

BROKERAGE AND THE ROBINSON-PATMAN ACT— THE HIGH COST OF PRICE PROTECTION

The reasons for and the effects of the brokerage provision of the Robinson-Patman Act have their roots in the evolution of our present day marketing system.¹ During the past two thousand years, the framework of business has alternated between specialization by function and the integration of trade activities no less than three times.² Since the industrial revolution, there has been a transition from high specialization of functions to great integration of business, both horizontally and vertically. Big business is a by-word of today. The food industries have been among the last to which corporate mass methods have been applied³ and since the marketing structure changes simultaneously with the integration and diversification of the industry, the food industries serve as a good sample for brief study.

With the great specialization and localization of the industries in particular geographical areas came the need for specialization in marketing.⁴ It was both unprofitable and impossible for a single industry to sell directly to the consumer or even directly to the retailer and the traditional method of distribution came to be from the producer to a middleman (either a full function wholesaler or a functional middleman such as a broker, commission agent, purchasing agent, etc.) to the retailer and then to the consumer. This is the system that is best known today and is the ideal expressed in the Robinson-Patman Act. The functional middlemen are of many types. Among the brokers alone, whose general duty is merely to negotiate a sale between a seller and a buyer, *i.e.*, bring them together for a fee which is generally based on a percentage of the total value of the sale, the variations are numerous.⁵ When there is a seller's market, a broker is more likely to represent buyers. When demand is normal or there is a buyer's market, he is likely to represent sellers. Many brokers represent either sellers or buyers, depending only upon who solicited their aid, and sometimes they represent both. Occasionally they render financial assistance or give credit advice; one of their principal assets is their acute knowledge of the conditions in the market of the products in which they specialize.⁶

1. For a fuller treatment on the evolution of marketing see HOFFMAN, *LARGE-SCALE ORGANIZATION IN THE FOOD INDUSTRIES* 1-14 (TNEC Monograph 35 1940); MAYNARD AND BECKMAN, *PRINCIPLES OF MARKETING* (1946); ZORN AND FELDMAN, *BUSINESS UNDER THE NEW PRICE LAWS* c. I (1937).

2. Gras, *The Rise of Big Business*, J. OF ECON. AND BUS. HIST. (1932), cited in HOFFMAN, *op. cit. supra* note 1, at 1.

3. The reasons for this are given in HOFFMAN, *op. cit. supra* note 1 at 2. An impressively thorough contribution to the learning in this specific area has recently been made by Fulda, *Food Distribution In The United States, The Struggle Between Independents and Chains*, 99 U. OF PA. L. REV. 1051 (1951).

4. See MAYNARD AND BECKMAN, *op. cit. supra* note 1, at 9.

5. CLARK, *PRINCIPLES OF MARKETING* 238 (1942); MAYNARD AND BECKMAN, *op. cit. supra*, note 1 at 315.

6. *Ibid.*

The first move toward bigness in the food industries was in mass retailing made possible by the corporate chain organization. In the field of clothing, furniture, and general consumer goods, it was the department store and mail-order house. The corporate chain utilized the same unit as that used by the independent retailer but employed mass buying and uniform or standardized pricing and policies. The voluntary cooperative chains and wholesaler-sponsored cooperative chains followed in close pursuit; they utilized mass buying to gain economies, but generally did not have the close control necessary to effect uniform prices and policies.⁷ The supermarket is the most recent mass-retailing innovation. After it had proved itself in the hands of small local chains or independents, the corporate chains were soon to adopt this type of unit. Naturally with this mass-retailing ability came mass buying power and the resultant absorption of the wholesaling function by the chains. A. & P. had not only set up its own warehouses throughout the country but also maintained its own buying agencies, thus doing away with the need for any middlemen, such as brokers, on its part.⁸ Many of the cooperatives followed suit. If the seller was large enough and the product was non-seasonal, so that an individual selling staff was economically feasible, the purchase transaction became a direct one between the seller and the buyer. The final step in integration is that which was brought to attention in the recent A. & P. suit⁹—the actual production or processing of goods by the chains, thus having all functions from manufacture to sale performed within the organization. Many large chains have their own bakeries, meat packing plants, milk plants, coffee roasting plants, canneries and even printing plants.¹⁰ With integration comes resultant advantages and economies both in production and distribution such as better utilization of labor and advertising, abolition of middlemen's fees, the removal of the necessity and expense of having to sell the product, etc., and last and in no way the least, the ability and power to demand a special price or rebate from a seller.

