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Secondary-Line Differential Pricing and the Robinson-Patman Act

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Chapter 8

SECONDARY-LINE DIFFERENTIAL PRICING AND THE ROBINSON-PATMAN ACT

INTRODUCTION

The Robinson-Patman Act — sometimes called the ``Wrong-way Corrigan" of antitrust[1] — is the most controversial of the federal antitrust laws. It has been described as subverting the very competition the antitrust laws are designed to protect, as protecting small businesses at the expense of consumers, and as dictating standards of conduct that virtually force companies to break other antitrust laws in order to avoid violating the Robinson-Patman Act.

The basic liability-creating section of the Robinson-Patman Act, section 2(a), **15 U.S.C. § 13(a)**, makes it unlawful ``to discriminate in price between different purchasers of commodities of like grade and quality … 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."

The Robinson-Patman Act is frequently called a ``price discrimination" statute, but that is a misnomer. The statute as interpreted by the courts is directed at price *differences*, not at price discrimination. Economic price discrimination occurs when a seller has different rates of return on sales to two different customers. In more technical language, price discrimination occurs when the ratio of price to marginal cost is different in different sales. Thus, sales of widgets at $1 each to two different customers can in fact be price discrimination if the seller's marginal cost is lower for one customer than for another. Such a pair of sales would not violate the Robinson-Patman Act, however, because both buyers pay the same price. As a result, many instances of actual economic price discrimination fall outside the Act — for example, where a manufacturer charges the same delivered price to customers located at varying distances from the seller's plant. On the other hand, the Act has frequently been used to condemn nondiscriminatory differential pricing: instances where a higher price to one buyer reflects no more than the

[1] On July 18, 1938, Douglas ``Wrong Way” Corrigan took off from New York City intending to fly to Los Angeles, but landed 20 hours later in Dublin, Ireland.

higher costs incurred by the seller. The Robinson-Patman Act provides a ``cost justification" defense which sometimes permits differential pricing that is economically nondiscriminatory. The courts have been so restrictive in their interpretation of the cost justification defense, however, that many instances of nondiscriminatory price difference may violate the statute. The ironic result is that the statute actually forces sellers to engage in economic price discrimination by selling to different purchasers at the same price, even though the marginal costs incurred by the seller are higher for one purchaser than for another.

The statute is not necessarily bad, however, simply because it condemns differential pricing rather than economically discriminatory pricing. That is a value judgment we can make only after we have decided whether either discriminatory pricing or differential pricing ought to be condemned.

[A]

The Economics of Price Discrimination

In order to engage in persistent price discrimination, a seller must have a certain amount of market power. In a perfectly competitive market, all sales will be made at economic cost, and a disfavored seller (one asked to pay more than cost) will simply buy from someone else. The one general exception to the market power requirement is when the price discrimination is the result of a seller's below cost pricing. For example, a seller may attempt to sell below cost in order to drive competitors out of business, or to encourage them to price oligopolistically. If the seller operates in more than one geographic market, and if it predates in only one market, then the seller will also be engaged in economic price discrimination: it is selling at cost in the nonpredated markets, but at below cost in the predated market.

Persistent, nonpredatory price discrimination requires market power, however, and it often requires that the seller have some mechanism for preventing ``arbitrage." Arbitrage occurs when a favored purchaser resells the product to a disfavored purchaser at some price greater than the favored purchaser paid for the product but less than the price that the original seller would have charged to the disfavored purchaser. Often the transaction costs of arbitrage are greater than the amount of price difference between the purchasers, and arbitrage will not occur. For example, suppose that a wholesaler sells salt in large quantities to a large grocery store for $10 per carton but in small quantities to a small store for $12 per carton. The small grocer might be willing to pay the larger grocer $11 per carton for salt, and the larger grocer might be willing to resell the salt at that price. However, if the costs of bargaining and redelivery of the salt are greater than $2 per carton, arbitrage will not occur.

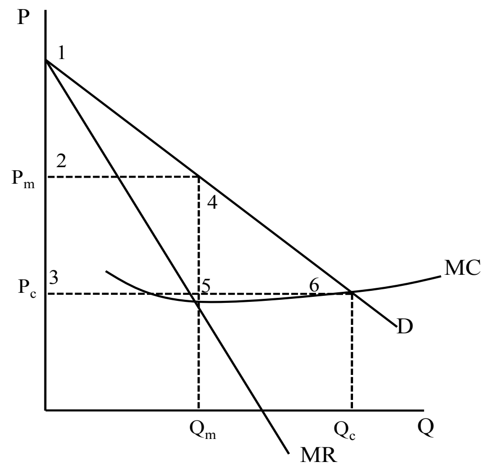
Assume, however, that a particular seller has market power and that arbitrage will not defeat a price discrimination scheme. In that case, the seller can either sell its output at its nondiscriminatory profit-maximizing price, or perhaps obtain greater profits by engaging in price discrimination. Given the existence of the market power, is there any reason that society ought to prefer the ``evil'' of nondiscriminatory monopolistic pricing to the ``evil'' of price discrimination?

One thing is clear: *both* monopoly pricing and price discrimination can make sellers richer and buyers as a group poorer than competitive pricing does. Absent legal sanctions, a profit-maximizing seller who has the requisite market power will choose the alternative that transfers the larger amount of wealth away from consumers and to itself. Any antitrust policy of favoring purchasers over sellers might suggest that both price discrimination and monopoly pricing are bad, not because they are inefficient but because they redistribute wealth in a way that we find politically or morally displeasing. From an efficiency standpoint, however, the problem is conceptually more difficult. One of the ironies of price discrimination is that while it can make sellers even richer than nondiscriminatory monopolistic pricing, it can also make some buyers better off, and it can increase total market output.

[1] Perfect Price Discrimination

Figure 1 illustrates the differences between competitive pricing, nondiscriminatory monopolistic pricing, and perfect price discrimination. The figure shows the demand curve (D) of either an entire market, or else of a single firm with substantial market power. It also shows marginal cost (MC) and marginal revenue (MR) curves. If this were a competitive industry, prices would be driven to marginal cost and the price of each unit of output would be determined by the point where marginal cost is equal to demand. This is the competitive price, P_c on the vertical axis. In such a market, a purchaser willing to pay the marginal cost of producing the product will be able to buy it. Many of these customers, of course, would have been willing to pay more than the competitive price, and triangle 1-3-6 represents the ``consumers' surplus'' — the amount of wealth created by the fact that many consumers can purchase the product for less than the value they place on it. For example, if a consumer would have been willing to pay as much as $3.00 for a product, but is able to purchase it for $2.50, the transaction creates a consumers' surplus of 50 cents. The consumer is 50 cents wealthier: she has a product she values at $3.00 but is out of pocket only $2.50.

Figure 1



Perfect competition maximizes the size of the consumers' surplus. However, in perfect competition there is *no* producers' surplus. Producers' surplus represents the amount of money obtained in the sale of a product in excess of the smallest amount that the seller would have been willing to accept for the sale. Since sellers are generally willing to make sales at marginal cost (which includes a fair rate of return), any price in excess of marginal cost creates producers' surplus in the amount of the excess. For example, if the marginal cost of producing and delivering a widget to a customer is $1.00, but the seller obtains a price of $1.10, the seller has received a producers' surplus of 10 cents. Many market transactions simultaneously generate consumers' and producers' surplus.

A profit-maximizing seller would naturally like to turn as much consumers' surplus as possible into producers' surplus. If the marginal cost of producing a blivet is $1.00, but a particular consumer values the blivet at $2.00, then a sale could be consummated at any price between $1.00 and $2.00. If the sale is consummated at $1.10, then 10 cents is producers' surplus and 90 cents is consumers' surplus. However, that same customer would have been willing to pay $1.90, which would have generated a producers' surplus of 90 cents.

The same demand, cost, and revenue curves of Figure 1 can also describe a single firm with substantial market power. One way the seller with market power can enlarge its producers' surplus, thereby increasing its profits, is by pricing its product at its profit-maximizing price, determined by the intersection between the marginal cost and marginal revenue curves on the graph. If the seller sells at its nondiscriminatory profit-maximizing price, P_m on the price axis of Figure 1, then the seller has created for itself a producers' surplus equal to rectangle 2-3-5-4, which represents revenues in excess of marginal cost. By contrast, consumers' surplus has been reduced to triangle 1-2-4. More seriously, however, triangle 4-5-6 represents deadweight loss, which is value that accrues to *neither* consumers nor producers. Triangle 4-5-6 represents value lost because customers unwilling to pay price P_m have chosen not to buy but to substitute an alternative that would have been less attractive to them in a competitive market. They lose the consumers' surplus that they could have had by purchasing at price P_c. However, this lost value does not go to the producer either, for it receives no revenues from sales that it does not make.

Suppose that the seller is able to determine precisely what every purchaser in the market is willing to pay for a blivet. If the seller can identify each purchaser willing to pay $1.00, each purchaser willing to pay $1.10, etc., and make every sale at the largest price that a buyer is willing to pay, then the seller would be able to turn *all* of triangle 1-3-6 into *producers*' surplus. Furthermore, the seller would make even the sales at price P_c, because those sales are profitable. In short, under *perfect* price discrimination, output is the same as it would be in a competitive market: the seller would sell to every customer willing to pay marginal cost or more. The chief difference between perfect competition and perfect price discrimination is that in the former all of 1-3-6 would be consumers' surplus. In the latter, all of triangle 1-3-6 would be producers' surplus.

Theoretically, perfect price discrimination allocates resources in the same way that perfect competition does. Output is the same as it would be under competition. No customers make inefficient substitutions for another product, because everyone willing to pay the marginal cost of a blivet will be able to purchase one. The chief difference between perfect price discrimination and perfect competition is that in the former, the price-discriminating seller is better off and its customers are worse off.

By contrast, the difference between perfect price discrimination and non-discriminatory monopoly pricing is that monopoly pricing reduces output in the monopolized market, forces customers to make inefficient substitutions for other products, and thereby distorts the market in those products as well. However, some customers are better off in the monopoly-priced market than in the discriminatory market. These are the customers who would have paid price P_m in the monopoly-priced market, but who actually value blivets more than P_m, and under perfect price discrimination, therefore, pay more. These purchasers would be located along the demand curve in Figure 1 between points 1 and 4.

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[2]

Imperfect Price Discrimination

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The differing effects of perfect price discrimination and nondiscriminatory monopoly pricing are easily described. But no seller can engage in anything approaching perfect price discrimination. First of all, 100 different customers might individually place 100 different values on a particular product. The seller, however, must generally be content to identify two or three different groups of customers — perhaps a high preference group, a medium preference group, and a low preference group. Further, if the cost of identifying these three groups, determining the profit-maximizing price for each group, and preventing arbitrage from one group to another is higher than the additional revenues that the seller can obtain by price discriminating, then discrimination will be unprofitable.

In addition, if price discrimination is not perfect, it no longer follows that discriminatory pricing results in a higher output than nondiscriminatory monopoly pricing. Suppose, for example, that a monopolist determines that its nondiscriminatory profit-maximizing price is $1.50, although its marginal cost at that rate of output is only $1.00. Suppose, further, that it is able to segregate three groups of potential purchasers. One group values the product at $1.00, another at $1.50, and another at $2.00. Perhaps the monopolist could reach these three groups of buyers by putting the product in three different boxes, marked ``good,'' ``better,'' and ``best.'' Suppose, however, that the monopolist discovers that the middle group is quite cost conscious and most of them will buy the $1.00 product if it is available, even though they would be willing to pay $1.50 otherwise. The seller might conclude that it is more profitable to sell the product only in $1.50 and $2.00 versions. After all, the $1.00 sales are not particularly profitable, but the $1.50 sales are very profitable. In short, the monopolist might price discriminate, but only *within* the group of customers who are willing to pay the profit-maximizing price or more. In that case, the lowest-price sales would be made at the profit-maximizing price, not at marginal cost. Output would be no greater than under nondiscriminatory monopoly pricing, and monopoly deadweight loss would be just as high. Furthermore, price discrimination within this group is not perfect either. Some disfavored customers will refuse to pay more than the nondiscriminatory profit-maximizing price. In that case, output under price discrimination would be even less than it would be under nondiscriminatory monopoly pricing.

The idea that price discrimination does not cause any socially costly deadweight loss evaporates when we give up the illusion of ``perfect'' price discrimination. Furthermore, it is quite possible that the entire value to a seller of engaging in price discrimination will be eaten up by the costs of acquiring and maintaining the requisite market power, and the cost of obtaining the information necessary for the seller to engage in price discrimination. For example, if price discrimination is worth $1,000,000 per year to a seller, it will be willing to spend any amount up to $1,000,000 in acquiring and maintaining the requisite market power, identifying the groups of customers who place differential values on the product, and disguising or marketing the product so as to prevent arbitrage. Many of these expenses are likely to be socially wasteful. (See the discussion of the deadweight loss of monopoly in Chapter 2, *supra*.) The result is that nearly all of triangle 1-3-6 in Figure 1 may not be producers' surplus at all, but deadweight loss. For a fuller discussion of these problems, see H. Hovenkamp, *Federal Antitrust Policy*, ch. 14 (4th ed. 2011); E.T. Sullivan & J. Harrison, *Understanding Antitrust and Its Economic Implications*, ch. 8 (5th ed. 2007).

In contrast to the monopolist's persistent price discrimination, purely sporadic price discrimination is frequently a sign of healthy competition. Competitive markets are rarely in perfect equilibrium. Supply and demand are always fluctuating, and even in a market with one thousand sellers we expect to see continual, daily adjustments in prices. Suppose, for example, that on a particular day the demand for blivets has dropped in relation to the supply. On the previous day a seller sold blivets for $1.00 each. When she opens for business on this morning she does not know of the change in market conditions. The first customer walks in and, not knowing of the market change either, purchases blivets from her at $1.00. The second and third customers walk away, however, and the fourth customer tells the seller that he can buy blivets across the street for 90 cents. When the seller learns of the change in the market she will likely drop her price to 90 cents, and we would not want a legal policy preventing her from doing so, even though the result is that she will be engaging in price discrimination as between her first customer in the morning and other customers later in the day. In all markets, information is less than perfect, and different sellers respond to changes in the market in slightly different ways and at different times. The result is sporadic, short-term price discrimination which is not anti-competitive at all, but evidence of hard, vigorous competition. If there is a cartel, on the other hand, we would expect each seller to hold to the agreed-upon price in spite of short-term fluctuations in demand.

[B]

Antitrust Policy and the Robinson-Patman Act

The ``fit" between the practices condemned by the Robinson-Patman Act and the kind of price discrimination which is inefficient is very poor. The Robinson-Patman Act has been used to condemn the kind of sporadic price discrimination which is really evidence of hard competition. Likewise, the Act has been used to condemn many instances of nondiscriminatory, differential pricing, simply because the defendant was unable to meet the ``cost justification" defense that the statute creates. Likewise, many sellers engaged in persistent price discrimination are not covered by the statute because they make all sales at the same ``price." For example, consider the variable proportion tying arrangement. Suppose a seller of a mimeograph machine requires purchasers to use its ink as a condition of obtaining the machine. The seller earns a 5% rate of return on the machine but a 20% rate of return on the ink. The seller will obtain a much higher net rate of return from high-volume users of the machine than from low-volume users, for the former use more ink. Nevertheless, all sales of machines are made at the same price, and all sales of ink are made at the same price per unit. The seller has not violated the Robinson-Patman Act. See the discussion of tie-ins and price discrimination in Chapter 5.

