirror*

substantial effect on the marketability or consumer acceptance of the item.¹⁰⁶ The 1955 *Attorney General's Report on the Anti-trust Laws* stated that: "Actual and genuine physical differentiations between two different products adapted to the several buyers' uses, and not merely a decorative or fanciful feature, probably remove differential pricing of the two from the reach of the Robinson-Patman Act."¹⁰⁷ It is this author's opinion that this observation is still sound.

The plaintiff in a section 2(f) case, in order to prevail, must establish three requirements in addition to the elements of a section 2(a) violation. These elements, by the terms of section 2(f) and judicial construction, are that the buyer must be engaged in interstate commerce, that the purchase in question must have been made in the course of such commerce, and, most importantly, that the buyer who induced or received the price must have had actual or constructive knowledge that the price differential given by the seller was violative of section 2(a).¹⁰⁸ It is not enough merely to show that the buyer knew that his price was lower than prices charged to other buyers. The illegality of the price must be shown.¹⁰⁹

The wording of the commerce requirement of section 2(f) theoretically makes it more difficult to prosecute a buyer than

Co. v. Pittsburgh Plate Glass Co., 313 F. Supp. 1184 (N.D. Tex. 1970); Universal Rundle Corp., 65 F.T.C. 924, 954-55 (1964), *order set aside and remanded on other grounds*, 352 F.2d 831 (7th Cir. 1965), *rev'd and remanded on other grounds*, 387 U.S. 244 (1967).

¹⁰⁶Interestingly enough, although consumer preferences are irrelevant if the products are physically identical, they are appropriate in evaluating whether a minor physical difference is "merely decorative or fanciful" or in fact affects the marketability of the product. *See, e.g.*, Central Ice Cream Co. v. Golden Rod Ice Cream Co., 184 F. Supp. 312 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961); Universal Rundle Corp., 65 F.T.C. 924, 954-55 (1964), *order set aside and remanded on other grounds*, 352 F.2d 831 (7th Cir. 1965), *rev'd and remanded on other grounds*, 387 U.S. 244 (1967).

¹⁰⁷1955 REPORT, *supra* note 2, at 158. *See generally* 16C J. VON KALINOWSKI § 25.02[2].

¹⁰⁸15 U.S.C. § 13(f) (1970).

¹⁰⁹Section 2(f) does not specifically provide that the buyer must know of the illegality of the price. This gloss was imparted by the Supreme Court's decision in *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61 (1953). *See* discussion of *Automatic Canteen*, text accompanying notes 114-17 *infra*. For discussion of the commerce requirement of section 2(f), see C. AUSTIN, *supra* note 9, at 159-61; F. ROWE, *supra* note 5, § 14.6; 16D J. VON KALINOWSKI § 36.04.

a seller for violating the Act.¹¹⁰ The requirement is no doubt satisfied when the buyer purchases from a seller located in another state even if the buyer resells only locally. At least that purchase transaction would be in the "course of such commerce." However, a buyer purchasing from a seller located in the same state who sells at higher prices to the buyer's out-of-state rivals, in theory, would not be culpable under section 2(f) although the seller has presumably violated section 2(a).¹¹¹ Of course it is possible that the courts will harmonize seller and buyer liability in the same transaction notwithstanding the literal language of section 2(f).¹¹²

As noted, the key to section 2(f) liability is the buyer's knowing inducement or receipt of the discriminatory price. Initially, FTC enforcement of section 2(f), which was not very

¹¹⁰Section 2(a) requires that the seller be engaged in commerce, that the discrimination occur in the course of such commerce, and that either or any of the purchases involved be in commerce. This is a narrower jurisdictional grant than obtains under the Sherman Act which applies to transactions effecting interstate commerce even if completely local in nature. See *Willard Dairy Co. v. National Dairy Prods. Corp.*, 309 F.2d 943, 946 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963). Although the jurisdiction requirement is tripartite, the crucial element is that one of the challenged sales must be in commerce since if the defendant has made such a sale, the first two requirements are satisfied ipso facto. *Liquilux Gas Serv. v. Tropical Gas Co.*, 303 F. Supp. 414, 416 n.2. (D.P.R. 1969). It is irrelevant whether the higher or lower priced sale is the interstate transaction. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). *Moore* appeared to have broadened the scope of section 2(a) by holding that the commerce requirement had been satisfied when the seller financed purely local predatory price cutting from interstate operations. However, the lower courts have been reluctant to read *Moore* expansively and even the Supreme Court seems to have had second thoughts. See *Willard Dairy Co. v. National Dairy Prods. Corp.*, 373 U.S. 934 (1963) (Black, J., dissenting from the denial of certiorari); *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1144 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); *Food Basket, Inc. v. Albertson's, Inc.*, 383 F.2d 785, 787 (10th Cir. 1967); *Borden Co. v. FTC*, 339 F.2d 953, 955 (7th Cir. 1964); *Liquilux Gas Serv. v. Tropical Gas Co.*, *supra*, at 417. See generally 16C J. VON KALINOWSKI §§ 26.01[2], 26.02; Comment, *The Interstate Commerce Requirement of Section 2(a) of the Robinson-Patman Act*, 44 U. COLO. L. REV. 607 (1973).