There has always been a strong feeling in this country for economic individualism and the small scale enterpriser and a reciprocal fear of bigness in industry. The chain store investigation completed by the Federal Trade Commission in 1934¹¹ brought to the fore the dominant position of the large chains and disclosed the secret rebates and discounts obtained by them in their purchases in the form of brokerage or advertising allowances.

7. On the economic status of chain stores, see FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, SEN. DOC. No. 4, 74th Cong., 1st Sess. (1935).

8. See *Great Atlantic and Pacific Tea Co. v. FTC*, 106 F.2d 667 (3rd Cir. 1939), cert. denied, 308 U.S. 625 (1940).

9. *United States v. N.Y. Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949), affirming 67 F. Supp. 626 (E.D. Ill. 1946); Note, 47 COL. L. REV. 786 (1947).

10. See HOFFMAN, *op. cit. supra* note 1, at 12 (Table 4 contains a list of the plant facilities owned by the 5 leading grocery chain systems in 1936.).

11. See note 7 *supra*.

The Commission found that "lower selling prices are a very substantial if not the chief factor in the growth of chain-store merchandising, and lower buying prices than are available to independents are a substantial, if not the chief factor in these lower selling prices."¹² Another economist, using the data determined by the Federal Trade Commission, has shown that only one-third of the difference in selling prices between the two types of stores could be explained by the difference in buying prices and that this difference amounted to two percent of the purchase price for the corporate chains as compared with one percent for independent wholesalers.¹³ Nevertheless, evidence of rebates and vicious price cutting was before the public. An investigation of the American Federation of Retailers, which was a lobby organization for large retailers, with additional evidence of secret discounts and allowances granted to A. & P., gave the chains a larger black eye.¹⁴ It was shown that in 1934, A. & P. collected \$2,000,000 in brokerage fees and over \$6,000,000 in advertising allowances and quantity discounts.¹⁵ Also the NRA codes frequently dealt with the practices of granting rebates and buying advantages.¹⁶ Out of this atmosphere came the brokerage provision of the Robinson-Patman Act. It was designed "primarily to protect the regular marketing channels against the inroads of the mass distributor by depriving the latter of the weapon of price cutting by which he is presumed to destroy competition and unfairly injure his smaller competitors."¹⁷

The Act was wholesaler-sponsored,¹⁸ broker-supported, and without any doubt, directed primarily at the chain stores. Section 2(c) of the Clayton Act, the brokerage provision, had the doubtful distinction of being the most ambiguous.¹⁹ However, it was the first to be reviewed by the courts²⁰ and in the first ten years of the Act the greatest number of orders were issued under this section, so that today section 2(c) is well settled in interpretation. In fact, all the major questions presented by the section were settled in a few cases. It reads as follows:

12. FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, SEN. DOC. No. 4, 74th Cong., 1st Sess. (1935). See also ZORN AND FELDMAN, *op. cit. supra* at note 1, 47.

13. HOFFMAN, *op. cit. supra* note 1, at 105.

14. *Hearings before the Special House Committee Investigating the American Retail Federation*, H.R. REP. No. 239, 74th Cong., 1st Sess. (1935).

15. *Id.* at 461.

16. See ZORN AND FELDMAN, *op. cit. supra* note 1, at 39.

17. HOFFMAN, *op. cit. supra* note 1, at 148. See also statements by Congressman Celler—author of Minority Report on the Robinson-Patman Bill in the House appearing in appendix of ZORN AND FELDMAN, *op. cit. supra* note 1, at 414.

18. Counsel for the United States Wholesale Grocers' Assoc. wrote the bill. See statement by Representative Patman, *Hearings before Comm. on Jud. on H.R. 8442, H.R. 4995, H.R. 5062* 74th Cong., 1st Sess. (1935).

19. See Austern, *Section 2(c)*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 37 (1946).

20. *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir. 1938), *cert. denied*, 305 U.S. 634 (1938).