Why has such a poorly designed statute managed to survive for so long? Largely because no one lobbies Congress for allocative efficiency, many interest groups have become highly effective lobbyists for their own interests, however, and among the most successful of these have been small businesses and retailers. The legislative history of the Robinson-Patman Act is filled with vituperative comments aimed at the ``chain stores'' — large, integrated merchandisers who were destroying the fortunes of many small businesses, mainly as a result of their efficiency of distribution. The one ``evil'' most explicitly targeted by the Act was price discounting of large quantity wholesale purchases, which gave large retailers an advantage over smaller ones. To this day, it seems, the Robinson-Patman Act survives because the owners of small and medium-sized businesses believe that the statute protects them from larger competitors, by preventing suppliers from treating the larger competitors more favorably than themselves. In fact, small distributors have not fared so well under the Robinson-Patman Act. The statute has been used frequently to prevent associations of small merchants or manufacturers from using volume buying to obtain lower prices. *See, e.g.*, *Mid-South Distribs. v. FTC*, 287 F.2d 512 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961); *Standard Motor Prods. v. FTC*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959).

In 1977, the United States Department of Justice issued a report sharply critical of the Robinson-Patman Act (Report on the Robinson-Patman Act (1977)). Since then it has not enforced the statute. Today the great majority of cases are brought by private plaintiffs. On private enforcement, see 14 H. Hovenkamp, *Antitrust Law* ¶¶ 2371–2372 (3d ed. 2013).

[C]

The Technical Coverage of the Robinson-Patman Act

The Robinson-Patman Act is a maze of technical requirements that often operate to hide or subvert the statute's basic purpose. Much litigation has been devoted to questions such as the meaning of ``commodities of like grade and quality'' under the statute, or the meaning of its requirement that the commodities must be ``sold for use, consumption, or resale within the United States.''

Unlike the Sherman Act, which applies to all transactions ``affecting commerce,'' up to the full Constitutional power of Congress to regulate interstate commerce, the Robinson-Patman Act requires that the seller be ``engaged in'' interstate commerce and that one of the discriminatory sales itself be made in interstate commerce. This has frequently meant that at least one of the transactions alleged to violate the statute must involve commodities, negotiations, or parties that crossed a state boundary. *See Cliff Food Stores v. Kroger*, 417 F.2d 203 (5th Cir. 1969). As a practical matter, this may mean that retail transactions never violate the Act, since buyer and seller are located in the same state. See, *e.g.*, *Indiana Grocery v. Super-Valu Stores*, 647 F. Supp. 254 (S.D. Ind. 1986).

In *Able Sales Co. v. Compania de Azucar de Puerto Rico*, 406 F.3d 56 (1st Cir. 2005), the defendant's high and low-priced sales of refined sugar did not cross state lines; however, its *purchases* of raw sugar prior to refining did. The court followed fairly old Supreme Court precedents which held that when goods are purchased across state lines and then resold to customers in one continuous flow, then the Robinson-Patman Act's commerce requirement is met. However, if the goods are brought in from out of state and then ``come to rest," this flow is interrupted. As a result, if the subsequent resales do not cross state lines, the jurisdictional requirement has not been met. The court concluded that the sugar in this case came to rest when it was delivered to the refineries and subjected to the refining process. It explained:

> Whatever the present contours of the in the [sic] ``flow of commerce" doctrine under the Robinson-Patman Act, it certainly does not apply when there are material differences between the product imported and the product sold after undergoing processing. The fact that the raw materials were imported into Puerto Rico does not necessarily mean that the ``in commerce" requirement of — § 2(a) of the Robinson-Patman Act is met. *See Belliston v. Texaco, Inc.*, 455 F.2d 175, 180 (10th Cir. 1972) (The production of gasoline from crude oil is a ``highly complex process" which interrupts the flow of commerce.). Indeed the ``flow of commerce" ends when these raw materials or goods are ``transformed in a material way." …
>
> This is not a case in which the same product was temporarily stored in the state of ultimate sale. *See, e.g., Standard Oil Co.* [*(Indiana) v. FTC*,] 340 U.S. [231] at 237–38 [(1951)] (temporary storage of gasoline does not deprive the gasoline of its interstate characteristic). Nor is it a case in which the resulting sold product was essentially the same as the imported product. *See, e.g., Dean Milk Co. v. FTC*, 395 F.2d 696, 715 (7th Cir. 1968); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 678 (5th Cir. 1965) (both holding that the processing of milk imported from out of state before local resale is not enough to remove the milk

> from the flow of commerce).

The court also rejected the plaintiff's argument that the defendant had made sales to one large purchaser, Tropical, knowing that this purchaser intended to ship the product across state lines upon resale:

> The flow of commerce is thought to end when the goods ``are stored in a [seller's] warehouse or storage facility for general inventory purposes," subject to an exception for when the goods are purchased and then stored in the seller's warehouse in response to a particular customer's needs. *See Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 878 (9th Cir. 1982). That exception does not apply here. There is no evidence that CAPR's sale to Tropical was anything other than final, with Tropical taking possession of the sugar. Indeed, there is no evidence whether Tropical actually ever exported the sugar. But what Tropical, an independent company, intended to do with the sugar, in these circumstances, is not germane to the ``in commerce" inquiry. …

The statute applies to ``sales" and not leases even though, as the discussion of tying arrangements suggests (*see* Chapter 5, *supra*), leases are often used to facilitate price discrimination. The statute applies only to the sale of ``commodities," and therefore does not cover labor or business services — even though price discrimination in service markets is commonly easier to pull off than it is in the sale of goods. For example, the doctor who charges wealthy patients more than poor ones need not worry about arbitrage.

Section 2(a) of the Robinson-Patman Act explicitly covers ``indirect" as well as ``direct" price discrimination. Within the statute, ``indirect" price discrimination refers to a seller's differential treatment of different classes of customers — for example, if the seller gives the favored buyer delivery, stocking or storage, advertising, brokerage allowances, return privileges, or any other favorable terms which put one buyer in a better position than another buyer.

When courts analyze ``indirect" price discrimination, they generally do so from the buyer's point of view, not from the seller's. Thus, for example, if a seller provides ``free" delivery in carload lots but requires buyers of less than carloads to pay their own delivery, courts will not generally look at the seller's marginal cost of servicing these two classes of customers in this way. Rather, courts will ask whether the carload lot buyer is effectively obtaining the commodity at a lower price than the small buyer is. If the answer is yes, the burden shifts to the defendant seller to show that the free delivery of carload lots was ``cost justified."

The statute has been held to require that there actually be two different sales, to two different purchasers, at two different prices. One sale and one offer to sell at a higher or lower price is not a violation of the statute. Furthermore, the two sales must be consummated within a reasonable time of each other. The question whether a parent and its subsidiary, or affiliated corporations, are two ``different'' purchasers has perplexed the court, although recent authority suggests that closely related corporations are not ``different'' and therefore that sales to them do not fall within the statute. Is the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1983) (reprinted in Chapter 4), that a parent and its subsidiary cannot be ``conspiring entities'' under the Sherman Act relevant to this issue? *See Caribe BMW v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994) (defendant and its wholly owned subsidiary were a single ``seller,'' and thus Robinson-Patman Act applies).

Sales to agencies of the federal government are not covered by the Robinson-Patman Act. In 1983, however, the Supreme Court decided that the Act applies when the low price sale is made to a state or local government agency, if the agency resells the commodity in competition with the disfavored purchasers. *Jefferson Cty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150 (1983). The Supreme Court assumed without deciding that a sale to a state or local government agency for internal consumption would be exempt from the Act, at least if the product was being used for some ``traditional governmental function.'' Four dissenters argued that application of the Robinson-Patman Act to purchases by state and local governmental agencies was inconsistent with the intent of the Act's framers.

For fuller treatment of the Act's technical coverage, see 14 H. Hovenkamp, *Antitrust Law*, ch. 23 (3d. ed. 2013); H. Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, § 14.6 (4th ed. 2011).

II

PRIMARY-LINE DISCRIMINATION

The original section 2 of the Clayton Act was enacted in 1914, but substantially amended and renamed the ``Robinson-Patman Act'' in 1936. The original 1914 provision was concerned chiefly with injuries that could accrue to the competitors of a seller engaged in price discrimination. We call these ``primary-line'' injuries. Today courts treat such injuries as a form of predatory pricing, and for that reason we have included primary-line actions in the section on predatory pricing (Chapter 6, *supra*).

III

SECONDARY-LINE DISCRIMINATION

The 1936 amendments to section 2 were concerned chiefly with injuries that can accrue to the price discriminator's disfavored customers (that is, the customers forced to pay the higher price). These are called ``secondary-line'' injuries. In secondary-line price discrimination, the perceived victims are customers of the defendant, not its competitors. If, for example, someone sells widgets to *A* at $1.00 and to *B* at 90 cents, then *A* is the victim of price discrimination as defined by the Robinson-Patman Act.

[A]

``Price Discrimination'' and ``Injury to Competition'' Under the Robinson-Patman Act

FTC v. MORTON SALT CO.

334 U.S. 37 (1948)

JUSTICE BLACK delivered the opinion of the Court.

Respondent manufactures several different brands of table salt and sells them directly to (1) wholesalers or jobbers, who in turn resell to the retail trade, and (2) large retailers, including chain store retailers. Respondent sells its finest brand of table salt, known as Blue Label, on what it terms a standard quality discount system available to all customers. Under this system, the purchasers pay a delivered price and the cost to both wholesale and retail purchasers of this brand differs according to the quantities brought. These prices are as follows, after making allowance for rebates and discounts:

Per case

Less-than-carload purchases	$1.60
Carload purchases	1.50
5,000-case purchases in any consecutive 12 months	1.40
50,000-case purchases in any consecutive 12 months	1.35

Only five companies have ever bought sufficient quantities of respondent's salt to obtain the $1.35 per case price. These companies could buy in such quantities because they operate large chains of retail stores in various parts of the country. As a result of this low price, these five companies have been able to sell Blue Label salt at retail cheaper than wholesale purchasers from respondent could reasonably sell the same brand of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores. . …

. … Respondent's basic contention, which it argues this case hinges upon, is that its ``standard quantity discounts, available to all on equal terms, as contrasted, for example, to hidden or special rebates, allowances, prices or discounts, are not discriminatory within the meaning of the Robinson-Patman Act." Theoretically, these discounts are equally available to all, but functionally they are not. For as the record indicates (if reference to it on this point were necessary) no single independent retail grocery store, and probably no single wholesaler, bought as many as 50,000 cases or as much as $50,000 worth of table salt in one year. Furthermore, the record shows that, while certain purchasers were enjoying one or more of respondent's standard quantity discounts, some of their competitors made purchases in such small quantities that they could not qualify for any of respondent's discounts, even those based on carload shipments. The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price. . …

… It is argued that the findings fail to show that respondent's discriminatory discounts had in fact caused injury to competition. There are specific findings that such injuries had resulted from respondent's discounts, although the statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations ``may be substantially to lessen competition … or to injure, destroy, or prevent competition." After a careful consideration of this provision of the Robinson-Patman Act, we have said that ``the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they `may' have such an effect." Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. …

Apprehension is expressed in this Court that enforcement of the Commission's order against respondent's continued violations of the Robinson-Patman Act might lead respondent to raise table salt prices to its carload purchasers. Such a conceivable, though, we think, highly improbable, contingency, could afford us no reason for upsetting the Commission's findings and declining to direct compliance with a statute passed by Congress.

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. . . .

NOTES AND QUESTIONS

1. Why was Morton Salt's ``price discrimination'' scheme not frustrated by arbitrage? Couldn't a buyer simply purchase 50,000 cases at $1.35 per case and resell them to small purchasers at $1.55 per case — lower than the $1.60 Morton Salt charged purchasers of less than a carload? If Morton Salt were truly price discriminating, such a scheme would cost it many of its most profitable sales.

There are several possible explanations. Most likely, Morton Salt did not care whether someone resold its salt, because it made just as much money per case from a 50,000 case sale as it did from a 100 case sale; that is, although the price per case of a 100 case sale was higher, costs were also higher. If Morton Salt did not care whether there was such arbitrage, that is good evidence that it was not engaged in true price discrimination.

Another possibility, however, is that Morton Salt was engaged in price discrimination, but that the additional transaction costs of arbitrage were greater than the amount of the discrimination. Someone seeking to purchase salt at $1.35 and resell it at $1.55 would have to buy the salt, store it, possibly advertise it, and then engage in individual sales and perhaps deliveries to smaller purchasers. If these operations cost more than 20 cents per case, arbitrage would be unprofitable. As a general rule, a seller's ability to price discriminate is limited by the costs of arbitrage. If arbitrage costs 20 cents per unit, then a price differential of less than 20 cents between favored and disfavored customers will preclude arbitrage from occurring.

2. The Supreme Court noted that the legislative history of the Robinson-Patman Act made it ``abundantly clear'' that ``Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability.'' If that is true, then doesn't the legislative policy of the Robinson-Patman Act require the Court to dispense with economic efficiency and use the statute to protect small businesses from larger, more efficient competitors? Isn't that precisely what the Court does when it defines ``injury to competition'' under the statute as injury to the ``competitive opportunities'' of small businesses who had to pay more than their larger competitors did? Isn't the Court confusing ``injury to competition'' with ``injury to competitors''? *See* H. Hovenkamp, *The Robinson-Patman Act: Unfinished Business*, 68 Antitrust L.J. 125 (2000).

3. Is there any evidence in the opinion that Morton Salt had market power in the wholesale salt market? A manufacturer cannot generally engage in systematic price discrimination unless it has market power. If Morton Salt's $1.60 price to small buyers were really a monopoly price, but Morton Salt had no market power, small buyers would simply find a seller willing to sell to them at a competitive price. Thus, persistent price differentials have one of two explanations: (1) either the seller has a certain amount of market power or (2) the price differential is in fact nondiscriminatory and merely reflects the higher costs of dealing with one set of customers. The case law on secondary-line price discrimination under the Robinson-Patman Act generally fails to discuss market power. It is simply not an issue. The absence of a market power requirement in secondary-line Robinson-Patman cases is economically irrational. However, there may be some explanations for the case law.

First of all, the legislative history of the Robinson-Patman amendments makes clear that the framers of the 1936 statute believed the real villains in secondary-line cases were large buyers, such as chain stores, and not large sellers. The theory was that big buyers somehow managed to force sellers to grant them discounts so large that the sales were effectively below cost. In order to cover these losses, the sellers had to raise the price to smaller buyers. Is the theory plausible? Can any buyer, no matter how great its monopsony power, force a seller to make long-term, below cost sales? Wouldn't a seller be better off simply to make the sales to the small buyers at the profit-maximizing price, and refuse to sell to the large buyers except at some price in excess of its marginal costs? This ``subsidy'' theory in the legislative history of the 1936 amendments is simply another version of the ``recoupment'' theory of predatory pricing, discussed *supra.* About the only thing that could explain the theory is a giant conspiracy between large buyers (the chain stores) and sellers to force small retailers out of business. Evidence of such a conspiracy has not surfaced. Furthermore, not even the conspiracy theory would explain why it would be profitable for sellers to make below-cost sales to large buyers, or why sellers would benefit from forcing their smaller customers out of business.

Another possible explanation for the absence of a market power requirement in secondary-line cases is that the ``cost justification'' defense, discussed *infra*, serves the same function. If price differences cannot be cost justified, then there is an inference of price discrimination, without the need of a showing that the defendant has market power.