¹¹¹See, e.g., *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 184 F. Supp. 312, 319 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961).

¹¹²Rowe has made such a suggestion in his volume on the Robinson-Patman Act noting that such a construction would obviate recourse to section 5 of the FTC Act which would apply since buyers in other states would be prejudiced by the discrimination. F. ROWE, *supra* note 5, at 437-38. See text accompanying note 32 *supra*.

extensive, emphasized receipt of the favorable price.¹¹³ However, the Supreme Court, in *Automatic Canteen*, shifted the emphasis to the culpability of the buyer. To paraphrase the Supreme Court, the buyer is guilty of violating section 2(f) if he knows the price induced was illegal or not within one of the defenses available to the seller.¹¹⁴ The second half of this statement was fatal in the *Kroger* case—Kroger knew that the dairy prices were not legitimately within the meeting competition defense of Beatrice since Kroger's manager had misrepresented the competitive bids. Kroger knew of the flaw in Beatrice's ostensibly perfect defense.¹¹⁵ The same can be said of A & P in the pending FTC proceeding, even though its position evokes more sympathy, if, as alleged, A & P knew that Borden was acting under a misconception.¹¹⁶ As the Court in *Automatic Canteen* further observed, "the buyer whom Congress in the main sought to reach was the one who, knowing well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices."¹¹⁷ This observation clearly applied to Kroger and almost as clearly to A & P.

The concept of "inducing or receiving a price discrimination" does not cover every situation in which a seller nets less from one customer than from another. In *Kapiolani Motors, Ltd. v. General Motors Corp.*,¹¹⁸ a defendant in a Sherman Act antitrust suit counterclaimed against Kapiolani, a Pontiac dealer, alleging that false and fraudulent warranty claims reduced General Motor's net receipts from sales to Kapiolani as compared to net receipts from sales to the defendant competitor. The result of the false claims was, allegedly, tantamount to a reduced price on the purchased cars. The court indicated that it was a "nice try" by the defendant but, even given the *Kroger* precedent, concluded that the Robinson-Patman proscription applied only to induced favorable "prices." The step to false warranty claims was too much to take.¹¹⁹ The

¹¹³See discussion of early section 2(f) cases in C. EDWARDS, *supra* note 29, at 486-501.

¹¹⁴*Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 74 (1953).

¹¹⁵*Kroger Co. v. FTC*, 438 F.2d 1372, 1377 (6th Cir.), *cert denied*, 404 U.S. 871 (1971).

¹¹⁶*In re Great A. & P. Tea Co.*, [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,639 (F.T.C. 1971).

¹¹⁷346 U.S. at 79.

¹¹⁸337 F. Supp. 102 (D. Hawaii 1972).

¹¹⁹*Id.* at 104. The court stated:

Kapiolani court noted that “[n]owhere in the legislative history of the Act does it indicate that Congress was worried about purchasers who would engage in fraud, misrepresentation, or actual stealing from suppliers to procure economic advantages only secondarily relevant to net prices.”¹²⁰ However, the court went on to say that “the conduct charged here states a prima facie case of obtaining money by false pretenses, fraud, conversion and the like, but definitely not a case of ‘inducing a price discrimination’ ”¹²¹ It is doubtful that *Kapiolani* stands for the proposition that actual indirect price discriminations, such as favorable credit terms or conditions of sale, are not covered by section 2(f).¹²²

Essentially, *Automatic Canteen* imposed a burden on the plaintiff, either private or the FTC, to come forward with some evidence that the defendant knew or should have known that the induced price was illegal. The reasoning of the Supreme Court is of solace to the buyer—the Court did not feel that it was an undue burden on the plaintiff to show that the defendant buyer was “not an unsuspecting recipient of prohibited discriminations.”¹²³ Since a section 2(a) violation requires both a price discrimination and a competitive injury, the knowledge element of section 2(f) is also twofold. It must be shown that buyer knew or should have known

Where the conduct in *Kroger* was specifically calculated to affect “price” as that term has been defined under the Robinson-Patman Act, *i.e.*, amount buyer actually pays for an item, here the alleged conduct has nothing to do with “price,” as either *General Motors* or *Kapiolani* viewed the term.

Id.

¹²⁰*Id.* at 103.

¹²¹*Id.* at 104.