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."²¹

SALES THROUGH INTERMEDIARIES

Services Rendered Clause.—As might well be expected, the four word clause "except for services rendered" provided the most difficulty in interpreting the section. These words were added by the House Judiciary Committee without any real explanation.²² In interpreting the section, the committee ignored the clause and treated the section as a flat prohibition against any payment of brokerage to a buyer or his agent or to a seller or his agent.²³ Congressman Utterback, at the time of the passage of the bill, explained the section as follows:

"The bill prohibits payment or allowances of brokerage or commission except for services rendered . . . this refers to true brokerage services rendered in fact for the party who pays for them, whether he be an agent employed and paid for by the seller to find market outlets or one employed and paid by the buyer to find sources of supply."²⁴

Several interpretations of the "except for services rendered" clause were propounded by the commentators. The first was that put forth in Congress that no effect be given to the clause at all so that under no circumstances might a buyer or his agent render services to the seller.²⁵ The second view was that even an independent broker could not receive brokerage commissions except for services rendered.²⁶ The third view was the one strenuously urged by the chains—that if a buyer or his agent rendered some service to the seller, he may receive payment for the fair

21. 49 STAT. 1526 (1936), 15 U.S.C. § 13(c) (1946).

22. H.R. REP. No. 8442, 74th Cong., 2d Sess. (1936).

23. H.R. REP. No. 2287, 74th Cong., 2d Sess. 15 (1936).

24. 80 CONG. REC. 9418 (1936). See also statement by Representative Celler, author of the minority report: "The conference report, in its reference to brokerage allowances, fails to take due notice of the fact that we put into the final bill the words 'except for services rendered.'"

25. See ZORN AND FELDMAN, *op. cit. supra* note 1, 209-211; Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act*, 8 GEO. WASH. L. REV. 511, 517 n. 12 (1940).

26. See text at note 24 *supra*.

value of the services.²⁷ A fourth view suggested that the purpose of the clause was to permit cooperative groups to receive brokerage.²⁸ Basis for this view was found in the fact that the clause was added at the request of representatives of cooperative associations and the differences in the buying operations of the cooperatives as compared with the corporate chains. The central office of a cooperative chain merely negotiates the best deals for its members but cannot commit them to purchases and thus it performs a selling service for the seller. On the other hand, the buying agent of a corporate chain has authority to buy for all its stores.

Biddle Purchasing Company was an independently owned enterprise which supplied a combined market information and purchasing service to 2400 wholesalers who paid a subscription fee of \$25 to \$50 per month. Biddle placed their orders with sellers but the goods were delivered and billed directly to the subscribers. The sellers paid brokerage commissions to Biddle which in turn were either credited or paid over to the buyers. In 86% of these transactions, the buyers received back as commissions sums less than the amounts they paid to Biddle as subscription fees. In 14% of the transactions, the commissions exceeded the fees. The Federal Trade Commission ordered Biddle to cease and desist from receiving brokerage from the sellers and from paying any fee to the buyers which it received from the sellers.²⁹ On appeal to the Second Circuit, Biddle argued that it was a true intermediary and represented both sellers and buyers in the transactions and rendered services to both for which it could be compensated under the services rendered clause. The court held that Biddle was the agent of the buyers and received compensation solely from them and since it passed on to the buyers all that it received from the sellers, the services rendered clause could not apply.³⁰ Of all the cases reviewed concerning section 2(c), Judge Swan rendered the only dissent in the Biddle case.³¹ He reasoned that Biddle actually rendered service to the sellers as well as to the buyers by selecting the sellers and bringing the products of the sellers to the attention of its subscribers. If Biddle had kept the brokerage commission, he said the Act would not forbid it because of the services rendered clause. He went on further to say that the section was not intended to eliminate the legitimate and useful business Biddle performed for 86% of its subscribers. These buyers paid the same price for their goods as their competitors paid and in addition, they paid something extra for the services Biddle rendered. He would have prohibited the remission of brokerage only in the 14% of the transactions where the brokerage fees exceeded the subscription price since in those instances the buyers got a discriminatory price.

27. *E.g.*, *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir. 1938), *cert. denied*, 305 U.S. 634 (1938).

28. 51 HARV. L. REV. 1303 (1938).

29. 25 F.T.C. 564 (1937).

30. 96 F.2d 687 (2d Cir. 1938).

31. *Id.* at 692.