In fact, however, it is probably easier for a plaintiff to show that the defendant has market power than it is for a defendant to justify price differentials under the rules that courts have created for the cost justification defense. Almost no seller knows its marginal costs with respect to each sale, and it is very difficult to compute such costs even for various categories of sales. Nevertheless, courts have generally required defendants to produce this kind of data in order to meet the affirmative defense of cost justification. See *United States v. Borden Co.*, this chapter, *infra*. *See generally* H. Hovenkamp, *Market Power and Secondary-Line Differential Pricing*, 71 Geo. L.J. 1157 (1983).

VOLVO TRUCKS NORTH AMERICA, INC. v. REEDER-SIMCO GMC, INC.

546 U.S. 164 (2006)

Chapter 8: the Robinson-Patman Act

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns specially ordered products — heavy-duty trucks supplied by Volvo Trucks North America, Inc. (Volvo), and sold by franchised dealers through a competitive bidding process. In this process, the retail customer states its specifications and invites bids, generally from dealers franchised by different manufacturers. Only when a Volvo dealer's bid proves successful does the dealer arrange to purchase the trucks, which Volvo then builds to meet the customer's specifications.

Reeder-Simco GMC, Inc. (Reeder), a Volvo dealer located in Fort Smith, Arkansas, commenced suit against Volvo alleging that Reeder's sales and profits declined because Volvo offered other dealers more favorable price concessions than those offered to Reeder. Reeder sought redress for its alleged losses under § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Price Discrimination Act. …

We granted review on the federal claim to resolve the question whether a manufacturer offering its dealers different wholesale prices may be held liable for price discrimination proscribed by Robinson-Patman, absent a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer. While state law designed to protect franchisees may provide, and in this case has provided, a remedy for the dealer exposed to conduct of the kind Reeder alleged, the Robinson-Patman Act, we hold, does not reach the case Reeder presents. The Act centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process.

I

Volvo manufactures heavy-duty trucks. Reeder sells new and used trucks, including heavy-duty trucks. 374 F.3d 701, 704 (C.A.8 2004). Reeder became an authorized dealer of Volvo trucks in 1995, pursuant to a five-year franchise agreement that provided for automatic one-year extensions if Reeder met sales objectives set by Volvo. Reeder generally sold Volvo's trucks through a competitive bidding process. In this process, the retail customer describes its specific product requirements and invites bids from several dealers it selects. The customer's ``decision to request a bid from a particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation, and cold calling or other marketing strategies initiated by individual dealers."

Once a Volvo dealer receives the customer's specifications, it turns to Volvo and requests a discount or ``concession'' off the wholesale price (set at 80% of the published retail price). It is common practice in the industry for manufacturers to offer customer-specific discounts to their dealers. Volvo decides on a case-by-case basis whether to offer a discount and, if so, what the discount rate will be, taking account of such factors as industry-wide demand and whether the retail customer has, historically, purchased a different brand of trucks. The dealer then uses the discount offered by Volvo in preparing its bid; it purchases trucks from Volvo only if and when the retail customer accepts its bid.

Reeder was one of many Volvo dealers, each assigned by Volvo to a geographic territory. Reeder's territory encompassed ten counties in Arkansas and two in Oklahoma. Although nothing prohibits a Volvo dealer from bidding outside its territory, Reeder rarely bid against another Volvo dealer. In the atypical event that the same retail customer solicited a bid from more than one Volvo dealer, Volvo's stated policy was to provide the same price concession to each dealer competing head to head for the same sale.

In 1997, Volvo announced a program it called ``Volvo Vision,'' in which the company addressed problems it faced in the market for heavy trucks, among them, the company's assessment that it had too many dealers. Volvo projected enlarging the size of its dealers' markets and reducing the number of dealers from 146 to 75. Coincidentally, Reeder learned that Volvo had given another dealer a price concession greater than the concessions Reeder typically received, and ``Reeder came to suspect it was one of the dealers Volvo sought to eliminate.'' Reeder filed suit against Volvo in February 2000, alleging losses attributable to Volvo's violation of the Arkansas Franchise Practices Act and the Robinson-Patman Act.

At trial, Reeder's vice-president, William E. Heck, acknowledged that Volvo's policy was to offer equal concessions to Volvo dealers bidding against one another for a particular contract, but he contended that the policy ``was not executed.'' Reeder presented evidence concerning two instances over the five-year course of its authorized dealership when Reeder bid against other Volvo dealers for a particular sale. One of the two instances involved Reeder's bid on a sale to Tommy Davidson Trucking. Volvo initially offered Reeder a concession of 17%, which Volvo, unprompted, increased to 18.1% and then, one week later, to 18.9%, to match the concession Volvo had offered to another of its dealers. Neither dealer won the bid. The other instance involved Hiland Dairy, which solicited bids from both Reeder and Southwest Missouri Truck Center. Per its written policy, Volvo offered the two dealers the same concession, and Hiland selected Southwest Missouri, a dealer from which Hiland had previously purchased trucks. After selecting Southwest Missouri, Hiland insisted on the price Southwest Missouri had bid prior to a general increase in Volvo's prices; Volvo obliged by increasing the size of the discount.

Reeder dominantly relied on comparisons between concessions Volvo offered when Reeder bid against non-Volvo dealers, with concessions accorded to other Volvo dealers similarly bidding against non-Volvo dealers for other sales. Reeder's evidence compared concessions Reeder received on four occasions when it bid successfully against non-Volvo dealers (and thus purchased Volvo trucks), with more favorable concessions other successful Volvo dealers received in connection with bidding processes in which Reeder did not participate. Reeder also compared concessions offered by Volvo on several occasions when Reeder bid unsuccessfully against non-Volvo dealers (and therefore did not purchase Volvo trucks), with more favorable concessions received by other Volvo dealers who gained contracts on which Reeder did not bid. …

The jury found that there was a reasonable possibility that discriminatory pricing may have harmed competition between Reeder and other Volvo truck dealers, and that Volvo's discriminatory pricing injured Reeder. …

A divided Court of Appeals for the Eighth Circuit affirmed. …

We granted certiorari to resolve this question: May a manufacturer be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer? Satisfied that the Court of Appeals erred in answering that question in the affirmative, we reverse the Eighth Circuit's judgment.

II

Section 2, ``when originally enacted as part of the Clayton Act in 1914, was born of a desire by Congress to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543, and n.6 (1960) (citing H.R. Rep. No. 627, 63d Cong., 2d Sess., 8 (1914); S. Rep. No. 698, 63d Cong., 2d Sess., 2-4 (1914)). Augmenting that provision in 1936 with the Robinson-Patman Act, Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand. See 14 Herbert Hovenkamp, Antitrust Law ¶ 2302 (3d ed. 2013).

Mindful of the purposes of the Act and of the antitrust laws generally, we have explained that Robinson-Patman does not ``ban all price differences charged to different purchasers of commodities of like grade and quality," *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993); rather, the Act proscribes ``price discrimination only to the extent that it threatens to injure competition". …

A hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. *FTC v. Sun Oil Co.*, 371 U.S. 505, 518–519 (1963) (evidence showed patronage shifted from disfavored dealers to favored dealers); *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437–438 (1983) (complaint ``supported by direct evidence of diverted sales"). We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time. See *FTC v. Morton Salt Co.*, 334 U.S. 37, 49–51 (1948); *Falls City Industries*, 460 U.S. at 435. Absent actual competition with a favored Volvo dealer, however, Reeder cannot establish the competitive injury required under the Act.

III

The evidence Reeder offered at trial falls into three categories: (1) comparisons of concessions Reeder received for four successful bids against *non-Volvo* dealers, with larger concessions other successful Volvo dealers received for *different sales* on which Reeder did not bid (purchase-to-purchase comparisons); (2) comparisons of concessions offered to Reeder in connection with several unsuccessful bids against *non-Volvo* dealers, with greater concessions accorded other Volvo dealers who competed successfully for *different sales* on which Reeder did not bid (offer-to-purchase comparisons); and (3) evidence of two occasions on which Reeder bid against another Volvo dealer (head-to-head comparisons). …

A

Both the purchase-to-purchase and the offer-to-purchase comparisons fall short, for in none of the discrete instances on which Reeder relied did Reeder compete with beneficiaries of the alleged discrimination *for the same customer*. Nor did Reeder even attempt to show that the compared dealers were consistently favored vis-à-vis Reeder. Reeder simply paired occasions on which it competed with *non-Volvo* dealers for a sale to Customer A with instances in which other Volvo dealers competed with *non-Volvo* dealers for a sale to Customer B. The compared incidents were tied to no systematic study and were separated in time by as many as seven months.

We decline to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality. No similar risk of manipulation occurs in cases kin to the chain-store paradigm. Here, there is no discrete ``favored" dealer comparable to a chain store or a large independent department store — at least, Reeder's evidence is insufficient to support an inference of such a dealer or set of dealers. For all we know, Reeder, on occasion, might have gotten a better deal vis-à-vis one or more of the dealers in its comparisons.

Reeder may have competed with other Volvo dealers for the opportunity to bid on potential sales in a broad geographic area. At that initial stage, however, competition is not affected by differential pricing; a dealer in the competitive bidding process here at issue approaches Volvo for a price concession only after it has been selected by a retail customer to submit a bid. Competition for an opportunity to bid, we earlier observed, is based on a variety of factors, including the existence *vel non* of a relationship between the potential bidder and the customer, geography, and reputation. We reiterate in this regard an observation made by JUDGE HANSEN, dissenting from the Eighth Circuit's Robinson-Patman holding: Once a retail customer has chosen the particular dealers from which it will solicit bids, ``the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale." 374 F.3d at 719. That Volvo dealers may bid for sales in the same geographic area does not import that they in fact competed for the same customer-tailored sales. In sum, the purchase-to-purchase and offer-to-purchase comparisons fail to show that Volvo sold at a lower price to Reeder's ``competitors," hence those comparisons do not support an inference of competitive injury. …

B

Reeder did offer evidence of two instances in which it competed head to head with another Volvo dealer. When multiple dealers bid for the business of the *same* customer, only one dealer will win the business and thereafter purchase the supplier's product to fulfill its contractual commitment. Because Robinson-Patman ``prohibits only discrimination `between different *purchasers*,' " Volvo and the United States argue, the Act does not reach markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory. See Brief for Petitioner 27; Brief for United States as *Amicus Curiae* 9, 17–20. We need not decide that question today. Assuming the Act applies to the head-to-head transactions, Reeder did not establish that it was *disfavored* vis-à-vis other Volvo dealers in the rare instances in which they competed for the same sale — let alone that the alleged discrimination was substantial. …

IV

Interbrand competition, our opinions affirm, is the ``primary concern of antitrust law." *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51–52, n.19 (1977). The Robinson-Patman Act signals no large departure from that main concern. Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*. In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. See *id.*, at 51–52 (observing that the market impact of a vertical practice, such as a change in a supplier's distribution system, may be a ``simultaneous reduction of intrabrand competition and stimulation of interbrand competition''). By declining to extend Robinson-Patman's governance to such cases, we continue to construe the Act ``consistently with broader policies of the antitrust laws.'' *Brooke Group*, 509 U.S. at 220.[1]

For the reasons stated, the judgment of the Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE THOMAS joins, dissenting.

… Reeder's theory of the case was that Volvo sought to cut back its number of dealers and deemed Reeder expendable. To avoid possible violations of franchise agreements and state laws, Volvo chose to accomplish this goal by offering Reeder worse prices than other regional dealers.

Reeder … showed that Volvo frequently gave worse prices to it than to other regional dealers. On at least four occasions, Volvo sold trucks to Reeder at significantly higher prices than to other dealers buying similar trucks around the same time. …

II

For decades, juries have routinely inferred the requisite injury to competition under the Robinson-Patman Act from the fact that a manufacturer sells goods to one retailer at a higher price than to its competitors. …

We have treated as competitors those who sell ``in a single, interstate retail market.'' *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983). … Under this approach — uncontroversial until today — Reeder would readily prevail. There is ample evidence that Volvo charged Reeder higher prices than it charged to competing

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1 *See also* 14 H. Hovenkamp, Antitrust Law ¶ 2333c, p. 109 (2d ed. 2006) (commenting that the Eighth Circuit's expansive interpretation ``views the [Robinson-Patman Act] as a guarantee of equal profit margins on sales actually made,'' and thereby exposes manufacturers to treble damages unless they ``charge uniform prices to their dealers'').

dealers in the same market over a period of many months. That those higher prices impaired Reeder's ability to compete with those dealers is just as obvious as the injury to competition described by the Court in *Morton Salt.*

Volvo nonetheless argues that no competitive injury could have occurred because it never discriminated against Reeder when Reeder and another Volvo dealer were seeking concessions with regard to the same ultimate customer. In Volvo's view, each transaction was a separate market, one defined by the customer and those dealers whom it had asked for bids. For each specific customer who has solicited bids, Reeder's only ``competitors'' were the other dealers making bids. Accordingly, if none of these other dealers were Volvo dealers, then Reeder suffered no competitive harm (relative to other Volvo dealers) when Volvo gave it a discriminatorily high price.

Unlike the Court, I cannot accept Volvo's vision. Nothing in the statute or in our precedent suggests that ``competition'' is evaluated by a transaction-specific inquiry, and such an approach makes little sense. It requires us to ignore the fact that competition among truck dealers is a continuing war waged over time rather than a series of wholly discrete events. Each time Reeder managed to resell trucks it had purchased at discriminatorily high prices, it was forced either to accept lower profit margins than were available to favored Volvo dealers or to pass on the higher costs to its customers (who then might well go to a different dealer the next time). And we have long indicated that lost profits relative to a competitor are a proper basis for permitting the *Morton Salt* inference. …

The Court appears to hold that, absent head-to-head bidding with a favored dealer, a dealer in a competitive bidding market can suffer no competitive injury. It is unclear whether that holding is limited to franchised dealers who do not maintain inventories, or excludes virtually all franchisees from the effective protection of the Act. In either event, it is not faithful to the statutory text.

III

As the Court recognizes, the Robinson-Patman Act was primarily intended to protect small retailers from the vigorous competition afforded by chainstores and other large volume purchasers. Whether that statutory mission represented sound economic policy is not merely the subject of serious debate, but may well merit JUDGE BORK's characterization as ``wholly mistaken economic theory.''[2] I do not suggest that disagreement with the policy of the Act has played a conscious role in my colleagues' unprecedented decision today. I cannot avoid, however, identifying the irony in a

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[2] **1** R. Bork, *The Antitrust Paradox* 382 (1978).

decision refusing to adhere to the text of the Act in a case in which the jury credited evidence that discriminatory prices were employed as means of escaping contractual commitments and eliminating specifically targeted firms from a competitive market. The exceptional quality of this case provides strong reason to enforce the Act's prohibition against discrimination even if JUDGE BORK's evaluation (with which I happen to agree) is completely accurate.

Accordingly, I respectfully dissent.

NOTES AND QUESTIONS

1. What do you make of this paragraph in the majority's opinion?

> Interbrand competition, our opinions affirm, is the `primary concern of antitrust law.' The Robinson-Patman Act signals no large departure from that main concern. Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*. In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. By declining to extend Robinson-Patman's governance to such cases, we continue to construe the Act `consistently with broader policies of the antitrust laws.'

First, the secondary-line provisions of the Robinson-Patman Act are expressly concerned with intrabrand competition, are they not? They are invoked only when a supplier sells essentially the same goods to two different dealers. *Second*, while the Supreme Court has frequently acknowledged the need to harmonize judicial interpretation of the Robinson-Patman Act with that of the antitrust laws generally, it has never incorporated a general requirement of injury to competition into the statute. Finally, the court has never required a showing that a challenged price discrimination resulted from the market power of a large purchaser, something that heavily concerned the framers of the statute. Is the Court signaling a new direction in the Robinson-Patman Act interpretation?