¹²²For examples of condemned indirect price discriminations, see *Skinner v. United States Steel Corp.*, 233 F.2d 762 (5th Cir. 1956) (credit terms); *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951) (freight allowance); *Secatori's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665 (D. Mass. 1959). Indirect price discriminations must be distinguished from promotional allowances cognizable under sections 2(d) and 2(e). Although the line is not very clear the key to which provisions apply is whether the allowances or payments are connected with resale of the goods by the buyer, so that sections 2(d) or 2(e) would apply, or incidental to the initial sale so that section 2(a) would apply. See *Chicago Spring Prod. Co. v. United States Steel Corp.*, 254 F. Supp. 83, 84-85 (N.D. Ill. 1965), *aff'd per curiam*, 371 F.2d 428 (7th Cir. 1966). In *Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972), discriminatory delays in delivery were held cognizable under section 2(e).

¹²³346 U.S. at 81. The FTC did not agree at first and dismissed a number of section 2(f) cases when *Automatic Canteen* was decided. See 16D

that he was receiving a price which was not cost justified or otherwise defensible and which was different from the price other buyers paid; it must also be shown that the buyer knew or should have known that the differential would have the effect of substantially lessening competition.¹²⁴ Although the substantiality of the discount does not, in and of itself, satisfy the lessening competition requirement,¹²⁵ the burden is often satisfied by showing a significant discrimination in a highly competitive industry with low profit margins. In *Kroger*, the discounts granted by Beatrice ranged up to forty-one percent on cottage cheese which, coupled with the strong competition and low profit margins in the retail food business, clearly demonstrated to the court the required adverse competitive effect.¹²⁶

If the price difference were cost justified, this might give rise to a major affirmative defense to a section 2(a) violation.¹²⁷

J. VON KALINOWSKI § 36.05[1], at 36-65 n.7. However, upon reflection the Commission realized that since the decision only involved the issue of the burden of introducing evidence, such burden could be satisfied by a showing that the buyer had reasonable knowledge as to the illegality of the seller's price. Consequently, the burden was not as onerous as originally thought and new section 2(f) proceedings were filed. See, e.g., *D & N Auto Parts Co.*, 55 F.T.C. 1279 (1959), *aff'd sub nom. Mid South Distrib. v. FTC*, 287 F.2d 512 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961). For general discussion of the burden of proof requirements under section 2(f), see ABA, ANTI-TRUST DEVELOPMENTS, *supra* note 2, at 153-55; C. AUSTIN, *supra* note 9, at 158-64; D. BAUM, *supra* note 2, at 70-73; C. EDWARDS, *supra* note 29, at 501-11; 1955 REPORT, *supra* note 2, at 194-97; F. ROWE, *supra* note 5, § 14.7; 16D J. VON KALINOWSKI § 36.05.

¹²⁴346 U.S. at 74.

¹²⁵With a few exceptions this is the generally accepted rule even if the *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), "inference technique" is applicable. See authorities listed in 16C J. VON KALINOWSKI § 31.01[1], at 31-8 n.23. The Second Circuit, and perhaps the Ninth Circuit, take the position that any discrimination among competing buyers is sufficient to establish a *prima facie* case under section 2(a). See *Enterprise Indus., Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 735 (1945); *Fowler Mfg. Co. v. Gorlich*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). For a discussion of *Morton Salt*, see text accompanying notes 142-43 *infra*.

¹²⁶438 F.2d at 1378-80. In fact, the discounts received by *Kroger* were among the highest in litigated *Robinson-Patman* cases. *Id.* at 1379 n.4.

¹²⁷The cost justification defense is established by the first proviso of section 2(a), 15 U.S.C. § 13(a) (1970), which provides "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

A seller may grant discounts to favored customers if the differential makes only due allowance for actual cost savings from the manufacture, sale, or delivery of the commodities, even if the discrimination does have the required adverse competitive effect.¹²⁸ The best example of cost savings that can be passed on to large volume buyers without jeopardy are carload freight rates.¹²⁹ A cost justification defense by a seller is not easy to sustain and, if one is attempted, good accountants are a necessity. The ostensible problem is that really workable criteria for application of the defense do not exist, and the courts have required accurate and actual, not estimated, data on the savings involved.¹³⁰ There has been some judicial broadening of the defense in that the use of average cost data for similar and legitimate customer groups has been permitted;¹³¹ however, use of reasonable approximations rather than actual cost data is still not allowed.¹³² The real problem, as might be suspected, is that the cost justification might first be considered after the FTC complaint had been filed. Some good advice to buyers, when a seller "offers" a substantial price break, is to insist on seeing the cost justification figures before the deal is consummated. Actually, the same advice may be given to sellers when a buyer asks for preferential prices, that is, the seller should be satisfied that the requested differential is cost justified before making the deal.