The record of the *Biddle* case was adopted as the record correctly describing the practices of Oliver Brothers in a subsequent case.³² The Fourth Circuit held that any services which Oliver rendered to the sellers was incidental to the services which it had bound itself to render to the buyers and even if Oliver rendered services to the sellers, a broker representing a seller cannot split his fee or give his commission to a buyer. The court went even further and adopted a concept used in the Congressional hearings that a broker is a fiduciary and that it is a contradiction in terms for an intermediary to render services to the seller when he is acting for the buyer.³³ While this statement was mere dictum and contrary to the common law of agency,³⁴ it was the death blow to reliance of buyers or their agents on the services rendered clause. After this case, the Commission adopted the view that an agent acting for or in behalf of the buyer could never lawfully render services to the seller and it was immaterial whether the fee was passed back to the buyer.³⁵

A further argument was made in both of these cases that the provision in section 2(a), which limits unlawful price discrimination to that which tends substantially to lessen competition, must be read into section 2(c).³⁶ This contention was rejected on the grounds that section 2(c) stands by itself and the prohibited practice was forbidden because of its tendency to lessen competition.³⁷ Then the petitioner argued that if the provision with respect to the effect on competition is not included, section 2(c) is a deprivation of the right to make ordinary contracts for the disposition of property and services in violation of due process of law. This contention was rejected without much difficulty in both courts.³⁸

Degree of Control.—While the Commission generally draws no distinction between an intermediary acting in fact for or in behalf of the buyer and one who is subject to the direct or indirect control of the buyer, it is convenient to do so for the purposes of discussion. At the outset, it should be recognized that the brokerage provision is the only one in the Act in which the contested transaction need not be compared with another transaction in order to show discrimination. Even in the case of advertising allowances or services which are specifically prohibited by

32. 26 F.T.C. 200, *aff'd*, 102 F.2d 763 (4th Cir. 1939).

33. 102 F.2d 763, 768 (4th Cir. 1939).

34. 1 MECHAM, AGENCY § 178 (1914); 2 *Id.* § 2398.

35. See Austern, *supra* note 19, at 41 and n. 20.

36. 49 STAT. 1526, 15 U.S.C. § 13(a) (1946). "(a) That it shall be unlawful for any person . . . either directly or indirectly, to discriminate in price between different purchasers . . . 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. . . ."

37. See *Biddle Purchasing Co. v. FTC supra*, note 30, at 690, and *Oliver Brothers v. FTC, supra* note 33, at 766.

38. *Ibid.*

section 3, the allowances are legal if rendered on proportionally equal terms to all customers and the phrase "proportionally equal terms" requires the comparison of two transactions. No discrimination need be shown at all to have a violation of section 2(c).³⁹ The only apparent reasons to be found for this are (1) brokerage rebates are secret and the reason for the section is to force price discriminations out into the open where they can be scrutinized by competitors⁴⁰ and (2) it is presumed that an agent who receives brokerage while "acting for or in behalf of" a buyer will, or at least has the opportunity to, grant a price discrimination to the buyer. Thus whether a broker is "directly or indirectly controlled" by the buyer so as to prohibit the payment of brokerage by the seller to the broker would seem to depend upon the likelihood of the brokerage being transmitted to the buyer.

In *Webb-Crawford Co. v. F. T. C.*⁴¹ three partners in a brokerage company owned 95% of the stock of a buying company and each of them was an important officer in the buying company. The brokerage partnership maintained its office in the building of the buying company and it represented and was paid only by sellers. The buying company bought only 10% of its goods through the brokerage company and the brokerage company had many other customers. There was an admitted rendering of services to the sellers by the brokerage company without the buying company's ever receiving any part of the brokerage. The court found that the results of the above practice were the same as if the buyer had received the commissions and upheld the order of the Commission prohibiting the partnership from accepting brokerage commissions when making purchases for the buying company. In *Modern Marketing Service v. F. T. C.*,⁴² an independently owned broker obtained a license from a corporation owned by a group of buyers to deal in merchandise packed under private brands owned by the buyers. It was held that the license arrangement and the distribution of the license fees received from the broker by the buyer-owned corporation was sufficient control by the buyers to prohibit the collection of brokerage by the broker. And in the case of *Quality Bakers of America v. F. T. C.*,⁴³ where all the stock of a brokerage company was owned by the members of a cooperative association with no one buyer in control, and the brokerage received from sellers on purchases made by the shareholders was applied to operating expenses, the reduction of member's dues and the payment of an 8% dividend, it was held that the corporation was agent for the shareholders and that even if the

39. See text at note 35 *supra*; *Southgate Brokerage Co. v. FTC*, 150 F.2d 607, 609 (4th Cir. 1945); *Oliver Bros. v. FTC*, 102 F.2d 763, 767 (4th Cir. 1939).