2. In *Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653 (9th Cir.), *cert. denied*, 522 U.S. 943 (1997), the court held that ``in a secondary-line Robinson-Patman case, the … inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition." The plaintiff was a distributor of certain Sylvania lighting products and went out of business after Sylvania gave discounts to larger distributors in competition with the plaintiff. The court relied mainly on the Supreme Court's holding in *Morton Salt* for the proposition that

> competitive injury in a secondary-line Robinson-Patman case may be inferred from evidence of injury to an individual competitor. More specifically, *Morton Salt* permits a fact finder to infer injury to competition from evidence of a substantial price difference over time, because such a price difference may harm the competitive opportunities of individual merchants, and thus create a ``reasonable possibility" that competition itself may be harmed.

FTC v. Morton Salt, 334 U.S. 37, 46–47 (1948).

The plaintiff attempted to rebut this presumption by showing that ``competition in the relevant market remains healthy," but the court found such a showing inadequate. Other circuits are divided on the issue. *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144 (D.C. Cir. 1988) (no competitive harm unless competition in the relevant market is injured); *J.F. Feeser v. Serv-A-Portion*, 909 F.2d 1524, 1532–1533 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) (harm to competitor is all that is required).

The relevant statutory language makes it unlawful to charge competing purchaser/resellers different prices

> 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 benefits of such discrimination, or with customers of either of them …*

15 U.S.C. § 13(a) (emphasis added).

The Ninth Circuit agreed with the Third Circuit's *Feeser* decision and with JUDGE MIKVA's dissent in the D.C. Circuit's *Boise Cascade* decision that the italicized portion of that statute permits a secondary-line violation to be shown on the basis of injury to a competitor alone rather than injury to competition. This language, as the court paraphrased JUDGE MIKVA, ``shifts the focus of the statute from protecting competition to protecting individual disfavored buyers from the loss of business to favored buyers."

But does the statutory language really have that meaning? While the distributors or dealers of a common manufacturer ``compete'' in the resale of the manufacturer's product, they also compete to be the best seller of that manufacturer's product. Price incentives are a typical reward of such competition. For example, a manufacturer might reward a dealer for its success with various rebates or discounts that lower its wholesale price. A dealer who knowingly attempts to receive such a reward is not ``injuring,'' ``destroying,'' or ``preventing'' such competition. Rather, he is furthering such competition.

The Ninth Circuit seemed to read the italicized statutory language as if it condemned price discriminations that ``injure … any person. … '' But the language reaches only those price discriminations that ``injure … *competition* with any person.'' The injury that a less effective dealer receives when a more effective dealer is rewarded with a rebate is not an injury to competition, but an inducement to competition.

The Third Circuit also noted in *Feeser, supra*, that the first portion of the statutory language (``may be substantially to lessen competition or tend to create a monopoly'') was contained in the original 1914 Clayton Act formulation. This language, the Third Circuit opined, ``refers generally to broad impacts on competition.'' By contrast, the language added by the 1936 ``Robinson-Patman'' amendments (``to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination'') was intended ``specifically to protect the ability of individual companies to compete.'' But does protecting ``the ability of individual companies *to compete*'' have to mean insulating them from all incentives programs rewarding dealers with larger sales by giving them lower effective prices?

To be sure, the secondary-line provisions of the Robinson-Patman Act were intended to give smaller rivals a certain element of protection against larger rivals. But the Supreme Court has also insisted that these provisions be interpreted in such a way so as to make them, to the extent possible, consistent with the overall goals of the antitrust laws. *See*, *e.g.*, *Great A. & P. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979), reprinted *infra*; *United States v. United States Gypsum Co*., 438 U.S. 422, 458 (1978), reprinted *infra*. Just as in *Chroma Lighting*, those decisions involved secondary-line applications of the Robinson-Patman Act.

3. The plaintiff in a secondary-line price discrimination case must generally show that it was injured because it paid a higher wholesale price than some other reseller with whom it was in competition. As a result, the plaintiff has the burden of showing that it competed with the favored purchaser, or the reseller who paid less. In *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191 (3d Cir. 2010), cert. denied, 131 S. Ct. 160 (2010), the court relied on *Volvo* to conclude that the favored and disfavored purchasers in that case were not relevant competitors. Feesers, a food distributor, alleged that Sodexo, a food service management company, was able to purchase certain food products from defendant Michaels at a lower price than Feesers was required to pay. In the ordinary distribution chain manufacturers sold to distributors such as Feesers, and distributors in turn sold to food service management companies such as Sodexo, as well as to others. Sodexo performed some food preparation services that Feesers did not. In this case the discrimination occurred at the bidding stage where the two firms were competing to win the right to bid a particular price to a customer. A "sale" would not take place until after the customer had accepted the bid from one of the bidders. Here, "the competition between Feesers and Sodexo for institutions' business occurred prior to Michaels's sales of food products to Feesers and Sodexo, when a customer consider[ed] switching…." At the time that the parties obtained price quotations as part of their bid preparations Sodexo "would not yet have secured any product from Michaels for resale to the prospective customer because the customer would only be deciding whether it wished to begin the…process."[S27] As a result, the court concluded, there was no actual competition between the two buyer/resellers.

While the decision is consistent with the Supreme Court's proper insistence that the Robinson-Patman Act be construed narrowly so as to make it less offensive to general antitrust goals, the reasoning requires some suspension of our knowledge about the realities of markets. Suppose a manufacturer sells to intermediaries *A* and *B*, who in turn would like to sell to a customer *X*. *X* requests that *A* and *B* submit bids, and in order to do so *A* and *B* must obtain a price quote from the manufacturer. The manufacturer then quotes *B* a lower price than *A*, and *B* in turn submits a lower bid to *X*, which *X* accepts. Significantly, only one sale is made, which is the one from the manufacturer to *B* to *X*. Further, at the time of the offered price difference no sale has been made at all. Further, it is always possible that *X* will decide to take the higher bid rather than the lower one, for other reasons. With respect to this series of events one could certainly conclude that there has not been a qualifying "sale" under the Robinson-Patman Act.[S28] But it seems quite odd to say that *A* and *B* are not competing with each other. To the contrary, this is precisely how competition in this particular market works.

The court may have felt unable to draw this conclusion because *A* and *B* (Feesers and Sodexo) were already purchasing from Michael Foods, probably for sales to the very customer involved in this dispute. The difference in bid quotation occurred with respect to future sales that had not yet been made. Even in that case, however, the complaint was not of actual sales at two different prices, but only of price quotations offering two different prices.

In *Godfrey v. Pulitzer Pub. Co (Godfrey II).*, 276 F.3d 405 (8th Cir. 2002), the

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[S27] *Feesers*, 591 F.3d at 203.
[S28] See ¶2312, and ¶d in particular.

court held that the requisite injury to secondary-line competition was not established where (a) the favored and disfavored purchasers operated in mutually exclusive territories; and (b) the resale price of the commodity (newspapers) was set by the publisher. The fact of exclusive territories would not itself be sufficient, because *customers* could cross territorial lines in order to obtain lower prices from the favored purchaser, thus injuring the disfavored purchaser. So, in this sense, even dealers in mutually exclusive territories continue to ``compete'' for Robinson-Patman Act purposes. However, with the resale price set by the publisher, customers had no motive to cross territorial lines; so the only injury that befell disfavored purchasers was a lower markup on the affected product. The plaintiffs unsuccessfully argued that this lower markup forbade them from competing effectively in the offering of collateral services. While the Eighth Circuit seemed ready to accept that argument in principle, it concluded that it was unsupported by the record.

4. In *Infusion Resources, Inc. v. Minimed, Inc.*, 351 F.3d 688 (5th Cir. 2003), *cert. denied*, 542 U.S. 920 (2004), the court held that in order for a disfavored purchaser to show that it was in competition with the favored purchaser, it must show ``actual competition … as of the time of the price differential,'' as well as ``competitive contact'' between the favored and disfavored purchasers. In addition, ``competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing.'' The Fifth Circuit approved these district court findings:

> [T]he district court noted that IIS's claim that it was one of MiniMed's top three distributors in the United States and that it was competing nationwide with MiniMed's other distributors, even if true, does not necessarily indicate that the markets of these distributors overlapped. The district court found that IIS did not specifically demonstrate any evidence showing that it directly competed with any of MiniMed's other distributors for ``the same dollar'' nationwide. The district court noted that while IIS did proffer some evidence that prior to the alleged price discrimination it competed with at least one reseller, Secure Care Medical, in the South, and that an entity named National Diabetes Pharmacy distributed MiniMed products in Virginia, it had not specifically pointed to any evidence that at the time of the alleged price discrimination that it was competing with these entities or any other entity in a particular market.

See also *Lewis v. Philip Morris, Inc.*, 355 F.3d 515 (6th Cir. 2004), where a cigarette manufacturer sold directly to retailers and wholesalers, and the latter resold to machine vendors. The court cited facts that smokers purchased from live vendors and machines interchangeably and were sensitive to relative price changes among them. This was sufficient to raise a fact issue with respect to whether sales of cigarettes through vending machines competed with sales through retailers. *And see Dynegy Marketing and Trade v. Multiut Corp.*, 648 F.3d 506 (7th Cir. 2011) (while plaintiff showed "competitive injury" under Robinson-Patman Act in the form of evidence that it paid more than a rival over a prolonged period of time, it did not show actual industry resulting from lost sales or profits; s ummary judgment for defendant).

PROBLEM 8.1

Steel, Inc. manufactures steel which is sold to various fabricators for a variety of purposes. Steel, Inc. also owns some fabrication plants itself. Some of these plants are carried in Steel, Inc.'s organizational structure as unincorporated divisions. Others are separately incorporated and listed as wholly-owned subsidiaries. Like most large firms, Steel, Inc. supplies steel to its divisional and subsidiary fabricators through a transfer pricing mechanism. That is, the steel is sold from Steel, Inc., to the division or subsidiary that will fabricate it, even though the division or subsidiary is wholly owned by Steel, Inc.

One of the unincorporated divisional plants fabricates steel into bridge girders. Bridge Co. is also a fabricator of steel bridge girders in competition with Steel, Inc.'s divisional fabricator. Steel, Inc. sells its own divisional plant steel for $4.00 per unit, while it charges Bridge Co. $5.00 per unit. Bridge Co. brings an action charging Steel, Inc. with violating the Robinson-Patman Act by discriminating in price in favor of its divisional plant. What outcome?

One of Steel, Inc.'s separately incorporated but wholly owned subsidiaries is called Hunter Chassis Co. Hunter makes automobile chassis out of steel in competition with an independent company, Bodyworks, Inc. Once again, Steel, Inc. sells its own subsidiary, Hunter, steel for $4.00 per unit, while it charges Bodyworks $5.00 per unit. Bodyworks also brings a Robinson-Patman case against Steel, Inc. What outcome? Should the outcome in the second case be the same as or different from that in the first case? Why? Is the Supreme Court's decision interpreting the Sherman Act in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (reprinted in Chapter 4, *supra*) relevant? Why or why not? *See Russ' Kwik Car Wash v. Marathon Petroleum Co.*, 772 F.2d 214 (9th Cir. 1985), especially JUDGE KENNEDY's dissent. Suppose that Hunter Chassis was only partly owned by Steel, Inc.? For example, suppose Steel, Inc. owned 60% of Hunter's shares while the remaining 40% were owned by others? Suppose Steel, Inc. owned only 20% of Hunter's shares? *See Danko v. Shell Oil Co.*, 115 F. Supp. 886 (E.D.N.Y. 1953); *Parrish v. Cox*, 586 F.2d 9 (6th Cir. 1978); *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 278–279 (8th Cir. 1988); Shelanski, Comment, *Robinson-Patman Act Regulation of Intra-Enterprise Pricing*, 80 Cal. L. Rev. 247 (1992).

Chapter 8: the Robinson-Patman Act

J. TRUETT PAYNE CO. v. CHRYSLER MOTORS CORP.

451 U.S. 557 (1981)

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented in this case is the appropriate measure of damages in a suit brought under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

Petitioner, for several decades a Chrysler-Plymouth dealer in Birmingham, Ala., went out of business in 1974. It subsequently brought suit against respondent in the United States District Court for the Northern District of Alabama, alleging that from January 1970 to May 1974 respondent's various ``sales incentive" programs violated § 2(a). Under one type of program, respondent assigned to each participating dealer a sales objective and paid to the dealer a bonus on each car sold in excess of that objective. Under another type of program, respondent required each dealer to purchase from it a certain quota of automobiles before it would pay a bonus on the sale of automobiles sold at retail. The amount of the bonus depended on the number of retail sales (or wholesale purchases) made in excess of the dealer's objective, and could amount to several hundred dollars. Respondent set petitioner's objectives higher than those of its competitors, requiring it to sell (or purchase) more automobiles to obtain a bonus than its competitors. To the extent petitioner failed to meet those objectives and to the extent its competitors met their lower objectives, petitioner received fewer bonuses. The net effect of all this, according to petitioner, was that it paid more money for its automobiles than did its competitors. It contended that the amount of the price discrimination — the amount of the price difference multiplied by the number of petitioner's purchases — was $81,248. It also claimed that the going-concern value of the business as of May 1974 ranged between $50,000 and $170,000.

. …

Petitioner first contends that once it has proved a price discrimination in violation of § 2(a) it is entitled at a minimum to so-called ``automatic damages" in the amount of the price discrimination. Petitioner concedes that in order to recover damages it must establish cognizable injury attributable to an antitrust violation and some approximation of damage. It insists, however, that the jury should be permitted to infer the requisite injury and damage from a showing of a substantial price discrimination. Petitioner notes that this Court has consistently permitted such injury to be inferred in injunctive actions brought to enforce § 2(a), *e.g.*, *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), and argues that private suits for damages under § 4 should be treated no differently. We disagree.

By its terms § 2(a) is a prophylactic statute which is violated merely upon a showing that ``the effect of such discrimination *may be* substantially to lessen competition."

(Emphasis supplied.) As our cases have recognized, the statute does not ``require that the discriminations must in fact have harmed competition." Section 4 of the Clayton Act, in contrast, is essentially a remedial statute. It provides treble damages to ``[a]ny person who *shall be injured* in his business or property by reason of anything forbidden in the antitrust laws. … " (Emphasis supplied.) To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. …

Our decision here is virtually governed by our reasoning in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). There we rejected the contention that the mere violation of § 7 of the Clayton Act, which prohibits mergers which *may* substantially lessen competition, gives rise to a damages claim under § 4. We explained that ``to recover damages [under § 4] respondents must prove more than that the petitioner violated § 7, since such proof establishes only that injury may result." *Id.*, at 486. Likewise in this case, proof of a violation does not mean that a disfavored purchaser has been actually ``injured" within the meaning of § 4.

. …

Petitioner next contends that even though it may not be entitled to ``automatic damages" upon a showing of a violation of § 2(a), it produced enough evidence of actual injury to survive a motion for a directed verdict. That evidence consisted primarily of the testimony of petitioner's owner, Mr. Payne, and an expert witness, a professor of economics. Payne testified that the price discrimination was one of the causes of the dealership going out of business. …

Neither Payne nor petitioner's expert witness offered documentary evidence as to the effect of the discrimination on retail prices. Although Payne asserted that his salesmen and customers told him that the dealership was being undersold, he admitted he did not know if his competitors did in fact pass on their lower costs to their customers. Petitioner's expert witness took a somewhat different position. He believed that the discrimination would ultimately cause retail prices to be held at an artificially high level since petitioner's competitors would not reduce their retail prices as much as they would have done if petitioner received an equal bonus from respondent. He also testified that petitioner was harmed by the discrimination even if the favored purchasers did not lower their retail prices, since petitioner in that case would make less money per car.