How does the plaintiff in a section 2(f) suit meet the burden of showing the requisite knowledge? The answer, contained in

sold or delivered." For discussion of the problems presented by the defense and the various techniques developed in its use, see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 131-35; C. AUSTIN, *supra* note 9, at 59-70; D. BAUM, *supra* note 2, at 22-25; C. EDWARDS, *supra* note 29, ch. 18; 1955 REPORT, *supra* note 2, at 170-76; F. ROWE, *supra* note 5, at 10; 16C J. VON KALINOWSKI § 32.02.

¹²⁸It is well settled that the cost justification defense is absolute. *United States v. Borden Co.*, 370 U.S. 460 (1962); *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 66-69 (1953).

¹²⁹*See, e.g., Morton v. National Dairy Prods. Corp.*, 414 F.2d 403 (3d Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970).

¹³⁰*See* 1955 REPORT, *supra* note 2, at 171-75; 16C J. VON KALINOWSKI § 32.03[1], at 32-86 to 32-92. *See also* authorities cited note 127 *supra*.

¹³¹*United States v. Borden Co.*, 370 U.S. 460 (1962). *See generally* 16C J. VON KALINOWSKI § 32.03[2].

¹³²*See* 1955 REPORT, *supra* note 2, at 173-75 (recommending such a liberalization of the defense but with little impact); ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 133; 16C J. VON KALINOWSKI § 32.03[1], at 32-92 n.14.

Automatic Canteen, is "trade experience,"¹³³ that is, the expertise of the skilled purchasing manager who knows a great deal about the going price for the commodities being purchased. If a bid appears out of line to experienced purchasers, it should be avoided until a cost justification is shown. Specific examples of the kind of evidence that has enabled the FTC to prevail in section 2(f) cases may be helpful to purchasing managers attempting to avoid liability. In *Fred Meyer, Inc. v. FTC*,¹³⁴ the FTC's burden was met in a proceeding against a large volume buyer when it was shown that: (1) none of the suppliers granted quantity discounts as a matter of course, (2) the favored customer received the discounts only in the one month a year it conducted a special coupon promotional sale, and (3) the price concessions amounted to a full one-third off the regular price while cost savings to the sellers were at best negligible.¹³⁵ Other proceedings have involved buyers forming buying groups and paying lower prices for their purchases while the mode, quantity, or quality of their individual purchases remained unchanged. This line of cases is typified by the automobile parts cases such as *American Motors Specialities Co. v. FTC*.¹³⁶ In that case, several automobile parts distributors grouped together to solicit lower prices and favorable price differentials. They were successful in their efforts, and the FTC was successful in its section 2(f) prosecution, since competing unorganized jobbers were paying higher prices for goods sold in the same quantities by the same sellers in the same manner.¹³⁷ However, if a buying group performs some distributive functions and is not a mere ordering service, the members will be absolved of liability unless the FTC can present evidence negating the possibility that the differentials were cost justified. The buyers prevailed on this ground in another auto parts case, *Alhambra Motor Parts v.*

¹³³346 U.S. at 79-81. Trade experience is, to be sure, a somewhat amorphous concept but the Commission, largely in section 5 cases, and the courts have developed some standards. For general discussion on this issue, see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 153-54; C. EDWARDS, *supra* note 29, at 515-17; 16C J. VON KALINOWSKI § 36.05[3][c].

¹³⁴359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

¹³⁵*Id.* at 363-67.

¹³⁶278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960). See also *Mid South Distrib. v. FTC*, 287 F.2d 512, 518-19 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961).

¹³⁷278 F.2d at 228-29.

FTC.¹³⁸ The key is that the FTC must show something that should have put the buyers on notice that the prices were not lawful and not cost justified.

As far as the competitive injury requirement is concerned, the burden of proof in a section 2(f) case can be satisfied, as in *Kroger*,¹³⁹ by showing price differentials of a kind that would cause or would be likely to cause the requisite injury to the seller's or buyer's competition. The simple cases are those in which the price concessions are great—it is not difficult to conclude, in a secondary line case, that a continuing one-third price reduction to a favored customer would benefit him vis-a-vis his competitors whether he passed on his savings or increased his profits.¹⁴⁰ In the primary line cases involving injury at the seller level, the clear case is one in which the seller has engaged in predatory, below-cost selling.¹⁴¹ The hard secondary line cases are those involving the propriety of using the *FTC v. Morton Salt Co.*¹⁴² inference technique. *Morton Salt* established the doctrine that if profit margins are small and the business is highly competitive, competitive injury can be, but does not necessarily have to be, inferred, even though the discounts are relatively insignificant and there is no evidence that disfavored retailers lost business or suffered financial loss. The technique is commonly utilized in cases involving the automobile parts and retail grocery industries.¹⁴³ It is a

¹³⁸309 F.2d 213 (9th Cir. 1962). *But see* General Auto Supplies, Inc. v. FTC, 346 F.2d 311 (7th Cir. 1965). On remand in *Alhambra*, the FTC, re-imposing section 2(f) liability, ruled that there was no cost justification for individual jobbers, who were deemed the real purchasers, and that they possessed the requisite knowledge. Southern Cal. Jobbers, Inc., 68 F.T.C. 1039 (1965). *See generally* ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 158-59; 16D J. VON KALINOWSKI § 36.05[3], at 36-88 to 36-90.