40. *Biddle Purchasing Co. v. FTC*, *supra* note 20, at 692.

41. 27 FTC 1099, *aff'd*, 109 F.2d 268 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940).

42. 149 F.2d 970 (7th Cir. 1945).

43. 114 F.2d 393 (1st Cir. 1940).

corporation rendered services, it could not collect brokerage from the sellers.

From these cases, it is apparent that little or nothing is left of the services rendered clause. The most meaning that can be derived from it is that a seller may pay a broker who is his agent and a buyer may pay his broker if he is only the buyer's agent. The mere showing that a broker is agent in fact for the buyer will prohibit the receipt of brokerage by him from the seller and if the buyer's control of a broker is such that payment of brokerage in any way ultimately accrues to the benefit of the buyer or anyone financially interested in the buyer, it is sufficient to prevent the receipt of brokerage from the seller.⁴⁴

The view of one commentator that the payment by the cooperatives of dividends reflecting brokerage to its members was protected by the services rendered clause was directly refuted in the *Quality Bakers* case.⁴⁵ An even stronger contention was made by the cooperative that it was exempt under section 4 of the Clayton Act which reads:

"Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association."⁴⁶

At a glance, it appears that this section would cover the situation in the *Quality Bakers* case. Even though section 4 does not specifically mention wholesalers or retailers, the shareholders in *Quality Bakers* were members of a cooperative and therefore at least covered literally. But the court, without giving any reasons, simply stated that section 4 does not authorize cooperative associations to engage in the practices forbidden by section 2(c) and does not except them from its provisions.⁴⁷ The decision seems to be based mainly on a common sense approach that a consumer or producer cooperative may remit patronage dividends to its members which reflect savings in merchandising but section 4 does not permit the evasion of a specific prohibition in the Act by allowing the remission of brokerage by an association to its wholesaler or retailer members.⁴⁸ This opinion is supported by legislative history. When the Patman Bill was reported to the House, section 4 contained the phrase "or a cooperative wholesale association from returning to its constituent members" and it was stricken out by the Conference Committee.⁴⁹ And while the bill was before the

44. Austern, *supra*, note 19, at 42. See also *FTC v. Bennett Brokerage Co.*, Doc. No. 5087 (1944) where the common stockholders owned only 50% in the broker and the buyer.

45. See note 28 *supra*.

46. 49 STAT. 1528, 15 U.S.C. § 13(b) (1946).

47. 114 F.2d 393, 400 (1940).

48. See Notes, 26 CORN. L.Q. 354 (1941); 88 U. OF PA. L. REV. 736 (1940).

49. See ZORN AND FELDMAN, *op. cit. supra* note 1, at 258.

Senate, an attempt to exclude cooperatives from the provisions of section 2(c) was rejected.⁵⁰

DIRECT SALES TO BUYERS

The most highly contested issue under section 2(c) was presented in the *A. & P.* case⁵¹—whether a saving in not using a broker may be passed on as a saving in selling expense to a buyer under section 2(a). The problem as to whether the provisions in section 2(a) are included in section 2(c) was raised more directly by the facts than in the *Biddle* and *Oliver* cases. At the time of the suit, *A. & P.* operated 14,800 retail stores. It had 6 geographical divisions further divided into units, each with a warehouse, a purchasing director, and a buyer. *A. & P.* also had central buying offices in key cities in charge of field buying agents who purchased merchandise upon instructions from the purchasing directors or warehouse buyers. Prior to the Robinson-Patman Act, these agents received brokerage commissions for all purchases they made for the chain. Following enactment, these agents were directed to deduct amounts from their purchase prices corresponding to the amounts the sellers paid their independent brokers through whom they sold merchandise. *A. & P.* claimed first that these field agents furnished the sellers with services such as exchanging market and traffic information and advising the sellers as to the quality of merchandise and the size of containers most marketable.