Even construed most favorably to petitioner, the evidence of injury is weak. Petitioner nevertheless asks us to consider the sufficiency of its evidence in light of our traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury. …

… In the first place, it is a close question whether petitioner's evidence would be sufficient to support a jury award even under our relaxed damages rules. In those cases where we have found sufficient evidence to permit a jury to infer antitrust injury and approximate the amount of damages, the evidence was more substantial than the evidence presented here. In *Zenith* [*Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100], for example, plaintiff compared its sales in Canada, where it was subject to a violation, with its sales in the United States, where it was not. And in *Bigelow* [*v. RKO Radio Pictures, Inc.*, 327 U.S. 251], plaintiff adduced evidence not only comparing its profits with a competitor not subject to the violation but also comparing its profits during the time of the violation with the period immediately preceding the violation.

But a more fundamental difficulty confronts us in this case. The cases relied upon by petitioner all depend in greater or lesser part on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof. In this case, however, we cannot say with assurance that respondent is a ``wrongdoer.'' Because the court below bypassed the issue of liability and went directly to the issue of damages, we simply do not have the benefit of its views as to whether respondent in fact violated § 2(a). Absent such a finding, we decline to apply to this case the lenient damages rules of our previous cases. Had the court below found a violation, we could more confidently consider the adequacy of petitioner's evidence.

Accordingly, we think the proper course is to remand the case so that the Court of Appeals may pass upon respondent's contention that the evidence adduced at trial was insufficient to support a finding of violation of the Robinson-Patman Act. … We emphasize that even if there has been a violation of the Robinson-Patman Act, petitioner is not excused from its burden of proving antitrust injury and damages. It is simply that once a violation has been established, that burden is to some extent lightened.

NOTES AND QUESTIONS

1. Is *J. Truett Payne* consistent with *Morton Salt?* In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Supreme Court held that in order to recover damages, a private antitrust plaintiff must show ``antitrust injury'' — that is, ``injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'' However, in *Morton Salt* didn't the Supreme Court identify the fact that small grocers had to pay a higher price for salt than large grocers as the lessening of competition that the Robinson-Patman Act was aimed at?

2. On remand, the Fifth Circuit noted that the plaintiff's sales actually increased during the period in which it was allegedly the victim of its supplier's price discrimination. It dismissed the complaint, concluding that there was no injury to competition among dealers. In fact, the competition became more intense. The Fifth Circuit virtually required that in order to show antitrust injury in a secondary-line price discrimination case, the plaintiff must show that it lost substantial sales or was driven from business as a result of the defendant's price discrimination scheme. Is it plausible that a manufacturer of cars would want to use a price discrimination scheme such as incentive rebates in order to drive a poorly performing dealership out of business? Why not simply terminate the dealership?

3. The ``Dealer Incentive Plan" at issue in *J. Truett Payne* is part of a scheme of partial vertical integration, designed by Chrysler to make its dealers operate more efficiently. If Chrysler owned and operated its retail dealerships, then it could hire, fire, and generally supervise retail operations. A manufacturer that sells through independent dealers must find more indirect mechanisms, however, for ensuring the efficiency of its outlets. Chrysler's answer was to reward its dealers who performed well and penalize the ones who did not. Dealers who met their sales quotas or exceeded them paid a lower net cost per car than dealers who failed to meet their quotas. That does not necessarily mean, however, that the different net prices charged to efficient and inefficient dealers were discriminatory. Perhaps it cost Chrysler more money to sell through inefficient dealers: they are more likely to go out of business; they may be slower in paying for cars; they may produce more dissatisfied customers who will not come back to Chrysler for another car. The question whether a dealer incentive program is actually discriminatory illustrates the enormous difficulty of determining a seller's true marginal costs with respect to any transaction. H. Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 191–198 (2005).

FTC v. HENRY BROCH & CO.

363 U.S. 166 (1960)

JUSTICE DOUGLAS delivered the opinion of the Court.

Section 2(c) of the Clayton Act … makes it unlawful for ``any person" to make an allowance in lieu of ``brokerage" to the ``other party to such transaction." The question is whether that prohibition is applicable to the following transactions by respondent.

Respondent is a broker or sales representative for a number of principals who sell food products. One of the principals is Canada Foods Ltd., a processor of apple concentrate and other products. Respondent agreed to act for Canada Foods for a 5% commission. Other brokers working for the same principal were promised a 4% commission. Respondent's commission was higher because it stocked merchandise in advance of sales. Canada Foods established a price for its 1954 pack of apple concentrate at $1.30 per gallon in 50-gallon drums and authorized its brokers to negotiate sales at that price.

The J. M. Smucker Co., a buyer, negotiated with another broker, Phipps, also working for Canada Foods, for apple concentrate. Smucker wanted a lower price than $1.30 but Canada Foods would not agree. Smucker finally offered $1.25 for a 500-gallon purchase.

That was turned down by Canada Foods, acting through Phipps. Canada Foods took the position that the only way the price could be lowered would be through reduction in brokerage. About the same time respondent was negotiating with Smucker. Canada Foods told respondent what it had told Phipps, that the price to the buyer could be reduced only if the brokerage were cut; and it added that it would make the sale at $1.25 — the buyer's bid — if respondent would agree to reduce its brokerage from 5% to 3%. Respondent agreed and the sale was consummated at that price and for that brokerage. The reduced price of $1.25 was thereafter granted Smucker on subsequent sales. But on sales to all other customers, whether through respondent or other brokers, the price continued to be $1.30 and in each instance respondent received the full 5% commission. Only on sales through respondent to Smucker were the selling price and the brokerage reduced.

The customary brokerage fee of 5% to respondent would have been $2,036.84. The actual brokerage of 3% received by respondent was $1,222.11. The reduction of brokerage was $814.73 which is 50% of the total price reduction of $1,629.47 granted by Canada Foods to Smucker.

. …

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up ``dummy'' brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay ``brokerage'' to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination. …

It is urged that the seller is free to pass on to the buyer in the form of a price reduction any differential between his ordinary brokerage expense and the brokerage commission which he pays on a particular sale because § 2(a) of the Act permits price differentials based on savings in selling costs resulting from differing methods of distribution. From this premise it is reasoned that a seller's broker should not be held to have violated § 2(c) for having done that which is permitted under § 2(a). We need not decide the validity of that premise, because the fact that a transaction may not violate one section of the Act does not answer the question whether another section has been violated. Section 2(c), with which we are here concerned, is independent of § 2(a) and was enacted by Congress because § 2(a) was not considered adequate to deal with abuses of the brokerage function.

. …

The fact that the buyer was not aware that its favored price was based in part on a discriminatory reduction in respondent's brokerage commission is immaterial. The Act is aimed at price discrimination, not conspiracy. The buyer's intent might be relevant were he charged with receiving an allowance in violation of § 2(c). But certainly it has no bearing on whether the respondent has violated the law. The powerful buyer who demands a price concession is concerned only with getting it. He does not care whether it comes from the seller, the seller's broker, or both.

Congress enacted the Robinson-Patman Act to prevent sellers and sellers' brokers from yielding to the economic pressures of a large buying organization by granting unfair preferences in connection with the sale of goods. The form in which the buyer pressure is exerted is immaterial and proof of its existence is not required. It is rare that the motive in yielding to a buyer's demands is not the ``necessity'' for making the sale. An ``independent'' broker is not likely to be independent of the buyer's coercive bargaining power. He, like the seller, is constrained to favor the buyers with the most purchasing power. If respondent merely paid over part of his commission to the buyer, he clearly would have violated the Act. We see no distinction of substance between the two transactions. In each case the seller and his broker make a concession to the buyer as a consequence of his economic power. In both cases the result is that the buyer has received a discriminatory price. In both cases the seller's broker reduces his usual brokerage fee to get a particular contract. There is no difference in economic effect between the seller's broker splitting his brokerage commission with the buyer and his yielding part of the brokerage to the seller to be passed on to the buyer in the form of a lower price.

. …

It is suggested that reversal of this case would establish an irrevocable floor under commission rates. We think that view has no foundation in fact or in law. Both before and after the sales to Smucker, respondent continued to charge the usual 5% on sales to other buyers. There is nothing in the Act, nor is there anything in this case, to require him to continue to charge 5% on sales to all customers. A price reduction based upon alleged savings in brokerage expenses is an ``allowance in lieu of brokerage'' when given only to favored customers. Had respondent, for example, agreed to accept a 3% commission on all sales to all buyers there plainly would be no room for finding that the price reductions were violations of § 2(c).

. …

NOTE

What does the *Henry Broch* decision do to the concept of the independent broker, whose job is to bring a buyer and seller together, sometimes, if necessary, by reducing her own commission in order to reach a net price that is acceptable to both buyer and seller?

The legislative history of the Robinson-Patman Act reveals that the Congress that passed it may have been anticompetitive; however, was it as anticompetitive as the Supreme Court's decision in *Broch*? The legislative history reveals that section 2(c) was designed to deal with ``phony'' brokerage allowances, given when there was no real broker at all, but when a large buyer performed certain services traditionally performed by the independent broker. In such cases, the seller might charge a uniform price but subtract a 5% ``brokerage allowance'' even though no broker participated. JUSTICE WHITTAKER's dissent, not reprinted here, contains a long analysis of the legislative history of section 2(c). Clearly, JUSTICE WHITTAKER noted, the statute does not forbid brokerage allowances for brokerage services actually performed. In this case, not only were brokerage services actually performed, but there was also a real independent broker actually performing them! *See* 14 H. Hovenkamp, *Antitrust Law* ¶ 2362 (3d ed. 2013).

[B]

Commodities of ``Like Grade and Quality''

FTC v. BORDEN CO.

383 U.S. 637 (1966)

JUSTICE WHITE delivered the opinion of the Court.

The Borden Company, respondent here, produces and sells evaporated milk under the Borden name, a nationally advertised brand. At the same time Borden packs and markets evaporated milk under various private brands owned by its customers. This milk is physically and chemically identical with the milk it distributes under its own brand but is sold at both the wholesale and retail level at prices regularly below those obtained for the Borden brand milk. The Federal Trade Commission found the milk sold under the Borden and the private labels to be of like grade and quality as required for the applicability of § 2(a) of the Robinson-Patman Act. … The Court of Appeals set aside the Commission's order on the sole ground that as a matter of law, the customer label milk was not of the same grade and quality as the milk sold under the Borden brand. …

… Here, because the milk bearing the Borden brand regularly sold at a higher price than did the milk with a buyer's label, the court considered the products to be ``commercially'' different and hence of different ``grade'' for the purposes of § 2(a), even though they were physically identical and of equal quality. Although a mere difference in brand would not in itself demonstrate a difference in grade, decided consumer preference for one brand over another, reflected in the willingness to pay a higher price for the well-known brand, was, in the view of the Court of Appeals, sufficient to differentiate chemically identical products and to place the price differential beyond the reach of § 2(a).

We reject this construction of § 2(a), as did both the examiner and the Commission in this case. …

Obviously there is nothing in the language of the statute indicating that grade, as distinguished from quality, is not to be determined by the characteristics of the product itself, but by consumer preferences, brand acceptability or what customers think of it and are willing to pay for it. Moreover, what legislative history there is concerning this question supports the Commission's construction of the statute rather than that of the Court of Appeals.

. …

The Commission's construction of the statute also appears to us to further the purpose and policy of the Robinson-Patman Act. Subject to specified exceptions and defenses, § 2(a) proscribes unequal treatment of different customers in comparable transactions, but only if there is the requisite effect upon competition, actual or potential. But if the transactions are deemed to involve goods of disparate grade or quality, the section has no application at all and the Commission never reaches either the issue of discrimination or that of anticompetitive impact. We doubt that Congress intended to foreclose these inquiries in situations where a single seller markets the identical product under several different brands, whether his own, his customers' or both. Such transactions are too laden with potential discrimination and adverse competitive effect to be excluded from the reach of § 2(a) by permitting a difference in grade to be established by the label alone or by the label and its consumer appeal.

If two products, physically identical but differently branded, are to be deemed of different grade because the seller regularly and successfully markets some quantity of both at different prices, the seller could, as far as § 2(a) is concerned, make either product available to some customers and deny it to others, however discriminatory this might be and however damaging to competition. Those who were offered only one of the two products would be barred from competing for those customers who want or might buy the other. The retailer who was permitted to buy and sell only the more expensive brand would have no chance to sell to those who always buy the cheaper product or to convince others, by experience or otherwise, of the fact which he and all other dealers already know — that the cheaper product is actually identical with that carrying the more expensive label.

The seller, to escape the Act, would have only to succeed in selling some unspecified amount of each product to some unspecified portion of his customers, however large or small the price differential might be. The seller's pricing and branding policy, by being successful, would apparently validate itself by creating a difference in ``grade'' and thus taking itself beyond the purview of the Act.

Our holding neither ignores the economic realities of the marketplace nor denies that some labels will command a higher price than others, at least from some portion of the public. But it does mean that ``the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory `like grade and quality' test.'' …

NOTES AND QUESTIONS

1. The Court's opinion sees something ``illegitimate'' about using advertising to create differential consumer preferences. Suppose that Borden's cost of producing milk was $1.00 per gallon, excluding advertising. Assume further that the only difference between the name brand and the private brand milk was that Borden spent 25 cents per gallon advertising the former, but nothing advertising the latter. Borden then sells the name brand for $1.25 and the private brand for $1.00. In this case, Borden has not engaged in economic price discrimination: its ratio of price to marginal cost is the same in both sets of sales. However, under the reasoning of the majority opinion, the advertising costs are irrelevant to the question of whether or not the products are of ``like grade or quality,'' even though the apparent result of the advertising is that consumers differentiate between the products.

Ultimately, the Supreme Court's opinion forces us to some decision about how much consumers need to be protected from their own choices. The Chicago School of antitrust analysis generally regards the consumer as free and able to make his or her own choices in the marketplace. If the consumer wishes to pay 25 cents more for an advertised product than for a chemically identical but unadvertised product, that is the consumer's business. But what if the advertising created the impression that Borden's name brand milk was somehow better than its house brand milk? One way to solve that problem, of course, is to regulate the content of advertising, and the Federal Trade Commission does that extensively. Another way, however, might be to force Borden to charge the same price for its advertised milk as for its unadvertised milk. However, the latter remedy goes too far, does it not? The result would be to eliminate *all* advertising of Borden milk, not just false or misleading advertising.

2. In *A. A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396, 1407–1408 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990), the court concluded that the ``like grade and quality'' requirement was not met with respect to two sets of transactions. In the first set, the seller picked the sizes; in the second set, the buyer picked them. In effect, the defendant boxed random-sized eggs as the chickens laid them. If a customer was willing to take such a box, it paid the lower price. But if a customer insisted on having only ``extra large,'' it paid a higher price. In comparing these two transactions, the court said, ``they are not fundamentally the same good, for the same reason that a seat on the 6:00 a.m. flight from Chicago to New York is not the same as a seat on the 5:00 p.m. flight, and a seat … reserved two weeks in advance is not the same as a seat on that flight for which the passenger had to stand by.''

[C]

Defenses

The Robinson-Patman Act explicitly recognizes two affirmative defenses. Section 2(a) (**15 U.S.C. § 13(a)**) exempts price ``differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.'' Section 2(b) (**15 U.S.C. § 13(b)**) permits a seller to rebut a prima facie case of violation ``by showing that his 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.''