¹³⁹438 F.2d at 1379-80. *See* note 126 *supra*.

¹⁴⁰*See, e.g.*, Corn Prods. Ref. Co. v. FTC, 324 U.S. 726 (1945); Whitaker Cable Corp. v. FTC, 239 F.2d 253, 255 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957) (discounts up to 30%). For a detailed analysis of the factors utilized in the evaluation of competitive effects at the buyer or secondary level, see 16C J. VON KALINOWSKI § 31.01[4].

¹⁴¹*See, e.g.*, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 843 (7th Cir. 1961). Decisions involving predatory pricing and the factors used in evaluating the intent of the seller are discussed in 16C J. VON KALINOWSKI § 29.02[2].

¹⁴²334 U.S. 37 (1948).

¹⁴³For general discussion of *Morton Salt* and its progeny, see 16C J. VON KALINOWSKI §§ 31.01[2][a]-[b], 31.04[4]. *See also* ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 124-28; F. ROWE, *supra* note 5, at 180-86.

difficult technique to defend and, in fact, in *United Biscuit Co. v. FTC*,¹⁴⁴ direct testimony by disfavored grocery store customers that they were not injured by United Biscuit's cumulative discount structure was deemed legally insufficient to protect the seller from a section 2(a) violation.¹⁴⁵ If the courts and the Commission do not deem the inference technique appropriate, they will, of course, attempt to ascertain if the competitive abilities of the disfavored customers have been impaired.¹⁴⁶ These inquiries often focus on the temporary or permanent nature of the discrimination, the causal nexus between the discrimination and the alleged injury, and the general availability of the challenged lower prices.¹⁴⁷ In other words, the health of the competitive process is examined in judging the impact of the discriminatory prices.

The hard primary line cases are those in which no predatory pricing is shown. Such cases also necessitate an examination of the health and vitality of the competitive system to determine if the discrimination had the requisite effect. A diversion of trade or loss of customers would be a factor considered by the courts or the Commission¹⁴⁸ but it does not establish a per se violation.¹⁴⁹ Loss of profits is a second important factor used to measure the impact of price discriminations on the seller's competition.¹⁵⁰ The structure of the particular market, including such factors as the

¹⁴⁴350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966).

¹⁴⁵Of course it is possible that testimony to the effect that the disfavored customers were not injured might very well mean that they have been injured but for various reasons are not complaining. For other cases rejecting such rebuttal evidence, see *Standard Motor Prods. Inc. v. FTC*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); *Moog Indus. Inc. v. FTC*, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958); 16C J. VON KALINOWSKI § 31.01[2][c].

¹⁴⁶*See, e.g.*, *American Oil Co. v. FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967); *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

¹⁴⁷*See* cases cited note 146 *supra*. *See generally* ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 125; F. ROWE, *supra* note 5, §§ 8.3-8.5; 16C J. VON KALINOWSKI § 31.03[3][5].

¹⁴⁸*See, e.g.*, *Lloyd A. Fry Roofing Co.*, 68 F.T.C. 217, 260 (1965), *aff'd*, 371 F.2d 277 (7th Cir. 1966).

¹⁴⁹*Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 840 (7th Cir. 1961); *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 790 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952). For a general discussion of the "diversion theory," see 16C J. VON KALINOWSKI § 29.03[1].

¹⁵⁰*See, e.g.*, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 611 (6th Cir.

number and strength of the competitors and even the availability of lower prices from others, have been considered in primary line cases.¹⁵¹ Also, the relationship between the seller's two prices, when the higher price subsidizes operations in the affected market, has been examined.¹⁵²

As noted earlier, section 5 of the FTC Act has been used to fill the gap in the coverage of the Robinson-Patman Act caused by the lack of a provision prohibiting buyers from inducing or receiving illegal promotional allowances or services. Section 2(d)¹⁵³ and 2(e)¹⁵⁴ of the Act prohibit a seller from granting promotional allowances or services to customers unless such allowances or services are available or accorded to all competing customers on proportionally equal terms. These sections establish per se offenses; thus, the cost justification defense is not available and no injury to competition need be shown.¹⁵⁵ Despite some problem with the literal language of section 2(b), the meeting competition defense is technically available for section 2(d) promotional allowances as well as for section 2(e) services.¹⁵⁶ However, successful recourse to this defense has been rare.¹⁵⁷

There are several variations in sections 2(b) and 2(e), a few of which will be mentioned.¹⁵⁸ The seller's product need not be

1965); *H.J. Heinz Co. v. Beechnut Life Savers, Inc.*, 181 F. Supp. 452 (S.D.N.Y. 1960). See generally 16C J. VON KALINOWSKI § 29.03[2].