The Third Circuit stated that section 2(c) was an absolute prohibition of payments of brokerage or allowances in lieu thereof by the seller to a buyer and if it were not so construed, all the words after the services rendered clause would become meaningless and unnecessary. It based its decision on statements in the Congressional reports that the purpose of the Act was to prevent dual representation.⁵² But the *A. & P.* case is more important for the holding that a saving resulting from not using a broker may not be considered a saving in selling expense under section 2(a) so as to justify a lower price.⁵³ Of course if the saving in cost proviso had been read into section 2(c), then it would also have become necessary for the Commission to show the necessary effect on competition which is required under section 2(a). Basing its opinion mainly on legislative history, the court found that paragraphs (a) and (c) possess separate significance and to read section (a) provisos into section (c) would destroy legislative intent. It is interesting to note that probably this case would never have arisen had not the words "other than broker-

50. 80 CONG. REC. 8241 (1936).

51. *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F.2d 667 (3rd Cir. 1939), cert. denied, 308 U.S. 625 (1940).

52. H.R. REP. No. 2287, 74th Cong., 2d Sess. 15 (1936); *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F.2d 667, 674 (3rd Cir. 1939), cert. denied, 308 U.S. 625 (1940).

53. 49 STAT. 1526, 15 U.S.C. § 13(a) (1946). ". . . Provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ."

age" been stricken from the saving in cost proviso in 2(a) by the Committee.⁵⁴ The reason given for its removal was that the subject of brokerage was adequately treated in section 2(c).⁵⁵

The *A. & P.* case does not preclude the seller from passing on savings other than brokerage. Thus a seller with its own sales organization may pass along to a direct buyer the chief saving in selling cost, *i.e.*, the cost of using salesmen, but a seller who uses brokers in some transactions is prohibited from passing along to a direct buyer his comparable saving in the cost of brokerage.⁵⁶ As a result of the above decision, *A. & P.* instructed its field buyers "to purchase as much as possible from sellers who use no brokers."⁵⁷ This in turn generally means buying from large producers or processors since they alone (particularly in the canning industry) are financially able to maintain their own selling staffs.⁵⁸ Another effect which this interpretation of section 2(c) is thought to encourage is the greater integration of the producing or processing function with distribution in the large food chains.⁵⁹ This is certainly contrary to the general overall purpose of the Act.

The most recent case reviewed by the courts is *Southgate Brokerage Co. Inc. v. F. T. C.*⁶⁰ The company, which did a large brokerage business, purchased 60% of its total volume of business for its own account and received brokerage commissions thereon just as it did on its other business. The company resold this merchandise to wholesalers charging the same price which the wholesalers would have paid if they had bought through a broker. In holding that the company violated section 2(c) when it received brokerage on its own purchases, the court again rejected the argument that a buyer can render services to a seller. But the company contended that there is no discrimination against any buyers since the wholesalers paid the same price they would have paid if they had bought through brokers. The court answered by stating that price discrimination is not necessary to a violation of section 2(c), and there is no reason to read into it the limitations with respect to price discrimination in section 2(a).⁶¹ Then the petitioner company tried to read in the requirement of discrimination in another manner. It was argued that under

54. See SEN. REP. No. 1502, 74th Cong., 2d Sess. 5 (1936) and H.R. REP. No. 2951, 74th Cong., 2d Sess. 6 (1936).

55. *Ibid.*

56. Oppenheim, *supra* note 25, at 535.

57. GREAT ATLANTIC & PACIFIC TEA COMPANY, MANUAL ON THE ROBINSON-PATMAN ACT. However this has set the stage for repercussions. See *United States v. N.Y. Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949); Fulda, *supra* note 3, at 1104.

58. See HOFFMAN, *op. cit. supra* note 1 at 69; MAYNARD AND BECKMAN, *op. cit. supra* note 1 at 317.

59. See HOFFMAN, *op. cit. supra* note 1, at 151; see MAYNARD AND BECKMAN, *op. cit. supra* note 1, at 715. *A. & P.*'s policies were also to some extent a stimulus to large manufacturers' specializing exclusively in quantity orders. Fulda, *supra* note 3, at 1104-1105.

60. 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945).