The defenses are generally called the ``cost justification'' defense and the ``meeting competition'' defense, respectively. Both are affirmative defenses: they are raised after the plaintiff has made out a prima facie case, and in claiming the defenses the defendant has the burden of proof.

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[1]

The ``Cost Justification'' Defense

The cost justification language of section 2(a) of the Robinson-Patman Act has the potential to turn the Act at least halfway into a price discrimination statute, rather than a price difference statute. It explicitly permits a defendant to avoid liability by showing that differential price treatment to two buyers was cost justified — i.e., that the seller had a higher marginal cost with respect to the disfavored buyer than he did for the favored buyer.

In fact, however, the courts have been quite restrictive in their interpretation of the ``cost justification" defense. It has not rescued many defendants.

UNITED STATES v. BORDEN CO.

370 U.S. 460 (1962)

JUSTICE CLARK delivered the opinion of the Court.

This is a direct appeal from a judgment dismissing the Government's Section 2(a) Clayton Act suit in which it sought an injunction against the selling of fluid milk products by the appellees, The Borden Company and Bowman Dairy Company, at prices which discriminate between independently owned grocery stores and grocery store chains. The District Court in an unreported decision found the pricing plan of each dairy to be a prima facie violation of § 2(a) but concluded that these discriminatory prices were legalized by the cost justification proviso of § 2(a), which permits price differentials as long as they ``make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." …

. …

… Both appellees are major distributors of fluid milk products in metropolitan Chicago. The sales of both dairies to retail stores during the period in question were handled under plans which gave most of their customers — the independently owned stores — percentage discounts off list price which increased with the volume of their purchases to a specified maximum while granting a few customers — the grocery store chains — a flat discount without reference to volume and substantially greater than the maximum discount available under the volume plan offered independent stores. These discounts were made effective through schedules which appeared to cover all stores; however, the schedules were modified by private letters to the grocery chains confirming their higher discounts. Although the two sets of discounts were never officially labeled ``independent" and ``chain" prices, they were treated, called, and regarded as such throughout the record.

. …

The Borden pricing system produced two classes of customers. The two chains, A & P and Jewel, with their combined total of 254 stores constituted one class. The 1,322 independent stores, grouped in four brackets based on the volume of their purchases, made up the other. Borden's cost justification was built on comparisons of its average cost per $100 of sales to the chains in relation to the average cost of similar sales to each of the four groups of independents. The costs considered were personnel (including routemen, clerical and sales employees), truck expenses, and losses on bad debts and returned milk. Various methods of cost allocation were utilized: Drivers' time spent at each store was charged directly to that store; certain clerical expenses were allocated between the two general classes; costs not susceptible of either of the foregoing were charged to the various stores on a per stop, per store, or volume basis.

Bowman's cost justification was based on differences in volume and methods of delivery. It relied heavily upon a study of the cost per minute of its routemen's time. It determined that substantial portions of this time were devoted to three operations, none of which were ever performed for the 163 stores operated by its two major chain customers. These added work steps arose from the method of collection, *i.e.*, cash on delivery and the delayed collections connected therewith, and the performance of ``optional customer services." The customer services, performed with varying frequency depending upon the circumstances, included ``services that the driver may be requested to do, such as deliver the order inside, place the containers in a refrigerator, rearrange containers so that any product remaining unsold from yesterday will be sold first today, leave cases of products at different spots in the store, etc." The experts conducting the study calculated as to these elements a ``standard" cost per unit of product delivered: the aggregate time required to perform the services, as determined by sample time studies, was divided by the total number of units of product delivered. In essence, the Bowman justification was merely a comparison of the cost of these services in relation to the disparity between the chain and independent prices. Although it was shown that the five sample independents in the Government's prima facie case received the added services, it was not shown or found that all 2,500 independents supplied by Bowman partook of them. On the basis of its studies Bowman estimated that about two-thirds of the independent stores received the ``optional customer services" on a daily basis and that ``most store customers pay the driver in cash daily."

… The Government candidly recognizes in its briefs filed in the instant case that ``[a]s a matter of practical necessity … when a seller deals with a very large number of customers, he cannot be required to establish different cost-reflecting prices for each customer." In this same vein, the practice of grouping customers for pricing purposes has long had the approval of the Federal Trade Commission. We ourselves have noted the ``elusiveness of cost data in a Robinson-Patman Act proceeding." *Automatic Canteen Co. v. Federal Trade Comm'n*, 346 U.S. 61, 68 (1953). In short, to completely renounce class pricing as justified by class accounting would be to eliminate in practical effect the cost justification proviso as to sellers having a large number of purchasers, thereby preventing such sellers from passing on economies to their customers. It seems hardly necessary to say that such a result is at war with Congress' language and purpose.

But this is not to say that price differentials can be justified on the basis of arbitrary classifications or even classifications which are representative of a numerical majority of the individual members. At some point practical considerations shade into a circumvention of the proviso. A balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member. High on the list of ``musts'' in the use of the average cost of customer groupings under the proviso of § 2(a) is a close resemblance of the individual members of each group on the essential point or points which determine the costs considered.

In this regard we do not find the classifications submitted by the appellees to have been shown to be of sufficient homogeneity. Certainly, the cost factors considered were not necessarily encompassed within the manner in which a customer is owned. Turning first to Borden's justification, we note that it not only failed to show that the economies relied upon were isolated within the favored class but affirmatively revealed that members of the classes utilized were substantially unlike in the cost saving aspects considered. For instance, the favorable cost comparisons between the chains and the larger independents were for the greater part controlled by the higher average volume of the chain stores in comparison to the average volume of the 80-member class to which these independents were relegated. The District Court allowed this manner of justification because ``most chain stores do purchase larger volumes of milk than do most independent stores.'' However, such a grouping for cost justification purposes, composed as it is of some independents having volumes comparable to, and in some cases larger than, that of the chain stores, created artificial disparities between the larger independents and the chain stores. It is like averaging one horse and one rabbit. As the Federal Trade Commission said in *In the Matter of Champion Spark Plug Co.*, 50 F.T.C. 30, 43 (1953): ``A cost justification based on the difference between an estimated average cost of selling to one or two large customers and an average cost of selling to all other customers cannot be accepted as a defense to a charge of price discrimination.'' This volume gap between the larger independents and the chain stores was further widened by grouping together the two chains, thereby raising the average volume of the stores of the smaller of the two chains in relation to the larger independents. Nor is the vice in the Borden class justification solely in the paper volumes relied upon, for it attributed to many independents cost factors which were not true indicia of the cost of dealing with those particular consumers. To illustrate, each independent was assigned a portion of the total expenses involved in daily cash collections, although it was not shown that all independents paid cash and in fact Borden admitted only that a ``large majority'' did so.

Likewise the details of Bowman's cost study show a failure in classification. Only one additional point need be made. Its justification emphasized its costs for ``optional customer service'' and daily cash collection with the resulting ``delay to collect.'' As shown by its study these elements were crucial to Bowman's cost justification. In the study the experts charged all independents and no chain store with these costs. Yet, it was not shown that all independents received these services daily or even on some lesser basis. Bowman's studies indicated only that a large majority of independents took these services on a daily basis. Under such circumstances the use of these cost factors across the board in calculating independent store costs is not a permissible justification, for it possibly allocates costs to some independents whose mode of purchasing does not give rise to them. The burden was upon the profferer of the classification to negate this possibility, and this burden has not been met here. If these factors control the cost of dealing, then their presence or absence might with more justification be the password for admission into the various price categories.

. …

In sum, the record here shows that price discriminations have been permitted on the basis of cost differences between broad customer groupings, apparently based on the nature of ownership but in any event not shown to be so homogeneous as to permit the joining together of these purchasers for cost allocations purposes. If this is the only justification for appellees' pricing schemes, they are illegal. …

NOTES AND QUESTIONS

1. All classification schemes contain a certain amount of arbitrariness, do they not? Borden serviced about 1,300 stores and Bowman about 2,500. In all likelihood, neither dairy had identical marginal costs for servicing any two stores. Each one was a slightly different distance from the storage facility, and each needed a slightly different combination of services. Simple differences, such as whether the delivery agent had to walk up a flight of stairs, affected the marginal cost of selling milk to a particular grocery store. In order to justify its costs, therefore, Borden must either produce its precise marginal cost for each of its 1,300 stores — certainly an impossible task — or else it must group together stores that impose relatively close, although not identical, marginal costs.

2. If Borden and Bowman are competitors, both with each other and with other dairies, would it be to their advantage to set truly discriminatory price schedules (i.e., schedules in which the price differentials could not be cost justified)? Any particular grocer would buy from the dairy that gave it the best price. In a competitive market, the price lists would naturally tend toward the cost of servicing the buyers who fell within a particular category. Any class of buyers charged a price above marginal cost would switch to another seller.

3. Because of the difficulties imposed by the Supreme Court in *Borden*, the cost justification defense has proved somewhat illusive. Courts have frequently rejected expensive studies undertaken by defendants to show cost justification. The courts have generally held either that the studies did not account for all elements of cost, or that the studies grouped buyers who were not sufficiently homogeneous. In many of these cases, the defendant clearly had no market power. *See, e.g.*, *Allied Accessories & Auto Parts Co. v. General Motors Corp.*, 825 F.2d 971, 977 (6th Cir. 1987). The defendant GM had one low-priced buyer of filters who had agreed not to obtain promotional brochures, catalogs, field representative services, or GM-sponsored incentive programs normally offered to automobile parts distributors. GM then averaged the costs of giving these services to all the other distributors (about 2000 in number) and asserted that this average was no greater than the discrimination in price. The court rejected the methodology because: (1) the high-priced set of customers was never offered the option of foregoing the same set of services as well; (2) there was a great deal of diversity in the services given to the various 2000 customers, none of which was accounted for in GM's ``average'' figures; and (3) although the additional services were *offered* to most customers in the larger class, many did not claim them and the others claimed them in varying degrees. What would GM have to do in order to satisfy these objections?

Nevertheless, a few defendants have been able to assert the defense successfully. *See, e.g.*, *Acadia Motors, Inc. v. Ford Motor Co.*, 44 F.3d 1050 (1st Cir. 1995) (differential warranty reimbursement rates found to be cost justified); *Americom Distrib. Corp. v. ACS Communications, Inc.*, 990 F.2d 223 (5th Cir.), *cert. denied*, 510 U.S. 867 (1993) (lower price on larger order cost justified).

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[2]

The ``Meeting Competition'' Defense

Section 2(b) of the Robinson-Patman Act, **15 U.S.C. § 13(b)**, provides that a defendant seller can rebut a prima facie case of unlawful price discrimination ``by showing that his 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.'' Case law developing the defense has become entangled in many complexities, such as what constitutes ``good faith,'' and whether someone who actually bids lower than a competitor has merely ``met'' competition or has beaten it and thus falls outside the protection of the defense. For some of these complexities, *see* 14 Herbert Hovenkamp, *Antitrust Law* ¶ 2352 (3d ed. 2013).

In recent years, the United States Supreme Court has substantially restructured the ``Meeting Competition'' defense, in the following two opinions.

UNITED STATES v. UNITED STATES GYPSUM CO.

438 U.S. 422 (1978)

[In *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945), the Supreme Court held that in order to justify a low-price sale under the meeting competition defense, a seller had to rely on more than rumors about a competitor's prices. The Court concluded that discriminatory bids ``made in response to verbal information received from salesmen, brokers or intending purchasers, without supporting evidence'' were not made with sufficient ``good faith'' to qualify for the defense.]

[The defendants in *United States Gypsum* were competitors who exchanged price information in violation of *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969); see Chapter 4. The defendants argued that under the *Staley* holding the information exchanges were necessary for them to ``investigate or verify'' a competitor's price so that they could meet its competition in good faith.]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

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Staley's ``investigate or verify'' language coupled with *Corn Products'* focus on ``personal knowledge of the transactions'' have apparently suggested to a number of courts that, at least in certain circumstances, direct verification of discounts between competitors may be necessary to meet the burden-of-proof requirements of the § 2(b) defense. …

A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2(b) defense. While casual reliance on uncorroborated reports of buyers or sales representatives without further investigation may not, as we noted earlier, be sufficient to make the requisite showing of good faith, nothing in the language of § 2(b) or the gloss on that language in *Staley* and *Corn Products* indicates that direct discussions of price between competitors are required. …

The so-called problem of the untruthful buyer which concerned the Court of Appeals does not in our view call for a different approach to the § 2(b) defense. The good-faith standard remains the benchmark against which the seller's conduct is to be evaluated, and we agree with the Government and the FTC that this standard can be satisfied by efforts falling short of interseller verification in most circumstances where the seller has only vague, generalized doubts about the reliability of its commercial adversary — the buyer. Given the fact-specific nature of the inquiry, it is difficult to predict all the factors the FTC or a court would consider in appraising a seller's good faith in matching a competing offer in these circumstances. Certainly, evidence that a seller had received reports of similar discounts from other customers; or was threatened with a termination of purchases if the discount were not met, would be relevant in this regard. Efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data would also be probative as would the seller's past experience with the particular buyer in question.

There remains the possibility that in a limited number of situations a seller may have substantial reasons to doubt the accuracy of reports of a competing offer and may be unable to corroborate such reports in any of the generally accepted ways. Thus the defense may be rendered unavailable since unanswered questions about the reliability of a buyer's representations may well be inconsistent with a good-faith belief that a competing offer had in fact been made. As an abstract proposition, resort to interseller verification as a means of checking the buyer's reliability seems a possible solution to the seller's plight, but careful examination reveals serious problems with the practice.

Both economic theory and common human experience suggest that interseller verification — if undertaken on an isolated and infrequent basis with no provision for reciprocity or cooperation — will not serve its putative function of corroborating the representations of unreliable buyers regarding the existence of competing offers. Price concessions by oligopolists generally yield competitive advantages only if secrecy can be maintained; when the terms of the concession are made publicly known, other competitors are likely to follow and any advantage to the initiator is lost in the process. … Thus, if one seller offers a price concession for the purpose of winning over one of his competitor's customers, it is unlikely that the same seller will freely inform its competitor of the details of the concession so that it can be promptly matched and diffused. Instead, such a seller would appear to have at least as great an incentive to misrepresent the existence or size of the discount as would the buyer who received it. Thus verification, if undertaken on a one-shot basis for the sole purpose of complying with the § 2(b) defense, does not hold out much promise as a means of shoring up buyers(representations.

The other variety of interseller verification is, like the conduct charged in the instant case, undertaken pursuant to an agreement, either tacit or express, providing for reciprocity among competitors in the exchange of price information. Such an agreement would make little economic sense, in our view, if its sole purpose were to guarantee all participants the opportunity to match the secret price concessions of other participants under § 2(b). For in such circumstances, each seller would know that his price concession could not be kept from his competitors and no seller participating in the information-exchange arrangement would, therefore, have any incentive for deviating from the prevailing price level in the industry. See *United States v. Container Corp.* Regardless of its putative purpose, the most likely consequence of any such agreement to exchange price information would be the stabilization of industry prices. Instead of facilitating use of the § 2(b) defense, such an agreement would have the effect of eliminating the very price concessions which provide the main element of competition in oligopolistic industries and the primary occasion for resort to the meeting-competition defense.