¹⁵¹For an analysis of this factor, see 16C J. VON KALINOWSKI § 29.03[3].

¹⁵²The so-called "war chest" theory is more likely to be in issue in the predatory primary line cases. See, e.g., *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). However, generally it is still a factor in other cases to support a conclusion that section 2(a) has not been violated. See, e.g., *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 842 (7th Cir. 1961); *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956). See generally 16C J. VON KALINOWSKI § 29.03[4].

¹⁵³15 U.S.C. § 13(d) (1970).

¹⁵⁴*Id.* § 13(e).

¹⁵⁵*FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).

¹⁵⁶*Exquisite Form Brassiere Co. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

¹⁵⁷In fact, on remand the Commission held that *Exquisite Form* had failed to sustain the defense. *Exquisite Form Brassiere Co.*, 64 F.T.C. 271 (1964). See also, *Rabiner & Jontow, Inc. v. FTC*, 386 F.2d 667 (2d Cir. 1967), *cert. denied*, 390 U.S. 1004 (1968). The defense was sustained in *Continental Bakery Co.*, 63 F.T.C. 2071 (1963).

¹⁵⁸For discussions of sections 2(d) and 2(e), see ABA, *ANTITRUST DEVELOPMENTS*, *supra* note 2, at 147-52; C. AUSTIN, *supra* note 9, ch. VI; D.

resold in exactly the same form in which purchased for the provisions to apply.¹⁵⁹ Also, "available" means truly available in real world terms, and a promotional program will not pass muster if only a few favored customers can and will benefit.¹⁶⁰ Some leeway is permitted in formulating a promotional program, but the risks of illegality increase as the program deviates from being keyed into the dollar volume or quantity of goods purchased.¹⁶¹ Thus, purchasing managers certainly may ask what promotional programs their suppliers have available, but should not ask for more, given the distinct possibility of a section 5 proceeding. The key to section 5 liability for inducing unlawful promotional allowances is the same as for section 2(f) liability for inducing price discrimination—the culpable knowledge of the recipient that the program or allowance was not offered on proportionally equal terms to his competition.¹⁶²

Examples of programs that have been condemned under section 5 include *Grand Union Co. v. FTC*,¹⁶³ in which the company solicited suppliers to rent space on a spectacular advertising sign located in Times Square, *R. H. Macy & Co. v. FTC*,¹⁶⁴ in which Macy solicited gifts and contributions towards the cost of its 100th Anniversary celebration, even though the payments were made solely for institutional publicity, and *Furr's Inc.*,¹⁶⁵

BAUM, *supra* note 2, at 50-65; C. EDWARDS, *supra* note 29, ch. 7; 1955 REPORT, *supra* note 2, at 189-93; F. ROWE, *supra* note 5, ch. 13; 16D J. VON KALINOWSKI chs. 34-45.

¹⁵⁹*See, e.g.*, *Corn Prods. Ref. Co. v. FTC*, 144 F.2d 211, 219 (7th Cir. 1944), *aff'd*, 324 U.S. 726 (1945); *Clairol, Inc.*, 69 F.T.C. 1009, 1046-49 (1966).

¹⁶⁰*See, e.g.*, *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1954); *State Wholesale Grocers v. Great A. & P. Tea Co.*, 258 F.2d 831, 839 (7th Cir.), *cert. denied*, 358 U.S. 947 (1958); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert denied*, 326 U.S. 773 (1945).

¹⁶¹*See, e.g.*, *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480 (2d Cir. 1962); *Lever Bros., Inc.*, 50 F.T.C. 494 (1953). *See generally* Miller, *Sections 2(d) and 2(e) of the Robinson-Patman Act: Seller in a Quandary*, 45 MARQ. L. REV. 511 (1962). *See also* authorities cited note 158 *supra*.

¹⁶²*See, e.g.*, *Grand Union Co. v. FTC*, 300 F.2d 92, 99-100 (2d Cir. 1962); *Alterman Foods, Inc.*, [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,248 (F.T.C. 1973). The FTC need not prove injury to competition before section 5 can be invoked against a buyer since sections 2(d) and 2(e) define per se offenses.

¹⁶³300 F.2d 92 (2d Cir. 1962).