61. See also *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943).

section 2(d) a seller may grant allowances to its customers for any services furnished by the customer in connection with the handling and sale of the seller's merchandise if available on proportionally equal terms to all other competing customers. Therefore if the commissions are granted to all other buyers who purchase for resale to wholesalers, the receipt of brokerage by petitioner is lawful. However, this contention was rejected on two grounds: (1) section 2(d) has no relation to the payment of brokerage to buyers and (2) for a seller to pay purchasers for purchasing, warehousing and reselling is to pay them for doing their own work.

The result in this case is probably the harshest of any under section 2(c). In the first place, a middleman such as the one in the *Southgate* case is frequently needed in rural areas where individual orders are not large enough or the credit status of the buyers is not strong enough to permit purchase through a regular broker.⁶² Thus it has been customary for sellers to grant the buying broker the same commissions while acting as a distributor as he receives when acting as a broker. It might be said that the petitioner in *Southgate* rendered no more services to the seller than an ordinary wholesaler did and was therefore not entitled to a lower price. But on the other hand, it can be asked, if a broker is paid a commission for merely negotiating a sale between a seller and a wholesaler, why shouldn't that same company be paid for doing more than merely negotiating a sale, such as taking title to the goods with the accompanying risks, storing and taking the credit risk of the wholesalers to which it sells? Should a company be forced to elect between the extremes of either being a true broker or a full-price buyer? What about the many variations of functional middlemen which exist between these extremes? Possibly the real problem involved is whether *Southgate* should have been granted a functional discount as a super-jobber or distributor rather than brokerage under section 2(c).⁶³ This aspect of the case was not considered either by the Commission or the court. Conceivably, if the allowance in the *Southgate* case had been called something other than brokerage such as a "distributor's discount" or "special service allowance," it would have been lawful, especially if the amount was not exactly the same as that granted to brokers. Since it would not be brokerage, it would not come within section (c) and no unlawful discrimination under section (a) or section (d) would appear to exist.⁶⁴

At any rate, it is abundantly clear from the *A. & P.* case, the *Southgate* case and subsequent Commission decisions that a purchaser cannot receive brokerage or allowances in lieu thereof from a seller either (1) by buying direct from the seller and claiming a saving in selling expense from

62. Austern, *supra* note 19, at 44.

63. A functional discount has been defined "as a systematic discrimination between classes of customers related entirely to differences in the respective roles played by these classes in the further distribution, processing, or consumption of the product in question, available equally to all buyers performing identical functions, regardless of individual differences in quantity or manner of purchase." ZORN AND FELDMAN, *op. cit. supra* note 1, at 166. See also *id.* at 183.

64. See Austern, *supra* note 19, at 45, n. 41.

not using a broker or (2) by acting as a bona fide broker in some transaction and buying for its own account.

APPRAISAL AND AMENDMENT

While the brokerage provision of the Robinson-Patman Act is ambiguous and poorly drafted, thereby allowing courts great leeway in interpretation, the Congressional intent was unquestionably clear. The courts have followed this intent to the letter and if the Act has not fulfilled its purpose, we cannot look to the courts for a change. Nor can the Commission be criticized since it has done an excellent administrative job. The enforcement of the provision has been impartial and methodical.⁶⁵ The Commission waited for each vital question to become settled by judicial review before issuing a large number of cease and desist orders against defendants in similar situations. As a result, many cease and desist orders were accepted by the violators without litigation.⁶⁶ Since we cannot look to the Commission or courts, any corrections or reforms which are needed must come from Congress.⁶⁷

It has been said "that enforcement of subsection (c) has achieved the political objectives of at least one group which actively sponsored the legislation."⁶⁸ But in legislation of this type, the interest of the public or the consumer must also be considered. This in turn requires determination of the effect of the section upon the price of merchandise in the hands of the consumer. From the outset, it must be accepted that "mass distribution has advantages from the standpoint of reducing food costs which are clear and incontrovertible."⁶⁹ Most marketing treatises will substantiate this statement.⁷⁰ However, while the public has an interest in obtaining lower prices which reflect savings arising out of greater efficiency of distribution, only a few will contend that the public is interested in lower prices which reflect discrimination or rebates coerced from sellers by those with large buying power. It would seem then that the object of section 2(c) should be to prevent secret price discriminations but at the same time provide an atmosphere in which marketing innovations may develop so that greater efficiencies may be obtained. But it is apparent that the results obtained under the present section 2(c) do not coincide with this objective.