Especially in oligopolistic industries such as the gypsum board industry, the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions. The Department of Justice's 1977 Report on the Robinson-Patman Act focused on the growing use of the Act as a cover for price fixing; former Antitrust Division Assistant Attorney General Kauper discussed the mechanics of the process:

``And thus you find in some industries relatively extensive exchanges of price information for the purpose, at least the stated purpose, of complying with the Robinson-Patman Act. …

Now, the mere exchange of price information itself may tend to stabilize prices. But I think it is also relatively common that once that exchange process begins, certain understandings go along with it — that we will exchange prices, but it will be understood, for example, you will not undercut my prices.

And from there it is a rather easy step into a full-fledged price-fixing agreement. I think we have seen that from time to time, and I suspect we will continue to see it as long as there continues to be a need to justify particular price discriminations in the terms of the Robinson-Patman Act."

We are left, therefore, on the one hand, with doubts about both the need for and the efficacy of interseller verification as a means of facilitating compliance with § 2(b), and, on the other, with recognition of the tendency for price discussions between competitors to contribute to the stability of oligopolistic prices and open the way for the growth of prohibited anticompetitive activity. To recognize even a limited ``controlling circumstance" exception for interseller verification in such circumstances would be to remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby. In *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953), the Court suggested that as a general rule the Robinson-Patman Act should be construed so as to insure its coherence with ``the broader antitrust policies that have been laid down by Congress"; that observation buttresses our conclusion that exchanges of price information — even when putatively for purposes of Robinson-Patman Act compliance — must remain subject to close scrutiny under the Sherman Act.

NOTES AND QUESTIONS

1. Why would any seller ever ask a price of $1.00 instead of $1.25? Because he believes that if he asks $1.25 of a particular customer, the customer will buy somewhere else? Aren't *all* prices calculated to ``meet competition"? Even the monopolist is unable to charge an infinite price. If there is no legal impediment to price discrimination, a monopoly seller would size up each individual buyer, take a guess at the largest amount that the buyer would be willing to pay based on the information available to the seller, and ask a price in that amount. That entire process is the meeting of competition. Would it matter if a buyer, asked to pay too high a price, decided not to buy any product at all? To buy a somewhat different product? Does the good faith meeting competition defense apply only when a seller is attempting to meet the competition of a particular, known seller?

2. Won't the *Gypsum* case encourage buyers to lie to sellers about competing offers?

FALLS CITY INDUSTRIES v. VANCO BEVERAGE, INC.

460 U.S. 428 (1983)

JUSTICE BLACKMUN delivered the opinion of the Court.

Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, provides that a defendant may rebut a prima facie showing of illegal price discrimination by establishing that its lower price to any purchaser or purchasers ``was made in good faith to meet an equally low price of a competitor." The United States Court of Appeals for the Seventh Circuit has concluded that the ``meeting-competition" defense of § 2(b) is available only if the defendant sets its lower price on a customer-by-customer basis and creates the price discrimination by lowering rather than by raising prices. …

From July 1, 1972, through November 30, 1978, petitioner Falls City Industries, Inc., sold beer f.o.b. its Louisville, Ky., brewery to wholesalers throughout Indiana, Kentucky, and 11 other States. Respondent Vanco Beverage, Inc., was the sole wholesale distributor of Falls City beer in Vanderburgh County, Ind. That county includes the city of Evansville. Directly across the state line from Vanderburgh County is Henderson County, Ky., where Falls City's only wholesale distributor was Dawson Springs, Inc. The city of Henderson, Ky., located in Henderson County, is less than 10 miles from Evansville. The two cities are connected by a four-lane interstate highway. The two counties generally are considered to be a single metropolitan area.

Vanco and Dawson Springs each purchased beer from Falls City and other brewers and resold it to retailers in Vanderburgh County and Henderson County, respectively. The two distributors did not compete for sales to the same retailers. This was because Indiana wholesalers were prohibited by state law from selling to out-of-state retailers, and Indiana retailers were not permitted to purchase beer from out-of-state wholesalers. Indiana law also affected beer sales in two other ways relevant to this case. First, Indiana required brewers to sell to all Indiana wholesalers at a single price. Second, although it was ignored and virtually unenforced, state law prohibited consumers from importing alcoholic beverages without a permit.

In December 1976, Vanco sued Falls City in the United States District Court for the Southern District of Indiana, alleging, among other things, that Falls City had discriminated in price against Vanco, in violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by charging Vanco a higher price than it charged Dawson Springs. …

… The [district] court held, however, that Vanco had made out a prima facie case of price discrimination under the Robinson-Patman Act. The District Court found that Vanco competed in a geographic market that spanned the state border and included Vanderburgh and Henderson Counties. Although Vanco and Dawson Springs did not sell to the same retailers, they ``competed for sale of [Falls City's] beer to … consumers of beer from retailers situated in [that] market area." Falls City charged a higher price for beer sold to Indiana distributors than it charged for the same beer sold to distributors in other States, including Kentucky. This pricing policy resulted in lower retail prices for Falls City beer in Kentucky than in Indiana, because Kentucky distributors passed on their savings to retailers who in turn passed them on to consumers. Finding that many customers living in the Indiana portion of the geographic market ignored state law to purchase cheaper Falls City beer from Henderson County retailers, the court concluded that Falls City's pricing policies prevented Vanco from competing effectively with Dawson Springs, and caused it to sell less beer to Indiana retailers.

The District Court rejected Falls City's § 2(b) meeting-competition defense. The court reasoned that, instead of reducing its prices to meet those of a competitor, Falls City had created the price disparity by raising its prices to Indiana wholesalers more than it had raised its Kentucky prices. Instead of ``adjusting prices on a customer to customer basis to meet competition from other brewers," Falls City charged a single price throughout each State in which it sold beer. The court concluded that Falls City's higher Indiana price was not set in good faith; instead, it was raised ``for the sole reason that it followed the other brewers … for its profit."

The United States Court of Appeals for the Seventh Circuit, by a divided vote, affirmed the finding of liability. …

. …

When proved, the meeting-competition defense of § 2(b) exonerates a seller from Robinson-Patman Act liability. This Court consistently has held that the meeting-competition defense `` `at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.' " The seller must show that under the circumstances it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors. Neither the District Court nor the Court of

Appeals addressed the question whether Falls City had shown information that would have led a reasonable and prudent person to believe that its lower Kentucky price would meet competitors' equally low prices there; indeed, no findings whatever were made regarding competitors' Kentucky prices, or the information available to Falls City about its competitors' Kentucky prices. …

On its face, § 2(b) requires more than a showing of facts that would have led a reasonable person to believe that a lower price was available to the favored purchaser from a competitor. The showing required is that the ``lower price … *was made* in good faith *to meet*" the competitor's low price. Thus, the defense requires that the seller offer the lower price in good faith *for the purpose* of meeting the competitor's price, that is, the lower price must actually have been a good faith response to that competing low price. In most situations, a showing of facts giving rise to a reasonable belief that equally low prices were available to the favored purchaser from a competitor will be sufficient to establish that the seller's lower price was offered in good faith to meet that price. In others, however, despite the availability from other sellers of a low price, it may be apparent that the defendant's low offer was not a good faith response.

… The Court of Appeals explicitly relied on two … factors in rejecting Falls City's meeting-competition defense: the price discrimination was created by raising rather than lowering prices, and Falls City raised its prices in order to increase its profits. Neither of these factors is controlling. Nothing in § 2(b) requires a seller to *lower* its price in order to meet competition. On the contrary, § 2(b) requires the defendant to show only that its ``lower price … was made in good faith to meet an equally low price of a competitor." A seller is required to justify a price difference by showing that it reasonably believed that an equally low price was available to the purchaser and that it offered the lower price for that reason; the seller is not required to show that the difference resulted from subtraction rather than addition.

A different rule would not only be contrary to the language of the statute, but also might stifle the only kind of legitimate price competition reasonably available in particular industries. In a period of generally rising prices, vigorous price competition for a particular customer or customers may take the form of smaller price increases rather than price cuts. Thus, a price discrimination created by selective price increases can result from a good faith effort to meet a competitor's low price.

… A seller need not choose between ``ruinously cutting its prices to all its customers to match the price offered to one, [and] refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs." *Standard Oil Co. v. FTC*, 340 U.S. at 250. Nor need a seller choose between keeping all its prices ruinously low to meet the price offered to one, and ruinously raising its prices to all customers to a level significantly above that charged by its competitors. A seller is permitted ``to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." The plain language of § 2(b) also permits a seller to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily freezing his price to his other customers.

Section 2(b) does not require a seller, meeting in good faith a competitor's lower price to certain customers, to forgo the profits that otherwise would be available in sales to its remaining customers. The very purpose of the defense is to permit a seller to treat different competitive situations differently. The prudent businessman responding fairly to what he believes in good faith is a situation of competitive necessity might well raise his prices to some customers to increase his profits, while meeting competitors' prices by keeping his prices to other customers low.

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The Court of Appeals also relied on *Staley* for the proposition that the meeting-competition defense `` `places emphasis on individual [competitive] situations, rather than upon a general system of competition,' " and ``does not justify the maintenance of discriminatory pricing among classes of customers that results merely from the adoption of a competitor's discriminatory pricing structure." The Court of Appeals was apparently invoking the District Court's findings that Falls City set prices statewide rather than on a ``customer to customer basis," and the District Court's conclusion that this practice disqualified Falls City from asserting the meeting-competition defense …

There is no evidence that Congress intended to limit the availability of § 2(b) to customer-specific responses. Section 2(b)'s predecessor, § 2 of the original Clayton Act, stated that ``nothing herein contained shall prevent … discrimination in price in the same or different communities made in good faith to meet competition." The Judiciary Committee of the House of Representatives, which drafted the clause explained the new section's anticipated function: ``It should be noted that while the seller is permitted to meet *local* competition, [§ 2(b)] does not permit him to cut *local* prices until his competitor has first offered lower prices, and then he can go no further than to meet those prices." Congress intended to allow reasonable pricing responses on an area-specific basis where competitive circumstances warrant them. The purpose of the amendment was to ``restric[t] the proviso to price differentials occurring in actual competition." We conclude that Congress did not intend to bar territorial price differences that are in fact responses to competitive conditions.

Section 2(b) specifically allows a ``lower price … to any purchaser or purchasers" made in good faith to meet a competitor's equally low price. A single low price surely may be extended to numerous purchasers if the seller has a reasonable basis for believing that the competitor's lower price is available to them. Beyond the requirement that the lower price be reasonably calculated to ``meet not beat" the competition, Congress intended to leave it a ``question of fact … whether the way in which the competition was met lies within the latitude allowed." Once again, this inquiry is guided by the standard of the prudent businessman responding fairly to what he reasonably believes are the competitive necessities.

A seller may have good reason to believe that a competitor or competitors are charging lower prices throughout a particular region. … In such circumstances, customer-by-customer negotiations would be unlikely to result in prices different from those set according to information relating to competitors' territorial prices. A customer-by-customer requirement might also make meaningful price competition unrealistically expensive for smaller firms such as Falls City, which was attempting to compete with larger national breweries in 13 separate States.

… Territorial pricing, however, can be a perfectly reasonable method — sometimes the most reasonable method — of responding to rivals' low prices. We choose not to read into § 2(b) a restriction that would deny the meeting-competition defense to one whose area-wide price is a well tailored response to competitors' low prices.

NOTES AND QUESTIONS

1. The court noted that distributors in the low-price market (Kentucky) and those in the high-price market (Indiana) did not sell to the same retailers because an Indiana statute prohibited Indiana distributors from selling to out-of-state retailers, and Indiana retailers from buying from out-of-state distributors. Thus, the favored and disfavored distributors did not compete for immediate customers at all. On the other hand, the differential pricing forced distributors in Indiana to sell to Indiana retailers at a higher price than Kentucky distributors sold to Kentucky retailers. The injury caused by the differential pricing was therefore shared by the disfavored distributors and their retailers. Presumably, the Indiana retailers were losing sales to customers who crossed the state line to buy cheaper beer in Kentucky. Because the Indiana retailers sold less beer, they purchased less from Indiana distributors. Doesn't this create a ``passing-on" problem analogous to that in *Illinois Brick v. Illinois, supra*, Chapter 3? Does *J. Truett Payne v. Chrysler Motor Corp., supra*, this chapter, holding that secondary-line plaintiffs are not entitled to automatic damages in the amount of the overcharge, suggest a rule for allocating damages between direct and indirect purchasers? In general, courts have permitted indirect purchasers to proceed under the Robinson-Patman Act, even after *Illinois Brick. See, e.g.*, *Paceo, Inc. v. Ishi Kawajma-Harima Heavy Indus. Co.*, 468 F. Supp. 256 (N.D. Cal. 1979).

2. The decision of the Supreme Court in the *Vanco Beverage* case modifies considerably the accepted definition of the ``meeting competition" defense as the Supreme Court described it nearly forty years earlier in *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945). In *Staley*, the defendant attempted to raise the meeting competition defense by showing that they had attempted to meet their competitors' entire price schedule. The competitors' price schedule, however, had itself already been found illegal under the Robinson-Patman Act. *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726 (1945). Thus, *Staley* could stand for either or both of two propositions: (1) one cannot meet competition by meeting a competitor's entire price schedule; competition must be met on a customer-by-customer basis; or (2) one cannot meet competition when the competitor's pricing is itself illegal under the Robinson-Patman Act. In *Vanco*, the Supreme Court has effectively told us that *Staley* stood for the second proposition but not the first.

Is this a sensible rule? What if Falls City's competitors in Kentucky were also violating the Robinson-Patman Act. Suppose, for example, that they were selling beer at a lower (or higher) price in Henderson County Kentucky than they were in some other county. Would that have any bearing on Falls City's need to compete with their prices in Henderson County? What if Falls City did not know that the competitors were themselves violating the Robinson-Patman Act? Should a seller seeking to ``meet competition'' in a certain market be put on notice whether the competitor's price is itself a violation of the Robinson-Patman Act? *See Standard Oil Co. v. Brown*, 238 F.2d 54 (5th Cir. 1956); *Knoll Assocs.*, 70 F.T.C. 311 (1966).

Compare Falls City with Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182 (1st Cir.), *cert. denied*, 519 U.S. 927 (1996), holding that while one can meet competition on a regional basis rather than customer-by-customer, there must nevertheless be evidence that someone else in the region is actually making sales at the lower price. Suppose that a defendant's lower price actually ends up meeting a rival's competition, but the seller did not know that fact at the time it offered the lower price. Can one be acting in ``good faith,'' as the statute requires, without knowing about the rival's lower price? *See Nichols Motorcycle Supply, Inc. v. Dunlop Tire Corp.*, 913 F. Supp. 1088 (N.D. Ill. 1995).

3. Seller *A* and seller *B* both sell widgets in St. Paul and Minneapolis. Each sells them for $1.00 in St. Paul and 80 cents in Minneapolis. Each is charged separately with a Robinson-Patman Act violation. *A* defends the low price in Minneapolis by arguing that it was a good faith effort to meet *B*'s competition. *B* defends its low price as a good faith effort to meet *A*'s competition. Will the defense succeed? What will happen to *B*'s defense if *A* has already been cleared? If *A* has already been condemned?

PROBLEM 8.2

Fred's Chocolates is a growing candy manufacturer selling to local distributors located in various parts of the country. Fred's principal rival is Anna Belle's Sweets, which also sells through distributors scattered across the country. Fred's experience is that any time an Anna Belle's distributor is in the geographic area, it must cut its price in order to meet Anna Belle's competition. Fred's has two distributors located in southern California, one in Los Angeles and one in San Diego. Their customers, retail stores, overlap a great deal. One day the San Diego distributor informs Fred's that an Anna Belle's distributor has come into San Diego for the first time. Fred's immediately cuts the price to the San Diego distributor, without actually inquiring whether the Anna Belle's distributor is selling cheaper. Is Fred's experience in other geographic areas sufficient to warrant his claim of the ``meeting competition'' defense? *See Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 391–393 (8th Cir. 1987).