¹⁶⁴326 F.2d 445 (2d Cir. 1964).

¹⁶⁵68 F.T.C. 584, 660-62, 680 (1965).

in which a buyer soliciting promotional payments for a promotional extravaganza was found to have violated section 5 even though, on advice of his attorney, he had refrained from asking the suppliers if they were making similar allowances available to his competitors. In *Furr's*, however, this fact, plus respondent's good faith, influenced the Hearing Examiner and the Commission to dismiss the complaint without prejudice rather than enter a cease and desist order. In *Colonial Stores, Inc. v. FTC*,¹⁶⁶ the Fifth Circuit affirmed an FTC order that Colonial, a "multi-million dollar supermarket chain," unlawfully induced and received advertising allowances for a specific promotion which it knew or should have known had not been accorded to other purchasers on proportionately equal terms. In considering an assertion that the chain had no culpable knowledge that the advertising payments were discriminatory, the court observed that Colonial must have known of the character of the payments based on its past experience with the suppliers involved.¹⁶⁷ The allowances, the court noted, were obviously "add-on" promotional advantages, grossly disproportionate to the ordinary allowances these particular suppliers provided.¹⁶⁸ The purchases were far from the level that would produce the dollar amounts under the regular promotional programs of the suppliers and were so substantial that there "could be no reasonable possibility for the supplier to offer equivalent payments to competitors."¹⁶⁹ Again, trade experience of the buyer sufficed to impose liability.

An interesting argument made by Colonial centered on "clean bill of health" written assurances obtained from suppliers. Colonial contended that even if it were aware of facts creating a duty to inquire about the legality of the challenged promotional payments, it had satisfied that duty by requiring all suppliers to sign a printed contract that included a clause recognizing that the "same agreement is made available by the Vendor on a proportionally equal basis to all dealers in the competitive area."¹⁷⁰ Anyone using or contemplating adopting similar forms to insulate against FTC attack would be well advised to note carefully what the court had to say about them:

¹⁶⁶450 F.2d 733 (5th Cir. 1971).

¹⁶⁷*Id.* at 745.

¹⁶⁸*Id.* at 737-38, 741-42.

¹⁶⁹*Id.* at 738.

¹⁷⁰*Id.* at 739 n.11.

[T]he requirement that a supplier sign such a representation is simply not sufficient, by itself, to offset actual knowledge of facts strongly suggesting, if not establishing, that despite disclaimers to the contrary the supplier is not offering proportionally equal payments to competitors. A written agreement, which by its nature is to be treated as a substitute for inquiry, cannot take the place of an independent investigation if, as found by the Commission, there are ample grounds for believing that the other party may not be complying with the requirements of the law. . . . [O]n that score no amount of written statements, disclaimers, protestations of clean health, noble purpose or purity of heart made by another could exculpate the recipient from bearing what the law imposes. When the warning signs are so clear, the recipient must either devise some practicable method for allaying its doubts—and thereby satisfying its duty of inquiry—or it must forego entirely the opportunity to solicit a lucrative but highly suspect promotional arrangement.¹⁷¹

In *Fred Meyer, Inc. v. FTC*,¹⁷² promotional allowances also were involved. The Ninth Circuit's decision was appealed to the Supreme Court which did not disturb that portion of the order holding that a direct buying supermarket chain had violated section 5 when it successfully "pressured" sellers for promotional allowances not made available to the chain's smaller competitors who purchased the same products through wholesalers. This decision precipitated significant revisions of the FTC Guides for Advertising Allowances and Other Merchandising Payments and Services that were promulgated on May 29, 1969,¹⁷³ and amended on August 4, 1972.¹⁷⁴ These Guides, popularly known as the "Fred Meyer Guides," are designed to assist sellers in formulating promotional programs that make promotional benefits available to other than direct purchasers on proportionally equal terms. Literal compliance with the FTC Guides does not insulate sellers from

¹⁷¹*Id.* at 746.

¹⁷²359 F.2d 351, 363 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

¹⁷³34 Fed. Reg. 8285 (1969).

¹⁷⁴37 Fed. Reg. 15699 (1972).

FTC attack,¹⁷⁵ but such compliance does reduce the likelihood of litigation.