In view of the dynamic and complex nature of marketing, it is difficult to pick out the single effects the brokerage provision has had on our systems of distribution but the probable tendencies are pretty well pointed

65. See *Oliver Bros. v. FTC*, 102 F.2d 763, 771 (4th Cir. 1939). The first two cases in which judicial review was sought involved small purchasing associations for independent wholesalers rather than large corporate chains.

66. Austern, *supra* note 19, at 46 and Addendum at 48.

67. *Ibid.*

68. *Ibid.*

69. HOFFMAN, *op. cit. supra* note 1 at 157.

70. See CLARK, *PRINCIPLES OF MARKETING* (1947); HOFFMAN, *op. cit. supra* note 1; MAYNARD AND BECKMAN, *op. cit. supra* note 1.

up by the cases. Sellers have been divided into two camps—those using brokers in all their sales and those selling entirely direct to the buyers. On the other side, the buyers are forced to buy from sellers who never use brokers if they desire to obtain savings by absorbing the brokerage function in their own organization. And the result of the *A. & P.* case tends to make the large chains become producers and manufacturers if they cannot avoid the use of brokers in any other manner. The truly independent broker occupies a preferred status under the Act. Finally, under the *Southgate* case, a buying-broker who historically occupied an established position in marketing is now forced to become exclusively either a buyer or a broker. The major question presented is whether these effects are the *necessary* by-products of the prevention of secret rebates. Prior to the Act, it was reasoned that any discount granted to large buyers in excess of savings was necessarily paid for by the smaller buyers. Now it may be said that any saving which a seller incurs through the non-use of brokers in direct sales to large buyers is retained by the seller or distributed among the smaller buyers in the form of lower prices. In no case, does the consumer get the benefits derived from greater marketing efficiencies. Oppenheim states that "Greater certainty and efficiency in the enforcement of 2(c) as presently interpreted might be too high a price to pay for thwarting the evolution of new methods of distribution."⁷¹

Several recommendations have been made by commentators for amendment of 2(c). There is a large group who favor giving effect to the services rendered clause in 2(c). They would allow payment by the seller to a buyer or his agent for the fair value of services honestly rendered by them.⁷² While this would probably bring secret rebates out into the open and provide a flexible rule so that marketing innovations could be employed, the job of administration by the Federal Trade Commission would be very difficult if not impossible. This is true even though the burden of proving the value of the services would be on the buyer. It wouldn't be difficult for a buyer to obtain testimony from a seller that his services had value—at least no more difficult than obtaining the rebate in the first place.

It has also been suggested that it might be wise to abolish 2(c) altogether—so that present prosecutions with respect to brokerage would be brought under the present section 2(a).⁷³ This would mean, however, that the Commission would be faced with three additional issues. First, the Commission would have to show that there was discrimination in the form of brokerage and it was actually received by the buyer. Second, it would have to show that the discrimination had the necessary effect on competition. However, it is not too difficult to show that a price dis-

71. Oppenheim, *op. cit. supra* note 25 at 537.

72. McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334 (1937); ZORN AND FELDMAN, *op. cit. supra*, note 1, at 210; 34 ILL. L. REV. 329. See 88 U. OF PA. L. REV. 744 (1940).

73. Oppenheim, *supra* note 25, at 541.

crimination "tends 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."⁷⁴ Third, the Commission would have to rebut the possible defense that the buyer who received brokerage or an allowance in lieu thereof could justify this price difference by savable cost differentials.

Along this same line of thought, a third suggestion for amendment might be made. If the job of showing actual receipt of the brokerage by the buyers and the necessary injury to competition is too great for the Commission, the present section 2(c) could be amended by adding a cost differential proviso similar to the one now in 2(a). It could read as follows:

Provided, That nothing herein contained shall prevent allowances or differentials which make only due allowance for differences in the cost of sale or delivery resulting from differing methods in which such commodities are to such purchasers sold or delivered.

This proviso would bring any secret discriminations before the scrutiny of competing buyers and at the same time take the straight jacket from our present marketing structure. The section would be enforceable by the Commission and still permit the consumer to obtain the economies which may result from more efficient methods of distribution. When the consumers become aware of the fact that under the present law they are paying for the survival of less efficient marketing methods, their emotional feeling for the small enterprise may be overcome enough to permit an amendment of section 2(c).

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74. 49 STAT. 1526, 15 U.S.C. § 13 (1946).

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