[D]

Robinson-Patman Violations by Buyers

Section 2(f) of the Robinson-Patman Act (**15 U.S.C. § 13(f)**) makes it ``unlawful for any person engaged in commerce … knowingly to induce or receive a discrimination which is prohibited by this section.''

GREAT ATLANTIC & PACIFIC TEA CO. v. FTC

440 U.S. 69 (1979)

JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether the petitioner, the Great Atlantic & Pacific Tea Co. (A&P), violated § 2(f) of the Robinson-Patman Act, by knowingly inducing or receiving illegal price discriminations from the Borden Co. (Borden).

The alleged violation was reflected in a 1965 agreement between A&P and Borden under which Borden undertook to supply ``private label'' milk to more than 200 A&P stores in a Chicago area that included portions of Illinois and Indiana. This agreement resulted from an effort by A&P to achieve cost savings by switching from the sale of ``brand label'' milk (milk sold under the brand name of the supplying dairy) to the sale of ``private label'' milk (milk sold under the A&P label).

To implement this plan, A&P asked Borden, its longtime supplier, to submit an offer to supply under private label certain of A&P's milk and other dairy product requirements. After prolonged negotiations, Borden offered to grant A&P a discount for switching to private-label milk provided A&P would accept limited delivery service. Borden claimed that this offer would save A&P $410,000 a year compared to what it had been paying for its dairy products. A&P, however, was not satisfied with this offer and solicited offers from other dairies. A competitor of Borden, Bowman Dairy, then submitted an offer which was lower than Borden's.

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At this point, A&P's Chicago buyer contacted Borden's chain store sales manager and stated: ``I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park." When the Borden representative asked for more details, he was told nothing except that a $50,000 improvement in Borden's bid ``would not be a drop in the bucket."

Borden was thus faced with the problem of deciding whether to rebid. A&P at the time was one of Borden's largest customers in the Chicago area. Moreover, Borden had just invested more than $5 million in a new dairy facility in Illinois. The loss of the A&P account would result in underutilization of this new plant. Under these circumstances, Borden decided to submit a new bid which doubled the estimated annual savings to A&P from $410,000 to $820,000. In presenting its offer, Borden emphasized to A&P that it needed to keep A&P's business and was making the new offer in order to meet Bowman's bid. A&P then accepted Borden's bid after concluding that it was substantially better than Bowman's.

. …

An Administrative Law Judge found, after extended discovery and a hearing that lasted over 110 days, that A&P had acted unfairly and deceptively in accepting the second offer from Borden and had … violated § 2(f). …

. …

The Robinson-Patman Act was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers. Notwithstanding this concern with buyers, however, the emphasis of the Act is in § 2(a), which prohibits price discriminations by sellers. Indeed, the original Patman bill as reported by Committees of both Houses prohibited only seller activity, with no mention of buyer liability. Section 2(f), making buyers liable for inducing or receiving price discriminations by sellers, was the product of a belated floor amendment near the conclusion of the Senate debates.

As finally enacted, § 2(f) provides: ``That 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.*" (Emphasis added.) Liability under § 2(f) thus is limited to situations where the price discrimination is one ``which is prohibited by this section." While the phrase ``this section" refers to the entire § 2 of the Act, only subsections (a) and (b) dealing with seller liability involve discriminations in price. Under the plain meaning of § 2(f), therefore, a buyer cannot be liable if a prima facie case could not be established against a seller or if the seller has an affirmative defense. In either situation, there is no price discrimination ``prohibited by this section." …

The derivative nature of liability under § 2(f) was recognized by this Court in *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61. In that case, the Court stated that even if the Commission has established a prima facie case of price discrimination, a buyer does not violate § 2(f) if the lower prices received are either within one of the seller's defenses or not known by the buyer not to be within one of those defenses. The Court stated:

> ``Thus, at the least, we can be confident in reading the words in § 2(f), `a discrimination in price which is prohibited by this section,' as a reference to the substantive prohibitions against discrimination by sellers defined elsewhere in the Act. It is therefore apparent that the discriminatory price that buyers are forbidden by § 2(f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act. … For we are not dealing simply with a `discrimination in price'; the `discrimination in price' in § 2(f) must be one `which is prohibited by this section.' Even if any price differential were to be comprehended within the term `discrimination in price,' § 2(f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the `defenses' available to sellers, such as that the price differentials reflect cost differences, fluctuating market conditions, or bona fide attempts to meet competition, as those defenses are set out in the provisos of §§ 2(a) and 2(b)."

346 U.S., at 70–71 (footnotes omitted). The Court thus explicitly recognized that a buyer cannot be held liable under § 2(f) if the lower prices received are justified by reason of one of the seller's affirmative defenses.

The petitioner, relying on this plain meaning of § 2(f) and the teaching of the *Automatic Canteen* case, argues that it cannot be liable under § 2(f) if Borden had a valid meeting-competition defense. The respondent, on the other hand, argues that the petitioner may be liable even assuming that Borden had such a defense. The meeting-competition defense, the respondent contends, must in these circumstances be judged from the point of view of the buyer. Since A&P knew for a fact that the final Borden bid beat the Bowman bid, it was not entitled to assert the meeting-competition defense even though Borden may have honestly believed that it was simply meeting competition. Recognition of a meeting-competition defense for the buyer in this situation, the respondent argues, would be contrary to the basic purpose of the Robinson-Patman Act to curtail abuses by large buyers.

The short answer to these contentions of the respondent is that Congress did not provide in § 2(f) that a buyer can be liable even if the seller has a valid defense. The clear language of § 2(f) states that a buyer can be liable only if he receives a price discrimination ``prohibited by this section." If a seller has a valid meeting-competition defense, there is simply no prohibited price discrimination.

. …

In the *Automatic Canteen* case, the Court warned against interpretations of the Robinson-Patman Act which ``extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." Imposition of § 2(f) liability on the petitioner in this case would lead to just such price uniformity and rigidity.[3]

In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices. Because of the evils of collusive action, the Court has held that the exchange of price information by competitors violates the Sherman Act. *United States v. Container Corp.,* 393 U.S. 333. Under the view advanced by the respondent, however, a buyer, to avoid liability, must either refuse a seller's bid or at least inform him that his bid has beaten competition. Such a duty of affirmative disclosure would almost inevitably frustrate competitive bidding and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers.

Ironically, the Commission itself … recognized the dangers inherent in a duty of affirmative disclosure:

> ``The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest. . …

We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid." . …

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[3] More than once the Court has stated that the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws. *United States v. United States Gypsum Co.,* 438 U.S. 422; *Automatic Canteen Co. of America v. FTC* [346 U.S. 61].

As in the *Automatic Canteen* case, we decline to adopt a construction of § 2(f) that is contrary to its plain meaning and would lead to anticompetitive results. Accordingly, we hold that a buyer who has done no more than accept the lower of two prices competitively offered does not violate § 2(f) provided the seller has a meeting-competition defense.

Because both the Commission and the Court of Appeals proceeded on the assumption that a buyer who accepts the lower of two competitive bids can be liable under § 2(f) even if the seller has a meeting-competition defense, there was not a specific finding that Borden did in fact have such a defense. But it quite clearly did. … ``A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2(b) defense." *United States v. United States Gypsum Co.* Since good faith, rather than absolute certainty, is the touchstone of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition.

Under the circumstances of this case, Borden did act reasonably and in good faith when it made its second bid. The petitioner, despite its longstanding relationship with Borden, was dissatisfied with Borden's first bid and solicited offers from other dairies. …

… Borden was informed by the petitioner that it was in danger of losing its A&P business in the Chicago area unless it came up with a better offer. It was told that its first offer was ``not even in the ball park" and that a $50,000 improvement ``would not be a drop in the bucket." In light of Borden's established business relationship with the petitioner, Borden could justifiably conclude that A&P's statements were reliable and that it was necessary to make another bid offering substantial concessions to avoid losing its account with the petitioner.

Borden was unable to ascertain the details of the Bowman bid. It requested more information about the bid from the petitioner, but this request was refused. It could not then attempt to verify the existence and terms of the competing offer from Bowman without risking Sherman Act liability. *United States v. United States Gypsum Co.* Faced with a substantial loss of business and unable to find out the precise details of the competing bid, Borden made another offer stating that it was doing so in order to meet competition. Under these circumstances, the conclusion is virtually inescapable that in making that offer Borden acted in a reasonable and good-faith effort to meet its competition, and therefore was entitled to a meeting-competition defense.

Since Borden had a meeting-competition defense and thus could not be liable under § 2(b), the petitioner who did no more than accept that offer cannot be liable under § 2(f).

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JUSTICE MARSHALL, dissenting in part. . …

I agree with the Court's suggestion that we must resolve the dilemma confronting a buyer who properly invites a seller to meet a competitor's price and then fortuitously obtains a lower bid. Congress could not have expected the buyer to choose between asking the seller to increase the bid to a specific price or accepting the lower bid and facing liability under § 2(f). Rather, it must have intended some accommodation for buyers who act in good faith yet receive bids that beat competition. This does not mean, however, that a buyer should be liable under § 2(f) only if his seller also would be liable. That solution to the buyer's dilemma would enable him to manufacture his own defense by misrepresenting to a seller the response needed to meet a competitor's bid and then allowing the seller to rely in good faith on incorrect information. The Court purports to reserve this ``lying buyer'' issue, but the derivative standard it adopts today belies the reservation. If ``prohibited by this section'' means that a buyer's liability depends on that of the seller, then absent seller liability, the buyer's conduct and bad faith are necessarily irrelevant.

I would hold that under § 2(f), the Robinson-Patman Act defenses must be available to buyers on the same basic terms as they are to sellers. To be sure, some differences in the nature of the defenses would obtain because of the different bargaining positions of sellers and buyers. With respect to the meeting-competition defense at issue here, a seller can justify a price discrimination by showing that his lower price was offered in ``good faith'' to meet that of a competitor. In my view, a buyer should be able to claim that defense — independently of the seller — if he acted in good faith to induce the seller to meet a competitor's price, regardless of whether the seller's price happens to beat the competitor's. But a buyer who induces the lower bid by misrepresentation should not escape Robinson-Patman Act liability. This definition of the meeting-competition defense both extricates buyers from an impossible dilemma and respects the congressional intent to prevent buyers from abusing their market power to gain competitive advantage.

NOTES AND QUESTIONS

1. Does the *A&P* case effectively sabotage section 2(f) of the Robinson-Patman Act? Under the Supreme Court's decision in *United States Gypsum*, 438 U.S. 422 (1978), reprinted *supra*, price information exchanges between competitors are illegal, and it is no defense that the sellers exchanged information in order to make out a ``meeting competition'' defense. Furthermore, said the court, it is not necessary for a seller to obtain information from a competitor about a reputed lower price; the seller will not be in violation of the statute as long as the seller acted in good faith. Suppose that *A* and *B* are competitors in the sale of Gadgets and the market price has been hovering around $1.00. Now *X*, a buyer, comes to *A*, with whom he has been doing business for some time. *X* tells *A* that *B* has offered to sell all the Gadgets *X* wants at 80 cents. In fact, *X* is lying and has really never corresponded with *B* at all. Under the *Gypsum* doctrine, *A* cannot call *B* to verify the offer. Not having any reason to doubt *X*, *A* decides to make the sale to *X* at 80 cents. Under the holding in *A&P*, *X* has not violated the statute, because *A* would probably be able to raise the defense of ``good faith" meeting of competition, even though *A* was not *really* meeting competition. Furthermore, *X* knows that *A* is not actually meeting competition.

The virtual effect of the *A&P* decision is that a buyer cannot unilaterally ``induce" a price discrimination. There must virtually be a conspiracy between the buyer and seller to engage in illegal price discrimination — or, at the very least, both the buyer and the seller must somehow independently decide to enter into a transaction in violation of the statute. The language of section 2(f) seems clear, however, that Congress did not mean to restrict buyer's liability to situations involving a conspiracy between the buyer and the seller. The statute is cast entirely in terms of single-firm conduct.

The suggestion in JUSTICE MARSHALL's dissent makes much more sense if the integrity of section 2(f) is to be preserved. JUSTICE MARSHALL would make the Act's affirmative defenses available to both buyer and seller on the ``same terms." Under JUSTICE MARSHALL's rule, the seller could take advantage of the ``meeting competition" defense if the seller acted in good faith, and the buyer could have the defense if the buyer acted in good faith. However, the buyer would not be able to take advantage of the seller's good faith if the buyer itself were acting in bad faith.

Would JUSTICE MARSHALL's rule be any more anti-competitive than the majority's rule? It might be if a bit of bad faith is good for competition. Perhaps hard, healthy competition requires a buyer to be able to say ``I can get it cheaper somewhere else," even though they know that in fact they cannot. The statement gives the seller the choice of making the sale at a lower price or not making it at all. Presumably, the seller will not make the sale unless it is profitable for it to do so. In short, the majority's rule would seem to do a better job of encouraging marginal cost pricing, although sometimes little white lies help reduce prices to marginal cost.

In *Gorlick Distribution Centers, LLC v. Car Sound Exhaust Sys., Inc*., ___ F.3d ___, 2013 WL 3766902 (9th Cir., July 19, 2013) the court held that although the favored purchaser had general knowledge that it was obtaining lower prices than a rival dealer, it did not know whether the seller qualified for a defense; as a result it could not be inducing unlawful price discrimination. In this case the competing dealer frequently, but not always, purchased in very large bulk quantities and may have qualified for the cost justification defense, and in the process obtained prices that were below the seller's post normal wholesale prices. The court was unwilling to interpret the statute in a way that prevented each dealer from obtaining the best wholesale price it could. The Act "doesn't prohibit buyers from haggling for a better deal. To put a buyer at risk of liability any time he asks for a lower-than-listed price would do enormous damages to the sturdy bargaining between buyer and seller for which scope was presumably left by our antitrust laws" (quoting *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 73-74 (1953). The court also declined to hold that a favored purchaser who knew it was getting better prices than a rival had a "duty to inquire" whether the lower prices qualified for a defense.

IV

CRIMINAL VIOLATIONS OF THE ROBINSON-PATMAN ACT

Section 3 of the Robinson-Patman Act (**15 U.S.C. § 13(a)**) makes it a crime for any seller knowingly to discriminate in price or to sell goods at an unreasonably low price ``for the purpose of destroying competition or eliminating a competitor." The statute provides a maximum fine of $5,000 or imprisonment up to one year, or both. The statute has seldom been used. It is not an ``antitrust law" for the purposes of section 4 of the Clayton Act, and there is no private right of action under section 3. *Nashville Milk Co. v. American Distilling Co.*, 570 F.2d 848, 854 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). In general, however, activity that would violate section 3 would also violate the general provisions of section 2a of the Robinson-Patman Act, or else section 2 of the Sherman Act.

The small amount of section 3 litigation that has reached the Supreme Court had dwelt on the statute's intent requirements. Because the statute is criminal, it has generally been held to require specific intent. In *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963), the Supreme Court held that the statute's prohibition of ``unreasonably low prices" was not unconstitutionally vague. Nevertheless, the Department of Justice has not enforced the statute since the early 1960s. Repeal has often been proposed, but has never passed. *See* 14 H. Hovenkamp, *Antitrust Law* ¶ 2364 (3d ed. 2013).