At the outset of this Comment, reference was made to buyer liability under section 2(c)¹⁷⁶ of the Robinson-Patman Act. This is the brokerage provision of the Act which applies by its terms to both buyers and sellers.¹⁷⁷ Section 2(c) prohibits the granting or receiving of a "commission, brokerage or any allowance or discount in lieu thereof except for services rendered in connection with the sales or purchase of goods, wares or merchandise."¹⁷⁸ For years the conventional wisdom was that payments of commissions to any but pure brokers were per se illegal. However, some flexibility was introduced by the Supreme Court's decision in *FTC v. Henry Broch & Co.*,¹⁷⁹ but not enough to protect a buyer or seller if the seller's broker is eliminated and the price to a direct buying customer is reduced by the amount formerly paid as a commission.¹⁸⁰ Section 2(c) might not apply if the buyer were rendering some services to the seller which previously had been rendered by a broker, or if the reduction were, in part, the result of other reduced costs.¹⁸¹ However, buyers should be wary since "receipt" is the key for section 2(c) liability,¹⁸² not "knowing inducement" as in the section 2(f) or section 5 cases.

¹⁷⁵*See, e.g.*, *FTC v. Mary Carter Paint Co.*, 382 U.S. 46, 47-48 (1965) (Guides Against Deceptive Pricing, 23 Fed. Reg. 7965 (1958)); *cf.* *Alterman Foods, Inc.*, [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,248 (F.T.C. 1973). In promulgating guides the FTC may not adopt arbitrary or inconsistent regulatory approaches. *Marco Sales Co. v. FTC*, 453 F.2d 1 (2d Cir. 1971); ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 76 nn.1&2 (Supp. 1968-71).

¹⁷⁶15 U.S.C. § 13(c) (1970).

¹⁷⁷In pertinent part, section 2(c) provides that: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept"

¹⁷⁸*Id.*

¹⁷⁹363 U.S. 166 (1960).

¹⁸⁰*See, e.g.*, *El Salto, S.A. v. PSG Co.*, 444 F.2d 477, 480-81 (9th Cir.), *cert. denied*, 404 U.S. 854 (1971); *FTC v. Washington Fish & Oyster Co.*, 282 F.2d 595 (9th Cir. 1960); *Venus Foods, Inc.* 57 F.T.C. 1025 (1960).

¹⁸¹*See, e.g.*, *Empire Rayon Yarn Co. v. American Viscose Corp.*, 354 F.2d 182 (2d Cir. 1965), *vacated en banc*, 364 F.2d 491 (2d Cir. 1966); *Thomasville Chair Co. v. FTC*, 306 F.2d 541, 545 (5th Cir. 1962); *Hruby Distrib. Co.*, 61 F.T.C. 1437 (1962); *cf.* *Donovan, Inc. v. Lum's, Inc.*, 1972 Trade Cas. ¶ 74,083 (N.D. Ill. 1972).

¹⁸²For general discussion of brokerage problems, see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 144-47; C. AUSTIN, *supra* note 9, ch. V;

How can a buyer protect himself? There is no absolute assurance that a vigorous and hard bargaining purchasing manager will not step over the line into a section 2(f), or section 2(c), or section 5 violation, but there is some advice that will reduce the likelihood of these unpleasant prospects. Under no circumstances should a purchaser lie about or misrepresent prices, terms, or allowances available elsewhere. To be absolutely safe, it might be better not to discuss competitive bids or prices at all other than in very general and truthful terms, such as telling a salesman that his prices are "too high." On the other hand, if the seller is clearly operating under some kind of misconception, withholding information on other bids appears to be an ill-advised tactic particularly if the FTC prevails in the *A & P* case.¹⁸³ If a seller proposes a deal that seems to be too good to be true—the proverbial offer that cannot be refused—a purchaser should be certain that the seller can demonstrate with hard facts why he is able to sell so low, that he absolutely must unload the merchandise, or, in the case of promotional allowances or services, that they are available to other customers on proportionally equal terms. Clean bill of health statements may be helpful, but the *Colonial Stores* warning should be heeded.¹⁸⁴

Another possible aid to buyers would be to include a "most favored customer" clause as part of a form contract or purchase order. This would assure the best possible deal for the purchaser while insulating the seller from possible section 2(a) liability if lower prices are subsequently offered to competitors. Perhaps the operating words should be "honestly" and "forthrightness." If these standards are not met, section 2(f) or section 5 liability is distinctly possible. In other words, as far as the Robinson-Patman Act is concerned, the word might well be "Caveat Emptor."

D. BAUM, *supra* note 2, at 25, 29, 38-49; C. EDWARDS, *supra* note 29, ch. 5; 1955 REPORT, *supra* note 2, at 187-89, 190-93; F. ROWE, *supra* note 5, ch. 12; 16D J. VON KALINOWSKI ch. 33.

¹⁸³See text accompanying notes 64-71 *supra*.

¹⁸⁴See text accompanying notes 166-70 *supra*. Care must be exercised in verifying price data to avoid running afoul of the price fixing prohibitions of section 1 of the Sherman Act. *United States v. Container Corp. of America*, 393 U.S. 333 (1969). The *Container* case was distinguished in *Wall Prods. Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), in which the price communications were made to comply with the meeting competition defense.